

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

VICKIE PARSONS)	
Claimant)	
)	
VS.)	
)	
THE BOEING COMPANY)	
Respondent)	Docket No. 268,421
)	
AND)	
)	
INSURANCE COMPANY OF THE STATE)	
OF PENNSYLVANIA C/O AMERICAN)	
INTERNATIONAL GROUP)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) requested review of the August 31, 2006 order Nunc Pro Tunc issued by Special Administrative Law Judge (SALJ) John Nodgaard.¹ The Board heard oral argument on December 15, 2006, in Wichita, Kansas.

APPEARANCES

Dale V. Slape, of Wichita, Kansas, appeared for the claimant. Eric K. Kuhn, of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

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

ISSUES

The SALJ granted claimant's request for modification of her Award, originally entered into on July 29, 2003. The SALJ concluded claimant returned to work in an accommodated

¹ This Nunc Pro Tunc purports to correct a calculation error contained within the SALJ's Review and Modification of an Award issued August 22, 2006.

position following her April 10, 2001 injury. But on October 15, 2004, she was laid off due to respondent's inability to continue accommodating her medical restrictions. The SALJ found claimant sustained a 68.75 percent work disability based upon a 63 percent task loss and a 74.5 percent wage loss.

The SALJ's Award provided a calculation for purposes of payment, but the calculation contained a mathematical error. As a result, the SALJ issued an order *Nunc Pro Tunc* purporting to correct the error from the August 22, 2006 Order. That order *Nunc Pro Tunc* simply provides for a 68.75 percent work disability payable at \$401 per week in a sum not to exceed \$100,000, *payable in one lump sum*.²

The respondent requests review of this decision alleging the SALJ had no jurisdiction to amend the Order in this manner, as in effect the SALJ ordered the entire award be paid immediately, even that portion of the Award which had not yet accrued. Respondent also urges the Board to modify the SALJ's underlying Order to reflect a 39.5 percent work disability. Respondent further asks that the work disability, regardless of the percentage, begin as of March 4, 2005.³

Claimant argues the SALJ's decision to correct the mathematical error was appropriate. Claimant further maintains the SALJ's decision as to the percentage of work disability should be affirmed or, in the alternative, increased to reflect a 74.5 percent work disability. Claimant agrees that any work disability should begin as of March 4, 2005.

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 and oral arguments, the Board finds the SALJ's Review and Modification of an Award order and the subsequent order *Nunc Pro Tunc* must be modified.

There is no dispute that the claimant sustained a compensable accident which forms the basis of this claim. The parties' negotiated an Award based upon a 12 percent functional impairment and those benefits have been paid. Since the entry of that Agreed Award, claimant was terminated from respondent's employ because her physical restrictions could no longer be accommodated. Although she ceased working on October 15, 2004, she received 20 weeks of severance pay and as of March 4, 2005, she was no longer employed.⁴

Respondent does not dispute claimant's entitlement to a permanent partial general (work) disability. Rather, it is the extent of that work disability that is in dispute.

² Order *Nunc Pro Tunc* (Aug. 31, 2006).

³ The parties do not dispute that any work disability would commence March 4, 2005.

⁴ E-5 Application for Review and Modification was filed on June 7, 2005.

Permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which 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.

This statute must be read in light of *Foulk* and *Copeland*.⁵ 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, that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages being received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury. If a finding is made that a claimant has not made a good faith effort to find post-injury employment, then the factfinder must determine an appropriate post-injury wage based on all the evidence before it.

Here, there is no dispute that claimant made very little effort to find post-injury employment and claimant concedes that as a result, a wage must be imputed to her for purposes of determining her work disability. The two vocational specialists testified that claimant had a capacity to earn anywhere from \$280 a week (in retail sales, telephone marketing or working as a clerk at Quik Trip) to \$400 per week, if not higher. The SALJ apparently believed claimant's true capacity was somewhere in between the two figures and concluded claimant had the ability to earn \$374 per week which yields a 74.5 percent wage loss.

The Board has considered the parties' arguments and concludes that the SALJ's approach was reasonable under these facts and circumstances. Claimant suffers from a bilateral hand and arm condition that will significantly limit her ability to perform work in the open labor market. The \$374 per week found by the SALJ, along with the corresponding 74.5 percent wage loss are therefore, affirmed.

⁵ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995); *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

And as for the task loss, the SALJ adopted an average of the two opinions expressed by Dr. Stein, excluding the remaining opinions, and found claimant bore a 63 percent task loss. The Board has considered all of the task loss opinions contained within the record and concludes that there is no reason to utilize one over the other. Thus, the Board finds that an average of all of the opinions is reasonable under the circumstances. Accordingly, the Award is modified to reflect a task loss of 61 percent.

It follows then that the ultimate finding of work disability must be modified to 67.75 percent (61 percent averaged with 74.5 percent).

The Board must also address respondent's objection to the order Nunc Pro Tunc. The Review and Modification Order awarded a 68.75 percent work disability, but the calculations included within the Order did not accurately reflect that figure. Thus, claimant sought and received an Order Nunc Pro Tunc which purported to correct that error. However, it unfortunately served to further confuse matters.

The purpose of an order nunc pro tunc is to provide a means for entering the actual judgment of the trial court which for one reason or another was not properly recorded.⁶ It may not be made to correct a judicial error involving the merits, to enlarge the judgment originally rendered, to supply a judicial omission, or to show what the court should have decided, as distinguished from what it actually did decide.⁷ Overall, the court is under the duty to make its judgment reflect its intent. If a correction entails a new finding, it is prohibited.⁸

The Board finds that the SALJ was merely attempting to correct the mathematical error within the Review and Modification Order. He was not attempting to award additional compensation that was not originally contemplated. Thus, the Board believes the Nunc Pro Tunc was appropriate, although it contained additional errors that must be addressed.

Both parties agree claimant's work disability began on March 4, 2005. And based upon the finding that claimant sustained a 67.75 percent work disability, only 143.94 weeks of permanent partial disability benefits are owed (as of December 22, 2006) when the work disability is found to have begun on March 4, 2005 and after considering the permanent partial disability that has already been paid. Accordingly, the Review and Modification Order will be modified to reflect the appropriate date for the onset of the work disability and an accurate calculation of the benefits now due and owing as well as those to be paid in the future, but subject to future modification should claimant become employed.

⁶ *Wallace v. Wallace*, 214 Kan. 344, 520 P.2d 1221 (1974).

⁷ *Book v. Everitt Lumbar Co., Inc.*, 218 Kan. 121, 125, 542 P.2d 669 (1975).

⁸ *Norcross v. Pickrell Drilling Co.*, 202 Kan. 524, 449 P.2d 569 (1969).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Review and Modification of an Award dated August 22, 2006 and order Nunc Pro Tunc of Special Administrative Law Judge John Nodgaard dated August 31, 2006, are modified as follows:

Wherefore, an award of compensation is hereby made in accordance with the above findings in favor of the claimant, Vickie Parsons, and against the respondent, the Boeing Company, and its insurance carrier, for an accidental injury sustained April 10, 2001.

The claimant is entitled to 49.80 weeks of permanent partial disability compensation at the rate of \$401.00 per week or \$19,969.80 for a 12 percent functional disability followed by permanent partial disability compensation at the rate of \$401.00 per week not to exceed \$100,000.00 for a 67.75 percent work disability.

As of January 9, 2007 there would be due and owing to the claimant 146.51 weeks of permanent partial disability compensation at the rate of \$401.00 per week in the sum of \$58,750.51 for a total due and owing of \$58,750.51, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$41,249.49 shall be paid at the rate of \$401.00 per week until fully paid or until further order from the Director.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

IT IS SO ORDERED.

Dated this _____ day of January, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Dale V. Slape, Attorney for Claimant
- Eric K. Kuhn, Attorney for Respondent and its Insurance Carrier
- John Nodgaard, Special Administrative Law Judge
- Nelsonna Potts Barnes, Administrative Law Judge