



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

### ISSUES

The sole issue presented to the Appeals Board for review in this case is the nature and extent of claimant's disability.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

(1) The claimant, Robert L. Cox, while working for the respondent, Bingham Sand and Gravel Company on April 26, 1990, suffered a personal injury by accident which arose out and in the course of his employment. As the direct result of such personal injury, the claimant is entitled to an award of compensation benefits based on a two and one half percent (2 1/2%) permanent partial general body functional disability.

Claimant's testimony was taken by evidentiary deposition on November 30, 1992. At that time claimant was 60 years of age, had been a truck driver the majority of his adult life and had been employed by the respondent as a truck driver for five years.

On the date of his accident, April 26, 1990, the claimant's trailer of his truck had been loaded with coal and during the loading process the truck's tarp had been covered up. The claimant crawled up onto the load of coal to uncover the tarp. While pulling the tarp loose, he slipped and fell off the trailer to the old coal pit resulting in a injury to his left hip.

Medical treatment was first provided at Baxter Memorial Hospital in Baxter Springs, Kansas with referral for further medical treatment to a Dr. Chubb in Baxter Springs, Kansas. Finally, Dr. Ned Chase, an orthopedic surgeon in Joplin, Missouri, was designated by the respondent as the claimant's treating physician. Claimant was seen by Dr. Chase four or five times which resulted in conservative treatment with physical therapy for two fractures found in the claimant's left hip.

Dr. Chase released the claimant to return to his regular truck driving job with the respondent on July 30, 1990. The last time Dr. Chase saw the claimant was December 3, 1990, when he concluded that the claimant had recovered satisfactorily from his injury with no disability.

Claimant was examined and evaluated at the request of his attorney by William D. Smith, M.D., an orthopedic surgeon in Bartlesville, Oklahoma, on two occasions, October of 1990 and April of 1991. In a report dated April 8, 1991, after examining the claimant, Dr. Smith found the claimant to be minimally symptomatic with mild persisting left hip weakness. As a result of claimant's work-related injury, Dr. Smith assigned a five percent (5%) permanent impairment of function of the whole body.

The claimant has not been treated by a physician concerning his left hip since he saw Dr. Smith on April 8, 1991. He has returned to his regular truck driving job with the respondent at the same wage he was earning on the date of his accident.

K.S.A. 1989 Supp. 44-510e(a) provides that when an employee returns to work for an employer at a comparable wage there is a presumption that the employee has no work disability. In the present case, the claimant has returned to work for the respondent at a comparable wage. The claimant has made no effort to present evidence to rebut the presumption, therefore, the claimant's disability is limited to a percentage of functional impairment. Perez v. IBP, Inc., 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

In regard to functional impairment, the administrative law judge found that the claimant was entitled to a five percent (5%) permanent functional impairment. Respondent argues that the most credible evidence is the treating physician, Dr. Chase's opinion that the claimant has no permanent impairment as a result of his accidental injury. Claimant contends that the appropriate award is the administrative law judge's five percent (5%) permanent functional impairment based on Dr. Smith's opinion.

The Appeals Board, as the trier of fact, is free to consider all of the evidence and decide for itself the appropriate percentage of disability. See Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 784, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

Neither Dr. Chase nor Dr. Smith's evidentiary depositions were taken in this case. The medical evidence was submitted by joint stipulation in the form of a medical report of Dr. Smith and an office note of Dr. Chase. Both physicians are orthopedic surgeons with Dr. Chase being the treating physician and Dr. Smith being the evaluating physician. After reviewing the whole record, the Appeals Board finds and concludes that there is no persuasive reason to disregard Dr. Chase's opinion that the claimant has no residual

disability as a result of his accidental injury. Accordingly, the Appeals Board finds that both Dr. Chase and Dr. Smith's opinions in regard to permanent functional impairment should be given equal weight, entitling the claimant to a two and one half percent (2 1/2%) permanent partial general body disability based on functional impairment.

Since the nature and extent of disability was the sole issue presented to the Appeals Board for review, all other findings and conclusions of Special Administrative Law Judge William F. Morrissey in his Award dated January 12, 1994, not inconsistent with this order are incorporated and adopted herein as if fully set out.

### AWARD

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that award of Special Administrative Law Judge William F. Morrissey, dated January 12, 1994, is hereby modified an award is entered as follows:

AN AWARD OF COMPENSATION IS HEREBY ENTERED IN ACCORDANCE WITH THE ABOVE FINDINGS in favor of the claimant, Robert L. Cox, and against the respondent, Bingham Sand and Gravel Company, and its insurance carrier, Cigna

Insurance Companies, for an accidental injury sustained on April 26, 1990, and based upon an average weekly wage of \$348.64.

Claimant is entitled to 13.57 weeks of temporary total disability at the rate of \$232.44 per week or \$3,154.21, followed by 401.43 weeks at \$5.81 per week or \$2,332.31 for a two and one half percent (2 1/2%) permanent partial general body functional disability, making a total award of \$5,486.52.

As of July 22, 1994, there would be due and owing to the claimant 13.57 weeks of temporary total disability compensation at \$232.44 in the sum of \$3,154.21 plus 207.72 weeks of permanent partial disability compensation at the rate of \$5.81 per week in the sum of \$1206.85 for a total due and owing of \$4361.06 which is ordered paid in one lump sum by sending amounts previously paid. Thereafter, the remaining balance in the amount of \$1125.46 shall be paid at \$5.81 per week for 193.71 weeks or until further order of the Director of the Division of Workers Compensation.

**IT IS SO ORDERED.**

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

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

cc: Fred Spigarelli, Attorney at Law, PO Box 1449, Pittsburg, KS 66762  
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