



the nature and extent of disability. The respondent and insurance carrier have requested review to determine the nature and extent of injury and the liability of the Kansas Workers Compensation Fund. These are the issues now before the Appeals Board.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary record, the Appeals Board finds as follows:

(1) Claimant is entitled to permanent partial disability benefits based upon a forty-five percent (45%) permanent partial impairment of function to the body as a whole as a result of his work related injury of June 16, 1989.

On June 16, 1989, while working for the respondent, claimant dropped parts weighing approximately 20 pounds on his left foot. Claimant did not immediately report the injury to the respondent as he did not feel anything was broken and hoped the pain and swelling in his foot would resolve. However, the symptoms in his foot progressed to the point that claimant sought treatment at a hospital emergency room. Claimant then notified respondent of the injury. Claimant received treatment from the company physician and was eventually referred to board certified orthopedic surgeon Robert L. Eyster, M.D.

Claimant first saw Dr. Eyster on July 10, 1989. Dr. Eyster initially diagnosed sympathetic dystrophy in the left leg and referred claimant to Dr. Badie S. Mansour for sympathetic nerve blocks. Claimant had his first sympathetic nerve block on July 11, 1989, and received some benefit from the injection. Due to the beneficial effect of the injection, Dr. Eyster referred claimant for a second injection from Dr. Mansour which was administered July 19, 1989. During the second injection, claimant experienced a terrible, shooting pain starting at the injection site on the left side and going down into his leg and into his foot. At the time, claimant told Dr. Mansour of the radicular pain. Dr. Mansour instructed claimant to remain at rest for 48 hours after the second injection.

Claimant saw Dr. Eyster again on July 24, 1989. At this time, Dr. Eyster felt claimant was improving and released him to return to work. On July 26, 1989, claimant consulted Dr. Eyster and advised him he was doing worse. Dr. Eyster referred claimant again to Dr. Mansour for a third injection. Claimant saw Dr. Mansour on August 2, 1989. Dr. Mansour declined to give claimant a nerve block and immediately telephoned Dr. Eyster and scheduled an appointment for claimant to see Dr. Eyster the following day. At this visit, Dr. Eyster did not tell claimant what he suspected, but referred claimant to Dr. Murrow, a neurologist. Claimant saw Dr. Murrow several times for various tests. Dr. Murrow first advised claimant that he had developed "foot drop".

Claimant is unable to pinpoint the date he first began having symptoms representative of foot drop as he was deliberately staying off his foot as much as possible due to the pain and swelling. In any event, the medical testimony indicates that as early as two days following the second injection, claimant had developed the foot drop. At this point, the medical experts disagree as to the cause of the condition.

Dr. Eyster believes the foot drop occurred as a result of compression of the peroneal nerve while claimant was lying in bed at home after the second sympathetic nerve block. Had the foot drop been caused by the second sympathetic nerve block injection, Dr. Eyster believes that claimant would have noticed it sooner than he did, and that the doctor himself would have discovered the condition before he made the referral to Dr. Mansour for the third injection. Interestingly, Dr. Eyster testified that had the hypodermic needles struck the L5 nerve root at the time of the sympathetic nerve block injection, claimant would have had

immediate complaints of severe pain going down into the leg. Although Dr. Eyster states that he does not have that history in his records, claimant described that symptomatology as occurring when he testified at the preliminary hearing held on December 12, 1989.

The only other medical expert to testify in this proceeding is Frank J. Kutilek III, D.O. Dr. Kutilek believes the most likely explanation is that the foot drop was caused by the sympathetic nerve block injections rather than claimant's lying in bed. Dr. Kutilek's opinion is based upon the history provided by claimant. Dr. Kutilek believes that compression of the peroneal nerve during sleep is an extremely remote possibility.

Whether claimant's foot drop was caused by the sympathetic nerve block injections he received or as a result of the prescribed bed rest, the foot drop is directly traceable to the work related accident and it is, therefore, compensable under the Workers Compensation Act. When a primary injury is shown to have arisen out of and in the course of employment, every consequence of that injury, including a new and distinct injury, is compensable under the Act if it is a direct and natural result of the primary injury. Chinn v. Gay & Taylor, Inc., 219 Kan. 196, 547 P.2d 751 (1976); Bergemann v. North Central Foundry, Inc., 215 Kan. 685, 527 P.2d 1044 (1974).

Claimant has experienced a forty-five percent (45%) impairment of function to the body as a whole as a result of his work related injury. The two physicians who testified agree that claimant's foot drop cannot be corrected. As a result of the foot drop, claimant's has atrophy in the left leg and has lost at least twenty-five percent (25%) of the muscle mass in the lower calf region. Prior to the accidental injury of June 1989, claimant's back was asymptomatic. Since the accident, claimant's gait has been altered and he has developed pain in the low back that has progressively worsened. In order to walk, claimant uses a cane or crutches when he has to be up for any period of time.

Dr. Eyster does not believe that there is any impairment due to claimant's back problem or any upper leg problems that would relate to his work related injury. However, Dr. Eyster does admit that foot drop does effect a person's gait and that some people complain of muscular ligamentous irritation as a result of the condition. Dr. Eyster also agrees that muscular ligamentous irritation over a long period of time can result in degenerative change in the spine. Dr. Eyster believes claimant has experienced a twenty-five percent (25%) permanent partial impairment of function to his left lower leg due to the foot drop.

Dr. Kutilek believes that claimant has lumbosacral strain because of claimant's problem with ambulating and functional shortening of the left leg due to the foot drop. Dr. Kutilek also found bulging discs at the intervertebral levels of L1-L2 and L2-L3 as evidenced by Magnetic Resonance Imaging (MRI), degenerative arthritis in the lumbar spine, and scoliosis of the lumbar spine with concavity to the right. Dr. Kutilek believes that claimant is at risk of rupture in those discs because of overloading due to the foot drop superimposed upon the scoliosis.

Using the American Medical Association's Guides to the Evaluation of Permanent Impairment, Dr. Kutilek believes that claimant has experienced a forty-five percent permanent partial impairment of function to the body as a whole as a result of the injuries and complications associated with the work related incident of June 1989. Dr. Kutilek diagnosed claimant's injuries resulting from the June 1989, incident as follows: left peroneal nerve palsy, anterior compartment atrophy of the left lower leg, left foot drop, lumbosacral strain with multiple somatic dysfunctions of the lumbar spine, sympathetic dystrophy of the left lower leg, varicosity of the left lower leg, varicosity of the left lower leg

secondary to the above, intermittent muscle spasm of left lower leg and foot, and paresthesia neuralgia of the left leg, and numbness and nerve pain.

Although it appears a good argument could be made that claimant has experienced work disability greater than his permanent impairment of function rating, the Appeals Board is unable to make such determination as the claimant has failed to sustain his burden of proof on this issue. Claimant's entitlement to benefits is governed by K.S.A. 44-510e which provides:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than the percentage of functional impairment."

Claimant has failed to provide any evidence regarding how claimant's injuries and restrictions have effected his ability to work in the open labor market or to earn a comparable wage. Regarding the restrictions of his physicians, Dr. Eyster testified that he would not want claimant to do anything that was uncomfortable for him and would not want him to do any climbing or working on elevated structures. Dr. Eyster believes that claimant should not repetitively ascend and descend stairs or repetitively squat. Dr. Kutilek did not place specific restrictions or limitations upon claimant, but testified that claimant is confined to clerical or sedentary type work. Additionally, Dr. Kutilek does not believe that claimant should engage in any occupations where he is lifting, stooping, or climbing. How these limitations and restrictions reduce claimant's access to work in the open labor market and to earn comparable wages taking into consideration his education, training, experience and capacity for rehabilitation is anybody's guess and subject to pure speculation. Therefore, claimant is entitled permanent partial general disability benefits based upon the forty-five percent (45%) impairment of function rating to the body as a whole.

(2) The Kansas Workers Compensation Fund is absolved of all liability in this proceeding.

The foot drop is a direct and natural consequence of the initial injury of June 16, 1989. Likewise, the impairment to the back is a natural result of the foot drop. The natural effects of the primary injury are the responsibility of the respondent and not the Kansas Workers Compensation Fund. Fund liability may be assessed only when claimant has sustained a subsequent compensable accidental injury and preexisting impairment either caused or contributed to the resulting impairment. See K.S.A. 44-567.

(3) The Appeals Board adopts the findings and conclusions of Special Administrative Law Judge William F. Morrissey as set forth in his Award of January 14, 1994, that are not inconsistent with those specifically set forth herein.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated January 14, 1994, is modified as follows:

AN AWARD OF COMPENSATION IS HEREBY ENTERED IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Edward L. Anderson, and against the respondent, Beech Aircraft Corporation, a self-insured, for an accidental injury occurring on June 16, 1989, based upon an average weekly wage of \$344.04.

The claimant is entitled to 104.86 weeks temporary total disability at the rate of \$229.37 per week or \$24,051.74 followed 310.14 weeks at \$103.22 per week or \$32,012.65 for a forty-five percent (45%) permanent partial general body disability making a total award of \$56,064.39.

As of April 21, 1994, there would be due and owing to the claimant 104.86 weeks temporary total compensation at \$229.37 per week in the sum \$24,051.74 plus 148.14 weeks permanent partial compensation at \$103.22 per week in the sum of \$15,291.01 for a total due and owing of \$39,342.75 which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$16,721.64 shall be paid at \$103.22 per week for 162 weeks or until further order of the Director.

The remaining orders of Special Administrative Law Judge William F. Morrissey in his Award of January 14, 1994, are affirmed and adopted by the Appeals Board as if specifically set forth herein.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May, 1994.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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