

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

ALICIA DUNCAN
Claimant

VS.

RGCS & S, INC.
Respondent

AND

ST. PAUL INSURANCE COMPANY
Insurance Carrier



Docket No. 160,022

ORDER

The Appeals Board has considered the parties' arguments in the request to review the Award of Administrative Law Judge Thomas F. Richardson, dated September 6, 1994.

APPEARANCES

Claimant appeared by her attorney, David J. Rebein of Dodge City, Kansas. The respondent and its insurance carrier appeared by their attorney, B.G. Larson of Dodge City, Kansas. There were no other appearances.

RECORD

The record considered by the Appeals Board is enumerated in the Award of the Administrative Law Judge.

STIPULATIONS

The stipulations of the parties are listed in the Award of the Administrative Law Judge and are adopted by the Appeals Board for this review.

ISSUES

The Administrative Law Judge found claimant entitled to permanent partial general body disability benefits for a work-related injury to her feet. The respondent and insurance carrier appeal the findings of the Administrative Law Judge and request the Appeals Board review the findings of the Administrative Law Judge pertaining to nature and extent of disability, if any.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

The finding of the Administrative Law Judge that claimant has sustained a seventy-two percent (72%) work disability and is entitled to benefits based upon that finding should be affirmed.

The Award of the Administrative Law Judge sets out the facts in detail not necessary to repeat here. The Appeals Board adopts the findings set forth in the decision that are not inconsistent with those set forth herein. The evidence is uncontroverted that claimant has sustained either permanent injury or permanent aggravation to both feet and ankles as a result of working seventy-five to eighty (75-80) hours per week standing and walking on a concrete floor while working for the respondent.

The Appeals Board adopts the analysis of the Administrative Law Judge regarding work disability as it is supported by the evidence. Vocational rehabilitation expert, Karen Terrill, testified that claimant has lost eighty-one percent (81%) of her ability to perform work in the open labor market considering the restrictions of Dr. Mohsen; ninety to ninety-five percent (90-95%) of her ability to perform work in the open labor market considering the restrictions of Dr. Mills; and, fifty to sixty percent (50-60%) loss of ability to perform work in the open labor market using the opinions of Dr. Drescher. Comparing claimant's loss of access to the open labor market to her sixty-eight percent (68%) loss of ability to earn a comparable wage, as opined by Ms. Terrill, the Administrative Law Judge was correct in concluding claimant has a seventy-two percent (72%) work disability.

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record." K.S.A. 44-501(a).

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." K.S.A. 44-508(g).

In the case before us, the weight of the credible evidence supports the claimant's contention that as a result of her work-related injury she is unable to continue in her former employment and is entitled to a significant work disability. The Appeals Board is not required to weigh equally the loss of access to the open labor market and loss of ability to earn a comparable wage. See *Schad v. Hearthstone Nursing Center*, 16 Kan. App. 2d 50, 52-53, 816 P.2d 409, rev. denied 250 Kan. 806 (1991). However, in this case there appears to be no compelling reason to give either factor greater weight and accordingly they are weighed equally.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Thomas F. Richardson entered in this proceeding on September 6, 1994, should be, and hereby is, affirmed in all respects, and that the orders contained in the Award are hereby adopted by the Appeals Board as its own.

IT IS SO ORDERED.

Dated this ____ day of February, 1995.

BOARD MEMBER _____

BOARD MEMBER _____

BOARD MEMBER _____

cc: B.G. Larson, Dodge City, KS
David Rebein, Dodge City, KS
Thomas F. Richardson, Administrative Law Judge
George Gomez, Director