

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JUAN PANIAGUA)	
Claimant)	
VS.)	
)	Docket No. 205,469
NATIONAL BEEF PACKING CO., L.P.)	
Respondent)	
AND)	
)	
WAUSAU INSURANCE COMPANIES)	
Insurance Carrier)	

ORDER

Claimant appeals from an Award entered by Administrative Law Judge Kenneth S. Johnson on June 17, 1997. The Appeals Board heard oral argument on November 26, 1997.

APPEARANCES

Claimant appeared by his attorney, Diane F. Barger of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, D. Shane Bangertter of Dodge City, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has reviewed and considered the record listed in the Award. The Board has also considered the transcript of proceedings dated July 11, 1997.

ISSUES

The Administrative Law Judge awarded benefits based on a 4 percent general body functional impairment and an average weekly wage of \$416.78. He found claimant has a 9 percent general body functional impairment but that 5 percent preexisted the current injury. He also denied claimant's request for temporary total disability benefits the week of August 28, 1995.

On appeal, claimant asks for review of the following issues:

- (1) Nature and extent of disability. Claimant argues he should receive a work disability. Claimant also asserts he had no preexisting disability in the low back and the Administrative Law Judge, therefore, erred when he found otherwise.
- (2) Temporary total disability. Claimant contends he is entitled to one week of temporary total disability.
- (3) Average weekly wage. Claimant argues the average weekly wage should be computed on the basis of a six-day work week because claimant was expected to be available to work six days a week and generally did work six days per week. Claimant cites in support Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

Claimant also asks the Board to review two Administrative Law Judge orders entered before the Award: (1) an order denying claimant's motion to extend terminal dates; and (2) an order granting respondent's motion to quash certain depositions taken after the last terminal date.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds, based on the findings of fact and conclusions of law stated below, the Award should be modified. Claimant should be awarded benefits for a 70 percent work disability, claimant is entitled to one week of temporary total disability, and his average weekly wage at the time of the injury was \$420.55. For reasons explained below, claimant's request to reverse the two interlocutory orders is denied.

Findings of Fact

1. Claimant injured his back on August 17, 1995, when he bent over to pick up a piece of meat from the floor in the course of performing his duties for respondent. Claimant normally worked as a rib cut trimmer, but on the day of the accident he was working in packaging.
2. Claimant reported the injury to the plant nurse on the day of the accident, August 17, 1995, and asked to see a physician. The nurse advised claimant it would be approximately two weeks before he could get in to see the physician. On August 18, 1995, the plant nurse recommended restrictions. Claimant was to avoid bending and stooping and was given a push/pull limit of 10 pounds. Claimant continued to work as a rib cut trimmer.

3. Claimant went on his own to see Dr. Munson, a chiropractor, on August 21, 1995. Dr. Munson took claimant off work for the last two weeks of August 1995.
4. Claimant saw the plant physician, Dr. Kenoyer, on August 29, 1995. Dr. Kenoyer recommended restrictions: no bending, lifting, stooping, or carrying over 10 pounds. Claimant returned to his regular job as a rib cut trimmer.
5. At Dr. Kenoyer's suggestion, claimant was placed on light duty as of October 25, 1995, and worked in a job folding gloves. He remained on light duty until November 26, 1995.
6. Respondent also authorized treatment by Win Moore, M.D. Dr. Moore sent claimant for physical therapy and then recommended claimant either have epidural injections or surgery. Claimant chose not to have either. Dr. Moore released claimant to work doing his regular rib-trimming job and claimant resumed work as a rib trimmer on November 26, 1995.
7. Claimant periodically missed work after he returned and respondent ultimately terminated claimant for "no-call, no-show." Claimant's last day of work was December 6, 1995.
8. Although claimant was terminated for not calling in and not showing up for work, the Appeals Board finds claimant missed work after he had been released to his regular job by Dr. Moore in significant part because of the pain and problems stemming from his injury. The Board further finds claimant's injury rendered him unable to perform the duties of the job as a rib cut trimmer. These conclusions are based, in part, upon testimony of claimant and testimony of coworkers Maria Martinez and Jose Reyes. These findings are also supported by the opinions of Sergio Delgado, M.D., and Daniel D. Zimmerman, M.D. Dr. Delgado testified to his opinion the restrictions recommended by Dr. Moore, when Dr. Moore released claimant to go back to his regular job, were inadequate. Dr. Delgado testified the duties as a trimmer would increase the pain and numbness in claimant's leg. Dr. Zimmerman testified that in his opinion claimant is permanently and totally disabled. According to Dr. Zimmerman, claimant cannot perform a full range of sedentary activities and this fact, combined with his lack of education and lack of English language skills, makes claimant unable to engage in substantial, gainful employment.
9. The Appeals Board finds claimant has made a good faith effort to obtain employment since leaving work for respondent. At the time of his deposition in May of 1996, he had moved to Wichita, applied for work at various places, including a temporary agency, warehouse work, Manpower, Smith Personnel, and Universal Products. He had not been able to find work.
10. The Appeals Board finds claimant's injury of August 17, 1995, resulted in 18 percent general body functional impairment. This finding is reached by giving approximately equal weight to the impairment rating of C. Reiff Brown, M. D., (9 percent), Daniel D. Zimmerman, M.D., (19 percent), and Sergio Delgado, M.D., (26 percent). The Appeals

Board construes Dr. Delgado's impairment rating to be 26 percent, not 15 percent as asserted in claimant's brief, an assertion not contested by respondent.

Dr. Delgado saw claimant twice. In his initial report, Dr. Delgado rated claimant's impairment as 28 percent of the body as a whole, 17 percent of which was for loss of range of motion. In the second report he reduced the range of motion component of the overall rating by 2 percent to 15 percent but stated his evaluation and rating was otherwise unchanged. The Appeals Board, therefore, construes Dr. Delgado's rating as a 26 percent general body rating.

11. The difference between claimant's preinjury wage and the wage he is earning after the injury is 100 percent.

12. Claimant has lost, as a result of his injury, the ability to perform 40 percent of the tasks he performed in the 15 years of employment prior to his injury of August 17, 1995. This finding is based on the testimony of Dr. Delgado after reviewing the task list prepared by Mr. Monty Longacre. The Board finds Dr. Delgado's opinion more persuasive than the opinion of Dr. Zimmerman (100 percent task loss) or the opinion of Dr. Brown (lost 2 of 26 or 27 tasks for a 7-8 percent task loss).

13. Claimant was expected to be available to work six days per week and did generally work overtime for respondent prior to his injury of August 17, 1995. In the nine full weeks claimant had worked for respondent prior to the injury, claimant worked 70.56 hours or 7.84 hours of overtime per week and his base hourly rate was \$8.10.

14. Based on the testimony of both Dr. Delgado and Dr. Zimmerman, the Board finds claimant did not have a preexisting permanent functional impairment in his low back. His injury of January 1995 was temporary only.

15. Ms. Karen Terrill testified in this case on November 26, 1996, and testified that an interpreter was available when she interviewed claimant but claimant was "a very fluent individual in regard to the English language" and the interpreter was not used to any great degree. (Deposition p. 9.)

16. Claimant's terminal date for submitting evidence was November 12, 1996. Respondent's was December 12, 1996. Respondent sent its submittal letter December 13, 1996. On June 10, 1997, claimant's counsel requested permission to extend terminal dates so that claimant could introduce evidence about his ability to speak English. Claimant disputes Ms. Terrill's testimony on this point. The Administrative Law Judge denied this request. When claimant's counsel nevertheless scheduled the deposition, respondent moved to quash the deposition and the Administrative Law Judge granted that motion.

Conclusions of Law

1. Work 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. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

2. Because claimant's injury rendered him unable to continue in the job he held at the time of his injury, and claimant has, in spite of his good faith effort, been unable to find work at 90 percent or more of his preinjury wage, claimant is entitled to work disability as defined in K.S.A. 44-510e if that work disability is higher than the functional impairment. Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, ___ P.2d ___ (1997).

3. Claimant has a 70 percent work disability based on a 100 percent wage loss and a 40 percent task loss. K.S.A. 44-510e.

4. Claimant is entitled to an average weekly wage based on a six-day work week. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991). The Board calculates the wage to be, as claimant argues, \$420.55 (\$8.10 per hour times 48 equals \$388.80 plus 7.84 hours of overtime at \$4.05 or \$31.75 for a total of \$420.55 per week).

5. Claimant's request to open the record, extend terminal dates, and take additional depositions should be denied. The Award in this case is not based on the testimony of Ms. Terrill. It is based on the actual wage loss and the task list prepared by Mr. Longacre and opinion of Dr. Delgado regarding those tasks. In addition, the delay by claimant's counsel in requesting the extension would, by itself, warrant denying claimant's request to extend the terminal dates.

6. The Appeals Board finds claimant is entitled to one week of temporary total disability. Even though Dr. Munson was not an authorized treating physician, the Board finds claimant was not able to work and the decision by Dr. Munson to take claimant off work from August 21 to September 1, 1996, was reasonable. Claimant was not off work for three consecutive weeks and is, therefore, not entitled to temporary total disability benefits for the

first week. Claimant is entitled to one week of temporary total disability benefits for the week beginning August 28, 1995. K.S.A. 44-510c.

AWARD

WHEREFORE, the Appeals Board finds that the Award entered by Administrative Law Judge Kenneth S. Johnson dated June 17, 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, Juan Paniagua, and against the respondent, National Beef Packing Co., L.P., and its insurance carrier, Wausau Insurance Companies, for an accidental injury which occurred August 17, 1995, and based upon an average weekly wage of \$420.55 for 1 week of temporary total disability compensation at the rate of \$280.38 per week followed by 290.50 weeks at the rate of \$280.38 per week or \$81,450.39, for a 70% permanent partial work disability, making a total award of \$81,730.77.

As of January 30, 1998, there is due and owing claimant 1 week of temporary total disability compensation at the rate of \$280.38 per week followed by 127.14 weeks of permanent partial compensation at the rate of \$280.38 per week in the sum of \$35,647.51 for a total of \$35,927.89, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$45,802.88 is to be paid for 163.36 weeks at the rate of \$280.38 per week, until fully paid or further order of the Director.

The Appeals Board also approves and adopts all other orders entered by the Administrative Law Judge not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of January 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Diane F. Barger, Wichita, KS
- D. Shane Bangertter, Dodge City, KS
- Kenneth S. Johnson, Administrative Law Judge
- Philip S. Harness, Director