BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

GRICELDA NAVARRETE	)	
Claimant	)	
V.	)	AP-00-0468-430
	)	CS-00-0449-931
TYSON FRESH MEATS, INC.	)	
Self-Insured Respondent	)	

ORDER

Claimant requested review of the June 23, 2022, Award Nunc Pro Tunc issued by Special Administrative Law Judge (SALJ) Duncan A. Whittier. The Board heard oral argument on October 6, 2022.

APPEARANCES

Scott J. Mann appeared for Claimant. Thomas G. Munsell appeared for self-insured Respondent.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the SALJ, consisting of the transcript of the Regular Hearing held December 7, 2021; the transcript of the Evidentiary Deposition of Aly A. Gadalla, M.D., from February 18, 2022, with exhibits 1, 2, 4, and 5 attached; the Evidentiary Deposition of David Hufford, M.D., from March 25, 2022, with exhibits attached; the Evidentiary Deposition of Ashley Bayer from January 28, 2022, with exhibit; and the documents of record filed with the Division.

ISSUES

1. What is Claimant's average weekly wage (AWW)?

2. Is there an underpayment of temporary total disability (TTD) benefits?

3. What is the nature and extent of Claimant's disability?

FINDINGS OF FACT

Claimant sustained compensable injuries to her low back and left knee when she suffered a work accident on October 23, 2017. Respondent provided authorized medical treatment, including a left knee arthroscopic partial lateral meniscectomy on May 9, 2018, by Dr. Ashfaq. Claimant later underwent lumbar spine decompression surgery on August 8, 2019, by Dr. Henry. Claimant began pain management care with Dr. Gadalla in June 2020, focusing on chronic low back pain, left knee pain, and lumbar radiculopathy. Dr. Gadalla continues to treat Claimant with home physical therapy and medications.

Using the AMA *Guides*,[1] Dr. Gadalla opined Claimant sustained 16 percent impairment of the whole body as a result of her work accident. Dr. Gadalla attributed 12 percent whole body impairment to Claimant's lumbar spine with radiculopathy and 5 percent whole body impairment related to her left knee. During his deposition, Dr. Gadalla acknowledged Claimant underwent a lateral meniscectomy to her left knee and not a medial meniscectomy, placing her in Class 1 for 1 percent whole body impairment. Dr. Gadalla's adjusted rating is 13 percent impairment of the whole body.

Dr. Hufford evaluated Claimant on April 9, 2020, at her counsel's request. Dr. Hufford reviewed Claimant's medical records and history and performed a physical examination. Dr. Hufford diagnosed an occupational slip and twist injury with direct injury to Claimant's low back, primarily at L3-4, and a lateral meniscus tear in the left knee. He found Claimant's pain management with Dr. Gadalla appropriate treatment and determined Claimant was at maximum medical improvement.

Using the AMA *Guides*, Dr. Hufford opined Claimant sustained 12 percent whole person impairment. Dr. Hufford assigned 9 percent whole body impairment for Claimant's lumbar disc protrusion with ongoing pain including left leg radicular symptomatology, 2 percent whole body impairment for a sacroiliac injury, and 1 percent whole body impairment for the lateral meniscus tear of the left knee.

In the 26-week period immediately preceding her work accident, Claimant earned an hourly wage. She earned $16.25 per hour for the first 16 weeks and $16.55 per hour for the last 10 weeks. Claimant also received holiday and vacation pay during this period. Ashley Bayer, Respondent's human resources manager, testified employees earn holiday pay by working the day before and the day after a holiday. Vacation pay is earned dependent on how many years an employee has worked for Respondent. Ms. Bayer testified vacation and holiday pay are not tied to the regular wages an employee receives, and Respondent does not consider vacation and holiday pay to be a bonus or gratuity.

---

[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (6th ed.).

Based on the length of her employment, Claimant was entitled to four weeks of vacation pay. During the 26-week period preceding her accident, Claimant collected vacation pay in addition to working her scheduled hours. An employee can submit a document requesting vacation pay in addition to the pay for work actually performed, instead of time off work, a practice Ms. Bayer described as "paying in lieu."[2] Respondent paid Claimant 9 weeks and 3 days of TTD compensation at the rate of $485.03 per week, for a total of $4,572.19.

The SALJ found Claimant's AWW was $864.99, with a compensation rate of $576.66. The SALJ determined the vacation pay Claimant collected in addition to her regular wages should not be included in the AWW calculation, and noted Claimant is entitled to an underpayment of TTD in the amount of $865.71. Further, the SALJ found Claimant sustained 13 percent permanent functional impairment to the whole body.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues she sustained 16 percent permanent functional impairment to the whole body as a result of her work-related accident. Further, Claimant argues she earned gross remuneration in the sum of $22,142.34 in the 26-week period prior to the accident, for an AWW of $1,006.47, entitling her to the maximum TTD rate of $631.00 per week. Claimant argues the vacation pay she received should be included in the AWW. Thus, the underpayment of TTD owed Claimant is $1,378.14.

Respondent maintains the SALJ's Award should be affirmed. In the alternative, Respondent argues Claimant's functional impairment should be 12.5 percent of the body as a whole.

1. What is Claimant's AWW?

K.S.A. 2017 Supp. 44-511 states, in part:

> (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.
>
> (2)(A) The term "additional compensation" shall include and mean only the following: (I) Board and lodging when furnished by the employer as part of the wages, which shall be valued at a maximum of $25 per week for board and lodging combined, unless the value has been fixed otherwise by the employer and

[2] Bayer Depo. at 11.

> employee prior to the date of the accident or injury, or unless a higher weekly value is proved; and (ii) employer-paid life insurance, disability insurance, health and accident insurance and employer contributions to pension and profit sharing plans.
>
> (B) In no case shall additional compensation include any amounts of employer taxes paid by the employer under the old-age and survivors insurance system embodied in the federal social security system.
>
> (C) Additional compensation shall not be included in the calculation of average wage until and unless such additional compensation is discontinued. If such additional compensation is discontinued subsequent to a computation of average weekly wages under this section, there shall be a recomputation to include such discontinued additional compensation.
>
> (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 preceding the date of the injury, divided by the number of calendar weeks the employee actually worked, or by 26 as the case may be.
>
> . . .
>
> (4) In determining an employee's average weekly wage with respect to the employer against whom claim for compensation is made, no money or additional compensation paid to or received by the employee from such employer, or from any source other than from such employer, shall be included as wages, except as provided in this section. No wages, other compensation or benefits of any type, except as provided in this section, shall be considered or included in determining the employee's average weekly wage.

Claimant argues K.S.A. 44-511 was amended with language which would include vacation pay. K.S.A. 1993 Supp. 44-511 stated, in part:

> (a) As used in this section:

> (1) The term "money" shall be construed to mean the gross remuneration, on an hourly, output, salary, commission or other basis, at which the service rendered is recompensed in money by the employer, but it shall not include any additional compensation, as defined in this section, any remuneration in any medium other than cash, or any other compensation or benefits received by the employee from the employer or any other source.

In *Bohanan v. U.S.D. No. 260*, which interpreted the old version of K.S.A. 44-511, the Kansas Court of Appeals wrote:

> Under the statutory definition of wages, Bohanan's vacation and sick leave do not constitute "money." The only way they can be included in an employee's average weekly wage is if they constitute "additional compensation." K.S.A. 44–511(a)(2) states that additional compensation "shall include and mean *only*" the items listed in the statute. (Emphasis added.) Vacation and sick leave are not listed in K.S.A. 44-511(a)(2) and do not constitute "remuneration for services in any medium other than cash." K.S.A. 44-511(a)(2)(D). The Board correctly held Bohanan's vacation and sick leave should not be used in determining Bohanan's average weekly wage.[3]

The Board is duty-bound to follow precedent of our appellate courts and does not have the discretion to choose not to comply with a mandate of the Court of Appeals.[4] The Court in *Bohanan* found vacation pay is not included in the definition of "money." This is the rule of law until *Bohanan* is reversed or modified to reflect the statutory changes made to K.S.A. 44-511 in 2011.

Even if *Bohanan* didn't apply, the plain language of K.S.A. 44-511(a)(3) says wages only include money and other compensation for services rendered. Because vacation pay is not paid for services rendered, it is excluded under K.S.A. 44-511(b)(4).

Claimant was not "employed" when she received her vacation pay. "Employed" has been interpreted, at least under an older version of K.S.A. 44-511, to mean "the time the worker is employed and on the job."[5] While *Osmundson* does not address vacation pay, the Court of Appeals addressed the inclusion or exclusion of sick and vacation pay in *Fuller*

---

[3] *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 375-76, 947 P.2d 440, 448 (1997).

[4] *See Griffith v. Wichita Thunder Hockey Team*, Nos. 1,065,568 & 1,068,589, 2017 WL 2991559 (Kan. WCAB June 30, 2017); *Vance v. DCCCA, Inc.*, No. 1,038,232, 2016 WL 453028 (Kan. WCAB Jan. 27, 2016); *Sager v. Delivery Logistics, Inc.*, No. 1,043,908, 2013 WL 1384372 (Kan. WCAB Mar. 15, 2013); *Johnson v. J&J BMAR Joint Ventures, LLP,* No. 1,012,089, 2005 WL 3407992 (Kan. WCAB Nov. 22, 2005).

[5] *Osmundson v. Sedan Floral, Inc.*, 10 Kan. App. 2d 261, 265, 697 P.2d 85 (1985).

v. Farmers Ins. Co.[6] In *Fuller*, the injured worker was restricted to working 20 hours a week and used her sick leave and vacation to compensate for the missing 20 hours she would normally work. The Board in *Fuller* ruled, "[W]hatever sick leave pay and vacation leave pay claimant currently receives is included in computing claimant's post-injury wages . . . [and] [a]s long as claimant is receiving pay from her employer, it should not matter whether that pay is from work performed or from a benefit the employer provides."[7] The Court of Appeals reversed the Board's decision.

Fuller, citing a prior version of K.S.A. 44-511, noted "wage" includes the total of money and additional compensation which the employee receives for services rendered for the employer while employed and on the job, following *Osmundson*. *Fuller* stated, "[T]he money received by Fuller for the vacation and sick leave benefits covered the 20 hours per week Fuller did not work and, thus, did not render any service for Farmers."[8] The case held:

> Here, Fuller was not "on the job" during the 20 hours per week she collected sick leave and vacation benefits due to her permanent restrictions. Fuller simply had no work to perform during those 20 hours per week she was not rendering any services for Farmers.
>
> Reversed and remanded with directions to exclude the payment of vacation and sick leave benefits from the computation of Fuller's average weekly wage.[9]

The same is true for this case. The claimant was not working or rendering services, or on the job, for her employer when she received her vacation pay. Both the version of K.S.A. 44-511 decided under *Fuller* and the version applicable to this case consider a worker's average weekly wage to include money and additional compensation for services "rendered."

Based upon the forgoing, the Board finds the SALJ correctly found Claimant's AWW to be $864.99, with a compensation rate of $576.66.

---

[6] *Fuller v. Farmers Ins. Co.*, 32 Kan. App. 2d 333, 82 P.3d 526 (2004).

[7] *Fuller v. Farmers Ins. Co.*, No. 262,620, 2003 WL 21087638, at *3 (Kan. WCAB Apr. 30, 2003).

[8] 32 Kan. App. 2d at 334.

[9] *Id.* at 335.

2. **Is there an underpayment of TTD?**

The SALJ properly held Claimant's AWW to be $864.99, with a compensation rate of $576.66, payable for 9.43 weeks, resulting in a total award of TTD in the amount of $5,437.90. The ALJ found the underpayment of TTD to be $865.71. The total amount of TTD owed to the claimant equals 9.43 weeks of TTD paid at a compensation rate of $576.66. Claimant is entitled to a total TTD award of $5,437.90.

The SALJ's order of TTD is affirmed.

3. What is the nature and extent of Claimant's disability?

Dr. Gadalla, a treating physician, opined Claimant experienced 13 percent whole body impairment. Dr. Hufford, Claimant's hired physician, found Claimant suffered 12 percent impairment. The SALJ awarded 13 percent whole body impairment rating. This finding is supported by the record. Claimant suffers 13 percent whole body impairment as the result of her October 23, 2017, injury by accident.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award Nunc Pro Tunc of Special Administrative Law Judge Duncan A. Whittier dated June 23, 2022, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2023.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the majority opinion related to the exclusion of vacation pay from the average weekly wage. Under the plain language of statute, the 2011 legislative changes to K.S.A. 44-511(a) should be read to include vacation pay within the definition of money. When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction.[10]

K.S.A. 2017 Supp. 44-511(a)(1) defines the term "money" as the gross remuneration, on an hourly, output, salary, commission or other basis earned while employed by the employer, including bonuses and gratuities. Vacation pay is part of Claimant's gross remuneration. Vacation benefits are earned. Vacation pay is not randomly given out to employees for no reason. The employee must work for, or earn, vacation benefits, just as they must work for their hourly pay.

The undersigned would reverse the SALJ's conclusions regarding AWW and TTD. The undersigned agrees with all other findings of the majority.

_____
BOARD MEMBER

c: (Via OSCAR)

Scott J. Mann, Attorney for Claimant
Thomas G. Munsell, Attorney for Self-Insured Respondent
Hon. Duncan A. Whittier, Special Administrative Law Judge

[10] *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 608, 214 P.3d 676 (2009).