

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

<b>JOHNNY L. DAVIS</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 205,740
<b>PLAZA INN/MICKEY'S LANDING</b>	)	
Respondent	)	
AND	)	
	)	
<b>UNITED STATES FIDELITY &amp; GUARANTY CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appeals from an Award entered by Administrative Law Judge Bryce D. Benedict on December 23, 1998. The Appeals Board heard oral argument on September 16, 1999.

**APPEARANCES**

Roger D. Fincher of Topeka, Kansas, appeared on behalf of claimant. Kristine A. Purvis of Overland Park, Kansas, appeared on behalf of respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

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

**ISSUES**

1. Did claimant's injury arise out of and in the course of his employment?
2. What is the nature and extent of claimant's injury?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments, the Appeals Board concludes the Award should be affirmed.

Claimant, who worked for respondent as a dishwasher, testified that he injured his back on September 25, 1995, while taking out trash. According to claimant, he told the cook, Tim Holly, that same evening, and Mr. Holly suggested he go see a doctor. Claimant had injured his back in 1994 while working for Southwest Publishing.

Based on the evidence presented at the preliminary hearing held in this case on January 10, 1996, the Board found claimant had failed to prove that he suffered accidental injury arising out of and in the course of his employment. Mr. Holly contradicted claimant's testimony. He testified that he was not aware of any back injury and that it would not be normal for claimant to take out trash on that date. The manager, Mr. Kyle Cloutier, testified claimant had asked for money to purchase medication for problems resulting from his prior back injury but that claimant had not reported a back injury from his work with respondent until September 29, 1995. At that time, claimant asked for a raise and from what claimant said, Mr. Cloutier believed claimant was suggesting that he would not pursue a claim if he received the raise.

Claimant has not presented evidence since the preliminary hearing which would cause the Board to change its original conclusion. Claimant did testify at the regular hearing and reiterated some of his testimony at the preliminary hearing. He also denied saying that he would not pursue the claim if he received additional pay. Claimant also presented the testimony of Dr. Mark A. Thomas. Dr. Thomas rated claimant's impairment as 7 percent impairment to the body as a whole. He recommended restrictions and gave his opinion about claimant's loss of ability to perform tasks. But Dr. Thomas' testimony is not convincing proof of a new injury. While Dr. Thomas does refer to an injury suffered while working as a dishwasher, he indicates the injury occurred in 1994, when claimant was injured at Southwest Publishing, rather than 1995. And the rating of 7 percent by Dr. Thomas was lower than the 15 percent impairment rating claimant had in 1994. Even if these ratings are not comparable because not based on the same criteria, this fact makes Dr. Thomas' testimony little, if any, support for finding a new injury.

Claimant argues the ALJ has focused on the fact there is no new functional impairment but ignored the restrictions and task loss opinion. But the Board's finding is that claimant has not proven he suffered an injury arising out of and in the course of his employment for respondent. We do not rely solely on the fact there is no evidence of any new functional impairment. That is only one factor. The other factors are those relied on for the ruling on the preliminary hearing. The fact that subsequent evidence failed to prove an increase in functional impairment since the 1994 accident, if not by itself proof of no disability, certainly does not persuade the Board to change its earlier ruling.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bryce D. Benedict on December 23, 1998, should be, and the same is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October 1999.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Roger D. Fincher, Topeka, KS  
Kristine A. Purvis, Overland Park, KS  
Bryce D. Benedict, Administrative Law Judge  
Philip S. Harness, Director