BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHAEL D. HITCH	)	
Claimant	)	
VS.	)	
	)	Docket No. 179,689
THE BOEING COMPANY	)	& 230,397
Respondent	)	
AND	)	
	)	
AETNA CASUALTY & SURETY COMPANY	)	
and INSURANCE COMPANY STATE OF	)	
PENNSYLVANIA, c/o AMERICAN	)	
INTERNATIONAL GROUP (AIG)	)	
Insurance Carriers	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Claimant appeals the March 21, 2001, Award and March 27, 2001, Nunc Pro Tunc Order of Administrative Law Judge John D. Clark. The Board held oral argument on September 4, 2001.

APPEARANCES

Claimant appeared by his attorney, Dale V. Slape of Wichita, Kansas. Respondent and its insurance carrier Aetna Casualty & Surety Company appeared by their attorney, Lyndon W. Vix of Wichita, Kansas. Respondent and its insurance carrier Insurance Company State of Pennsylvania, c/o American International Group (AIG), appeared by their attorney, Eric K. Kuhn of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, John C. Nodgaard of Wichita, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations contained in the Award and Nunc Pro Tunc Order.

ISSUES

(1) Did claimant provide timely notice under K.S.A. 44-520 for the alleged accident of October 1997 under Docket No. 230,397?

(2) Did claimant sustain a new injury in October 1997 as alleged in Docket No. 230,397, or is his current impairment and resulting disability the result of earlier injuries suffered through a series of injuries culminating on June 24, 1993, in Docket No. 179,689?

(3) What, if any, is the nature and extent of claimant's injury and/or disability in both docketed cases?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Appeals Board finds as follows:

Claimant originally began working for respondent in 1988. He suffered a series of back injuries from June 6, 1992, through June 24, 1993, for which the parties entered into an agreed award of 30 percent to the body as a whole, resulting in a $69,000 award to claimant in Docket No. 179,689.

On July 28, 1995, claimant returned to work for respondent at a comparable wage. Respondent then filed a Motion for Review and Modification on August 23, 1995, which resulted in claimant's original award being reduced to a 5 percent permanent partial disability based on a whole body functional impairment.

Claimant continued working for respondent under the restrictions of Dr. Lesko and Dr. Ernest R. Schlachter. However, claimant began developing additional problems with his back and hip. In October 1997, claimant was helping lift a spar when he experienced a sudden onset of back pain. At first, claimant was under the impression that he had just pulled a muscle and was overly tired from work. When his condition did not improve after a couple of days, he notified Brian Keeling, his supervisor, of the problem and an accident report was completed. Claimant was then referred to Central Medical for treatment and was later referred to Dr. Ely Bartal for treatment. Dr. Bartal recommended an MRI, but that medical test was not authorized. Eventually, claimant was referred to Anthony G.A. Pollock, M.D., a board certified orthopedic surgeon, for ongoing treatment. Dr. Pollock diagnosed a disc herniation at L5-S1. Claimant was treated conservatively by Dr. Pollock until July of 1999, when he was released with a 17 percent impairment to the body as a whole pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. Dr. Pollock testified, and the parties stipulated, that claimant had a 5 percent impairment to the body as a whole, attributable to claimant's prior back injuries. Claimant's

attorney also agreed that the 5 percent should be deducted as a preexisting impairment based upon Dr. Pollock's testimony and pursuant to K.S.A. 1997 Supp. 44-501(c).

It is acknowledged that claimant has an ongoing right knee injury, which is still in litigation against respondent in Docket No. 247,582. That claim is not before the Board at this time.

Claimant continued working for respondent under restrictions until September 30, 1998, at which time he was terminated as a result of poor attendance. At the time of the regular hearing, claimant was working with Triangle Trucking, making $300 per week as an over-the-road trucker. Claimant was able to perform those duties as his job involved 100 percent non-handle loads, meaning he did not have to touch the freight. He simply drove the freight to the location and it was unloaded by others.

Respondent contends claimant is entitled to no additional permanent disability benefits for this injury, as the restrictions placed upon him after this 1997 injury are the same restrictions as were placed upon him by Dr. Lesko after the 1992 and 1993 injuries. Those included no lifting over 50 pounds and no repetitive bending, stooping or twisting.

Respondent further contends claimant is not entitled to a work disability as his termination of employment was related to attendance problems and not related to anything associated with his work-related injuries. Claimant contends that his termination occurred as a result of ongoing difficulties associated with his back and hip, and were the direct result of the accident suffered in October 1997. Claimant further contends that his condition in October 1997 was substantially worse than the injuries he suffered in 1992 and 1993 and, therefore, his current difficulties are the result of a new accidental injury, and not a reasonable and natural consequence of the 1992 and 1993 injuries.

Evidence of claimant's attendance history was placed into the record for consideration regarding the justification for the termination. Respondent's attendance policy required that when an employee had excessive absences, that employee would be provided a notation of corrective counseling, or NCC. Claimant was given an NCC on May 15, 1998, for infractions occurring on March 25, 1998, May 6, 1998, May 12, 1998, and May 14, 1998. This NCC was signed both by claimant and by his supervisor, John McAninch. James E. Fields, a retired former employee of respondent, testified that an NCC would be given any time an employee had two infractions in an 8-week period. Should an employee then get two more infractions in a subsequent 8-week period, they get a CAM, or corrective action memo, along with a counseling for the attendance problems. Claimant received a CAM on September 14, 1998. At that time, he had additional infractions for August 4, August 27, September 9, September 10, and September 11, 1998. Claimant contends the attendance problems on September 10 and September 11, 1998, were the result of his ongoing back problems. However, the medical records from Boeing show that claimant had an examination scheduled on September 11 for his knee. Claimant, however, failed to attend that examination. A review of Dr. Pollock's medical

records fails to uncover any medical examination during the month of September 1998 for claimant's back. Claimant was not again provided medical treatment for his back by Dr. Pollock until December 4, 1998.

Claimant's termination occurred on September 30, 1998. This termination resulted from additional absences on September 17 and September 18, 1998. At the time the termination report was created, claimant provided no reason for those absences. Even though the CAM for that date allowed for employee comments, none were included. Additionally, claimant refused to sign that document.

The first justification for those absences came in the form of a handwritten note from Dr. Pollock's office dated December 4, 1998, indicating claimant was off work on September 17 and 18 because of right knee swelling. That note was not signed by Dr. Pollock, but instead Dr. Pollock's signature stamp was affixed to the bottom. Prior to December 4, 1998, claimant provided no justification for those absences.

In workers compensation litigation, the burden of proof is on claimant to establish his right to an award of compensation by proving the various conditions upon which that right depends by a preponderance of the credible evidence. *See* K.S.A. 1997 Supp. 44-501 and K.S.A. 1997 Supp. 44-508(g).

Respondent contends claimant failed to provide notice under K.S.A. 44-520 of the accident occurring in October 1997. K.S.A. 44-520 obligates claimant to provide that notice within 10 days of the date of accident. Here, claimant testified that he advised his supervisor, Brian Keeling, of the problem. Mr. Keeling did not testify, and there is no evidence to contradict claimant's allegation that he told Mr. Keeling within 10 days of the date of accident. The Appeals Board, therefore, finds that claimant did provide timely notice of accident.

The Board must next consider whether claimant's ongoing difficulties are the result of the October 1997 alleged accident and, therefore, compensable under Docket No. 230,397 or a continuation of the problems suffered by claimant during the period June 6, 1992, through June 24, 1993, in Docket No. 179,689.

Claimant testified that he had a sudden onset of pain in October 1997 while lifting a spar. Claimant further testified that afterwards his symptoms were worse and his back and hip were giving him more problems. While it is acknowledged that claimant was provided no different restrictions as a result of the 1997 accident, he was, however, given a higher functional impairment rating by Dr. Pollock as result of that accident. Dr. Pollock assessed claimant a 17 percent impairment to the body as a whole pursuant to the AMA Guides, Fourth Edition, and the parties stipulated claimant had a 5 percent whole person preexisting impairment. The Appeals Board, therefore, finds that claimant did suffer accidental injury arising out of and in the course of his employment in October 1997, resulting in a worsening of his ongoing back and hip conditions. Therefore, claimant has

suffered a new and separate accident, justifying an award against respondent and its insurance company AIG in Docket No. 230,397.

While it is true Dr. Pollock gave claimant a 17 percent impairment to the body as a whole, on cross-examination Dr. Pollock admitted that a proper utilization of the combined values chart under the AMA Guides should have resulted in a 16 percent impairment to the body as a whole. The Appeals Board, therefore, finds that the Award by the Administrative Law Judge, granting claimant a 16 percent impairment, is appropriate and should be affirmed.

Additionally, the parties stipulated at Dr. Pollock's deposition that claimant had a 5 percent impairment to the body as a whole, which preexisted claimant's October 1997 accident. The parties further stipulated that that amount should be reduced from claimant's whole person impairment as a preexisting impairment pursuant to K.S.A. 1997 Supp. 44-501(c). The Board, therefore, affirms the Award by the Administrative Law Judge granting claimant an 11 percent permanent partial disability to the body as a whole after deducting the 5 percent preexisting from claimant's 16 percent whole body impairment.

The Board must next consider claimant's entitlement to a work disability under K.S.A. 1997 Supp. 44-510e.

Permanent partial disability compensation under K.S.A. 1997 Supp. 44-510e is the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the 15-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the accident and the average weekly wage the worker is earning after the injury.

Additionally, K.S.A. 1997 Supp. 44-510e(a) creates a presumption that no work disability exists where a worker returns to work, for the same wage, after an injury. In this instance, claimant returned to work for respondent at a comparable wage, but was terminated from his employment on September 30, 1998, as a result of attendance problems. Although interpreting a different version of K.S.A. 44-510e, the Kansas Court of Appeals, in Perez v. IBP, Inc., 16 Kan. App. 2d 277, 826 P.2d 520 (1991), held that a claimant's award may be limited to his demonstrated functional impairment where that claimant lost his job as a result of attendance problems not related to his injury. That same logic has been extended to the present version of the statute.

Here, the Board finds that the termination of claimant for attendance problems was justified. Claimant had ample opportunity to provide justification for the absences on September 10 and 11, 1998, but failed to do so. Additionally, the absences on September 17 and 18, 1998, were not explained at the time of claimant's termination. It was over two months after the claimant's termination before any type of explanation was provided. The Appeals Board finds that claimant's attendance problems did

not demonstrate a good faith effort to retain his employment with respondent. *See* Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997). Furthermore, the termination was not related to claimant's injuries with respondent. Therefore, the Appeals Board finds the wage claimant was earning while working for respondent should be imputed to him and claimant is limited to his functional impairment of 11 percent to the body as a whole.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Nunc Pro Tunc Order of Administrative Law Judge John D. Clark, dated March 27, 2001, should be, and is hereby, affirmed in all regards. An award is granted in favor of the claimant, Michael D. Hitch, and against the respondent, The Boeing Company, and its insurance carrier, Insurance Company State of Pennsylvania, a/k/a AIG, for an injury occurring through October 1997, for an 11 percent permanent partial general body disability. Claimant is entitled to 0.71 weeks temporary total disability compensation at the rate of $366 per week in the amount of $259.86, followed by 45.65 weeks permanent partial general body disability at the rate of $366 per week totaling $16,707.90, for a total award of $16,967.76. As of the date of this award, the entire amount is due and owing in one lump sum, minus any amounts previously paid.

IT IS SO ORDERED.

Dated this ____ day of February, 2002.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant
Lyndon W. Vix, Attorney for Respondent
Eric K. Kuhn, Attorney for Respondent
John C. Nodgaard, Attorney for Fund
John D. Clark, Administrative Law Judge
Philip S. Harness, Director