

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

GARRETT QUINT)	
Claimant)	
VS.)	
)	Docket No. 208,451
VANDEE STUCCO)	
Respondent)	
AND)	
)	
AMERICAN FAMILY MUTUAL INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appealed the October 3, 2000 Award entered by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on April 4, 2001.

APPEARANCES

Michael L. Hodges of Lenexa, Kansas, appeared for claimant. Joseph R. Ebbert of Kansas City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

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

ISSUES

This is a claim for a June 25, 1993 accident and injuries to the right hip and back. In the October 3, 2000 Award, Judge Foerschler denied claimant's request for permanent partial general disability benefits, finding that claimant presented insufficient medical

evidence to prove that claimant's present impairment was caused by the 1993 accident at work. But the Judge did grant claimant certain medical benefits.

Claimant contends Judge Foerschler erred. Claimant argues that he has a 51 percent work disability (a permanent partial general disability greater than the functional impairment rating).

Conversely, respondent and its insurance carrier argue that the Award should be affirmed. They argue that all of claimant's permanent functional impairment was caused by an April 14, 1994 bicycle accident in which claimant was thrown over a car. In the alternative, they argue that any award of permanent partial general disability benefits should be limited to approximately three percent as claimant failed to prove that he lost any ability to perform work in the open labor market or that he lost any ability to earn a comparable wage.

The only issues before the Board on this appeal are:

1. Did claimant sustain any permanent injury or permanent impairment from the June 25, 1993 accident?
2. If so, what is the nature and extent of claimant's injuries and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After considering the entire record, the Board finds and concludes:

1. For the reasons below, the Award should be modified to grant claimant a three percent permanent partial general disability.
2. Claimant injured his right hip and back on June 25, 1993, when he fell approximately ten feet and landed on his right hip on a concrete footing. The accident arose out of and in the course of employment with respondent.
3. The Board finds that claimant now has a ten to 12 percent whole body functional impairment due to his back and right hip injuries. That finding is based upon the opinions expressed by Dr. C. Erik Nye, who evaluated claimant in October 1997 in the role of a neutral physician selected by the Judge, and by Dr. Edward J. Prostic. Dr. Nye determined that claimant had a ten percent whole body functional impairment rating. Dr. Prostic estimated that claimant had a 12 or 13 percent whole body functional impairment when he evaluated claimant in January 1998 in connection with claims being made for the April 1994 bicycle accident.

The Board is mindful that Dr. Keith D. Sheffer testified that he saw claimant on two occasions – once in August 1993 and once in November 1993 – and believed that claimant would make a complete recovery and would suffer no permanent impairment as a result of the June 1993 fall. But claimant's symptoms did not resolve as Dr. Sheffer speculated. Therefore, the Board gives little weight to the functional impairment opinion provided by Dr. Sheffer.

4. The Board finds that claimant had ongoing back symptoms following the June 1993 accident despite undergoing the medical treatment prescribed by Dr. Sheffer. Claimant's testimony of ongoing symptoms is consistent with the medical records introduced in this claim. First, hospital records dated April 14, 1994, and compiled immediately after the bicycle accident, indicate that claimant provided the emergency room with a history that he was recovering from a workers compensation injury in which he had fallen from a scaffold and severely injured his back several months earlier. Second, an April 21, 1994 medical note from Southland Family Medicine Center also indicates that claimant was having back pain before the bicycle accident that he associated with an earlier workers compensation injury. Third, claimant's chiropractic notes from January 25, 1995, state that claimant was seeking treatment for severe pain that began after he fell in June 1993 from a scaffold, landing on his right hip. Fourth, when claimant saw Dr. Prostic in January 1998 to be evaluated for claims being made for the April 1994 bicycle accident, claimant told Dr. Prostic that he had experienced ongoing pain in the low back and right hip with tingling in the right leg since the June 1993 fall.

5. The Board finds that claimant sustained an approximate three percent whole body permanent functional impairment as a result of the June 1993 accident. That finding is based upon Dr. Prostic's opinion that approximately one-fourth to one-third of claimant's ultimate functional impairment that he possessed following both the June 1993 work-related accident and the April 1994 bicycle accident was attributable to the former.

6. The formula for determining claimant's permanent partial general disability for a June 1993 accident is set forth in K.S.A. 1992 Supp. 44-510e, which provides:

. . . The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. Functional impairment means 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. There shall be a presumption that the employee has no work

disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury. . . .

The claimant has failed to present evidence on the loss of ability to perform work in the open labor market and the loss of ability to earn a comparable wage. The only evidence that claimant presented concerning the economic consequences of the back and right hip injuries was his own testimony that he was earning less money after moving to Colorado and starting his own business, along with his own testimony that he had lost the ability to perform approximately 20 to 25 percent of the work tasks of a plasterer. Although that evidence would be relevant to prove the permanent partial general disability for accidents occurring on and after July 1, 1993, that evidence does not address the permanent partial general disability formula for accidents that occurred before that date.

7. Considering and weighing the entire evidentiary record, the Board concludes that claimant is entitled to receive a three percent permanent partial general disability for the injuries that he sustained while working for respondent on June 25, 1993.

AWARD

WHEREFORE, the Board modifies the October 3, 2000 Award and grants claimant a three percent permanent partial general disability.

Garrett Quint is granted compensation from VanDee Stucco and its insurance carrier for a June 25, 1993 accident and resulting disability. Based upon an average weekly wage of \$620, Mr. Quint is entitled to receive 415 weeks of permanent partial disability benefits at \$12.40 per week, or \$5,146, for a three percent permanent partial general disability, making a total award of \$5,146.

As of April 20, 2001, there is due and owing to the claimant 408 weeks of permanent partial general disability compensation at \$12.40 per week, or \$5,059.20, for a total due and owing of \$5,059.20, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$86.80 shall be paid at \$12.40 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of April 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Michael L. Hodges, Lenexa, KS
Joseph R. Ebbert, Kansas City, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director