

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

FRANCES MABERRY)	
Claimant)	
VS.)	
)	Docket No. 186,053
RUBBERMAID SPECIALTY PRODUCTS)	
Respondent)	
)	
AND)	
)	
AMERICAN MANUFACTURERS MUTUAL INS.)	
Insurance Carrier)	
)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Respondent and claimant appealed the Award entered by Administrative Law Judge John D. Clark on April 29, 1996. The Appeals Board heard oral argument by telephone conference.

APPEARANCES

Claimant appeared by his attorney, Roger A. Riedmiller of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Terry J. Torline of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Edward D. Heath, Jr. of Wichita, Kansas. There were no other appearances.

RECORD

The Appeals Board considered the record listed in the Award of the Administrative Law Judge. In addition, the Appeals Board considered the report of the independent

medical examination of claimant conducted by Philip R. Mills, M.D., pursuant to an Order of the Administrative Law Judge.

STIPULATIONS

The Appeals Board adopted the stipulations listed in the Award of the Administrative Law Judge.

ISSUES

Both the claimant and the respondent requested the Appeals Board to review the findings and conclusions of the Administrative Law Judge in regard to the following issue:

- (1) Nature and extent of claimant's disability.

The respondent raised the following additional issues for review by the Appeals Board:

- (2) The appropriate date of claimant's work-related accident.
- (3) Whether the respondent is entitled to a credit as provided for in either K.S.A. 44-501(c) or K.S.A. 44-510a, or both, for claimant's preexisting permanent functional impairment.
- (4) The liability of the Kansas Workers Compensation Fund (Fund).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and the arguments of the parties, the Appeals Board finds as follows:

Both the respondent and the claimant appealed from an Award of the Administrative Law Judge that found claimant entitled to permanent partial disability benefits based on a 46 percent work disability. Respondent argues that claimant should be limited to permanent partial disability benefits based on two separate scheduled upper extremity injuries. However, if the upper extremity injuries are found to be bilateral and, therefore, a whole body injury, the respondent contends that claimant's disability should be limited to permanent functional impairment because of preexisting permanent restrictions that resulted from a previous bilateral carpal tunnel syndrome injury. Additionally, respondent argues that any whole body disability should be reduced by the credit provisions contained in both K.S.A. 44-501(c) and K.S.A. 44-510a. In contrast, claimant argues that the 46 percent work disability is inadequate and the record supports a higher work disability in the amount of 64.5 percent.

(1)(2) Before claimant suffered the alleged shoulder injuries that are the subject of this appeal, claimant injured her right wrist in 1990 and her left wrist in 1991 while working for

the respondent. Claimant was treated for the right wrist injury by orthopedic surgeon, J. Mark Melhorn, M.D., of Wichita, Kansas. Dr. Melhorn performed a right carpal tunnel release and a de Quervain's release on September 5, 1990. The doctor opined that claimant had a 10.9 percent permanent functional impairment of the right forearm as a result of the work-related injury. However, he returned claimant to her regular work with no restrictions.

Following claimant's return to work, she developed symptoms in her left wrist. Medical treatment for that injury was provided by the respondent with Paul D. Lesko, M.D., an orthopedic surgeon in Wichita, Kansas. Dr. Lesko, on May 22, 1991, performed a left carpal tunnel and de Quervain's release. Dr. Lesko returned claimant to work on November 6, 1991, with permanent restrictions of no lifting over 15-20 pounds with both hands, limited repetitive gripping, and instructed claimant to wear splints on her wrists while she was working.

Claimant was also examined on December 19, 1991, at the request of her attorney by Ernest R. Schlachter, M.D., of Wichita, Kansas. Dr. Schlachter assessed claimant with a 10 percent permanent functional impairment to her right upper extremity and a 15 percent permanent functional impairment to her left upper extremity. The doctor permanently restricted claimant to no repetitive pushing, pulling, twisting, or grasping motion with either arm or hand. Claimant's lifting was limited to 10 pounds repetitively and 20 pounds for a single lift with either arm or hand. Dr. Schlachter opined that claimant's current employment was outside those restrictions.

Claimant settled her bilateral wrist and hand injuries in a settlement hearing held before a Special Administrative Law Judge on February 6, 1992. Claimant received a lump sum compromise settlement in the amount of \$12,000 based on Dr. Schlachter's permanent functional impairment ratings.

Claimant testified she started having symptoms in her right shoulder and to a lesser degree in her left shoulder on March 9, 1993, and those symptoms worsened until her last day worked on August 16, 1994. The respondent provided medical treatment for claimant's shoulder complaints first with the company doctor, John Winblad, M.D., located in Winfield, Kansas. Dr. Winblad then referred claimant to orthopedic surgeon Anthony G. A. Pollock in Wichita, Kansas.

Dr. Pollock first saw claimant on December 20, 1993, with complaints in both her right and left shoulders. Dr. Pollock treated claimant conservatively with medication, physical therapy, and injections. However, claimant remained symptomatic in both shoulders as she continued to perform her regular work activities as a production employee for the respondent. On May 10, 1994, Dr. Pollock placed restrictions on claimant's work activities of no overhead work, no pushing, pulling, or gripping, and limited her lifting to 10 pounds. The doctor took claimant off work from May 23, 1994, through June 6, 1994.

On August 24, 1994, Dr. Pollock increased claimant's restrictions to sedentary work, no lifting over 10 pounds, no overhead work, and no repetitive movements. The respondent

could not accommodate claimant's restrictions and claimant was taken off work. The last day claimant worked was August 16, 1994.

Although not working, claimant's shoulders remained symptomatic. Dr. Pollock's diagnosis was right shoulder impingement and rotator cuff tendonitis. In an effort to relieve claimant of the continuing pain and discomfort, Dr. Pollock, on October 25, 1994, performed an acromioplasty on claimant's right shoulder. Following months of physical therapy, Dr. Pollock released claimant to return to work on March 30, 1995, with a 10 percent permanent functional impairment of the right upper extremity including the shoulder. The doctor permanently restricted the claimant from performing overhead work, pushing and pulling in excess of 20 pounds, limited repetitive motion to 90 times per hour, and advised claimant that the work she performed should be limited to waist level height.

The Administrative Law Judge ordered an independent medical examination of claimant by Philip R. Mills, M.D., board-certified in physical medicine. In a report to the Administrative Law Judge dated September 27, 1995, Dr. Mills diagnosed claimant with overuse myofascitis, status post carpal tunnel releases, status post de Quervain's releases, and status post rotator cuff repair. The doctor assessed a 12 percent whole body impairment for the bilateral releases and a 3 percent whole body impairment for the overuse myofascitis for both shoulders. Dr. Mills' permanent restrictions were no resisted gripping or crimping, avoid repetitive or prolonged wrist flexion/extension, vibratory tools, direct wrist pressure, or environments less than 50 degrees without adequate clothing.

Respondent argues that claimant suffered two separate shoulder injuries. Respondent contends that the claimant did not present credible evidence that the claimant overused her left shoulder to protect her right shoulder. The Appeals Board disagrees with the respondent and finds that both of claimant's shoulders were simultaneously injured while she performed her repetitive work activities for the respondent between March 9, 1993, and August 16, 1994. This conclusion is supported by claimant's testimony that both shoulders were symptomatic on March 9, 1993. Furthermore, this is supported by Dr. Pollock's testimony that claimant complained of bilateral shoulder pain and discomfort the first time that he treated her on December 20, 1993. Although Dr. Pollock did not assign a permanent functional disability rating to claimant's left shoulder, he did admit, on cross-examination, that claimant's left shoulder would be classified as a chronic problem.

The Appeals Board also finds that due to claimant's repetitive work activities she suffered permanent injury to both shoulders. This conclusion is supported by Dr. Mills' and Dr. Schlachter's assessment of permanent functional impairment to both shoulders and claimant's own consistent complaints of pain and discomfort of both shoulders.

If a worker simultaneously injures either both upper extremities or both lower extremities the disability is removed from a scheduled disability to a general body disability. See Murphy v. IBP, Inc., 240 Kan. 141, 727 P.2d 468 (1986). Therefore, the Appeals Board finds claimant is eligible for a work disability, if the work disability is greater than her permanent functional impairment. See K.S.A. 44-510e(a).

Both Dr. Mills and Dr. Schlachter expressed permanent functional impairment opinions based on claimant's upper extremity and bilateral shoulder injuries. Dr. Schlachter opined those injuries resulted in a 24 percent whole body permanent functional rating. Dr. Mills assessed a 12 percent permanent functional whole body rating for the upper extremities and a 3 percent whole body rating for the bilateral shoulder injuries. Dr. Mills' two functional impairment ratings would combine for a 15 percent whole body rating. The Appeals Board finds that both Dr. Schlachter's and Dr. Mills' permanent functional impairment ratings should be given equal weight and the Appeals Board finds claimant has a functional impairment rating of 19.5 percent.

Before the work disability issue can be addressed, the appropriate date of accident has to be determined. In this case, the claimant alleged a period of accident from March 9, 1993, through August 16, 1994. The Administrative Law Judge relying on Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994) and Condon v. Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995) found that claimant's appropriate date of accident was August 16, 1994, her last day worked. The respondent, however, argues that the appropriate date of accident was May 23, 1994, the date that claimant was first taken off work because she could not tolerate the pain in her neck and shoulder. Furthermore, the respondent concludes that claimant's last day worked of August 16, 1994, is not the appropriate date of accident because claimant was taken off work because the respondent could no longer accommodate her restrictions and not because of her injuries.

The Appeals Board agrees with the Administrative Law Judge and finds that claimant's appropriate date of accident is August 16, 1994, her last day worked. The Appeals Board concludes that claimant's work-related injuries worsened resulting in increased work restrictions that respondent was unable to accommodate. Therefore, claimant's last day worked is the appropriate date of accident because claimant was required to leave work due to repetitive type injuries sustained over a period of time. See Durham v. Cessna Aircraft Company, 24 Kan. App. 2d 334, Syl. ¶ 1, ___ P.2d ___, (1997).

Having determined August 16, 1994, as claimant's date of accident, claimant's entitlement to permanent partial disability benefits is contained in the July 1, 1993, amendments to the Workers Compensation Act found at K.S.A. 44-510e. Work disability is measured in that statute as the loss of the employee's ability to perform work tasks that the employee performed in the 15 years preceding the date of accident. That percentage is required to be averaged with the difference between the employee's post and pre-injury average weekly wage. K.S.A. 44-510e(a). The employee's loss of task performing ability must be expressed in the opinion of a physician.

In the case at hand, only one physician expressed an opinion on claimant's loss of ability to perform work tasks. Dr. Schlachter reviewed a work task list compiled by vocational expert Jerry Hardin and verified by the claimant. Dr. Schlachter opined that utilizing the permanent restrictions he placed on the claimant, claimant had lost 54 percent of her ability to perform work tasks during the 15-year period preceding her date of accident.

In an effort to show claimant had permanent restrictions before this injury, the respondent had Dr. Pollock express an opinion on claimant's work task loss based on the restrictions placed on claimant by Dr. Lesko following her wrist and hand injuries. However, the Appeals Board concludes that based on claimant's testimony, she performed work for the respondent after her wrist and hand injuries that exceeded those restrictions. Therefore, the Appeals Board finds those prior restrictions should not be considered when determining claimant's work disability.

At the time of the regular hearing, claimant testified she was working for Pizza Hut as a delivery person earning \$6.69 per hour and averaging 18 hours per week for a post-injury average weekly wage of \$120.42. The claimant also testified she had applied for a job with a temporary employment service that could place her at Binney & Smith, a manufacturing company in Winfield, Kansas. However, she had not started the job at that time. Claimant further testified that the job was only temporary. Nevertheless, the Administrative Law Judge found that claimant had testified she was working for Binney & Smith earning \$7.25 per hour for a post-injury average weekly wage of \$290. The Administrative Law Judge compared that post-injury weekly wage with the claimant's pre-injury average weekly wage of \$473.39 finding a wage loss for claimant of 38 percent.

The Appeals Board finds that claimant's wage loss should be determined by her actual earnings post-injury at the time of the regular hearing in the amount of \$120.42 per week instead of a post-injury wage based on a job claimant had not started. Comparing the post-injury average weekly wage of \$120.42 with her pre-injury average weekly wage of \$473.39 gives claimant a wage loss of 75 percent.

K.S.A. 44-510e(a) requires both the 54 percent work task loss and the 75 percent wage loss be given equal weight in arriving at a work disability. Therefore, the Appeals Board concludes that claimant is entitled to a work disability in the amount of 64.5 percent.

(3) The respondent argued that if claimant is entitled to a work disability, then the work disability should be reduced by a credit for the settlement of claimant's prior bilateral wrist and hand injuries as provided for in K.S.A. 44-510a and further reduced by the amount of preexisting functional impairment of the prior bilateral wrist and hand injuries as provided by K.S.A. 44-501(c).

The Administrative Law Judge found that respondent was not entitled to a K.S.A. 44-510a credit for claimant's bilateral hand and wrist injuries. The Administrative Law Judge did not address whether claimant's work disability should be reduced pursuant to K.S.A. 44-501(c).

As previously noted, claimant suffered bilateral wrist and hand injuries resulting in permanent functional impairment while employed by the respondent in 1990 and 1991. Claimant settled those work-related injuries in 1992 based on Dr. Schlachter's permanent functional impairment ratings of 10 percent to claimant's right upper extremity and 15 percent to claimant's left upper extremity for a lump sum settlement amount of \$12,000.

Dr. Schlachter testified that claimant's preexisting bilateral hand and wrist injuries contributed 100 percent to her current disability.

The Appeals Board has previously addressed the issue of whether both a credit pursuant to K.S.A. 44-510a and a preexisting permanent functional impairment pursuant to K.S.A. 44-501(c) should be applied to reduce claimant's entitlement to permanent partial disability benefits. See Carver v. Missouri Gas Energy, Docket No. 195,270 (July 1997). In Carver, as in this case, the record contained evidence that it was arguable that both statutes could be applied. However, in Carver, the Appeals Board concluded that it would be inequitable and duplicative to reduce claimant's overall disability by his preexisting impairment twice.

The Appeals Board has examined the provisions of both statutes and, under the facts and circumstances of this case, finds that only the 1993 amendment to K.S.A. 44-501(c) should be applied. This conclusion is supported by the fact that the legislature specifically amended K.S.A. 44-501(c) to include a reduction for preexisting functional impairment and such amendment applies to all work-related accidents on or after July 1, 1993. Thus, the Appeals Board finds that Dr. Schlachter assessed a 10 percent right upper extremity functional impairment and a 15 percent left upper extremity functional impairment as a result of claimant's 1990 and 1991 work-related injuries. In accordance with the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised), those two upper extremity ratings combine to a 14 percent whole body functional impairment rating. Therefore, claimant's work disability of 64.5 percent should be reduced by her preexisting whole body functional impairment in the amount of 14 percent resulting in claimant's entitlement to permanent partial disability benefits in the amount of 50.5 percent.

(4) The Appeals Board affirms the Administrative Law Judge's conclusion that the Fund has no liability for the Award in this case. Since claimant's date of accident was found to be August 16, 1994, the July 1, 1993, amendments to the Kansas Workers Compensation Act eliminated the liability of the Fund for injuries to handicapped employees occurring after July 1, 1994. See K.S.A. 44-566a(e)(1) and K.S.A. 44-567(a)(1) and Shain v. Boeing Military Airplanes, 22 Kan. App. 913, 924 P.2d 1280 (1996).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated April 29, 1996, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Frances Maberry, and against the respondent, Rubbermaid Specialty Products, and its insurance carrier, American Manufacturers Mutual Insurance, for an accidental injury which occurred August 16, 1994, and based upon an average weekly wage of \$473.39.

Claimant is entitled to 40.71 weeks of temporary total disability compensation at the rate of \$315.61 per week or \$12,848.48, followed by 196.59 weeks of permanent partial disability compensation at the rate of \$315.61 per week or \$62,045.77 for a 50.5% permanent partial work disability, for a total award of \$74,894.25.

As of October 30, 1997, there is due and owing claimant 40.71 weeks of temporary total disability compensation at the rate of \$315.61 per week or \$12,848.48, followed by 126.58 weeks of permanent partial compensation at the rate of \$315.61 per week in the sum of \$39,949.91 for a total of \$52,798.39, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$22,095.86 is to be paid for 70.01 weeks at the rate of \$315.61 per week, until fully paid or further order of the Director.

Future medical treatment for claimant's injuries may be awarded upon proper application to and approval by the Director.

Unauthorized medical expense up to the statutory maximum is awarded to the claimant.

All outstanding authorized medical expenses are awarded to the claimant.

All other orders entered by the Administrative Law Judge in the Award are approved and adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of October 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Roger A. Riedmiller, Wichita, KS
- Terry J. Torline, Wichita, KS
- Edward D. Heath, Jr., Wichita, KS
- John D. Clark, Administrative Law Judge
- Philip S. Harness, Director