

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

<b>ELIZABETH SMITH HERRMAN</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 147,095
<b>DEVELOPMENTAL SERVICES OF N.W. KANSAS</b>	)	
Respondent	)	
AND	)	
	)	
<b>TRAVELERS INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

**ON** the 4th day of November, 1993, the application of the respondent for review by the Workers Compensation Appeals Board of an award entered by Administrative Law Judge George R. Robertson on October 6, 1993, came on for oral argument by telephone conference.

**APPEARANCES**

Claimant appeared by her attorney, Richard A. Boeckman of Great Bend, Kansas. Respondent and insurance carrier appeared by their attorney Jerry Ward of Great Bend, Kansas. There were no other appearances.

**RECORD**

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

**STIPULATIONS**

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

**ISSUES**

- (1) What is the nature and extent of the claimant's disability?
- (2) Is claimant entitled to future medical benefit?

**FINDINGS OF FACT**

Having reviewed the whole evidentiary record filed herein, and in addition to the stipulations of the parties, the Appeals Board make the following findings of fact:

- (1) The claimant suffered an accidental injury while in the course of her employment with Developmental Services of Northwest Kansas, on November 26, 1989, to her low back and right hip when a patient became violent and pushed the claimant over into a bath tub where she landed on her low back.
- (2) The authorized treating physician was Dr. Holland of Russell, Kansas, who then referred the claimant to Dr. C. Rieff Brown, an orthopedic surgeon in Great Bend, Kansas.
- (3) The claimant never returned to her employment with the respondent but took a job as a Emergency Medical Technician with the Ellis County Emergency Medical Service (ECEMS) on January 2, 1990.
- (4) Dr. Brown first treated the claimant conservatively during the time she was working for ECEMS.
- (5) The claimant worked for ECEMS from January 2, 1990, until July 17, 1990, when she was terminated after the claimant's supervisor, Kerry G. McCue, requested that Dr. Brown examine the claimant and as a result of the examination, Dr. Brown placed work restrictions on the claimant of only lifting with proper body mechanics, then only frequently lifting up to 25 pounds and occasionally lifting up to 75 pounds.
- (6) An MRI was taken shortly after the claimant's accident which showed degenerative disc disease present at L5-S1 and moderate bulging of the disc at the same level. Because of increased discomfort of the sciatic distribution of the right leg another MRI was taken in August of 1991, which revealed herniation at L5-S1 on right side. Dr. Brown then performed a laminectomy with discectomy and spinal fusion at L5-S1 on September 18, 1990.
- (7) Since the operation, the claimant has progressively lost function due to epidural fibrosis (scar tissue) that was found at the operative site.
- (8) The claimant has not been actively employed since July 17, 1990, which was her last day worked at ECEMS, except for a day and one-half when she worked at Anthony's Store in Russell, Kansas. Her duties at the clothing store were to hang up clothes and wait on customers. However, she could not perform the work because she could not stand on her feet for eight hours because her back hurting so badly.

(9) Dr. Brown testified that her work restrictions would be no lifting above 25 pounds and he doubted that she really could hold a job. The only way she could work would be for short periods of time and she would have to switch positions frequently. She is unable to do any climbing, stooping, bending at all. He gave her a functional impairment rating of 25 percent of the body as a whole.

(10) Dr. Robert Eyster, an orthopedic surgeon in Wichita, Kansas, was hired by the respondent to examine and evaluate the claimant. He found that the claimant's functional impairment was 18 percent of the body as a whole, and further found work restrictions of no lifting over 20 pounds and no repetitive lifting over 10 pounds with no repetitive bending, twisting or working in a bent-over position.

(11) The claimant testified that the vocational rehabilitation vendor, David Green, during the vocational assessment, determined that because of her back injury there were no jobs that he knew she could do that were within Dr. Brown's restrictions. The claimant went on to testify that her back is worse since the surgery and she is unable to pick up her right leg when she walks which causes her to drag the leg.

(12) The claimant further testified at the regular hearing on May 6, 1993, that her only income was from SRS because she has a 16-year old dependent son.

(13) It is Dr. Brown's opinion that the November 26, 1989, accident that occurred while she was employed by the respondent and the resulting injury was the cause of the claimant's subsequent disc herniation. He went on to testify that the November 26, 1989, injury brought about the onset of symptoms and the initial accident started a chain of events which subsequently resulted in the rupture of the claimant's disc.

(14) Kerry McCue, claimant's supervisor at ECEMS, testified that the claimant was unable to lift while she was employed at ECEMS and because of this inability he finally sent her to the doctor for an examination. Such examination resulted in the weight restriction and he had to terminate the claimant.

(15) During the time claimant worked for ECEMS, she did little lifting as two men were usually on every ambulance run and lifted the stretcher. When she was not on a run, she kept the corridors clean and stocked the ambulances which was light work.

(16) The claimant further testified that nothing occurred to her while employed by ECEMS that was an accident which would have injured her back. Her back felt the same when she started in January of 1990, as it did when she quit in July of 1990.

(17) The testimony of Dr. Brown and T. Scott Webb, D.O., firmly established that the cause of the claimant's inflamed stomach was from the medication she was taking for her back pain.

(18) Dr. Brown's testimony established that in the future the claimant would need pain medication and occasional medical treatment.

#### **CONCLUSIONS OF LAW**

(1) The Workers Compensation Appeals Board on review of any act, finding, award, decision, ruling or modification of findings or awards of the Administrative Law Judge shall have the authority to grant or refuse compensation, or to increase or to diminish any award of compensation or to remand any matter to the Administrative Law Judge for further proceedings. 1993 Session Laws of Kansas, Chapter 286, Section 53. (b)(1).

(2) Dr. Brown's uncontradicted testimony in this case is that he is of the opinion that the November 26, 1989 accident that the claimant suffered and her resulting injury while she was employed by the respondent was the cause of the claimant's subsequent disc herniation. He went on to testify that the November 26, 1989 injury brought about the onset of symptoms and the initial accident started a chain of events which subsequently resulted in the rupture of the claimant's disc. When a primary injury under the Workers Compensation Act rises out of and in the course of employment every natural consequence that flows from the injury is compensable if it is a direct and natural result of the primary injury. Gillig v. Cities Service Gas Co., 222 Kan. 369, 372, 564 P.2d 548 (1977).

(3) The Appeals Board is persuaded by a preponderance of credible evidence that there was no intervening cause or aggravation which resulted in the claimant's disc herniation while she was in the employment of ECEMS.

(4) The argument of the respondent in this case that the Administrative Law Judge's award that the claimant is entitled to a 100 percent work disability is excessive and if the claimant is entitled to any disability it should be an impairment of function to the body as a whole is not supported by the evidence.

(5) 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. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence. There shall be a presumption that the employee has no work disability if the employee engages in any work for wages compared to the average gross weekly wage that the employee was earning at the time of injury. K.S.A. 1992 Supp. 44-510e(a).

(6) The claimant in the instant case should receive nothing less than her functional impairment rating which was established by the testimony of Dr. Brown in the amount of 25 percent and from Dr. Eyster in the amount of 18 percent.

(7) If the claimant is entitled to work disability, then the work disability should be determined upon a two-prong test. This test for determining permanent partial general disability is the extent, expressed as a percentage, to which the ability of the employee to perform in the open labor market has been reduced and the ability of the worker to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience, and capacity for rehabilitation. Hughes v. Inland Container Corporation, 247 Kan. 407, 422, 799 P.2d 1011 (1990). Hughes does not mandate that a court use a specific formula to arrive at the extent of permanent partial disability; it does require consideration of the two factors stated above when computing the extent of permanent partial disability. Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 52-53, 816 P.2d 409, rev. denied 250 Kan. 806 (1991).

(8) In this case, there is no evidence in the record of testimony by a vocational expert which would give us a percentage as to the claimant's loss of ability to perform work in the open labor market and her loss of ability to earn comparable wages. However, there is uncontroverted evidence in testimony by both Dr. Brown and the claimant that she cannot find a job in the open labor market and she does not have the ability to earn a comparable wage. The claimant testified that she has not been actively employed since July 17, 1990, which was her last day worked at ECEMS, except for a day and one-half when she worked at Anthony's Clothing Store in Russell, where she hung clothes and waited on customers. She could not perform this work because she could not stand on her feet for eight hours because of her back hurting her so badly. She went on to testify in the regular hearing that during the vocational rehabilitation assessment, the vendor determined that because of her back injury there were no jobs that she knew she could do that were within Dr. Brown's restrictions. When she walks at the present time she drags her right leg because she cannot pick it up.

(9) Dr. Brown established that the claimant's work restrictions would be no lifting above 25 pounds and he doubted that she really could hold a job. The only way she could work would be for short periods of time and switch positions frequently. The claimant is unable to do any climbing, stooping, bending at all.

(10) Dr. Robert Eyster, an orthopedic surgeon who was hired by the respondent to examine and evaluate the claimant found work restrictions of no lifting over 20 pounds and no repetitive lifting over 10 pounds with no repetitive bending, twisting or working in bent-over positions.

(11) The claimant is a high school graduate and has had training in both as a certified nurse aide and emergency medical technician. However, all of these jobs have work requirements which far exceed her work restrictions established by Dr. Brown and Dr. Eyster.

(12) The only evidence in the record that the claimant has ability to perform work in the open labor market is that she has taken care of her two-year old grandson and that she has worked a day and one-half at Anthony's Store.

(13) The Appeals Board affirms the Administrative Law Judge's decision that considering the record as a whole, finds that the claimant should be entitled to a 100 percent work disability award.

(14) The Appeals Board also affirms the Administrative Law Judge's decision that any and all outstanding medical bills, costs and mileage, upon proper presentation to the respondent should be paid forthwith as these costs relate to the claimant's inflamed stomach. This includes prescription costs, Dr. Brown's and Dr. Webb's statements for treatment and any related hospital stays.

(15) The Appeals Board further finds that based upon Dr. Brown's testimony and the claimant's testimony that the Administrative Law Judge's decision that further future medical should be provided by the respondent upon application only.

(16) Medical benefits in the amount of \$40,552.12 have been paid in this case by the respondent.

**WHEREFORE**, it is the finding, decision and order of the Appeals Board that the Award of Administrative Law Judge George Robertson dated October 6, 1993, is affirmed in all respects and an award of compensation is hereby entered in favor of the claimant, Elizabeth A. Smith Herrman, and against the respondent, Developmental Services of Northwest Kansas, and the insurance carrier, Travelers Insurance Company.

The claimant is entitled to 133 weeks at temporary total disability at the rate of \$158.86 per week or \$21,128.38 followed by 282 weeks at \$158.86 per week or \$44,798.52 for a 100 percent permanent partial general bodily disability making a total award of \$65,926.90.

As of October 3, 1993, there would be due in owing to the claimant 133 weeks temporary total compensation at \$158.86 per week in the sum of \$21,128.38 plus 68 weeks permanent partial compensation at \$158.86 per week in the sum of \$10,802.48 for a total due in owing of \$31,930.86 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance in the amount of \$33,996.04 shall be paid at \$158.86 per week for 214 weeks or until further order of the Director.

FURTHER AWARD is made that claimant is entitled to medical expenses, and any unauthorized medical expenses up to \$350.

Future medical will be considered upon proper application.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent and such are directed to pay cost of the transcripts as follows:

Kelly, York and Associates, Ltd. Deposition Dr. Robert Eyster dated March 10, 1993	\$108.84
Owens, Brake and Associates Preliminary hearing transcript dated November 5, 1991	\$ 99.59
Preliminary hearing transcript dated March 3, 1992	\$100.40
Regular hearing transcript dated May 6, 1993	\$233.55
TOTAL	\$433.54
Underwood and Shane Preliminary hearing transcript dated August 6, 1992	\$ 36.00
Deposition of Dr. C. Rieff Brown dated March 4, 1993	\$438.25
TOTAL	\$474.25
Delores Eilts, C.S.R. Deposition of Kerry McCue dated May 5, 1992	\$107.00
Deposition of Dr. Scott Webb dated February 19, 1993	\$249.00
TOTAL	\$356.00

IT IS SO ORDERED.

Dated this \_\_\_\_ day of November, 1993.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

cc: Richard A. Boeckman, Attorney for Claimant  
Jerry Ward, Attorney for Respondent  
George R. Robertson, Administrative Law Judge  
George Gomez, Director