

The sole issue on appeal is the nature and extent of claimant's disability. The Administrative Law Judge awarded benefits for functional impairment only. Claimant argues the award should be for work disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Appeals Board finds that claimant is entitled to benefits for a 24 percent work disability.

Claimant began working for respondent in January of 1990. Claimant first injured his back in November 1993 while working as a scissor lift operator. The 1993 accident was the subject of a claim treated under Docket No. 189,574 and consolidated with this claim. Claimant was awarded benefits for 26 percent permanent partial impairment. Neither party appealed that Award.

The current claim involves an accident which occurred June 28, 1995. After the 1993 accident, claimant returned to work for respondent at a weekly wage of 90 percent or more of his pre-injury wage. Upon his return he worked as a crewman. His job required more physical labor than did his job as a scissor lift operator. On June 28, 1995, claimant reinjured his back while lifting a section of wall. Claimant testified that something popped in his back.

Claimant was treated by Jerome F. Mangen, D.C., and then by Michael P. Estivo, D.O. Dr. Estivo had also treated claimant for the 1993 injury. Dr. Estivo provided conservative treatment and in October 1995 imposed permanent restrictions. Dr. Estivo recommended claimant limit his work to medium level work, lifting 50 pounds occasionally, 20 pounds frequently, and 10 pounds constantly. He also recommended claimant limit repetitive bending, stooping, or twisting to less than one-third of an eight-hour day. Dr. Estivo testified that claimant's functional impairment had increased from 26 to 29 percent.

For unscheduled injuries, disability is defined in K.S.A. 44-510e as follows:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. "

Following claimant's release, respondent could no longer offer claimant employment. Respondent asserts that evidence supports the conclusion that claimant is not looking for other employment and should be limited to functional impairment on the

basis of principles established in Fouk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140, *rev. denied* 257 Kan. 1091 (1995). The Appeals Board, however, finds otherwise. Respondent points out that claimant has given inconsistent testimony regarding his efforts to find other employment. The Appeals Board, however, is persuaded by claimant's specific testimony regarding the places he has applied for employment, including efforts to obtain employment with respondent. The record does not support imputing a wage under the Fouk rationale. The evidence indicates claimant is not currently working and, accordingly, his wage loss for purposes of determining work disability is 100 percent.

Claimant has not offered testimony from a physician regarding his task loss ability. The record suggests that the claimant expected to obtain such testimony through the deposition of Dr. Estivo. However, Dr. Estivo refused to give an opinion. As a result, the record contains evidence that claimant did, in fact, lose the ability to perform tasks, but does not include the opinion of a physician regarding which tasks claimant can no longer perform. Claimant, therefore, has not met his burden of establishing this prong of the work disability test. The Appeals Board finds, for the purpose of calculating work disability, claimant's task loss must be considered to be 0 percent.

When the task loss and wage loss are averaged together, as required by K.S.A. 44-510e, the result is a 50 percent work disability. K.S.A. 44-501(c) requires that the award be reduced by the amount of preexisting impairment. The Appeals Board finds that preexisting impairment to be 26 percent based upon the Award previously entered under Docket No. 189,574. Claimant is, therefore, entitled to benefits in this claim based upon a 24 percent work disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark, dated February 4, 1997, should be, and is hereby, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Steven M. Fairless, and against the respondent, Morton Building, Inc., and its insurance carrier, Insurance Company of North America, for an accidental injury which occurred June 28, 1995, for 14.57 weeks of temporary total disability compensation at the rate of \$319 per week or \$4,647.83, followed by 99.60 weeks at the rate of \$319 per week or \$31,772.40, for a 24% permanent partial general disability, making a total award of \$36,420.23.

As of July 30, 1997, there is due and owing claimant 14.57 weeks of temporary total disability compensation at the rate of \$319 per week or \$4,647.83, followed

by 94.43 weeks of work disability compensation at the rate of \$319 per week in the sum of \$30,123.17 for a total of \$34,771, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$1,649.23 is to be paid for 5.17 weeks at the rate of \$319 per week, until fully paid or further order of the Director.

The Appeals Board approves and adopts the orders by the Administrative Law Judge relating to fees and expenses.

IT IS SO ORDERED.

Dated this ____ day of July 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: James E. Martin, Overland Park, KS
- Vincent A. Burnett, Wichita, KS
- John D. Clark, Administrative Law Judge
- Philip S. Harness, Director