

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Appeals Board finds:

(1) As a result of accidental injury arising out of and in the course of his employment claimant suffers a forty-nine percent (49%) permanent partial general disability.

Claimant was injured when he was struck with a boom attached to a tractor unloading pipe. He suffered a broken right arm and broken left leg. He also injured his right wrist and aggravated degenerative changes in his lumbar spine. Dr. Gilbert treated claimant for approximately one year following the January 5, 1992 injury. On January 15, 1993, Dr. Gilbert released claimant to return to his regular work without restrictions.

Dr. Zimmerman evaluated claimant's injuries on claimant's behalf. He found degenerative disc disease in the low back and resolved broken bone injuries. He also found nerve impingement syndrome in the right wrist. He concluded claimant suffers a twenty-nine percent (29%) permanent partial loss of function to the body as a whole. He recommended that claimant limit his lifting to no more than twenty (20) pounds occasionally and ten (10) pounds frequently. He also recommended claimant avoid frequent flexion or extension of his spine and that he avoid frequent flexing, stooping, squatting and crawling maneuvers. For the right wrist he recommended that claimant avoid frequent flexion, extension, twisting, torquing and hammering activities.

The Administrative Law Judge referred claimant for an independent evaluation by Dr. Fluter. Dr. Fluter is board certified in physical medicine and rehabilitation, as well as internal medicine. From his examination in November 1993, Dr. Fluter wrote Judge Richardson stating his impression that claimant suffered right distal radius and left femur fractures in addition to an occipital laceration. He noted that claimant continued to have pain and joint mobility restrictions despite appropriate therapy. He referred claimant for a functional capacity evaluation and range of motion assessment of the right wrist, left hip, left knee and lumbar spine. Upon receipt of the range of motion evaluation Dr. Fluter gave claimant a permanent partial impairment rating of thirty-five percent (35%) to the body as a whole. Although the recommended functional capacity evaluation was not yet available, Dr. Fluter also recommended certain restrictions. By letter dated February 21, 1994, Dr. Fluter modified those restrictions based upon results of the functional capacity evaluation. He indicated the results of the evaluation were considered valid and based upon the findings from the evaluation recommended work restrictions of lifting no more than fifteen (15) pounds to the shoulder level, no more than ten (10) pounds overhead, carrying no more than fifteen (15) pounds, pushing/pulling on a wheeled cart of no more than two hundred (200) pounds. He indicated squatting, kneeling and crawling should be strictly avoided. Climbing should be limited to occasional climbing. He also recommended that heavy grasping with the right hand be avoided. At his deposition, Dr. Fluter clarified these restrictions by indicating that the restriction of fifteen (15) pounds to shoulder level should be a limitation with regard to lifting as opposed to one time or occasional. His testimony suggests a similar clarification of the overhead lifting restriction.

Both Jerry Hardin and Karen Terrill testified to the impact of the injury and the medical restrictions on claimant's ability to earn a comparable wage and perform work in the open labor market. Both agreed that based upon Dr. Gilbert's evaluation claimant suffered no loss of ability to earn a comparable wage or perform work in the open labor market. Jerry Hardin concluded that claimant suffered a seventy-two percent (72%) loss

of access to the open labor market based upon Dr. Zimmerman's restrictions and a ninety percent (90%) loss of ability to perform work in the open labor market based upon Dr. Fluter's restrictions. Karen Terrill testified that claimant suffered a seventy percent (70%) loss of access based upon Dr. Zimmerman's restrictions and a fifty-five percent (55%) loss of access to the open labor market if Dr. Fluter's restrictions were applied.

Respondent urges the Appeals Board to adopt and base its Award upon the opinions of Dr. Gilbert. The Appeals Board concludes, however, that Dr. Gilbert's opinion, giving no work restrictions, is not an appropriate basis for determination of the disability in this case. Although Dr. Gilbert does indicate he has not recommended restrictions, he also qualifies his opinion by stating that this was other than any restrictions claimant might feel necessary to place on himself. When asked about lifting particular weights the doctor indicates he would have no objection if the claimant felt he was able. The doctor also suggests he anticipated the claimant would not be returning to his employment for respondent and did not wish to impose restrictions because the claimant would be competing for work in the open labor market.

The Appeals Board finds more credible the evaluations and restrictions of Drs. Zimmerman and Fluter. These evaluations reach very similar conclusions. They appear to be more appropriate in light of the severity of claimant's injuries. From the restrictions of both Dr. Zimmerman and Dr. Fluter it is apparent that claimant would not be able to return to his previous employment. There is no evidence in the record to suggest claimant has returned to work at a comparable wage. The Appeals Board finds claimant is entitled to an award based upon work disability. See K.S.A. 1991 Supp. 44-510e.

Respondent argues that even if Dr. Gilbert's opinions are not adopted, that the opinions of Jerry Hardin should not be included in considering an award of work disability. Respondent challenges Mr. Hardin's opinions for several reasons. With one exception, the Appeals Board does not find these arguments to be a reasonable basis for discounting Mr. Hardin's opinions in any way other than by averaging them with the slightly lower evaluations given by Ms. Terrill. The one exception is the fact that Mr. Hardin relied upon his interpretation of the restrictions recommended by Dr. Fluter, as stated in Dr. Fluter's report. Dr. Fluter's testimony clarified those restrictions. Mr. Hardin had, from Dr. Fluter's report, concluded the weight lifting limitations were limitations on single lift. In fact, Dr. Fluter testified they were intended to be limitations on frequent lifting. For this reason the Appeals Board concludes that Mr. Hardin's opinions based upon Dr. Fluter's restrictions should not be considered. Ms. Terrill, on the other hand, had the benefit of the clarification of Dr. Fluter's restrictions. Her opinions based on Dr. Fluter's clarified restrictions will be considered.

The Appeals Board notes the opinions of Ms. Terrill and Mr. Hardin based upon Dr. Zimmerman's restrictions are quite similar. Mr. Hardin found a seventy-two percent (72%) loss of access to the open labor market, Ms. Terrill a seventy percent (70%) loss based upon Dr. Zimmerman's restrictions. Ms. Terrill's deposition was taken after clarification by Dr. Fluter in his testimony. From the clarified restrictions of Dr. Fluter, Ms. Terrill concludes claimant would have a fifty-five percent (55%) loss of ability to perform work in the open labor market. The Appeals Board finds it appropriate to give equal weight to the restrictions of both Dr. Zimmerman and Dr. Fluter. The average of the two vocational expert's opinions based upon Dr. Zimmerman's restrictions is seventy-one percent (71%) loss of access to the open labor market. As indicated, Ms. Terrill opines Dr. Fluter's restriction results in a fifty-five percent (55%) loss of access to the open labor market. By

giving equal weight to the average of the two vocational experts based on Dr. Zimmerman's restrictions and the single opinion of Ms. Terrill based on Dr. Fluter's restrictions, the Appeals Board finds that claimant has suffered a sixty-three percent (63%) loss of ability to perform work in the open labor market.

The Appeals Board agrees with the evaluation by the Administrative Law Judge relating to claimant's loss of ability to earn a comparable wage. The Administrative Law Judge noted claimant's working career, apparently, as an unskilled manual laborer. He noted claimant has a sixth grade education. The \$200.00 per week post-injury wage projected by Mr. Hardin appears reasonable. When compared to the actual preinjury wage of \$310.09 the result is a thirty-five percent (35%) loss of ability to earn a comparable wage. Applying the formula approved in Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990), results in a forty-nine percent (49%) work disability. The Appeals Board, therefore, finds claimant is entitled to an award based upon forty-nine percent (49%) permanent partial general disability.

(2) Pursuant to K.S.A. 1991 Supp. 44-510e(b) respondent is not obligated to pay any compensation which would otherwise be due from this award after the date of claimant's death, November 30, 1994.

The parties have agreed in oral argument in this case the date of claimant's death was November 30, 1994. The parties also acknowledge that the death was caused by causes independent of the injuries which are the subject of the present workers compensation claim. K.S.A. 1991 Supp. 44-510e(b) reads in pertinent part as follows:

"If any employee has received an injury for which compensation is being paid, and the employee's death is caused by other and independent causes, any payment or compensation already due the employee at the time of death and then unpaid shall be paid to the employee's dependents directly or to the employee's legal representatives if the employee left no dependent, but the liability of the employer for the payments of compensation not yet due at the time of death of such employee shall cease and be abrogated by the employee's death."

The plain language of the above quoted statute indicates death of the employee from other and independent causes, terminates the obligation to pay benefits which become due pursuant to the award after the date of the claimant's death. Benefits due as of the date of death are to be paid either to the employee's dependents or to the employee's legal representatives if the employee left no dependent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Thomas F. Richardson dated March 3, 1995, shall be, and hereby is, modified and claimant, Hidalgo Rodriguez, is awarded compensation against respondent, Praytor Construction, and its insurance carrier, AETNA Casualty & Surety Company, for an accidental injury occurring on January 5, 1992.

The claimant is entitled to 53.86 weeks temporary total disability at the rate of \$206.74 per week or \$11,135.02 followed by 361.14 weeks at \$101.30 per week or

\$36,583.48 for a 49% permanent partial general disability making a total award of \$47,718.50. As of November 30, 1994, the date of claimant's death, there would be due and owing to the claimant 53.86 weeks temporary total compensation at \$206.74 per week in the sum of \$11,135.02 plus 97.43 weeks permanent partial compensation at \$101.30 per week in the sum of \$9,869.66 for a total due and owing of \$21,004.68 which is ordered paid in one lump sum less amounts previously paid. Amounts due but unpaid as of November 30, 1994 are to be paid to claimant's dependents or legal representative if claimant left no dependents.

Claimant's contract of employment with his 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:

Underwood & Shane	
Transcript of Proceedings	\$199.50
Deposition of Dr. Gilbert	Unknown
Gene Dolginoff Associates, LTD	
Deposition of Dr. Zimmerman	\$390.00
Satterfield Reporting Services	
Deposition of Jerry Hardin	\$213.80
Deposition of Dr. Fluter	\$153.80
Ireland Court Reporting	
Deposition of Karen Terrill	\$167.77

IT IS SO ORDERED.

Dated this ____ day of August, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Randy Stalcup, Wichita, Kansas
- Gregory D. Worth, Lenexa, Kansas
- Thomas F. Richardson, Administrative Law Judge
- Philip S. Harness, Director