BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JERRY W. JOHNSON Claimant	)	
VS.	)	
DOCTOR'S LAWN & LANDSCAPE Respondent	)	Docket Nos. 241,836 & 242,699
AND	)	
UNION INSURANCE COMPANY Insurance Carrier	)	

ORDER

Respondent appealed Administrative Law Judge Julie A.N. Sample's Award dated April 10, 2001. The Board heard oral argument on October 2, 2001, by teleconference.

APPEARANCES

Claimant appeared by his attorney, Michael W. Downing. Respondent and its insurance carrier appeared by their attorney, Mark A. Buck.

RECORD & STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed claimant's pre-injury average weekly wage was $509.63.

ISSUES

Docket No. 241,836 is a claim for an accident that occurred on or about October 16, 1998, that alleged injuries to the left shoulder and the whole body. Docket No. 242,699 is a claim that was filed for injuries to both arms, both shoulders, neck and back that allegedly occurred each and every workday through claimant's last day of work in January 1999.[1]

[1]Although the form E-1 Application for Hearing alleged dates of injury as each and every workday through January 1999, the evidence established that claimant's last day at work was December 2, 1998.

The Administrative Law Judge determined claimant had suffered not only the left shoulder injuries but also determined the October 16, 1998, accident was the cause of the claimant's bilateral carpal tunnel syndrome. Accordingly, the Administrative Law Judge awarded claimant a 40.5 percent permanent partial general bodily disability in Docket No. 241,836 and denied an award in Docket No. 242,699.

The respondent contends the Administrative Law Judge erred in finding: (1) the claimant's carpal tunnel syndrome arose out of and in the course of employment; (2) that claimant gave timely notice of the carpal tunnel syndrome; (3) the nature and extent of disability; and, (4) the post-injury average weekly wage.

Conversely, claimant contends the Administrative Law Judge's decision should be affirmed in all respects except the percentage of task loss should be increased.

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 Board finds the Administrative Law Judge's findings and conclusions are accurate and supported by the law and facts contained in the record. It is not necessary to repeat those findings and conclusions in this Order. The Board approves those findings and conclusions and adopts them as its own except as to the wage loss component of the two part work disability formula.

On October 16, 1998, claimant's left hand became tangled in a stand-behind lawnmower's hand controls. With his left hand and arm caught on the machine, the mower dragged claimant for up to several minutes until he was able to free his hand. The parties stipulated that this accident occurred and to timely notice. Respondent and its insurance carrier do not dispute that this accident injured claimant's left shoulder. But they do dispute that the accident injured claimant's left hand or arm, or that the accident contributed to the bilateral carpal tunnel syndrome.

After the accident, claimant first sought medical treatment from Dr. Gary L. Gustafson. Dr. Gustafson treated claimant's shoulder for two weeks and then referred him to an orthopedic specialist, Dr. John A. Gillen II. Dr. Gillen prescribed physical therapy, injections, medications, and restricted claimant to light duty.

While on light duty, claimant continued working for respondent. While doing that work and undergoing physical therapy, he began experiencing symptoms in his wrists and hands. When claimant met with Dr. Gillen on January 4, 1999, his shoulder pain was better and his chief complaint was pain in the left arm especially at night. At that office visit, Dr. Gillen decided that an EMG was needed to determine if claimant had a peripheral neuropathy, a compression neuropathy, or cervical radicular symptoms.

The EMG/NCV studies were done on January 15, 1999. Those studies indicated claimant had bilateral carpal tunnel syndrome, the left worse than the right.

Respondent argues that after claimant was injured on October 16, 1998, his complaints were limited to the left shoulder and no mention was made of hand complaints until January 4, 1999, and at that time the complaint was limited to the left. Respondent argues this delay in hand complaints proves the claimant did not suffer injuries to his hands in the October 16, 1998, accident. Respondent further argues that the Board should adopt Dr. Gillen's opinion that the incident on October 16, 1998, did not cause the carpal tunnel syndrome.

The Administrative Law Judge adopted the testimony of the independent medical examiner, Dr. Darnell, that claimant's bilateral carpal tunnel syndrome was traumatically induced by the work-related accident on October 16, 1998. Although the first complaint of hand pain did not appear in a medical report until a few months after the incident, claimant testified he had hand pain immediately after the incident and later made complaints of hand and arm pain while in physical therapy. Drs. Darnell and Gillen both noted the acute rotator cuff shoulder injury could have masked the bilateral hand complaints. Moreover, Dr. Darnell opined claimant had suffered a normal progression of increased symptomatology from a traumatically induced carpal tunnel syndrome. Dr. Darnell further noted the absence of hand complaints prior to the incident and an onset of symptoms shortly after, when claimant was on light duty work, further indicated the carpal tunnel syndrome was traumatically induced by the incident on October 16, 1998.

The Administrative Law Judge concluded claimant not only suffered a partially torn rotator cuff on October 16, 1998, but also suffered a bilateral carpal tunnel injury which did not manifest itself immediately because of the severity of the shoulder injury. The Board agrees and adopts the finding that the carpal tunnel syndrome was traumatically induced by the work-related accident on October 16, 1998.

Respondent next contends it did not receive timely notice of claimant's bilateral carpal tunnel syndrome. Docket No. 241,836 is a claim for an accident that occurred on or about October 16, 1998, and alleged injuries to claimant's left arm and shoulder. The respondent does not deny timely notice of that accident but, as previously noted, contends claimant did not suffer bilateral carpal tunnel injuries in that accident.

Respondent admits notice of the October 16, 1998, accident, but contends it fails to satisfy the requirements of the statute[2] as to the bilateral carpal tunnel injuries because claimant only voiced complaints about his left arm and shoulder at that time. The notice required, however, is notice of accident, not notice of injury. Here respondent was given notice that an accident had occurred and properly responded by providing medical

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[2]K.S.A. 44-520.

treatment for the injury. The fact that the full nature and extent of the injury was not known does not defeat the claim. The fact that claimant initially alleged left arm and shoulder injuries does not require additional notice where the carpal tunnel syndrome is determined to be a consequence of the original work-related injury. Additional notice is not necessary.[3]

Because claimant's injuries constitute an "unscheduled" injury, claimant's permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a). That statute provides:

> 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. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of Foulk[4] and Copeland.[5] In Foulk, the Court held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In Copeland, for purposes of the wage loss prong of K.S.A. 44-510e(a), the Court held that workers' post-injury wages should be based upon ability rather than actual wages when they fail to make a good faith effort to find appropriate employment after recovering from their injuries.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[6]

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[3] Frazier v. Mid-West Painting, Inc., 268 Kan. 353, 995 P. 2d 855 (2000).

[4] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[5] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[6] Copeland at 320.

Respondent contends claimant is not entitled to a work disability because he did not attempt to return to work for respondent after his release from treatment. Respondent argues that an accommodated job would have been provided had claimant returned.

The question becomes whether claimant made a good faith effort to obtain employment. If claimant failed to make a good faith effort, or unreasonably refused to perform appropriate work as in Foulk, then claimant is precluded from using his actual earnings when calculating the wage loss prong of the two-part disability formula. The test of good faith, however, is on the part of both claimant and the employer.[7]

Although respondent's owner testified that if claimant had returned and requested it, an accommodated job would have been provided. However, such offer was never extended to claimant. Moreover, there was no indication what the pay would have been or whether it would have been a full-time job. Although it is unclear whether claimant had been terminated or had quit, it is clear that claimant had not been employed by respondent since December 1998. Lastly, when the respondent's owner made those statements, the claimant had already obtained other employment.

Within approximately a month of his release from treatment the claimant obtained employment. Although he did not seek re-employment with respondent, the respondent never offered claimant a job. The Board concludes claimant made a good faith effort to find employment and did not refuse accommodated employment with respondent because such employment was never offered.

The Board agrees with the Administrative Law Judge's analysis of the evidence regarding claimant's functional impairment, restrictions and task loss as set forth in the Award. In particular, the Board agrees that, in this instance, greater weight should be given to the opinions of Dr. Darnell as to claimant's permanent restrictions, task loss and impairment. Accordingly, the Board adopts the finding that claimant sustained a 50 percent task loss.

Turning to the wage loss prong of the permanent partial disability formula, at oral argument before the board the parties agreed claimant's average weekly wage was $509.63 as determined by the Administrative Law Judge. The claimant testified his post-injury wage was $8.75 an hour for a 40-hour work week. He received a holiday bonus of approximately $200 or $3.85 per week. At the conclusion of the regular hearing, it was agreed that claimant's attorney would provide the respondent with information regarding health benefits provided by claimant's current employer. That information indicated his

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[7] Oliver v. Boeing Co., 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999); Tharp v. Eaton Corp., 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

current employer's contribution for health insurance was $106.19 a month or $26.55 a week.[8]

For purposes of the permanent partial general disability formula, claimant's post-injury wage is $380.40, which includes both bonus and additional compensation items. The bonus and additional compensation items should be included in the post-injury wage as they have true and measurable economic value. Including those items when determining wage loss in the disability formula is consistent with K.S.A. 44-511.

Accordingly, the Board finds the Administrative Law Judge's finding that claimant sustained a 31 percent wage loss should be modified to a 25 percent wage loss. When this figure is added with the 50 percent task loss and divided, it yields a 37.5 percent work disability. The Board modifies the Administrative Law Judge's Award and finds claimant sustained a 37.5 percent work disability and affirms the Award in all other respects.

The Administrative Law Judge's Award in Docket No. 242,699 is affirmed in all respects.

AWARD

Docket No. 242,699

WHEREFORE, it is the finding, decision, and order of the Board that Administrative Law Judge Julie A.N. Sample's April 10, 2001, Award should be, and is hereby, affirmed in all respects.

AWARD

Docket No. 241,836

WHEREFORE, it is the finding, decision, and order of the Board that the Award entered by Administrative Law Judge Julie A.N. Sample on April 10, 2001, should be, and hereby is, modified to a 37.5 percent permanent partial general disability.

The claimant is entitled to 68.67 weeks temporary total disability at the rate of $339.77 per week or $23,332 followed by 135.49 weeks at $339.77 per week or $46,035.43 for a 37.5 percent permanent partial general bodily disability making a total award of $69,367.43.

As of February 28, 2002, there would be due and owing to the claimant 68.67 weeks temporary total compensation at $339.77 per week in the sum of $23,332 plus 107.19

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[8]The Administrative Law Judge's Award incorrectly noted that benefit calculated to $24.50 per week.

weeks permanent partial compensation at $339.77 per week in the sum of $36,419.94 for a total due and owing of $59,751.94 which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $9,615.49 shall be paid at $339.77 per week for 28.30 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of February 2002.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael W. Downing, Attorney for Claimant
Mark A. Buck, Attorney for Respondent
Julie A.N. Sample, Administrative Law Judge
Philip S. Harness, Workers Compensation Director