

ISSUES

Respondent appeals from an award for thirty-five percent (35%) permanent partial general disability. The issues raised and argued on appeal were:

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) The Appeals Board finds the claimant sustained a twenty-four and one-half percent (24.5%) permanent partial general disability as a result of an accidental injury arising out of and in the course of her employment with the respondent.

Claimant suffered injury to her low back, upper back and left shoulder while operating a Kiwi brush machine in April of 1991. Operation of the machine required claimant to pick up objects weighing fifty to sixty (50-60) pounds from the floor, twist and put them on a bench in intervals of a few seconds. Claimant received treatment by or at the direction of Dr. Brown, Dr. Fleske, and Dr. Gillinwater. Of the treating physicians, only Dr. Brown testified. Dr. Brown diagnosed myofascial pain syndrome or fibromyalgia. He rated her functional impairment at ten percent (10%) of the body as a whole and recommended that she not lift more than fifty (50) pounds occasionally or twenty-five to thirty (25-30) pounds on a frequent basis. Dr. Brown testified that six percent (6%) of the total ten percent (10%) functional impairment was for two levels of disc degeneration and four percent (4%) was for myofascial pain syndrome. Dr. Brown expressed his opinion that the work activity did aggravate the pre-existing disease in the low back and that aggravation was permanent.

Dr. Schlachter examined claimant at the request of claimant's attorney. He diagnosed fibrositis syndrome and also evaluated functional impairment at ten percent (10%) of the body as a whole. He recommended claimant be restricted from repetitive lifting of more than twenty-five (25) pounds and single lifts of no more than thirty-five (35) pounds. Dr. Schlachter recommended no repetitive bending, twisting or working in awkward positions and indicated that claimant should have a job where she can sit part time and stand part time.

Claimant has not returned to work for respondent since the injury and the Appeals Board finds, based upon the work restrictions, claimant could not return to that same job. Dr. Brown felt she might be able to return with some accommodations, but did not specify what accommodations would be necessary. The restrictions Dr. Schlachter recommends would prohibit claimant from performing the work she had performed at Fuller Brush. Claimant testified she would not be able to perform the Fuller Brush work. Claimant participated in a vocational rehabilitation plan which included training in typing, computers, bookkeeping and transcribing at Barton County Community College. The plan also attempted to help her find a job. Claimant ultimately found a job on her own at Sunflower Training Center where, according to claimant, she earns \$5.35 per hour for thirty-four (34) hours per week.

Since claimant has not and, in the opinion of the Appeals Board, cannot return to work at a comparable wage, she is entitled to an award based on work disability. See K.S.A. 1990 Supp. 44-510e. In order to determine the extent of her work disability, the Appeals Board must consider the reduction in claimant's ability to earn wages and the reduction in her ability to obtain employment in the open labor market. Hughes v. Inland Container, 247 Kan 407, 799 P.2d 1011 (1990).

Two experts testified regarding elements of work disability. Mr. Jerry Hardin testified that in his opinion claimant's ability to obtain employment in the open labor market had been reduced by sixty to sixty-five (60-65%). Mr. Hardin relied solely on the restrictions recommended by Dr. Schlachter and he expressed no opinions based on the restrictions of Dr. Brown. He also testified that claimant's ability to earn wages had been reduced by thirty-six percent (36%). The wage factor was calculated on the basis of a comparison between \$171.00 he understood she was earning in her post-injury job, and the \$276.00 he understood she earned pre-injury. He also testified, however, that he believed based upon her education and training she had the ability to earn \$250.00 per week. The parties have stipulated that the pre-injury wage, including fringes and overtime, was \$352.94. Comparing the stipulated pre-injury wage to \$250.00 per week yields a twenty-nine (29%) wage loss factor.

Ms. Karen Terrill testified and gave separate opinions based upon Dr. Schlachter's and Dr. Brown's restrictions. From Dr. Schlachter's restrictions she concluded that claimant had suffered thirty-nine percent (39%) loss of access to the open labor market and from Dr. Brown's restrictions a six percent (6%) loss of access to the open labor market. She concluded there was a zero percent (0%) loss of ability to earn a comparable wage.

As the finder of facts, the Appeals Board must consider both prongs of the test for determining work disability. In this case, the Appeals Board considers it appropriate to weigh equally Mr. Hardin's conclusions based upon Dr. Schlachter's restrictions as the one extreme and Ms. Terrill's opinions based on Dr. Brown's restrictions as the other extreme. This weighs equally Mr. Hardin's sixty to sixty-five (60-65%) and Ms. Terrill six percent (6%) reduction in access to the open labor market. The result is a thirty-four and one-quarter percent (34.25%) which the Appeals Board finds to be the claimant's loss of access to the open labor market. By weighing equally Mr. Hardin's opinion of twenty-nine percent (29%) wage reduction and Ms. Terrill's zero percent (0%), the Appeals Board finds claimant has a reduction in her ability to earn a comparable wage of fourteen and one-half percent (14.5%).

The Appeals Board also considers it appropriate to weigh equally claimant's loss of access to the labor market and reduced ability to earn a comparable wage as authorized by *Hughes v. Inland Container Corp.*, 247 Kan. 407, 422, 799 P.2d 1011 (1990). When both factors are given equal weight in this case the result (rounded to the nearest one-half percent) is twenty-four and one-half percent (24.5%) which the Appeals Board finds to be claimant's work disability. Claimant is, therefore, awarded benefits based upon a twenty-four and one-half percent (24.5%) permanent partial general disability.

(2) The Appeals Board finds that the Workers Compensation Fund should be responsible for sixty percent (60%) of the benefits awarded.

In order to shift responsibility for payment of benefits, respondent must show both knowledge of the pre-existing handicap and contribution of the handicap to the ultimate disability. See K.S.A. 1990 Supp. 44-567.

Through the testimony of Patty Ogle, respondent established knowledge of claimant's pre-existing degenerative low back condition prior to the current injury. Claimant had been off work in 1988 or 1989 due to this condition and respondent filed a Form 88 which reflected respondent's knowledge of the impairment. The Appeals Board finds that respondent had the requisite knowledge of a pre-existing impairment.

The record also establishes that the pre-existing handicap contributed to the disability for which benefits are awarded. Dr. Schlachter refused to attribute any of his ten percent (10%) rating to the pre-existing impairment. Dr. Brown testified that six percent

(6%) of the total ten percent (10%) impairment rating is a result of aggravation of the low back degenerative disease. Four percent (4%) of the total ten percent (10%) was for myofascial pain unrelated to the pre-existing condition. He also testified that but for pre-existing disc disease, the injury of April 1991 probably or most likely would not have resulted in the six percent (6%) impairment in the claimant's low back. The Appeals Board finds the testimony of Dr. Brown to be persuasive on this issue. The Appeals Board, therefore, concludes the Kansas Workers Compensation Fund shall be responsible for payment of sixty percent (60%) of the Award

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge George R. Robertson 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, Lenora M. Hutton, and against the respondent, Fuller Brush Company, its insurance carrier, Aetna Casualty and Surety, and the Kansas Workers Compensation Fund, for an accidental injury which occurred on April 17, 1991 and based upon an average weekly wage of \$352.94, for 93.38 weeks of temporary total disability compensation at the rate of \$235.31 or \$21,973.25, followed by 321.62 weeks at the rate of \$57.65 or \$18,541.39 for a 24.5% permanent partial general body impairment of function, making a total award of \$40,514.64

As of January 3, 1995, there is due and owing claimant 93.38 weeks of temporary total disability compensation at the rate of \$235.31 or \$21,973.25, followed by 100.62 weeks of permanent partial disability compensation at the rate of \$57.65 per week in the sum of \$5,800.74 for a total of \$27,773.99 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$12,740.65 is to be paid for 221 weeks at the rate of \$57.65 per week, until fully paid or further order of the Director.

The Kansas Workers Compensation Fund shall be responsible for 60%, the respondent, Fuller Brush Company and Aetna Casualty & Surety Company, for 40% of all compensation, including medical and unauthorized medical.

Further award is made that claimant is entitled to medical expenses and unauthorized medical expenses, if any.

Future medical will be considered upon proper application.

The Court finds attorney fee contract is reasonable and approves such fee arrangement.

Therefore, pursuant to K.S.A. 44-536, a lien is placed against the award in the amount of twenty-five percent (25%) in favor of Mr. Chris Clements.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed to respondent to pay 40% and the Workers Compensation Fund 60% and such are directed to pay costs of the transcripts as follows:

TRI-STATE REPORTING SERVICE	
Preliminary Hearing Transcript	\$105.90
Dated January 14, 1993	
IRELAND COURT REPORTING	
Deposition of Jerry Hardin	\$305.30

Dated July 14, 1993

Deposition of Dr. Ernest Schlachter Dated July 14, 1993	\$161.80
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Total	\$467.10
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UNDERWOOD AND SHANE

Deposition of Patty Ogle Dated August 3, 1993	\$147.90
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Deposition of Dr. C. Reiff Brown Dated January 17, 1994	\$275.70
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Total	\$423.60
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OWENS, BRAKE & ASSOCIATES

Regular Hearing Transcript Dated April 13, 1994	\$208.01
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HARPER & ASSOCIATES

Deposition of Karen Crist Terrill Dated June 27, 1994	\$196.98
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IT IS SO ORDERED.

Dated this ____ day of January, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Chris A. Clements, Attorney at Law, Wichita, KS
- Julie A. Bedinghaus, Attorney at Law, Great Bend, KS
- Richard L. Friedeman, Attorney at Law, Great Bend, KS
- George R. Robertson, Administrative Law Judge
- George Gomez, Director