

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

LOUIE D. DEMING)	
Claimant)	
VS.)	
)	Docket No. 206,402
TOTAL PETROLEUM, INC.)	
Respondent)	
Self-Insured)	

ORDER

Respondent, a qualified self-insured, appeals from an Award entered by Administrative Law Judge Jon L. Frobish on June 27, 1997. The Appeals Board heard oral argument December 12, 1997.

APPEARANCES

James B. Zongker of Wichita, Kansas, appeared on behalf of claimant. Richard J. Liby of Wichita, Kansas, appeared on behalf of respondent.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The sole issue on appeal is the nature and extent of claimant's disability. The Administrative Law Judge awarded benefits for a 39 percent work disability based on a 40 percent loss of ability to perform tasks and a 38 percent wage loss. Respondent disputes the findings as to both the task loss and the wage loss. As to the task loss, respondent argues the Administrative Law Judge should have adopted or at least given weight to the opinion of Dr. Poole, the treating physician. Dr. Poole testified he would not recommend restrictions. Respondent also contends the task loss as found by the Administrative Law Judge does not properly take into consideration testimony about preexisting restrictions. As to the wage prong, respondent argues that claimant, a truck driver paid on a per-haul basis, earned less post-injury, not because of the injury, but because respondent had fewer hauls for all drivers. Respondent also contends the Administrative Law Judge has made an error in calculating the difference between the pre- and post-injury wage.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments by the parties, the Appeals Board finds and concludes the Award should be modified and claimant should be awarded benefits based on a 22 percent work disability.

Claimant worked for respondent as a crude oil truck driver. He injured his low back in August 1995 while bending over pulling on a valve. Respondent provided medical treatment and on February 13, 1996, claimant underwent surgery performed by Dr. Bernard T. Poole. The surgery involved a laminectomy at L4-5 and L5-S1 and a discectomy without fusion. On April 15, 1996, Dr. Poole released claimant to return to his job as a crude oil truck driver with advice that claimant use good body mechanics when doing any lifting.

The only issue on appeal is the nature and extent of claimant's disability. K.S.A. 44-510e(a) defines work disability as the average of the wage loss and task loss:

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.

Loss of Ability to Perform Tasks

Two physicians testified about work restrictions resulting from the injury. Dr. Poole, the physician who performed the surgery, testified he did not recommend any restrictions. Dr. Poole explained that he considers restrictions appropriate only when there is a high likelihood of accruing new injury. He does not use restrictions to deal with pain. He rated claimant's functional impairment as 10 percent of the whole body due to this injury. According to Dr. Poole, claimant had a preexisting impairment to his low back not included in this rating of 10 percent.

Dr. Robert A. Rawcliffe, Jr., examined and evaluated claimant's injuries at the request of claimant's counsel. Dr. Rawcliffe recommended claimant be limited to the light work categories as defined by OSHA. Dr. Rawcliffe indicated this would include restrictions limiting occasional lifting to no more than 20 pounds and more frequent lifting to no more than 10 pounds. He also recommended he avoid repetitive bending or crouching.

Dr. Rawcliffe testified that the purpose for the restrictions he recommended was to avoid further injury.

Dr. Rawcliffe applied his restrictions to a list of tasks claimant had performed for respondent and his one previous employer. Dr. Rawcliffe agreed that claimant could not do two of the four tasks he performed in his job for respondent and could not do two of the six tasks he did for his previous employer, Haliburton Oil Services. In other words, according to Dr. Rawcliffe, claimant cannot now perform 40 percent of the tasks.¹ Dr. Rawcliffe also rated the functional impairment. He testified claimant has a 15 percent impairment to the whole body with 5 percent of this impairment preexisting.

The ALJ adopted the restrictions and opinions of Dr. Rawcliffe. Respondent contends the ALJ should have relied on the opinions of the treating physician, Dr. Poole, or at least given some weight to Dr. Poole's opinions. The Appeals Board agrees Dr. Poole's opinions are entitled to some weight. In addition, the Board finds claimant's post-injury work activity indicates he is capable of more than is suggested by Dr. Rawcliffe's restrictions. Dr. Rawcliffe would restrict claimant from performing two of the tasks he performed in his job for respondent, hooking up hoses and carrying a tray up a ladder. But after the current injury, claimant returned to his job performing those tasks. Although he testified he could no longer work the same number of hours he was working, he continued to perform the same tasks. The Board concludes claimant is able and not restricted from performing those tasks. If, as Dr. Rawcliffe predicts, degenerative changes ultimately make claimant unable to perform the job, review and modification may be appropriate. Nance v. Harvey County, 23 Kan. App. 2d 899, 937 P.2d 1245 (1997).

On the other hand, the Board does not agree with the opinion of Dr. Poole that claimant has no restrictions. The evidence establishes claimant had a significant injury which required surgery and, in the Board's opinion, the injury was one which would warrant restrictions.

The Board concludes appropriate restrictions would be a reasonable compromise between the opinions of Dr. Poole and Dr. Rawcliffe. As previously indicated, Dr. Rawcliffe restricted claimant from two of the six tasks performed in his previous work for Haliburton Oil Services and two of the four in his work for respondent. Based in part on Dr. Poole's testimony and in part on claimant's actual post-injury work, the Board does not believe claimant's injury warrants the restrictions from the tasks he performed in the work for respondent. But the Board agrees the injury would warrant restrictions against two tasks in the work for Haliburton. Dr. Rawcliffe's testimony indicated a restriction to even the

¹ The Board notes that in the questioning of Dr. Rawcliffe, he agreed that claimant lost the ability to do 50 percent (two of four) of the tasks he did for respondent and 33 percent (two of six) of the tasks he did for his previous employer. Based on those numbers, claimant's counsel elicited a higher loss by adding 50 percent and 33 percent and dividing by two. The actual percentage of tasks lost was, however, 40 percent, four out of a total of ten.

medium category would eliminate two tasks from the work with Haliburton: laying pipe and hooking up hoses. The report from Jerry D. Hardin indicates the hooking up of hoses at Haliburton involved heavier weights than it did for respondent. The laying of pipe also involved heavier weights than the medium category of work.

Giving some weight to the opinions of both Dr. Poole and Dr. Rawcliffe, the Board concludes claimant's current injury warranted restrictions which would prevent him from performing two of the tasks he performed for Haliburton but none of the tasks he performed for respondent. The Board, therefore, finds claimant lost the ability to perform 20 percent (two out of ten) of tasks he performed in the relevant fifteen years of work.

Wage Loss

The parties stipulated that claimant earned \$857.72 per week prior to the current injury. Before the injury he was working 13 to 15 hours per day and now can only work 7 to 8 hours. He testified there was more work available for him but he cannot now do it because of the back pain.

Respondent, on the other hand, contends all of its drivers have had their work reduced. Mr. Dennis Lemieur, field supervisor, testified that drivers were previously scheduled to work 5 ½ days per week. Because respondent now has a lower volume of business, the week has been reduced to 4 days. He also testified that all drivers are given the same number of hauls. All drivers have had a reduction in their pay.

The Board finds credible claimant's testimony that he cannot now work the longer hours. He testified he starts experiencing pain after about 6 hours and works only 7 to 8 hours. The Board also accepts claimant's testimony that there were additional loads he could have hauled if he were able. In so doing, the Board does not discount the testimony by respondent regarding the general reduction in work. The Board believes both factors likely worked together but finds the evidence supports a conclusion that claimant did not earn a wage equal to 90 percent or more of his pre-injury wage and the injury was, in significant part, the reason he did not.

At oral argument the parties stipulated there had been a calculation error in the Award and agreed that the wage loss should be 34 percent if the Board finds, as it has, the wage loss should be attributed to the injury. The 34 percent wage loss will, therefore, be used to calculate work disability.

Preexisting Disability

Respondent argues the disability awarded should take into consideration Dr. Rawcliffe's testimony that he would have restricted claimant from performing some of the tasks claimant performed for Haliburton even before the current injury. Based on that testimony, respondent asks the Board to use in the task loss calculation only the additional

task loss, if any, after the current injury. As indicated in prior decisions, the Board does not generally discount for prior disability through the task loss factor. Carver v. Missouri Gas Energy, Docket No. 195,270 (July 1997). Instead, the Board deducts preexisting functional impairment on the basis of K.S.A. 1996 Supp. 44-501. In addition, in this case the Board has concluded the record does not contain convincing evidence regarding what, if any, restrictions would have been appropriate before this injury.

This record contains convincing evidence that claimant has a preexisting impairment. MRI testing done after an earlier injury, when claimant fell off a roof, revealed a midline disc herniation at L4-5 and diffuse bulging at L3-4. Claimant was not symptom free after that injury and from time to time sought chiropractic treatment. Both Dr. Poole and Dr. Rawcliffe testified claimant had functional impairment before the current injury. Only Dr. Rawcliffe stated how much. He testified claimant had a 5 percent general body functional impairment before this injury. Although the Board has not adopted Dr. Rawcliffe's restrictions, the Board does find reasonable, under the circumstances, the 5 percent rating for the preexisting impairment.

Work Disability

The Board concludes claimant has a 27 percent work disability based on a 34 percent wage loss and a 20 percent task loss. The 5 percent preexisting impairment should be deducted with the result that claimant is entitled to benefits for a 22 percent general body disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish on June 27, 1997, should be, and hereby is, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Louie D. Deming, and against the respondent, Total Petroleum, Inc., a qualified self-insured, for an accidental injury which occurred October 31, 1995, and based upon an average weekly wage of \$857.72, for 11 weeks of temporary total disability compensation at the rate of \$326 per week or \$3,586, followed by 91.3 weeks at the rate of \$326 per week or \$29,763.80 for a 22% permanent partial disability, making a total award of \$33,349.80, all of which is presently due and owing.

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

IT IS SO ORDERED.

Dated this ____ day of June 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James B. Zongker, Wichita, KS
Richard J. Liby, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director