

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

CARL B. LESLEY)	
Claimant)	
VS.)	
)	Docket No. 170,672
BEECH AIRCRAFT CORPORATION)	
Respondent)	
Self-Insured)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Claimant appeals from an Award entered by Assistant Director Brad E. Avery on November 27, 1996.

APPEARANCES

Claimant appeared by his attorney, Russell B. Cranmer of Wichita, Kansas. Respondent appeared by its attorney, Terry J. Torline of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, E. L. Lee Kinch of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has reviewed and considered the record identified in the Award. The Appeals Board has also adopted the stipulations listed in the Award.

ISSUES

The Assistant Director found that claimant had not established that he suffered an accidental injury arising out of and in the course of his employment on the dates alleged. Claimant appeals from that finding. The parties have agreed that if the Board reverses the decision by the Assistant Director, the Board should also address the issues of timely notice

of claim, nature and extent of disability, claimant's entitlement to unauthorized and future medical compensation, and the liability of the Workers Compensation Fund, if any.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes that the Award by the Assistant Director should be affirmed.

Claimant, who settled a prior workers compensation claim for injury to his low back in 1983, alleged and testified that he reinjured his back and suffered additional permanent injury caused by work he performed as a hand router for respondent in 1992. The Assistant Director decided claimant did not establish a new injury and gave two general reasons for his decision. First, he notes that claimant gave several inconsistent descriptions of the cause of his injury in 1992. Second, the Assistant Director found convincing the testimony of Dr. Robert L. Eyster. Dr. Eyster had seen claimant for the earlier injury as well as for the 1992 injury. Dr. Eyster concluded there was no new permanent impairment in 1992.

Although the Appeals Board might give a different emphasis, the Board generally agrees with the reasons given for the conclusion reached by the Assistant Director. Claimant testified both at the preliminary hearing and the regular hearing that there was no specific injury but that his low-back condition became noticeably worse in January 1992. In contrast, claimant apparently told Dr. Mary A. Lynch that he suffered an injury in January 1992 lifting something. He told vocational expert Jerry D. Hardin that the injury occurred in April 1992. He told vocational expert Karen Crist Terrill that he had injured himself setting up tools sometime in 1992. From this evidence the Appeals Board concludes probably or most likely claimant does not know what, if anything, specifically might have caused his back to become worse and does not know specifically when his back became worse.

Dr. Eyster, who treated claimant for the injury in the early 1980s, concluded claimant had suffered no new permanent impairment in 1992. Dr. Eyster did, on the other hand, recommend more severe restrictions after 1992. In 1983 Dr. Eyster recommended claimant not lift over 40 or 50 pounds. After 1992, Dr. Eyster recommended that claimant not lift over 10 to 15 pounds. To explain the more limiting restrictions, Dr. Eyster testified that claimant is getting older. Dr. Eyster's answers suggest that there has been a worsening of claimant's degenerative disc disease. Dr. Eyster testified there were a number of factors which explain this worsening. According to Dr. Eyster it is a combination of daily living, work activities, sitting at home, and just getting older.

The Appeals Board also finds Dr. Eyster's testimony and evidence convincing. Dr. Eyster's opinions are supported, in part, by the claimant's own inability to identify any specific cause or even a time when the condition worsened. As the Board construes and understands Dr. Eyster's testimony, it might have provided a legitimate basis for review and modification of the claim claimant made in the early 1980s. Nance v. Harvey County, 23 Kan. App. 2d 899, 937 P.2d 1245 (1997), *aff'd*, Docket No. 75,703 (Kan., *opinion filed* 12/30/97). However, claimant settled the prior claim and, in doing so, waived his right to

review and modification. The testimony by Dr. Eyster established, however, there had been no new compensable injury.

Claimant relied, in part, upon the testimony of Dr. Mary Lynch. Dr. Lynch has diagnosed fibromyalgia in addition to the degenerative disc disease. According to Dr. Lynch claimant has had muscle spasms on and off since 1983. She states that claimant gave a history which indicated he had injured himself in 1992 and the muscle spasms increased. She described the fibromyalgia as a condition created from chronic muscle overload. The testimony by Dr. Lynch does not dissuade the Board from its reliance on the opinion of Dr. Eyster. It appears Dr. Lynch had a history of a specific accident. That history is not consistent with claimant's testimony at either the preliminary hearing or the regular hearing in this case. Second, when asked about that specific accident, Dr. Lynch indicates that the specific mechanism was not significant. According to Dr. Lynch the injury could be caused by something like lifting a cup. What was significant to Dr. Lynch was an increase in the muscle spasms. The Appeals Board finds from the evidence that claimant's condition has generally worsened. Dr. Lynch's version of the events do not convince the Board that the worsening is anything other than a result of general aging or day-to-day living activities.

AWARD

WHEREFORE, the Appeals Board finds that the Award entered by Assistant Director Brad E. Avery, dated November 27, 1996, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of January 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Russell B. Cranmer, Wichita, KS
- Terry J. Torline, Wichita, KS
- E. L. Lee Kinch, Wichita, KS
- Nelsonna Potts Barnes, Administrative Law Judge
- Philip S. Harness, Director