

The Special Administrative Law Judge awarded claimant permanent partial disability benefits based upon a five percent (5%) whole body functional impairment. Claimant requested the Appeals Board to review the finding of nature and extent of disability. The respondent and its insurance carrier requested the Appeals Board to review the issues of claimant's entitlement to temporary total disability benefits and whether the respondent is entitled to a credit for any overpayment. Those are the issues now before the Appeals Board on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

For the reasons expressed below the Award of the Special Administrative Law Judge should be affirmed.

(1) Claimant alleges he injured his neck and upper back while working for the respondent on January 4, 1991, when he was helping to move a heavy box of tools. Claimant testified he immediately reported the incident to his supervisor and sought treatment later that day from Michael Morris, a chiropractor, who treated claimant on an intermittent basis through the date of the regular hearing held in April 1994. At regular hearing claimant testified he was then in physical therapy ordered by Joseph G. Sankoorikal, M.D.

Claimant alleges this injury has caused pain in his neck and down into the area between his shoulder blades. Before this alleged accident, claimant had previously injured the same part of his body in a work-related accident in 1982. A letter dated December 30, 1987 to claimant's attorney from Craig Yorke, M.D., a physician with The Menninger Foundation in Topeka, indicates claimant was in a car accident August 1987 and was complaining of chronic pain in his neck and both shoulders. X-ray films viewed by Dr. Yorke at that time revealed cervical spondylosis both at C6-C7 and in the upper thoracic spine.

Claimant presented the testimony of Michael K. Morris, D.C., the chiropractor who saw claimant on January 4, 1991, the day of the alleged accident. Claimant told Dr. Morris he sustained an injury at work that morning and was experiencing pain in his neck, shoulder, mid back and right scapula. Upon examining claimant, he observed muscle spasm in the lower neck and upper back. The doctor then treated claimant daily for three weeks before modifying his treatments to every other day. He released claimant to light duty in July 1991 with the restrictions of no lifting greater than twenty (20) pounds and no working with his arms overhead. He saw claimant for a total of sixty (60) times, the last visit occurring in March 1994. Although claimant told him about the injury to his neck in the early 1980s and that the problem was never corrected, the doctor understood that claimant was asymptomatic before the January 1991 injury. At his deposition taken in June 1991, Dr. Morris stated that claimant's condition was subject to remission and exacerbation and that it would be hard to say whether the January 1991 incident was a new occurrence or just an exacerbation of a prior injury that had been in remission. However, at his second deposition in May 1994, the doctor stated he believed claimant sustained permanent "disability" as a result of the January 1991 injury.

Claimant also presented the testimony of Joseph G. Sankoorikal, M.D., a physician board certified in physical rehabilitation. Dr. Sankoorikal first saw claimant for an

independent medical evaluation in March 1993 at claimant's attorney's request. During the initial examination, the doctor found tenderness in the cervical spine and multiple trigger points in the small muscles of the neck, trapezius and interscapular areas. His impression was myofascial pain syndrome and a history of cervical spondylosis at C5-6 and C6-7 with radicular symptoms. The doctor found claimant motivated to return to work and at that time recommended a short course of physical therapy followed by low-impact conditioning and work-hardening programs.

Dr. Sankoorikal performed a follow-up evaluation in December 1993. At that time claimant was complaining of only the pain in his neck and trapezius areas. The doctor found a few trigger points in the trapezius muscle and in the neck muscles, as well as tenderness in the trigger points in the interscapular area. He believes claimant has a five percent (5%) whole body functional impairment. However, because of claimant's earlier injuries and difficulties, Dr. Sankoorikal admits it is very difficult to determine how much of the impairment was caused by the 1991 incident.

The respondent presented the testimony of Robert M. Brown, M.D., a general medicine and family practitioner. He saw claimant in 1991 for back pain. Claimant told the doctor about a previous back injury in 1982 that had never healed. Dr. Brown believes claimant's symptoms were somewhat out of proportion to his physical condition and found no objective signs of injury. He believes claimant did not sustain any permanent injury of any significant amount as a result of the January 1991 incident and that claimant should be able to do most of the physical tasks required of the average worker.

Vocational rehabilitation counselor Monty Longacre testified for the claimant. Mr. Longacre met with the claimant in December 1993 to evaluate his loss of ability to perform work in the open labor market and his loss of ability to earn a comparable wage as a result of the January 1991 accident. Based on Dr. Morris' restrictions, Mr. Longacre believes claimant has lost fifty-six percent (56%) of his ability to perform work in the open labor market and fifty-seven percent (57%) of his ability to earn a comparable wage. However, in formulating his opinions, Mr. Longacre did not consider or otherwise take into account that claimant felt himself to be impaired and unable to perform strenuous physical labor at the time of the January 1991 accident, although claimant testified at length how impaired he was at the time of the accident and how he was unable to work as a laborer.

Based upon the above evidence, the Special Administrative Law Judge found that claimant had established a compensable, work-related accident on January 4, 1991 and that he was entitled to receive permanent partial disability benefits based upon a five percent (5%) whole body functional impairment. The Judge rejected Mr. Longacre's opinion because it was not reasonable in light of claimant's declarations that he was unable to perform strenuous manual labor at the time the accident occurred.

The Appeals Board agrees with the analysis and conclusions of the Special Administrative Law Judge. The Appeals Board finds it is more probably true than not that claimant sustained a new injury or permanent aggravation to his neck and upper back as a result of the January 4, 1991 incident, and that he now has a five percent (5%) whole body functional impairment for which he is entitled to receive permanent partial disability benefits. Likewise, the Appeals Board agrees with the Special Administrative Law Judge that for the reasons stated Mr. Longacre's opinion is not credible.

(2) The respondent requests the Appeals Board to review the issue whether claimant is entitled to an award for temporary total disability benefits. However, a close reading of the regular hearing transcript indicates the respondent did not make claimant's entitlement to temporary total disability benefits an issue to be decided by the Judge. The Special Administrative Law Judge did not address that issue in the Award, and it was neither listed as an issue to be decided by the judge in claimant's submission letter nor in the respondent's. In fairness to all parties, the Appeals Board will not consider issues raised for the first time on appeal. See Scammahorn v. Gibraltar Savings & Loan Assn., 197 Kan. 410, 416 P.2d 771 (1966). This is especially true when the issue is not raised before the parties have completed submission of their case. To hold otherwise would place the Appeals Board in the position of attempting to decide issues based upon an incomplete record and without the benefit of evidence that may have been presented if the parties were aware of the disputed matters.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey on February 21, 1995 should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of February 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Steven Hornbaker, Junction City, Kansas
 John D. Jurcyk, Lenexa, Kansas
 David G. Shriver, McPherson, Kansas
 Mark R. Wallace, White City, Kansas
 William F. Morrissey, Special Administrative Law Judge
 Philip S. Harness, Director