BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ANA MARIA GUERRERO Claimant VS. **DOLD FOODS, INC.** Respondent AND **LIBERTY MUTUAL INSURANCE COMPANY** Insurance Carrier AND **KANSAS WORKERS COMPENSATION FUND**	) Docket Nos. 176,366 & 176,367

ORDER

Respondent appeals from an Amended Award entered by Administrative Law Judge Shannon S. Krysl on November 29, 1994. The Appeals Board heard oral argument February 16, 1995.

APPEARANCES

Claimant appeared by and through her attorney, Richard Sanborn of Wichita, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Douglas D. Johnson of Wichita, Kansas. The Workers Compensation Fund appeared by and through its attorney, Vincent L. Bogart of Wichita, Kansas.

RECORD AND STIPULATIONS

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

ISSUES

The respondent asks the Appeals Board to review findings relating to nature and extent of claimant's disability and Fund liability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

(1) Claimant is entitled to benefits based upon a five percent (5%) functional impairment up to the last date she worked and thereafter upon work disability of forty-three percent (43%).

Claimant, who had worked for Dold Foods for more than seven (7) years, began having problems with her arms. She began receiving medical treatment in the fall of 1992 at the direction of Dr. Melhorn. He initially recommended modification of claimant's work and nonsteroidal anti-inflammatories. He then provided exercises, splints and casting. Nerve conduction tests were positive and he eventually recommended and performed surgery for right carpal tunnel and right ulnar nerve release. His records indicate that she also initially complained of problems to the left upper extremity and complained occasionally thereafter. As of the time he released her, however, Dr. Melhorn felt she did not have any functional impairment on the left. Dr. Melhorn rated claimant's functional impairment at 10.35 percent of the right upper extremity.

Claimant was also seen and evaluated by Dr. Poole. He diagnosed myofascial shoulder pain syndrome bilaterally; mild chronic cervical spondylosis; post-right median ulnar nerve releases, with no evidence of continuing nerve entrapment; and overuse syndrome affecting both upper limbs. He rated her disability at five percent (5%) of the body as a whole.

Although both Dr. Poole and Dr. Melhorn recommend work restrictions, respondent argues that the award in this case should be limited to functional impairment. As part of the argument respondent offers the testimony of Dr. Melhorn indicating claimant could have performed certain jobs offered to her by respondent after her injury and surgery. Respondent made and offered into evidence a videotape showing jobs which were offered to claimant. Dr. Melhorn testified that he had viewed the videotape showing jobs and felt, from his review, that she could perform several of the jobs shown on the videotape.

Claimant first argues the videotape should not properly be considered in evidence in this case as it was not identified at Dr. Melhorn's deposition. We note, however, that Duke Vair, personnel and safety director for Dold Foods, testified that he prepared a videotape at Dr. Melhorn's request. He identified the tape he took as the one he had shown to Dr. Melhorn. The Appeals Board considers this testimony adequate to support Dr. Melhorn's testimony, based upon his review of the videotape.

Based upon review of the record as a whole, however, the Appeals Board finds that Dr. Melhorn's evaluation and restrictions understate the nature and extent of claimant's impairment. Specifically, the Appeals Board finds convincing Dr. Poole's testimony that claimant has disability on the left as well as the right and into the shoulders. His opinions were consistent with claimant's testimony and, in fact, were supported by complaints

shown in Dr. Melhorn's records. The Appeals Board finds the claimant has suffered a five percent (5%) permanent partial functional impairment to the whole body as indicated by Dr. Poole. The functional impairment will be used as the basis for the Award from the date of accident until the last date worked. Although the record contains inconsistent evidence relating what date was the last date worked, the Appeals Board finds, based on notation in the personnel records, that the last day worked was April 29, 1993. The Appeals Board notes the Administrative Law Judge used May 28, 1992 as the date to commence benefits. Neither party argued for a different date and May 28, 1992 will, therefore, also be used here as the date for commencement of benefits.

The central question in this appeal is whether claimant should be limited to functional impairment or awarded benefits based upon a work disability for the period after she terminated her employment with respondent. The record indicates that after her surgery, claimant did work for a period of time at a comparable wage job with respondent. Respondent is, therefore, entitled to the benefit of the presumption found in K.S.A 44-510e that claimant suffered no work disability. The presumption arises whenever an employee engages in work at a comparable wage after the subject injury.

The Appeals Board finds, however, from the evidence in this record that the presumption against work disability has been overcome. Dr. Melhorn recommended restrictions limiting claimant's work to the light and medium categories of work. He indicated she should not lift more than thirty-five (35) pounds maximum and not more than twenty (20) pounds on a frequent basis. He further indicated she should limit repetitive grasping, pulling, pushing and fine manipulation; she should limit use of vibratory and power tools to four (4) hours or less per eight- (8-) hour day, probably broken into shorter, two- (2-) hour periods. Dr. Poole indicated claimant should not engage in repetitive motion work. He considered her fit for light work not involving repetitive motion.

Claimant argues that the work offered by respondent, as shown in the videotape, would have violated Dr. Poole's restrictions. The problem with claimant's argument is that Dr. Poole refused to define what he meant by his restriction limiting repetitive motion. Instead, he indicated it would depend upon the motion and the particular circumstances. The videotape shows jobs involving repetitive activities, but the frequency of the repetitions differ significantly. Dr. Melhorn considered one of the jobs offered, that of labeling, to be too involved repetitively. The others, he considered appropriate.

Claimant testified that she attempted but was unable to perform the jobs. The Administrative Law Judge found, and the Appeals Board agrees, that claimant could have performed one or more of the positions offered at Dold Foods. These positions were comparable wage positions and, accordingly, the Appeals Board finds a zero percent (0%) loss of ability to earn a comparable wage.

The Appeals Board finds, however, that the reduction of ability to obtain employment in the open labor market has been significantly impaired. The only testimony in the record is that of Mr. Hardin, and he testifies to his opinion that claimant would have an eighty-five to ninety percent (85-90%) loss of access to the open labor market on the basis of either Dr. Poole's or Dr. Melhorn's restrictions. The Appeals Board considers this evidence sufficient to overcome the presumption against work disability and finds claimant has, in fact, suffered an eighty-five percent (85%) loss of ability to obtain employment in

the open labor market. As authorized in Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990), the Appeals Board considers it appropriate in this case to give equal weight to the loss of ability to earn a comparable wage and the loss and reduction of ability to obtain employment in the open labor market. On that basis, the Appeals Board finds claimant has a forty-three percent (43%) permanent partial general disability.

(2) The evidence does not establish liability on the part of the Kansas Workers Compensation Fund.

The Kansas Workers Compensation Fund becomes liable when the respondent employs or retains the individual with knowledge of a handicap and then the handicap contributes to subsequent disability arising out of and in the course of employment. In this case the Appeals Board finds the claimant has not suffered two separate accidents, but, instead, a series of mini-traumas which, in effect, constitute an injury over a period of time ending with the last date of employment. See Berry v Boeing, Case No. 71,001 (1994). In addition, the testimony from Dr. Melhorn relating to contribution does not reflect a percentage of contribution after respondent had knowledge of the handicap. For these two reasons the Appeals Board finds that the respondent has not established the prerequisites for imposing liability on the Kansas Workers Compensation Fund.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Amended Award of Administrative Law Judge Shannon S. Krysl, dated November 29, 1994, shall 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, Ana Maria Guerrero, and against the Respondent, Dold Foods, its insurance carrier and the Kansas Workers Compensation Fund, for an accidental injury which occurred May 19, 1992 to May 28, 1992 and finalizing on April 29, 1993 upon her termination.

Claimant is entitled to 48 weeks at $15.78 or $757.44 for 5% permanent partial impairment.

Commencing April 30, 1993, claimant is entitled to 367 weeks at $135.70 or $49,801.90 for a 43% permanent partial general disability, making a total of $50,559.34.

As of March 24, 1995, there is due and owing to the claimant 48 weeks at $15.78 or $757.44 plus 99.14 weeks at $I35.70 or $13,453.30 for a total due and owing of $14,210.74, which is ordered paid in one lump sum, less any amounts previously paid. Thereafter, the remaining balance in the amount of $36,348.60 shall be paid at $135.70 for 267.86 weeks or until further order of the Director.

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

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the Respondent to be paid direct as follows:

Deposition Services	
Transcript of preliminary hearing	$162.50
Harper & Associates	
Deposition of Bernard T. Poole, M.D.	$140.14
Deposition of Jerry D. Hardin	$256.00
Barber & Associates	
Transcript of regular hearing	$226.25
Alexander Reporting Co.	
Deposition of Mark Melhorn, M.D.	$374.00
Deposition of Duke Vair	$376.10

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: Richard Sanborn, Wichita, KS
Douglas D. Johnson, Wichita, KS
Vincent L. Bogart, Wichita, KS
Shannon S. Krysl, Administrative Law Judge
George Gomez, Director