

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

ABSALON BANUELOS)	
Claimant)	
VS.)	
)	Docket No. 155,501
PRAIRIELAND PROCESSORS)	
Respondent)	
AND)	
)	
ITT HARTFORD)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Both claimant and the Kansas Workers Compensation Fund appealed from an Award entered by Administrative Law Judge John D. Clark on March 23, 1995. The Appeals Board heard oral argument September 8, 1995.

APPEARANCES

The claimant appeared by and through his attorney, Albert Herdoiza of Overland Park, Kansas. The respondent and its insurance carrier appeared by and through their attorney, Frederick L. Haag of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Scott J. Mann of Hutchinson, Kansas.

RECORD AND STIPULATIONS

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

ISSUES

The Administrative Law Judge awarded claimant benefits based upon a 47 percent permanent partial general body disability and assessed all of the award against the Kansas Workers Compensation Fund (Fund). On appeal, the Fund asked for review of the determination of the decision to assess the liability against the Fund and also asked for a review of the findings regarding the nature and extent of claimant's disability. Claimant, on the other hand, argues that the Administrative Law Judge erred by not adding certain fringe benefits to claimant's average weekly wage. Claimant also asks for a review of the findings relating to the nature and extent of disability and argues specifically that the Administrative Law Judge erred in giving equal weight to the vocational experts who testified.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds that the Award entered by the Administrative Law Judge should be modified.

(1) The Appeals Board finds that claimant's average weekly wage should be \$469.33. The parties stipulated that certain benefits should be considered "additional benefits" and, therefore, part of claimant's average weekly wage. The benefits to which the parties stipulated show both single and family coverage costs for health insurance. Claimant has testified that he is married and has seven children. The Appeals Board considers the clear implication of this stipulation to be one indicating the respondent paid \$247.40 per month for family health insurance coverage, a benefit which should be included as part of claimant's average weekly wage. The weekly value of this benefit would be \$57.09. The base wage plus overtime was \$412.24 and the total average weekly wage is, therefore, \$469.33.

(2) The Appeals Board finds claimant sustained a 54 percent permanent partial general body disability.

Both parties dispute the finding relating to the nature and extent of claimant's disability. The Administrative Law Judge found claimant sustained a 47 percent permanent partial general disability. He did so by giving equal weight to the opinions of two vocational experts, Mr. Michael Dreiling and Ms. Karen Terrill, and by giving equal weight to the wage and labor market components of the work disability. K.S.A. 44-510e. Both parties have argued, for various reasons, that it is inappropriate in this case to give equal weight to the two opinions. The Appeals Board disagrees and finds the methodology followed in this case appropriate. However, the adjustment in average weekly wage requires an adjustment in the wage loss component. Both Ms. Terrill and Mr. Dreiling conclude that claimant would be able to earn \$5.50 per hour after the injury. When that wage is compared to the actual pre-injury wage of \$469.33 the result is a 53 percent loss of ability to earn a comparable wage.

In Ms. Terrill's opinion, claimant has a 29 percent reduction in his ability to perform work in the open labor market. Mr. Dreiling concluded that claimant has an 80 percent reduction in his ability to perform work in the open labor market. Giving equal weight to

both opinions, the Appeals Board concludes that the claimant has a 54.5 percent loss of ability to perform work in the open labor market and a 53 percent loss of ability to earn a comparable wage. Giving equal weight to both factors, as authorized in Hughes v. Inland Container Co., 247 Kan. 407, 799 P.2d 1011 (1990), the Appeals Board finds claimant is entitled to benefits based upon 54 percent permanent partial general body disability.

(3) The Appeals Board concludes that the respondent has not established that respondent had knowledge of a pre-existing handicap. Therefore, all of the award should be assessed against the respondent, not the Kansas Workers Compensation Fund. As respondent points out, claimant had shoulder problems in July 1990. At that time he was referred by respondent for treatment by Dr. R. Kevin Bryant. However, Dr. Bryant released him to return to work without restrictions effective August 27, 1990. Dr. Bryant testified that at that point he believed claimant's shoulder condition was temporary and would resolve.

Respondent clearly had knowledge of the 1990 injury and medical treatment. However, the Appeals Board concludes that claimant did not have knowledge of an impairment which would constitute a handicap. Dr. Bryant has testified that he was concerned that continuing to work might aggravate claimant's shoulder. Nothing in the record, however, indicates respondent was advised of this fact. Respondent made no accommodation to the initial injury and the Appeals Board concludes that claimant did not have knowledge of an impairment constituting a handicap. Respondent has not established a basis or imposition of a liability on the Kansas Workers Compensation Fund. Hines v. Taco Tico, 9 Kan. App. 2d 633, 683 P.2d 1295 (1984). That portion of the Award is, therefore, reversed.

AWARD

WHEREFORE, the Appeals Board finds that the Award of Administrative Law Judge John D. Clark dated March 23, 1995, should be, and the same is hereby, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Absalon Banuelos, and against the respondent, Prairieland Processors, and its insurance carrier, ITT Hartford Accident & Indemnity, for an accidental injury which occurred July 31, 1990 through January 15, 1991 and based upon an average weekly wage of \$469.33, for 55 weeks of temporary total disability compensation at the rate of \$278 per week or \$15,290.00, followed by 360 weeks at the rate of \$168.97 per week or \$60,829.20 for a 54% permanent partial general body impairment of function, making a total award of \$76,114.20.

As of October 1, 1996, there is due and owing claimant 55 weeks of temporary total disability compensation at the rate of \$278 per week or \$15,290, followed by 243 weeks of permanent partial disability compensation at the rate of \$168.97 per week in the sum of \$41,059.71, for a total of \$56,349.71 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$19,403.28 is to be paid for 117 weeks at the rate of \$168.97 per week, until fully paid or further order of the Director.

The Appeals Board adopts all other orders entered by the Administrative Law Judge not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of September 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Albert Herdoiza, Overland Park, KS
Frederick L. Haag, Wichita, KS
Scott J. Mann, Hutchinson, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director