BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT CRAWFORD	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 157,443; 195,627
	)	& 195,628
WOLF CREEK NUCLEAR OPERATING CORP.	)	
Respondent,	)	
Self-Insured	)	
AND	)	
	)	
WORKERS COMPENSATION FUND	)	

ORDER

Respondent appealed the February 18, 2003 Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on August 5, 2003.

APPEARANCES

John J. Bryan of Topeka, Kansas, appeared for claimant. John D. Jurcyk of Roeland Park, Kansas, appeared for respondent. Robert L. Kennedy of Kansas City, Kansas, appeared for the Workers Compensation Fund.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

Judge Avery decided three claims in the February 18, 2003 Award. In Docket No. 157,443, the Judge awarded claimant permanent partial general disability benefits for an eight percent whole body functional impairment for a February 28, 1991 accident. In Docket No. 195,627, the Judge awarded claimant permanent partial general disability benefits for a six percent whole body functional impairment for an October 20, 1992 accident. And finally, in Docket No. 195,628, the Judge awarded claimant permanent

partial general disability benefits for a four percent whole body functional impairment for a March 14, 1994 accident.

The Judge did not make a finding as to what parts of claimant's body were injured. But in the first claim, claimant's Application for Hearing that he filed with the Division of Workers Compensation alleged a left shoulder injury. And in the other two claims, claimant's applications alleged injuries to both the neck and left shoulder. But claimant testified in these claims that on February 28, 1991, he primarily injured his left shoulder, on October 20, 1992, he primarily injured his neck and on March 14, 1994, he aggravated and injured both his left shoulder and neck.

Respondent contends Judge Avery erred and exceeded his authority when, after the parties' terminal dates had expired, he wrote Dr. Peter V. Bieri (who was the doctor whom the Judge had earlier selected to perform an independent medical evaluation) on November 19, 2002, requesting additional information about claimant's functional impairment ratings. Respondent also argues that neither Dr. Bieri nor Dr. Edward J. Prostic, who also evaluated claimant, had sufficient information from which to formulate accurate opinions regarding claimant's functional impairment.

Next, respondent argues that claimant's alleged dishonesty required Dr. Bieri's deposition to clarify certain issues. Respondent also argues that claimant did not miss the requisite time from work following his first two injuries to qualify for permanent disability benefits in those claims. And finally, respondent argues that it was denied due process when the Judge extended the parties' terminal dates for presenting evidence and when claimant waited for more than 10 years to bring these claims to regular hearing.

Consequently, respondent requests the Board to deny claimant's request for benefits as (1) he failed to prosecute these claims in a reasonably timely manner, (2) he did not miss enough work in the first two claims to receive permanent disability benefits as was required by K.S.A. 1990 Supp. 44-501(c) and the *Boucher*[1] decision, and (3) he failed to prove the extent of his functional impairment in any of the three claims. And finally, respondent requests the Board to assess the costs of Dr. Bieri's October 29, 2002 deposition against claimant and to exclude from the record Dr. Bieri's November 26, 2002 supplemental report.

Conversely, claimant contends the Award should be affirmed. Claimant argues that if the Judge erred by extending terminal dates to obtain additional information from Dr.

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[1] *Boucher v. Peerless Products, Inc.*, 21 Kan. App. 2d 977, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996).

Bieri, the error was harmless as the Judge based his findings of claimant's permanent functional impairment upon Dr. Prostic's opinions. Claimant also argues that respondent was not denied due process in these claims as respondent had time to take Dr. Bieri's deposition when the Judge extended the parties' terminal dates to December 20, 2002. Claimant also argues that during the pendency of these claims respondent was neither prevented from investigating these claims nor taking depositions to preserve evidence and, therefore, respondent's argument that it was denied due process due to the length of time that these claims were pending before the Judge is without merit.

Claimant argues that both Dr. Bieri and Dr. Prostic had sufficient evidence to formulate their opinions regarding claimant's injuries and impairment. Finally, claimant argues that he satisfied the requirements of K.S.A. 1990 Supp. 44-501(c) and the *Boucher* decision. According to claimant, he missed approximately 18 half-days from work for physical therapy, plus another two or three days to see a Wichita doctor, following the February 1991 accident. Moreover, according to claimant, respondent changed his work duties following that accident. And following the October 1992 accident, claimant contends he missed from 10 to 15 days due to headaches that arose from that accident.

Finally, claimant argues that he did not sustain any permanent injury to his neck or left shoulder when he fell on March 4, 1991, while feeding his horses. Claimant also argues that he did not injure himself lifting a piece of wood on March 1, 1991, as that event never occurred.

The issues before the Board on this appeal are:

1. Did claimant miss the requisite time from work following the February 28, 1991, and October 20, 1992 accidents to receive permanent disability benefits?

2. Did the Judge err by writing Dr. Bieri for additional information and extending the parties' terminal dates to permit the parties to submit additional evidence into the record?

3. What is the nature and extent of claimant's injuries and disability?

4. Should the costs of Dr. Bieri's deposition be assessed against claimant?

5. Were respondent's due process rights violated in these claims?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes that the February 18, 2003 Award should be affirmed.

The Board finds that on February 28, 1991, claimant injured his left shoulder while lifting a meter above his head. On October 20, 1992, claimant primarily injured his neck while taking pneumatic hoses apart. Finally, on March 14, 1994, claimant reinjured both his neck and left shoulder as he was starting down a ladder. All three accidents arose out of and in the course of claimant's employment as an electrician in respondent's nuclear power plant.

1. Did claimant miss the requisite time from work following the February 28, 1991, and October 20, 1992 accidents to receive permanent disability benefits?

At the time of claimant's 1991 and 1992 accidents, the Workers Compensation Act provided that only those workers who had sustained injuries that had prevented them from earning full wages for at least one week were entitled to receive permanent disability benefits. The Act read, in part:

> Except for liability for medical compensation, as provided for in K.S.A. 44-510 and amendments thereto, the employer shall not be liable under the workers compensation act in respect of any injury which does not disable the employee for a period of at least one week from earning full wages at the work at which the employee is employed.[2]

Claimant testified that following the February 1991 accident he missed approximately 18 half-days from work for therapy, missed two or three days from work to see a doctor in Wichita and, in addition, was placed on light duty for approximately four weeks with his arm in a sling after a doctor manipulated his left shoulder.

Regarding the October 20, 1992 accident, claimant testified that he missed from 10 to 15 days of work as a result of the headaches that he experienced following the resulting neck injury.

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[2] K.S.A. 1990 Supp. 44-501(c).

The Board finds claimant's testimony credible and, therefore, affirms the Judge's finding that claimant missed the requisite period from work in order to qualify to receive permanent disability benefits under the Act.

2. Did the Judge err by writing Dr. Bieri for additional information or by extending the parties' terminal dates to permit the parties to submit additional evidence into the record?

The Judge appointed Dr. Peter V. Bieri to evaluate claimant and provide his opinions for purposes of these claims. The doctor saw claimant in August 2002 and provided his report to the Judge. On October 29, 2002, the parties took Dr. Bieri's deposition. On November 19, 2002, after the parties' terminal dates had initially expired, the Judge wrote Dr. Bieri for additional information. The Judge then entered an order extending the parties' terminal dates, which, in effect, allowed them to submit whatever additional evidence they felt necessary by Dr. Bieri's response. Dr. Bieri responded to the Judge's request in a November 26, 2002 letter.

Respondent contends that the Judge erred by extending the terminal dates or reopening the record after the case had been submitted for decision. The Board disagrees.

This issue has been before this Board on at least two prior occasions. The Board has held that a judge has the authority to reopen a claim to take additional evidence upon his or her own motion. Furthermore, the Board has held that reopening a claim does not deny the parties due process as long as the judge sets new terminal dates for the parties to allow them an opportunity to introduce whatever additional evidence that may be desired due to the change of events.

The Kansas Supreme Court has held that the general public is an interested party in a workers compensation proceeding and that public policy requires careful scrutiny of workers compensation settlements.[3] The same public policy rationale equally applies to litigated proceedings under the Workers Compensation Act. Accordingly, judges upon their own initiative can determine that good cause exists to reopen the record to receive additional evidence. Parties may seek reopening of the record for good cause under K.S.A. 2002 Supp. 44-523(b)(3). Public policy dictates that judges have the same ability.

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[3] *Cramer v. Railways Co.*, 112 Kan. 298, 211 Pac. 118 (1922); *Miles v. Wyatt*, 138 Kan. 863, 865, 28 P.2d 748 (1934).

Moreover, the Workers Compensation Act specifically empowers judges to "conduct an investigation, inquiry or hearing on all matters"[4] before them.

In the claim of *Hicks*,[5] the Board held:

> It has long been the law in workers compensation that the administrative law judge is not bound by the technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, insure the employee and the employer an expeditious hearing and act reasonably without partiality. Bahr v. Iowa Beef Processors, Inc., 8 Kan. App. 2d 627, 663 P.2d 1144, *rev. denied* 233 Kan. 1091 (1983); K.S.A. 1999 Supp. 44-523. In fact, any procedure which is appropriate and not prohibited by the Workers Compensation Act may be employed by the administrative law judge. Bushey v. Plastic Fabricating Co., 213 Kan. 121, 515 P.2d 735 (1973).
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> A fact situation similar to this was presented to the Board in Sapata v. Southwestern Bell Telephone Company, WCAB Docket No. 133,971 (Jan. 1997). In Sapata, the assistant director selected Peter V. Bieri, M.D., to evaluate claimant for the purposes of a review and modification proceeding. This request was made approximately nine months after the record was closed and the parties had submitted their case for decision. Before either party had the opportunity to respond to Dr. Bieri's findings, the assistant director issued an award, in part, utilizing Dr. Bieri's opinion. In that instance, the Board found that the assistant director, in effect, reopened the record upon his own initiative to receive additional evidence without extending the parties' terminal dates or otherwise giving the parties and *[sic]* opportunity to respond to the new evidence.
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> K.S.A. 44-516 allows the director, in the director's own discretion, to refer claimant for an independent medical examination. The Board found in Sapata that this procedure was appropriate. However, the Board went on to hold that once the record is reopened, K.S.A. 44-523 dictates that the parties shall be given a reasonable opportunity to respond to the new evidence.
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> . . . The Appeals Board finds that, while the Administrative Law Judge had the right to reopen the record, the Administrative Law Judge should have given the parties the opportunity to respond to and, if necessary, rebut the evidence.

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[4] K.S.A. 2002 Supp. 44-551(b)(1).

[5] *Hicks v. Labor Ready*, No. 228,851, 2000 WL 1134435 (Kan. WCAB July 31, 2000).

> The reliance by the Administrative Law Judge on ex parte investigations or examinations violates their due process by not giving the parties an opportunity to respond.
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> > The basic right to confront, cross-examine, and refute must be respected. . . . Under the increasingly common practice of referral of the claimant to an official medical examiner or an independent physician chosen by the Commission, it is particularly important that commissions not lose sight of the elementary requirement that the parties be given an opportunity to see such doctor's report, cross-examine the doctor, and if necessary provide rebuttal testimony. 7 Larson's Workers' Compensation Law, § 127.05[4] (2000).
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> The Appeals Board is mindful of the Kansas Supreme Court decisions in both Baker v. St. Louis Smelting & Refining Co., 145 Kan. 273, 65 P.2d 284 (1937), and Burns v. Topeka Fence Erectors, 174 Kan. 136, 254 P.2d 285 (1953). However, in both Baker and Burns, the parties were given the opportunity to cross-examine the independent medical examination doctor prior [to] the issuance of the decision by the then Workers Compensation Commissioner, thus protecting their due process rights. In this instance, the opportunity to cross-examine the independent medical examination doctor was never afforded the parties prior to the issuance of the decision.
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> The Appeals Board finds that the Administrative Law Judge's decision to reopen the record was proper and well within her jurisdiction. However, her consideration of the report without providing the parties an opportunity to cross-examine and refute the evidence was a denial of due process. . . .

Accordingly, respondent's request to exclude from the record Dr. Bieri's November 26, 2002 letter is denied.

3. What is the nature and extent of claimant's injuries and disability?

The Board affirms the Judge's findings that claimant sustained an eight percent permanent partial general disability for the February 28, 1991 accident, a six percent permanent partial general disability for the October 20, 1992 accident, and a four percent permanent partial general disability for the March 14, 1994 accident.

The Board is persuaded by Dr. Edward J. Prostic's opinions of claimant's functional impairment. According to Dr. Prostic, who saw claimant in February 1995 and again in March 2002, claimant sustained an eight percent whole body functional impairment due to the left shoulder injury from the February 1991 accident, a six percent whole body

functional impairment due to the neck and left shoulder injury from the October 1992 accident, and a four percent whole body functional impairment from the neck and left shoulder injury from the March 1994 accident. In evaluating claimant's functional impairment, Dr. Prostic utilized the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (3d ed. rev.).

The Board is aware that there is one physical therapy note that indicates that claimant's symptoms started when claimant lifted a piece of wood. The Board is also aware that claimant fell on March 4, 1991, while he was going to feed his horses. But the Board is not persuaded that the former event occurred or that claimant's fall caused any type of injury to the left shoulder other than causing a temporary flare-up of pain. Claimant's testimony is credible that the fall only caused a temporary increase of pain and discomfort.

4. Should the costs of Dr. Bieri's deposition be assessed against claimant?

The Board denies respondent's request to assess the costs of Dr. Bieri's deposition against claimant. The Board rejects respondent's argument that claimant was dishonest and, therefore, respondent was required to take the doctor's deposition.

5. Were respondent's due process rights violated in these claims?

As indicated above, the Board noted that the Judge did not violate respondent's right to due process by reopening the claim for additional evidence as the Judge also extended the parties' terminal dates to allow them the opportunity to present whatever additional evidence they considered necessary in light of Dr. Bieri's response to the Judge's November 2002 inquiries. The Board notes respondent's due process arguments so that they might be preserved for purposes of appeal. Nonetheless, the Board notes that claimant provided respondent with both timely notice and timely written claim, which gave respondent the opportunity to investigate and monitor these claims.

The Board finds no reason to modify the Judge's findings and conclusions and adopts them as its own to the extent they are consistent with the above.

AWARD

WHEREFORE, the Board affirms the February 18, 2003 Award entered by Judge Avery.

IT IS SO ORDERED.

Dated this ____ day of August 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
John D. Jurcyk, Attorney for Respondent
Robert L. Kennedy, Attorney for Fund
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director