

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

**WESLEY TALLMAN**  
Claimant

VS.

**CASE CORPORATION**  
Respondent,  
Self-Insured

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Docket No. 265,276

**ORDER**

The employee, Mr. Tallman, appealed the April 22, 2002 Award entered by Administrative Law Judge John D. Clark. The Board heard oral argument on October 23, 2002.

**APPEARANCES**

William L. Phalen of Pittsburg, Kansas, appeared for Mr. Tallman. Vaughn Burkholder of Wichita, Kansas, appeared for the employer, Case Corporation.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award.

**ISSUES**

This is a claim for a July 18, 2000 accident and the resulting low back injury. The parties stipulated that the accident arose out of and in the course of Mr. Tallman's employment as a welder.

In the April 22, 2002 Award, Judge Clark determined that Mr. Tallman sustained an additional eight percent whole body functional impairment due to the July 2000 accident. Additionally, citing *Watkins*,<sup>1</sup> the Judge determined Mr. Tallman was not entitled to receive a work disability (a permanent partial general disability greater than the whole body

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<sup>1</sup> *Watkins v. Food Barn Stores, Inc.*, 23 Kan. App. 2d 837, 936 P.2d 294 (1997).

functional impairment rating) as he was laid off due to an economic slowdown after returning to work following his accident and performing his regular work duties without accommodations. Accordingly, the Judge awarded Mr. Tallman an eight percent permanent partial general disability.

The employee contends Judge Clark erred. In summary, Mr. Tallman argues the *Watkins* case is not applicable as he returned to work following his accident to an accommodated position or, in the alternative, he was not back to work for a sufficient period of time to determine if he could perform his regular job duties. Mr. Tallman argues he has a 63 percent task loss and a 100 percent wage loss, which creates an 81.5 percent work disability. Accordingly, Mr. Tallman requests the Board to increase his permanent partial general disability from eight percent to 81.5 percent.

Conversely, the employer argues the Award should be affirmed. The employer contends Mr. Tallman returned to work following the July 2000 accident and performed his regular job duties without accommodations. Therefore, the employer contends the *Watkins* case applies and limits Mr. Tallman's permanent partial general disability to the functional impairment rating. In the alternative, the employer also argues Mr. Tallman has failed to make a good faith effort to find appropriate employment following his layoff and, therefore, a post-injury wage should be imputed. Because Mr. Tallman allegedly retains the ability to work as a welder and earn the same wages that he was earning before the July 2000 accident, the employer argues Mr. Tallman's imputed post-injury wage precludes him from receiving a work disability.

The only issue before the Board on this appeal is the nature and extent of Mr. Tallman's injury and disability.

**FINDINGS OF FACT**

After reviewing the entire record, the Board finds:

1. The employee, Wesley Tallman, worked for the employer, Case Corporation, as a welder building skid steer loaders. The parties stipulated Mr. Tallman's average weekly wage for purposes of this claim was \$861.12, which included overtime and additional compensation items.
2. On July 18, 2000, Mr. Tallman injured his back while pulling on the frame of one of the loaders. The parties stipulated the accident arose out of and in the course of Mr. Tallman's employment with the employer.
3. The employee came under treatment of Dr. Paul Stein, who had previously operated on Mr. Tallman's low back in February 1996 and performed a partial discectomy at the L5-

S1 intervertebral level. The doctor determined the July 2000 accident, however, had herniated the right side of the L5-S1 disc and in October 2000 performed another surgery on Mr. Tallman's low back.

4. The employee returned to work for the employer in mid-November 2000 and worked until approximately February 8, 2001, when he was laid off for economic reasons. At the time of the December 2001 Regular Hearing, Mr. Tallman was not employed despite contacting a carpenter's union and approximately 14 other potential employers.

5. According to Mr. Tallman, following the first surgery in 1996, Dr. Stein released him to return to work without any work restrictions after obtaining the results of a May 1996 functional capacities evaluation. That evaluation indicated Mr. Tallman occasionally could lift up to 120 pounds from the floor to the waist, lift 70 pounds from the floor to 67 inches, carry 110 pounds, push up to 79 pounds and pull up to 39 pounds. The functional capacities evaluation also indicated Mr. Tallman frequently could lift 60 pounds from the floor to the waist, lift 35 pounds from the floor to 67 inches, carry 55 pounds, push up to 40 pounds and pull up to 20 pounds. Finally, the evaluation indicated Mr. Tallman constantly could lift 24 pounds from the floor to the waist, lift 14 pounds from the floor to 67 inches, carry 22 pounds, push up to 16 pounds and pull up to eight pounds. In summary, the recommendation from the functional capacities evaluation was to return Mr. Tallman to work without restrictions.

6. Following the first back surgery, Mr. Tallman had back symptoms for approximately six months and those symptoms "pretty much" resolved. Mr. Tallman returned to manual labor jobs, including working as a carpenter and a welder. And then in either July 1998 or 1999, Mr. Tallman began his welding job at Case Corporation.<sup>2</sup>

7. Comparing his recoveries from the back surgeries, Mr. Tallman does not believe that he has recovered as well from his last surgery. According to Mr. Tallman, when he returned to work for the employer in November 2000 following his last back surgery, he was initially limited to light duty but he returned to his regular duties on the line approximately two weeks before being released by Dr. Stein on January 25, 2001. The doctor released Mr. Tallman with the same permanent work restrictions that he had following the 1996 surgery, which, as indicated above, were none. Mr. Tallman did not undergo a functional capacities evaluation following the July 2000 accident.

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<sup>2</sup> Mr. Tallman testified that he believed he began working for the employer in July 1998. But the task list created by vocational rehabilitation counselor Karen Crist Terrill indicates Mr. Tallman began working for the employer in July 1999.

8. The employee testified that his back continued to hurt despite the fact that the workload had decreased from nine or 10 loader frames per shift to approximately five frames per shift. Based upon the symptoms that he was experiencing from building only five frames per day, Mr. Tallman did not believe that he would have been able to work at full capacity building nine or 10 frames per shift, nor based upon his symptoms did he believe that he could have continued to work at building only five frames per shift. Accordingly, Mr. Tallman believes the first back injury minimally affected his ability to work, as opposed to this second back injury that has left him with constant hip and right leg pain.

9. The employee's lead man, Richard Cisneroz, testified somewhat differently concerning Mr. Tallman's job duties and the number of frames that Mr. Tallman was working on each shift following the July 2000 accident. According to Mr. Cisneroz, the plant was producing seven or eight frames per shift and 15 pounds was the heaviest weight Mr. Tallman was required to lift, as the heavier parts were hoisted hydraulically. Mr. Cisneroz also indicated that Mr. Tallman would be required to bend only approximately three to nine minutes total per frame while tacking parts onto the frame.

10. Mr. Cisneroz also testified that Mr. Tallman was anxious to leave his light duty job in small parts and resume his regular job duties on the line. According to the employer's records, Mr. Tallman was back on the line during the week of January 28, 2001. Mr. Tallman worked 40 hours that week, 40 hours the next week and 31.6 hours the week ending February 11, 2001, which was the week that Mr. Tallman and approximately 12 other welders were laid off.

11. When Mr. Tallman resumed his duties on the line, he did not complain to Mr. Cisneroz about his back but, instead, told Mr. Cisneroz that he was getting along fine. Mr. Cisneroz, however, also testified that Mr. Tallman was not a complainer. Moreover, Mr. Cisneroz somewhat confirmed Mr. Tallman's testimony about moving parts without using a hoist when Mr. Cisneroz indicated it was faster for his welders to move a part without a hoist, which they sometimes did when the plant was running closer to maximum capacity.

12. The employer presented the deposition of neurological surgeon Dr. Paul Stein. On direct examination, Dr. Stein testified he released Mr. Tallman following the 1996 surgery with restrictions against lifting as set forth in the functional capacities evaluation. But on cross-examination, the doctor agreed the functional capacities evaluation recommended that Mr. Tallman be returned to work without restrictions. The doctor also agreed he had released Mr. Tallman to very heavy manual labor and essentially released Mr. Tallman without any restrictions. Additionally, the doctor also admitted that he had signed a Physical Capacities Form in May 1996 in which Mr. Tallman was released to work full duty without noting any restrictions. The doctor testified, in part:

Q. (Mr. Phalen) Okay. Well, that's interesting. At the bottom -- would it be a fair statement that no restrictions -- essentially no restrictions were placed upon Mr. Tallman by this Physical Capacities Form prepared by the nurse case manager of Intracorp back in '96?

A. (Dr. Stein) That's right. And it was prepared based on the FCE.

Q. And, in fact, it says, "Per FCE, very heavy"?

A. That's right, that's right.

....

Q. And then above your signature, in fact, it says -- there's a check mark that says, "Full duty"?

A. That's correct.

Q. So would it be a fair statement then that based upon his 1996 injury, he really didn't have any work restrictions, correct?

A. As a practical matter, probably not.<sup>3</sup>

13. According to Dr. Stein, Mr. Tallman sustained an additional five percent whole body functional impairment as a result of the July 2000 accident, as compared to the seven percent whole body functional impairment that Mr. Tallman had sustained as a result of the earlier back injury and surgery. The doctor utilized the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.) (*AMA Guides*) in determining that Mr. Tallman had sustained the additional five percent whole body functional impairment.

14. When Dr. Stein released Mr. Tallman from treatment on January 25, 2001, he did not place any additional work restrictions on Mr. Tallman and again referenced Mr. Tallman to the 1996 functional capacities evaluation. Although the doctor last saw Mr. Tallman in February 2002, Dr. Stein testified that he does not have any medical data to change his opinion regarding Mr. Tallman's permanent work restrictions. The doctor initially testified Mr. Tallman was able to return to his heavy work activities following the 1996 surgery and, likewise, Mr. Tallman can perform that type of work now. Consequently, Dr. Stein testified that based upon his knowledge of Mr. Tallman's condition as of January 2001, which included Mr. Tallman's statements that he had returned to his regular work duties, Mr.

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<sup>3</sup> Stein Depo. at 29-30.

Tallman had not lost the ability to perform any work tasks as a result of the July 2000 accident.

15. But on cross-examination, Dr. Stein testified that he would need another functional capacities evaluation to determine Mr. Tallman's ability to perform work tasks. The doctor testified, in part:

Q. (Mr. Phalen) Your opinions here today based upon your examination of 2002, I take it, would then be he would need to have an additional functional capacities evaluation to make a determination as to whether he could do any or all of those job tasks, correct?

A. (Dr. Stein) I think that would be reasonable, yes.<sup>4</sup>

....

Q. And the only real question for us today is what additional restrictions should be placed as the result of this most recent injury, and we really can't answer that unless we get an additional functional capacities evaluation, true?

A. I think so.<sup>5</sup>

16. The employee's attorney hired vocational rehabilitation counselor Karen Crist Terrill to interview Mr. Tallman and determine the work tasks that he performed in the 15-year period before the July 2000 accident. Excluding duplicates, Ms. Terrill identified a total of 19 work tasks that Mr. Tallman had worked for that period. According to Ms. Terrill, despite the July 2000 back injury Mr. Tallman retains the ability to earn between eight and nine dollars per hour straight time, plus fringe benefits in the approximate sum of 20 percent of the gross wages.

17. The employee's attorney also hired Dr. Pedro Murati to examine and evaluate Mr. Tallman for purposes of this claim. The doctor examined Mr. Tallman in June 2001 and determined that Mr. Tallman had sustained an additional 11 percent whole body functional impairment due to the July 2000 accident, according to the *AMA Guides* (4th ed.).

18. Dr. Murati restricted Mr. Tallman from lifting, carrying, pushing or pulling more than 50 pounds. The doctor also restricted Mr. Tallman from crawling more than rarely and from sitting, standing, bending, climbing stairs or ladders, squatting, driving or lifting, carrying,

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<sup>4</sup> *Id.* at 26.

<sup>5</sup> *Id.* at 30.

pushing or pulling more than 50 pounds more than occasionally. Finally, the doctor limited Mr. Tallman from walking and from lifting, carrying, pushing or pulling more than 35 pounds more than frequently. The doctor defined occasionally as from one to 33 percent of the time and defined frequently as from 34 to 66 percent of the time. The doctor also indicated that Mr. Tallman should alternate sitting, standing and walking, use good body mechanics at all times, and limit constant lifting, carrying, pushing and pulling to 10 pounds.

19. Upon reviewing Ms. Terrill's list of Mr. Tallman's former work tasks, Dr. Murati testified Mr. Tallman had lost the ability to perform 12 of the 19 tasks, or 63 percent, due to the July 2000 accident.

20. The employer's attorney hired vocational rehabilitation consultant Michael Dreiling to evaluate how the July 2000 accident had affected Mr. Tallman's ability to perform former work tasks and his ability to earn wages. Mr. Dreiling interviewed Mr. Tallman in January 2002. Assuming Mr. Tallman retains the ability to work as a welder, which Dr. Stein initially indicated, Mr. Dreiling believes Mr. Tallman retains the ability to earn \$15.36 per hour. But if Dr. Murati's medical restrictions are accurate, Mr. Dreiling believes Mr. Tallman retains the ability to work in the security field and earn between nine and 10 dollars per hour. Mr. Dreiling also testified that he agrees with Ms. Terrill it is reasonable that Mr. Tallman would also receive fringe benefits having a value of approximately 20 percent of his gross wages.

21. The Board affirms the Judge's finding that Mr. Tallman sustained an additional eight percent whole body functional impairment as a result of the July 18, 2000 accident.

22. As quoted above, Dr. Stein could not determine Mr. Tallman's ability to work without having him undergo another functional capacities evaluation, which leaves the Board with only Dr. Murati's opinions of the work restrictions that Mr. Tallman should observe. Considering those restrictions and limitations, the Board finds Mr. Tallman has lost the ability to perform approximately 63 percent of the work tasks that he performed in the 15-year period before the July 2000 accident.

23. Based upon Mr. Tallman's limited job search following his layoff, the Board affirms the Judge's finding that Mr. Tallman failed to make a good faith effort to find appropriate employment. In conjunction with that finding, the Board concludes Mr. Tallman retains the ability to earn nine dollars per hour, plus fringe benefits valued at 20 percent of the weekly gross wage, which equates to \$432 per week. Comparing \$432 to Mr. Tallman's pre-injury average weekly wage of \$861.12 yields a 50 percent difference.

#### **CONCLUSIONS OF LAW**

For the reasons below, the Award should be modified to increase Mr. Tallman's permanent partial general disability to 57 percent for the period following February 8, 2001.

Because Mr. Tallman's injuries comprise an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 44-510e. That statute provides, in part:

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*<sup>6</sup> and *Copeland*.<sup>7</sup> In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wages should be based upon ability rather than actual wages when the worker fails to make a good faith effort to find appropriate employment after recovering from the work-related injury.

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. . . .<sup>8</sup>

Because Mr. Tallman returned to work for the employer after recovering from the July 2000 accident and the resulting October 2000 back surgery, he resumed earning his pre-injury wage. Therefore, for any periods of permanent disability between the date of accident and the date of Mr. Tallman's layoff on February 8, 2001, the permanent partial

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<sup>6</sup> *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

<sup>7</sup> *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

<sup>8</sup> *Id.* at 320.

general disability is limited to Mr. Tallman's eight percent whole body functional impairment rating.

The parties hotly contest the extent of Mr. Tallman's permanent partial general disability for the period commencing with his February 2001 layoff. Judge Clark, citing *Watkins*,<sup>9</sup> limited Mr. Tallman's permanent partial general disability for that period to Mr. Tallman's eight percent functional impairment rating. The Board disagrees.

First, the facts distinguish this claim from *Watkins*. In *Watkins*, the worker returned to the same job without any accommodations. But it cannot be said that Mr. Tallman fully returned to the job that he was performing before the July 18, 2000 accident. Instead, the record is uncontradicted that the assembly line to which Mr. Tallman returned after recovering from his October 2000 surgery was producing considerably less frames per shift than it did before Mr. Tallman's July 2000 accident. Accordingly, the Board concludes Mr. Tallman returned to a job that was considerably less demanding and less strenuous than the job that he was working before his accident.

Second, this claim is similar to *Gadberry*<sup>10</sup> in which the worker sustained a January 1994 accident, afterwards returning to the job that she held at the time of the accident until she was laid off. Citing *Lee*,<sup>11</sup> the Kansas Court of Appeals ruled that Ms. Gadberry became eligible for a work disability upon her termination, one component of which was actual wage loss. It is important to note that the formula for determining a worker's permanent partial general disability has not changed since the Court ruled in *Gadberry*.

Third, the logic of the *Watkins* decision does not apply to the present version of K.S.A. 44-510e because it defines permanent partial general disability entirely different from the version addressed by the Kansas Court of Appeals in *Watkins*. The former version of K.S.A. 44-510e, which *Watkins* addressed, predicated permanent partial disability upon two considerations – the worker's loss of ability to perform work in the open labor market and the worker's loss of ability to earn a comparable wage. But the present version of K.S.A. 44-510e measures permanent partial general disability based upon two different prongs – a worker's actual wage loss and a worker's loss of ability to perform actual former work tasks.

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<sup>9</sup> *Watkins, supra*.

<sup>10</sup> *Gadberry v. R.L. Polk & Co.*, 25 Kan. App. 2d 800, 975 P.2d 807 (1998).

<sup>11</sup> *Lee v. Boeing Co.*, 21 Kan. App. 2d 365, 899 P.2d 516 (1995).

Unlike the former version of K.S.A. 44-510e, the theoretical loss of ability to earn wages is only considered when, pursuant to *Copeland*,<sup>12</sup> a worker has failed to make a good faith effort to find appropriate employment.

In *Gadberry*, the Kansas Court of Appeals noted the important distinctions in defining permanent partial general disability under the former and the present versions of K.S.A. 44-510e. The Court wrote, in part:

To arrive at a fair and accurate assessment of the effect of work-related injuries, the Kansas Legislature has, throughout the life of the Workers Compensation Act, considered several compensatory theories. This court reviewed the legislative evolution of the work disability concept in *Lee v. Boeing Co.* Although various formulas have been adopted in an effort to ascertain a fair measurement of a worker's disability, prior to 1993, the formulas were primarily based on the concept of compensation for the loss of *abilities* – the ability to earn wages and/or the ability to perform work. For various reasons, measuring disability compensation by the loss of abilities resulted in concerns about increased litigation and higher insurance premiums. Therefore, in 1993, the Kansas Legislature introduced a new factor into the equation – actual wage loss. The new two-part test for finding and measuring work disability includes both a measurement of the loss of ability to *perform work tasks* and *actual loss of wages* resulting from the worker's disability. . . .<sup>13</sup>

Later in the decision, the *Gadberry* Court noted that the present permanent partial general disability formula in K.S.A. 44-510e provided “an objective determination of wage loss – the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker was earning after the injury” and that the statute did not set forth any exceptions to that mathematical calculation.

Finally, in *Helmstetter*,<sup>14</sup> the Kansas Court of Appeals held that *Watkins* did not apply to determining permanent partial general disability under the present version of K.S.A. 44-510e. The Court wrote, in part:

Midwest Grain [the employer] also argues claimant is not entitled to work disability because he has demonstrated he retains the ability to perform his preinjury job, relying on *Watkins v. Food Barn Stores, Inc.* *Watkins* is distinguishable. Here, claimant left Midwest Grain due to his injury. *Watkins* left his job because Food Barn went out of business.

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<sup>12</sup> *Copeland, supra.*

<sup>13</sup> *Gadberry*, 25 Kan. App. 2d at 802-803 (citation omitted).

<sup>14</sup> *Helmstetter v. Midwest Grain Products, Inc.*, 29 Kan. App. 2d 278, 28 P.3d 398 (2001).

Further, *Watkins* involved a different definition of work disability. The former version of K.S.A. 44-510e involved an ability test both as to jobs and wages, and *Watkins* is premised on that ability test.

Currently, ability or capacity to earn wages only becomes a factor when a finding is made that a good faith effort to find appropriate employment has not been made. Once a finding has been made that the claimant has established a good faith effort, the difference in pre-and post-injury wages can be based on the actual wages made.<sup>15</sup>

The Board is aware of the *Newman*<sup>16</sup> decision in which the Kansas Court of Appeals applied *Watkins* to an accident under the present formula for permanent partial general disability. *Newman*, however, does not address the changes in defining permanent disability in the former and present versions of K.S.A. 44-510e. Moreover, *Newman* did not even acknowledge that the Kansas Legislature materially changed the definition of permanent partial general disability or acknowledge the holding in *Helmstetter* that *Watkins* did not apply to the present definition of permanent disability. Accordingly, the *Newman* decision does not address the issue now before the Board in this claim.

Averaging Mr. Tallman's 50 percent wage loss with his 63 percent loss of ability to perform former work tasks, the Board concludes Mr. Tallman has a 57 percent permanent partial general disability for the period following February 8, 2001.

### **AWARD**

**WHEREFORE**, the Board modifies the April 22, 2002 Award and increases the permanent partial general disability from eight percent to 57 percent for the period following February 8, 2001.

Wesley Tallman is granted compensation from Case Corporation for a July 18, 2000 accident and resulting disability. Based upon an average weekly wage of \$861.12, Mr. Tallman is entitled to receive the following disability benefits:

Mr. Tallman is entitled to receive 4.57 weeks of temporary total disability benefits at \$401 per week, or \$1,832.57.

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<sup>15</sup> *Id.* at 280-281 (citations omitted).

<sup>16</sup> *Newman v. Kansas Enterprises*, \_\_\_ Kan. App. 2d \_\_\_, 42 P.3d 752 (2002).

For the period through February 8, 2001, 24.71 weeks of benefits are due at \$401 per week, or \$9,908.71, for an eight percent permanent partial general disability.

For the period commencing February 9, 2001, 211.84 weeks of benefits are due at \$401 per week, or \$84,947.84, for a 57 percent permanent partial general disability and a total award of \$96,689.12.

As of November 25, 2002, Mr. Tallman is entitled to receive 4.57 weeks of temporary total disability compensation at \$401 per week in the sum of \$1,832.57, plus 118.28 weeks of permanent partial general disability compensation at \$401 per week in the sum of \$47,430.28, for a total due and owing of \$49,262.85, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$47,426.27 shall be paid at \$401 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 2002.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

- c: William L. Phalen, Attorney for Claimant
- Vaughn Burkholder, Attorney for Respondent
- John D. Clark, Administrative Law Judge
- Director, Division of Workers Compensation