

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

<b>MARY HANDY</b>	)	
Claimant	)	
VS.	)	
<b>SWINGSTER</b>	)	Docket No. 173,640
Respondent	)	
AND	)	
<b>CNA INSURANCE COMPANY</b>	)	
Insurance Carrier	)	
AND	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Both claimant and respondent appeal from an Award entered by Administrative Law Judge Robert H. Foerschler on September 15, 1994.

**APPEARANCES**

Claimant appeared by and through her attorney, Steve Tilton of Topeka, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Fred Greenbaum of Kansas City, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Fred J. Logan, Jr., of Prairie Village, Kansas.

**RECORD & STIPULATIONS**

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

**ISSUES**

The sole issue to be considered in this appeal is the nature and extent 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:

(1) Claimant is entitled to benefits based upon a nineteen percent (19%) impairment to the right lower extremity from the injury of March 19, 1991.

The record establishes claimant suffered two injuries. The first occurred on March 19, 1991, when she tripped and fell over a cord, injuring her right knee. The parties have stipulated that the impairment to her right lower extremity was nineteen percent (19%). The Appeals Board, therefore, awards benefits based upon nineteen percent (19%) to the lower extremity for the injury of March 19, 1991.

(2) Claimant is entitled to benefits based upon a seven percent (7%) general body disability for the injury of August 1, 1992.

Following surgery for the March 19, 1991, injury to the claimant's right knee, claimant returned to work for respondent. Due to restrictions placed upon her by Dr. Murphy she was unable to perform her pre-injury job as a screen printer and respondent placed claimant in a "cut parts" job. The new job provided a lower wage. In the fall of 1992 she began experiencing problems in her shoulder. The parties have stipulated that at the time of the injury to her knee, her average weekly wage was \$421.78. They have also stipulated that at the time of the injury to her shoulder her average weekly wage was \$267.12.

Claimant missed only a few days of work as a result of the injury to her shoulder and respondent paid no temporary total disability benefits. After cortisone injections she returned to work for the respondent performing the same duties at the same rate of pay. She continued in this position until she was terminated for falling asleep on the job.

Based upon review of the record as a whole, the Appeals Board finds that claimant should not be entitled to work disability for the second injury. After the shoulder injury, claimant returned to work and continued to work earning a wage comparable to what she was earning when she injured her shoulder. The respondent is accordingly entitled to a presumption that there was no work disability. K.S.A. 1992 Supp. 44-510e. The evidence in this case does not overcome that presumption. Claimant testified that had she not been terminated, she would be able to perform the duties for the respondent at the comparable wage job. Dr. Wertzberger performed an IME on July 6, 1993. He testified that he also considered her still able to perform the duties of her job for respondent.

The expert testimony of Michael Dreiling also does not overcome the presumption. Although he testified claimant has a reduced ability to obtain employment, his opinions were based upon a misunderstanding or a misinterpretation of Dr. Wertzberger's use of the term repetitive. He also incorrectly understood Dr. Wertzberger to be restricting claimant to sedentary work, and did not differentiate between restrictions for claimant's knee and those for the shoulder injury.

Dr. Wertzberger gave the only opinion regarding claimant's functional impairment for the shoulder alone. He rated her disability at seven percent (7%) of the body as a whole and the parties have stipulated that the functional impairment for the shoulder injury was seven percent (7%) to the body as a whole. In his opinion aggravation of claimant's prior knee injury was temporary only. Accordingly, the Appeals Board finds claimant should be awarded benefits based upon that seven percent (7%) to the body as a whole for the injury of August 1992.

### AWARD

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler is hereby modified as follows:

**WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Mary E. Handy, and against the respondent, Swingster, and its insurance company, CNA Insurance, and the Kansas Workers Compensation Fund for accidental injuries sustained on March 19, 1991, and August 1, 1992.

The claimant is entitled to 10 weeks of temporary total disability at the rate of \$278.00 per week or \$2,780.00 followed by 36.1 weeks at the rate of \$278.00 per week or \$10,035.80 for a 19% loss of use of the right lower extremity, making a total award of \$12,815.80 for the injury of March 19, 1991 all of which is now due and owing.

The claimant is entitled to 415 weeks at \$12.47 per week or \$5,175.05 for a 7% permanent partial general bodily disability award based on an average weekly wage of \$267.12. As of April 21, 1995, there would be due and owing to the claimant 142 weeks of permanent partial compensation at \$12.47 per week in the sum of \$1,770.74 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance in the amount of \$3,404.31 shall be paid at \$12.47 per week for 273 weeks or until further order of the Director.

Unauthorized medical expense pursuant to K.S.A. 44-510(c) in the amount of \$350.00 are also awarded to the claimant.

Pursuant to K.S.A. 44-536, the claimant's contract of employment with her counsel is hereby approved.

The Kansas Workers Compensation Fund is to reimburse the respondent 50% of the award for the August 1, 1992 injury as agreed.

Costs of transcripts in the record are taxed against respondent and carrier as follows:

Metropolitan Court Reporters, Inc.	\$563.07
Richard Kupper & Associates	\$499.40

**IT IS SO ORDERED.**

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

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

- c: Steve Tilton, Topeka, KS  
Fred Greenbaum, Kansas City, KS  
Fred J. Logan, Jr., Prairie Village, KS  
Robert H. Foerschler, Administrative Law Judge  
George Gomez, Director