

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

NESTOR VILLALOBOS)	
Claimant)	
VS.)	
)	Docket No. 184,413
NATIONAL BEEF PACKING COMPANY)	
Respondent)	
AND)	
)	
LUMBERMEN'S UNDERWRITING ALLIANCE)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

The applications of claimant and respondent for review by the Workers Compensation Appeals Board of an Award entered by Special Administrative Law Judge William F. Morrissey on November 25, 1996, came on for oral argument.

APPEARANCES

Claimant appeared by and through his attorney, Lawrence M. Gurney of Wichita, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Kerry E. McQueen of Liberal, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Wendel W. Wurst of Garden City, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board. In addition, the Appeals Board acknowledges the parties stipulated to a 9 percent whole body functional impairment as a result of the injuries suffered by claimant in Docket No. 184,413.

Issues

Claimant raised the following issues before the Appeals Board:

- (1) What is the nature and extent of claimant's injury and/or disability?
- (2) What is the date of accident in Docket No. 184,413?

Respondent raised the following issues before the Appeals Board:

- (1) Did the Administrative Law Judge err in exceeding the stipulated 9 percent whole body functional impairment?
- (2) Was there an overpayment of temporary total disability compensation? The parties acknowledged that, while the Special Administrative Law Judge did not decide the issue dealing with an overpayment of temporary total disability compensation, this matter is not to be remanded, but instead, the Appeals Board is to rule on the issue.
- (3) Whether respondent is entitled to a credit pursuant to K.S.A. 44-510a or K.S.A. 44-501(c).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After having reviewed the entire record, considering the briefs, and hearing the arguments of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Findings of Fact

Claimant initially filed three claims against respondent as a result of injuries suffered from his work at respondent's plant. In Docket No. 163,997, claimant alleged an injury to one finger on his right hand. This matter was settled by settlement conference on April 21, 1993, for a 24 percent permanent partial disability to the finger. In Docket No. 173,260, claimant alleged bilateral hand and arm injuries that included left side carpal tunnel surgery. This matter was also settled by settlement conference on April 21, 1993, for a 7 percent whole body impairment. At that time, claimant acknowledged giving up all rights to any claim to injuries to his arms, shoulders, neck, upper back, and fingers. However, the attorney for the claimant made it clear that claimant's current neck and shoulder claim was not being resolved at that settlement hearing.

During the same period, when claimant was receiving treatment for his carpal tunnel syndrome, he was complaining of pain in his shoulders with radiculopathy into his cervical

spine. In December 1992, he was diagnosed by Dr. Guillermo Garcia as having bilateral shoulder tendinitis. Dr. Garcia related the problem to overuse and expected, at that time, that claimant would improve. Claimant was scheduled for a functional capacity assessment at which time he registered additional complaints in the shoulders and the neck.

On January 5, 1993, claimant returned to work with respondent with restrictions. He worked for approximately one month washing tanks and then was assigned to a job assisting in repairing and sharpening regular and air driven knives. Later, the person claimant was assisting left, and claimant was required to clean, sharpen, disassemble and reassemble the knives by himself. The claimant testified that this work caused his neck, shoulders and right wrist to worsen.

Claimant was examined by Dr. Ernest R. Schlachter on March 9, 1993. At that time, Dr. Schlachter found claimant to be suffering from overuse syndrome of both upper extremities, with entrapment neuropathy at the ulnar nerve of the elbow, early carpal tunnel syndrome of the right hand and carpal tunnel syndrome of the left.

Dr. Schlachter felt claimant had a 10 percent impairment of function of the left upper extremity which converts to a 6 percent whole body impairment. He also estimated a 5 percent impairment of function to the claimant's right upper extremity which converts to a 3 percent impairment of function to the body as a whole which, combined, equals a 9 percent whole body functional impairment. He placed claimant on restrictions of no repetitive pushing, pulling, twisting or grasping motions with either hand or arm and limited claimant to no more than 15 pounds lifting on a repetitive basis and 20 pounds single lift with either hand or arm. He also advised that claimant avoid vibratory tools and cold environments.

Respondent continued to accommodate claimant's limitations and restrictions in the knife room. Claimant continued working for respondent through May 5, 1994, at which time he was taken off work for medical treatment and placed on temporary total disability compensation. Claimant was paid 67 weeks temporary total disability compensation at \$227.35 per week totalling \$15,232.45. Based upon an average weekly wage of \$315.94, without fringe benefits, claimant would be entitled to temporary total disability compensation at the rate of \$210.64 per week, which represents an overpayment of \$16.71 per week, totalling \$1,119.57.

It was during the time claimant was off work on temporary total disability compensation that claimant received additional restrictions from Grace Stringfellow, M.D. Respondent was unable to accommodate the restrictions placed on claimant by Dr. Stringfellow and as of May 1995, claimant was laid off work with no further offer of accommodation from respondent. The record indicates claimant's last day of work was May 5, 1994, approximately one year before the actual layoff.

On May 14, 1996, claimant was reexamined by Ernest R. Schlachter, M.D., at the request of Mr. Kerry McQueen, attorney for the respondent and insurance carrier. At that

time, claimant had complaints of pain in his neck and shoulders and a burning sensation in his right hand. Claimant was diagnosed with overuse syndrome of both upper extremities, mild carpal tunnel syndrome on the right, carpal tunnel syndrome previously operated on the left, rotator cuff tendinitis of the right shoulder, and chronic cervical sprain with aggravation of degenerative changes which had been discovered after an MRI of claimant's cervical spine.

Dr. Schlachter assessed claimant a 10 percent impairment of function of the left upper extremity which was consistent with his earlier examination. Claimant also had a 5 percent impairment of function of the right shoulder and a 5 percent impairment of function to the cervical spine which, he opined, combined to an 18 percent permanent partial impairment of function to the body as a whole.

Dr. Schlachter restricted claimant from occasional lifting of 5 pounds with either hand or arm, occasional pushing, pulling, twisting, or grasping with either hand or arm and advised no use of his right arm overhead or performing work which required him to look overhead or turn his head sharply left to right. His caution against vibratory tools and cold environments continued.

Claimant was examined on August 8, 1995, by Dr. C. Reiff Brown, an orthopedic surgeon, at the request of the Administrative Law Judge. Dr. Brown diagnosed chronic thoracic sprain and possible early myofascial pain syndrome which caused symptoms to claimant's shoulders and scapular area. Claimant's condition involved the lower cervical paraspinals resulting in secondary tightness and occipital headaches. He also felt that claimant had a degenerating disc in the cervical spine which Dr. Brown did not believe was related to these symptoms. He placed work restrictions on claimant prohibiting lifting above shoulder level greater than 25 pounds occasionally, 15 pounds frequently and opined claimant had a 3 percent whole body impairment as a result of the myofascial pain syndrome. He also felt claimant had a 10 percent impairment of the right arm, half of which preexisted the injury in 1993. He did not indicate that claimant had suffered any additional trauma as a result of his return to work with respondent from 1993 through May of 1994.

Claimant was examined and evaluated by two vocational experts. Respondent referred claimant to Karen Crist Terrill for an evaluation regarding what, if any, work disability claimant would be entitled. Claimant utilized the opinion of vocational expert Jerry D. Hardin in providing additional information upon which to base a work disability award.

Conclusions of Law

In proceedings under the Workers Compensation Act, the burden of proof shall be on claimant to establish claimant's right to an award of compensation by proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. See K.S.A. 44-501(a) and K.S.A. 44-508(g).

In order to properly compute claimant's work disability, the Appeals Board must first decide the date of accident in this matter. The injuries suffered to claimant's shoulders and neck appear to have stemmed from a series of microtraumas both before and during claimant's employment with respondent as a knife sharpener. The neck and shoulder conditions were symptomatic at the time claimant was examined by Dr. Garcia in 1992 and, pursuant to claimant's testimony, continued to worsen when claimant was required to work the knife sharpening job by himself.

Claimant continued working for respondent through May 5, 1994, at which time he was taken off work and placed on temporary total disability compensation. While the record is sketchy regarding how significant claimant's symptoms were through this date, it does appear from claimant's testimony that his condition continued to worsen during this period of time.

When dealing with dates of accidents involving microtrauma injuries two significant cases must be considered. In Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994), the Kansas Court of Appeals established a bright line rule for carpal tunnel injuries. The Court of Appeals held the claimant's last day worked as the appropriate "date of injury" or "date of occurrence."

While the Berry Court indicated that the last day of work should be the date from when all disability is computed in all cases involving carpal tunnel syndrome, the Court of Appeals somewhat diluted this rule in Condon v. Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995). While Condon involved possible carpal tunnel syndrome, it also involved pain originating in the claimant's shoulders, neck, and left side. The Condon Court was asked to analyze a situation where claimant did not reach a point where she could no longer do her job as a result of a microtrauma injury but, instead, continued having symptoms up until claimant's last day of work, when she was laid off. In analyzing the appropriate date of accident, the Court considered a second option discussed in 1B Larson, The Law of Workman's Compensation, § 39.50 (1992), which discussed "the onset of pain which necessitates medical attention" as an appropriate injury date where a microtrauma gradual injury is involved. The Court of Appeals acknowledged that these repetitive conditions which occur over a period of months as a result of some type of repetitive trauma are conditions which defy any attempt to determine a precise date of accident. The Court in Condon also held that, when a worker suffers from work-related injuries caused by microtraumas and is involved in a general layoff, and not because of medical conditions, the date of injury is not always the last day the worker works.

In this instance, the Appeals Board finds claimant's circumstance is somewhat akin to both Condon and Berry. Here, claimant lost his job as a result of a general layoff. However, claimant left work on May 5, 1994, for the purpose of seeking medical treatment. Claimant was thereafter placed on temporary total disability compensation and remained on temporary total disability compensation for several weeks beyond his termination of employment in 1995. In considering the holdings of both Condon and Berry, the Appeals Board finds that claimant's upper extremity micro-trauma injuries to his shoulders and neck

occurred through a series of accidents culminating on May 5, 1994, the last day claimant worked before he sought medical treatment and was placed on temporary total disability compensation.

Claimant did return to work for a brief three week period of time in June of 1995, but, there is no indication that claimant's condition worsened during this brief period.

As the parties have stipulated that the appropriate functional impairment in this matter is 9 percent, the Appeals Board must next look to what, if any, work disability claimant would be entitled as a result of the injuries suffered to his shoulders and neck.

K.S.A. 44-510e(a) in effect on the date of accident obligates the Appeals Board to consider as permanent partial general disability:

[T]he 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 fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.

In considering the opinions of the two vocational experts Jerry Hardin and Karen Crist Terrill, the Appeals Board must consider a wide range of opinions. Mr. Hardin as claimant's expert found, based upon Dr. Brown's and Dr. Stringfellow's restrictions, that claimant had suffered an 89 percent loss of task performing ability. This task assessment of Mr. Hardin was reviewed and considered by Dr. Ernest Schlachter who felt that, out of the 22 tasks listed, claimant could only perform two, resulting in a 91 percent task loss from these injuries.

Ms. Terrill reviewed claimant's prior work tasks and compared same to the restrictions of several doctors. Ms. Terrill had the opportunity to review the medical reports of Dr. C. Reiff Brown, Dr. Earl C. Smith, Dr. Tonya Washburn, Dr. Jeff Moore, Dr. David Edwards, Dr. Grace Stringfellow, Dr. Ernest Schlachter and Dr. Guillermo Garcia. She also had the opportunity to review the functional capacities evaluation as requested by Dr. Garcia and the medical reports from Southwest Medical Center. Based upon Dr. Brown's restrictions, she found claimant had lost less than one percent (.89) of his task performing abilities. Based upon the restrictions of Dr. Stringfellow and Dr. Washburn, claimant's loss of task performing abilities was also less than one percent. This was based upon claimant's description of his various tasks. When considering respondent's description of the tasks involved, Ms. Terrill found, after considering Dr. Brown's, Dr. Stringfellow's, and Dr. Washburn's restrictions, that claimant had suffered no loss of task performing ability. This opinion by Ms. Terrill was considered and reviewed by Dr. Brown

and adopted as his opinion. The Appeals Board finds significant the fact Ms. Terrill considered claimant's prior restrictions when reaching her opinions.

The Appeals Board recognizes that, in workers compensation litigation, disputes will arise between various expert witnesses. The dispute in this instance is dramatic, with respondent's expert finding practically no loss of task performing abilities and claimant's expert finding an almost total loss of task performing abilities based upon claimant's injuries and limitations. The Appeals Board, in considering the limitations placed upon claimant, cannot accept respondents expert's opinion that claimant has lost no ability to perform tasks resulting from these injuries. It is clear from the opinion of Dr. Schlachter, who had the opportunity to examine claimant in 1993 and again in 1996, that claimant's injuries to his shoulders and neck have worsened since he was placed on the light duty knife sharpening job. This would indicate some loss of task performing ability has resulted. The Appeals Board further disagrees with respondent's expert's consideration of claimant's preexisting restrictions, and, as a result, considers the opinion of Dr. Schlachter to be the most credible regarding claimant's loss of task performing ability.

The Appeals Board therefore finds that claimant's task performing loss, pursuant to K.S.A. 44-510e, is 91 percent pursuant to the opinion of Dr. Schlachter.

K.S.A. 44-510e obligates the Appeals Board to consider the difference between claimant's average weekly wage at the time of the injury and the average weekly wage the claimant is earning after the injury.

With the exception of 3 weeks work with respondent, claimant has been unemployed since his layoff in 1995. Claimant did testify to receiving unemployment compensation but acknowledged, when the unemployment compensation ran out, he simply stopped looking for work. Even though claimant's restrictions are not totally debilitating, he felt that he would be unable to find employment within those restrictions and ceased all efforts. The Kansas Court of Appeals in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997), was asked to consider this issue. In Copeland, the Court of Appeals felt, in harmonizing the language of K.S.A. 44-510e(a) with the principles of Fouk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), that the fact finder must first decide whether a claimant has made good faith effort to find appropriate employment. The Appeals Board finds in this instance claimant has voluntarily taken himself out of the open labor market without justification and has not made a good faith effort to find appropriate employment.

Copeland further obligates the fact finder, upon a finding that a good faith effort has not been made to find appropriate employment, to determine an appropriate post-injury wage, based upon all of the evidence before it, including any expert testimony concerning the claimant's capacity to earn wages. In this instance, Karen Terrill opined that claimant had the ability, post-injury, to earn \$6.50 per hour. This, when compared to claimant's average weekly wage of \$330.03 per week, equates to a loss of wage earning ability of 21 percent. As K.S.A. 44-510a obligates the Appeals Board to consider both claimant's

task loss and loss of wage earnings, the Appeals Board finds claimant has suffered a work disability of 56 percent as a result of the injuries occurring in Docket No. 184,413 and based upon an injury date of May 5, 1994.

In computing claimant's permanent disability, the Appeals Board has included \$14.09 in fringe benefits in the average weekly wage which were not included at the time temporary total disability compensation was computed. Claimant was not terminated from his employment until nearly all of claimant's temporary total disability compensation had been paid. In addition, the record does not show when the fringe benefits were terminated. The Appeals Board therefore will only use the fringe benefit portion of the wage for purpose of computing permanent disability, but not temporary total disability compensation. Therefore, claimant's permanent award will be based upon an average weekly wage of \$330.03 per week.

The Appeals Board must next consider what, if any, credit the respondent would be entitled to under either K.S.A. 44-510a or K.S.A. 44-501(c).

The Appeals Board has held in the past that a reduction under K.S.A. 44-510a is only applicable if compensation was actually paid or is collectable for the prior disability. In this instance, claimant settled his prior claims for a functional impairment, as claimant had been returned to work with respondent at a comparable wage. The Appeals Board has ruled that it would be inequitable to reduce claimant's overall disability under both K.S.A. 510a and K.S.A. 44-501c. A detailed analysis of the Appeals Boards consideration of both K.S.A. 44-510a and K.S.A. 44-501(c) is contained in the Appeals Board decision of Carver v. Missouri Gas Energy, Docket No. 195,270 (July, 1997.)

The Appeals Board does find, in this instance, that K.S.A. 44-501(c) is applicable. That statute states in part:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting."

In this instance, claimant is alleging bilateral shoulder and neck complaints. There is no indication that claimant had a preexisting condition in his neck which would allow for a reduction under K.S.A. 44-501(c). There is also no medical evidence to document a preexisting functional impairment in claimant's left shoulder.

Dr. Schlachter's exam of March 9, 1993, indicated problems in the claimant's right scapular border, the right hand and wrist. Currently claimant is alleging problems with his right upper extremity including the wrist and the shoulder. The Appeals Board finds that the 5 percent permanent partial impairment of function to the right upper extremity as assessed by Dr. Schlachter in 1993 is a preexisting functional impairment as contemplated by K.S.A. 44-501(c). In converting the 5 percent upper extremity impairment to a 3 percent

whole body impairment, the Appeals Board finds respondent is entitled to a reduction of 3 percent from the overall award.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge William F. Morrissey, dated November 25, 1996, should be, and is hereby, modified and claimant is granted an award against respondent, National Beef Packing Company, its insurance carrier, Lumbermen's Underwriting Alliance, and the Kansas Workers Compensation Fund for an injury occurring through May 5, 1994, for a 53 percent permanent partial disability to the body as a whole based upon an average weekly wage of \$330.03.

Claimant is entitled to 67 weeks of temporary total disability compensation at the rate of \$220.03 or \$14,742.01, followed thereafter by 192.39 weeks at the rate of \$220.03 per week or \$42,331.57, making total award of \$57,073.58.

As of April 15, 1998, there is due and owing claimant 67 weeks of temporary total disability compensation at the rate of \$220.03 per week or \$14,742.01, followed by 138.86 weeks of permanent partial compensation at the rate of \$220.03 per week in the sum of \$30,553.37 for a total of \$45,295.38, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$11,778.20 is to be paid for 53.53 weeks at the rate of \$220.03 per week, until fully paid or further order of the Director.

Pursuant to the stipulation of the parties, compensation and costs shall be paid 25 percent by respondent and 75 percent by the Kansas Workers Compensation Fund.

Future medical benefits are awarded upon proper application to and approval by the Director.

Unauthorized medical expenses up to \$500 shall be awarded upon presentation to respondent of an itemized statement verifying same.

Claimant's contract for attorney's fees is approved insofar as it is not inconsistent with the applicable version of K.S.A. 44-536.

Fees and expenses necessary to defray the expense of the administration of the Kansas Workers Compensation Act are hereby assessed against the respondent, its insurance carrier, and the Kansas Workers Compensation Fund to be assessed as follows:

Special Administrative Law Judge

\$150.00

Underwood & Shane	
Transcript of Regular Hearing	\$325.00
Susan Maier	
Transcript of Preliminary Hearing	\$ 96.38
Barber & Associates	
Deposition of Karen Crist Terrill	\$308.20
Deposition Ernest R. Schlachter, M.D.	\$225.60
Advanced Court Reporting Services	
Deposition of C. Reiff Brown, M.D.	\$133.70
Ireland Court Reporting, Inc.	
Deposition of Jerry D. Hardin	\$212.79

IT IS SO ORDERED.

Dated this ____ day of April 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Lawrence M. Gurney, Wichita, KS
- Kerry E. McQueen, Liberal, KS
- Wendel W. Wurst, Garden City, KS
- Philip S. Harness, Director