

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

<b>SALVADOR ROBLES</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 242,197
<b>NATIONAL BEEF PACKING COMPANY, L.P.</b>	)	
Respondent	)	
AND	)	
	)	
<b>WAUSAU INSURANCE COMPANIES</b>	)	
Insurance Carrier	)	

**ORDER**

Both claimant and respondent appealed the June 19, 2001 Decision entered by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on November 20, 2001.

**APPEARANCES**

Stanley R. Ausemus of Emporia, Kansas, appeared for claimant. D. Shane Bangerter of Dodge 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 Decision. Additionally, the parties stipulated at oral argument to the Board that the June 1, 2000 letter from Dr. Charles McElhinney to Judge Fuller was also part of the evidentiary record.

**ISSUES**

This is a claim for a February 4, 1999 accident, which aggravated the degenerative disk disease in claimant's low back and which also caused a hernia. Judge Fuller awarded claimant a 10 percent permanent partial general disability for the low back injury but awarded claimant only medical benefits for the hernia. The Judge did not reduce the award by the preexisting functional impairment caused by the degenerative disk disease.

Claimant contends Judge Fuller erred. Claimant argues that the hernia is inoperable and, therefore, he is entitled to receive 12 weeks of temporary total disability benefits under the “scheduled” injury statute, K.S.A. 1998 Supp. 44-510d(a)(22). But claimant also argues that he has a 10 percent whole body functional impairment due to his back injury and, therefore, the 10 percent permanent partial general disability for the back injury should be awarded under the “nonscheduled” injury statute, K.S.A. 1998 Supp. 44-510e. Finally, claimant argues that the degenerative disk disease in his back did not comprise a preexisting functional impairment as he was asymptomatic before the February 4, 1999 accident and, therefore, the Judge was correct by not reducing the award for preexisting impairment. Accordingly, claimant requests the Board to increase the award by 12 weeks of temporary total disability compensation.

Conversely, respondent and its insurance carrier contend the medical evidence is uncontradicted that claimant before the accident had a five percent whole body functional impairment due to the degenerative disk disease in his low back. Therefore, respondent and its insurance carrier contend the Judge erred by failing to reduce the award by that amount.

The issues before the Board on this review are:

1. What is the nature and extent of claimant’s injuries and disability?
2. Did claimant have any functional impairment due to his degenerative disk disease before the February 1999 accident?

#### **FINDINGS OF FACT**

After reviewing the entire record, the Board finds:

1. On February 4, 1999, claimant slipped and fell at work. The accident arose out of and in the course of employment with respondent.
2. As a result of the accident, claimant permanently aggravated the degenerative disk disease in his low back and sustained an inguinal hernia.
3. Claimant’s attorney hired Dr. Pedro Murati to evaluate claimant for purposes of this claim and rate him according to the American Medical Association’s *Guides to the Evaluation of Permanent Impairment* (AMA Guides). The doctor saw claimant twice, the last visit being in October 2000, and rated claimant as having a 10 percent whole body functional impairment for the low back injury. The doctor rated the hernia as constituting a nine percent whole body functional impairment, but noted that the hernia was not at maximum medical improvement.

At his deposition, Dr. Murati was not asked whether claimant had a functional impairment before the February 1999 accident due to the degenerative disk disease in claimant's low back. The doctor was also not asked whether claimant's hernia was operable or inoperable.

4. The Judge appointed Dr. Terrence Pratt to evaluate claimant. Dr. Pratt's testimony is uncontradicted that before the February 1999 accident claimant had a five percent whole body functional impairment due to the degenerative disk disease in his low back. According to the doctor, before the accident claimant's degenerative disk disease was significant enough to limit and restrict the range of motion in claimant's spine. Dr. Pratt also testified that claimant's hernia was not inoperable, but rather it was small and did not require surgery when the doctor evaluated claimant in November 2000.

Dr. Pratt also rated claimant according to the *AMA Guides* and found that claimant had a 10 percent whole body functional impairment due to the low back and a two percent whole body functional impairment due to the hernia. Subtracting the preexisting five percent functional impairment, the doctor testified that claimant sustained a seven percent whole body functional impairment as a direct result of the February 4, 1999 accident.

5. As indicated above, the parties stipulated that Dr. Charles McElhinney's June 1, 2000 letter is part of the evidentiary record. Dr. McElhinney, who examined claimant on June 1, 2000, wrote Judge Fuller that claimant had a relatively asymptomatic left inguinal hernia that should be repaired at some point in time but such repair would not relieve the pain and numbness that claimant was experiencing down his leg. The doctor wrote, in part:

Mr. Robles states today that all of his symptoms are on the left lateral aspect of his hip over the greater trochanter and down the left side of his leg. I do believe that he does have a small left inguinal hernia, but I doubt seriously that repair of this will relieve his symptoms of pain and numbness down his leg. It is true that the hernia most likely should be repaired at some date, because it could very well enlarge or become symptomatic or incarcerate or strangulate, but I wanted to make it clear that I don't think a repair at this time would relieve all of his symptoms.

6. Considering the various medical opinions, the Board finds and concludes that claimant has sustained an additional seven percent whole body functional impairment as a direct result of the February 4, 1999 accident as opined by Dr. Pratt. The Board also finds that before the February 1999 accident, claimant had a five percent whole body functional impairment due to his degenerative disk disease.

7. At the time of the April 2001 regular hearing, claimant was continuing to work for respondent. At this time, claimant is not requesting a work disability (a permanent partial general disability greater than the functional impairment rating).

CONCLUSIONS OF LAW

1. The Decision should be modified to award claimant benefits for a seven percent whole body functional impairment, which resulted from both the low back injury and the hernia.

2. The Board also finds and concludes that claimant is entitled to receive one award of disability benefits under K.S.A. 1998 Supp. 44-510e rather than two separate awards for a “nonscheduled” injury to the low back and for a “scheduled” injury for the hernia. The Board concludes that the back injury renders this a “nonscheduled” injury and, accordingly, claimant is entitled to receive permanent partial general disability benefits resulting from the combined effects of the back injury and hernia.<sup>1</sup>

Claimant’s permanent partial general disability is determined by the formula set forth in K.S.A. 1998 Supp. 44-510e, which 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.)

Because claimant is continuing to work for respondent at a wage comparable to that which he was earning on the date of accident, claimant’s permanent partial general disability is limited to the seven percent functional impairment rating, which, according to Dr. Pratt, is the whole body functional impairment rating after deducting the preexisting five percent functional impairment.

3. The Board agrees with respondent and its insurance carrier that claimant’s award should be reduced by the claimant’s preexisting five percent functional impairment rating due to the degenerative disk disease in his low back. Dr. Pratt’s opinion that claimant’s

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<sup>1</sup> See *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972), in which the Court held that an arm and a shoulder injury, which was then a nonscheduled injury, should be treated as a general body disability.

range of motion was probably limited by that preexisting condition is persuasive. Moreover, the doctor's expert medical opinion that claimant's degenerative disk disease constituted a preexisting functional impairment is uncontradicted by any other medical opinion in the record. Accordingly, respondent and its insurance carrier have proven that claimant's preexisting degenerative disk condition actually constituted an impairment, requiring the award to be reduced under the provisions of K.S.A. 1998 Supp. 44-501(c).

4. The Board adopts the findings and conclusions set forth in the Decision that are not inconsistent with the above.

**AWARD**

**WHEREFORE**, the Board modifies the June 19, 2001 Decision and awards claimant a seven percent permanent partial general disability.

Salvador Robles is granted compensation from National Beef Packing Company, L.P., and its insurance carrier for a February 4, 1999 accident and resulting disability. Based upon an average weekly wage of \$446.59, Mr. Robles is entitled to receive 29.05 weeks of permanent partial disability benefits at \$297.74 per week, or \$8,649.35, for a seven percent permanent partial general disability and a total award of \$8,649.35, which is all due and owing less any amounts previously paid.

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

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December 2001.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

- c: Stanley R. Ausemus, Attorney for Claimant
- D. Shane Bangerter, Attorney for Respondent and its Insurance Carrier
- Pamela J. Fuller, Administrative Law Judge
- Philip S. Harness, Workers Compensation Director