

ISSUES

- (1) Did claimant suffer accidental injury or occupational disease arising out of and in the course of his employment with respondent?
- (2) What is the nature and extent of claimant's injury and/or disability?
- (3) Did claimant suffer intervening exposures, increasing his asthmatic condition?
- (4) What is claimant's post-award average weekly wage?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

Findings of Fact

Claimant alleges that on August 14, 1992, while cleaning a drain spill, he suffered an asthmatic episode which later caused him to go to the emergency room at the local hospital. Claimant was treated at the emergency room and later came under the treatment of Dr. Thomas Bloxham, board certified in internal medicine and pulmonary diseases. Dr. Bloxham examined and treated claimant over a long period of time, diagnosing mild asthma.

Claimant attempted to return to work with respondent, but due to the grain dust exposure was unable to continue working there, terminating his employment in May 1993. Claimant remained unemployed until approximately September 21, 1993, at which time he obtained a job with Sutrak as a quality control employee. He continued working for Sutrak in that capacity until April 22, 1994, when he voluntarily terminated his employment. Claimant alleges his Sutrak termination was as a result of dissatisfaction with the job, concern over the instability of the job and a fear of being exposed to fiberglass.

The Sutrak quality assurance manager, Pamela Vallejos, acknowledged claimant worked for Sutrak and that he terminated his employment in April 1994. She disputed that the termination was as a result of any health problems or concerns claimant had while working for Sutrak. She alleged claimant's termination was due to frustration with the job. She did acknowledge that, while employed with Sutrak, claimant was exposed on a daily

basis to paints, fiberglass fumes, forklift exhaust and occasionally welding fumes when he volunteered to help with Suttrak's welding. During this period of employment, claimant rarely sought medical treatment.

On the same date as his termination of employment with Suttrak, claimant began his employment with Ranch Manufacturing. Mr. Randall Hays, the job shop supervisor for Ranch Manufacturing, testified that claimant did work for him for a period of several months. He acknowledged claimant was exposed to paint fumes, sometimes on a daily basis. He was not aware claimant had a pulmonary difficulty until approximately a month after claimant began working there. At that time, claimant started exhibiting symptoms and having difficulty breathing. In August 1994, claimant again began appearing at the local emergency room with breathing and respiratory difficulties. Between August 27, 1994, and November 1, 1994, claimant visited the emergency room on seven different occasions.

On approximately November 16, 1994, claimant terminated his employment with Ranch which, according to the claimant, was pursuant to the instructions of Dr. Charles T. Hinshaw, Jr., who first examined claimant on November 8, 1994. At that time, Dr. Hinshaw diagnosed both chemical sensitivity and secondary hyperactivity disease, also known as asthma. Claimant has undergone examinations and/or treatment with a multitude of doctors, with a general consensus that he either has slight asthma or some type of respiratory condition. Dr. Hinshaw felt claimant's exposure to the grain dust on August 14, 1992, caused the development of multiple chemical sensitivities and asthma. He warned against claimant being exposed to any additional substances, including chemicals which may trigger the symptoms.

Dr. Bloxham, who initially examined claimant on January 7, 1993, also found that claimant had developed a sensitivity to dust, fumes and respiratory irritants. He did note during his exam of April 13, 1993, that claimant's functional impairment was normal, but agreed claimant's condition could be aggravated by exposure to irritating dusts and fumes. On July 13, 1993, Dr. Bloxham opined that claimant had no permanent pulmonary impairment as a result of his injury suffered with respondent. In his medical report of June 3, 1993, Dr. Bloxham warned that claimant would be bothered by welding fumes.

Claimant was examined by Dr. Dumont Clark in August 1992. Dr. Clark's letter of August 31, 1992, to Dr. Hilton Ray indicated that claimant's pulmonary functions were normal but warned that continued exposure to grains and/or chemicals could possibly cause irreversible obstruction. Dr. Clark also warned in his December 2, 1992, letter to attorney James McVay that repeated exposure to grains and/or chemicals would cause respiratory difficulties. Dr. Bloxham stated in his July 13, 1993, letter that claimant had reached maximum medical improvement. This is significant as the April 4, 1995, letter from Dr. Cecile Rose, who began treating claimant in April 1995, opined that claimant was not at maximum medical improvement. In addition, a methacholine inhalation challenge

done on April 4, 1995, indicated claimant was four times more asthmatic than he was at the time of the examinations by Dr. Bloxham in 1993.

Conclusions of Law

In proceedings under the Workers Compensation Act, the burden of proof shall be on claimant to establish claimant's right to an award of compensation by proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. K.S.A. 1992 Supp. 44-501 and K.S.A. 1992 Supp. 508(g). See also Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

When a primary injury under the Workers Compensation Act arises out of and in the course of a worker's employment, every natural consequence that flows from that injury is compensable if it is a direct and natural result of the primary injury. Gillig v. Cities Service Gas Co., 222 Kan. 369, 564 P.2d 548 (1977).

Although Kansas does recognize the doctrine of natural and direct consequences which flow from a work-related injury, the doctrine is not applicable when the consequence results from a new and separate accident. Wietharn v. Safeway Stores, Inc., 16 Kan. App. 2d 188, 820 P.2d 719, *rev. denied* 250 Kan. 808 (1991).

Claimant has proven occupational disease arising out of and in the course of his employment with respondent on the date alleged. The exposure by claimant led to almost immediate symptoms and the necessity for claimant to go to the emergency room that evening. Claimant had difficulties returning to work and ultimately had to terminate his employment with respondent as a result of the grain exposures. Several doctors in the record, including Dr. Bloxham and Dr. Hinshaw, felt that claimant's symptomatology began with his exposure in August 1992 with respondent. It is also noted that several doctors, including Dr. Bloxham, Dr. Hinshaw, Dr. Clark and Dr. Rose, warned claimant against additional exposure to grain dust or certain chemicals.

However, after leaving his employment with respondent, claimant obtained employment with Sutrak Corporation in Lamar, Colorado. Claimant was hired as a quality control employee. Claimant testified he rarely if ever was exposed to any chemicals while working for Sutrak. On one occasion, he did admit to being exposed to fiberglass which caused an episode of increased asthmatic symptoms. Pamela Vallejos, quality assurance manager, was claimant's supervisor at Sutrak. Ms. Vallejos testified that, during his employment with Sutrak, claimant was exposed on an almost daily basis to paint smell, fiberglass fumes and forklift exhaust. She acknowledged claimant even volunteered on an occasional basis to help with the welding. Claimant's termination of employment with Sutrak was voluntary. Ms. Vallejos opined that claimant's reason for leaving resulted from frustration with the job situation. She was provided no indication by claimant that his termination of employment resulted from any health concerns or difficulties.

Claimant left Sutrak and on the same day obtained employment with Ranch Manufacturing. While at Ranch Manufacturing, claimant acknowledged being involved in welding on a more frequent basis. He was also exposed to paint fumes as often as every day according to Randall Hays, the Ranch Manufacturing job shop supervisor. Mr. Hays denied being aware of claimant's breathing difficulties at the time claimant was hired. He did acknowledge claimant began exhibiting symptoms within approximately one month of his hire. Claimant's employment with Ranch Manufacturing began on April 22, 1994. By August 27, 1994, claimant was exhibiting symptoms significant enough to cause him to again go to the emergency room. Between August 27, 1994, and November 1, 1994, claimant was forced to go to the emergency room for treatment of his breathing difficulties on seven separate occasions.

While claimant was under the treatment of Dr. Bloxham in 1993, he was diagnosed with very mild asthma. Claimant terminated his employment with respondent in May 1993. Dr. Bloxham's June 3, 1993, medical report indicated that claimant was bothered by welding. However, at both the Sutrak job and the job with Ranch Manufacturing, claimant continued at least sporadically to weld and be exposed to the welding fumes. In July 1993, Dr. Bloxham opined claimant had reached maximum medical improvement and felt claimant had suffered no permanent pulmonary impact from his exposures. Dr. Bloxham's April 13, 1993, exam found claimant's pulmonary function to be normal, but he acknowledged that claimant's condition could be aggravated by exposure to dust, fumes or respiratory irritants. Dr. Dumont Clark, who had the opportunity to examine claimant in August 1992, felt that claimant's pulmonary functions were also normal. However, he also cautioned that exposure to grains or chemicals in the future could possibly cause irreversible obstructions. Dr. Clark, in his letter to James McVay on December 2, 1992, warned of repeated exposure and the resulting respiratory difficulties which may occur. Claimant began treatment with Dr. Charles Hinshaw in November 1994, shortly before his termination of employment with Ranch Manufacturing. According to claimant, it was Dr. Hinshaw who advised him to quit working for Ranch because of claimant's ongoing symptoms. Dr. Hinshaw diagnosed multiple chemical sensitivity with secondary hyperactive airway disease, also known as asthma. Dr. Hinshaw acknowledged that claimant could not tolerate exposure to even minute fumes. He recommended claimant avoid chemicals which may trigger these symptoms.

Dr. Cecile Rose, who began treating claimant in 1995, felt that claimant was not at maximum medical improvement which indicated claimant's condition had worsened substantially since his examination by Dr. Bloxham in July 1993.

The medical evidence clearly supports a finding that claimant suffered an occupational disease while working for respondent on or about August 14, 1992, when he was exposed to the grain dust. However, the medical evidence also shows that claimant's pulmonary function was normal shortly after terminating his employment with respondent. Dr. Hinshaw was concerned that claimant's employment in November 1994, exposing him

to many acetylene torch welders and their resultant fumes, would cause claimant additional problems. In addition, the methacholine inhalation challenge done by Dr. Rose on April 4, 1995, showed claimant to be four times more asthmatic than after his treatment with Dr. Bloxham in 1993 and before working for Ranch Manufacturing.

The Appeals Board finds, based upon a review of the medical evidence, that claimant suffered additional injury while working for Ranch Manufacturing in 1994 with a worsening of his symptoms and a worsening of his underlying chronic condition.

The Appeals Board further finds that claimant's employment with Sutrak paid him an average weekly wage of \$418.53. This, when compared to claimant's average weekly wage of \$438.00, resulted in a 5 percent loss of wages.

In addition, while working for Ranch Manufacturing, claimant was earning between \$402.00 and \$488.00 per week, depending upon the extent of overtime he was allowed. This represents a return to employment at a wage equal to or greater than the wage claimant was earning with the respondent.

Under the occupational disease statutes, K.S.A. 44-5a01(a) provides that an occupational disease shall be treated as the happening of an injury by accident, and the employee shall be entitled to compensation for such disablement in accordance with the provisions of the Workers Compensation Act, as in cases of injuries by accident. The occupational disease section of the Act provides no instruction on computing benefits available to a worker for an occupational disease. Slack v. Thies Development Corp., 11 Kan. App. 2d 204, 718 P.2d 310, *rev. denied* 239 Kan. 694 (1986). The only provision under the occupational disease statute dealing with the determination of amounts of compensation is found at K.S.A. 1992 Supp. 44-5a04, which provides as follows:

(b) The director may cancel the award and end the compensation if the director finds that the employee (1) has returned to work for the same employer in whose employ the employee was disabled or for another employer and is capable of earning the same or higher wages than the employee did at the time of the disablement, or is capable of gaining an income from any trade or employment which is equal to or greater than the wages the employee was earning at the time of disablement

In this instance, claimant has, on two separate occasions, obtained employment, subsequent to suffering his occupational disease with respondent, which provided claimant an income which is comparable to or greater than the wages claimant was earning at the time of disablement. As such, the Appeals Board finds, pursuant to K.S.A. 1992 Supp. 44-5a04, claimant is entitled to no work disability as a result of the occupational disease suffered while employed with respondent.

Should it be later determined that claimant suffered accidental injury rather than occupational disease while working for respondent, the Appeals Board finds the decision to grant no work disability would be the same.

K.S.A. 1992 Supp. 44-510e awards permanent partial general disability when considering the ability of the claimant to perform work in the open labor market and to earn comparable wages. The statute goes on to preclude work disability if the employee engages in any work for wages comparable to the average gross weekly wage the employee was earning at the time of the injury.

Therefore, pursuant to K.S.A. 1992 Supp. 44-510e, claimant would have no work disability as a result of an accidental injury suffered with respondent, as he engaged in work for wages comparable to the average gross weekly wage he was earning at the time of the injury on two separate occasions subsequent to his termination of employment with respondent. It is clear from the medical evidence and the testimony of claimant that his job with Ranch Manufacturing terminated as a result of additional exposure to chemicals, including welding fumes. This additional exposure, causing additional injury, resulted in the work disability suffered by claimant at this time. Claimant would, therefore, be limited as a result of an accidental injury suffered with respondent to his functional impairment.

The Kansas Supreme Court in Hill v. General Motors Corporation, 214 Kan. 279, 519 P.2d 608 (1974), dealt with the issue of functional impairment from synovitis that resulted from an occupational disease, and allowed the claimant to retain the 7.5 percent functional impairment award granted under the occupational disease claim. The Court refused to overturn the Director's ruling that the claimant was entitled to the functional impairment award, even though there was no wage loss. Thus, the Appeals Board finds irrelevant the issue of whether claimant suffered occupational disease or accidental injury. Claimant would be entitled to a functional impairment as a result of the injury suffered with respondent regardless of whether it is occupational disease or accidental injury.

Dr. Bloxham examined claimant in 1993 and found claimant at maximum medical improvement, having suffered no permanent pulmonary impact. Dr. Clark, who also examined claimant in 1992, felt that claimant's pulmonary functions were normal. He was concerned about continued exposure to irritants. Dr. Hinshaw found claimant to have suffered a 90 percent impairment of function as a result of his injuries exposed at work with respondent. However, the Appeals Board has concern regarding Dr. Hinshaw's opinion. First, Dr. Hinshaw acknowledges a confusion regarding the difference between functional impairment and disability. In addition, Dr. Hinshaw did not have the opportunity to examine claimant after his employment with respondent and before the intervening exposures suffered with both Sutrak and Ranch Manufacturing. The Appeals Board, therefore, discounts the opinion of Dr. Hinshaw. Dr. Rose, who had the opportunity to examine claimant, also did not get to see claimant until 1995. While she opined claimant had a 15 percent impairment of function rating based upon his asthmatic condition, she noted

that claimant was substantially more symptomatic from the asthma than at the time he was examined by Dr. Bloxham.

In workers compensation litigation, it is the function of the trier of facts to decide which testimony is more accurate and/or credible, and to adjust the medical testimony along with the testimony of claimant and any other testimony that may be relevant to the question of disability. The trier of facts is not bound by medical evidence, but has the responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

In this instance, the Appeals Board acknowledges claimant suffered occupational disease with respondent with a resultant asthmatic condition which, while diagnosed, was felt to be mild. The Appeals Board further finds claimant has suffered a functional impairment less than the 90 percent opined by Dr. Hinshaw and less than the 15 percent impairment opined by Dr. Rose. In considering the evidence of Dr. Bloxham and Dr. Clark, the Appeals Board finds claimant has suffered a 5 percent permanent partial impairment to the body as a whole as a result of the injury suffered with respondent. Tovar, *supra*.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Assistant Director Brad E. Avery dated June 30, 1997, should be, and is hereby, modified, and an award is granted in favor of the claimant, Curtis D. Wright, and against the respondent, Plunkett Feedlot, and its insurance carrier, EMC Insurance Company, for an occupational disease sustained on August 14, 1992, for a 5 percent permanent partial disability, based upon an average weekly wage of \$438.00.

Claimant is entitled to 35.47 weeks of temporary total disability compensation at the rate of \$292.01 per week in the amount of \$10,357.59, followed thereafter by 379.53 weeks permanent partial disability compensation at the rate of \$14.60 per week in the amount of \$5,541.14, for a total award of \$15,898.73.

As of September 8, 1998, claimant is entitled to 35.47 weeks of temporary total disability compensation at the rate of \$292.01 per week totaling \$10,357.59, followed thereafter by 281.10 weeks permanent partial disability compensation at the rate of \$14.60 per week in the amount of \$4,104.06, for a total of \$14,461.65, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$1,437.08 is to be paid for 98.43 weeks at the rate of \$14.60 per week, until fully paid or further order of the Director.

Claimant's contract for attorney fees is approved subject to the provisions of K.S.A. 44-536.

The fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

Underwood & Shane	
Transcript of Preliminary Hearing	\$ 49.40
Transcript of Regular Hearing	\$104.50
Deposition of Curtis Wright	\$504.00
Harper & Associates	
Deposition of Charles Hinshaw, Jr., M.D.	\$516.42
Deposition of Karen Terrill	Unknown
Deposition of Thomas Bloxham, M.D.	\$309.30
Agren Reporting & Video, Inc.	
Deposition of Cecile Rose, M.D.	Unknown
Cindy L. Fenton	
Deposition of Richard Plunkett	Unknown
Deposition of Hilton Ray, M.D.	Unknown
Deposition of Diane Powell	Unknown
Deposition of Randall Hays	Unknown
Meek & Associates	
Deposition of Diana Haverkamp	Unknown
Deposition of Pamela Vallejos	Unknown
Deposition of Nadine Landgraf	Unknown
Hyatt Court Reporting & Video	
Deposition of Cecile Rose, M.D.	Unknown

IT IS SO ORDERED.

Dated this ____ day of October 1998.

BOARD MEMBER

BOARD MEMBER

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c: Jeffrey D. Wicks, Great Bend, KS
James M. McVay, Great Bend, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director