

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JULIA GUSTAFSON
Claimant

v.

CHURCH OF THE NATIVITY
Respondent

AP-00-0468-269
CS-00-0378-059

and

CHURCH MUTUAL INSURANCE CO.
Insurance Carrier

AP-00-0468-270
CS-00-0083-252

ORDER

Claimant requested review of the Award, dated June 3, 2022, and Order *Nunc Pro Tunc*, dated June 7, 2022, issued by Administrative Law Judge (ALJ) Julie A.N. Sample. The Board heard oral argument on October 6, 2022.

APPEARANCES

James R. Shetlar appeared for Claimant. Jeffrey A. Mullins appeared for Respondent and its Insurance Carrier.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the Transcript of Regular Hearing Taken via Videoconference, held November 10, 2021, with no exhibits; the transcript of Deposition of Julia D. Gustafson, taken June 4, 2021, including Exhibit 1; the transcript of Evidentiary Deposition of Julia Gustafson, taken January 10, 2022, including Exhibit 1; the transcript of Evidentiary Deposition of Kevin Gustafson, taken April 7, 2021, with no exhibits; the transcript of Deposition of Alan D. Schmidt, Ph.D., taken January 26, 2022, with exhibits 1-2; the transcript of Deposition of Daniel D. Zimmerman, M.D., taken January 26, 2022, with exhibits 1-4; the transcript of Evidentiary Deposition of Stephen Hendler, M.D., taken April 29, 2022, with exhibits 1-4; and the pleadings and orders contained in the administrative file. The Board also reviewed the parties' briefs.

ISSUES

1. What is Claimant's average weekly wage and corresponding compensation rate?

2. Was Claimant underpaid or overpaid temporary total disability compensation based on the compensation rate?

FINDINGS OF FACT

Claimant is employed by Respondent as a second grade teacher. Claimant has been employed by Respondent since 2014. As is customary for school teachers, Claimant entered into annual employment contracts with Respondent.

The record contains a copy of Claimant's employment contract with Respondent for the 2017-18 school year. According to the contract, Claimant's employment with Respondent started August 1, 2017 and ended on July 31, 2018. Claimant was paid an annual salary of \$44,686.00. Claimant testified she was paid bimonthly at the time of her accidents. The contract states Claimant's first paycheck was issued on August 15, 2017, and her final paycheck was issued on July 31, 2018, indicating Claimant was paid the entire calendar year. The contract also stated, however, Claimant started her actual work on August 10, 2017 and her work ended on May 25, 2018.

The record does not contain a copy of Claimant's employment contract with Respondent for the 2016-17 school year. The record is silent to Claimant's earnings prior to August 1, 2017, whether Claimant was paid the entire calendar year prior to August 1, 2017, or Claimant's starting and ending dates of actual work during the preceding school year.

On September 12, 2017, Claimant slipped and fell at work. Claimant sustained injuries to her head and neck, and she experienced headaches, dizziness and ringing in the ears. Claimant also reported neck and upper back pain. Claimant received medical treatment and continued working. That matter was assigned Case Number CS-00-0083-252 by the Division.

On December 19, 2017, Claimant was teaching a class. Claimant continued to experience headaches, tinnitus and vision problems. Claimant blacked out and fell to the ground. A paraprofessional helped Claimant to a chair, and Claimant was transported to the emergency room for treatment. That matter was assigned Case Number CS-00-0378-059 by the Division.

Claimant was taken off work for the rest of the school year. Claimant received medical treatment focusing on post-concussion syndrome, including vestibular therapy, and vision problems. Claimant also received treatment for her cervical symptoms.

Claimant received thirty-three weeks of temporary total disability compensation, paid at \$609.98 per week. Ultimately, Claimant returned to work the following school year as a school teacher. Claimant reported ongoing, constant headaches, dizziness, vision problems and tinnitus. Claimant also noticed memory or cognitive problems.

Dr. Schmidt evaluated Claimant at her counsel's request, and rated Claimant's functional impairment at 10% of the body as a whole for neurological impairment under a strict reading of the *AMA Guides to the Evaluation of Permanent Impairment*, Sixth Edition (*AMA Guides*), but believed, under a *Johnson* analysis, Claimant's impairment was more adequately rated at 15% of the body as a whole under the *AMA Guides to the Evaluation of Permanent Impairment*, Fourth Edition. At the request of her counsel, Claimant was evaluated by Dr. Zimmerman for her physical injuries, and he rated Claimant's functional impairment at 14% of the body as a whole, and Claimant's global impairment for her physical and neurological impairments was 27% of the body as a whole under the *AMA Guides*. Dr. Schmidt and Dr. Zimmerman also thought Claimant would require future medical treatment.

Dr. Hendler evaluated Claimant's physical injuries at the request of Respondent, and initially rated Claimant's impairment at 10% of the body as a whole under the *AMA Guides to the Evaluation of Permanent Impairment*, Fourth Edition. Dr. Hendler later rated Claimant's impairment at 10-12% of the body as a whole on account of the first accident.

In the Award, ALJ Sample concluded Claimant's average weekly wage was \$859.34. ALJ Sample determined Claimant's average weekly wage by dividing the annual salary of \$44,686.00 for the 2017-18 school year by fifty-two weeks. ALJ Sample also determined Claimant's compensation rate was \$572.92. Based on the wage determination, ALJ Sample concluded Claimant was overpaid temporary total disability compensation in the amount of \$1,222.98. ALJ Sample found Claimant's functional impairment was 25% of the body as a whole on account of the first accident, and no additional impairment resulted from the second accident. ALJ Sample also awarded future medical and unauthorized medical. These review proceedings follow.

PRINCIPLES OF LAW AND ANALYSIS

The parties do not dispute ALJ Sample's determinations of Claimant's functional impairment, the apportionment of Claimant's impairment, or the awards of future and unauthorized medical. Therefore, those provisions of the Award are affirmed.

Claimant seeks review of ALJ Sample's determination of Claimant's average weekly wage. Claimant also seeks review of ALJ Sample's determination temporary total disability compensation was overpaid. Claimant contends her average weekly should be determined by dividing her annual salary by the 180 days, or thirty-six weeks, she would have worked in the 2017-18 school year. Claimant argues this produces a compensation rate of \$631.00 per week, and she was underpaid temporary total disability compensation based on the compensation rate. Respondent argues Claimant's average weekly wage should be calculated by dividing her annual salary for the 2017-18 school year by fifty-two weeks because she was employed for fifty-two weeks.

With regard to average weekly wage calculations, the Act states:

(a)(1) The term "money" shall be construed to mean the gross remuneration, on an hourly, output, salary, commission or other basis earned while employed by the employer, including bonuses and gratuities. Money shall not include any additional compensation, as defined in paragraph 2.

* * *

(3) The term "wage" shall be construed to mean the total of the money and any additional compensation which the employee receives for services rendered for the employer in whose employment the employee sustains an injury arising out of and in the course of such employment.

(b)(1) Unless otherwise provided, the employee's average weekly wage for the purpose of computing any compensation benefits provided by the workers compensation act shall be the wages the employee earned during the calendar weeks employed by the employer, up to 26 calendar weeks immediately proceeding the date of the injury, divided by the number of calendar weeks the employee actually worked, or by 26 as the case may be.¹

"Additional compensation" is not included in the calculation of the average weekly wage unless the additional compensation is discontinued.² When the plain language of a statute is clear and unambiguous, a court must apply the statute as written.³

¹ K.S.A. 44-511.

² See K.S.A. 44-511(a)(2)(C).

³ See *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607, 214 P.3d 676 (2009).

According to Claimant's uncontradicted testimony, she was employed by Respondent for the twenty-six week period preceding September 12, 2017. Based on the plain language of K.S.A. 44-511, Claimant's average weekly wage is determined by dividing her total gross remuneration earned during the calendar weeks employed by the employer for the twenty-six weeks preceding the date of accident, divided by the number of calendar weeks actually worked.

The twenty-six week period preceding September 12, 2017, is March 14, 2017 through September 11, 2017. The record contains no information concerning Claimant's gross remuneration from March 14, 2017 through July 31, 2017. Moreover, the record does not indicate when Claimant actually worked from March 14, 2017 through July 31, 2017. It is likely school was in session and Claimant actually worked during part of that time period. The current record does not contain sufficient information for the Board to determine Claimant's average weekly wage, which was an issue raised by the parties, in accordance with the plain language of the statute.

The case cited by Claimant in support of her position, *Lynch v. U.S.D. No. 480*,⁴ is not controlling. In *Lynch*, K.S.A. 1992 Supp. 44-511(b), was in effect, and the parties stipulated to the total compensation the employee was paid.⁵ At issue was determining the number of weeks to divide the employee's total compensation.⁶ The Court, using K.S.A. 1992 Supp. 44-511(b)(5), determined the employee's average weekly wage by dividing the total compensation by 42.71 weeks actually worked.⁷

This case does not involve K.S.A. 1992 Supp. 44-511(b). The method for determining an employee's average weekly wage was part of the 2011 amendments to the Kansas Workers Compensation Act. The Board is charged with applying the version of K.S.A. 44-511 in effect on September 12, 2017, not K.S.A. 1992 Supp. 44-511(b). Therefore, the Board declines to apply *Lynch*. The plain language of the statute controls.

⁴ 18 Kan. App. 2d 130, 850 P.2d 271 (1993).

⁵ See *id.* at 132-33.

⁶ See *id.* at 133-39.

⁷ See *id.* at 136-39.

The Board's review authority is limited to the record presented to the Administrative Law Judge.⁸ On review of final awards, the Board has the authority to remand any matter to the Administrative Law Judge for further proceedings.⁹ The Board must do so here, rather than engage in speculation. Therefore, the award of temporary total disability compensation and permanent partial disability compensation is reversed in Case No. CS-00-0083-252, and these matters are remanded to ALJ Sample for further proceedings.

On remand, ALJ Sample is instructed to receive additional evidence concerning Claimant's gross remuneration earned from March 14, 2017 through July 31, 2017. ALJ Sample is also instructed to receive additional evidence confirming the dates Claimant actually worked from March 14, 2017 through July 31, 2017. Presumably, Respondent has copies of pay records and Claimant's employment contract for the prior school year, which should contain this information. Upon receipt of this additional evidence, ALJ Sample is instructed to calculate Claimant's average weekly wage under K.S.A. 44-511, and Claimant's resulting compensation rate. Finally, ALJ Sample is instructed to recalculate the awards of temporary total disability compensation and permanent partial disability compensation based on 25% functional impairment of the body as a whole for Case No. CS-00-0083-252.

CONCLUSION

WHEREFORE, it is the finding, decision and order of the Board the Award issued by ALJ Julie A.N. Sample, dated June 3, 2022, and Order *Nunc Pro Tunc*, dated June 7, 2022, are reversed as to Claimant's average weekly wage and the compensation rate. These matters are remanded to the ALJ to receive additional evidence and to make new findings of fact and conclusions in accordance with the instructions above. The awards of temporary total disability compensation and permanent partial disability based on 25% functional impairment of the body as a whole are subject to recalculation. In all other respects, the Award and Order *Nunc Pro Tunc* are affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2023.

⁸ See K.S.A. 44-555c(a).

⁹ See K.S.A. 44-551(l)(1).

BOARD MEMBER

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DISSENT

The record is sufficient to determine the claimant's average weekly wage. I disagree with the Board remanding the case for additional evidence concerning the claimant's earnings for the 26 weeks prior to her first accident.

No party argued for the need for additional wage documentation of the claimant's earnings prior to the employment contract in effect at the time of her accidents. The Board, in general, should not unilaterally raise issues not otherwise presented, because doing so is arbitrary and contrary to the relaxed rules of procedure and evidence in K.S.A. 44-523(a).¹⁰

The only issue before the Board was whether to calculate the claimant's average weekly wage over an entire year, resulting in a lower wage, or during a more condensed time frame consisting of the school year actually worked, resulting in a higher wage. Determination of this sole issue has been delayed.

The Board does not need evidence of 26 weeks of earnings to calculate the claimant's average weekly wage. K.S.A. 44-511(b)(1) contemplates using "up to" 26 calendar weeks an employee "actually worked." It is likely the Board is asking for wage records for a period of time the claimant was not actually working and earning wages (during summer break) before her return to work on August 10, 2017. Assuming the

¹⁰ See *Goss v. Century Mfg., Inc.*, No. 108,367, 2013 WL 3867840, at *4 (Kansas Court of Appeals unpublished opinion filed July 26, 2013).

claimant was paid during summer break, the question raised by the parties still exists: should the average weekly wage be based on an entire year or just the time the claimant actually worked.

While a worker's average weekly wage no longer hinges on yearly earnings following statutory amendments effective May 15, 2011, the claimant's average weekly wage may be determined by extrapolation. The claimant's yearly salary of \$44,686 can be divided by one year (52.13 weeks) to determine average earnings of \$857.04 per week. This figure of \$827.04 can then be applied to either 4.57 weeks the claimant actually worked before her first accident (August 10 until September 12) or the 6 weeks from the inception of the contract until the first accident (August 1 until September 12). Applying the average earnings to the applicable time period and dividing by the time period results in the same figure: an average weekly wage of \$857.04. Admittedly, this is circular reasoning, but it is based on the actual evidence in the record and technically does not base the claimant's average weekly wage on yearly pay, but rather on 4.57 or 6 weeks.

Finally, Kansas law does not require absolute certain mathematic precision in determining an "average" weekly wage. The burden of proof is based on a preponderance of the evidence, not "clear and convincing" evidence or any higher standard.

BOARD MEMBER

c: (Via OSCAR)

James R. Sheltar
Jeffrey A. Mullins
Hon. Julie A.N. Sample