

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

<b>PATRICIA A. FENWICK</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 206,618
<b>STERLING PRESBYTERIAN MANOR</b>	)	
Respondent	)	
AND	)	
	)	
<b>INSURANCE MANAGEMENT ASSOCIATES, INC.</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant requested review of the Award dated September 11, 1996, entered by Administrative Law Judge Bruce E. Moore. The Appeals Board heard oral argument on March 4, 1997.

**APPEARANCES**

Jan L. Fisher of Topeka, Kansas, appeared for the claimant. Gregory D. Ballew of Wichita, Kansas, appeared for the respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. The Appeals Board did not consider those exhibits presented by the respondent attached to its brief which were not otherwise included in the evidentiary record before the Administrative Law Judge. Also, at oral argument the parties agreed that claimant's average weekly wage on the date of accident was \$307.42.

**ISSUES**

The Administrative Law Judge awarded claimant permanent partial general disability benefits based upon a 7 percent whole body functional impairment rating less 3.5 percent for preexisting impairment. Claimant requested the Appeals Board to review the issues of (1) nature and extent of disability and (2) whether the award should be reduced for preexisting functional impairment. Those are the only issues before the Appeals Board on this review.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Appeals Board finds as follows:

The Award entered by the Administrative Law Judge should be modified.

(1) Because the parties have agreed claimant's average weekly wage on the date of accident in May 1995 was \$307.42, the principal issues to be resolved are claimant's post-injury average weekly wage and the effect of claimant's leaving work for coronary bypass surgery which was unrelated to this claim. Although the facts are relatively simple, the issues surrounding claimant's post-injury average weekly wage are not.

Claimant injured her back while working for the respondent on May 4 and May 5, 1995. After a period of conservative treatment, claimant returned to work for respondent in an accommodated position as a dietary aide on approximately September 5, 1995. Claimant then worked until January 15, 1996, when she took a leave of absence to have coronary bypass surgery.

For the period claimant worked for the respondent between September 5, 1995, and January 15, 1996, claimant contends she is entitled to receive permanent partial general disability benefits for a work disability because she contends she earned less than 90 percent of the average weekly wage she was earning on the date of accident. For the period after January 14, 1996, when claimant left work for treatment of her heart condition, claimant contends her work disability increased because the difference in pre- and post-injury wages increased to 100 percent.

Conversely, respondent contends claimant's permanent partial general disability benefits are limited to the stipulated 7 percent whole body functional impairment rating because it returned claimant to work after she recovered from her back injury in an accommodated position which paid at least 90 percent of her pre-injury average weekly wage. Respondent relies upon the language contained in K.S.A. 44-510e.

After examining claimant's earnings statements representing the 26-week period before the date of accident, the Administrative Law Judge found claimant's average weekly wage was \$307.42, comprised of \$270 (40 hours X \$6.75 per hour) per week base wage and \$37.42 per week overtime. Both claimant and respondent in their briefs and at oral argument agreed to that finding. However, the Administrative Law Judge found claimant's

post-injury average weekly wage was \$277.15 which was comprised of \$263.27 (38.21 hours X \$6.89 per hour) per week base wage and weekly overtime and holiday pay of \$13.88.

The parties agree claimant's hourly rate on the date of accident was \$6.75 and she was regularly scheduled to work five days per week, eight hours per day. The parties also agree claimant's post-injury hourly wage rate was raised from \$6.75 to \$6.89 in November 1995. Claimant continued to earn \$6.89 per hour through her last day of work in January 1996.

Claimant contends the Administrative Law Judge erred in computing the post-injury wage because claimant's average work week as a dietary aide consisted of 37.33 hours. The parties agree that the dietary aide position required claimant to work four days and two days off which created a six-week cycle in which claimant worked five days per week for four weeks and four days per week for the remaining two weeks. Therefore, claimant worked a total of 224 hours in every six-week cycle or an average of 37.33 hours per week. Claimant contends her weekly base wage is \$257.20 (37.33 hours X \$6.89 per hour). She also contends her average weekly post-injury overtime is \$6.95 which she computes by dividing the \$132.13 shown as overtime on claimant's post-injury earning statements by the 19 weeks they represent. Based upon those numbers, claimant contends her post-injury average weekly wage for the period through January 14, 1996, was \$264.15 for a 14 percent wage loss.

Claimant also argues that another way to compare pre- and post-injury wages is to compare the actual average weekly wage claimant received during the 26-week period before the accident with the actual average weekly wage claimant received during the 19-week period claimant worked after the accident. Claimant contends she received an average of \$309.39 per week before the accident (\$8,044.15 total wages for the 26-week period preceding the date of accident ÷ 26 weeks) and \$274.22 per week after the accident (\$5,210.26 total wages for the 19-week period claimant worked after the accident ÷ 19 weeks) for an 11 percent wage loss. Both of claimant's proposed post-injury average weekly wages are less than 90 percent of the average weekly wage on the date of accident ( $\$307.42 \times 90\% = \$276.68$ ).

On the other hand, respondent contends claimant's post-injury average weekly wage is greater than 90 percent of her average weekly wage on the date of accident whether one compares actual wages paid or whether one attempts to apply the wage formula of K.S.A. 44-511(b)(4). Respondent contends claimant's regular and customary post-injury work week consisted of 40 hours per week despite the two weeks of the six-week cycle when claimant was only scheduled to work 32 hours. Therefore, respondent contends claimant's post-injury base wage was \$275.60 (40 hours X \$6.89 per hour) per week. In the alternative, respondent contends claimant worked 701.47 regular hours in the 18-week period claimant worked between September 11, 1995, and January 15, 1996, or an average of 38.97 hours per week. Thus, respondent argues claimant's customary and average work week should be considered to be comprised of 38.97 hours which yields a weekly base rate of \$268.50 (38.97 hours X \$6.89 per hour). Respondent also contends claimant's post-

injury average weekly overtime is \$14.54 which is computed by dividing \$261.79 by 18 weeks. The \$261.79 represents the overtime amount specified on claimant's earning records plus holiday pay which exceeds the weekly base pay rate. Adding \$268.50 for base pay with \$14.54 for overtime yields an average weekly wage of \$283.04.

Respondent also contends that comparing claimant's actual post-injury average wages for the 18-week period claimant worked between September 11, 1995, and January 15, 1996, is also greater than 90 percent of claimant's pre-injury average weekly wage. Between that period claimant earned a total of \$5,046.36 which yields a weekly average of \$280.35. Although claimant returned to work on approximately September 5, 1995, and worked several days for a total of 24.18 hours, respondent contends that week should not be counted or utilized in obtaining an average wage figure because it did not comprise a full week. All of respondent's proposed post-injury average weekly wages are more than 90 percent of the pre-injury average weekly wage.

Both parties are aware claimant's post-injury average weekly wage may be skewed by the method of computation. As respondent notes, counting claimant's first week back to work in September 1995 as a full week despite her working only 24.18 hours could tend to lower the average weekly wage computation. Claimant, on the other hand, notes that averaging the total number of hours which claimant worked from the time she returned to work for the respondent in September 1995 until such time as she left work for coronary bypass surgery could tend to skew the average weekly wage computation higher. The Appeals Board also notes that claimant's post-injury pay may also be somewhat skewed because of the pay claimant received for working on Thanksgiving and Christmas holidays when she returned to work.

Under the unique circumstances presented in this case, the Appeals Board finds that claimant's post-injury average weekly wage should be determined by computing the base wages claimant should have received by working the average number of hours she was regularly expected to work as a dietary aide considering the 6-week work cycle and adding that base wage to the additional compensation claimant received over and above the base wage for overtime and holiday pay. As the record indicates, claimant was expected and scheduled to work an average of 37.33 hours per work by reason of her 6-week work cycle. Therefore, the Appeals Board finds claimant's weekly post-injury base wage was \$257.20 (37.33 hours X \$6.89 per hour), and any amounts claimant received over and above that sum should be considered overtime as contemplated by K.S.A. 44-511(b)(4).

As indicated by the earnings statements which were stipulated into evidence, claimant received the following amounts for the following periods:

<u>Period</u>	<u>Amount Paid</u>	<u>Amount Paid In Excess of Base Rate</u>
To 09/10/95	\$163.90	\$ 0.00
09/11/95 to 09/24/95	\$503.85	\$ 0.00

09/25/95 to 10/08/95	\$559.54	\$ 45.14
10/09/95 to 10/22/95	\$488.06	\$ 0.00
10/23/95 to 11/05/95	\$620.70	\$106.30
11/06/95 to 11/19/95	\$540.00	\$ 25.60
11/20/95 to 12/03/95	\$566.95	\$ 52.55
12/04/95 to 12/17/95	\$546.92	\$ 32.52
12/18/95 to 12/31/95	\$641.92	\$127.52
01/01/96 to 01/14/96	\$578.42	<u>\$ 64.02</u>
TOTAL		\$453.65

Based upon the above amounts, the Appeals Board finds claimant was paid a total of \$453.65 over and above the average weekly base wage of \$257.20 (or average biweekly base wage of \$514.40) for an average weekly overtime rate of \$23.88 for the 19-week period represented. Adding the \$257.20 weekly base rate and the \$23.88 weekly overtime rate yields a post-injury average weekly wage of \$281.08 for the period claimant returned to work for the respondent between September 5, 1995, and January 15, 1996. This represents 91 percent of claimant's pre-injury average weekly wage.

Because hers is an "unscheduled" injury, K.S.A. 44-510e governs the computation of claimant's permanent partial general disability benefits. That statute provides in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee **is engaging** in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury." (Emphasis added.)

As K.S.A. 44-510e indicates, claimant is prevented from receiving permanent partial general disability benefits in excess of the stipulated 7 percent whole body functional impairment rating for that period she is working and earning at least 90 percent of the pre-injury average weekly wage. The Appeals Board finds that claimant returned to work for the respondent on September 5, 1995, and earned 90 percent of her pre-injury average weekly wage until January 15, 1996, when she left work for coronary bypass surgery. Therefore, for the period September 5, 1995, through January 14, 1996, claimant is entitled to receive permanent partial general disability benefits based upon the 7 percent whole body functional impairment rating.

For the period commencing January 15, 1996, when claimant was off work for nonwork-related heart problems, the Appeals Board likewise finds claimant is entitled to permanent partial disability benefits based upon the functional impairment rating. The Appeals Board disagrees with claimant's contention that she should be entitled to a work disability while off work for the coronary bypass surgery. The literal language of K.S.A. 44-510e may suggest the conclusion claimant urges. As claimant points out, she is not, during that period, earning a wage of 90 percent of her preinjury wage. The difference between her pre-injury wage and her post-injury wage is 100 percent. However, this reading of K.S.A. 44-510e, contradicts the general intent of the Workers Compensation Act. The Workers Compensation Act provides benefits to assist with the loss caused by a work-related injury. Before work disability is appropriate the work-related injury must have a negative impact on claimant's ability to work and earn wages. When, after the work injury, a claimant suffers a separate nonwork-accident or illness which, by itself, renders claimant unable to work, the work-related injury cannot be said to have any impact on claimant's ability to work or earn wages. The intervening and superseding event should not trigger work disability benefits.

(2) Respondent contends claimant's award should be reduced by the extent of functional impairment which preexisted the date of accident. Under the facts presented, the Appeals Board disagrees.

K.S.A. 44-501(c) provides in part:

"The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting."

Before 1993, when a preexisting condition was aggravated by a work-related accident the worker was entitled to receive permanent partial disability benefits for both the preexisting impairment and the permanent aggravation. However, the 1993 Legislature added the above-quoted language to K.S.A. 44-501(c) to prevent multiple recovery for the same permanent impairment. Before the statute is applicable, however, the respondent must prove claimant had a preexisting functional impairment which it has failed to do.

Although before May 1995 claimant may have had either a congenital abnormality or a degenerative condition developing in her spine, the condition did not constitute an impairment. Before May 1995, claimant was unaware she had any impairment related to her back. Claimant's back was asymptomatic and claimant was working without medical restrictions or limitations. Although she had previously injured her back many years before, her injuries had resolved. There is no evidence claimant received a functional impairment rating before May 1995 or had been advised that she had a permanent impairment or restrictions. In addition, the doctors' testimony indicated claimant's asymptomatic back condition would not support an impairment rating under the guidelines published by the American Medical Association. When considering the entire record, the Appeals Board

finds the evidence does not establish that claimant had a preexisting functional impairment, and, therefore, K.S.A. 44-501(c) is not applicable.

(3) The Appeals Board hereby adopts the findings and conclusions set forth by the Administrative Law Judge in the Award to the extent they are not inconsistent with the above.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award dated September 11, 1996, entered by Administrative Law Judge Bruce E. Moore should be, and hereby is, modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Patricia A. Fenwick, and against the respondent, Sterling Presbyterian Manor, and its insurance carrier, Insurance Management Associates, Inc., for an accidental injury which occurred on or about May 4 and May 5, 1995, and based upon an average weekly wage of \$307.42, for 17.71 weeks of temporary total disability compensation at the rate of \$204.96 per week, or \$3,629.84, and 28.86 weeks of permanent partial disability compensation at the rate of \$204.96 per week or \$5,915.15, for a 7% whole body functional impairment rating, making a total award of \$9,544.99, which is all due and owing less any amounts previously paid.

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

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April 1997.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

- c: Jan L. Fisher, Topeka, KS
- Gregory D. Ballew, Wichita, KS
- Bruce E. Moore, Administrative Law Judge
- Philip S. Harness, Director