

The stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

- (1) Whether claimant suffered accidental injury arising out of and in the course of his employment.
- (2) Nature and extent of claimant's injury and/or disability.
- (3) Whether respondent and the Workers Compensation Fund are entitled to a credit pursuant to K.S.A. 44-510a (Ensley).
- (4) What, if any, is the liability of the Kansas Workers Compensation Fund?
- (5) Whether claimant is entitled to additional temporary total disability compensation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant was an employment training specialist for the respondent, meaning he helped train people with disabilities and handicaps in locating and learning occupations. The claimant was involved in teaching a client to grind or cut wells at the Great Plains Manufacturing Company. In order to teach the client to perform these tasks, claimant was first required to learn the job himself. He would then spend a significant portion of his time showing the client how to perform the work and then observe the client performing the tasks involved in the new trade. On February 24, 1993, while working at Great Plains Manufacturing, claimant stood on concrete surfaces all day in a slightly bent position, grinding parts. Claimant began developing pain in his low back, with spasms into the upper back, on the first day. He was also having pain into his legs and hips. He did not inform anyone at Great Plains or anyone with respondent of this problem. He returned to Great Plains the following day, February 25, 1993, and worked until approximately noon. During this time the back symptoms worsened considerably.

On the afternoon of February 25, claimant met a second client whom he was to assist in locating jobs. Unfortunately, a snow storm made travel difficult and claimant advised the client to go home. When the client's car became stuck in the parking lot of the respondent's building, claimant assisted client in removing car from the parking lot, believing this to be part of his job duties. Claimant advised that his back did not worsen while pushing the car from the snow because it was already painful. He described the pain as like being stabbed in the back with a knife. Claimant advised his employer the following day he was having difficulties and would not be able to work. He then called Dr. James Shafer.

Dr. Shafer prescribed anti-inflammatories, physical therapy and a TENS unit. Dr. Shafer felt the claimant's aggravation began while standing eight or nine (8-9) hours on a concrete floor in a slightly bent position. This, coupled with pushing the car from the snow, was sufficient enough to cause claimant to develop additional symptoms in his lumbar spine. Claimant continued in physical therapy for approximately one month. Shortly thereafter on April 28, 1993, claimant underwent a CAT scan which, when compared to a CAT scan from January 1989, indicated the L5-S1 disc space in claimant's

lumbar back had narrowed significantly. An MRI done August 5, 1993, indicated degenerative disc disease at L5-S1 with a mild bulging disc at L4-5. The MRI did not indicate disc herniation or spinal stenosis. Dr. Shafer found this to be chronic low back pain, secondary to a previous injury claimant suffered in an automobile-train accident in 1988. He did opine that standing at Great Plains and pushing the car from the parking lot aggravated claimant's ongoing back problems.

The medical evidence is sufficient for the Appeals Board to find claimant suffered accidental injury arising out of and in the course of his employment with the respondent, with the major aggravating factor being the employment at Great Plains Manufacturing. The testimony of the claimant indicates that the physical act of pushing the car from the parking lot did not significantly aggravate his back condition.

The respondent's contention that claimant's ongoing symptomatology is somehow related to his home activity of raising horses is not supported by the evidence in the record.

Dr. Brown, in evaluating claimant's condition, found that there had been at least a two percent (2%) increase in the functional impairment of claimant's back as a result of the situation in February 1993. Overall, the objective medical testimony supports a finding that claimant suffered additional impairment as a result of the February 24 and 25, 1993 injuries with respondent.

The Administrative Law Judge's Award set out the applicable law regarding accidents arising "out of" and "in the course of" employment in the State of Kansas. The Appeals Board will not burden to the record by repeating same.

Claimant requests additional temporary total disability compensation as a result of this injury. It should be noted at the regular hearing the claimant did not raise this issue before the Administrative Law Judge. The Administrative Law Judge, in the Award of August 5, 1994, did not list additional temporary total disability benefits as being at issue. The Administrative Law Judge did have this issue before him at the preliminary hearing of May 11, 1993. At that time additional temporary total disability was denied claimant. This finding was not appealed. Having failed to appeal the preliminary hearing order of May 11, 1993 and further failing to raise the issue of temporary total disability at the time of regular hearing, claimant cannot now raise the issue before the Appeals Board.

K.S.A. 1992 Supp. 44-510e states in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than percentage of functional impairment."

K.S.A. 1992 Supp. 44-510e(a) further provides:

"There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

The evidence in the record indicates claimant has been unable to return to employment earning wages comparable to the average gross weekly wage he was earning at the time of the injury. As such, the presumption contained in K.S.A. 1992 Supp. 44-510e is not applicable and claimant is entitled to work disability in this matter. In determining the extent of permanent partial disability to which claimant is entitled, the Appeals Board must consider the reduction of claimant's ability to perform work in the open labor market and to earn comparable wages. The Appeals Board must decide this, taking into consideration the claimant's education, training, experience and capacity for rehabilitation. K.S.A. 1992 Supp. 44-510e.

It should be noted that claimant did undergo a severe trauma in 1988 when he was involved in a car-train accident while employed with Pony Express. As a result of that injury, claimant was placed under a fifty (50) pound lifting restriction, a restriction which he attempted to follow while employed with respondent. Dr. Shafer, who performed a pre-employment physical on the claimant in August 1990, made respondent aware of this pre-existing injury and restriction. He noted the bulging disc at L5-S1 and agreed with the fifty (50) pound weight restriction upon claimant. Subsequent to the February 24 and 25, 1993 injury, Dr. Shafer felt claimant's condition had worsened. Additional restrictions were placed upon claimant which included no heavy lifting greater than twenty (20) pounds and no frequent bending. He also recommended work which would allow alternating standing and sitting.

Claimant was examined by Dr. Lawrence Blaty, a physiatrist, on December 3, 1993. Dr. Blaty placed post-injury restrictions on claimant, including thirty (30) pounds occasional lift; twenty (20) pounds frequent lift; and only occasional bending, stooping and twisting. He recommended alternating standing and sitting at hourly periods with only occasional kneeling and advised claimant to avoid crawling activities altogether. He assessed claimant at eleven percent (11%) permanent partial impairment of function per The American Medical Association's Guides to the Evaluation of Permanent Impairment, Third Edition, Revised, and advised, of the eleven percent (11%), six percent (6%) was related to the initial injury, with five percent (5%) being from the February 1993 injury.

Claimant was examined by Dr. C. Reiff Brown, an orthopedic surgeon, on June 11, 1994. Dr. Brown had the opportunity to review Dr. Shafer's and Dr. Taylor's records, as well as the physical therapy records and Dr. Blaty's report. The CAT scan of April 28, 1993 and the MRI of August 5, 1993 both revealed degenerative changes at L5-S1. Dr. Brown felt that claimant had pre-existing symptoms of degenerative disc disease which were aggravated or increased by the February 1993 incident. He placed lifting restrictions on claimant of seventy-five (75) pounds occasionally, forty (40) pounds frequently, and assessed a seven percent (7%) permanent partial functional impairment to the body as a whole per the AMA Guides. Of this seven percent (7%), Dr. Brown felt five percent (5%) pre-existed the February 1993 incident, with two percent (2%) resulting from the February 1993 injury.

The only vocational expert to testify was Jerry Hardin, who testified on behalf of the claimant. He examined claimant on May 2, 1994, obtaining appropriate histories regarding claimant's work, medical and injury history, education, training and experience. In taking into consideration the fifty (50) pound pre-existing restriction placed upon claimant, Mr. Hardin opined claimant had suffered a forty to forty-five (40-45) percent loss of his ability to perform work in the open labor market. The Appeals Board finds as claimant was attempting to observe these restrictions and, as claimant and respondent were fully aware

of the restrictions prior to the February 1993 incident, applying these pre-existing restrictions in this circumstance would be appropriate. The Appeals Board adopts Mr. Hardin's finding that claimant has suffered a forty to forty-five percent (40-45%) loss of access to the open labor market and assesses claimant a forty-two and one-half percent (42.5%) loss of access to the open labor market. Mr. Hardin went on to state claimant was capable of earning \$240 per week, which, when compared to claimant's average weekly wage of \$365.60, equates to a loss of ability to earn comparable wage of thirty-four percent (34%). The Appeals Board adopts same as its finding.

It is claimant's burden to prove his entitlement to an award by proving the various conditions on which the claimant's right depends. See K.S.A. 44-501. This burden must be carried by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

As the Appeals Board has already found claimant has proven his entitlement to work disability, the Appeals Board must next consider how to apply the loss of access to the open labor market and loss of ability to earn comparable wage found by Mr. Hardin to arrive at the appropriate work disability. In determining the extent of permanent partial general disability, both of these losses must be considered by the Appeals Board. See Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990). While the Court of Appeals in Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409, rev. denied 250 Kan. 806 (1991) also found that both factors must be considered, no Court has specified what emphasis should be placed on either factor. The Courts have only found that an appropriate mathematical formula must be utilized in determining the end result and that some balancing of the two factors must be applied. The trier of facts is the ultimate decider regarding disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied, 249 Kan. 778 (1991).

In reviewing the evidence before the Appeals Board, there appears to be no legitimate reason for placing greater emphasis on one factor over the other in this case. As such, the Appeals Board finds claimant's loss of access to the open labor market of forty-two and one-half percent (42.5%) and loss of ability to earn a comparable wage of thirty-four percent (34%), when combined, result in a work disability of thirty-eight percent (38%).

The Appeals Board must next decide whether respondent and the Workers Compensation Fund are entitled to a credit pursuant to K.S.A. 44-510a (Ensley). While it has been shown claimant did have a pre-existing back condition for which he was provided specific restrictions at the time of his hire with the respondent, it is significant that the prior Award of the Administrative Law Judge for the injury suffered in 1988 specifically excludes any award to claimant as a result of a low back injury. K.S.A. 44-510a (Ensley) allows a credit, "If an employee has received compensation or if compensation is collectible under the laws of this state or any other state or under any federal law which provides compensation for personal injury by accident arising out of and in the course of employment as provided in the workmen's compensation act, and suffers a later injury . . ."

While claimant does have a pre-existing back condition, it was not found that this pre-existing back condition occurred as a result of an accidental injury arising out of and in the course of claimant's employment. A credit under K.S.A. 44-510a (Ensley) would not be appropriate under these circumstances.

In deciding the liability of the Kansas Workers Compensation Fund, the Appeals Board notes the evidence supports a finding that claimant had a pre-existing back condition and claimant was physically restricted from performing certain activities prior to his employment with respondent. The evidence further supports a finding that the respondent had knowledge of this pre-existing handicap.

The only doctor to testify regarding these pre-existing problems and the effect they had on claimant's February 1993 injury was Dr. C. Reiff Brown. Dr. Brown felt that if claimant had not had the pre-existing condition, the February 1993 incident would have resulted in no permanency to claimant.

K.S.A. 1992 Supp. 44-567(a)(1) provides in part:

"Whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director awards compensation therefor and finds the injury, disability or the death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workers' compensation fund."

The testimony of Dr. C. Reiff Brown, coupled with the additional medical evidence and testimony of the claimant, convinces the Appeals Board that the injury of February 24 and 25, 1993 probably or likely would not have occurred "but for" the pre-existing physical impairment of this handicapped employee. Therefore, the respondent is entitled to a one hundred percent (100%) reimbursement from the Kansas Workers Compensation Fund for all costs, medical expenses and disability awarded in this matter.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge George R. Robertson dated August 5, 1994, shall be and is modified in that claimant is granted an award of compensation against the respondent, its insurance carrier and the Kansas Workers Compensation Fund for a thirty-eight percent (38%) permanent partial general body work disability. Claimant is entitled to four hundred and fifteen (415) weeks permanent partial general body disability compensation at the rate of \$92.63 per week, totaling \$38,441.45.

As of May 31, 1995, there would be due and owing to claimant 118 weeks of permanent partial disability compensation at the rate of \$92.63 per week for a total of \$10,930.34, which is ordered paid in one lump sum, less amounts previously paid. Thereafter, claimant is entitled to 297 weeks permanent partial general body at the rate of \$92.63 per week, for a total of \$27,511.11, until fully paid or until further order of the Director.

The Appeals Board further finds claimant is entitled to medical expenses per the Award of the Administrative Law Judge. Future medical is ordered upon proper application to and approval by the Director.

Claimant is entitled to unauthorized medical up to \$350.00 upon presentation of an itemized statement proving same.

Claimant's attorney fee contract is approved insofar as it is not inconsistent with K.S.A. 44-536.

The Appeals Board further finds the Kansas Workers Compensation Fund is liable for one hundred percent (100%) for any and all costs, medical expenses and disability from this Award and is ordered to reimburse respondent for any and all such sums previously paid by respondent in this matter.

The fees necessary to defray the expenses of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier, with reimbursement from the Kansas Workers Compensation Fund, to be paid as follows:

OWENS, BRAKE & ASSOCIATES

Preliminary Hearing Transcript Dated May 11, 1993	\$358.75
Deposition of Dr. James Shafer Dated September 23, 1993	\$358.75
Regular Hearing Transcript Dated April 13, 1994	\$454.95
Total	\$1172.45

UNDERWOOD AND SHANE

Deposition of Dr. C. Reiff Brown Dated June 23, 1994	\$241.00
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BARBER & ASSOCIATES

Deposition of Dr. Lawrence Blaty Dated April 6, 1994	\$237.80
Deposition of Jerry Hardin Dated June 14, 1994	\$391.00
Total	\$628.80

IT IS SO ORDERED.

Dated this ____ day of May 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Stephen J. Jones, Wichita, KS
Mickey Mosier, Salina, KS
C. Stanley Nelson, Salina, KS
George R. Robertson, Administrative Law Judge
George Gomez, Director