

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

MIKE FRANCIS

Claimant

VS.

IBP, INC.

Respondent
Self-Insured

AND

KANSAS WORKERS COMPENSATION FUND

Docket Nos. 159,945
160,308

ORDER

Respondent appeals from an Award entered by Administrative Law Judge Floyd V. Palmer dated March 31, 1995. Oral arguments were made to the Appeals Board on September 18, 1995. Appeals Board member Gary M. Korte has recused himself from this proceeding and Board Member Pro Tem Ernest L. Johnson has been appointed in his place.

APPEARANCES

Claimant appeared by his attorney, Diane F. Barger of Emporia, Kansas. The self-insured respondent appeared by its attorney, Paul K. Thoma of Kansas City, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, James B. Biggs, Topeka, 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 listed in the Award of the Administrative Law Judge are adopted by the Appeals Board for this review.

ISSUES

The issues for determination by the Appeals Board in both docketed claims are as follows:

- (1) Nature and extent of claimant's disability; and
- (2) Liability of the Kansas Workers Compensation Fund.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record, the Appeals Board finds that the Award entered by the Administrative Law Judge should be affirmed. The findings of fact and conclusions of law as to both docketed claims as enumerated in the Award are found to be accurate, appropriate and are hereby adopted by the Appeals Board as if specifically set forth herein.

In Docket Number 159,945, the Appeals Board agrees with the finding by the Administrative Law Judge that claimant has proven that his work for respondent aggravated, accelerated and intensified claimant's shoulder conditions and the resulting disability is compensable. The Appeals Board further agrees that, in light of the restrictions imposed by Dr. Fred Wood, claimant is entitled to an award based on work disability. Pursuant to Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990), permanent partial general disability should be determined by the extent (percentage) of reduction of the employee's ability to perform work in the open labor market and the employee's ability to earn a comparable wage. Both prongs of this two-part test were properly considered in the testimony of Mr. Monty Longacre in light of the employee's education, training, experience and capacity for rehabilitation. K.S.A. 1991 Supp. 44-510e(a).

Giving due weight to the restrictions imposed by Dr. Wood and the uncontroverted opinions of claimant's vocational expert, Mr. Longacre, as to claimant's post-accident ability to earn a comparable wage in the open labor market and claimant's labor market loss, we agree with the Administrative Law Judge and find the claimant to have sustained a ninety-eight and one-half percent (98.5%) work disability.

Finally, the Appeals Board agrees that the respondent has failed to sustain its burden of proof that it knowingly retained a handicapped employee. Therefore, the Administrative Law Judge properly found that no liability for the award to claimant should be shifted to the Kansas Workers Compensation Fund.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Floyd V. Palmer dated March 31, 1995, should be, and hereby is, affirmed in all respects.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Mike Francis, and against the respondent, IBP, Inc., a self-insured, for an accidental injury sustained as follows:

In Docket No. 159,945 (Date of Accident on or about 5/91 to on or about 10/21/91)

The claimant is entitled to 58 weeks temporary total disability at the rate of \$289.00 per week or \$16,762.00 followed by 357 weeks at \$289.00 per week or \$103,173.00 for a 98.5% permanent partial general body disability making a total award of \$100,000.00.

As of February 29, 1996, there would be due and owing to the claimant 58 weeks temporary total compensation at \$289.00 per week in the sum of \$16,762.00 plus 169.57 weeks permanent partial compensation at \$289.00 per week in the sum of \$49,005.73 for a total due and owing of \$65,767.73, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance shall be paid at \$289.00 per week until the maximum amount of \$100,000.00 has been paid, or until further order of the Director.

Claimant is awarded future medical treatment on application to the Director.

Claimant is awarded unauthorized medical treatment up to \$350.00 upon presentation of proper statements.

No portion of this award is assessed against the Fund.

Claimant is not awarded additional authorized medical expense or medical reimbursement.

Claimant's attorney fees are approved up to 25% of the disability award subject to the terms of K.S.A. 1991 Supp. 44-536.

In Docket No. 160,308 (Date of Accident on or about June, 1990 to on or about May 6, 1991)

Claimant is not awarded any disability compensation for this compensable claim.

Claimant is awarded medical treatment expense and future medical treatment upon application to the Director.

Claimant is awarded unauthorized medical expense up to \$350.00 upon presentation of proper statements.

None of this award is assessed against the Kansas Workers Compensation Fund.

K.S.A. 44-510a credit is not allowed.

In both Docket Numbers 159,945 and 160,308, claimant's motion for assessment of costs and expenses to respondent and the Fund is denied.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent and insurance carrier to be paid direct as follows:

Fivecoat & With	Unknown
Gene Dolginoff Associates, LTD	\$ 467.90
Kelly, York & Associates, LTD	\$ 284.21
Correll Reporting Service	\$ 252.90
Appino & Achten Reporting Service	\$ 739.85
Nora Lyon & Associates, Inc.	\$1076.25

IT IS SO ORDERED.

Dated this ____ day of February 1996.

BOARD MEMBER PRO TEM

BOARD MEMBER

BOARD MEMBER

c: Diane F. Barger, Emporia, Kansas
Paul K. Thoma, Kansas City, Kansas
James B. Biggs, Topeka, Kansas
Ernest L. Johnson, Board Member Pro Tem
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director