

- (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) While working for the respondent, National Beef Packing Company, the claimant, Jesus Fraire, on November 19, 1991, sustained a personal injury by accident which arose out of and in the course of his employment. As a direct result of such personal injury, the claimant has suffered sixteen percent (16%) permanent partial general functional disability.

On November 19, 1991, the claimant while performing his regular job duties at the respondent's meat packing plant of removing the skin from the first foot of a cow was kicked in the left arm by such cow. Claimant's job duties at this time required him to cut the skin from the foot of the cow with a knife in his right hand while holding the skin with his left hand. The claimant was required to work at a fast repetitive pace in order to successfully complete these job duties.

The claimant is presently working for the respondent on the kill floor washing tails of the cows. This job is a lighter job in that it requires the claimant only to hold the tail, which weighs approximately 30 pounds, with his left hand and remove small pieces of meat with his right hand using a knife, at a fast pace. He is able to complete this job adequately but has numbness and pain involving his left shoulder, left upper extremity and his right wrist and right arm up to the elbow. Increased repetitive use of both extremities increases his symptoms of pain and discomfort. The claimant is presently earning a wage comparable to the wage he was earning at the time of his accidental injury.

After the incident when the cow kicked the claimant on the left arm, the respondent provided medical care for the claimant with E.C. Estrada, M.D., in Liberal, Kansas. Dr. Estrada, on December 18, 1991, excised a cyst on the lateral aspect of the left wrist of the claimant.

Because of the claimant's continuing symptoms and complaints, the respondent referred the claimant to H.C. Palmer, M.D., in Liberal, Kansas, for treatment. Dr. Palmer in turn referred the claimant to Guillermo Garcia, M.D., an orthopedic surgeon, in Dodge City, Kansas, on February 17, 1992. Dr. Garcia examined the claimant once and did not recommend treatment for his continuing pain and discomfort in his left upper extremity. Dr. Palmer finally referred the claimant to Tyrone D. Artz, M.D., an orthopedic surgeon, in Wichita, Kansas, for examination and treatment.

Dr. Artz, as the claimant's authorized treating physician, treated the claimant from March 11, 1991 through January 29, 1993, the last time that the claimant was treated by a doctor for his work related injuries. Dr. Artz's initial diagnosis, in reference to the claimant's complaints, was left carpal tunnel syndrome, ulnar nerve compression at the left elbow, recurrent ganglion cyst over the volar radial aspect of the left wrist and small ganglion cyst at the dorsal base of the second and fourth metacarpals of the left hand. On May 11, 1992, at the request of Dr. Artz, an EMG/NCT was performed which found mild carpal tunnel and mild ulnar nerve compression at the elbow on the right. The claimant,

up to this point in time, had no symptoms or complaints of the right upper extremity.

As a result of Dr. Artz's clinical diagnosis, on May 18, 1992, he performed an endoscopic release of the carpal tunnel; anterior transposition ulnar nerve at the elbow; removal of soft tissue masses from the dorsal base of the second and fourth metacarpals and volar radial aspect of the wrist, all on the left.

Surgery was again performed by Dr. Artz on July 17, 1992, to remove a recurrent mass, dorsal ulnar aspect of the claimant's left hand and wrist. From June 18, 1992 to October 22, 1992, Dr. Artz had the claimant attend regular physical therapy sessions at the Southwest Medical Center in Liberal, Kansas, for treatment of his injuries. The claimant was returned to work on August 17, 1992, with work restrictions of twenty (20) pounds left arm lifting limit for six weeks and to limit repetitive movements with his left hand of one-third of each day to avoid recurrence of carpal tunnel syndrome. Because of claimant's continuing complaints of his left shoulder and left neck area, Dr. Artz referred the claimant to Ronald Manasco, M.D., an anesthesiologist, in Wichita, Kansas, to evaluate and treat the claimant's pain in these areas. Dr. Manasco found tenderness along the medial aspect of the shoulder blade and tenderness on the left side of the neck. On October 22, 1992, and also on December 19, 1992, Dr. Manasco treated this pain and discomfort with multiple trigger point injections of anesthetic and a steroid anti-inflammatory agent.

After an MRI evaluation of the claimant's cervical spine which ruled out herniation or stenosis, Dr. Artz released claimant on January 29, 1993, to return as needed with permanent work restrictions limiting the claimant to repetitive activities of the left hand to one-third of the day and to avoid working in cold climates.

The claimant presently is adequately performing his job duties of washing the tails of cows at a comparable wage for the respondent. However, he has continuing symptoms of pain and numbness in left shoulder, left upper extremity, and has since January of 1993, experienced pain and numbness in his right arm and wrist. It is the claimant's opinion that the reason he started having right arm problems is because he was relying more on his right arm to compensate for the pain, discomfort and weakness of the injured left arm and shoulder.

This case did not include allegations concerning the claimant's right arm until an amended application for hearing was filed by the claimant on June 24, 1993, which was after the date of the regular hearing on April 21, 1993. However, a stipulation was filed by both parties on August 12, 1993, in which the respondent stipulated that they would not object to the amended application for hearing and further stipulated that they had been treating this claim as a bilateral upper extremity claim all along.

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 for the respondent at a comparable wage. The claimant has made no effort to present 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).

With respect to the issue of functional impairment, the claimant, at the request of his attorney, was examined and evaluated by Dr. Ernest R. Schlachter, a general practice physician, in Wichita, Kansas, on December 8, 1992. The claimant in this matter has a limited use of the English language. An interpreter was not present during Dr. Schlachter's

examination. Therefore, Dr. Schlachter adopted the medical history of the claimant which was set forth by the claimant's attorney in a letter to him prior to his examination. Such history was read into Dr. Schlachter's deposition without an objection from respondent.

Even though an interpreter was not present, Dr. Schlachter was able to perform a complete physical examination of the claimant and made the following findings:

- a. Diffused tenderness about the left shoulder joint.
- b. Full range of motion of the left shoulder with mild inconstant in crepitus.
- c. Rotator cuff pain and weakness.
- d. Tinel sign was not able to be accomplished because of the tenderness of the left elbow.
- e. Tinel sign negative on right elbow and Tinel sign negative at the wrist bilaterally.
- f. Phalen test and reverse-Phalen test are with acute pain on the left and negative on the right.
- g. No sensory deficits and no atrophy.
- h. Diffused tenderness of left trapezius muscle extending into left cervical paraspinus muscle and along scapula border.
- i. Seventy-five (75) pounds grip strength in right hand and thirty (30) pounds left hand, right-handed dominant individual.
- j. X-rays revealed degenerative changes of left shoulder.

It was Dr. Schlachter's diagnosis that the claimant has overuse syndrome of the left shoulder girdle with tendinitis of the left shoulder and overuse syndrome of the left upper extremity with entrapment neuropathy at the elbow and wrist bilaterally, previously operated.

Dr. Schlachter was of the opinion that the claimant can not do his previous work and that his current complaints arose out of and in the course of his employment with the respondent. Dr. Schlachter went on to rate the claimant for functional impairment giving ten percent (10%) loss of function to the body as a whole for the left shoulder, and twenty percent (20%) loss of function to the left upper extremity which converts to a twelve percent (12%) loss of function to the body as a whole. Utilizing the combined values chart of the American Medical Association's Guides to Evaluation of Permanent Impairment, Third Edition, Revised, these percentages total twenty-one percent (21%) permanent partial impairment of function to the body as a whole.

At the request of the respondent, Dr. C. Reiff Brown, examined and evaluated claimant on May 20, 1993. Dr. Brown is a board certified orthopedic surgeon practicing in Great Bend, Kansas. During the examination of the claimant, Dr. Brown had the benefit of an interpreter. Dr. Brown's physical examination of the claimant resulted in the following findings:

- a. In reference to the claimant's right arm and right hand he found tenderness present over the radial aspect of the wrist joint anterior and posterior. Some tenderness over the tendons of the right thumb extensor and the Finkelsten test is mildly positive. The right hand and fingers reveal that there is a tender nodule which is small, contained within the right ring and middle flexor tendons. This is extensively tender to direct pressure.
- b. Examination of the left arm, shoulder, and neck reveals tenderness diffusely present over the entire wrist and hand. Claimant also complains of tenderness immediately over the flexor tendons of the middle and ring finger

at the distal palmar crease level and tenderness noted specifically over the tendons. There is discomfort on the movement of his left hand and fingers. Tenderness is localized anteriorly in the left shoulder over the biceps and rotator cuff tendons and is noted to be more severe in degree over the upper trapezius extending into paraspinal and muscular of the left cervical area downward into the levator scapulae, rhomboid and scapular muscular.

As a result of Dr. Brown's examination of the claimant and review of medical records of Dr. Estrada, Dr. Palmer, and Dr. Artz, he made the following diagnosis of the claimant's condition and expressed his opinion as to the claimant's permanent partial function impairment he suffered as a result of his injuries:

- a. The claimant's left shoulder complaints are due to tendinitis of the rotator cuff and biceps tendon. There is a limited range of motion in abduction and flexion and according to the AMA Guides this accounts for a three percent (3%) permanent partial impairment of function of the left arm.
- b. Claimant has been treated successfully by decompression of the anterior transposition of the ulnar nerve and there is no findings of residuals as a result of the carpal tunnel syndrome that was successfully treated by decompression. However, three percent (3%) permanent partial impairment of function is given to the left arm on the basis of the tendency of recurrence of the carpal tunnel syndrome with repeated flexion and extension of the wrist.
- c. Due to the treatment of his tendon sheath tumor there is a restriction in range of motion due to the tightening of the dorsal capsular structures and that accounts for a three percent (3%) permanent partial impairment of function of the left arm.
- d. Mild constrictive tendinitis involving the ring and middle fingers is present in the left hand which constitutes a ten percent (10%) impairment of each of these digits, which converts and combines to a three percent (3%) permanent partial impairment of function of the arm.
- e. With respect to the right arm there is evidence of tendinitis in the flexor tendons of the ring and middle fingers which constitutes a ten percent (10%) impairment of each of these fingers, which converts and combines to a three percent (3%) permanent partial impairment of function of the right arm.
- f. Using the combined values charts of the AMA Guides, the left arm impairment converts to seven percent (7%) permanent partial impairment of function of the body as a whole and the right arm impairment converts to a two percent (2%) permanent partial impairment of function of the body as a whole, which combines for a nine percent (9%) permanent partial impairment of function of the body as a whole for the claimant as a result of his work related injuries.

In reference to the claimant's right arm complaints, Dr. Brown attributed such complaints to overuse occurring while working for the respondent over a period of time dating back to November of 1991. This is evidenced by the fact that the EMG/NCT testing which took place at the direction of Dr. Artz in May of 1992, diagnosed right carpal tunnel syndrome even though the claimant was not complaining of right-sided symptoms at that time. Dr. Brown concluded that you often find abnormalities in nerve conductive tests even though there is no complaint of any impingement of the nerve at the particular time. Symptoms then later appear as the impingement of the nerve becomes worse.

In awarding the claimant a nine percent (9%) permanent partial general functional

disability, the Administrative Law Judge concluded that Dr. Brown's and Dr. Artz's opinions in regard to the left arm and shoulder were generally consistent. On the other hand, Dr. Schlachter's opinion was considerably different and such difference may be explained by the language barrier between the claimant and Dr. Schlachter. Dr. Artz's medical records were entered into evidence in this case by a joint stipulation of the parties. In addition, the claimant and the respondent stipulated during Dr. Brown's deposition that Dr. Artz's opinion as to the permanent partial general function disability should not be considered as evidence in deciding this case. Consequently, it was error for the Administrative Law Judge to consider Dr. Artz's permanent partial general disability rating in his findings in deciding this case. Even though Dr. Schlachter did not have the benefit of an interpreter when he examined and evaluated the claimant, he did have the benefit of an accurate medical history provided by the claimant's attorney along with previous medical records relating to the treatment of claimant's injuries. In addition, he was able to complete a physical examination of the claimant and based his opinions and conclusions on the claimant's physical examination, medical history and previous medical records. With respect to the medical history used by Dr. Schlachter, the respondent did not object to the accuracy of such history and, in fact, used this same history during the deposition of Dr. Brown in preparation of asking Dr. Brown questions in regard to his diagnosis of claimant's medical conditions.

It is the respondent's position in this case that Dr. Brown's permanent impairment rating is the most credible and persuasive evidence and the nine percent (9%) award of the Administrative Law Judge is fair and reasonable based on this evidence.

The claimant argues that Dr. Schlachter's opinion, as to claimant's functional impairment rating of his left arm, left hand and left shoulder, is the most credible and persuasive evidence and his rating of twenty-one percent (21%) of the body as a whole should be used in determining the claimant's permanent partial general disability award. He argues that Dr. Brown's impairment of function rating is too conservative, as Dr. Brown completely discounts loss of sensation and pain in arriving at his opinion of claimant's functional impairment.

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). As the trier of fact, the Appeals Board is free to consider all of the evidence and decide for itself the percentage of disability. See Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 784, 817 P.2d 212, rev. denied 249 Kan. 778 (1991). The trier of fact has the right and the obligation to weigh the evidence and to determine the credibility of the witnesses, including the physicians who testify, and utilize that as a factor in making its decision. Crabtree v. Beech Aircraft Corp., 229 Kan. 440, 442, 625 P.2d 453 (1981).

After reviewing the whole evidentiary record in this case, the Appeals Board finds and concludes that both Dr. Schlachter's and Dr. Brown's opinions in regard to the claimant's permanent partial general functional disability are both persuasive. Dr. Schlachter's opinion should not be completely disregarded because an interpreter was not available when he examined the claimant. Therefore, the Appeals Board finds and concludes that in regard to the claimant's left arm and shoulder, Dr. Brown's opinion of seven percent (7%) and Dr. Schlachter's opinion of twenty-one percent (21%) loss of function to the body as a whole should be given equal weight. Because Dr. Brown was the only physician who considered the claimant's right arm complaints, as such complaints did not appear until after January of 1993, his opinion of two percent (2%) permanent loss of function of the body is uncontradicted and will be the Appeals Board's finding in regard to

the right arm. Therefore, the Appeals Board finds that giving equal weight to Dr. Schlachter's and Dr. Brown's impairment rating in reference to the claimant's left arm and left shoulder will result in a fourteen percent (14%) permanent partial loss of function to the body as a whole and combining this rating with Dr. Brown's two percent (2%) impairment rating for the claimant's right wrist and arm, in accordance with the AMA Guides' combined values chart, the claimant is entitled to a sixteen percent (16%) permanent partial general functional disability award.

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

During the regular hearing held in this case and also during an evidentiary deposition that was taken in this case, the claimant complained that he is having continuing pain and discomfort in his left upper extremity, left shoulder, and right wrist and arm. Even though the claimant had not seen Dr. Artz since January 29, 1993, Dr. Artz stated in that note that the claimant should be checked again as needed. The claimant also stated that practically every day he goes to the company nurse to get some kind of medication for his continuing pain.

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

It is noted by the Appeals Board that evidence exists in the record which would support a finding that vocational rehabilitation may be warranted in the future. Dr. Schlachter concluded if the claimant has no job skills within his work restriction limits he should undergo a vocational rehabilitation training program in a different occupation.

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 20, 1993, is modified as follows:

AN AWARD OF COMPENSATION is herein entered in favor of the claimant, Jesus Fraire, and against the respondent, National Beef Packing Company, and its insurance carrier, Lumbermen's Underwriting Alliance.

The claimant is entitled to 20.14 weeks temporary total disability at the rate of \$228.43 per week or \$4,600.58 followed by 394.86 weeks at \$36.55 per week or \$14,432.13 for a sixteen percent (16%) permanent partial general body disability making a total award of \$19,032.71. As of January 25, 1994, there would be due and owing to the claimant 20.14 weeks temporary total compensation at \$228.43 per week in the sum \$4,600.58 plus 94 weeks permanent partial compensation at \$36.55 per week in the sum of \$3,435.70 for a total due and owing of \$8,036.28 which is ordered paid in one lump sum less amount previously paid. Thereafter, the remaining balance in the amount of \$10,996.43 shall be paid at \$36.55 per week for 300.86 weeks or until further order of the Director.

The claimant's contract of employment with his attorney 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	\$206.10
UNDERWOOD & SHANE	
Deposition of Dr. Brown	\$427.00
DEPOSITION SERVICES	
Deposition of Dr. Manasco	\$123.30
DEPOSITION SERVICES	
Deposition of Dr. Schlachter	\$136.90
SUSAN MILLER	
Deposition of Jesus Fraire	\$143.67

IT IS SO ORDERED.

Dated and mailed this _____ day of January, 1994.

BOARD MEMBER _____

BOARD MEMBER _____

BOARD MEMBER _____

cc: Kelly Johnston, P.O. Box 3089, Wichita, Kansas 67201-3089
Kerry McQueen, P.O. Box 2619, Liberal, Kansas 67905-2619
Thomas F. Richardson, Administrative Law Judge
George Gomez, Director