BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RAY E. WESTON	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 184,160 & 190,277
FAIRBANKS MORSE PUMP CORP.	)	
Respondent	)	
AND	)	
	)	
TRANSAMERICA INSURANCE GROUP	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Respondent appeals from an Award entered by Administrative Law Judge Robert H. Foerschler on September 24, 1997. The Appeals Board heard oral argument March 17, 1998.

APPEARANCES

Claimant's counsel did not appear. Respondent and its insurance carrier appeared by attorneys Thomas R. Hill and Christopher T. Wilson of Overland Park, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, John B. Meyer of Kansas City, Kansas.

RECORD AND STIPULATIONS

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

ISSUES

In Docket No. 184,160 claimant was awarded compensation for a 15 percent impairment to the left leg. The Fund was not a party to this claim. In Docket No. 190,277, claimant was awarded compensation for a 70 percent permanent partial general body disability. Fifty percent of this award was assessed against the Fund. On appeal respondent contends 100 percent of the second award should be assessed against the Fund. The Fund agrees with the award. Claimant has dismissed his appeal and there are no issues concerning compensability or the amount of either award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds that 50 percent of the award in Docket No. 190,277 should be assessed against the Kansas Workers Compensation Fund.

FINDINGS OF FACT

1. Claimant injured his left knee on February 11, 1992, as he let himself down from the handle of a barrel jack during a boiler test. This injury was the subject of Docket No. 184,160. The award for 15 percent permanent partial disability to the left leg is not appealed.

2. For the injury on February 11, 1992, claimant received treatment, including arthroscopic surgery for a torn medial meniscus by Peter C. Boylan, M.D. The surgery was done on March 25, 1992, and claimant returned to light duty April 20, 1992, and then to his normal job.

3. Claimant continued to have problems with his left knee after the surgery by Dr. Boylan. Dr. Boylan saw claimant for soreness and swelling on May 13, 1992, on October 7, 1992, for tightness behind the knee, and on February 3, 1993, for complaints of pain in the knee.

4. Respondent knew about the February 11, 1992, left knee injury and the continuing problems claimant had as a result.

5. Claimant injured his left knee a second time on March 12, 1993. The second injury occurred while working on his knees cupping or uncupping a line after a pump went out.

6. Claimant saw Dr. Boylan two times after the March 12, 1993, injury before being referred to other physicians. Dr. Boylan opined that the second injury would not have occurred but for the initial injury of February 11, 1992.

7. After the second injury, claimant asked for another physician and was sent to Dr. Rice. Instead, claimant was treated by Dr. Murphy from Dr. Rice's office. Dr. Murphy first saw claimant April 1, 1993, and performed a second surgery, an arthroscopic

meniscectomy, on April 28, 1993. Dr. Murphy felt that claimant's second injury was not entirely caused by the first injury. Dr. Murphy concluded that it was not a but for situation. When Dr. Murphy scoped the knee, he found what he described as two problems (in addition to degenerative changes which Dr. Murphy thought predated either injury): (1) a new tear which he believed was non-existent at the time Dr. Boylan did surgery; and (2) a cartilage defect with unstable cartilage in the medial femoral condyle which Dr. Murphy thought might be related to the lesion described by Dr. Boylan. This second lesion Dr. Murphy thought was likely the result of the first injury exacerbated by the second. Dr. Murphy, who rated claimant's impairment as 31 percent of the knee or 13 percent of the body as a whole, opined that 50 percent of the second injury was related directly to the preexisting injury and 50 percent to the subsequent trouble.

8. Claimant ultimately underwent a complete left knee replacement by Dr. Hood in March 1995. Claimant attempted to return to work but eventually retired.

9. The ALJ appointed Edward J. Prostic, M.D., to examine and evaluate claimant's injuries. Dr. Prostic saw claimant April 26, 1996, and again on August 13, 1996. By the time of the August 13, 1996 exam, claimant had developed problems in his back and Dr. Prostic rated claimant's impairment as 30-31 percent of the whole body. Dr. Prostic reviewed Dr. Boylan's report and agreed with the conclusion that the second injury probably or most likely would not have occurred but for the first.

10. Based on the medical testimony and testimony from vocational experts, the ALJ awarded benefits for a 70 percent work disability.

CONCLUSIONS OF LAW

1. Under the law applicable at the time of claimant's accident, the Kansas Workers Compensation Act shifted liability for injuries to handicapped employees under certain circumstances. If the employer knowingly employs or retains a handicapped employee and the employee later suffers an injury which is caused or contributed to by the handicap, the Kansas Workers Compensation Fund is liable for all or a part of the benefits.

If the second accident would not have occurred but for the first, the Fund is liable for 100 percent of the benefits paid for the second injury. If the second accident would have occurred regardless of the first injury but the first injury contributes to the resulting disability, the Fund is responsible for the amount attributable to the preexisting disability. K.S.A. 1992 Supp. 44-567.

2. After his injury of February 11, 1992, claimant was a handicapped employee and respondent retained claimant with knowledge of claimant's preexisting impairment.

3. Claimant's second injury, the one on March 12, 1993, would have occurred regardless of the preexisting impairment but the preexisting impairment contributed 50 percent of the resulting disability.

The Board so finds based on its reading of Dr. Murphy's testimony and based on the conclusion Dr. Murphy was in a better position, because he performed the second surgery, to give an opinion about the relationship between the first and second injuries.

4. The Kansas Workers Compensation Fund is liable for 50 percent of the benefits paid or to be paid under Docket No. 190,277 for the injury of March 12, 1993.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler, dated September 24, 1997, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of March 1998.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Mark E. Kolich, Kansas City, KS
Thomas R. Hill, Overland Park, KS
Christopher T. Wilson, Overland Park, KS
John B. Meyer, Kansas City, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director