BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DOROTHY L. ADAMS Claimant VS. **THE BOEING COMPANY** Respondent AND **AETNA CASUALTY & SURETY** Insurance Carrier AND **KANSAS WORKERS COMPENSATION FUND**	)))))))))))))	Docket No. 166,155

ORDER

Both the Kansas Workers Compensation Fund and the claimant request the Appeals Board to review an Award entered by Special Administrative Law Judge William F. Morrissey, dated February 21, 1994. This matter came on before the Appeals Board for oral argument by telephone conference on April 14, 1994.

APPEARANCES

Claimant appeared by and through her attorney, Dale V. Slape of Wichita, Kansas. The respondent and its insurance carrier appeared by and through their attorney, Frederick L. Haag of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, J. Philip Davidson of Wichita, Kansas. There were no other appearances.

RECORD

The Appeals Board adopts the record as set out in the Award of the Special Administrative Law Judge.

STIPULATIONS

The Appeals Board adopts the stipulations as set out in the Award of the Special Administrative Law Judge.

ISSUES

The Kansas Workers Compensation Fund and the claimant raise the issue of nature and extent of claimant's disability. Additionally, the Kansas Workers Compensation Fund requests the Appeals Board to review the issue of Fund liability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After a review of the whole evidentiary record and arguments of the parties, the Appeals Board finds as follows:

(1) The Special Administrative Law Judge awarded the claimant a nine percent (9%) permanent partial general work disability. For the reasons stated below, the Appeals Board affirms this award.

The claimant was employed by the respondent in the job classification of Data Processor I. Her job duties included operating printers, copy machines, plotting machines, filing and counter work. She sustained an injury to her low back and lower extremities on January 30, 1992, while trying to move two six-hundred pound rolls of paper. This accident occurred while the claimant was working on second shift. The first symptoms that she noticed occurred at approximately four o'clock in the morning when she woke up with low back and neck pain accompanied by a headache.

The next day, January 31, 1992, claimant notified the respondent's personnel department of her injuries and was seen by Boeing Central Medical. She returned to her regular work and was treated by Boeing Central Medical on February 3, 11, and 19, 1992, receiving Ibuprofen for her continuing pain. She was then referred to Dr. Lesko, an orthopedic surgeon in Wichita, Kansas, for further treatment.

Dr. Lesko prescribed physical therapy, medication and recommended work restrictions. The respondent also sent the claimant for an examination and treatment with Dr. Fleming of Wichita, Kansas. Dr. Kenneth D. Zimmerman, of Boeing Central Medical, testified that after claimant saw Dr. Fleming, permanent restrictions were assigned by Boeing Central Medical of no lifting over thirty-five (35) pounds and limited bending and twisting to ten (10) times per hour. Boeing Central Medical's final diagnosis was chronic lumbar strain.

Claimant was laid off of work by the respondent on July 14, 1992, because of a general reduction in the work force that was not associated with her injuries. At the time of the Regular Hearing held on January 13, 1993, claimant's low back remained symptomatic.

Prior to the claimant commencing work with the respondent on a full-time basis in October 1991, the claimant had injured both of her knees working for Toys R Us in Wichita, Kansas. She testified that her knees had not bothered her from the time of that injury until after the accident that occurred while working for respondent on January 30, 1992. Claimant testified at the Regular Hearing that she continued to have knee problems. In fact, she was receiving medical care at that time for her back and knee problems from a Dr. Stanley Jones of Wichita, Kansas.

Both Dr. Zimmerman and Dr. Ernest R. Schlachter testified in this case in regard to claimant's permanent functional impairment which resulted from her chronic lumbosacral strain. Each physician opined that as a result of her work-related injuries, she had a five percent (5%) permanent partial impairment of function of the body as a whole.

In a workers compensation case, work disability is defined as the extent to which claimant's ability to perform work and to earn comparable wages in the open labor market has been reduced. However, permanent partial general disability shall not be less than the percentage of functional impairment. Additionally, a rebuttable presumption arises against work disability when the claimant engages in work at a comparable wage. See K.S.A. 1991 Supp. 44-510e(a). This claimant has testified that she continued to perform her job duties of a Data Processor I subsequent to her injury of January 30, 1992 and until her layoff of July 14, 1992. Two vocational experts testified in this matter and both agree that claimant has the ability to perform jobs that are available in the open labor market that pay a comparable wage.

Although the presumption of no work disability is applicable because claimant had the ability to earn a comparable wage, the Appeals Board concludes that there is persuasive evidence in this case that rebuts this no work disability presumption. See Locks v. Boeing Co., 19 Kan. App. 2d 17, 864 P.2d 738 (1993). The claimant testified that her low back remained symptomatic and was causing her excruciating pain on a bad day. Dr. Schlachter assigned permanent restrictions to the claimant because of her low back injury. Both vocational experts testified that because of her work restrictions, claimant's ability to perform work in the open labor market had been reduced. At the time of the Regular Hearing, claimant was also not employed.

The claimant argues that her labor market loss should be somewhere between twenty-seven percent (27%) and thirty-five percent (35%) based on the average of the opinions of claimant's vocational expert, Jerry Hardin, and respondent's vocational expert, Karen Terrill. This average was based on hypothetical questions posed during the testimony of the vocational experts. However, both experts concluded their testimony by reaffirming their original personal opinion on the issue of claimant's labor market loss. The respondent and the Kansas Workers Compensation Fund, on the other hand, contend that Karen Terrill's opinion should be given more weight, which would yield a six to eight percent (6-8%) work disability.

The Appeals Board finds that the most credible and persuasive evidence of the claimant's labor market loss is Jerry Hardin's personal opinion of twenty to twenty-five percent (20-25%) and Karen Terrill's personal opinion of twelve to fifteen percent (12-15%). Both of these opinions should be averaged, yielding an eighteen percent (18%) labor market loss. The eighteen percent (18%) labor market loss should be weighed equally with no comparable wage loss to arrive at a work disability of nine percent (9%). See Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990).

(2) The Kansas Workers Compensation Fund appeals from the Special Administrative Law Judge's finding that the Fund should be one-hundred percent (100%) liable for all workers compensation benefits and costs paid in this case.

In order to shift liability to the Fund, the respondent has the burden to prove that it had knowledge of the pre-existing impairment at the time that the respondent employed the handicapped employee or the respondent retained the handicapped employee in its employment after obtaining such knowledge. See K.S.A. 1991 Supp. 44-567(b). The question in the instant case is whether the claimant knowingly misrepresented to the respondent that she did not have a previous injury to her knees. If the evidence establishes that she knowingly misrepresented this fact, then knowledge is presumed conclusively. See K.S.A. 1991 Supp. 44-567(c).

The facts herein clearly establish that the claimant failed to notify the respondent that she injured her knees in a fall while working for Toys R Us in Wichita, Kansas, on September 29, 1988. She was examined by Dr. Schlachter in reference to her knee injuries on September 20, 1990. Dr. Schlachter opined that as a result of these injuries she had an eight percent (8%) permanent impairment of function to the body as a whole. He placed permanent restrictions on her of limited kneeling, squatting, bending, stair climbing and walking. Claimant settled this workers compensation claim for a lump sum amount of $2,000 on October 31, 1991, after she was employed by the respondent.

Prior to commencing work for the respondent, the claimant, on October 9, 1991, completed a required Preplacement Occupational Health and Safety Questionnaire. The claimant answered no to questions related to previous injuries to her legs. She also answered no to questions requesting whether she had lost time because of a work-related accident, filed a workers compensation claim, had a workers compensation claim still open, or received a disability award for a job-related accident. During her Regular Hearing testimony on cross examination, claimant also admitted that she did not advise the respondent of her previous knee injuries when asked on the respondent's questionnaire.

The Kansas Workers Compensation Fund cites Collins v. Cherry Manor Convalescent Center, 7 Kan. App. 2d 270, 640 P.2d 875 (1982), for the principle that in determining whether an employee has knowingly misrepresented his condition, it is the employee's state of mind which controls. The Fund goes on to argue that there is absolutely no evidence in the record in this case which indicates what the claimant's state of mind was at the time she filled out the pre-employment questionnaire for the respondent.

The Appeals Board disagrees with the Fund and finds that the facts contained in the record of this case support a finding that the claimant knowingly misrepresented that she had not had a previous injury to her knees. The claimant was a high-school graduate with approximately thirty (30) hours remaining to complete a college degree in psychology. She was employed by the respondent as a Data Processor I, which required her to operate computers and other miscellaneous office machines. The Appeals Board concludes that because of her work experience and her extensive educational background, the claimant had the capacity to understand the questions asked her on the respondent's medical questionnaire. Claimant had enough knowledge to hire an attorney to represent her in the prior workers compensation claim. She was examined by Dr. Schlachter for purposes of obtaining an impairment rating and accepted a lump sum settlement for her permanent disability after being employed by the respondent.

If the claimant's permanent disability would not have occurred but for her pre-existing injury, all compensation benefits should be paid by the Workers Compensation Fund. See K.S.A. 1991 Supp. 44-567(a). The only two physicians to testify in the case at hand, Dr. Schlachter and Dr. Zimmerman, both opined that but for the claimant's pre-existing knee problems, her back difficulties would not have resulted in a permanent disability. This medical testimony was uncontradicted by the Kansas Workers Compensation Fund. Uncontradicted evidence which is not improbable or unreasonable may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976). Accordingly, the Kansas Workers Compensation Fund shall be assessed liability for all of the compensation benefits paid in this matter as the claimant knowingly misrepresented that she did not have a previous injury to her knees and the uncontradicted medical testimony established that but for the pre-existing impairment to the claimant's knees she would not have had a permanent disability as a result of her work-related back injury.

All other findings of Special Administrative Law Judge William F. Morrissey, in his Award of February 21, 1994, are incorporated herein and are made a part hereof as if specifically set forth in this Order to the extent that they are not inconsistent with the findings and conclusions expressed herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge William F. Morrissey, dated February 21, 1994, should be, and hereby is, affirmed as follows:

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Dorothy L. Adams, and against the respondent, The Boeing Company, and its insurance carrier, Aetna Casualty & Surety Company, and the Kansas Workers Compensation Fund, for an accidental injury which occurred on January 30, 1992, and based on an average weekly wage of $497.86, for 415 weeks of compensation at the rate of $29.87 per week in the sum of $12,396.05 for a 9% permanent partial general body work disability.

As of February 8, 1995, there is due and owing claimant 157.86 weeks of permanent partial compensation at the rate of $29.87 per week, making a total due and owing of $4,715.28.

The remaining balance of $7,680.77 is to be paid for 257.14 weeks at the rate of $29.87 per week until fully paid or further order of the director.

The Kansas Workers Compensation Fund is hereby ordered to reimburse the respondent for one-hundred percent (100%) of all workers compensation benefits and costs incurred in this claim.

IT IS SO ORDERED.

Dated this ____ day of February, 1995.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Dale V. Slape, Wichita, KS
Frederick L. Haag, Wichita, Ks
J. Philip Davidson, Wichita, KS
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director