

ISSUES

This is a claim for Fund reimbursement only. Claimant alleged she injured her back and both arms while working for Boeing. She alleged she first injured her back on either April 19 or April 20, 1990, and injured her arms during the period from January 1991 through her last day of work on June 30, 1992. Although claimant settled her claim with Boeing in an agreed Award in July 1995, Boeing reserved its claim against the Fund for determination by the Administrative Law Judge.

By Award dated September 30, 1997, the Administrative Law Judge found the Workers Compensation Fund was wholly responsible for the benefits in this claim. The Fund, however, disagreed with that decision and filed this appeal, contending it has no liability. Fund liability is the only issue before the Appeals Board on this review.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds as follows:

- (1) Claimant began working for Boeing on November 9, 1989. In a Preplacement Occupational Health and Safety Questionnaire completed in September 1989, claimant advised Boeing she had a back condition that limited her ability to bend and lift and carry heavy objects. Also, she indicated on that questionnaire that she had regularly seen a chiropractor for her back since 1978 and that her "back goes out sometimes." The Boeing physicians diagnosed marked thinning of the L5-S1 lumbar disc, degenerative lumbar spine arthritis and osteoporosis, and mild scoliosis. On a form dated April 13, 1990, Boeing sent notice to the State Division of Workers Compensation that claimant was handicapped because of her back.
- (2) At the initial medical evaluation, Boeing also learned that claimant had a history of lateral epicondylitis in her right elbow and, perhaps, even osteoporosis and degenerative arthritis. During her initial evaluation, claimant commented that she continued to have problems with her right elbow hurting. A Boeing nurse noted in claimant's file that she still had problems with the right elbow whenever she used it a lot.
- (3) Claimant alleged she injured her back and both arms while working for Boeing. The first back injury occurred on April 19, 1990, while claimant was working as a sealer. Claimant returned to work in November 1990 and immediately experienced an increase in her back symptoms. In January 1991, claimant reported she again hurt her back at work when she was thrown from a motorized cart.
- (4) Because of her back injury, Boeing provided claimant accommodated work, placing her in its work pool. Claimant alleges she injured both arms while working in the work pool during the period from January 1991 through June 30, 1992, the date she was laid off. Claimant testified the symptoms in both arms began in March 1991 after mopping for two

days. Despite her alleged ongoing bilateral arm symptoms, claimant continued to work and did not seek medical treatment for her arms until July 1991.

(5) After considering the testimony of both Dr. Ernest R. Schlachter and Dr. Forney W. Fleming, the Appeals Board finds the April 19, 1990, work-related accident caused permanent impairment and injury to claimant's back. But, the incidents involving her back after that date caused only temporary aggravation.

(6) The back injury and disability arising from the April 19, 1990, accident would not have occurred but for the preexisting condition in claimant's back. That conclusion is based upon the opinion of Dr. Schlachter, who saw claimant in both July 1991 and January 1995. The Appeals Board finds Dr. Schlachter's testimony more persuasive than that of Dr. Fleming as his testimony is, in key parts, unclear.

(7) Claimant permanently injured both her arms while working for the respondent from January 1991 through June 30, 1992. The injury to the right arm would not have occurred but for the preexisting lateral epicondylitis in her right elbow. The left elbow, however, was not in any way related to either the right arm injury or the preexisting condition in the right arm. Claimant's history of simultaneous onset of bilateral arm symptoms is directly contrary to Dr. Schlachter's history that the right arm became symptomatic and that claimant then overused the left arm as she protected and compensated for the right. Because of that significant difference in history, Dr. Schlachter's opinion regarding the relationship between the preexisting right arm condition and the ultimate bilateral arm injury is unpersuasive.

(8) As indicated by Dr. James L. Gluck, it is more probable that claimant's continuing to work after the March 1991 mopping incident caused claimant to develop the bilateral arm injuries.

(9) As a result of the back injury, claimant has a 19 percent whole body functional impairment rating. As a result of the bilateral arm injury, claimant has a 6 percent whole body functional impairment for the right arm and a 6 percent whole body functional impairment rating for the left arm, which combine to a 12 percent whole body functional impairment.

CONCLUSIONS OF LAW

The Workers Compensation Fund does not question the reasonableness of the settlement between claimant and Boeing. The Fund, however, contends Boeing failed to prove the Fund should be responsible for any portion of the agreed Award.

Both K.S.A. 1989 Supp. 44-567(a) and K.S.A. 1991 Supp. 44-567(a) are identical and provide that the Fund has liability when an employer either knowingly hires or retains

a handicapped worker and (1) the worker is then injured or disabled because of a preexisting impairment or (2) the impairment contributed to the resulting disability:

(1) Whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director awards compensation therefor and finds the injury, disability or the death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workers' compensation fund.

(2) Subject to the other provisions of the workers compensation act, whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director finds the injury probably or most likely would have been sustained or suffered without regard to the employee's preexisting physical or mental impairment but the resulting disability or death was contributed to by the preexisting impairment, the director shall determine in a manner which is equitable and reasonable the amount of disability and proportion of the cost of award which is attributable to the employee's preexisting physical or mental impairment, and the amount so found shall be paid from the workers' compensation fund.

The Appeals Board finds claimant's impairments in both her back and her right elbow were of such nature as to constitute a hindrance and handicap in obtaining or retaining employment. The Appeals Board also finds that Boeing had knowledge of the impairments when it hired claimant.

As indicated above, the Appeals Board finds that the back and right elbow injuries would not have occurred but for the preexisting condition. The left elbow injury, however, occurred without regard to the right elbow condition. Because the parties in the agreed Award did not separate the benefits that were being paid for the back injury as opposed to the bilateral arm injuries, the only method to apportion liability between Boeing and the Fund is to compare the functional impairment ratings.

As determined above, claimant has a 19 percent whole body functional impairment for her back and a 6 percent whole body functional impairment for her right arm. Adding those two percentages yields a 25 percent whole body functional impairment as compared to a combined 31 percent whole body functional impairment for the back and both arms. Comparing 25 percent to 31 percent, the Appeals Board finds the back and right arm impairments constitute approximately 80 percent of claimant's combined whole body impairment for which the Workers Compensation Fund should be responsible.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Nelsonna Potts Barnes dated September 30, 1997, should be, and hereby is, modified to assess 20% of the liability for all benefits and costs associated with this claim to Boeing and its insurance carrier and 80% to the Workers Compensation Fund.

IT IS SO ORDERED.

Dated this ____ day of March 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Vaughn Burkholder, Wichita, KS
Chris S. Cole, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director