BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GEORGE SURLS	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 211,321
SAGINAW QUARRIES, INC.	)	& 213,766
NEOSHO CONSTRUCTION COMPANY, INC.	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
ST. PAUL FIRE & MARINE INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent Neosho Construction Company and its insurance carrier appeal from Awards entered by then Assistant Director Brad E. Avery on February 6, 1998, modified by the Nunc Pro Tunc Orders of February 9, 1998, and February 11, 1998. The Appeals Board heard oral argument August 18, 1998.

APPEARANCES

Keith L. Mark of Mission, Kansas, appeared on behalf of claimant. Maureen T. Shine of Overland Park, Kansas, appeared on behalf of respondent Saginaw Quarries and its insurance carrier. Kristine A. Purvis of Overland Park, Kansas, appeared on behalf of respondent Neosho Construction Company and its insurance carrier.

RECORD AND STIPULATIONS

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

ISSUES

This appeal involves two cases consolidated for trial. The first claim, Docket No. 211,321, is brought against Saginaw Quarries for injury on January 19, 1996. Claimant slipped getting out of his truck and injured his back, neck, shoulder, arm, and leg. The second claim is against Neosho Construction for an accident on May 17, 1996. On this

occasion, claimant suffered injury while lifting a ramp. He re-injured the same parts of his body.

For the first accident, the Assistant Director awarded claimant benefits based on an 8.75 percent functional impairment and for the second accident he awarded benefits based on a 74.75 percent work disability. Neosho, the employer at the time of the second accident, appeals and contends it should be responsible for a functional impairment only because the work restrictions did not change after the second accident. Neosho also contends the Assistant Director erred when he refused to extend the terminal dates to allow evidence of an offer of employment made by Neosho.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Awards should be modified.

Findings of Fact

1. On January 19, 1996, while working as a heavy equipment operator for respondent Saginaw Quarries, claimant injured his neck, back, shoulder, arm, and leg. Claimant was off work for approximately three weeks, received treatment from Dr. David Clymer and then returned to the same job. Claimant returned with work restrictions. He testified Saginaw provided work within those restrictions.

2. Claimant was examined by Dr. Edward J. Prostic on April 18, 1996. Dr. Prostic recommended claimant not lift greater than 50 pounds on a single lift or greater than 20 pounds on a repetitious basis. Dr. Prostic also recommended claimant limit work above eye level. Claimant testified that Dr. Clymer recommended restrictions similar to those recommended by Dr. Prostic. These were claimant's work restrictions at the time he returned to work for Saginaw.

3. The parties have stipulated that claimant has an 8.75 percent general body functional impairment as a result of his injury on January 19, 1996.

4. After returning to work for respondent Saginaw, claimant was transferred to work for Neosho where he again worked as a heavy equipment operator. According to claimant, Neosho owns Saginaw. Claimant testified Neosho also provided work within the restrictions.

5. On May 17, 1996, while working for Neosho, claimant re-injured the same parts of his body he had injured while working for Saginaw. At the time, he was lifting a ramp weighing approximately 100 pounds. This lifting violated the restrictions, but claimant testified he was the only one there to lift the ramp.

6. After the May 17, 1996, accident, claimant again received medical treatment and was off work. He was treated by Dr. Melvin Karges. Dr. Karges released claimant with the same

restrictions Dr. Clymer had recommended. This time, respondent Neosho refused to reemploy claimant. They told him he had to be 100 percent in order to come back to work.

7. Claimant has not worked since the second injury. After a period of approximately six months of temporary total disability, he put in applications for work at UPS, Missouri Power and Light, a steel company, and the City of Independence. He has also applied for social security disability.

8. Claimant saw Dr. Prostic again after the second accident. Dr. Prostic testified that as a result of the second accident, claimant has additional functional impairment but he did not recommend a change in the restrictions. Dr. Prostic reviewed a list of the work tasks claimant had performed in the 15 years before the injuries in this case. He concluded claimant is unable to perform 67 percent of those tasks.

9. Terminal dates were originally set in this case as June 30, 1997, for the claimant and July 30, 1997, for respondent. Due to difficulty scheduling the deposition of Dr. Prostic, the parties agreed to an initial extension to August 18, 1997, for claimant and September 18, 1997, for respondent. Claimant completed his case by August 18, 1997, and the parties then agreed to a second and third extension for respondent and respondent's terminal date became November 18, 1997. Respondent did not take any additional evidence before the terminal date and then, on December 31, 1997, respondent Neosho asked for an additional extension. On January 5, 1998, respondent Saginaw also requested an extension. The reason for this request was to put on evidence of a job offer. Claimant contends the job offer discussions had begun in late October 1997 and the offers were for jobs outside of the Kansas City area.

Conclusions of Law

1. The Board affirms the decision not to extend the terminal dates. K.S.A. 44-523 sets the rules for extending terminal dates. The statutes list several specific grounds for an extension and then adds the more general "for good cause shown." None of the specific grounds are present here and the Board finds respondent has not shown good cause for an extension. Respondent Neosho asked for the extension to present evidence of a late job offer. No explanation is given for the delay. Respondent has available the review and modification procedures under K.S.A. 44-528 if the evidence warrants.

2. The key issue in this case concerns the decision to assess the work disability benefits against Neosho, the second employer. The Board concludes the work disability should be assessed against Saginaw. The work restrictions, which in turn produced the work disability, occurred from the injury at Saginaw. Claimant suffered no new work restrictions in the injury at Neosho. For the injury at Saginaw claimant should receive benefits based on functional impairment until after his injury at Neosho. Until that date he was earning the same wage he had been earning at the time of his first injury. His disability is therefore limited to the percentage of functional impairment based on K.S.A. 44-510e. But after the second injury, the injury at Neosho, claimant ceased to earn 90 percent or more of the wage he earned at Saginaw and the permanent partial disability should be modified to work disability based on task loss and wage loss. For a period of 22.71 weeks

after the second injury, claimant received temporary total benefits. He should not be considered eligible for work disability while receiving temporary total disability benefits and the work disability benefits should begin only after the period of temporary total disability.

3. Based on Dr. Prostic's testimony, claimant has lost the ability to perform 67 percent of the tasks he performed in the relevant work history. K.S.A. 44-510e.

4. The Board also agrees with and affirms the finding that claimant has a 100 percent wage loss after making a good faith effort to find employment. Neither respondent disputed this finding on appeal.

5. Claimant's disability for the accident of January 19, 1996, Docket No. 211,321, while working for Saginaw Quarries, is 8.75 percent, the stipulated functional impairment, through October 23, 1996, the end of the temporary total disability period following the May 17, 1996, accident at Neosho, and is entitled to a work disability of 83.5 percent thereafter.

6. Claimant is entitled to benefits for a 3 percent disability based on functional impairment for the accident of May 17, 1996, while working for Neosho Construction Company, Docket No. 213,766. The parties have agreed that claimant had an additional functional impairment of 3 percent in addition to the preexisting 8.75 percent for the January 19, 1996, accident at Saginaw. Pursuant to K.S.A. 44-501, the preexisting functional impairment must be deducted from the total impairment and claimant is entitled to benefits only for the additional 3 percent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Awards entered by then Assistant Director Brad E. Avery on February 6, 1998, modified by the Nunc Pro Tunc Orders of February 9, 1998, and February 11, 1998, should be, and the same are hereby, modified as follows:

Docket No. 211,321

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, George Surls, and against the respondent, Saginaw Quarries, Inc., and its insurance carrier, Liberty Mutual Insurance Company, for an accidental injury sustained on January 19, 1996. The claimant is entitled to 2.28 weeks temporary total disability at the rate of $293.35 per week, or $668.84, followed by 36.31 weeks at $293.35 per week, or $10,651.54, for an 8.75% permanent partial general body disability based on functional impairment. Beginning October 24, 1996, respondent owes an additional 302.3 weeks at $293.35 per week, for an 83.5% permanent partial general disability, making a total award of $100,000.

As of March 31, 1999, there is due and owing claimant 2.28 weeks of temporary total disability compensation at the rate of $293.35 per week, or $668.84, followed by 164.29

weeks of permanent partial disability compensation at the rate of $293.35 per week in the sum of $48,194.47, for a total of $48,863.31, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $51,136.69 is to be paid for 174.32 weeks at the rate of $293.35 per week, until fully paid or further order of the Director.

Docket No. 213,766

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, George Surls, and against the respondent, Neosho Construction Company, and its insurance carrier, St. Paul Fire & Marine Insurance Company, for an accidental injury sustained on May 17, 1996. The claimant is entitled to 22.71 weeks of temporary total disability at the rate of $293.35 per week, or $6,661.98, followed by 12.22 weeks of permanent partial disability compensation at the rate of $293.35 per week, or $3,584.74, for a 3% permanent partial disability, making a total award of $10,246.72, all of which is presently due and owing less amounts previously paid. This is in addition to amounts paid on Docket No. 211,321.

Pursuant to K.S.A. 44-536, the claimant's contract of employment with his counsel is hereby approved.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent to be paid direct as follows:

Richard Kupper & Associates	
Transcript of Regular Hearing	$412.25
Deposition of Edward Prostic, M.D.	$393.55

IT IS SO ORDERED.

Dated this _____ day of March 1999.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

DISSENT

The undersigned would affirm the decision by the Administrative Law Judge. Claimant should receive benefits for an 8.75 percent disability based on functional impairment for the injury at Saginaw. By the definitions in our Act, his disability from that accident is only the functional impairment because he was earning 90 percent or more of the wage he was earning at the time of the injury.[1] The event which makes claimant's disability a work disability is the second injury which resulted in a wage of less than the 90 percent threshold in K.S.A. 44-510e. The second injury is also the event which caused the work restrictions to have a practical importance. After the second injury, and the undersigned would find because of the second injury, respondent Neosho decided not to retain claimant.

BOARD MEMBER

DISSENT

The undersigned Board Member would also affirm the Administrative Law Judge's Award. After claimant's first work-related accident on January 19, 1996, Saginaw returned claimant to work earning 90 percent or more of the wage he was earning at the time of the injury. Accordingly, Saginaw's responsibility for permanent partial disability benefits is limited to the 8.75 percent permanent functional impairment that resulted from the January 19, 1996, accident. *See* K.S.A. 44-510e(a).

In March, 1996, claimant went to work for another employer, Neosho, where he sustained another work-related injury in a May 17, 1996, accident. After claimant was released to return to work with the same restrictions as he had following the January 19, 1996, injury, Neosho did not return claimant to work. Because Neosho did not return claimant to work, Neosho is responsible for claimant's work disability.

The Appeals Board acknowledges that Dr. Prostic was the only physician to testify in this case and saw claimant both after the January 19, 1996, accident and after the May 17, 1996, accident. Dr. Prostic testified that claimant's work restrictions did not change after the May 17, 1996, accident. But Dr. Prostic did find that claimant had an additional 5 percent permanent functional impairment as a result of the May 17, 1996, accident. Claimant testified his symptoms were "a lot worse" after the second accident. Claimant was off work for only approximately three weeks after the first accident and some six months after the second accident. Furthermore, Dr. Prostic identified two of the four work tasks claimant had performed at Neosho as work tasks he could not perform because of the

[1] Respondent Neosho asserts in its brief to the Board that it is undisputed claimant returned to Saginaw in an accommodated job. The undersigned does not agree with that assertion. Claimant testifies both Saginaw and Neosho provided work within the restrictions. Claimant does not say the job was modified in any way from the job he was doing at the time of injury. In fact, he identifies at least one task in the heavy equipment operator job he performed for both Saginaw and Neosho which was outside the work restrictions.

permanent work restrictions. Claimant testified his second accident occurred when he was lifting a 100-pound ramp while performing the work task of unloading heavy equipment. That was one of the work tasks that Dr. Prostic identified that claimant could not perform because it exceeded his permanent work restrictions. Claimant identified the work task of loading and unloading heavy equipment as a work task that he performed 20 percent of the time while he was employed by Saginaw and Neosho.

This Board Member would conclude the record proves that claimant worked outside of his preexisting restrictions while he was employed by Neosho. Since Neosho worked claimant outside of his preexisting permanent restrictions and claimant was injured while performing work outside those restrictions, the preexisting restrictions should not be taken into consideration when claimant's work task loss is determined. *See Maberry v. Rubbermaid Specialty Products*, Docket No. 186,053 (October 1997).

The 1993 legislature changed K.S.A. 44-510e(a) from a no work disability presumption to a conclusive rule that an injured employee that returns to work following a work-related injury at a wage that pays 90 percent or more of the worker's pre-injury wage is limited to permanent partial disability benefits based on the worker's permanent functional impairment. The legislature's reason for changing the no work disability presumption to a conclusive rule was to encourage employers to return injured employees to work. In this case, this Board Member finds the majority has violated this conclusive rule. Saginaw returned claimant to work after his injury earning 90 percent or more of his pre-injury wage and now instead of being responsible only for claimant's 8.75 percent functional impairment, as required by statute, Saginaw has been found responsible for a work disability of 83.5 percent resulting in a total award of $100,000.

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BOARD MEMBER

c: Keith L. Mark, Mission, KS
Maureen T. Shine, Overland Park, KS
Kristine A. Purvis, Overland Park, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director