

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

LARRY L. GRIMES)
Claimant)
VS.)
GARLAND RURAL VOLUNTEER FIRE DEPT.)
Respondent)
AND)
COMMERCIAL UNION INS. CO.)
Insurance Carrier)

Docket No. 261,793

ORDER

Respondent and its insurance carrier (respondent) requested review of the February 21, 2006 Award on Remand by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Appeals Board (Board) placed this matter its summary docket on May 19, 2006.

APPEARANCES

Kala A. Spigarelli, of Pittsburg, Kansas, represents the claimant. Christopher J. McCurdy, of Overland Park, Kansas, represents respondent and its insurance carrier.

ISSUES

This is the second time this claim has been before the Board. Following the first appeal from the ALJ's Order, the Board concluded claimant sustained a compensable injury that left him permanently and totally disabled. However, consistent with the parties' agreement, this matter was remanded back to the ALJ for further proceedings on the issue of claimant's average weekly wage in light of the provisions of K.S.A. 44-511(b)(6)(A) as claimant was a volunteer firefighter at the time of his work-related injury. The Board issued its Order on February 17, 2006.

On February 21, 2006, without the benefit of any further evidence, the ALJ issued his Award On Remand. This Award reflects the ALJ's conclusion that claimant's average weekly wage was \$550.68, a figure based upon a 52 hour work week at \$10.59 an hour of a full-time firefighter in the Pittsburg, Kansas area.

Respondent appeals the ALJ's most recent Order on Remand. Respondent argues the claimant failed to meet her evidentiary burden on the issue of wage. Simply put, respondent argues that the only evidence offered by claimant was that of a full-time firefighter employed by the city Pittsburg, Kansas, a community that is not comparable to Garland, Kansas, the site of claimant's accident. And based upon the applicable statute, claimant's employment was not presumed to have been full-time. Thus, respondent contends that the ALJ not only erred in presuming full-time employment, but also in utilizing the wage information from a community that is not "comparable", as required by K.S.A. 44-511(b)(6)(A).

Alternatively, respondent contends that if \$10.59 an hour is an appropriate figure, the wage should be based upon a 40 hour work week rather than a 52 hour week.

Claimant contends the Board should affirm the ALJ's determination in all respects.

The sole issue to be decided in this appeal is whether the ALJ erred in computing the claimant's average weekly wage based K.S.A. 44-511(b)(6)(A).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Following the first appeal in this matter, the Board remanded this appeal to the ALJ for his determination on claimant's average weekly wage in light of the provisions of K.S.A. 44-511(b)(6)(A). That statute provides:¹

The average gross weekly wage of a person serving on a volunteer basis as a duly authorized law enforcement officer . . . or any other volunteer under the workers compensation act, who receives no wages for such services, or who receives wages which are substantially less than the usual wages paid for such services by comparable employers to employees who are not volunteers, shall be computed on the basis of the usual wages paid by the employer for such services to employees who are not volunteers, or, if the employer has no employees performing such services for wages who are not volunteers, the average gross weekly wage shall be computed on the basis of the usual wages paid for such services by comparable

¹ K.S.A. 44-511(b)(6)(A) has since been amended.

employers to employees who are not volunteers. Volunteer employment shall not be presumed to be full-time employment.²

That same statute goes on to provide that “[t]he average gross weekly wage of any person performing community service work shall be deemed to be \$37.50.”³

In his first Award, the ALJ utilized the only evidence contained within the record which indicates that experienced firefighters in Pittsburg, Kansas were paid \$10.59 per hour and were expected to work 56 hour weeks. Full-time workers also received fringe benefits that represented 30 to 31 percent of their salary. Pittsburg does not employ any part-time firefighters, nor do they utilize volunteers in that position. Garland, the community where claimant lived and volunteered, has no paid firefighters and is a much smaller community than Pittsburg.

At oral argument, the parties were questioned about the application of K.S.A. 44-511(b)(6)(A) and they agreed to have this matter remanded to the ALJ for further proceedings on the issue of claimant’s wage. The Board’s Order explicitly indicated that, pursuant to statute, the ALJ was not to presume a full-time wage in calculating the claimant’s wage.⁴ Curiously, no further evidence was offered by the parties and it would appear that they chose to rely solely upon the evidence offered in the original proceedings as neither party objected to ALJ’s decision to enter his Award on Remand without an opportunity to present further evidence.

In his Award on Remand, the ALJ acknowledged the applicable statute and then determined claimant’s average weekly wage was \$550.68, based upon \$10.59 per hour and a 52 hour work week (rather than the 40 hour work week he used previously). In doing so, the ALJ apparently concluded Pittsburg, Kansas was a “comparable” community. And he then imputed the wages for a 52 hour a week position of an experienced firefighter.

Based upon the record presented, the Board finds that the ALJ’s Award on Remand should be modified. The Board finds claimant has failed to meet his evidentiary burden on the issue of wage. As such, claimant’s average weekly wage is hereby modified to be \$37.50, as required by K.S.A. 44-511(b)(6)(B).

When this matter was orally argued, the parties were advised about the provisions of K.S.A. 44-511(b)(6)(A) and the fact that the only evidence within the file reflected *full-time wages for a full-time firefighter in Pittsburg, Kansas*. Both parties concede claimant was a part-time volunteer firefighter in Garland, Kansas, a community that is notably

² K.S.A. 44-511(b)(6)(A)

³ K.S.A. 44-511(b)(6)(B).

⁴ Board Order (Feb. 17, 2006) at 2 (Footnote 3).

smaller than Pittsburg, Kansas. Garland has no paid firefighters. More to the point, there is absolutely no evidence in the record to suggest or even surmise how many hours claimant might have worked as a volunteer for the community of Garland in the 26 weeks before his accident.

The applicable statute mandates the trier of fact to determine a wage based on evidence and expressly prohibits any assumption that wage is based upon full-time employment. Yet, that was done in both instances. And the ALJ utilized wage information from a community that, based on this record, the Board is unable to conclude is comparable for purposes of calculating a wage.

As argued by respondent, when dealing with volunteers the statute contemplates evidence on the claimant's actual hours of service or of those in comparable communities along with wage information from a comparable community. The obvious intent of this statute is to give a fair and accurate comparison thereby allowing the trier of fact to make a factually and logically based decision as to wage. Here that cannot be done.

Even if the Board concluded Garland and Pittsburg are comparable communities, the claimant still failed to meet his burden on the issue of wage. There is no evidence indicating how many hours claimant served as a volunteer nor of those who worked with him in Garland or in any other surrounding comparable communities. Furthermore, the *only* evidence claimant offered was that of a full-time firefighter, a position claimant did not hold. Claimant's counsel conceded claimant was a *part-time* volunteer. As the Board noted, the statute expressly prohibits a presumption of full-time employment. It is unclear why further evidence was not developed on this issue. But having concluded that claimant failed to meet his burden, the Board is compelled to modify the Award on Remand to reflect an average weekly wage of \$37.50, as set forth in K.S.A. 44-511(b)(6)(B).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated February 21, 2006, is modified as follows:

The claimant is entitled to permanent total disability compensation at the rate of \$25.00 per week not to exceed \$125,000.00 for a permanent total general body disability.

As of June 29, 2006 there would be due and owing to the claimant 312.57 weeks of permanent total disability compensation at the rate of \$25.00 per week in the sum of \$7,814.25 for a total due and owing of \$7,814.25, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$117,185.75 shall be paid at \$25.00 per week until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of June, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kala A. Spigarelli, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director