



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

### ISSUES

- (1) What is the nature and extent of claimant's injury and disability?
- (2) What, if any, is the liability of the Kansas Workers Compensation Fund?

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Claimant alleges accidents in July 1991 and again in October 1991 through December 5, 1991, while working for respondent. In both instances, claimant fell backwards off of a three-step ladder, suffering injuries to her back, hip and left leg. In both instances, claimant was referred to Boeing Central Medical with follow-up care occurring only after the October incident.

Claimant, in October 1991, was referred to Dr. Robert Eyster, an orthopedic surgeon in Wichita, Kansas. Claimant was given steroid injections and returned to work at light duty. Claimant was unable to perform the light duty and was taken off work December 5, 1991, never to return. Claimant was later referred to Dr. Lawrence Blaty, who ordered physical therapy. Claimant was unable to complete the physical therapy. She was then referred to Dr. Ozanne, who requested a functional capacity assessment, which she was also unable to complete. Claimant underwent an MRI which showed mild facet degenerative changes with disc dehydration at L4-5, but no herniation or spinal stenosis was found. In spite of aggressive physical therapy and medication, claimant continued to be symptomatic. Claimant was released and returned to work in July 1992, but the respondent was unable to put her back to work within her restrictions.

Claimant was examined by Dr. Ernest Schlachter on December 16, 1992, and again on November 12, 1993. Dr. Schlachter diagnosed chronic lumbosacral sprain with disc disease of the lumbar spine and symptomatology indicative of nerve root irritation with psychogenic overlay. He rated claimant functionally at ten percent (10%) to the body as a whole and recommended permanent restrictions of no repetitive bending, twisting, stooping, kneeling, squatting or working in awkward positions. He advised claimant avoid repetitive lifting over twenty (20) pounds and single lifting over thirty-five (35) pounds and recommended she rotate between sitting and standing. After the second examination, he diagnosed chronic lumbosacral sprain with disc disease and severe psychogenic overlay. He imposed the same permanent restrictions and advised claimant would not be willing to work even at a very sedentary type of job because of her severe psychogenic overlay. He found claimant to be neurotic and probably unwilling to work within her physical capabilities.

Claimant was examined by Dr. Kenneth Zimmerman, the Boeing medical director, after both the July and October incidents. In July 1991, he felt claimant could continue working without medical attention, diagnosing only stretched muscles without extreme pain.

After the October accident, he felt claimant had been affected in the same areas of the body, but with more severe pain. He diagnosed chronic lumbosacral strain with recurrent muscle spasm superimposed on preexisting X-ray abnormalities, including degenerative arthritis in the lumbosacral spine and sacroiliac, a thinning disc at L5-S1 and increased lumbosacral angulation. He imposed permanent restrictions of no lifting over twenty (20) pounds, no bending over ninety degrees (90°) or twisting more than forty-five degrees (45°), level work only, with claimant being allowed to change positions frequently. He further advised against standing or sitting for more than one hour at a time. He rated claimant at seven percent (7%) of the body as a whole on a functional basis. Subsequent to December 5, 1991, claimant was incapable of returning to work at Boeing within the restrictions placed upon her by either doctor.

In proceedings under the Workers Compensation Act, the burden of proof shall be upon the claimant to establish claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends by a preponderance of the credible evidence. See K.S.A. 44-501 and K.S.A. 44-508(g).

K.S.A. 1992 Supp. 44-510e(a) provides in part:

"There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to average gross weekly wage that the employee was earning at the time of the injury."

The Administrative Law Judge found claimant suffered accidental injury in July 1991. The Workers Compensation Appeals Board finds the more problematic of claimant's incidents occurred during the period October 1991 through December 5, 1991 and adopts same as its date of injury. The Appeals Board also finds that while claimant returned to work subsequent to her fall in October 1991, her condition continued to worsen until December 5, 1991 when she was forced to leave due to her ongoing physical problems. When claimant was returned to work in June 1992, the employer was unable to meet the restrictions placed upon her by either Dr. Schlachter or Dr. Zimmerman. As such, the Appeals Board finds that claimant has rebutted the presumption contained in K.S.A. 1992 Supp. 44-510e(a) and is entitled to a work disability in this matter beyond her functional impairment.

K.S.A. 1992 Supp. 44-510e(a) states in part:

"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 to 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."

Dr. Schlachter assessed claimant a ten percent (10%) whole body functional impairment as a result of her injuries suffered with respondent. Dr. Zimmerman assessed claimant a seven percent (7%) whole body functional impairment as a result of her injuries suffered while employed with respondent. The Appeals Board finds claimant has an eight

and one-half percent (8.5%) whole body functional impairment. The functional impairment neither meets nor exceeds the claimant's entitled work disability in this matter.

Claimant was referred to two vocational experts for an assessment of claimant's loss of access to the open labor market and loss of ability to earn comparable wages. Jerry Hardin, testifying on behalf of the claimant, felt claimant's loss of ability to perform work in the open labor market was sixty to sixty-five percent (60-65%) based upon Dr. Ozanne's restrictions and sixty-five to seventy percent (65-70%) based upon Dr. Schlachter's restrictions. Mr. Hardin felt that claimant was capable of making \$240.00 per week post-injury which, when compared to a preinjury average weekly wage of \$740.00 computes to a sixty-eight percent (68%) loss of ability to earn a comparable wage.

Mr. Maurice Entwistle opined, on behalf of the respondent, that claimant's loss of access to the open labor market would be thirty-four percent (34%), although Mr. Entwistle did opine that he felt claimant did not have a valid loss in this case. He felt claimant should only be diagnosed with a back strain, which he did not believe was permanent. Mr. Entwistle did go on to state that claimant would be capable of making wages in the range of \$10.12 per hour, which would compute to a thirty-eight percent (38%) loss of ability to earn a comparable wage. Mr. Entwistle then divided the claimant's wage loss percentage by fifty percent (50%) because, based upon his opinion that Boeing's wages are so much higher than the remainder of the Wichita market, to leave it as is would be inappropriate. The Appeals Board, in assessing this novel approach, rejects same.

While the statute discusses two factors that must be considered in computing work disability, the statute gives no indications as to what, if any, emphasis is to be placed on each. The Supreme Court, in Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011, (1990), found that a balancing of the two factors would be appropriate, giving equal weight to each. In reviewing the opinions of the experts, the Appeals Board finds, by giving equal weight to each expert, claimant has suffered a fifty-one percent (51%) loss of ability to perform work in the open labor market and a fifty percent (50%) loss of ability to earn a comparable wage. The Appeals Board finds no reason to place greater emphasis upon one, in this circumstance, over the other and, in applying equal weight to each, finds claimant has suffered a fifty percent (50%) permanent partial general body disability as a result of the injuries suffered with the respondent during the period October 1991 through December 5, 1991.

The Appeals Board is next asked to decide what, if any, is the liability of the Kansas Workers Compensation Fund. Both Dr. Schlachter and Dr. Zimmerman, in evaluating claimant's preexisting problems, opined that but for claimant's preexisting problems she would not have had the current impairment which she suffered.

The purpose of the Workers Compensation Fund is to encourage employment of persons handicapped as a result of specific impairments by relieving employers, wholly or partially, of workers compensation liability resulting from compensable accidents suffered by these employees. K.S.A. 44-567(a); Blevins v. Buildex, Inc., 219 Kan. 485, 548 P.2d 765, (1976).

K.S.A. 44-567(b) provides in part:

"In order to be relieved of liability under this section, the employer must prove either the employer had knowledge of the preexisting

impairment at the time the employer employed the handicapped employee or the employer retained the handicapped employee in employment after acquiring such knowledge.”

An employee is handicapped under the act if the employee is “afflicted with an impairment of such character as to constitute a handicap in obtaining or retaining employment.” Carter v. Kansas Gas & Electric Co., 5 Kan. App. 2d 602, 621 P.2d 448, (1980).

In this instance, the Appeals Board is persuaded that the respondent has met its burden of proving that it retained a handicapped employee within the definition of K.S.A. 44-566(b) and further, that respondent had knowledge of this handicap sufficient to satisfy the requirements of K.S.A. 44-567(b). The respondent retained claimant, as a handicapped employee, after acquiring such knowledge.

As both Dr. Schlachter and Dr. Zimmerman have found that but for claimant's preexisting condition, she would not have suffered the impairment found from the injury occurring October 1991 through December 5, 1991, the Appeals Board finds that all the compensation, medical expenses and costs in this matter shall be borne by the Kansas Workers Compensation Fund.

### AWARD

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated July 13, 1994, shall be and is affirmed in all respects, with the exception that the accident date is found to be October 1991 through December 5, 1991. The claimant, Linda L. Pearce, is awarded compensation against the respondent, The Boeing Company, and its insurance carrier, AETNA Casualty & Surety Company, and the Kansas Workers Compensation Fund for an accidental injury occurring on October 1991 through December 5, 1991, and based upon an average weekly wage of \$740.00 per week, for 84 weeks temporary total disability compensation at the rate of \$289.00 per week in the sum of \$24,276.00, followed thereafter by 331 weeks compensation at the rate of \$246.68 per week in the sum of \$81,651.08 for a 50% permanent partial general body work disability, making a total award not to exceed \$100,000.

As of June 27, 1995, there would be due and owing to claimant 84 weeks temporary total disability compensation at the rate of \$289.00 per week in the sum of \$24,276.00, followed thereafter by 101 weeks permanent partial general body work disability at the rate of \$246.68 per week in the sum of \$25,126.83 for a total of \$49,402.83, which is due and owing in one lump sum less any compensation previously paid. Thereafter, claimant is entitled to 205.11 weeks permanent partial general body work disability at the rate of \$246.68 per week in the sum of \$50,579.17 until fully paid or until further order of the Director.

Future medical benefits are awarded upon proper application to and approval by the Director.

Unauthorized medical expenses of up to \$350.00 are ordered paid to or on behalf of the claimant upon presentation of statements justifying same.

All compensation, medical expenses and costs are to be borne by the Kansas Workers Compensation Fund with the Fund ordered to reimburse respondent for any and all such payments made to date by the respondent.

Claimant's attorney fees contract is herein approved insofar as it is not in contravention with K.S.A. 44-536.

The fees necessary to defray the expense of the Workers Compensation Act are hereby assessed against the Kansas Workers Compensation Fund to be paid as follows:

William F. Morrissey	
Special Administrative Law Judge	\$150.00
Barber & Associates	
Transcript of Preliminary Hearing	\$ 70.40
Transcript of Regular Hearing	\$224.55
Deposition of Jerry D. Hardin	\$254.20
Deposition of Ernest R. Schlachter, M.D.	\$222.50
Deposition Services	
Deposition of Kenneth D. Zimmerman, M.D.	\$296.20
Deposition of Maurice Entwistle	\$313.00

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July, 1995.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

- c: James B. Zongker, Wichita, Kansas
- Frederick L. Haag, Wichita, Kansas
- Randall C. Henry, Hutchinson, Kansas
- William F. Morrissey, Special Administrative Law Judge
- David A. Shufelt, Acting Director