

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

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|--|---|----------------------|
| SUSAN K. JONES |) | |
| Claimant |) | |
| VS. |) | |
| |) | Docket No. 1,004,917 |
| BURGER KING |) | |
| Respondent |) | |
| AND |) | |
| |) | |
| AMERICAN PROTECTION INSURANCE CO. |) | |
| Insurance Carrier |) | |

ORDER

Claimant appeals the November 6, 2003 Award Nunc Pro Tunc of Administrative Law Judge Jon L. Frobish. Claimant was awarded benefits for a 7 percent impairment to the right lower extremity after suffering injury on September 18, 2001. Claimant contends she is entitled to a 20 percent impairment to the right lower extremity based upon the opinion of orthopedic surgeon Edward J. Prostic, M.D. Respondent, on the other hand, contends claimant is limited to a 2 percent impairment to the right lower extremity based upon the opinion of Kevin D. Komes, M.D. This case was placed on the summary docket for decision without oral argument and deemed submitted effective January 30, 2004.

APPEARANCES

Claimant appeared by her attorney, William L. Phalen of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, P. Kelly Donley of Wichita, Kansas.

RECORD AND STIPULATIONS

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award Nunc Pro Tunc.

ISSUES

- (1) What is the nature and extent of claimant's injury?

- (2) What is claimant's average weekly wage?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Board finds the Award Nunc Pro Tunc of the Administrative Law Judge should be affirmed with regard to the functional impairment, but modified with regard to the average weekly wage.

Claimant began work for respondent on August 31, 2001, as a crew member. Claimant underwent a period of training and then began working at the drive through window. On September 18, 2001, claimant slipped, striking her right knee on the floor. Claimant was referred to the Ashley Clinic after going to the emergency room in Chanute, Kansas. She then came under the treatment of James F. Queenan, D.O., who performed an MRI and, after a period of conservative treatment, performed surgery on claimant's knee on January 7, 2002. Claimant was placed in a knee brace and continued treatment with Dr. Queenan.

After a period of time, Dr. Queenan recommended claimant obtain a second opinion, as there was some question regarding the progress claimant was making with regard to the knee. Claimant was then referred by the insurance company to physical medicine and rehabilitation specialist Kevin D. Komes, M.D. Dr. Komes saw claimant on two separate occasions. At the first examination on June 4, 2002, claimant displayed no major difficulties with her knee. Dr. Komes did note claimant was wearing a knee brace and using a cane, which he felt inhibited her ability to rehabilitate her knee. Dr. Komes recommended a second MRI, which was performed prior to his June 19, 2002 follow-up examination. At that time, Dr. Komes identified minimal joint effusion, with no cartilage or ligament tear. He assessed claimant a 2 percent impairment to the right lower extremity based upon the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). Dr. Komes testified that chondromalacia of the patella femoral space and degenerative joint disease were conditions not related to claimant's fall. He also felt the moderate right knee joint effusion diagnosed was a result of claimant's obesity. Claimant was described as being 5'6" and weighing 312 pounds.

Claimant was referred to orthopedic surgeon Edward J. Prostic, M.D., by her attorney, for an examination on July 29, 2002. Dr. Prostic also examined the MRIs performed on claimant. He opined claimant suffered a 20 percent impairment to the right lower extremity pursuant to the *AMA Guides* (4th ed.). Dr. Prostic assessed claimant impairment for the partial medial meniscectomy with a defect of the medial femoral condyle, thigh atrophy on the right leg and chondromalacia. Dr. Prostic was asked about claimant's pre-injury history, but was unable to discuss any right knee history with the exception of arthroscopic surgery done by Dr. David O. King in July of 1990. Dr. Prostic found claimant to have no preexisting impairment, as, with the exception of the diagnostic

arthroscopy by Dr. King, claimant informed him of no preexisting impairment or difficulties to the knee. The history provided Dr. Prostic was incomplete.

At the regular hearing, on direct examination, claimant was questioned about prior knee problems in 1988, when her knee gave out and she was treated for several months by the Ashley Clinic; the arthroscopic surgery performed by Dr. King in 1990; a fall in 1995 while roller skating; and a fall after the roller skating incident, at home, while in the shower.

Claimant was referred to physical medicine and rehabilitation specialist Vito J. Carabetta, M.D., by the Administrative Law Judge for an independent medical examination. The first examination occurred on October 23, 2002, at which time Dr. Carabetta diagnosed status right medial meniscectomy and chondromalacia of the patella. He assessed claimant a 2 percent impairment to the lower extremity pursuant to the *AMA Guides* (4th ed.) as a result of the partial medial meniscectomy and a 10 percent impairment for claimant's preexisting conditions and the subsequent aggravation of those preexisting conditions as a result of the September 18, 2001 injury. He found claimant to have suffered a 5 percent impairment specifically from the September 18, 2001 fall, as it applies to the diagnosis of chondromalacia patella. In utilizing the Combined Values Chart of the *AMA Guides*, he assessed claimant a 7 percent impairment of the right lower extremity at the level of the knee for the September 18, 2001 injury.

Claimant alleged, for the purpose of computing her average weekly wage, that she was hired as a full-time employee. Respondent, in rebuttal, provided the testimony of Bruce E. Swisshelm, the owner of respondent Burger King. Mr. Swisshelm discussed claimant's employment status as a part-time employee, testifying that crew workers, such as claimant, were not hired on a full-time basis, but were required to go through a probationary period. Their part-time versus full-time status would then be determined based upon their abilities. Claimant acknowledged at the regular hearing that she was working part time and had not yet been elevated to full-time status at the time of the injury.¹ Mr. Swisshelm also testified that claimant was paid \$5.15 per hour, having worked a total of 76.82 hours during the 2.71 weeks claimant was employed with respondent.²

In workers' compensation litigation, it is claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.³

¹ R.H. Trans. at 32.

² The record indicates claimant's first day at work was August 31, 2001, with an accident date of September 18, 2001, at total of 2.71 weeks. See Swisshelm Depo., Ex. 2.

³ K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

A worker's average weekly wage is to be determined by multiplying his or her daily rate by the number of days and half days he or she usually and regularly works or is expected to work.⁴ In this instance, the Board finds that the evidence supports respondent's contention that claimant was a part-time employee earning \$5.15 per hour. While claimant initially argued she was a full-time employee expected to work 40 hours a week, the employment records verify that claimant at no time worked more than 31 hours per week with respondent. Additionally, claimant acknowledged at regular hearing that at the time of her injury, she was still in training and had not been elevated from her part-time training status to full-time employment. Claimant testified that she was paid a total of \$395.62 with respondent, which, when compared to the 76.82 hours worked, does compute to \$5.15 per hour. When calculated over a 2.71-week period, this computes to an average weekly wage of \$145.99 and a compensation rate of \$97.33. The Award is modified with regard to claimant's average weekly wage and compensation rate.

With regard to the nature and extent of claimant's injury, the Award sets out findings of fact and conclusions of law and it is not necessary to repeat those herein. The dispute arises between respondent's expert, Dr. Komes, and claimant's expert, Dr. Prostic. Both find justification for their widely separate impairment ratings. The Administrative Law Judge, in adopting the opinion of the court-ordered independent medical examiner, Dr. Carabetta, appeared to be searching for an independent, unbiased and objective opinion of claimant's ongoing impairment. Dr. Carabetta assessed claimant a 2 percent impairment for the surgery and a 5 percent impairment for the chondromalacia, which, all combined, equates to a 7 percent impairment to the right lower extremity. The Board finds that is supported by the record.

The Board, therefore, affirms the 7 percent functional impairment of the Administrative Law Judge as set forth in the Award Nunc Pro Tunc of November 6, 2003. The Award Nunc Pro Tunc should be modified to reflect the appropriate numbers for both the average weekly wage and temporary total disability rate.

The Board, therefore, affirms the Award Nunc Pro Tunc of the Administrative Law Judge of November 6, 2003, granting claimant a 7 percent impairment to the right lower extremity, but modifies the Award Nunc Pro Tunc with regard to the average weekly wage and weekly compensation rate.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award Nunc Pro Tunc of Administrative Law Judge Jon L. Frobish dated November 6,

⁴ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

2003, should be, and is hereby, affirmed with regard to the award of a 7 percent impairment to the right lower extremity, but modified with regard to the average weekly wage. Claimant is awarded 39 weeks temporary total disability compensation at the rate of \$97.33 per week totaling \$3,795.87, followed by 11.27 weeks permanent partial disability compensation at the rate of \$97.33 per week totaling \$1,096.91, for a total award of \$4,892.78. As of the date of this Award, the entire amount would be due and owing and ordered paid in one lump sum minus any amounts previously paid.

In all other regards, the Award Nunc Pro Tunc of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of March 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: William L. Phalen, Attorney for Claimant
- P. Kelly Donley, Attorney for Respondent
- Jon L. Frobish, Administrative Law Judge
- Paula S. Greathouse, Workers Compensation Director