

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

<b>JEANETTE TILLMAN</b>	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 158,162
<b>SWIFT-ECKRICH, INC.</b>	)	& 158,163
Respondent	)	
AND	)	
	)	
<b>OLD REPUBLIC INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier requested review of the Award dated June 30, 1995, entered by Administrative Law Judge Robert H. Foerschler. The Appeals Board heard oral argument November 2, 1995.

**APPEARANCES**

James E. Martin of Overland Park, Kansas, appeared for the claimant. Mark E. Kolich of Kansas City, Kansas, appeared for the respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. In addition, the record includes the preliminary hearing transcript dated January 7, 1992, and the hearing transcript dated October 23, 1992.

**ISSUES**

The Administrative Law Judge awarded claimant permanent partial disability benefits for a 40 percent work disability. The respondent and its insurance carrier asked the Appeals Board to review the issue of nature and extent of disability. That is the only issue 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:

The Award entered by the Administrative Law Judge should be modified.

In Docket No. 158,162, claimant alleged repetitive trauma injury to her upper extremities during the period commencing May 18, 1991, and each and every work day thereafter through her last day of work in December 1992. In Docket No. 158,163, claimant alleged a right foot injury occurring on June 19, 1991. The parties stipulated that claimant sustained personal injury by accident arising out of and in the course of employment with the respondent on the dates alleged. Because the parties do not contest the accident date of May 18, 1991, as found by the Administrative Law Judge in Docket No. 158,162, the Appeals Board adopts that finding as its own. The parties also stipulated that claimant's average weekly wage for both alleged accidents was \$306.42.

The Administrative Law Judge found the testimony of claimant's treating physician, board-certified orthopedic surgeon Mark J. Maguire, M.D., to be persuasive and adopted that doctor's opinion that claimant had a 24 percent whole body functional impairment as a result of her work-related injuries to both upper extremities. Dr. Maguire diagnosed a bilateral overuse cumulative trauma type syndrome which included right carpal tunnel syndrome for which he operated, left carpal tunnel syndrome, and mild left shoulder impingement syndrome. Dr. Maguire testified that claimant should not return to any work which required repetitive use of either hand or upper extremity, lifting above shoulder height, lifting more than 20 pounds, and avoid prolonged standing. He does not believe claimant has sustained permanent injury or needs permanent work restrictions as a result of back or foot problems. He also utilized the AMA Guides to the Evaluation of Permanent Impairment to assess claimant's functional impairment.

As the treating physician, Dr. Maguire had the opportunity to see claimant on numerous occasions between January 1992 and July 1993, a period of approximately 18 months. The Appeals Board agrees with the Administrative Law Judge that Dr. Maguire's opinions are the most persuasive regarding claimant's final diagnosis, functional impairment rating, and work restrictions.

Because hers is an "unscheduled" injury, the determination of permanent partial general disability benefits is governed by K.S.A. 1990 Supp. 44-510e which provides in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been

reduced, taking into consideration the employee's education, training, experience, and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

The Administrative Law Judge based his finding of work disability upon the testimony of claimant's vocational expert witness, Michael J. Dreiling. He was the only labor market expert to testify regarding how claimant's injuries have affected her ability to work or earn wages. Mr. Dreiling testified that claimant has experienced a loss of ability to perform work in the open labor market in the range of 50 to 75 percent utilizing Dr. Maguire's medical restrictions. Averaging those percentages, the Appeals Board finds that claimant's loss of ability to perform work in the open labor market for the first prong of the permanent partial general disability formula is 62.5 percent. Regarding the second prong of the formula, the Appeals Board finds that claimant has no loss of ability to earn a comparable wage. Claimant testified that she had applied for jobs paying up to \$8.50 per hour, or \$340 per week. She testified she could perform those jobs and there appears no reason to doubt her belief. Therefore, the Appeals Board finds that claimant retains the ability to earn as much as what she was earning on the date of accident, or \$306.42.

As indicated by the statute quoted above, in determining permanent partial general disability the Appeals Board must consider both the 62.5 percent loss of ability to perform work in the open labor market and the zero percent loss of ability to earn a comparable wage. Because there appears no valid reason to afford one loss greater weight than the other, the Appeals Board averages those losses and finds that claimant has a 31 percent work disability for which she is entitled to receive permanent partial general disability benefits for her upper extremity injuries in Docket No. 158,162.

Claimant is denied permanent partial general disability benefits in Docket No. 158,163. That conclusion is based upon Dr. Maguire's opinion that the June 1991 accident did not cause claimant permanent injury or disability.

The Appeals Board hereby adopts the findings and conclusions of the Administrative Law Judge set forth in the Award to the extent they are not inconsistent with the findings and conclusions specifically made herein.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award dated June 30, 1995, entered by Administrative Law Judge Robert H. Foerschler should be, and hereby is, modified.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Jeanette Tillman, and against the respondent, Swift-Eckrich, Inc., and its insurance carrier, Old Republic

Insurance Company, for accidental injuries which occurred May 18, 1991, and based upon an average weekly wage of \$306.42 for 90.29 weeks of temporary total disability compensation at the rate of \$204.29 per week or \$18,445.34, followed by 324.71 weeks at the rate of \$63.33 per week or \$20,563.88, for a 31% permanent partial general disability, making a total award of \$39,009.22.

As of November 15, 1996, there is due and owing claimant 90.29 weeks of temporary total disability compensation at the rate of \$204.29 per week or \$18,445.34, followed by 196.57 weeks of permanent partial compensation at the rate of \$63.33 per week in the sum of \$12,448.78 for a total of \$30,894.12, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$8,115.10 is to be paid for 128.14 weeks at the rate of \$63.33 per week, until fully paid or further order of the Director.

The Appeals Board denies permanent partial disability benefits for the June 19, 1991, alleged accident in Docket No. 158,163.

The Appeals Board hereby adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 1996.

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BOARD MEMBER

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BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

- c: James E. Martin, Overland Park, KS
- Mark E. Kolich, Kansas City, KS
- Robert H. Foerschler, Administrative Law Judge
- Philip S. Harness, Director