

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**RANDY E. HARGUS**  
Claimant

VS.

**GLENN R. STEVENS LUMBER**  
Respondent

AND

**INDIANA LUMBERMENS INSURANCE CO.**  
Insurance Carrier



Docket No. 169,504

**ORDER**

Respondent appeals from an Award entered by Special Administrative Law Judge William F. Morrissey on October 27, 1994.

**APPEARANCES**

Claimant appeared by his attorney, James B. Zongker of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, W. John Badke of Wichita, Kansas. There were no other appearances.

**RECORD & STIPULATIONS**

The Appeals Board has considered the record and adopted the stipulations considered in the Award.

**ISSUES**

The sole issue to be considered on appeal is the extent and nature of claimant's disability.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments of the parties, the Appeals Board finds that claimant sustained a forty-four percent (44%) permanent partial general work disability and the Award of the Special Administrative Law Judge should be affirmed.

Respondent first argues that the Award should be limited to a scheduled injury, specifically injury to the left upper extremity. In support respondent urges greater weight should be given the testimony of Dr. Duane A. Murphy as the treating physician. Dr. Murphy rated claimant's impairment as an impairment to the left arm only, noting that claimant did not complain of pain to the shoulder. However, based upon the claimant's testimony that he continued to have pain in his left shoulder when using the left arm, the

Appeals Board finds the injury did include the shoulder and, accordingly, the injury is a general body injury. This finding is also supported by the testimony of Dr. Ernest R. Schlachter and his report of August 12, 1992. He notes chronic pain in the left trapezius muscle and acute tenderness along the left scapula border when claimant uses his arm above horizontal. He rates claimant at three percent (3%) of the whole body for the shoulder injury. He also rates the upper extremity injury as twenty percent (20%) of the extremity which he converts to twelve percent (12%) of his whole body. He combines the two ratings to arrive at fifteen percent (15%) impairment of the whole body.

Respondent next asserts that if work disability is awarded the amount should be less than the amount awarded by the Special Administrative Law Judge. Specifically, respondent disagrees with the finding by the Special Administrative Law Judge relating to the loss of ability to earn a comparable wage. Respondent points out that the finding by the Special Administrative Law Judge, a finding of thirty percent (30%), exceeds the opinion expressed by either of the vocational experts, Karen Terrill or Jerry Hardin.

The Appeals Board agrees in part and disagrees in part with the finding by the Special Administrative Law Judge relating to loss of ability to earn a comparable wage. First, the Appeals Board agrees with the Administrative Law Judge that the opinion of Mr. Jerry Hardin should be considered as an opinion that claimant had lost thirty percent (30%) of his ability to earn a comparable wage. Although Mr. Hardin expressed an opinion that the loss was twenty-five percent (25%), he did so on the basis of a pre-injury wage of two hundred sixty-five dollars (\$265.00). When Mr. Hardin's projected post-injury wage of two hundred dollars (\$200.00) is compared to the actual stipulated wage of two hundred eighty-six dollars and thirty-one cents (\$286.31), the loss calculates to be thirty percent (30%).

The Appeals Board agrees with respondent, on the other hand, that the opinion of Karen Terrill should be understood as an opinion that claimant has a zero percent (0%) loss of ability to earn a comparable wage. She has testified that she expects he could earn two hundred sixty-five dollars (\$265.00) per week, which she understood to be the base pre-injury pay. She also testifies that she believes he could obtain employment which would allow overtime pay. She does not attempt to speculate about the amount of overtime which might be earned.

The Appeals Board finds persuasive, however, claimant's actual post-injury wage. It appears from the evidence this wage likely would have soon increased from one hundred seventy dollars (\$170.00) per week to a two hundred dollar (\$200.00) per week wage. Using the two hundred dollar (\$200.00) per week as the post-injury wage, the Appeals Board finds a thirty percent (30%) loss of ability to earn a comparable wage and agrees with the conclusion by the Special Administrative Law Judge.

The Appeals Board also agrees with the finding of the Special Administrative Law Judge that claimant has approximately a fifty-eight percent (58%) loss of ability to perform work in the open labor market. This conclusion is reached by giving equal weight to the opinions of Ms. Terrill and Mr. Hardin. Mr. Hardin concluded claimant lost seventy to seventy-five percent (70-75%) of his ability to perform work in the open labor market and Ms. Terrill found claimant had lost forty-three percent (43%) of his ability to perform work in the open labor market. Giving equal weight to both opinions yields the fifty-eight percent (58%) loss which the Appeals Board finds to reasonably assess claimant's loss of ability to perform work in the open labor market.

As claimant has pointed out, the Special Administrative Law Judge purports to weigh equally the loss of access to the open labor market and loss of ability to earn a comparable wage as authorized by Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990). In fact, however, an averaging of the two percentages, fifty-eight

percent (58%) and thirty percent (30%) would yield a forty-four percent (44%) work disability. From this claimant argues that the Award should either be increased to forty-four percent (44%), or the alternative, that the Award should be affirmed. After reviewing the record as a whole, the Appeals Board finds that the forty-four percent (44%) represents a reasonable assessment of claimant's disability.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated October 27, 1994 should be, and the same is, hereby modified.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR OF** the claimant, Randy E. Hargus, and against the respondent, Glenn R. Stevens Lumber Company, and the insurance carrier, Indiana Lumbermens Insurance Company, for an accidental injury which occurred on December 5, 1991 and based on an average weekly wage of \$286.31, for 38.43 weeks of temporary total disability compensation at the rate of \$190.88 per week in the sum of \$7,335.52 and 376.57 weeks of compensation at the rate of \$83.99 per week in the sum of \$31,628.11 for a 44% permanent partial general body work disability making a total award of \$38,963.63.

As of December 29, 1995 there is due and owing claimant 38.43 weeks of temporary total disability compensation at the rate of \$190.88 per week in the sum of \$7,335.52, and 173.71 weeks of permanent partial compensation at the rate of \$83.99 per week in the sum of \$14,589.90 making a total due and owing of \$21,925.42 less compensation heretofore paid. The remaining \$17,038.21 is to be paid for 202.86 weeks at the rate of \$83.99 per week until fully paid or further order of the Director.

Future medical benefits will be awarded only upon proper application to and approval of the Director. Unauthorized medical expense of up to \$350.00 is ordered paid to or on behalf of the claimant upon presentation of proof of such expense.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed to the respondent to be paid direct as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Ireland Court Reporting Transcript of Regular Hearing	\$109.70
Barber & Associates Deposition of Ernest R. Schlachter, M.D. Deposition of Jerry D. Hardin	\$120.00 \$198.80
Harper & Associates Deposition of Karen Crist Terrill	Unknown
Satterfield Reporting Services Deposition of Duane A. Murphy, M.D.	\$ 78.60

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January 1996.

BOARD MEMBER

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- c: James B. Zongker, Wichita, Kansas
- W. John Badke, Wichita, Kansas
- William F. Morrissey, Special Administrative Law Judge
- Philip S. Harness, Director