

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

JUDITH TOMLIN)	
Claimant)	
VS.)	
DILLONS BAKERY)	Docket No. 195,891
Respondent)	
Self-Insured)	
AND)	
WORKERS COMPENSATION FUND)	

ORDER

On March 13, 1996, the applications of both claimant and respondent for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Bruce E. Moore on November 22, 1995 came regularly on for oral argument.

APPEARANCES

Claimant appeared by and through her attorney Robert R. Lee of Wichita, Kansas. The respondent, a qualified self-insured, appeared by and through its attorney Scott J. Mann of Hutchinson, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney David G. Shriver of McPherson, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

- (1) Claimant requests review of the nature and extent of claimant's injury and/or disability.
- (2) The respondent requests review of the liability, if any, of the Kansas Workers Compensation Fund.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein and, in addition, the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

The Award of the Administrative Law Judge sets forth findings of fact and conclusions of law deemed appropriate by the Appeals Board. A reiteration of same herein is unnecessary and the Appeals Board adopts the findings and conclusions of the Administrative Law Judge which are not contradictory to this decision as if fully set forth herein. The Appeals Board finds the Award of the Administrative Law Judge granting claimant an 8 percent general body disability is appropriate and the Appeals Board affirms same. The Appeals Board further adopts and affirms the decision by the Administrative Law Judge that 5 percent of claimant's disability preexisted the June 10, 1994 accident, leaving only 3 percent compensable due and owing from the June 10, 1994 date of accident. See K.S.A. 44-501(c).

With regard to the liability of the Kansas Workers Compensation Fund the Award of the Administrative Law Judge appropriately sets out the applicable law dealing with Fund liability. The Appeals Board, however, does not agree with the result reached by the Administrative Law Judge and reverses same. Respondent filed a Form 88 on September 20, 1991 stating as follows: "Lumbosacral Strain, Lumbar Region, Myositis / Myofasc____(sic), Stiffness of joint." Respondent filed a second Form 88 on December 13, 1991 noting that claimant had "[S]trained lower back, Spinal adjustment." Both Dr. Schlachter and Dr. Eyster found claimant had preexisting degenerative arthritis and degenerative disc disease at the time of the June 10, 1994 accident. Dr. Schlachter felt that, given the appropriate history of the 1991 problems, claimant had a 1 to 2 percent impairment which would be attributable to the preexisting condition. He went on to state that claimant would not have suffered the nature and extent of her current impairment "but for" the preexisting condition. Dr. Eyster, after reviewing the MRI and x-rays, confirmed claimant had preexisting degenerative disc disease in the low back at the L5-S1, S3-S4 levels. He felt the degeneration was mild and went on to state that he did not believe that claimant's impairment had changed because of the work injury, finding this to be a temporary aggravation of her preexisting condition. He did state that but for the preexisting degenerative disc disease, the aggravation of June 10, 1994 would not have occurred.

It is respondent's burden to prove that respondent had knowledge of a preexisting impairment at the time it employed a handicapped employee or retained a handicapped employee in its employment. K.S.A. 44-567(b); Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

The Appeals Board is persuaded that respondent has met its burden of proof in showing that it retained a handicapped employee within the definition of K.S.A. 44-566(b). The Appeals Board further finds that respondent had knowledge of this handicap sufficient to satisfy the requirements of K.S.A. 44-567(b) and further finds respondent Dillons Bakery retained a handicapped employee after acquiring such knowledge. The medical testimony supports a finding that but for claimant's preexisting condition, the injury of June 10, 1994 would not have occurred. As such, the entire liability for the June 10, 1994 injury is the responsibility of the Kansas Workers Compensation Fund, with the Fund being responsible for reimbursing respondent for any and all costs and expenses associated with this case.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bruce E. Moore dated November 22, 1995, is modified in that the claimant, Judith Tomlin, is awarded compensation against the respondent, Dillons Bakery, a qualified self-insured, and the Kansas Workers Compensation Fund for an injury occurring on June 10, 1994, for a 3% permanent partial general body disability. Claimant is entitled to 18.14 weeks temporary total compensation at the rate of \$313.00, totaling \$5,677.82, followed by 12.36 weeks permanent partial general body disability at the rate of \$313.00 per week totaling \$3,868.68 for a total award of \$9,546.50 all of which is due and owing in one lump sum minus amounts previously paid.

The Kansas Workers Compensation Fund is ordered to reimburse respondent for 100% of the costs and expenses associated with this award.

Claimant is further entitled to medical expenses, unauthorized medical and future medical per the award of the Administrative Law Judge.

The claimant's attorney fee contract is approved insofar as it is not in contravention to K.S.A. 44-536.

Fees necessary to defray the expenses of the administration of the Kansas Workers Compensation Act are hereby assessed against the Kansas Workers Compensation Fund as follows:

Don K. Smith & Associates Deposition of Dr. Ernest R. Schlachter Dated March 28, 1995	\$184.75
Owens, Brake, Cowan & Associates Regular Hearing Transcript Dated June 7, 1995	\$212.43
Kelley, York & Associates, Ltd. Deposition of Dr. Robert Eyster Dated July 31, 1995.	\$261.20

IT IS SO ORDERED.

Dated this ____ day of March 1996.

 BOARD MEMBER

 BOARD MEMBER

BOARD MEMBER

- c: Robert R. Lee, Wichita, Kansas
Scott J. Mann, Hutchinson, KS
David G. Shriver, McPherson, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director