BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOHN BEATTY	)	
Claimant	)	
VS.	)	
	)	Docket No. 227,810
LABOR READY	)	
Respondent	)	
AND	)	
	)	
CIGNA INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals from an Award entered by Administrative Law Judge Bryce D. Benedict on September 28, 1999. The Appeals Board heard oral argument January 18, 2000.

APPEARANCES

Thomas O. Rost of Topeka, Kansas, appeared as a friend of the Court. Michael H. Stang of Overland Park, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

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

ISSUES

The issue on appeal is the amount of temporary total disability owed claimant. Respondent asks for modification of language in the Award stating claimant is "entitled to 39 weeks temporary total disability compensation at the rate of $183.43 per week or $7,153.77." Respondent argues this statement in the Award is based on an incorrect average weekly wage and incorrectly applies an agreement by respondent not to seek credit for overpayment of temporary total disability benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds the Award should be modified.

Claimant alleged he injured his back at work on April 28, 1997, and proceeded to preliminary hearing on October 30, 1997. Respondent did not appear at the preliminary

hearing and, based on claimant's testimony, the ALJ ordered temporary total disability benefits commencing August 17, 1997, at the rate of $183.43 calculated on an average weekly wage of $275. Complying with that Order, respondent paid claimant 39 weeks of temporary total disability benefits for a total of $7,153.77.

A prehearing settlement conference was held in November 1998. No record was made of that conference, but the ALJ later stated on the record that respondent stipulated, at this prehearing settlement conference, to an average weekly wage of $275. Respondent disagrees. Respondent asserts that it merely advised that temporary total disability benefits had been paid on that basis, not that this was the correct wage. Respondent contends claimant is a part-time employee and the $275 per week assumes full-time work.

This disagreement about the nature of the stipulation surfaced at the beginning of the regular hearing on June 17, 1999. After the ALJ advised his notes reflected a stipulation, the ALJ considered whether it would be appropriate to allow respondent to withdraw its stipulation. After discussion of possible prejudice to claimant, the ALJ allowed respondent to withdraw its stipulation but did so based on the understanding that respondent would not seek a credit for overpayment of benefits previously paid. This understanding was expressed in the following exchange:

> Judge Benedict: All right. Well, so Mr. Stang, I understand you are saying that even if average weekly wage is found out to be something less than what was believed before that, the respondent is not going to ask for a credit for any overpayment of temporary total?
>
> Mr. Stang: Yes, Your Honor.

The case was then tried and an Award entered. In the Award, the ALJ found claimant was not entitled to permanent disability benefits, only temporary total disability benefits. The ALJ also found, as respondent had argued, that claimant was a part-time employee with an average weekly wage of $135.16. But the ALJ ordered respondent to pay 39 weeks of temporary total disability benefits at the rate of $183.43. The ALJ ruled that the respondent had stipulated to the wage of $275 and had been permitted to withdraw that stipulation at regular hearing on the condition that respondent not seek a credit for overpayment of temporary total disability benefits. At the same time, the ALJ noted that respondent had not stipulated that it would not seek reimbursement from the Kansas Workers Compensation Fund.

The Board concludes the Award should, as respondent requests, be modified to state the correct amount of temporary total disability owed using a wage of $135.16 and to order respondent to pay only that amount. The Board first concludes it cannot, without a transcript from the prehearing conference, address the specific substance of the stipulation entered. But it is clear at the regular hearing respondent intended to make an issue of the amount of claimant's average weekly wage. At that point, in our view, there would be no cognizable prejudice to claimant from allowing the respondent to withdraw a stipulation so long as claimant was allowed to present its evidence on the question.

In any event, the arrangement achieved by the ALJ, namely an agreement that the respondent would not seek a credit for overpayment, leaves open the question of the amount of average weekly wage. It leaves this question open because it does not foreclose respondent's right to seek reimbursement from the Kansas Workers Compensation Fund under K.S.A. 44-534a(b) if it has overpaid temporary total disability based on an incorrect wage. A stipulation not to seek credit can only reasonably be understood as an agreement not to seek credit from amounts owed the claimant. This is the most logical interpretation because the term credit is used, not reimbursement. In addition, it is apparent the ALJ was concerned about prejudice to the claimant. Nothing in the stipulation addressed respondent's right to seek reimbursement, as distinguished from credit. The ALJ agrees with this interpretation, stating: "However, at no time did Respondent counsel intimate that any right to recover from the Fund was being waived."

Given these circumstances, the Board agrees that the Award should be modified. The second full sentence under the section headed "AWARD" should read: The claimant is entitled to 39 weeks of temporary total disability benefits at the rate of $90.11 per week or $3,514.29.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bryce D. Benedict on September 28, 1999, should be, and is hereby, corrected to state that the claimant is entitled to 39 weeks of temporary total disability benefits at the rate of $90.11 per week or $3,514.29.

IT IS SO ORDERED.

Dated this _____ day of February 2000.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Thomas O. Rost, Topeka, KS
Michael H. Stang, Overland Park, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director