

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

<b>JUANITA HARGISS</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 158,488
<b>J. C. AIR, INC.</b>	)	
Respondent	)	
AND	)	
	)	
<b>LIBERTY MUTUAL INSURANCE COMPANY</b>	)	
Insurance Carrier	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Claimant requested Appeals Board review of an Award entered by Administrative Law Judge Robert H. Foerschler on December 13, 1994. The Appeals Board heard oral argument in Kansas City, Kansas.

**APPEARANCES**

Claimant appeared by her attorney, Steven J. Quinn of Kansas City, Missouri. Respondent and its insurance carrier appeared by their attorney, James K. Blickhan appearing for Stephanie Warmund of Overland Park, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Charles D. Vincent of Paola, Kansas. There were no other appearances.

**RECORD AND STIPULATIONS**

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

Additionally, the Administrative Law Judge failed to list as part of the record a joint stipulation filed on April 18, 1994, that contained the medical records of Dr. Lawrence Eidt and another joint stipulation filed on March 7, 1994, that contained settlement documents from the State of Missouri Department of Labor and Industrial Relations Division of the Workers Compensation.

Included in the record as specified by the Administrative Law Judge was a preliminary hearing transcript dated June 25, 1992. The parties agree that this transcript was part of the record of the case but the respondent specifically objected before the Administrative Law Judge to the admissibility of medical records admitted at the preliminary hearing being considered as evidence in the record of the Award. That objection is sustained.

**ISSUES**

- (1) Claimant requested Appeals Board review of the single issue of nature and extent of claimant's disability.
- (2) Respondent, at oral argument, raised the issue of whether claimant was temporarily totally disabled from November 21, 1992, through December 23, 1992.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

(1) Claimant started working for the respondent on May 2, 1991. She was hired to perform electronic assembly line duties requiring her to use both of her hands repetitively. She was required to use pliers, cutters, and soldering irons in the performance of her assembly job duties. Additionally, she was required to pick up and install small parts on circuit boards. Claimant testified that while performing these repetitive hand movements, she started having symptoms of numbness in her fingers and pain in her wrists which caused her to frequently drop items at work and at home.

Claimant reported those symptoms to her supervisor on June 4, 1991. She first sought medical treatment for the symptoms from her family doctor who referred her to Ted E. Lockwood, M.D., a plastic surgeon, who had previously treated claimant for carpal tunnel syndrome. Dr. Lockwood subsequently referred claimant to Dr. J. B. Moore, a hand surgeon, located in Kansas City. Dr. Moore diagnosed right carpal tunnel syndrome and performed a right carpal tunnel release on July 11, 1991. Post-operatively, claimant had increased symptoms, this time, up into her arm, elbow, and shoulder. Because the symptoms migrated up the claimant's arm, Dr. Moore, a hand surgeon, referred claimant for treatment to Daniel

D. Schaper, M.D., an orthopedic surgeon, who also had previously seen claimant for shoulder complaints in April 1991. Dr. Schaper diagnosed claimant with adhesive capsulitis and reflex sympathetic dystrophy. He treated claimant with stellate ganglion blocks and physical therapy.

At the request of respondent's insurance carrier, claimant was referred for further medical treatment to Dale E. Darnell, M.D., an orthopedic surgeon, located in Kansas City, Missouri. Dr. Darnell treated claimant from January 15, 1992, through November 20, 1992. Dr. Darnell's treatment was only concerned with claimant's right shoulder problems. Dr. Darnell's diagnosis was adhesive capsulitis of the right shoulder or stiff shoulder. On May 26, 1992, Dr. Darnell performed a closed manipulation of the right shoulder under anesthetic which was followed by extensive physical therapy treatment. However, the claimant showed little or no improvement. Dr. Darnell, on August 19, 1992, performed diagnostic arthroscopic surgery of the right shoulder and a subacromial decompression. He found a Grade III-IV slap lesion of her right shoulder and a lot of synovitis present. Claimant was placed on a physical therapy program for further rehabilitation. After that surgery, claimant's condition again did not improve. Dr. Darnell last saw claimant on November 20, 1992. At that time, he notified her that his only other recommendation would be an open subacromial decompression which may or may not be effective. Claimant never contacted Dr. Darnell after the November 20, 1992 visit, thus Dr. Darnell concluded, she was not interested in any further treatment.

Dr. Darnell testified the claimant would not be able to return to her pre-injury occupation. He restricted claimant from participating in employment which would require her working with her right arm overhead or out in front of her. Any job claimant would return to would have to be using her left hand exclusively with her right hand as a helper. Dr. Darnell testified that as of the November 20, 1992, visit, he had not released claimant to return to any employment. The doctor did not express an opinion on claimant's permanent functional disability.

C. Erik Nye, M.D., an orthopedic surgeon in Shawnee Mission, Kansas, was appointed by the Administrative Law Judge to perform an independent medical examination of the claimant. After reviewing claimant's past medical records, Dr. Nye examined claimant on November 2, 1993. Dr. Nye found claimant had complaints to her right upper extremity to the extent it was so painful that it would not function and she could not use it. During the examination, claimant simply sat and held her injured upper extremity. Claimant was taking six Hydrocodone per day for her extreme pain. The doctor attempted to conduct a physical examination of claimant's right upper extremity and shoulder but any attempt he made to move her upper extremity was so painful that the claimant resisted. Dr. Nye did find claimant to have a weak grip. Claimant complained of current pain in her upper extremity that radiated down to her right hand resulting in numbness and weakness. Dr. Nye concluded claimant had adhesive capsulitis of her right shoulder secondary to her hand/shoulder syndrome, a variant of reflex sympathetic dystrophy. Dr. Nye opined that both the adhesive capsulitis and reflex sympathetic dystrophy conditions were not present until after her right carpal tunnel release performed by Dr. Moore on July 11, 1991. Dr. Nye testified both conditions could be brought on by surgery. Dr. Nye expressed his opinion that claimant had a 50 percent permanent functional impairment of the right arm. He converted the upper

extremity opinion to a 30 percent permanent functional impairment of the whole body. The doctor opined claimant was not able to work in any form of occupation. He recommended claimant be seen at a future time by a specialist in reflex sympathetic dystrophy in an effort to salvage the patient to a point she could tolerate her extreme pain.

The Administrative Law Judge found claimant was eligible for work disability because of the severe injury to her right upper extremity and right shoulder. The Administrative Law Judge found those injuries to be so severe that it rendered claimant unable to perform job functions of electronic assembler which she had performed for the respondent and the majority of her adult life. The Administrative Law Judge examined the testimony of the two vocational experts who testified in this case, Michael Dreiling for the claimant and Gary Weimholt on behalf of the respondent. The Administrative Law Judge found Mr. Weimholt's opinion that claimant had retained the ability to earn \$5 per hour post injury the only accurate measure in the record on which to base a work disability award. Accordingly, the Administrative Law Judge compared this \$200 per week post-injury wage with claimant's actual earnings at the time she worked for the respondent of \$290 per week. The Administrative Law Judge concluded claimant had a 31 percent loss of wage earning ability because of her injuries. The Administrative Law Judge went on to find that the 31 percent wage earning loss was the proper basis from which to award claimant permanent partial general disability benefits based on a work disability. The Administrative Law Judge determined both vocational experts' opinions on claimant's loss of ability to perform work in the open labor market were flawed and, therefore, not credible.

The respondent argued the claimant was not eligible for a work disability for two reasons. First, the respondent alleged the claimant was offered a position in December 1993 as a security guard within her permanent restrictions and she refused to even attempt the job. Therefore, the respondent asserted the no work disability presumption applies and the claimant is limited to her functional impairment. See Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995). Additionally, respondent argued claimant was limited to permanent partial disability benefits based on functional impairment only because neither of the vocational experts' opinions took into consideration claimant's severe restrictions resulting from her prior injuries sustained from her work activities before she was employed by the respondent. Respondent contended that the proper award in this matter would be Dr. Nye's 30 percent functional impairment opinion. The respondent disagreed with the method the Administrative Law Judge arrived at the 31 percent award. However, the respondent requested the Appeals Board to affirm the award as the resulting disability figure was acceptable.

Claimant argued the Administrative Law Judge erred when he found claimant was limited to permanent partial general disability benefits of 31% based on work disability. Claimant contended the opinions of the independent medical examiner, C. Erik Nye, M.D., and vocational expert, Michael Dreiling, coupled with claimant's credible testimony, established claimant, post-injury, had a 100% loss of her ability to perform work and earn a comparable wage. Thus, claimant asserted she was entitled to permanent partial disability benefits based on a 100% work disability. It should be noted, the Appeals Board clarified at oral argument, that claimant's claim for disability benefits was being made pursuant to the

permanent partial disability statute found at K.S.A. 1990 Supp. 44-510e, and not pursuant to the permanent total disability statute found at K.S.A. 1990 Supp. 44- 510c.

The regular hearing was held in this matter on January 14, 1994. Claimant testified at that time she was 58 years of age and she had a seventh grade education. Claimant's work history consisted of working as an electronics assembler on a moving assembly line requiring the repetitive use of her hands while working with very small parts, pliers, cutters, and soldering irons. Prior to her being employed by the respondent, claimant was employed by Wilcox Electric Co. for some 25 years and Aviation Systems for 2 years in the performance of electronics assembly work. While employed by Wilcox Electric Co., claimant injured her upper extremities which required multiple surgical procedures all performed by orthopedic surgeon Dr. Ted Lockwood of Kansas City, Missouri. A carpal tunnel release was performed on July 23, 1985; a left carpal tunnel release was performed on September 14, 1987; an additional left hand surgery was performed on December 21, 1987; a left ulnar nerve decompression surgery was performed on January 14, 1988; and a trigger finger release of the right long, ring, and small fingers was performed in November 1988. As a result of those injuries, claimant received workers compensation settlements for her right hand in 1986 and for both of her hands in 1989.

Claimant left her employment at Wilcox Electric Co. in 1989 because her husband had retired from the company and she did not want to commute the required 60 miles per day alone. Claimant obtained employment with Aviation Systems, Inc. as an electronics assembler after she terminated her employment with Wilcox. Claimant denied she had any physical problems while employed by Aviation Systems, Inc. The reason claimant left Aviation Systems, Inc. was that the company went bankrupt. Claimant's next employment was with J. C. Penney Outlet as a stock handler from March 26, 1991 through April 21, 1991. Claimant quit that type of work because the work aggravated her shoulders and made them symptomatic. While claimant was working for J. C. Penney Outlet she saw both Dr. Eidt and Dr. Schapero for her shoulder pain.

Immediately following claimant's termination from J. C. Penney, she commenced her job with the respondent as an electronic assembler on May 2, 1991. Claimant testified she believed she could perform this light assembly job without the job causing her any physical problems. Claimant testified the pain she had in her shoulders while she worked for J. C. Penney was from a bursitis condition and was not the same pain she was now experiencing going up her arm.

On the date of regular hearing, claimant remained on the pain medication Hydrocondone that had been previously prescribed by Dr. Darnell even though she had not seen Dr. Darnell since her last visit of November 20, 1992. In addition to the Hydrocondone medication, claimant testified she took Labrum for her nerves and Tagamet for her stomach. Claimant testified her right arm pain was so severe she could not sleep at night. Claimant established that her right arm and shoulder problems were so debilitating she could not perform the activities of everyday living. Claimant had not worked since the last day she worked for the respondent on July 9, 1991, two days prior to her right carpal tunnel release.

The Appeals Board agrees with the Administrative Law Judge that claimant is eligible for permanent partial general disability benefits based on work disability. However, the Appeals Board disagrees the claimant should be limited to work disability based only on a wage loss component of the work disability test. The Appeals Board finds the greater weight of the credible evidence supports a work disability based on both claimant's loss of ability to perform jobs in the open labor market and loss of ability to earn a comparable wage.

The Appeals Board finds the medical testimony and reports of Dr. Darnell and Dr. Nye support the conclusion that claimant's right upper extremity including her shoulder is severely impaired. Furthermore, since claimant is right-hand dominate the severe impairment limits claimant's ability to work and her ability to perform essential daily living activities. Dr. Darnell restricted claimant's return to work to only allow her to use her left hand almost exclusively and her right hand as a helper. Dr. Nye examined the claimant and found her in extreme pain and her injured right upper extremity was not functional. He opined claimant could not use the right upper extremity to perform any occupation or to perform the activities of daily living.

The Appeals Board has examined the testimony and the reports of the two vocational experts, Mr. Dreiling and Mr. Weimholt. The Appeals Board is mindful the Administrative Law Judge discounted Mr. Dreiling's opinion because the Administrative Law Judge felt the medical evidence and claimant's previous job experiences indicated claimant had retained some ability to work and earn wages. The Administrative Law Judge questioned Mr. Weimholt's opinion because he took into consideration claimant's previous restrictions when forming his opinion on her loss of labor market. The Appeals Board finds the medical opinions of Dr. Darnell and Dr. Nye indicate that claimant's dominate right upper extremity was severely disabled as a result of her work-related injuries. The Appeals Board also finds the vocational expert opinion of Michael Dreiling is the most persuasive in regard to claimant's loss of labor market and loss of comparable wage. The Appeals Board concludes that Mr. Dreiling's opinions should be given the most weight in determining claimant's appropriate work disability. Furthermore, claimant's testimony is persuasive as it has been consistent in describing her symptoms and physical problems as a result of her injury to her right upper extremity and shoulder.

Mr. Dreiling formed his opinion on claimant's loss of ability to perform work in the open labor market and her loss of ability to earn comparable wages by taking into consideration claimant's limited education, limited job experience, age, and medical restrictions to her dominate right arm. Mr. Dreiling opined that based on those considerations, claimant had a 100 percent loss of capacity to perform work in the open labor market and a 100 percent loss of capacity to earn a comparable wage. Additionally, Mr. Dreiling opined that the claimant would not benefit from any type of vocational rehabilitation program. Mr. Dreiling reviewed the jobs that Mr. Weimholt had determined the claimant retained the ability to perform. He opined, taking into consideration all the factors of the case, that claimant could not perform those jobs. Accordingly, the Appeals Board finds, based on the entire evidentiary record, claimant is entitled to a permanent partial disability award based on work disability of 100 percent.

(2) Respondent questioned whether the evidence established claimant was temporarily totally disabled from November 21, 1992 through December 23, 1992 a period of 4.71 weeks. The last time claimant saw Dr. Darnell was November 20, 1992. At that time, Dr. Darnell indicated to the claimant that the only additional medical treatment that he knew could help her severe right shoulder pain would be an open abduction surgery. The doctor gave claimant the choice of whether or not to have the surgery. Claimant was told to think about whether or not she wanted to have the surgery and to notify him of her decision. Dr. Darnell testified claimant did not contact him and notify him of her decision. The Appeals Board finds since the claimant chose not to have the additional surgical treatment, she at that time had met maximum medical improvement on November 20, 1992. Therefore, respondent should be given credit in the award for those 4.71 weeks of temporary total benefits paid to the claimant.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler dated December 13, 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, Juanita Hargiss, and against the respondent, J. C. Air, Inc., and Liberty Mutual Insurance Company and Kansas Workers Compensation Fund for an accidental injury which occurred on June 4, 1991, and based upon an average weekly wage of \$290.

Claimant is entitled to 71.29 weeks temporary total disability compensation at the rate of \$193.34 per week or \$13,783.21, followed by 343.71 weeks of permanent partial compensation at the rate of \$193.34 per week in the sum of \$66,452.89, for a 100% permanent partial general work disability, making a total award of \$80,236.10.

As of October 26, 1996, there is due and owing claimant 71.29 weeks of temporary total disability compensation at the rate of \$193.34 per week or \$13,783.21, followed by 210.42 weeks of permanent partial disability compensation at the rate of \$193.34 per week in the sum of \$40,682.60 for a total of \$54,465.81 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$25,770.29 is to be paid for 133.29 weeks at the rate of \$193.34 per week, until fully paid or further order of the director.

Unauthorized medical expense pursuant to K.S.A. 1990 Supp. 44-510(c) in the amount of \$350 is awarded the claimant upon proper presentation of a statement.

Pursuant to K.S.A. 1990 Supp. 44-536, the claimant's contract of employment with her attorney is hereby approved.

Pursuant to the stipulation filed by the Kansas Workers Compensation Fund and the respondent, the Kansas Workers Compensation Fund is responsible for 35% of the award and costs.

The cost of the transcripts and the record are taxed against the respondent and insurance company as follows:

Richard Kupper & Associates	\$196.80
Hostetler & Associates, Inc.	\$368.50
Rebecca Ramsay	\$582.30
AAA Reporting Service	\$497.05

**IT IS SO ORDERED.**

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

---

BOARD MEMBER

---

BOARD MEMBER

---

BOARD MEMBER

- c: Steven J. Quinn, Kansas City, Mo
- Stephanie Warmund, Kansas City, Mo
- Charles Vincent, Paola, KS
- Robert H. Foerschler, Administrative Law Judge
- Philip S. Harness, Director