

BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION

TIMOTHY J. PFANNENSTIEL	)	
Claimant	)	
VS.	)	
	)	Docket No. 167,515
KEEBLER COMPANY	)	
Respondent	)	
AND	)	
	)	
TRANSPORTATION INSURANCE COMPANY )	)	
Insurance Carrier	)	
AND	)	
	)	
THE KANSAS WORKERS COMPENSATION FUND )	)	

**ORDER**

ON the 4th day of November, 1993, the application of the Workers Compensation Fund for review by the Workers Compensation Appeals Board of an award entered by Administrative Law Judge George R. Robertson on October 1, 1993, came on for oral argument by telephone conference.

**APPEARANCES**

The claimant and respondent have settled their issues in this case and the claimant appears not. The respondent and insurance carrier appeared by their attorney, Jerry M. Ward, of Great Bend, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Kent Roth, of Great Bend, Kansas.

**RECORD**

The record of the Administrative Law Judge set forth in the October 1, 1993 award is herein adopted by the Appeals Board.

**STIPULATIONS**

The issues between the respondent and the claimant were resolved prior to this award. There are no stipulations from the Administrative Law Judge's award of October 1, 1993.

**ISSUES**

- (1) What is the nature and extent of the Kansas Workers Compensation Fund liability, if any.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

- (1) The Workers Compensation Appeals Board on review of any act, finding, award, decision, ruling or modification of findings or awards of the Administrative Law Judge, shall have the authority to grant or refuse compensation, or to increase or to diminish any award of compensation or to remand any matter to the Administrative Law Judge for further proceedings. 1993 Session Laws of Kansas, Chapter 286, Section 53(b)(1).

(2) The claimant, Timothy Pfannenstiel, while in the employ of the Keebler Company, suffered numerous injuries involving his back, between August, 1989, and February, 1992.

(3) On August 14, 1992, the claimant and respondent entered into a settlement of the claimant's workers compensation claim from the injury of February, 1992, for a lump sum payment of \$19,052.64. This compromised settlement was in addition to medical and temporary total disability benefits already paid in this matter.

(4) In August, 1989, claimant suffered an injury to his back with an additional episode in December, 1991, and a final episode in February, 1992. In between these episodes claimant continued to work with the employer at the same job, earning a comparable wage.

(5) From the period August, 1989, to December, 1991, claimant was suffering no problems and was performing his duties satisfactorily.

(6) The employer was aware of the condition of claimant's back as a result of the August, 1989 incident, with treatment being provided in August, 1989, by Dr. C. Reiff Brown.

(7) Claimant suffered subsequent injuries to his back in December, 1991, and again in February, 1992, at which time surgery became necessary. The surgery was performed by Dr. Paul Stein. The medical records of Dr. Stein were stipulated into evidence on March 17, 1993. Dr. Stein found claimant to have suffered an approximate ten percent (10%) impairment to the body as a whole related to the herniation and subsequent surgery.

(8) The purpose of the Workers Compensation Fund is to encourage employment of persons handicapped as a result of specific impairments by relieving employers, wholly or partially, of workers compensation liability resulting from compensable accidents suffered by these employees. K.S.A. 44-567(a); Morgan v. Intercollegiate Press, 4 Kan. App. 2d 319, 606 P.2d 479 (1980); Blevins v. Buildex Inc., 219 Kan. 485, 548 P.2d 765 (1976).

(9) Liability will be assessed against the Workers Compensation Fund when an employer shows that it knowingly hired or retained a handicapped employee who subsequently suffered a compensable work-related injury. An employee is handicapped under the Act if the employee is "afflicted with an impairment of such a character as to constitute a handicap in obtaining or retaining employment." Carter v. Kansas Gas & Electric Co., 5 Kan. App. 2d 602, 621 P.2d 448 (1980).

(10) In order for an employer to be relieved of liability, either in whole or partially, from the Workers Compensation Fund, it is the employers responsibility and burden to show that it hired or retained a handicapped employee after acquiring knowledge of a preexisting impairment. K.S.A. 44-567(b) provides in part:

"In order to be relieved of liability under this section, the employer must prove either that the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or that the employer retained the handicapped employee in employment after acquiring such knowledge."

(11) The employer has the burden of proving that it knowingly hired or retained a handicapped employee. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

(12) In this instance, the Appeals Board is persuaded that the respondent has met its burden of proof in showing that it retained a handicapped employee within the definition contained in K.S.A. 44-566(b). The Appeals Board further finds that the respondent had knowledge of this handicap sufficient to satisfy the requirements of K.S.A. 44-567(b) and further finds the respondent, Keebler Company, retained a handicapped employee after acquiring such knowledge.

(12) K.S.A. 44-567(a)(1) provides in part:

"Whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the Director awards compensation therefore, and finds that the injury, disability or death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the Workers Compensation Fund."

(13) Dr. C. Reiff Brown, when questioned in his deposition on page 12, opined as follows:

"Q. Do you have an opinion, Doctor, as to whether that medical treatment following the episode on December 23d, 1991, and the episode of February 27th, 1992, probably or most likely would not have occurred but for the preexisting condition?

A. Yes.

Q. And what is your opinion?

A. That it most likely would not have occurred but for the preexisting condition.

Q. Do you have an opinion, Doctor, based upon reasonable medical certainty, as to whether the ten percent impairment of function to the body as a whole probably or most likely would not have occurred but for the preexisting condition?

A. Yes.

Q. And what's your opinion?

A. It probably would not have occurred but for the preexisting condition."

(14) Dr. Brown's testimony, coupled with the finding that the respondent had knowledge of this preexisting handicapped condition, persuades this Appeals Board that this is not a contribution situation, but is indeed a "but for" under K.S.A. 44-567(a)(1).

(15) The Workers Compensation Fund alleges a credit is due under K.S.A. 44-510a. The Fund has cited Brozek v. Lincoln County Highway Department, 10 Kan. App. 2d 319, 698 P.2d 392 (1985) as controlling in this matter.

(16) In Brozek, the claimant and the employer's insurance carrier entered into a settlement wherein the claimant received \$9,709.61 based upon a 15 percent permanent partial disability for an injury occurring on October 28, 1981, and a lump sum payment of \$5,616.00 plus monthly benefits of \$300.00 each, totalling \$72,000.00, for an the injury sustained on June 22, 1982.

(17) While Brozek does accurately state the law of Kansas, it is distinguishable from the matter before this Appeals Board in that this claimant, Timothy Pfannenstiel, while suffering an injury and resulting handicap from the 1989 incident, never actually collected compensation as a result of that incident.

(18) K.S.A. 44-510a provides that a reduction in subsequent compensation awards be made when a prior injury contributes to the present permanent disability. However, this reduction only applies during those "weeks for which compensation was paid or is collectable for such prior disability and which are subsequent to the date of the later injury." Hampton v. Professional Security Co., 5 Kan. App. 2d 39, 41, 611 P.2d 173 (1980).

(19) K.S.A. 44-510a provides that the compensation for the disability resulting from the later injury is to be reduced by the percentage of contribution that the prior disability contributes to the overall disability of the later injury. A reduction in the subsequent compensation is required if compensation was actually paid or is collectable for a prior disability. Baxter v. L.T. Walls Construction, Co., 241 Kan. 588, 592, 738 P.2d 445 (1987).

(20) In the case before this Board, there was no showing that compensation had actually been paid from the claimant's 1989 incident, nor that compensation was collectable as a result of that incident.

(21) For a credit to be assessed under K.S.A. 44-510a, evidence must be presented to show that compensation was paid or was collectable as a result of an injury to the claimant occurring in August, 1989. Hampton supra at 41.

(22) The testimony of Dr. C. Reiff Brown, coupled with the lack of evidence of that compensation was actually paid or was collectable from the August, 1989 incident, persuades this Board that the injury of February 19, 1992, probably or most likely would not have occurred "but for" the preexisting physical impairment of the handicapped employee.

**WHEREFORE**, it is the finding, decision and order of the Appeals Board that the Award of Administrative Law Judge George R. Robertson, dated October 1, 1993, shall be and is affirmed in all respects and an award of compensation is hereby entered in favor of the respondent and against the Kansas Workers Compensation Fund with the Fund reimbursing the respondent for 100 percent of any and all monies paid in this matter.

The Appeals Board further finds that the fees necessary to defray the expenses of administration of this action are hereby assessed against the respondent with reimbursement to the respondent by the Kansas Workers Compensation Fund of 100 percent of any and all fees involved in the litigation of this matter as follows:

UNDERWOOD & SHANE

Settlement Hearing Transcript, Dated August 14, 1992	\$ 51.00
Deposition of Timothy Pfannenstiel, Dated March 8, 1993	\$ 169.80
Deposition of Dr. C. Reiff Brown, Dated March 18, 1993	\$ 129.00

**IT IS SO ORDERED.**

Dated this 3rd day of December, 1993.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

cc: Jerry M. Ward, Ward Law Office, P.O. Drawer 2005, Great Bend, Kansas 67530  
Kent Roth, Feldt & Roth, P.A., P.O. Drawer 338, Great Bend, Kansas 67530  
George R. Robertson, Administrative Law Judge  
George Gomez, Director