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

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| **MARK E. HANSEN**<br>Claimant | ) | |
| VS. | ) | |
| **MEIER'S READY MIX, INC.**<br>Respondent | ) | Docket Nos. 204,466 & 204,467 |
| AND | ) | |
| **KS. BLDG. INDUSTRY WCF**<br>Insurance Carrier | ) | |

## ORDER

Claimant appealed Administrative Law Judge Julie A.N. Sample's Award dated August 9, 2001. The Board heard oral argument on March 12, 2002.

### APPEARANCES

Claimant appeared by his attorney, Michael Kelley. Respondent and its insurance carrier appeared by their attorney, Matthew S. Crowley.

### RECORD AND STIPULATIONS

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

### ISSUES

**Docket No. 204,466**

This docketed claim involves injuries to claimant's cervical spine that occurred on June 12, 1995, when claimant was in a line of trucks waiting to be loaded with cement and the truck directly in front of his unexpectedly backed into the claimant's truck. Claimant's head hit the back of the cab of his truck. The Administrative Law Judge awarded a 5 percent permanent partial functional impairment for the neck based upon the record after noting the doctors' opinions were compromised. On appeal, respondent alleges the

Administrative Law Judge erred because there was no competent medical evidence to establish permanent impairment from the June 12, 1995, accident. The nature and extent of claimant's disability is the sole issue for review in this docketed claim. Conversely, claimant contends the Administrative Law Judge's Award should be affirmed.

**Docket No. 204,467**

This docketed claim involves alleged injuries to claimant's low back that occurred on June 21, 1995, when he was underneath his truck assisting a mechanic in removing the drive shaft. When the drive shaft came loose claimant testified he injured his low back. The Administrative Law Judge found claimant suffered no injury as a result of this accident. On appeal, claimant seeks review of the Administrative Law Judge's findings concerning the nature and extent of the injuries sustained on June 21, 1995, specifically, the Administrative Law Judge's determination that claimant did not suffer injury from this accident. Claimant argues he is permanently totally disabled or in the alternative entitled to a substantial work disability. Conversely, respondent argues claimant failed to give timely notice. Accordingly, respondent contends the claim should be denied. Respondent further argues claimant is precluded from recovery pursuant to Boucher v. Peerless Products, Inc., 21 Kan. App.2d 977, 911 P.2d 198 rev. denied, 260 Kan. 991 (1996). Lastly, respondent argues the evidence fails to show claimant suffered any permanent disability.

## FINDINGS OF FACT

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

**Docket No. 204,466**

The Board finds the Administrative Law Judge's Award contains a detailed analysis of the evidence and therefore need not be repeated herein.

The sole issue on review from Docket No. 204,466 is the nature and extent of disability. The Administrative Law Judge concluded claimant suffered a 5 percent functional impairment as a result of his upper back and cervical complaints from the June 12, 1995, injury.

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.[1] "'Burden of proof' means the burden of a party to persuade the trier of

[1]K.S.A. 44-501(a); see also Chandler v. Central Oil Corp., 253 Kan. 50, 853 P.2d 649 (1993) and Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[2] The Act is to be liberally construed to bring employers and employees within the provisions of the Act but those provisions are to be applied impartially to both.[3]

Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the AMA Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[4] In workers compensation cases, the law in effect at the time of the injury governs the rights and obligations of the parties.[5] For injuries occurring before April 4, 1996, the Third Edition (Revised) of the AMA Guides is the version to be utilized. For injuries occurring on or after April 4, 1996, the Fourth Edition of the AMA Guides will be utilized. As claimant's injury occurred on June 12, 1995, the appropriate version in effect would be the Third Edition (Revised) of the AMA Guides.

Sharon McKinney, D.O., opined claimant suffered a 5 percent impairment as a result of his cervical injury. However, this opinion was based upon the AMA Guides, Fourth Edition. As previously noted for a date of injury of June 12, 1995, the appropriate version for a physician to utilize was the Third Edition (Revised). Because Dr. McKinney utilized only the AMA Guides, Fourth Edition, the Board finds that her opinion does not comply with K.S.A. 44-510e.

Sergio Delgado, M.D., who treated claimant, opined claimant suffered a 5 percent impairment to the low back but concluded such impairment was not related to either of claimant's incidents in June 1995. When Dr. Delgado began treating claimant he conducted an extensive examination of claimant's cervical spine both for cervical changes and radiculopathy in the upper extremities. In the absence of clinical findings and a normal MRI the doctor concluded no additional treatment was indicated. Moreover, Dr. Delgado testified claimant did not continue to make complaints regarding his cervical area. The Board concludes the findings of the treating physician, Dr. Delgado, are more persuasive and concludes claimant has failed to meet his burden of proof to establish he suffered a permanent impairment as a result of the June 12, 1995, accident.

Accordingly, the Administrative Law Judge's finding in Docket No. 204,466 is modified to reflect claimant did not suffer any permanent functional impairment.

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[2]K.S.A. 44-508(g). See also *In re* Estate of Robinson, 236 Kan. 431, 690 P.2d 1383 (1984).

[3]K.S.A. 44-501(g).

[4]K.S.A. 44-510e.

[5]Osborn v. Electric Corp. of Kansas City, 23 Kan. App.2d 868, 936 P.2d 297 (1997).

**Docket No. 204,467**

As to Docket No. 204,467 the Board agrees with and adopts as its own the findings and conclusions stated in the Award by the Administrative Law Judge. The Board specifically notes Drs. Delgado and Sosinski did not relate claimant's low back condition to any incident in June 1995. As noted by the Administrative Law Judge, Dr. McKinney's opinion is compromised by the fact she did not have a complete and accurate history of claimant's prior low back complaints and treatment. Lastly, the claimant's videotaped activities do not match Dr. McKinney's findings regarding claimant's physical capability. Accordingly, the Board adopts and affirms the Administrative Law Judge's findings and conclusions that claimant did not suffer a work-related injury to his back on June 21, 1995.

## AWARD

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Julie A.N. Sample dated August 9, 2001, is modified in Docket No. 204,466 to reflect claimant suffered a temporary injury and did not suffer any permanent impairment. The Board affirms the Award entered by Judge Sample in Docket No. 204,467.

The Board adopts the remaining orders as set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this _____ day of April 2002.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael Kelley, Attorney for Claimant
Matthew S. Crowley, Attorney for Respondent
Julie A.N. Sample, Administrative Law Judge
Philip S. Harness, Workers Compensation Director