



the Appeals Board review that finding. That is the sole issue now before the Appeals Board.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire record, the Appeals Board finds, as follows:

For the reasons expressed below, the Award of the Special Administrative Law Judge, dated May 25, 1994, should be affirmed.

The sole physician to testify, orthopedic surgeon Edward J. Prostic, M.D., testified that claimant has sustained a fifteen percent (15%) permanent partial impairment of function to the body as a whole as a result of his work-related accident of February 1992, and should observe the permanent work restrictions and limitations of no lifting greater than forty (40) pounds more than three (3) times per hour; avoid lifting ten (10) pounds more than twenty (20) times per hour; and limit his bending, stooping, and twisting to no more than ten (10) times per hour. Dr. Prostic also believes that claimant should limit his sitting to one (1) hour at a time and to no more than six (6) hours per day. Standing should be limited likewise. Future medical treatment such as epidural steroid injections or surgery may be necessary.

Claimant presented the testimony of vocational rehabilitation specialist Karen Sherwood. Ms. Sherwood is a certified rehabilitation counselor and is a qualified rehabilitation professional with the State of Kansas Division of Workers Compensation. Ms. Sherwood is familiar with the southeast Kansas area where claimant resides as she has previously worked with injured workers and has performed labor market surveys in that area.

Utilizing the restrictions and limitations as expressed by Dr. Prostic, Ms. Sherwood believes that claimant has experienced a loss of ability to perform work in the open labor market of seventy-nine percent (79%) as a result of the work-related injury. Attached to Ms. Sherwood's deposition is her report dated October 28, 1992, that includes the opinion that claimant would have no loss of access to the open labor market assuming claimant had no restrictions, and that claimant would have an eighty-eight percent (88%) loss of access to the open labor market assuming the restrictions of Dr. Spencer were adopted which were no lifting or bending and restricting all work to that of a sedentary nature. Ms. Sherwood believes that claimant retains the ability to earn \$170.00 to \$200.00 per week and, thus, has experienced a loss of ability to earn comparable wage as a result of his work-related injury of zero to fifteen percent (0-15%).

Based upon the evidence presented, the Appeals Board finds that claimant has experienced a seventy-nine percent (79%) loss of access to the open labor market and a fifteen percent (15%) loss of ability to earn a comparable wage. The opinion regarding loss of ability to earn comparable wage is influenced by the fact that claimant has worked at two jobs since leaving the employment of the respondent earning \$4.25 and \$4.62 per hour.

The Appeals Board is not required to weigh equally 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 no compelling reason to give either factor a greater weight and accordingly they will be weighed equally. The result is an average between the seventy-nine percent (79%) loss of access to the open labor market and the fifteen percent (15%) loss of ability to earn a comparable wage, resulting in a forty-seven percent (47%)

work disability which the Appeals Board considers to be an appropriate basis for the award in this case.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated May 25, 1994, should be, and hereby is, affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of September, 1994.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

- c: Pamela G. Phalen, PO Box 1449, Pittsburg, KS 66762
- Edward D. Heath, Jr., PO Box 95, Wichita, KS 67201
- William F. Morrissey, Special Administrative Law Judge
- George Gomez, Director