

ISSUES

- (1) Whether claimant suffered an accidental injury arising out of and in the course of his employment with respondent.
- (2) What, if any, is the nature and extent of claimant's injury and or disability?

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 began working for respondent January 28, 1991 and worked through August 20, 1992. He has alleged an injury to his back beginning in January 1992, and running through his last date of employment. Claimant was hired by respondent to create training programs and training manuals. As a part of his employment he would be required to perform physical labor approximately one and one-half (1 ½) hours out of each working day dealing with weights anywhere from five to fifty (5-50) pounds. Claimant estimated this average working weight would be in the thirty to thirty-five (30-35) pound range and he would have to lift this weight two (2) to three (3) times a day nonrepetitively. Claimant also testified that he owned a farm and was feeding four (4) cows and a calf on a regular basis. He would feed them ten to fifteen (10-15) pounds of range cubes per day and, during the non-pasture season, would provide one (1) to two (2) bales of hay at each feeding with the bales weighing in the range of forty to fifty (40-50) pounds. Claimant also testified that during his farming activities he would put up hay, generally dealing with approximately eighty (80) bales of hay weighing anywhere from forty to eighty (40-80) pounds depending upon the moisture content.

In August 1992, claimant went on a twelve (12) day vacation to Nashville, Tennessee. He returned to work on a Tuesday and then spent the following day, Wednesday, at Wichita State University attending classes. The next day, Thursday, April 20, 1992, claimant awoke with his back hurting more than usual. Claimant's back continued to get worse until by approximately 2:30 he was required to leave work and go to the doctor. Claimant describes no specific physical activity which lead to this worsening of his back condition.

Claimant's history is significant in that he suffered a serious injury in 1986 while in the Air Force. His ongoing back difficulties in the Air Force led to an Honorable Medical Discharge in 1988 with the Air Force assigning claimant a ten percent (10%) whole body functional impairment and the Veterans Administration assigning claimant a twenty percent (20%) whole body functional impairment. Claimant was diagnosed with spinal stenosis at L4-5 and further was diagnosed with a bulging disc at that same level. Dr. Anthony Pollock, a board certified orthopedic surgeon, examined claimant in 1986 while claimant was in the military. Dr. Pollock recommended, in 1987, that claimant undergo surgery in order to correct the problems found in his low back.

When Dr. Pollock examined claimant in September 1992, claimant did not mention any specific injury. He simply talked to the doctor regarding his ongoing back complaints. The doctor opined that claimant was suffering from the same conditions in 1992 as diagnosed in 1986, 1987 and 1988. The doctor testified that claimant underwent a disectomy in October 1992, which was the same surgery that the doctor had recommended in 1987. When described the physical activities required at work and on the

farm, the doctor testified that more likely than not claimant's farming activities were the aggravating factor in this situation.

Dr. Pollock testified that claimant's spinal stenosis, diagnosed in 1986, would simply get worse with age. Sooner or later he advised claimant was going to have to have surgery to correct the problem. He felt claimant's condition in 1992 was no different than that in 1987.

Claimant was examined by Dr. Ernest Schlachter on October 18, 1993. The history contained in Dr. Schlachter's records indicated claimant regularly worked with weights weighing from sixty to sixty-five (60-65) pounds with respondent. This history is dissimilar to that provided by claimant during his testimony. Repetitive lifting of up to sixty-five (65) pounds on the job would create significant demand upon claimant's low back. The testimony provided by claimant regarding his work duties with respondent fails to support this type of heavy work history. The Appeals Board finds the medical history of Dr. Schlachter, being inaccurate, would have a negative influence upon the doctor's ability to accurately predict the cause of claimant's ongoing symptomatology. As such, the doctor's opinion regarding claimant's aggravating circumstances is not considered to be reliable by the Appeals Board.

In proceedings under the Workers Compensation Act it is the claimant's burden to prove by a preponderance of the credible evidence his entitlement to benefits under the Workers Compensation Act. See K.S.A. 44-501 and K.S.A. 44-508(g). Claimant must establish that he has sustained an accident and injury arising out of and in the course of his employment. These are separate elements which must be proven in order for the claim to be compensable. Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973). In order to establish that the incident "arose out of the employment" the claimant must show that there is some causal connection between the accident, injury and the employment. To do this it must be shown that the injury arose out of the nature, conditions, obligations and incidents of the employment. "In the course of employment" relates to the time, place and circumstances under which the accident occurred and requires that the injury happened while the employee was at work at his employer's service. Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 689 P.2d 837 (1984).

The credible medical evidence in this file comes from the testimony of Dr. Anthony Pollock. Dr. Pollock had the advantage of examining claimant both in 1986 when claimant first suffered injury and in 1992. Dr. Pollock, as the treating physician, also provided the surgery to claimant which was recommended in both 1987 and 1992. In Dr. Pollock's opinion the condition suffered by claimant in 1992 was no different than that found in 1986 and 1987. As such, the Appeals Board finds that the condition suffered by claimant stems from his original injury in 1986 while with the Air Force. It cannot be found by a preponderance of the credible evidence that claimant suffered accidental injury arising out of and in the course of his employment with respondent and, as such, benefits are denied.

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 September 14, 1994, denying claimant an award against the respondent due to claimant's failure to prove that it is more probably true than not that his injury resulted from his employment, should be and is affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of October, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Andrew E. Busch, Wichita, Kansas
- Michael D. Streit, Wichita, Kansas
- Bill Mitchell, Hutchinson, Kansas
- William F. Morrissey, Special Administrative Law Judge
- Philip S. Harness, Director