

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JOHN NOLL)
Claimant)
V.)
ANOTHER HEATING & AIR CO. LLC) AP-00-0481-161
Respondent) CS-00-0473-616
AND)
FEDERATED RESERVE INS. CO.)
Insurance Carrier)

ORDER

The respondent and its insurance carrier, through Pamela Parker, requested review of Administrative Law Judge (ALJ) Gary Jones' Award, dated January 31, 2024. Randy Stalcup appeared for the claimant. The Board heard oral argument on June 6, 2024.

RECORD AND STIPULATIONS

The Board considered the same record as the ALJ, consisting of: (1) Independent Medical Examination (IME) report of Terrence Pratt, M.D., dated August 17, 2023; (2) deposition transcript of Paul Hardin, taken November 6, 2023; (3) regular hearing transcript, held November 7, 2023; (4) deposition transcript of Daniel Zimmerman, M.D., taken November 13, 2023; (5) deposition transcript of David Hufford, M.D., taken November 28, 2023; (6) deposition transcript of Terrence Pratt, M.D., taken November 30, 2023; (7) deposition transcript of Steve Benjamin, taken December 11, 2023; (8) joint stipulation admitting fringe benefit statement, filed December 12, 2023; (9) all exhibits attached to items 2-7; (10) documents of record filed with the Division; and (11) the parties' briefs. At oral argument, the respondent offered a page showing how the Award should have been calculated. The claimant did not object. The Board considered the respondent's calculations.

ISSUES

1. What is the claimant's average weekly wage and compensation rate?
2. What is the nature and extent of the claimant's disability?
3. Does the ALJ's Award contain a mathematical error affecting the disability benefits due to the claimant or a potential credit or reimbursement due to the respondent?

FINDINGS OF FACT

The claimant, 68 years old, worked for the respondent. On January 27, 2021, the claimant slipped and fell while standing on a roof, landing flat on his back. He ultimately underwent neck surgery and was released at maximum medical improvement. The respondent accepted compensability of the claim.

The claimant testified there was a period of time following his accident when he received both temporary total disability (TTD) benefits (7/28/21 to 1/24/23) and Social Security retirement benefits (effective 11/1/21).

At his attorney's request, the claimant saw David Hufford, M.D., on February 20, 2023, for an IME. The doctor is board certified in occupational medicine and as an independent medical examiner.

Dr. Hufford diagnosed the claimant with injuries to his cervical and lumbar spine. The doctor opined the prevailing factor for the claimant's injuries was the work-related fall.

Using the *AMA Guides to the Evaluation of Permanent Impairment*, 6th ed. (*Guides*), as a starting point, and considering substantial competent medical evidence, Dr. Hufford assigned the claimant 11% whole person impairment and testified:

Q And, Doctor, can you walk the Court through your opinion regarding Mr. Noll's functional impairment?

A Yes. He had had a one-level cervical fusion at the C3 to C4 level. Dr. Henry described a disc herniation at this level. I placed him in the Class 1-E from Table 17-2 on Page 564 for a disc herniation. I did not believe that he had a residual radiculopathy, and therefore his impairment in that class of diagnosis was 8% to the whole person.

I also opined that there was an injury to the lumbar spine. The MRI that had been performed in conjunction with Dr. Henry's treatment did not appear to show a disc herniation; therefore, he was in Class 1-E, or rather 1-D from Table 17-4, Page 570. This is a 3% whole person impairment and I used the modifier +1 for positive straight leg raise on his physical examination. In the cervical spine I had used a modifier of +2, because he had significant functional limitations that I applied to arrive at this diagnosis. Combining those two impairments is 11 percent to the whole person.¹

¹ Hufford Depo. at 9-10.

Dr. Hufford testified his opinions were stated within a reasonable degree of medical certainty and probability.

At his attorney's request, the claimant saw Daniel Zimmerman, M.D., on April 18, 2023. The doctor was board certified as an independent medical examiner through 2014.

Dr. Zimmerman diagnosed the claimant with a C3-4 discal lesion, chronic headaches, and chronic lumbar paraspinous myofascitis with lumbar degenerative arthritis and opined the prevailing factor for the claimant's diagnoses is the work event on January 27, 2021.

Using the *Guides*, Dr. Zimmerman assigned the claimant a combined 22% impairment to the whole person. When including his medical professional opinion, Dr. Zimmerman testified:

For the cervical spine diagnosis, the rating was 15 percent of the body as a whole.

The impairment rating due to the right greater occipital, lesser occipital and greater auricular nerve entrapment syndromes was 4 percent of the body as a whole.

The impairment rating due to the lumbosacral spine diagnosis was 11 percent of the body as a whole.

Using a Combined Values Chart, the impairment rating of the body as a whole considering all factors of assessment was 27 percent.²

Dr. Zimmerman testified this opinion was "more equitable"³ because it considers the severity of the pain and discomfort, range of motion limitations and weakness affecting the body parts, as these factors impact the claimant's ability to perform activities of daily living and work-related tasks. Dr. Zimmerman testified all of his opinions were provided to a degree of reasonable probability and certainty.

On August 17, 2023, the claimant saw Terrence Pratt, M.D., for a court-ordered IME. The doctor is board certified in physical medicine and rehabilitation.

Dr. Pratt diagnosed the claimant with: (1) history anterior cervical discectomy with interbody fusion and anterior cervical instrumentation at C4-5 to C6-7 for spinal stenosis, degeneration, kyphosis with slight bruising of the spinal cord and spinal changes consistent

² Zimmerman Depo. at 19.

³ *Id.* at 20.

with myelomalacia; (2) C3-4 disc protrusion with spinal canal compression and myelopathy, status post C3-4 anterior cervical discectomy and decompression of neural elements with interbody fusion at C3-4, and anterior cervical discectomy utilizing titanium plates and screws; (3) cervical spondylosis; and (4) lumbosacral syndrome with spondylosis, neuroforaminal stenosis and right sacroiliac joint dysfunction.

Dr. Pratt opined the 2021 work accident was the prevailing factor for the claimant's disc abnormality at C3-C4 and the right sacroiliac joint.

Using the *Guides*, as a starting point, and considering substantial competent medical evidence, Dr. Pratt assigned the claimant 17% whole person impairment. Dr. Pratt testified all of his opinions were within a reasonable degree of medical probability.

At his attorney's request, Paul Hardin, a vocational consultant, interviewed the claimant on May 24, 2023. Mr. Hardin prepared a list of 13 tasks the claimant performed in the five years before his accident. Mr. Hardin opined the claimant is essentially and realistically unemployable based on Drs. Hufford's, Zimmerman's and Pratt's restrictions.

Out of the 13 tasks on Mr. Hardin's task list, Dr. Zimmerman opined the claimant is unable to perform 10 of them and had a question about the other three tasks. Dr. Hufford opined the claimant is unable to perform 10 for a 77% task loss and Dr. Pratt opined the claimant is unable to perform five for a 38% task loss.

At the respondent's request, Steve Benjamin, a vocational rehabilitation consultant, interviewed the claimant on September 29, 2023. Mr. Benjamin prepared a list of 20 tasks the claimant performed in the five years before his accident. Mr. Benjamin opined the claimant is capable of earning approximately \$431.44 per week working as a bench assembler, fast food worker, production helper, sales clerk or driver. Mr. Benjamin admitted when applying the restrictions imposed by Dr. Zimmerman, the claimant is unable to engage in substantial and gainful employment.

Out of the 20 tasks on Mr. Benjamin's task list, Dr. Hufford opined the claimant is unable to perform 11 of them for a 55% task loss and Dr. Pratt opined the claimant is unable to perform eight for a 40% task loss.

The claimant currently experiences difficulty with turning his head to the right, low back problems, right shoulder stiffness, frequent headaches and bilateral leg weakness. He takes over-the-counter medication for pain relief. The claimant has not worked anywhere since the accident. He began receiving Social Security retirement benefits in November 2021, in the amount of \$2,109.85 per month. He currently receives \$2,310.90 per month.

The ALJ stated:

The Court finds that the Claimant's base average weekly wages without additional compensation is \$697.47. The wage statement shows that the Claimant earned \$16,739.25 during the 26 weeks prior to the accident. There were two weeks shown on the wage statement in which the Claimant did not actually work. So the wage statement shows 24 weeks of work. \$16,739.25 divided by 24 is \$697.47. This is the base average weekly wages.

The Court rejects the Claimant's calculations based on weeks in which the Claimant worked less than 40 hours counting as partial weeks. That is not the way K.S.A. 44-511 reads and has been interpreted. See *Morris v. Shilling Construction*, AP-00-0474-055, CS-00-0434-953 (Kan. WCAB July 2023).

Regarding fringe benefits, this situation is somewhat unusual since the health insurance was terminated prior to the accident. However, the Court agrees with the Respondent's calculations of the Claimant's fringe benefits. The value of the health insurance was \$83.82 per week and the life insurance was \$2.87 per week.

The Claimant's average weekly wages through September 30, 2022, was \$781.29 with a compensation rate of \$520.89 ($\$781.29 \times .6667$). After September 30, 2022, when the Claimant's life insurance terminated, his average weekly wages was \$784.16 with a compensation rate of \$522.80 ($[\$]784.16 \times .6667$).

...

The parties allege that there was an overpayment or underpayment of TTD based on the weekly rate that TTD was paid.

The Respondent has paid \$46,262.12 in temporary total disability benefits for 77.86 weeks at \$586.67 per week.

Based on the Court's findings regarding AWW and the corresponding TTD rate, there was an overpayment of TTD based on the rate that TTD was paid. The adjustment and credit given to the Respondent will be shown in the Award below.

...

The Court finds that the Claimant's functional impairment is 18.3%. This is found by averaging the opinions from the three doctors. The Court finds the three doctors' ratings equally credible. Dr. Zimmerman provided a rating for the Claimant's headaches. The Court finds the Claimant's description of his headaches and other symptoms credible.

...

The Claimant is entitled to work disability. The Court finds that the Claimant has a 66% task loss. This is based on an average of the task loss percentages given by Dr. Hufford of 55% based on Mr. Benjamin's task list and 77% based on Mr. Hardin's task list.

Dr. Pratt gave lower task loss percentages. Dr. Zimmerman . . . did not give a task loss percentage, although his description of the tasks the Claimant cannot do appears to align more with the opinion from Dr. Hufford.

The Court is not persuaded by Mr. Hardin's opinion that the Claimant is incapable of earning wages. Only the restrictions given by Dr. Zimmerman result in an inability to work in the open labor market.

Conversely, the Court is not totally persuaded by Mr. Benjamin's opinion that the Claimant is capable of earning \$431.44 per week. Mr. Benjamin assumed in his calculations that the Claimant could travel up to 60 miles per day [one] way, 120 miles round trip, from Severy, Kansas, to go to an entry-level job. That does not seem realistic. Based on all the evidence, the Court concludes that the Claimant is capable of earning \$9.00 per hour for 40 hours or \$360.00 per week.

Based on the Claimant's preinjury average weekly wages through September 30, 2022, of \$781.29 and his average weekly wages of \$784.16 after September 30, 2022, the Court finds that the Claimant has suffered a 54% wage loss.

Averaging the Claimant's 54% wage loss and his 66% task loss, the Court concludes that the Claimant has a 60% work disability.

. . .

The Respondent asserts that the Claimant is not entitled to any award of permanent partial disability benefits due to the offset. The Claimant does not make any argument regarding this issue in his brief although it has a significant impact on this award.

The Court recognizes that there have been several prior court decisions that say the K.S.A. 44-501(f) offset applies to TTD.

The Claimant's current social security weekly payment is higher than his weekly permanent partial disability rate. Therefore, the Claimant receives no payments for his work disability. However, the Court finds that the Claimant is entitled to some additional compensation as shown below.

AWARD

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the Claimant, John Noll, and against the Respondent, Another Heating & Air Co. LLC, and the Insurance Carrier, Federated Reserve Insurance Co., for an accidental injury sustained on January 27, 2021.

The Claimant is initially entitled to 61.14 weeks of temporary total disability compensation from July 29, 2021, to September 30, 2022, at the rate of \$520.89 per week, or \$31,847.21, plus 16.4 weeks of TTD from October 1, 2022, to January 24, 2023, at the rate of \$522.80 per week, or \$8,573.92, for a total of 77.54 weeks in the total amount of \$40,421.13.

The Claimant received social security payments totaling \$31,710.90 from July 29, 2021, to January 24, 2023. The Respondent is granted an offset against the Claimant's TTD of \$484.62 per week from November 1, 2021, to December 31, 2022. The Respondent is granted an offset against the Claimant's TTD from January 1, 2023, in the amount of \$533.28 per week. This results in a total offset of \$31,710.90. This offset reduces the amount of TTD owed from \$40,421.13 to \$8,710.23.

The Claimant is further entitled to 64.5 weeks of permanent partial disability compensation at the rate of \$522.80 per week, or \$33,720.69, based on a 18.3% whole person injury making a total award of \$42,430.92. The total of TTD and permanent partial disability owed is \$51,114.15 less any amounts already paid.

The Respondent has already paid \$46,262.12 in TTD benefits to the Claimant. Therefore, there is a total presently due and owing to the Claimant of \$4,879.03, which is ordered paid in one lump sum.

As mentioned above, the Claimant's current social security weekly payment is higher than his weekly permanent partial disability rate. Therefore, the Claimant receives his functional impairment but receives no payments for his work disability[.]⁴

PRINCIPLES OF LAW AND ANALYSIS

The respondent argues the Award contains a mathematical error. The respondent contends it has paid more in compensation benefits than the claimant is entitled to under the Award and is owed a credit of \$3,831.20. The claimant agrees the respondent is due a credit under the Award; however, he submits the primary issue on appeal is the nature and extent of the claimant's disability. The claimant asserts Dr. Zimmerman's 27%

⁴ ALJ Award at 7-13.

functional impairment rating is most credible. Also, according to the claimant's brief to the ALJ, the claimant argues he is entitled to the maximum weekly benefit rate of \$687 due to his calculation of his average weekly wage (AWW), resulting in the claimant being owed an additional \$7,227.70 for TTD.

As an initial matter, to the extent the claimant incorporated his arguments to the ALJ and reiterated at oral argument, the Board agrees with the ALJ's calculation regarding the claimant's AWW. The claimant argued some of the weeks he worked should be calculated as partial weeks, not full weeks. As stated by the ALJ, *Morris*⁵ dictates the AWW is calculated based on the earnings during the 26 weeks actually worked prior to the accident, divided by the number of weeks actually worked. The ALJ properly divided the total wages paid over the 24 weeks actually worked to determine the claimant's AWW. The Board rejects the claimant's assertion to the contrary.

Next, the Board agrees with the ALJ's determination of the nature and extent of the claimant's disability. The ALJ found the three impairment ratings equally credible and afforded them equal weight. The Board sees no reason to give Dr. Zimmerman's rating more weight.

With respect to the calculation of the Award, the parties agree the claimant received more benefits than he was entitled. According to the briefs submitted to the Board, the parties agree this amount is \$3,831.20.

As noted in the ALJ's Award, the respondent paid the claimant \$46,262.12 in TTD benefits for 77.86 weeks of TTD at the rate of \$586.67 per week. However, the ALJ only awarded \$40,421.13 in TTD. After deducting \$31,710.90 for a social security offset, \$8,710.23 was owed for TTD. The claimant was also entitled to \$33,720.92 in permanent partial disability benefits for his functional impairment. The total awarded should have been \$42,430.92. However, in calculating the award, the ALJ added the TTD twice, resulting in an Award of \$51,114.15.⁶

The respondent paid \$46,262.12. The total Award was \$42,430.92. The respondent overpaid \$3,831.20, as agreed to by the parties, which is also the legal finding of the Board. The respondent and its insurance carrier are allowed to pursue reimbursement against the Kansas Workers Compensation Fund.

⁵ See *Morris v. Shilling Constr. Co. Inc.*, No. 123,297, 2021 WL 5751704, at *16 (Kansas Court of Appeals unpublished opinion filed Dec. 3, 2021).

⁶ This appears to be a miscalculation. The total should be \$51,141.15.

AWARD

WHEREFORE, the Board modifies the Award dated January 31, 2024. The Award is affirmed, apart from the calculation error.

IT IS SO ORDERED.

Dated this _____ day of June, 2024.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (via OSCAR)
Randy Stalcup
Dallas Rakestraw
Hon. Gary Jones