BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LEORA L. SMITH Claimant VS. **THE CURLING IRON** Respondent AND **INSURANCE COMPANY OF NORTH AMERICA** Insurance Carrier AND **KANSAS WORKERS COMPENSATION FUND**	))))))))))))))	Docket No. 186,891

ORDER

Claimant and respondent appeal from an Award entered by Administrative Law Judge George R. Robertson dated February 21, 1995. The Appeals Board heard oral argument July 6, 1995.

APPEARANCES

Claimant appeared by and through her attorney, Patrick W. Neustrom of Salina, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Vincent A. Burnett of Wichita, Kansas. The Workers Compensation Fund appeared by its attorney, David Shriver of McPherson, Kansas.

RECORD AND STIPULATIONS

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

ISSUES

Issues raised on appeal are:

(1) The amount of claimant's average weekly wage.

(2) The nature and extent of claimant's disability.

(3) Whether the Workers Compensation Fund should be liable for all or any portion of the Award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties the Appeals Board finds and concludes:

Claimant's average weekly wage was $328.58.

Claimant owned and operated her own beauty salon business. The business operated as a sole proprietorship, not a corporation. Claimant paid herself a monthly draw in varying amounts. Claimant also paid, from the business account, certain personal expenses, including her health insurance and medical bills and other various miscellaneous personal expenses.

The amount of the claimant's average weekly wage is to be computed in accordance with the rules set forth in K.S.A. 1992 Supp. 44-511. The calculation depends upon the pay period. The statute includes two methods arguably applicable here. K.S.A. 1992 Supp. 44-511(b)(2) provides the method calculating the wage if the rate of pay is fixed by the month:

> "If at the time of the accident the money rate is fixed by the month, the average gross weekly wage shall be the monthly rate so fixed multiplied by 12 and divided by 52 . . . ."

K.S.A. 1992 Supp. 44-511(b)(5) provides a method for calculating the average weekly wage in cases where the pay is not keyed to any particular pay period:

> "If at the time of the accident the money rate is fixed by the output of the employee, on a commission or percentage basis, on a flat-rate basis for performance of a specified job, or on any other basis where the money rate is not fixed by the week, month, year or hour . . . the average gross weekly wage shall be the gross amount of money earned during the number of calendar weeks so employed, up to a maximum of 26 calendar weeks immediately preceding the date of the accident, divided by the number of weeks employed, or by 26 as the case may be . . . ."

Claimant testified, and the records show, claimant did not have a set draw each month. According to claimant, she withdrew what she needed to live on. She also testified that the draw depended upon how much in sales she had that month. The Appeals Board, therefore, concludes that the claimant's pay was not a money rate fixed by the month. The average weekly wage should be calculated as in subsection (5) above and would be based upon the 26 weeks preceding the date of accident.

The parties have introduced into evidence a variety of financial information including information relating to profit and taxable income for the business. The parties have also introduced evidence relating to the amount of the draws paid to claimant during the 26 weeks preceding the date of accident and the amount of personal expenses paid during that same period. The Appeals Board considers this latter information to conform with the standards for compiling average weekly wage set forth in Thompson v. Harold Thompson

Trucking, 12 Kan. App. 2d 449, 748 P.2d 430 (1987), rev. denied 243 Kan. App. 782 (1988). The total amount of payments made directly to claimant or for personal expenses of claimant, were $8,543.08. That total divided by 26 weeks yields an average weekly wage of $328.58, which we find to be claimant's average weekly wage for purposes of this Award.

The Appeals Board has relied upon the testimony of Ms. Alice Rahmeier, respondent's bookkeeper. Her testimony differed in material respects from Exhibit 3 to claimant's regular hearing, a summary prepared by or for claimant's counsel. The Appeals Board has resolved the differences in favor of the testimony given by respondent's bookkeeper.

Finally, the Appeals Board notes that this claim involves allegations of a single injury in December 1992 and then repetitive trauma thereafter until claimant sold her business in the summer of 1993. At the outset of the regular hearing, respondent admitted that claimant suffered accidental injury on the dates alleged. Under these circumstances, it could be appropriate to consider claimant's date of accident to be the last date worked in accordance with the principles announced in Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994). The record does not include, however, adequate evidence relating to draws and personal expense paid for the 26 weeks preceding the last date claimant worked. Respondent has argued for a lower average weekly wage but has done so on the basis of an argument that the wage should be calculated over one year preceding the date of accident rather than the 26 weeks. This argument assumes, as have the parties in trying this case, that the wage would be calculated from the December 1992 date of accident. Respondent has argued that if the one year is not used to calculate wage, the $328.58 found by the Administrative Law Judge should be affirmed. Therefore, the Appeals Board concludes that while the later date of accident might have been a more appropriate basis for determining average weekly wage, the parties have in effect waived the argument. December 20, 1992 has, therefore, been used as the date of accident for purposes of calculating average weekly wage.

(2) The Appeals Board agrees with and affirms the finding that claimant sustained a 9 percent permanent partial general body disability.

After selling her hair salon business, claimant went to work as a sales representative for a beauty supply company. The evidence established that, at the time of the regular hearing, she was earning a wage comparable to or greater than she had earned in her self-employment. K.S.A. 1992 Supp. 44-510e provides that there is to be a presumption that an employee has no work disability if the employee engages in work or wages comparable to the average gross weekly wage the employee was earning at the time of the injury. In such cases, the injury does not have an immediately practical effect on the claimant's ability to earn wages or to obtain employment. This is the case here and the Appeals Board finds the vocational expert testimony does not overcome that presumption.

Claimant's disability is, therefore, limited to functional impairment. Dr. Kruckmyer, claimant's treating physician, provided the only opinion relating to the nature and extent of claimant's functional impairment. He diagnosed right lateral epicondylitis and subacromial bursitis, as well as tendinitis of the right shoulder. He rated claimant's total impairment as 9 percent to the body as a whole. The Appeals Board adopts that percentage as the percentage of disability for purposes of this award.

(3) The Award in this case should be paid by the respondent with no portion of it assessed against the Kansas Workers Compensation Fund.

To shift liability for all or any portion of the Award the respondent must show it had knowledge of a preexisting impairment which had constituted a handicap and that the preexisting impairment caused or contributed to the ultimate disability suffered by the claimant. Setting aside the fact that the primary function of the second injury fund liability, that of encouraging retention of handicapped employees, is not necessarily furthered by application of principles to a self-employed individual, the Appeals Board finds the record in this case does not contain any evidence upon which to base an assessment of liability against the Fund. Respondent attempted to elicit from Dr. Kruckmyer, in the course of his deposition, testimony which might form the foundation of an assessment against the Workers Compensation Fund. However, the closest Dr. Kruckmyer came to providing such a basis was his testimony that the injury to claimant's shoulder could be the result of compensatory overuse.

Dr. Kruckmyer did not see claimant until April 1993. At that time claimant was already having complaints of pain in her shoulder. When asked what portion of functional impairment preexisted the increase of symptoms in December of 1992, the doctor stated he did not have any idea. When asked to determine the percentage attributed to the elbow and arm injury and the percentage attributable to her shoulder injury, the doctor indicated he could not. His testimony is most fairly read as indicating he does not have an opinion regarding whether the shoulder injury was, in fact, the result of compensatory overuse. The doctor does not state that any portion of the injury would not have occurred but for a preexisting impairment. His testimony provides no foundation or basis for apportioning part or all of the liability against the Workers Compensation Fund. Accordingly, the Appeals Board finds and concludes the total amount of the Award should be assessed against the respondent with none to be paid by the Workers Compensation Fund.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge George R. Robertson dated February 21, 1995, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Patrick W. Neustrom, Salina, KS
Vincent A. Burnett, Wichita, KS
David Shriver, McPherson, KS
George R. Robertson, Administrative Law Judge
Philip S. Harness, Director