

- (1) What is the nature and extent of claimant's disability?
- (2) Is claimant entitled to future medical benefits?
- (3) Is claimant entitled to future vocational rehabilitation benefits?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

- (1) As a result of a personal injury by accident which arose out of and in the course of claimant's employment with respondent, the claimant has sustained a twelve percent (12%) permanent partial general functional disability.

In April of 1991, the claimant while working for the respondent in the meat packing plant, was performing his job duties of cleaning fat off of bones with an air knife when he started having problems with pain and discomfort in his hands, arms and shoulders. The respondent first provided medical treatment for the claimant with Dr. Nevins, of Liberal, Kansas, who eventually referred the claimant to Dr. Guillermo Garcia, an orthopedic surgeon, in Dodge City, Kansas, for further treatment. The claimant during his medical treatment was off work and paid temporary total disability benefits for ten weeks.

Dr. Garcia provided medical treatment for the claimant from June 1, 1992, through July 20, 1992. He prescribed anti-inflammatory medication, splinting of wrist at night and wrist injections. His diagnosis was bilateral carpal tunnel syndrome and shoulder tendinitis. Finally, after the claimant's right hand did not respond to the conservative treatment, he recommended surgery in the form of a carpal tunnel release on the right. The claimant refused this surgery because Dr. Garcia would not guarantee the result. In addition, the claimant had known of other workers employed by the respondent who had had unsuccessful carpal tunnel surgeries performed by Dr. Garcia.

After the claimant refused surgery, Dr. Garcia had no further recommendations of treatment and released the claimant on July 20, 1992 with a permanent functional impairment rating of ten percent (10%) to the claimant's right upper extremity. He also imposed permanent work restrictions of avoiding repetitive motions of the hand and recommended a limited amount of work with hooks and knives.

As a result of the claimant's injury, the respondent placed the claimant on a light duty job of using an air gun to clean floors at a comparable wage. The respondent allows the claimant to work at his own pace while performing the duties of the light duty job. However, during the claimant's testimony at the regular hearing which was held on March 17, 1993, the claimant complained that even his light duty job was aggravating his condition. He went on to further testify that he is having increasingly severe pain in his hands, arms and shoulders.

At the request of claimant's attorney, the claimant was examined and evaluated by Dr. Ernest R. Schlachter, a general physician, in Wichita, Kansas, on December 29, 1992. It is Dr. Schlachter's opinion that the claimant's present light duty job is gradually making the claimant more symptomatic. He diagnosed the claimant's condition as bilateral overuse syndrome of both upper extremities and overuse syndrome and tendinitis of both

shoulder girdles. With few positive objective findings, Dr. Schlachter rated the claimant for functional impairment in accordance with the American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition, Revised, and his experience of evaluating patients for over 35 years as follows:

- A. Five percent loss of function to the right shoulder.
- B. Ten percent loss of function to the left shoulder.
- C. Fifteen percent loss of function to the right upper extremity.
- D. Ten percent loss of function to the left upper extremity.

Utilizing the combined value chart of the AMA Guides, these percentages totaled a thirty percent (30%) permanent partial impairment of function to the body as a whole.

Dr. Schlachter also imposed the following permanent work restrictions on the claimant because of his injuries:

- A. No repetitive pushing, pulling, twisting, or grasping motions with either arm or hand.
- B. No lifting over 5 pounds on a repetitive basis and 15 pounds on a single basis with either arm or hand. (Repetitive means 30 times for an hour).
- C. Avoid work above the horizontal and pushing and pulling movements with the shoulders.
- D. Avoid cold environments and vibrating tools.

K.S.A. 1992 Supp. 44-510e(a) provides that when an employee returns to work for an employer at a comparable wage there is a presumption that the employee has no work disability. In the present case, the claimant has returned to work at an accommodated job earning a comparable wage. The claimant has presented no evidence to rebut this presumption, therefore, the claimant's disability is limited to the percentage of functional impairment. Perez v. IBP, Inc., 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

The claimant argues that Dr. Schlachter's opinion as to the claimant's functional impairment is the most credible and persuasive evidence presented because Dr. Schlachter examined the claimant six months after Dr. Garcia saw the claimant which took in consideration of the claimant's worsening condition. In addition, Dr. Garcia only rated the claimant's right extremity when he should have included the left extremity because of positive objective findings.

Respondent's position in this case is that Dr. Garcia's impairment rating is more credible and persuasive because Dr. Schlachter saw claimant only one time and his opinions are based only on subjective complaints. Also, Dr. Garcia is the treating physician who treated claimant over a period of time, and his opinion should accordingly be given more weight.

The Administrative Law Judge, in the case at hand, noted that both Drs. Garcia and Schlachter found objective evidence of bilateral carpal tunnel syndrome, thus indicating that the claimant had some permanent impairment of function as a result of this condition. He then combined, in accordance with AMA Guides, Dr. Garcia's ten percent (10%) upper right extremity rating with Dr. Schlachter's ten percent (10%) upper left extremity rating for a finding that the claimant has a twelve percent (12%) permanent partial general functional disability as a result of his work-related injury. In arriving at the foregoing permanent partial loss of function, the Administrative Law Judge did not include a permanent loss of function to the claimant's shoulders as he found the claimant greatly exaggerated his complaints for the benefit of the trier of fact.

The Appeals Board on review of an Award of an Administrative Law Judge has the authority to increase or diminish an award of compensation. 1993 Session Laws of Kansas, Chapter 286, Section 53(b)(1). After reviewing the whole evidentiary record in this case, the Appeals Board finds and concludes that the Award of Administrative Law Judge Thomas F. Richardson dated October 19, 1993, awarding the claimant twelve percent (12%) permanent partial general functional disability should be affirmed in all respects.

(2) The claimant is entitled to future medical treatment only upon proper application to and approval by the Director of Workers Compensation.

The claimant, during the regular hearing held in this case, complained that he is having continuing pain and discomfort in his hands, arms and shoulders. Dr. Schlachter also was of the opinion that the claimant's current job is slowly aggravating his condition.

(3) The claimant is entitled to vocational rehabilitation benefits only upon proper application to and approval by the Director of Workers Compensation.

Dr. Schlachter concluded that the claimant's current job is aggravating his condition and if he has no job skills within his restrictions he should undergo a vocational rehabilitation.

(4) The Appeals Board further adopts and incorporates herein the findings of Administrative Law Judge Thomas F. Richardson as set forth in his award dated October 19, 1993, to the extent that they are not inconsistent with the findings and conclusions expressed in this order.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the award of Administrative Law Judge Thomas F. Richardson dated October 19, 1993, is affirmed in all respects and an award of compensation is hereby entered in favor of the claimant, Alberto Rios, and against the respondent, National Beef Packing Company, and its insurance carrier, Lumbermen's Underwriting Alliance.

The claimant is entitled to 10 weeks temporary total disability at the rate of \$209.90 per week or \$2,099.00 followed by 405 weeks at \$25.19 per week or \$10,201.95 for a twelve percent (12%) permanent partial general bodily disability making a total award of \$12,300.95.

As of October 19, 1993, there would be due and owing to the claimant 10 weeks temporary total compensation at \$209.90 per week in the sum of \$2,099.00 plus 119 weeks permanent partial compensation at \$25.19 per week in the sum of \$2,997.61 for a total due and owing of \$5,096.61 which is ordered paid in one lump sum less amount previously paid. Thereafter, the remaining balance in the amount of \$7,204.34 shall be paid at \$25.19 per week for 286 weeks or until further order of the Director.

The claimant's contract of employment with his counsel is approved subject to the provisions of K.S.A. 44-536.

Future medical is awarded upon proper application to the Director.

Future vocational rehabilitation benefits are awarded upon proper application to the Director.

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 SERVICES	
Transcript of Regular Hearing	\$135.50
Deposition of Dr. Garcia	\$147.80
Total	\$283.30

TODD REPORTING
Deposition of Dr. Schlachter

\$117.54

IT IS SO ORDERED.

Dated and mailed this _____ day of January, 1994.

BOARD MEMBER

BOARD MEMBER

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DISSENT

We dissent upon the basis that the Administrative Law Judge and majority of the Appeals Board ignore the injury to the shoulders. The Administrative Law Judge and Appeals Board are inconsistent in their analysis as they find Dr. Schlachter credible in his opinion regarding bilateral carpal tunnel syndrome, but not credible regarding shoulder injury. The majority also, in essence, relies upon one physician, Dr. Garcia, to rate one extremity and another physician, Dr. Schlachter, to rate the other extremity. The result is to treat both extremities as though they had the same impairment. In fact, however, both physicians agree the right extremity was more severely impaired.

The majority places too much weight on the Administrative Law Judge's finding that claimant has exaggerated, in some unspecified manner, his complaints. A careful review of the record does not support such finding. Both doctors indicate that there is injury to the arms bilaterally due to the carpal tunnel syndrome, and even Dr. Garcia agrees there is a pathological condition in the cervical spine that he would expect to cause discomfort, pain, and stiffness.

Regarding the lack of objective findings in the shoulders, it must be noted that tendinitis is a soft tissue injury which, by its very nature, displays few, if any, objective findings. The lack of objective findings does not mean there is not actual injury. If our analysis requires objective findings in every instance, there are numerous disabling injuries that would never support an award for benefits. However, such is not the law.

Based upon the credible, medical evidence claimant has experienced permanent injury to his hands and shoulders and is entitled to benefits for same.

BOARD MEMBER

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cc: Lawrence M. Gurney, 1861 N. Rock Rd., Ste. 320, Wichita, Kansas 67206
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Thomas F. Richardson, Administrative Law Judge
George Gomez, Director