

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

JAMES R. PERES)	
Claimant)	
VS.)	
)	Docket No. 210,614
BEACHNER CONSTRUCTION COMPANY, INC.)	
Respondent)	
AND)	
)	
AETNA CASUALTY & SURETY COMPANY)	
Insurance Carrier)	

ORDER

On November 14, 1997, the application of claimant for review by the Workers Compensation Appeals Board of an Award issued by Administrative Law Judge Bryce D. Benedict on July 11, 1997, came on for oral argument.

APPEARANCES

Claimant appeared by and through his attorney, John J. Bryan of Topeka, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Gregory D. Worth of Lenexa, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

What is the nature and extent of claimant's injury and/or disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After having reviewed the entire evidentiary record the Appeals Board makes the following findings of fact and conclusions of law:

The Appeals Board finds that the Award of the Administrative Law Judge sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The findings and conclusions enumerated in the Award of the Administrative Law Judge are accurate and appropriate and the Appeals Board adopts same as its own findings and conclusions as if specifically set forth herein.

Claimant was awarded a 26 percent permanent partial disability to the body as a whole on a functional basis as a result of injuries suffered on February 24, 1995, when he fell off a trailer. The medical depositions of Dr. Daniel D. Zimmerman and Dr. David Tillema were taken in this matter. The treating physician, Dr. Bunch was neither deposed nor were his medical reports stipulated into evidence. The Administrative Law Judge in reviewing the limitations placed on claimant by Dr. Zimmerman and Dr. Tillema found that claimant was physically capable of returning to employment within those restrictions. However, claimant decided that he was not able to work even though the medical restrictions would allow him to work. Therefore, claimant has voluntarily taken himself out of the labor market. The Administrative Law Judge, in limiting claimant to a functional impairment only, found it unacceptable for claimant to voluntarily remove himself from the labor market in this manner. The Award of the Administrative Law Judge was issued in July 1997. The opinion of the Kansas Court of Appeals in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, ___ P.2d ___ (1997) was issued August 29, 1997. The Court of Appeals in Copeland also found it unacceptable for a claimant to fail to attempt, in good faith, to obtain a job in the open labor market. As such, even though the Award of the Administrative Law Judge preceded the decision in Copeland, the logic is consistent and the Appeals Board finds, based upon Copeland, that claimant has voluntarily removed himself from the open labor market and has not provided a good-faith effort in attempting to obtain employment.

Copeland requires that if a good faith effort has not been made, the fact-finder will have to determine an appropriate post-injury wage based upon all the evidence before it including expert testimony concerning claimant's capacity to earn wages. In this instance there is no evidence regarding claimant's post-injury wage earning ability. However, since both Dr. Zimmerman and Dr. Tillema find claimant to be physically capable of returning to employment within their restrictions, the Appeals Board finds claimant is able to earn the minimum wage of \$5.15 per hour for a 40 hour week giving claimant a post-injury wage of \$206 per week. When this is compared to claimant's average weekly wage of \$340.35 the Appeals Board finds claimant has suffered a 39 percent wage loss as a result of these injuries.

The Administrative Law Judge found, and the Appeals Board agrees, that the task loss analysis provided in this case does not adequately satisfy the requirements of K.S.A.1994 Supp. 44-510e. Dr. Zimmerman's task loss opinion was as to which of

claimant's previous "jobs" he could still do. However, it failed to break all the jobs down into individual work tasks. Therefore, the Administrative Law Judge found that claimant had failed to establish the amount of his task loss as a result of these injuries and thus no percentage of task loss could be given claimant for purpose of this award.

K.S.A. 1994 Supp. 44-510e obligates that the task loss be averaged with the wage loss. In comparing a 0 percent task loss with the 39 percent wage loss, the Appeals Board finds claimant has suffered a 19.5 percent work disability in this matter.

K.S.A. 44-510e states:

In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.

As claimant has a 26 percent permanent impairment to the body as a whole on a functional basis and, as claimant's work disability is less than the established functional impairment, claimant is entitled pursuant to K.S.A. 1994 Supp. 44-510e to the 26 percent permanent partial disability to the body as a whole as was awarded by the Administrative Law Judge.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bryce D. Benedict dated July 11, 1997, should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of December 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: John J. Bryan, Topeka, KS
- Gregory D. Worth, Lenexa, KS
- Bryce D. Benedict, Administrative Law Judge
- Philip S. Harness, Director