

RECORD AND STIPULATIONS

The Appeals Board considered the record and adopted the stipulations listed in the Award.

ISSUES

The Kansas Workers Compensation Fund asks for a review of the finding by the Special Administrative Law Judge that the claimant suffered a forty-eight percent (48%) permanent partial general disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant has alleged and testified that he suffered an injury to his neck while putting up a fence post with a fence post driver. The record establishes the claimant had a prior cervical injury in 1987 and surgery had been recommended but declined in 1989. Claimant contends that the April 18, 1990 incident aggravated the pre-existing condition. Respondent, on the other hand, argues that the April 18, 1990 injury was not a new injury. For the reasons stated below the Appeals Board finds that the April 18, 1990 incident was a new injury. The Appeals Board also finds, however, that the finding relating to the nature and extent of claimant's disability should be adjusted and the award should be based upon a thirty-six and one-half percent (36.5%) permanent partial general disability.

The Appeals Board bases its finding that the claimant suffered a new injury on April 18, 1990 on four factors. First, claimant has testified that following his 1987 injury he had problems but nothing as disabling as he experienced in April 1990. Second, Dr. Zimmerman examined him at the request of claimant's counsel and provides credible testimony that the incident of April 1990 aggravated a pre-existing condition. Third, the MRI taken after the April 1990 incident did, according to Dr. Abay, show slightly more prominent herniation than the MRI taken in 1989. He testified that although slight, he would not expect this to be in the normal course of events. According to Dr. Abay, the herniation would normally regress in time with conservative therapy. Finally, the Appeals Board notes that although Dr. Abay, the treating physician, testifies that there must have been a gradual deterioration, the medical history given him was not as detailed as that given to Dr. Zimmerman and that claimant testified to in the record in this case.

Although the Appeals Board does consider the April 1990 incident to be an aggravating event giving rise to a compensable claim, the Appeals Board also concludes that an adjustment should be made in the determination of claimant's permanent partial disability. The Administrative Law Judge found that claimant experienced a forty-eight percent (48%) permanent partial general disability. The Appeals Board agrees with the finding that claimant is entitled to a work disability. The restrictions would preclude him from returning to work at a comparable wage. The Appeals Board concludes the amount of such disability shall be reduced.

The only evidence of work disability in this case is that introduced through the testimony of Mr. Jerry Hardin. He has testified, based on Dr. Zimmerman's restrictions, that claimant has suffered a fifty-five percent (55%) loss of the ability to obtain employment

in the open labor market. He initially gave an opinion that claimant had a forty-five percent (45%) loss of ability based on Dr. Odulio's restrictions. When, however, those restrictions were clarified to conform with the testimony of Dr. Odulio, Mr. Hardin indicated that his opinion would change. With the clarification it would be his opinion that claimant had, based on Dr. Odulio's restrictions, a twenty percent (20%) loss of access to the open labor market. The Appeals Board finds it appropriate to give both opinions equal weight in this case and concludes that claimant has a thirty-two and one-half percent (32.5%) reduction in his ability to obtain employment in the open labor market.

Mr. Hardin also gave opinions regarding loss of ability to earn a comparable wage. Based upon Dr. Zimmerman's restrictions he indicated he felt claimant sustained a thirty-eight percent (38%) loss of ability to earn a comparable wage. However, when advised that claimant's stipulated pre-injury wage was \$437.85, Mr. Hardin indicated his loss would, when compared to the stipulated wage, be forty-five percent (45%) and the Appeals Board finds this latter number should be used as Mr. Hardin's opinion based upon Dr. Zimmerman's restrictions. Mr. Hardin also adjusted his opinion of the impact of restrictions recommended by Dr. Odulio and suggested that it would change his opinion in that based on Dr. Odulio's restrictions claimant would be able to earn \$280 post-injury when compared to the stipulated pre-injury wage of \$437.85, the result would be a thirty-six percent (36%) loss of ability to earn a comparable wage. By giving both opinions equal weight, the Appeals Board finds that the claimant has a forty and one-half percent (40.5%) loss of ability to earn a comparable wage.

The Appeals Board also finds it appropriate in this case to give equal weight to the loss of access to the open labor market and a reduction of ability to earn a comparable wage. See *Hughes v. Inland Container Corp.*, 247 Kan. 407, 799 P.2d 1011 (1990). Doing so yields a thirty-six and one-half percent (36.5%) permanent partial impairment which the Appeals Board finds to be an appropriate basis for the award in this case.

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 December 1, 1994, should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, David N. Fosberg, Jr., and against the respondent, Kansas Department of Transportation, and its insurance carrier, the State Self Insurance Fund and the Kansas Workers Compensation Fund, for an accidental injury which occurred April 18, 1990 and based upon an average weekly wage of \$437.85, for 99.86 weeks of temporary total disability compensation at the rate of \$271.00 per week or \$27,062.06, followed by 315.14 weeks at the rate of \$106.55 per week or \$33,578.17 for a thirty six and one-half percent (36.5%) permanent partial general body impairment of function, making a total award of \$60,640.23.

As of March 31, 1995 there is due and owing claimant 99.86 weeks of temporary total disability compensation at the rate of \$271.00 per week or \$27,062.06 followed by 158.57 weeks of permanent partial disability compensation at the rate of \$106.55 per week in the sum of \$16,895.63 for a total of \$43,957.69 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$16,682.54 is to be paid for 156.57 weeks at the rate of \$106.55 per week, until fully paid or further order of the Director.

Future medical benefits will be awarded only upon proper application to and approval of the Director. Unauthorized medical expense of up to \$350.00 is ordered paid to or on behalf of the claimant upon presentation of proof of such expense.

All compensation, medical expenses and costs are to be borne twenty percent (20%) by the respondent and eighty percent (80%) by the Kansas Workers Compensation Fund.

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

Fees necessary to defray the expenses of administration of the Kansas Workers Compensation Act are hereby assessed twenty percent (20%) to the respondent and eighty percent (80%) to the Kansas Workers Compensation Fund to be paid direct as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Barber & Associates Transcript of Regular Hearing	\$216.40
Deposition of Eustaquio O. Abay, II, M.D.	\$284.00
Deposition of Perlita Odulio, M.D.	\$175.00
Deposition of Robert L. Eyster, M.D.	\$197.00
Don K. Smith & Associates Deposition of Jerry Hardin	\$226.00
Pamela L. Lamar Deposition of Daniel D. Zimmerman, M.D.	\$443.85

IT IS SO ORDERED.

Dated this ____ day of March, 1995.

BOARD MEMBER

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- c: Randy S. Stalcup, Wichita, Kansas
- Jeffrey R. Brewer, Wichita, Kansas
- Michael T. Harris, Wichita, Kansas
- William F. Morrissey, Special Administrative Law Judge
- George Gomez, Director