

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

PAUL PHILIP HAMILTON)	
Claimant)	
)	
VS.)	
)	
ARBY'S)	
Respondent)	Docket No. 241,239
)	
AND)	
)	
FIREMAN'S FUND INSURANCE CO.)	
Insurance Carrier)	

ORDER

Claimant appealed Administrative Law Judge Bruce E. Moore's Award dated February 5, 2001. The Board heard oral argument on July 25, 2001, by teleconference.

APPEARANCES

Claimant appeared by his attorney, Joseph Seiwert. Respondent and insurance carrier appeared by their attorney, Terry J. Torline.

RECORD & STIPULATIONS

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

ISSUES

Claimant raised the following issues on review: (1) whether the claimant's accidental injury arose out of and in the course of employment; (2) whether there is an underpayment of temporary total disability benefits; and, (3) nature and extent of claimant's disability.

In its brief to the Board, the respondent raised the following issues: (1) whether the claimant's accidental injury arose out of and in the course of employment; (2) whether claimant's fraud in the inducement of his employment contract relating to his physical condition will bar all workers compensation benefits; (3) nature and extent of claimant's disability; (4) whether the claimant suffered an intervening accident which affects claimant's right to future benefits; and, (5) whether the respondent is entitled to a K.S.A. 44-510a credit.

FINDINGS OF FACT & CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, and the stipulations of the parties, the Board makes the following findings of fact and conclusions of law:

The Administrative Law Judge's Award contains detailed findings of fact and appropriate conclusions of law which specifically address the issues raised on review by the parties. It would serve no useful purpose to reiterate those findings of fact and conclusions of law herein. The Board adopts those findings of fact and conclusions of law as its own.

The sole issue raised that is not addressed by the Administrative Law Judge's Award is whether there was an underpayment of temporary total disability compensation payments.

The claimant alleges an underpayment of temporary total disability compensation. The parties stipulated that the respondent discontinued payment of fringe benefits on March 12, 1999. The claimant contends that temporary total disability compensation paid after that date was underpaid because the compensation rate was not adjusted to reflect the value of the discontinued benefits.

The respondent notes that the Award simply contains the stipulation that respondent paid 24.74 weeks of temporary total disability compensation at the rate of \$269.01. The respondent contends that because the record does not recite the dates when the temporary total disability compensation was paid, a determination cannot be made whether any temporary total disability compensation was paid after the fringe benefits were discontinued.

The Administrative Law Judge entered a preliminary Order dated March 8, 1999, which specifically ordered temporary total disability compensation be paid ". . . for the period from January 27, 1999, until March 1, 1999." The Administrative Law Judge entered another preliminary Order dated June 1, 1999, which ordered temporary total disability compensation be paid ". . . for the period from March 8, 1999, until Claimant is released to return to work, and is actually employed within medical restrictions, or has attained maximum medical improvement."

At the regular hearing held in this case, the parties stipulated claimant had received 24.74 weeks of temporary total disability compensation at the weekly rate of \$269.01. The parties further stipulated that the claimant's average weekly wage was \$403.50 and the weekly value of fringe benefits was \$30.75.

The temporary total disability compensation rate is a sum equal to 66 2/3 percent of the claimant's gross average weekly wage. K.S.A. 44-510c(b)(1). The claimant's average weekly wage multiplied by .6667 yields a temporary total disability compensation rate of \$269.01.

In the determination of the average gross weekly wage the value of additional compensation (fringe benefits) is not included until and unless such remuneration is discontinued. K.S.A. 44-511(a)(2). After the employer's weekly contribution of \$30.75 for claimant's fringe benefits was discontinued on March 12, 1999, the claimant's average gross weekly wage increased to \$434.25. Accordingly, the weekly temporary total disability compensation rate increased from \$269.01 to \$289.51 for any temporary total disability compensation paid after March 12, 1999.

The preliminary Order dated March 8, 1999, ordered temporary total disability compensation for the period from January 27, 1999, through March 1, 1999, or a period of 4.86 weeks. This period was before fringe benefits were discontinued and the weekly temporary total disability rate was \$269.01. There was no underpayment of benefits for this time period.

The preliminary Order dated June 1, 1999, ordered temporary total disability compensation from March 8, 1999, until claimant was released to return to work or attained maximum medical improvement. As previously noted, the fringe benefits were not discontinued until March 12, 1999, and so claimant was entitled to a weekly temporary total disability compensation rate of \$269.01 from March 8, 1999, through March 12, 1999, a period of .71 weeks. There was no underpayment of benefits for this time period.

The parties stipulated that claimant was paid 24.74 weeks of temporary total disability compensation at the rate of \$269.01. Although the respondent contends there is no evidence regarding when the weeks of temporary total disability compensation was paid, it is clear from the preliminary orders that 5.57 weeks were paid before the payment of fringe benefits was discontinued by the respondent.

The claimant contends that the remaining 19.17 weeks were paid after the March 12, 1999, discontinuance of fringe benefits and pursuant to the June 1, 1999, preliminary Order should have been paid at the rate of \$289.51. The June 1, 1999, preliminary Order also designated Dr. Kruckemyer the authorized treating physician. Dr. Kruckemyer testified that claimant was not at maximum medical improvement in July 1999. This testimony supports the claimant's assertion that the remaining weeks of temporary

total disability compensation were paid after March 12, 1999, pursuant to the preliminary Order dated June 1, 1999.

The claimant has met his burden of proof to establish an underpayment of temporary total disability benefits for 19.17 weeks. The weekly underpayment was \$20.50 (\$289.51-\$269.01=\$20.50). Claimant is entitled to an award of an additional \$392.99 for the underpayment of temporary total disability compensation.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated February 5, 2001, is modified to award claimant an additional \$392.99 for an underpayment of temporary total disability compensation and is affirmed in all other respects.

IT IS SO ORDERED.

Dated this _____ day of September 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Joseph Seiwert, Attorney for Claimant
- Terry J. Torline, Attorney for Respondent and Insurance Carrier
- Bruce E. Moore, Administrative Law Judge
- Philip S. Harness, Workers Compensation Director