

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

DANIEL L. WEIGEL
Claimant

VS.

BOB BROWN'S AUTO SERVICE CENTER
Respondent

AND

CINCINNATI INSURANCE COMPANY
Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 187,447

ORDER

Respondent appeals from an Award entered by Administrative Law Judge James R. Ward dated July 25, 1995. The Appeals Board heard oral argument December 5, 1995.

APPEARANCES

The claimant appeared by his attorney, Jeff K. Cooper of Topeka, Kansas. The respondent and insurance carrier appeared by their attorney, Anton C. Andersen of Kansas City, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Anthony D. Clum of Topeka, Kansas.

RECORD AND STIPULATIONS

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

ISSUES

Respondent's Application for Review lists the issues as follows:

- (1) Nature and extent of claimant's impairment;
- (2) Whether claimant had a pre-existing impairment prior to his work injury of August 2, 1993, and if so, how much impairment;
- (3) How much of claimant's present permanent partial impairment is due to a pre-existing impairment;
- (4) What is the Kansas Workers Compensation Fund liability; and
- (5) Whether claimant should be entitled to future medical treatment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

(1,2,3) Taking into consideration claimant's pre-existing impairment, the Appeals Board finds claimant is entitled to benefits in this claim for a six percent (6%) permanent partial general disability.

The injury at issue in this case occurred on August 3, 1995. On that date claimant injured his back while working to remove spark plugs from a vehicle. Claimant had suffered prior low back injuries in 1987 and again in 1991. In 1987 he injured both his low back and his pelvis from a slip and fall on ice. Although it took claimant approximately two (2) years to recover from the injury, he had no complaints he attributed to the 1987 injury. The injury in 1991 occurred while working for respondent, Bob Brown. Claimant twisted and felt something "pop" in his back when he was lifting an intake manifold. He was off work for approximately thirty (30) days and received chiropractic treatment from Dr. Penn.

Respondent asserts claimant had permanent impairment prior to the 1993 injury at issue in this case. The effect of pre-existing impairment was the subject of an amendment to K.S.A. 44-501 effective July 1, 1993. The amended statute provides in pertinent part as follows:

"Any 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 applying the quoted statute, respondent emphasizes the testimony of Dr. Sergio Delgado. Dr. Delgado conducted an independent medical examination at the direction of the Administrative Law Judge. Dr. Delgado concluded, based upon the history claimant gave, that claimant had a permanent impairment prior to the 1993 injury. According to Dr. Delgado, claimant now has a nineteen percent (19%) permanent partial general disability. Of this impairment, however, he attributes only three percent (3%) to the 1993 injury. Relying upon the testimony of Dr. Delgado, respondent argues the award in this case should be limited to three percent (3%) impairment.

Claimant, on the other hand, emphasizes the testimony of Dr. Prostic. Dr. Prostic rated claimant's impairment at fifteen percent (15%) to the body as a whole. Dr. Prostic testifies that he did not attribute any of the fifteen percent (15%) impairment to a pre-existing injury. Claimant contends Dr. Prostic's testimony is more credible because he had the opportunity to review x-rays taken both before and after the 1993 injury. As the Appeals Board reads Dr. Prostic's testimony he does not state claimant had no prior permanent impairment, only that his rating of fifteen percent (15%) is an assessment of the disability, attributable solely to the 1993 injury.

The Appeals Board reached its conclusion claimant is entitled to benefits for a six percent (6%) permanent partial impairment for several reasons. First, the Appeals Board considers Dr. Delgado's opinion to significantly overstate the pre-existing impairment. As noted, he did not have the benefit of x-rays. According to Dr. Prostic the x-rays taken after the 1993 injury show significant changes from the x-rays taken before the 1993 injury. Because Dr. Prostic has had the opportunity to review those x-rays, the Appeals Board finds his opinions more persuasive. However, Dr. Prostic testifies that of his rating, only six percent (6%) is pursuant to the AMA Guides. The other nine percent (9%) is based upon his own opinions and other factors. K.S.A. 44-510e requires that the functional impairment be based upon the AMA Guides, Third Edition Revised, if the impairment is contained therein. From our review of the testimony, it appears the impairment is contained within the guides and the six percent (6%) impairment rating should be utilized. We understand this to be a rating of only new impairment resulting from the 1993 injury.

(4) The Appeals Board finds that the evidence does not establish respondent had knowledge of a pre-existing impairment constituting a handicap. Respondent did, of course, know of claimant's 1991 injury and knew that he had been off for some period of time following that injury. However, when claimant returned, he returned to the same work he had done prior to the 1991 injury. Respondent also was aware of the 1987 injury. Mr. Brown, owner of respondent, testified that claimant had told him about the 1987 injury several months after he started working for respondent. Claimant told him it was uncomfortable, but it didn't affect his work. Mr. Brown also testified that after the 1991 injury he did complain of stiffness and soreness. Mr. Brown stated, however, that it is normal for mechanics to feel stiffness and soreness. However, he testified claimant complained more than the other two (2) people he was working with. He did not recall claimant being off at any time for appointments with a physician after the 1991 injury and testified that claimant is still performing the same tasks at work he had performed prior to the 1991 injury. The Appeals Board concludes the evidence does not establish respondent had knowledge of an impairment constituting a handicap. Accordingly, the request to impose liability on the Kansas Workers Compensation Fund is denied. K.S.A. 44-567.

(5) Although listed as an issue in the Application for Review, respondent did not brief or argue against the Award for future medical treatment. In fact, the Award only states that future medical should be awarded upon proper application. The Appeals Board finds this portion of the Award to be appropriate and affirms same.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge James R. Ward dated July 25, 1995, should be, and hereby is, modified.

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Daniel L. Weigel, and against the respondent, Bob Brown's Auto Service Center, and its insurance carrier, Cincinnati Insurance Company, for an accidental injury which occurred August 3, 1993 and based upon an average weekly wage of \$624.70, for a 6% permanent partial disability to the body as a whole, for 24.90 weeks at the rate of \$313.00 per week or \$7,793.70, all of which would be due and owing in one lump sum.

Further award is made that claimant may be entitled to future medical on application only.

Claimant's attorney is granted a lien for attorney's fees in accordance with K.S.A. 1993 Supp. 44-536.

Reporters' fees are assessed as costs against the respondent and insurance carrier to be paid direct as follows:

Metropolitan Court Reporters, Inc.	(amount unknown)
Appino & Biggs Reporting Service	\$184.80
Nora Lyon & Associates	\$198.55

IT IS SO ORDERED.

Dated this ____ day of December 1995.

BOARD MEMBER _____

BOARD MEMBER

BOARD MEMBER

- c: Jeff K. Cooper, Topeka, Kansas
Anton C. Andersen, Kansas City, Kansas
Anthony D. Clum, Topeka, Kansas
James R. Ward, Administrative Law Judge
Philip S. Harness, Director