

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

DALE HERBSTREITH)
 Claimant)
VS.)
))
McKESSON SERVICE MERCHANDISING)
 Respondent)
AND)
))
OLD REPUBLIC INSURANCE COMPANY)
 Insurance Carrier)
AND)
))
KANSAS WORKERS COMPENSATION FUND)

Docket No. 177,479

ORDER

Respondent appeals from an Award entered by Administrative Law Judge James R. Ward on July 18, 1995.

APPEARANCES

Claimant appeared by his attorney, Steven M. Tilton of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Mark E. Kolich of Kansas City, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Bob W. Storey of Topeka, Kansas.

RECORD AND STIPULATIONS

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

ISSUES

Respondent asked for review of the following issues:

- (1) The nature and extent of claimant's disability.
- (2) Claimant's average weekly wage.

(3) Liability of the Kansas Workers Compensation Fund.

Respondent argues that there were intervening accidents and injuries after claimant's original injury of August 5, 1991. Although respondent identifies this argument as a separate issue, the Appeals Board has, for purposes of this Award, treated this argument as part of the issue relating to the nature and extent of disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board concludes that the Award should be modified. For the reasons described below, the Appeals Board concludes that claimant suffered injury to his low back on August 5, 1991, and that this injury resulted in a 2 percent permanent partial general body disability. Claimant, thereafter, continued to work and the work caused a worsening of his low back condition. He also suffered a shoulder injury during the course of therapy for the subsequent low back injury. The permanent aggravation of the low back condition and the shoulder injury are attributable to accidental injuries alleged in a separately-docketed claim and should be addressed under that separate docket number.

Claimant testified that on August 5, 1991, his back started to pull, ache, and hurt while he was loading packs containing 72 bottles of shampoo. Each case weighed approximately 110 pounds. He reported the injury to his supervisor. None of the parties dispute this injury.

The disputed issue in this case is whether claimant suffered additional permanent injury from his work after the August 5, 1991, incident. After review of the record, the Appeals Board concludes the evidence establishes more probably than not claimant did suffer additional injury. Although claimant testified that he did not believe his condition worsened after August 5, 1991, the medical history convinces the Appeals Board otherwise.

Although claimant reported the incident of August 5, 1991, claimant continued to perform his regular duties and sought no medical treatment until he went to the chiropractor on his own on November 11, 1991. At that time he did not specifically mention the August 5, 1991, incident. In fact, the history he gave the chiropractor was that he had been doing a lot of lifting for about a month before he came in. The intake form refers to an incident of October 7, 1991. The chiropractor, Dr. Robert

E. Sullivant, saw claimant again on November 18, 1991, and scheduled an appointment to see the claimant on November 20, 1991. Claimant did not go to the November 20 appointment. Dr. Sullivant's notes indicate claimant told the receptionist that he was feeling better and would call next week. He did not call the next week or return to see Dr. Sullivant.

Claimant continued with his regular work activities and did not seek additional medical treatment for his back until May 6, 1992. Claimant had seen Dr. William R. Lentz for an unrelated condition in March and April of 1992 and made no mention of back complaints. Claimant scheduled a third appointment, again for an unrelated condition, on May 6, 1992. At the May 6, 1992, appointment claimant mentioned to Dr. Lentz he injured his back in August of 1991 while working for respondent. He told Dr. Lentz he then became better, but in January 1992 the condition had become more severe and gradually increased in intensity. When claimant asked his employer to pay for the MRI recommended by Dr. Lentz, his note states that his back got worse again from lifting things at work. Dr. Lentz's notes on claimant's last visit of July 10, 1992, indicate claimant's back was getting better but is now getting worse. Dr. Lentz recommended the MRI to rule out the nerve impingement. Dr. Lentz's order of July 28, 1992, indicated claimant was to be admitted to the hospital for traction and physical therapy.

Dr. Lentz also recommended claimant be limited to light duty. Respondent had no light duty work and claimant ceased working for respondent on July 10, 1992. This was the first time he had been off work since the original injury of August 5, 1991. At the time of regular hearing in August 1994, he had not returned to work for respondent, or otherwise.

After leaving work for respondent, claimant also received medical treatment at the direction of Dr. Eric E. Hansen at the Kansas Rehabilitation Hospital. He first saw Dr. Hansen December 14, 1992. Dr. Hansen treated claimant for chronic lumbar strain. The history claimant gave on December 14, 1992, indicated he had injured his back originally in August 1991 and that he continued to work but his condition gradually worsened.

Two other physicians examined and evaluated claimant's impairment. Dr. Michael J. Poppa reviewed the medical records and concluded claimant had suffered an initial injury in August 1991. He further concluded that claimant had suffered an additional permanent impairment from his work activities after the initial injury. Dr. Nathan Shechter evaluated claimant's permanent impairment but gave no opinion whether claimant's condition worsened. He did testify, however, that the condition was one which could be made worse by work activities.

Based on the above described evidence, the Appeals Board concludes that claimant's injuries worsened and he suffered additional permanent injury from his work activities after the initial injury of August 5, 1991. After that date he continued his regular work which involved deliveries and lifting between 15 and 100 pound weights on a regular basis. The record establishes that claimant's condition worsened to the point he was no longer able to perform his duties for the respondent in July 1992. The shoulder injury occurred in the course of treatment for the worsened back injury.

The Appeals Board also concludes that the evidence establishes more probably than not this worsening was from the work activities claimant performed for respondent. As a result of the Appeals Board's finding that the condition worsened, several of the functional impairment ratings in the evidence have no probative value. This includes the functional ratings of Dr. Shechter and Dr. Hansen. Both give ratings which include impairment which occurred after the injury of August 5, 1991. Only Dr. Poppa rates impairment resulting exclusively from the August 5, 1991 injury. He rates the claimant's impairment from that injury as 2 percent permanent partial general body impairment. His final rating for the impairment is consistent with those of Dr. Shechter and Dr. Hansen and the Appeals Board finds his 2 percent rating from the August 5, 1991, injury to be credible.

As a result of this ruling the Appeals Board also finds that the Kansas Workers Compensation Fund has no liability for the amounts ordered under this docket number. The liability of the Workers Compensation Fund for injury occurring subsequent to August 5, 1991, should be litigated under the separate Docket No. 201,523. The medical expenses and temporary total disability are also issues to be determined under the separate docketed number. Finally, the Appeals Board agrees with and adopts the findings by the Administrative Law Judge relating to claimant's average weekly wage. The Appeals Board, therefore, finds claimant's average weekly wage was \$793.09.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge James R. Ward dated July 18, 1995, should be, and is hereby, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Dale Herbstreith, and against the respondent, McKesson Service Merchandising, and its insurance carrier, Old Republic Insurance Company, for an accidental injury which occurred August 5, 1991, and based

upon an average weekly wage of \$793.09 for 415 weeks at the rate of \$10.58 per week or \$4,390.70, for a 2% permanent partial disability.

As of November 15, 1996, there is due and owing claimant 275.57 weeks of permanent partial compensation at the rate of \$10.58 per week in the sum of \$2,915.53 which is due and owing in one lump sum minus any amounts previously paid. The balance of \$1,475.17 will be paid at \$10.58 per week for 139.43 weeks.

The Appeals Board approves and adopts all other orders by the Administrative Law Judge not inconsistent with this order.

IT IS SO ORDERED.

Dated this ____ day of November 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Steven M. Tilton, Topeka, KS
- Mark E. Kolich, Kansas City, KS
- Bob W. Storey, Topeka, KS
- Bryce D. Benedict, Administrative Law Judge

DALE HERBSTREITH

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Philip S. Harness, Director