

RECORD

The record is herein adopted by the Appeals Board as specifically set forth in the Award of the Administrative Law Judge.

STIPULATIONS

The stipulations are herein adopted by the Appeals Board as specifically set forth in the Award of the Administrative Law Judge.

ISSUES

The issues addressed in this proceeding are:

- (1) Whether claimant met with personal injury by accident arising out of and in the course of her employment with the respondent during the alleged period of each and every work day through on or about April 1, 1992;
- (2) Nature and extent of disability, if any;
- (3) Unauthorized medical benefits;
- (4) Vocational rehabilitation and future medical benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) Claimant began work for respondent in 1983, having worked there previously from 1976 through 1978. In 1989, claimant was performing the "excruters" job and began experiencing pain in her back, neck, and shoulders as a result of bending and reaching to unjam meat from the processing equipment.

As a result of her difficulties with the excruter position, respondent moved claimant to the "analrays" job. This job required claimant to use a core gun to remove samples from meat to determine its percentage of fat and to make boxes. This job did not bother claimant's back as did the excruter position.

Claimant next worked in "employee meats" for approximately one and one-half years. After six months on this job, claimant hurt her back and saw the company nurse who gave her a back belt. Claimant's symptoms improved until approximately one month before her termination when the symptoms began to progressively worsen. The job of employee meats required claimant to frequently lift boxes weighing from ten to one hundred pounds.

C. Reiff Brown, M.D., examined claimant at respondent's request and believes that claimant has myofascial pain syndrome and chronic low back strain. Dr. Brown believes claimant's injuries are the result of her work related activities. John W. Ellis, M.D., examined claimant at the request of claimant's counsel and diagnosed strain of the cervical, thoracic, and lumbar areas; and strain of the shoulder girdle and acromioclavicular joints. Dr. Ellis believes claimant's injuries resulted from the repetitive activities required by her work.

Based upon the record as a whole, the Appeals Board finds that claimant has experienced personal injury by accident arising out of and in the course of her employment with the respondent as a result of the frequent lifting and handling of pieces and boxes of meat. Claimant's last day of employment was on or about April 1, 1992, and that date is designated as the date of accident for purposes of this proceeding.

(2) Based upon the diagnoses indicated above, Dr. Brown believes claimant has experienced a five percent permanent partial impairment of function to her body as a whole, whereas Dr. Ellis believes claimant has experienced a 28 percent permanent functional impairment.

Gregg M. Snyder, M.D., performed a neurological evaluation of claimant and did not find a neurological problem. Dr. Snyder did not perform an orthopedic evaluation as he felt he was not qualified. As a result, Dr. Snyder's opinions are not helpful regarding nature and extent of the musculo-skeletal injury.

Regarding permanent restrictions and limitations, Dr. Brown believes claimant should avoid lifting greater than 50 pounds occasionally and 25 pounds frequently, and that all lifting should be done with proper body mechanics. Dr. Ellis believes that claimant should not lift greater than 40 pounds and should not work in cold environments.

For injuries occurring between July 1, 1987, and July 1, 1993, the extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and earn comparable wages has been reduced, taking into consideration the employee's education, training, experience, and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than the percentage of functional impairment. K.S.A. 1992 Supp. 44-510e. In Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409, rev. denied 250 Kan. 806 (1991), the Kansas Court of Appeals held that this statute required the balancing of two factors: the ability to perform work in the open labor market and the ability to earn comparable wages. It is mandatory these factors be considered to compute the percentage of the injured worker's disability. Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990).

Vocational rehabilitation counselor Jim Molski testified that claimant had lost 12-15 percent of her ability to perform work in the open labor market and 45-47 percent of her ability to earn comparable wages based upon the restrictions set forth by Dr. Ellis. Should the restrictions of Dr. Brown be observed, claimant has lost 7-10 percent of her ability to perform work in the open labor market and 45-47 percent of her ability to earn a comparable wage.

The Appeals Board finds the opinion of Dr. Brown to be more persuasive in this instance as the diagnoses of myofascial pain syndrome and chronic low back strain appears to be more probably true than not. The symptomatology experienced by claimant such as the trigger points, difficulty in sleeping, and massive symptoms complex is more indicative of myofascial pain syndrome than mere strain as diagnosed by Dr. Ellis. The Appeals Board finds the uncontroverted opinions of Jim Molski regarding loss of access to the open labor market and loss of ability to earn comparable wages of 7-10 percent and 45-47 percent, respectively, to be persuasive. The Appeals Board finds that the two losses should be averaged to yield a work disability of 27 percent for which claimant should receive permanent partial general disability benefits.

The respondent argues that claimant should be limited to benefits based upon her

functional impairment due to the manner of claimant's voluntary termination. The Appeals Board does not agree. Claimant's restrictions prevent her from performing her former job duties with the respondent. There is no evidence that respondent was willing or able to accommodate claimant and provide her employment within her permanent restrictions nor is there evidence that claimant could be rehabilitated to earn a comparable wage.

(3) Claimant is entitled to unauthorized medical expense up to the statutory maximum of \$350.00 upon proper substantiation of payment.

(4) Upon proper application to the Director, claimant may be entitled to future medical and vocational rehabilitation benefits.

AWARD

WHEREFORE, it is the finding, decision and order of this Appeals Board that the Award of Administrative Law Judge Thomas F. Richardson, dated October 19, 1993, is modified, as follows:

AN AWARD OF COMPENSATION IS HEREIN ENTERED IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR OF the claimant, Donna Denoon, and against the respondent, National Beef Packing Company, and its insurance carrier, Lumbermen's Underwriting Alliance, for an accidental injury occurring on April 1, 1992. The claimant is entitled to 415 weeks at the rate of \$71.59 per week, for a 27 percent permanent partial general disability making a total award of \$29,709.85. As of January 18, 1994, there would be due and owing to the claimant 94 weeks of permanent partial compensation at the rate of \$71.59 per week in the sum of \$6,729.46 which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the sum of \$22,980.39 shall be paid at \$71.59 per week for 321 weeks or until further order of the Director.

The claimant is awarded an amount not to exceed \$350.00 as unauthorized medical expense upon proper substantiation of payment.

Claimant's contract of employment with her attorney is approved subject to the provisions of K.S.A. 44-536.

Fees and expenses of administration of the Kansas Workers Compensation Act are assessed against the respondent and insurance carrier to be paid direct as follows:

TRI-STATE REPORTING	
Transcript of Regular Hearing	\$ 154.80
BARBER & ASSOCIATES	
Deposition of Dr. Snyder	\$ 110.60
COURT REPORTING SERVICES	
Deposition of Mr. Molski	\$ 121.70

IT IS SO ORDERED.

Dated and mailed this ____ day of January, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Harold K. Greenleaf, 400 North Washington, Liberal, Kansas 67901-3444
James H. Morain, P.O. Box 2619, Liberal, Kansas 67905-2619
Thomas F. Richardson, Administrative Law Judge
George Gomez, Director