

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

DAWN R. SHERMAN)	
Claimant)	
VS.)	
)	Docket No. 186,998
NINNESCAH MANOR, INC.)	
Respondent)	
AND)	
)	
KANSAS HEALTH CARE ASSN.)	
Insurance Carrier)	

ORDER

Claimant requests review of the Award by Administrative Law Judge Jon L. Frobish entered in this proceeding on January 8, 1997. The Appeals Board heard oral argument on June 13, 1997.

APPEARANCES

Claimant appeared by her attorney, Alan D. Herman of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Kirby A. Vernon of Wichita, Kansas. There were no other appearances.

RECORD

The record considered by the Appeals Board is enumerated in the Award of the Administrative Law Judge. Claimant also seeks to have her October 11, 1993, discovery deposition testimony considered. Respondent objects. The Appeals Board finds that a deposition clearly designated as a discovery deposition cannot be included in the record absent a stipulation by the parties. Therefore, the October 11, 1993, discovery deposition was not a part of the record considered by the Board.

STIPULATIONS

The stipulations of the parties are listed in the Award and are adopted by the Appeals Board for this review.

ISSUES

The Administrative Law Judge awarded claimant permanent partial disability benefits for a 4 percent functional impairment. The Administrative Law Judge found that claimant had returned to work at a comparable wage and, therefore, applied the presumption of no work disability contained in K.S.A. 1992 Supp. 44-510e. The claimant requested the Appeals Board to review the denial of work disability arguing she is at a minimum entitled to a work disability award for the period of time after she was no longer employed by respondent up until the time she began earning a wage comparable to the stipulated average weekly wage. The nature and extent of claimant's disability is the sole issue now before this Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the Award entered by the Administrative Law Judge should be modified to award claimant permanent partial disability benefits based upon a work disability until she became reemployed at a comparable wage.

At the time of her injury, claimant was 25 years old and worked for the respondent as a certified nurses aide (CNA). Claimant's duties primarily involved the care, feeding, and attending to the personal needs of the elderly residents. On March 3, 1993, claimant injured herself at work while transferring a patient from a wheelchair to a bed. Claimant reported the accident to her supervisor and was referred to Dr. D. Papish and Dr. Wheeler. After being taken off work for a time, claimant returned to work at light duty with the restriction that she was not to lift in excess of 20 to 25 pounds and limit bending and twisting. She was eventually referred to orthopedic surgeon Dr. Robert L. Eyster for treatment of her shoulders and upper back. When Dr. Eyster saw claimant on July 20, 1993, he considered her capable of working with a restriction against lifting over 50 pounds.

She was taken off work again in August 1993 by Dr. Eyster and he released her to return to work on August 27, 1993, with restrictions of no repetitive lifting over 25 pounds and no single lifts over 50 pounds and no repetitive bending or twisting. However, claimant was not permitted to return to work with these restrictions. Respondent has not offered claimant employment since that date nor has respondent offered any vocational rehabilitation services. Claimant last saw Dr. Eyster on September 21, 1994, at

respondent's request, at which time Dr. Eyster determined claimant was no longer in need of any restrictions.

At her attorney's request, claimant was evaluated by Jane K. Drazek, M.D., on October 18, 1993, and again on November 30, 1994. Dr. Drazek found limited range of motion in claimant's back, areas of tenderness, and complaints of chronic and persistent upper back and medial scapular pain. As a result of her injuries, the doctor believes claimant has sustained a functional impairment of 5 percent to the body as a whole. Dr. Drazek believes claimant should observe the permanent work restrictions of no lifting more than 25 pounds on a repetitive basis or more than 35 pounds on an occasional basis and that claimant should avoid prolonged standing and bending. Sustained use of the upper extremities should also be avoided.

On June 5, 1996, claimant was examined and evaluated by a court ordered neutral physician, Philip R. Mills, M.D. Dr. Mills' diagnosis was chronic rhomboid strain. Dr. Mills believed claimant had a 3 percent functional impairment rating under the AMA standards and recommended restrictions including avoid prolonged or repetitive reaching at or above shoulder height.

The Appeals Board finds the presumption of no work disability contained in K.S.A. 1992 Supp. 44-510e is not applicable for that period commencing August 27, 1993, when claimant left work because of the physical restrictions she was given by her treating physician as a result of her accidental injury. During this time, claimant had several jobs but none paid her a wage comparable to that which she was earning with respondent. However, beginning March 4, 1996, the Appeals Board will apply the presumption of no work disability because claimant became employed full time at a job that paid her \$7.00 per hour and included fringe benefits such that she was earning a comparable wage.

Because she has sustained a "non-scheduled injury", claimant is entitled to permanent partial general disability benefits under the provisions of K.S.A. 1992 Supp. 44-510e. The statute provides in pertinent part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

As indicated by the Administrative Law Judge, claimant has sustained a functional impairment of 4 percent as a result of her work-related injuries. Based upon the testimony of labor market experts Jerry D. Hardin and Karen Crist Terrill, the Appeals Board finds claimant has lost approximately 28 percent of her ability to perform work in the open labor market and 38 percent of her ability to earn a comparable wage when one considers the medical restrictions of the doctors and claimant's actual post-injury wages. The Appeals Board formulated its opinion regarding loss of ability to earn a comparable wage based upon its belief that claimant, post-injury, retained the ability to earn approximately \$6.00 per hour. The Appeals Board concludes the claimant has lost 38 percent of her ability to earn a comparable wage comparing the \$6.00 per hour to the stipulated \$385.27 average weekly wage claimant was earning on the date of accident.

The Appeals Board is not required to weigh equally loss of access to the open labor market and loss of ability to earn a comparable wage. See Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 52-53, 816 P.2d 409, *rev. denied* 250 Kan. 806 (1991). But in this case there appears no compelling reason to give either factor a greater weight and accordingly they will be weighed equally. The result is an average of the 28 percent loss of ability to perform work in the open labor market and the 38 percent loss of ability to earn a comparable wage resulting in a 33 percent work disability which the Appeals Board considers to be an appropriate basis for the Award in this case for the period beginning August 27, 1993, when claimant was not able to return to work for respondent until March 4, 1996, when claimant began working at a job that paid her a wage comparable to what she was earning on her accident date. Thereafter, the award for permanent partial disability should be based upon the percentage of functional impairment.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish, dated January 8, 1997, 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, Dawn R. Sherman, and against the respondent, Ninnescan Manor, Inc., and its insurance carrier, Kansas Health Care Assn., for an accidental injury which occurred March 3, 1993, and based upon an average weekly wage of \$385.27 for 7 weeks of temporary total disability compensation at the rate of \$256.86 per week or \$1,798.02, followed by 18.14 weeks of permanent partial disability compensation for a 4% functional impairment at the rate of \$10.27 per week, or \$186.30; followed by 131.43 weeks for a 33% work disability at the rate of \$84.76 per week, or \$11,140.01; followed by 258.43 weeks for a 4% functional impairment at the rate of \$10.27 per week, or \$2,654.08, making a total award of \$15,778.41.

As of March 15, 1998, there is due and owing claimant 7 weeks of temporary total disability compensation at the rate of \$256.86, or \$1,798.02; 18.14 weeks of permanent partial disability compensation for a 4% functional impairment at the rate of \$10.27 per week, or \$186.30; 131.43 weeks of permanent partial disability compensation for a 33% work disability at the rate of \$84.76 per week, or \$11,140.01; 106 weeks for a 4% functional impairment at the rate of \$10.27 per week, or \$1,088.62, for a total of \$14,212.95, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$1,565.46 is to be paid for 152.43 weeks at the rate of \$10.27 per week, until fully paid or further order of the Director.

The Appeals Board hereby adopts the remaining orders of the Administrative Law Judge as set forth in the Award that are not inconsistent with the findings and the order specifically set forth herein.

IT IS SO ORDERED.

Dated this ____ day of March 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Alan D. Herman, Wichita, KS
Kirby A. Vernon, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director