BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

EVERETT L. BEASLEY	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 141,726
EXTRUSIONS, INC.	)	and 168,508
Respondent	)	
AND	)	
	)	
CONSTRUCTION SUPPLY	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
Insurance Carrier	)	
AND	)	
	)	
AMERICAN STATES INSURANCE COMPANY	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

The application of claimant and respondent for review by the Workers Compensation Appeals Board of an Award entered by Special Administrative Law Judge William F. Morrissey on June 8, 1994, and a Nunc Pro Tunc Award entered by Special Administrative Law Judge William F. Morrissey on June 17, 1994, came on for oral argument in Chanute, Kansas.

APPEARANCES

Claimant appeared by and through his attorney David L. McLane of Pittsburg, Kansas. Respondent, Construction Supply, and American States Insurance Company appeared by and through their attorney John R. Cunningham of Overland Park, Kansas. Respondent, Extrusions, Inc. and its insurance carrier, Travelers Insurance Company, appeared by and through their attorney Leigh C. Hudson of Fort Scott, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney Robert Talkington of Iola, Kansas. There were no other appearances.

RECORD

The record as specifically set forth in the Awards of the Special Administrative Law Judge is herein adopted by the Appeals Board.

STIPULATIONS

The stipulations as specifically set forth in the Awards of the Special Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

Docket No. 141,726

(1) Did claimant suffer accidental injury on the dates alleged?
(2) Did claimant's alleged accidental injury arise out of and in the course of his employment?
(3) What is the nature and extent of claimant's injury and/or disability?

ISSUES

Docket No. 168,508

What is the nature and extent of claimant's injury and/or disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Docket No. 141,726

Having reviewed the entire evidentiary record including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

In Docket No. 141,726 claimant alleges accidental injury arising out of and in the course of his employment on October 17, 1989. The initial injury suffered by claimant on October 17, 1989, was to his left knee with no back or right leg involvement noted. In August 1990 when claimant went to the emergency room for treatment on his back, he advised the treating physician that he had developed back pain while helping a gentlemen lift a tractor tire, experiencing severe low-back pain. At that time, the pain also radiated into his right lower extremity. Claimant had undergone prior surgery at L5-S1 in November, 1988 involving disc excision and removal of fragments. There was no indication that his back condition was exacerbated or aggravated by the October 17, 1989 injury.

The evidence in the file indicates claimant more probably than not injured his left knee as a result of an accidental injury suffered while employed with respondent arising out of and in the course of his employment on October 17, 1989. This injury did not extend to his back and right lower extremity. Claimant was examined by Dr. Edward Prostic at his attorney's request on January 8, 1992. Dr. Prostic assessed claimant a twenty percent (20%) functional impairment to the lower left extremity as a result of his October 17, 1989 injuries. Dr. Prostic, in his functional impairment evaluation, also included a functional percentage for the low-back. The Appeals Board finds, as claimant's low-back injury did not stem from the injury of October 17, 1989, an inclusion of the low-back functional percentage would be inappropriate. The Appeals Board finds, based upon the medical evidence of Dr. Prostic, claimant is entitled to a twenty percent (20%) functional impairment to the left leg as a result of the injuries suffered October 17, 1989.

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 June 8, 1994, shall be, and hereby is, modified and claimant, Everett L. Beasley, is awarded compensation against respondent, Construction Supply Co., and its insurance carrier, American States Insurance Company, for an accidental injury occurring on October 17, 1989, based upon an average weekly wage of $284.33 per week, for 40.57 weeks temporary total disability compensation at the rate of $189.56 per week, in the sum of $7,690.45, followed thereafter by 31.89 weeks compensation at the rate of $189.56 per week in sum of $6,044.31 for a total award of $13,734.76 representing a 20% permanent partial loss of use of the left leg.

As of June 13, 1995, all compensation is due and owing and ordered paid in one lump sum minus amounts previously paid.

Claimant is awarded future medical benefits upon proper application to and approval by the Director. Claimant is further awarded unauthorized medical up to $350.00 to be paid upon presentation of an itemized statement proving same.

Claimant's contract for attorney's fees is herein approved insofar as it is not inconsistent with K.S.A. 44-536.

Fees and expenses of the administration of the Kansas Workers Compensation Act are assessed against the respondent, its insurance carrier and the Kansas Workers Compensation Fund as specified in the Award of the Special Administrative Law Judge.

IT IS SO ORDERED.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Docket No. 168,508

Claimant suffered injuries to his left leg on October 17, 1989, and injuries to his low-back, non-work related, in August, 1990. Subsequent to these injuries claimant suffered an additional injury on April 15, 1992, when he partially fell through a ceiling while working for Extrusions, Inc. As a result of this new injury claimant experienced problems on a temporary basis to his left leg, but suffered permanent aggravation to his low-back.

Dr. Prostic had examined claimant for both the leg and the back in January 1992. At that time, he rated the back at twenty-two and one-half percent (22.5%) to the body as a whole. Subsequent to the April 15, 1992 injury, claimant had a twenty-five percent (25%) whole body functional impairment per the opinion of Dr. Prostic. Claimant further had restrictions requiring alternating sitting, standing, walking and driving every thirty (30) minutes. Claimant was evaluated by Karen Crist Terrill at claimant's attorney's request regarding his loss of access to the open labor market and loss of ability to earn a comparable wage. Ms. Terrill opined that, based upon the restrictions given by Dr. Toma, claimant had a forty-nine percent (49%) loss of access to the open labor market. Dr. Toma's deposition was never taken and the attorney for Extrusions, Inc. and Travelers Insurance Company and the Fund, properly objected to the use of said medical records by Ms. Terrill in expressing her opinion regarding claimant's loss of access to the open labor market.

In providing her opinion regarding claimant's loss of access to the open labor market, Ms. Terrill also used Dr. Toma and Dr. Prostic in comparison. In reviewing the

transcript of Ms. Terrill's deposition, the Appeals Board finds that the objection to the use of the medical records of Dr. Toma was appropriate. The elimination of Dr. Toma's medical reports from the record eliminates the evidence supporting claimant's allegation of loss of access to the open labor market. As it is claimant's burden of proof under K.S.A 44-501 and K.S.A. 44-508(g) to persuade the trier of fact by a preponderance of the credible evidence that claimant's position is more probably true than not true based upon the whole record, the elimination of this evidence, in effect, eliminates claimant's proof of loss of access to the open labor market.

K.S.A. 1991 Supp. 44-510e(a) states in part:

> "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."

K.S.A. 44-510e requires a two prong test when assessing work disability. As we have already eliminated claimant's evidence regarding his loss of access to the open labor market the Appeals Board must next look to the claimant's loss of ability to earn a comparable wage. Ms. Terrill did opine claimant had the ability, post-injury, to earn $4.25 per hour. This equals a weekly wage of $170.00. When compared to claimants wage at Extrusions, Inc. of $309.00 per week, this equals a loss of wage earning capacity of fifty-five percent (55%). While K.S.A. 44-510e requires consideration of both prongs of the formula, it gives no direction regarding what weight should be given to each. The Supreme Court, in Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011, (1990), found that giving equal weight to each factor is an appropriate computation of a claimant's work disability. Finding no compelling reason for providing additional emphasis to one factor over the other in this matter, the Appeals Board finds claimant has suffered a twenty-seven and one-half percent (27.5%) work disability as a result of the injuries suffered with Extrusions, Inc.

The issue regarding credit under K.S.A. 44-510a was also raised. The Appeals Board finds no justifiable reason for applying a credit in this matter as claimant's preexisting knee condition would not allow for a credit against the claimant's current back injury. It should also be noted under K.S.A. 44-510a the credit is appropriate if the employee has received compensation or if compensation is collectable for personal injury by accident arising out of and in the course of the employee's employment. As claimant's earlier back injury did not arise out of and in the course of his employment, it would not be possible for claimant to have received or collected compensation for that condition. A credit under K.S.A. 44-510a in these circumstances would not be proper and same is denied.

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 June 8, 1994, and the subsequent Nunc Pro Tunc Order of Special Administrative Law Judge William F. Morrissey dated June 17, 1994, are hereby modified and claimant is granted an award against Extrusions, Inc. and its insurance carrier, Travelers Insurance Company, and the Kansas Workers Compensation Fund, for an accidental injury occurring on April 15, 1992, based upon an average weekly wage of $309.09 per week for 42.43 weeks temporary total disability compensation at the rate of $206.07 per week, in the sum of $8,743.55, followed thereafter by 372.57 weeks permanent partial general body disability compensation at the rate of $56.67 per week totaling $21,113.54 for a total award of $29,857.09, for a 27.5% permanent partial general body work disability.

As of June 13, 1995, there is due and owing claimant 42.43 weeks temporary total disability compensation at the rate of $206.07 per week in the sum of $8,743.55, followed by 122.43 weeks permanent partial general body disability compensation at the rate of $56.67 per week in the amount of $6,938.11 for a sum of $15,681.66 due and owing in one lump sum minus any amounts previously paid. Claimant is thereafter entitled to 250.14 weeks permanent partial general disability compensation at the rate of $56.67 per week totaling $14,175.43 to be paid until fully paid out or further order of the Director.

Future medical benefits are awarded upon proper application to and approval by the Director.

Unauthorized medical of up to $350.00 is ordered paid to the claimant upon presentation of proof of said expense.

Per the stipulation of the parties, the Kansas Workers Compensation Fund will be responsible for 80% of all costs of this Award.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Fees and expense of the administration of the Kansas Workers Compensation Act are assessed against the respondent and its insurance carrier and the Kansas Workers Compensation Fund per the Award of the Special Administrative Law Judge of June 8, 1994.

IT IS SO ORDERED.

Dated this ____ day of June, 1995.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: David L. McLane, Pittsburg, Kansas
John R. Cunningham, Overland Park, Kansas
Leigh C. Hudson, Fort Scott, Kansas
Robert Talkington, Iola, Kansas
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director