

- (1) Whether the parties are subject to the provisions of the Kansas Workers Compensation Act.
- (2) What is the nature and extent of claimant's disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After having reviewed the whole evidentiary record and the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

- (1) Administrative Law Judge Alvin E. Witwer found that the parties were subject to the provisions of the Kansas Workers Compensation Act. After review of the whole record and arguments of the parties, for the reasons set forth below, the Appeals Board affirms the Administrative Law Judge's decision with respect to this issue.

When a worker is injured outside the state of Kansas, the Kansas Workers Compensation Act applies if his principal place of employment is within the state of Kansas or if the contract of employment was made within the state of Kansas, unless the contract provides otherwise. See K.S.A. 44-506. The record in this matter has established that the claimant is a resident of Odessa, Missouri. He commenced working for the respondent in 1979 at a terminal located in Missouri. He sustained a work-related injury while working for the respondent in Hurst, Texas, on November 12, 1991. As there is no evidence to the contrary, we must conclude that claimant's contract of employment was not made within the state of Kansas. One would assume that claimant's contract of employment with respondent was made in Missouri since he did commence working at the respondent's Missouri terminal. Consequently, in order for the Kansas law to apply, the claimant's principal place of employment on the date of his injury has to be located in Kansas.

The evidence in the record through the testimony of the claimant; Jim Votipka, former president and business agent of Teamsters Local 498; and Ron Lewis, manager of the Fairfax terminal for the respondent; clearly establishes that on the date claimant sustained his accidental injury his place of employment was respondent's terminal located in the Fairfax district of Kansas City, Kansas. In 1982, the claimant transferred from the respondent's terminal located in Missouri to the Fairfax terminal. This transfer meant that the claimant's employment seniority was located at the Kansas terminal and he had relinquished his seniority rights at the Missouri terminal. All of the claimant's work instructions were dispatched to him from the Fairfax terminal. Even though he occasionally loaded and unloaded at a different terminal, he always picked up and returned his truck to the Fairfax terminal. The respondent's principal argument against applying the Kansas Workers Compensation Act to the parties is that the claimant performed most of his duties and spent most of his time outside of the state of Kansas. Respondent cites the case of Knelson v. Meadowlanders, Inc., 11 Kan. App. 2d 696, 732 P.2d 808 (1987), in support of its argument. However, the Appeals Board finds that Knelson better supports the claimant's position for Kansas jurisdiction than the respondent's position. In Knelson, the base of claimant's employment was Wichita, Kansas, and he traveled from that location to other states to play hockey games. The Court of Appeals held that since the claimant's principal place of employment was Wichita, Kansas, the Kansas Act applied to the parties. Likewise in the instant case, the claimant's base of employment, and therefore his principal place of employment, is the Fairfax terminal in Kansas City, Kansas.

(2) Since the Kansas Workers Compensation Act applies to the parties herein, the only remaining issue is the nature and extent of claimant's disability. The Administrative Law Judge found that the claimant's work-related injury entitled him to a fifteen percent (15%) permanent partial disability based upon functional impairment. After a review of all the relevant facts concerning this issue, the Appeals Board finds that as a result of claimant's accidental injury sustained while employed by the respondent on November 12, 1991, the claimant has suffered a twenty-five percent (25%) permanent partial disability based upon functional impairment.

Claimant was injured while preparing to unload a load of automobiles in Hurst, Texas, on November 12, 1991. As he was stepping on the tongue of the trailer of the truck, he slipped on some grease and fell on his right arm when he was reaching out to catch himself. He was treated in Texas at a local hospital where it was found he had a dislocated elbow which was set and was then immobilized with a sling.

After the claimant returned from Texas, the respondent sent the claimant to Dr. John Aiken of the Business & Industry Health Group in Kansas City, Kansas. However, Dr. Aiken immediately referred the claimant on November 14, 1991, to Robert Drisko, Sr., M.D., an orthopedic surgeon in Kansas City, Missouri. Dr. Drisko first treated the claimant's elbow and then ordered an arthrogram of his right shoulder due to his complaining of pain in the shoulder during his visit of December 19, 1991. The arthrogram showed changes consistent with a right rotator cuff tear.

Because of the claimant's right shoulder complaints and limited range of motion, Dr. Drisko prescribed three (3) physical therapy treatments and then he released the claimant to return to his regular truck driving job on January 1, 1992, with instructions to continue exercises at home. Dr. Drisko, at this time, recommended surgical intervention to repair the claimant's right rotator cuff tear. It was Dr. Drisko's opinion that there was an eighty-five percent (85%) chance that the surgery would improve the claimant's condition more than the conservative treatment and such surgery was not unreasonably dangerous. Claimant, however, refused to undergo surgery as he was able to perform his regular truck driving duties for the respondent. He testified that he had known many fellow union members who had experienced unsuccessful rotator cuff surgeries.

Dr. Drisko saw the claimant on March 19, 1992, and then at the request of Dr. Aiken, as a result of claimant's returning with shoulder complaints, last treated claimant on March 30, 1993. Dr. Drisko testified that claimant's condition had improved substantially from his initial treatment in November 1991. Claimant was sent for a second medical opinion to a Dr. Darnell, an orthopedic surgeon in the Kansas City area, who affirmed the rotator cuff tear diagnosis but indicated that if the claimant could tolerate the pain, surgery was not necessary. Dr. Drisko was not asked and therefore did not express an opinion on permanent functional impairment.

Nathan Shechter, M.D., a board-certified orthopedic surgeon, at the request of claimant's attorney, examined and evaluated the claimant for permanent functional impairment on January 6, 1993. Dr. Shechter personally took a medical history from the claimant, performed a physical and x-ray examination, and reviewed medical records of claimant's previous treatment. He found as a result of claimant's work-related injury that he had sustained a dislocation of his right elbow, impingement syndrome of the right shoulder and a partial tear of the rotator cuff of the right shoulder which may ultimately need surgical repair. In regard to permanent functional impairment, it was Dr. Shechter's

opinion that the claimant's work-related accident had resulted in a permanent partial impairment of twenty-five percent (25%) to the body as a whole on a functional basis. Permanent work restrictions were placed on the claimant by Dr. Shechter of no more than fifty (50) pounds on a single lift basis and none on a repetitive basis plus refraining from working above shoulder level.

As noted previously, claimant has returned to his regular job duties as a truck driver for the respondent at the same wage he was earning prior to his injury. Accordingly, there is a presumption that the claimant has suffered no work disability. See K.S.A. 1990 Supp. 44-510e(a). However, such presumption is rebuttable. See Locks v. Boeing Co., 19 Kan. App. 2d 17, 864 P.2d 738 (1993). In the present case, the claimant has not presented evidence to rebut this presumption. Therefore, claimant's disability, if any, is limited to the percentage of functional impairment. See Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

After citing two cases giving the fact finder the ultimate decision as to the nature and extent of a claimant's disability, the Administrative Law Judge found that the claimant possesses a fifteen percent (15%) permanent partial general disability to the body as a whole. Carter v. Koch Engineering, 12 App. 2d 74, 735 P.2d 247, (1987); Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 785, 817 P.2d 212, rev. denied 249 Kan. 778 (1991). The claimant makes claim for a twenty-five percent (25%) permanent partial general disability based on Dr. Shechter's uncontradicted twenty-five percent (25%) opinion. On the other hand, the respondent contends that if the Kansas Act applies, the appropriate award would be the Administrative Law Judge's finding of fifteen percent (15%) permanent partial general disability.

Unless shown to be improbable, unreasonable or untrustworthy, uncontradicted evidence cannot be disregarded and should be ordinarily regarded to be conclusive. Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 380, 573 P.2d 1036 (1978). Dr. Shechter's opinion that claimant has sustained a twenty-five percent (25%) permanent functional impairment as a result of his work-related injury is uncontradicted. Additionally, the respondent has not shown that Dr. Shechter's opinion in reference to functional impairment is improbable, unreasonable or untrustworthy. Upon review of an Administrative Law Judge's decision, the Appeals Board has the statutory authority to increase or diminish an award of compensation. See K.S.A. 44-551(b)(1). Considering the whole evidentiary record, the Appeals Board finds and concludes the appropriate award in regard to claimant's permanent partial general disability should be twenty-five percent (25%) based on Dr. Shechter's uncontradicted permanent impairment opinion.

As the issues of jurisdiction of the Kansas Workers Compensation Act and nature and extent of claimant's disability were the only issues presented for review by the Appeals Board, all other findings made by Administrative Law Judge Alvin E. Witwer in his Award dated January 25, 1994, are incorporated herein and made a part hereof as if specifically set forth in this Order.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Alvin E. Witwer, dated January 25, 1994, is hereby modified and an award is entered as follows:

AN AWARD OF COMPENSATION IS HEREBY ENTERED IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR OF the claimant, Robert W. Polson, and against the respondent, Jack Cooper Transport Co., Inc., and its insurance carrier, Liberty Mutual Fire Insurance Company, for an accidental injury sustained on November 12, 1991, and based upon an average weekly wage of \$1,121.32.

Claimant is entitled to 7.29 weeks of temporary total disability compensation at the rate of \$289.00 per week or \$2,106.81, followed by payment of \$186.90 per week for 407.71 weeks or \$76,201.00 for a twenty-five percent (25%) permanent partial general disability, making a total award of \$78,307.81.

As of September 16, 1994, there is due and owing to the claimant 7.29 weeks of temporary total disability compensation at the rate of \$289.00 per week in the sum of \$2,106.81, plus 141.28 weeks of permanent partial disability compensation at \$186.90 per week in the sum of \$26,405.23 for a total due and owing of \$28,512.04, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$49,795.77 shall be paid at \$186.90 per week for 266.43 weeks until fully paid or until further order of the Director of Kansas Workers Compensation.

IT IS SO ORDERED.

Dated this ____ day of September, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The majority opinion notes that the only rating of disability is that provided by Dr. Shechter stating that claimant suffered a twenty-five percent (25%) permanent partial impairment. The majority adopts Dr. Shechter's opinion as to the percentage of disability citing case law indicating that uncontradicted evidence cannot be disregarded and is ordinarily regarded as conclusive unless it is shown to be improbable, unreasonable or untrustworthy. See e.g. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

I disagree with the majority opinion for two reasons. First, I do not believe the above cited case law regarding uncontradicted evidence applies to the ultimate conclusion as to the percentage of disability. As indicated in Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991), the finder of fact has the right and obligation in determining the percentage of disability to weigh and adjust the medical testimony along

with the testimony of the claimant and other testimony which may be relevant to the question of disability. The Board is not bound to adopt the rating of any physician.

Second, I do not believe that the evidence in this case, taken as a whole, supports the finding of twenty-five percent (25%) permanent partial impairment. Claimant dislocated his right elbow when he slipped and fell on November 14, 1991. He was provided a splint for about three (3) weeks and then underwent a rehabilitation program. Examination and testing ultimately revealed that at the same time claimant suffered a torn rotator cuff of his right shoulder. From the evidence taken as a whole, it appears that the injury to the elbow largely, but not completely, resolved. Claimant declined surgery to his shoulder. He has returned to his job as a driver and continues to load and unload his truck.

At the time of the regular hearing, claimant indicated that his symptoms included numbness in the bottom three (3) fingers of his right hand. He could not extend his elbow fully and has a knot on the elbow which he indicates he frequently bumps. He testified that he could not fully extend his right shoulder and could not reach as high as he had previously. He testified he could not sleep on his right shoulder and has aches in his right shoulder when the weather changes or when he loads and unloads the truck on the same day. He testified that in the latter event he would have pain in the evening which could be taken care of with aspirin.

Claimant's medical treatment was primarily provided by Dr. Drisko. Although Dr. Drisko did not provide a rating of claimant's disability, he testified that as of March 30, 1993, claimant had an excellent recovery to right elbow dislocation. He described the tear of the rotator cuff as a slight tear. He indicated that the claimant's shoulder did still hurt, particularly on elevation overhead. Neither abduction nor lateral elevation bothered him very much and raising straight up in front did not bother him. The doctor testified that the range of motion in the shoulder was complete with some crepitus. He indicated there was some evidence of weakness on internal rotation but that he did not have a problem with abduction. He also indicated the range of motion of the elbow was complete on flexion but that he lacked about five (5) degrees on extension. He indicates that the grip is good. Although he does attribute the numbness in the fingers to the elbow injury, he indicates that the median nerve has not been affected by the elbow dislocation.

Dr. Shechter examined the claimant on January 6, 1993. He described the complaints as including intermittent aching in the right shoulder, especially if the weather changes. He indicated there is a restriction of the motion of the right shoulder and that the claimant has trouble working above shoulder level. He also described occasional aching over the right elbow and numbness of the middle, ring and little finger of the right hand on occasion. He indicated the claimant complained of weakness of grip of the right hand. Dr. Shechter's physical examination revealed tenderness in the shoulder. He found a lack of full abduction by ten (10) degrees and flexion by five (5) degrees. Extension he found to be normal, but associated with pain at the extremes. External rotation was normal, but associated with discomfort on the right external rotation. He indicates claimant lacks about five (5) degrees of full internal rotation and finds no muscle atrophy. His testing does indicate the grip strength is somewhat less in the right than left. X-rays of both shoulder and elbow are normal.

K.S.A. 44-510e defines functional impairment as:

“ . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence”

While not minimizing what undoubtedly was a serious injury, namely a dislocated elbow and torn rotator cuff, I do not believe the above findings suggest that claimant has lost one-fourth of his total physiological capabilities. I do believe that the finding made by the Administrative Law Judge of fifteen percent (15%) permanent partial general disability was a reasonable one and should be affirmed.

BOARD MEMBER

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