

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

VICKI HARVELL
Claimant

VS.

**SUPERIOR INDUSTRIES
INTERNATIONAL, INC.**
Respondent
Self-Insured

AND

KANSAS WORKERS COMPENSATION FUND



Docket No. 176,051

ORDER

Both claimant and respondent appeal from an Award entered by Administrative Law Judge John D. Clark dated January 17, 1995.

APPEARANCES

Claimant appeared by her attorney William L. Phalen of Pittsburg, Kansas. Respondent, a qualified self-insured, appeared by its attorney John I. O'Connor of Pittsburg, Kansas. The Kansas Workers Compensation Fund appeared by its attorney Robert V. Talkington of Iola, Kansas.

RECORD AND STIPULATIONS

For reasons explained below, the Appeals Board has not considered as part of the record depositions of Dr. Christopher Andrew and Larry Goodall. The Appeals Board has otherwise reviewed and considered the record listed in the Award. The Appeals Board has also adopted the stipulations listed in the Award.

ISSUES

Claimant has asked for review of the findings relating to nature and extent of disability. She contends that the award should be for a higher disability and should be for a work disability. Respondent appeals from the decision denying liability of the Kansas Workers Compensation Fund.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds and concludes as follows:

(1) The Appeals Board agrees with the finding by the Administrative Law Judge regarding nature and extent of claimant's disability and concludes that the award based upon 10 percent permanent partial impairment.

The Appeals Board first finds that certain of the evidence offered by respondent should not be considered because it was presented beyond terminal dates set by the Administrative Law Judge and claimant's counsel made timely objection to the introduction of the evidence. K.S.A. 1992 Supp. 44-523 provides that the claimant is to submit all of the claimant's evidence within 30 days after the first full hearing and respondent is to submit its evidence no later than 30 days thereafter. Extensions may be granted for reasons listed in the statute. In this case the depositions of Dr. Christopher Andrew and Mr. Larry Goodall were taken after terminal dates and after any agreed-upon extension of those terminal dates. None of the grounds for extensions are shown in this record. The Appeals Board, therefore, finds that those depositions and evidence presented in those depositions should not be considered in this claim.

The Administrative Law Judge determined the extent of functional impairment by giving approximate equal weight to the opinions of Dr. Edward J. Prostic, who rated claimant's impairment at 15 to 20 percent, and Dr. Paul W. Toma, who rated claimant's impairment at 3 percent. The Appeals Board agrees with and adopts this conclusion regarding the extent of functional impairment.

The Administrative Law Judge based his award in this case upon the functional impairment after finding that claimant could have returned to work at a comparable wage for respondent but chose not to do so. He applied the rationale from Fouk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994) and ruled that the presumption of no work disability limited claimant's award to functional impairment only. Claimant contends that without the depositions and evidence from Dr. Andrew and Mr. Goodall nothing in the record contradicts claimant's testimony that she could not have returned to the offered work because her injuries rendered her unable to perform these duties. The Appeals Board agrees. She testified that she was familiar with the duties of the offered accommodated position and because she had performed those duties in the past, she believed she would not be able to perform those duties. Based upon that evidence claimant has not declined a job offer for a position she is capable of performing. This evidence does not justify imposition of the presumption of no work disability in K.S.A. 1992 Supp. 44-510e or the rationale followed in the Fouk decision.

Without the presumption of no work disability claimant would be entitled to benefits based on a work disability if the work disability is greater than the functional impairment. K.S.A. 1992 Supp. 44-510e. The record does not, however, establish a work disability any greater than the functional impairment upon which the award was based. The current claim is the second filed by claimant for injury in the course of her employment with respondent. The first claim involved injury while she was working as a deburrer in the tool crib. She injured her right arm, shoulder and wrist. The claim was settled and claimant returned to work for respondent but no longer worked as a deburrer. The record establishes that claimant thereafter worked within the limits of permanent work restrictions which were accommodated by respondent. Respondent first attempted to accommodate those restrictions by placing claimant in housekeeping. Claimant indicated she was not able to do that position well and respondent transferred her to a position in the tool crib. While working in the tool crib area, claimant suffered the injuries which are at issue in this claim.

The prior restrictions were treated differently by the two vocational experts who testified in this case. Ms. Sherwood gave opinions to claimant's loss of access to the open labor market and loss of ability to earn comparable wage which assumed claimant had no work restrictions at the time of her injuries. When asked about Dr. Edward J. Prostic's prior work restrictions she acknowledged that the prior work restrictions would have resulted in as much as a 55 percent loss of access to the open labor market before the injuries in this case. Ms. Sherwood had previously testified that, in her opinion, claimant had a 71 percent loss of access to the open labor market as a result of the injuries involved in this claim.

Respondent suggests that it might be appropriate to treat Ms. Sherwood's opinion as one that claimant had lost 16 percent of access to the open labor market from the current injuries. However, Ms. Sherwood does not give any opinions which assume a redefined labor market prior to the injury in this case. The subtraction suggested by respondent of preexisting work disability from the current work disability does not equate to an appropriate recalculation of current work disability.

The only opinions in the record which account for the preexisting work restrictions are those of Mr. Weimholt. He gave opinions based upon both Dr. Prostic's and Dr. Andrews's restrictions. As previously indicated, evidence from Dr. Andrew has not been considered in this case. When Mr. Weimholt accounted for Dr. Prostic's prior restrictions he concluded claimant has a 5.61 percent loss of access to the open labor market as a result of current injuries. He also testifies that in his opinion, claimant has a 17 percent loss of ability to earn a comparable wage. Giving equal weight to the loss of access and loss of ability to earn comparable wage results in a work disability approximately one percent higher than the functional impairment rating adopted by the Administrative Law Judge for his award. The Appeals Board notes that at the time the case was tried the claimant was going to Vatterott College undergoing training to become an accounting clerk or an accounting assistant. Ms. Sherwood believed the completion of this program would reduce claimant's loss of ability to earn comparable wage to approximately 5 percent. Taking into consideration these combined factors, the Appeals Board finds and concludes that the work disability is not greater than the 10 percent functional impairment.

(2) The Appeals Board finds that the Kansas Workers Compensation Fund should be liable for two-sevenths or 28.5 percent of the award in this case. Respondent knew of claimant's injury in 1991 and the resulting work restrictions. Respondent accommodated those restrictions in claimant's employment. Two physicians testified about the relationship between the 1991 injuries and the injuries in this case. Dr. Michael J. Poppa testified that the current injuries probably or most likely would not have occurred but for the previous impairment. Dr. Prostic, on the other hand, testified that only the neck injury was aggravated by the current injuries and that aggravation or increased impairment to the neck probably or most likely would not have occurred but for the preexisting injuries.

After reviewing the record, the Appeals Board finds Dr. Prostic's opinions on this issue more convincing. Dr. Poppa did not see the claimant, he only reviewed medical records. Dr. Prostic, on the other hand, had examined the claimant after the 1991 injuries and again after the current injuries. He testified that the current injuries involved additional impairment of 3 percent to the low back, 2 percent to the shoulder and 2 percent to the neck. Dr. Poppa only evaluated the neck and shoulder injuries. Dr. Prostic believed the current shoulder injury to be a completely new injury. He concluded that the previous shoulder complaints were, in fact, referred pain from the neck injury. The low back injury was also a new injury. Although Dr. Prostic has combined the additional impairment into a total of 5 percent, the Appeals Board finds, as to the issues relating to Fund liability, it is appropriate to treat the total additional impairment as 7 percent. As indicated, Dr. Prostic found an additional 3 percent for the low back, 2 percent for the shoulder and 2 percent for the neck. That portion attributable to the additional neck injury would be two-sevenths of additional impairment. Based upon Dr. Prostic's opinion that this 2 percent would not have occurred but for the preexisting impairment, the Appeals Board finds the Kansas Workers Compensation Fund should be liable for two-sevenths of the award in this case.

The Kansas Workers Compensation Fund argued at the time of oral argument of this case that a credit should be applied for payments being made under the prior award from the 1991 injury. The Appeals Board finds it inappropriate to do so for two reasons. First, the evidence in the record does not include evidence relating to the amount of benefits paid under the prior claim. In addition, the credit issue was not raised before the Administrative Law Judge. The Appeals Board does not consider it appropriate to raise this issue for the first time on appeal. Scammahorn v. Gibraltar Savings & Loan Assn., 197 Kan. 410, 416 P.2d 771 (1966).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark, dated January 17, 1995 should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Vicki Harvell, and against the respondent, Superior Industries International, Inc., a qualified self-insured, and the Kansas Workers Compensation Fund, for an accidental injury which occurred February 26, 1993 and based upon an average weekly wage of \$295.05, for 32 weeks of temporary total disability compensation at the rate of \$196.71 per week or \$6,294.72, followed by 383 weeks at the rate of \$19.67 per week or \$7,533.61 for a 10% permanent partial general body impairment of function, making a total award of \$13,828.33.

As of April 30, 1996 there is due and owing claimant 32 weeks of temporary total disability compensation at the rate of \$196.71 per week or \$6,294.72, followed by 133.57 weeks of permanent partial disability compensation at the rate of \$19.67 per week in the sum of \$2,627.32, for a total of \$8,922.04 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$4,906.29 is to be paid for 249.43 weeks at the rate of \$19.67 per week, until fully paid or further order of the Director.

The Kansas Workers Compensation Fund is responsible for payment of 28.5 percent of the benefits awarded.

The Appeals Board adopts the orders of the Administrative Law Judge relating to attorney fees and costs.

IT IS SO ORDERED.

Dated this ____ day of April 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: William L. Phalen, Pittsburg, KS
- John I. O'Connor, Pittsburg, KS
- Robert V. Talkington, Iola, KS
- John D. Clark, Administrative Law Judge
- Philip S. Harness, Director