BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RUTH OLIVER Claimant	)	
VS.	)	
AUTOMOTIVE CONTROLS CORP. Respondent	)	Docket No. 251,648
AND	)	
HARTFORD ACCIDENT & INDEMNITY Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the November 10, 2004 Award by Special Administrative Law Judge Marvin Appling. The Board heard oral argument on May 25, 2005.

APPEARANCES

Joseph Seiwert of Wichita, Kansas, appeared for the claimant. Garry Lassman of Pittsburg, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

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

ISSUES

The Special Administrative Law Judge (SALJ) found claimant to have a 25 percent whole person functional impairment as a result of her August 13, 1999 accident. The SALJ further determined claimant's average gross weekly wage was $428 based upon the pretrial stipulations.

The respondent requests review of the nature and extent of claimant's disability. Respondent argues claimant has failed to meet her burden of proof to establish that she suffered permanent psychological or physiological impairment. In the alternative, respondent argues claimant's psychological impairment should be limited to a 10 percent

rating and further argues claimant suffered no permanent physiological impairment as a result of her injury and subsequent neck surgeries.

Claimant argues that she met her burden of proof to establish that she suffered not only a permanent psychological impairment but also a permanent physiological impairment as a result of her work-related accident. Claimant further argues the Board should combine her 11 percent functional impairment for her neck with her 25 percent functional impairment for her psychological condition and award her a 33 percent whole person functional impairment.

Claimant further requests the Board remand the issue of average weekly wage back to the ALJ to "either allow claimant to take evidence on this issue, or to require respondent to provide the wage statement they were ordered to provide."[1]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

On August 13, 1999, claimant was working for respondent as a press operator, when a small piece of metal flew into claimant's neck. As a result of the injury, claimant received emergency treatment and was transferred to another hospital where surgery was performed to repair a laceration to her right carotid artery. The small piece of metal was not removed. On December 7, 1999, claimant returned to the hospital for additional surgery described as a scar revision.

Claimant was released to return to work and at that time the metal fragment was still lodged in her neck. Claimant had anxiety when she returned as it was difficult for her to be around the machines, but she continued to work until June 2000. She described episodes where she would leave her work area and go to the bathroom and cry until she calmed down enough to return to her work station. Claimant also described anxiety attacks working around machines and that she had nightmares and flashbacks regarding the incident at work. Finally, she decided that she couldn't handle the pressure working around machines and she took early retirement. Her decision was also based upon the fact that her daughter had transferred to Tennessee and claimant decided to move with her in order to babysit her grandchildren.

[1] Claimant's Brief at 6 (filed Jan. 18, 2005).

Claimant continued to have checkups with Dr. Thomas Holzen, to determine whether the metal fragment remained stationary. In early 2002, claimant requested a consultation with a vascular surgeon regarding the metal fragment and claimant further requested a psychiatric evaluation. Ultimately, she was referred to Dr. Marc A. Passman, a board certified vascular surgeon, who treated claimant from January 8, 2003, to March 19, 2003, and on March 3, 2003, successfully removed the metal fragment from claimant's neck.

Dr. Passman did not believe that claimant had any permanent impairment of function or disability once he removed the metal and felt that she should have full mobility of her neck. On claimant's last visit, March 19, 2003, Dr. Passman felt that claimant was about 90 percent recovered and that no impairment rating was necessary as a result of her surgery. He had no opinion about whether claimant had any impairment before her surgery.

During this approximate period of time claimant's personal physician prescribed medications for claimant's anxiety and she began receiving counseling from a licensed clinical social worker.

At her attorney's request, claimant was examined on October 20, 2003, by Dr. Robert E. Schulman, a licensed clinical psychologist. Dr. Schulman diagnosed claimant with post-traumatic stress disorder (PTSD). The doctor noted claimant exhibited most, if not all, the criteria for such diagnosis. The doctor listed as significant criteria the fact that claimant was exposed to what she perceived as a life threatening event; she has flash backs and painful memories of the event; she becomes fearful and avoids situations which remind her of the incident; she attempts to not think about the incident; she has problems concentrating and sleeping; and she is hyper-vigilant around noises.

Dr. Schulman recommended claimant continue her counseling and medication regimen. He opined claimant had moderate impairment of daily activities, and a reduced capacity for physical activity. She continues to experience pain and has difficulty doing activity away from home, and has become socially isolated and does not interact with other individuals easily. She has a moderate impairment in social functioning. Her concentration appears to be mildly impaired. Her capacity to adapt to new vocational situations and new settings generally is moderately impaired. She has made an effort to return to vocational activity. Dr. Schulman opined claimant has a 25 percent impairment in regard to personal and vocational functioning, and that claimant could not function in an industrial setting similar to what she used to function in, even on a part time basis.[2]

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[2] Schulman Depo., Ex. 2 at 4.

Claimant was referred by respondent to Dr. Dale A. Halfaker, a licensed psychologist, for a psychological evaluation. Dr. Halfaker indicated in his report that claimant believes she has post-traumatic stress syndrome, and complained of depression, anxiety, being fearful of people and new places or noises, of pain in her neck, and driving.[3] Dr. Halfaker opined claimant has a 10 percent permanent partial impairment as a result of her PTSD. He recommended continuation of medication and counseling.

Claimant saw Dr. Pedro A. Murati on July 9, 2003, complaining of neck pain. After an examination, Dr. Murati diagnosed neck pain secondary to trauma of the carotid artery and status post multiple surgeries, and dysesthesia of claimant's neck scar. He opined this was a result of claimant's work injury on August 13, 1999. He recommended that claimant work as tolerated based on an 8-hour day. He then assigned a 6 percent whole person impairment for loss of range of motion at the level of the cervical spine, a 5 percent whole person impairment for dysesthesia of the right anterior neck scar. All based on the fourth edition of the AMA *Guides*[4] and combined for a 11 percent whole person impairment.

In workers compensation litigation, it is the claimant's burden to prove entitlement to benefits by a preponderance of the credible evidence.[5]

> 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 and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[6]

Disabilities resulting from psychological injuries are compensable under the Workers Compensation Act when the condition is directly traceable to the compensable physical injury.[7]

Respondent argues claimant did not suffer psychological impairment as a result of the accident at work because she continued working for several months before she retired and moved with her daughter to Tennessee. The Board disagrees.

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[3] Halfaker Depo., Ex. 2 at 2.

[4] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[5] K.S.A. 1999 Supp. 44-501 and K.S.A. 1999 Supp. 44-508(g).

[6] K.S.A. 1999 Supp. 44-510e(a).

[7] *Rund v. Cessna Aircraft Co.*, 213 Kan. 812, 518 P.2d 518 (1974).

The evidence is overwhelming that claimant has PTSD and that this condition is directly traceable to the accident on August 13, 1999. Claimant testified that while she continued working she experienced episodes of anxiety that finally reached the point that she could no longer continue working around machines. She described an incident where she attempted to return to work around machines after she relocated to Tennessee but was only able to work two days. Both Drs. Schulman and Halfaker diagnosed claimant with PTSD. The claimant has met her burden of proof that as a result of her work-related accident she suffers from a psychological impairment.

Dr. Schulman opined claimant suffered a 25 percent psychological impairment and Dr. Halfaker opined claimant suffered a 10 percent psychological impairment. The Board, in considering both opinions, finds neither to be sufficiently persuasive to outweigh the other. Therefore, the Board will average the two ratings, and find claimant is entitled to an 18 percent psychological impairment.

In addition, Dr. Murati opined claimant suffered an 11 percent functional whole person impairment as a result of her physical injuries. Dr. Passman opined that as a result of his surgery he did not expect the claimant to suffer any permanent impairment. But he agreed that claimant did suffer from some loss of sensation around her old operative site. And he did not express an opinion whether claimant had an impairment before the surgery he performed. The claimant continues to complain of loss of range of motion in her neck as well as loss of sensation and occasional pain. In this instance, the Board concludes that Dr. Murati's opinion regarding claimant's physical impairment is persuasive and essentially uncontradicted. The Board finds claimant suffers an 11 percent permanent partial functional impairment.

The Board finds claimant has a 18 percent impairment to the body as a whole for the psychological trauma resulting from the August 13, 1999 injury, which, when combined with the 11 percent whole person impairment for the physical injuries, results in a 27 percent whole person functional impairment.[8]

At the regular hearing on December 8, 2003, the ALJ recited the stipulations and noted that at the prehearing settlement conference he had written down $428 for the average gross weekly wage but had not designated whether the parties had stipulated to that figure. The following colloquy then occurred:

> MR. SEIWERT: Well, I don't think I have a wage statement. Why don't we show that as still an issue, but I'll let Mr. Lassman get a wage statement and benefits statement together. Can you still do that at this point with the company?

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[8] Using the combined values chart of the AMA *Guides*, an 18 percent impairment and an 11 percent impairment combine for a 27 percent impairment.

MR. LASSMAN: Yeah, I think so.

MR. SEIWERT: Okay.

THE COURT: All right.

MR. LASSMAN: Let's see, that was - - yes I think so.[9]

No further testimony was elicited regarding claimant's average weekly wage. In her submission letter filed January 29, 2004, the claimant again noted that upon receipt of wage information from respondent it was anticipated that a stipulation regarding the average gross weekly wage would be filed.

As the litigation continued and depositions were taken the terminal dates for the submission of evidence were extended through May 17, 2004. The case was later assigned to a SALJ for decision and the Award was entered on November 10, 2004. The SALJ determined claimant's average gross weekly wage was $428 as alleged at the prehearing settlement conference.[10]

Claimant requests the matter be remanded so that additional evidence can be taken on the issue of average gross weekly wage.

At the regular hearing, the claimant was apprised of the fact that the only evidence in the record regarding the average gross weekly wage was the figure of $428 taken from the prehearing settlement conference discussions. Claimant specifically noted that the average gross weekly wage was still an issue. In her submission letter claimant notes she was still awaiting wage information that respondent had been ordered to provide. However, this incorrectly states respondent had been ordered to provide the information. Nonetheless, K.A.R 51-3-8(c) provides in pertinent part:

> The respondent shall be prepared to admit any and all facts that the respondent cannot justifiably deny and to have payrolls available in proper form to answer any questions that might arise as to the average weekly wage.

The regulation requires that if the respondent is not prepared to stipulate to the average gross weekly wage it is incumbent that respondent come forward at the regular hearing with payroll records.

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[9] R.H. Trans., at 4-5.

[10] It should also be noted that temporary total disability compensation was paid based upon an average gross weekly wage of $428 and underpayment of temporary total disability compensation was not an issue at regular hearing.

As previously noted, the respondent's counsel had indicated that he thought he could obtain the wage information. Although claimant relied upon that assertion, nonetheless, at both regular hearing and when submitting her case the claimant was aware that the only evidence regarding the average gross weekly wage was the hearsay evidence taken from the prehearing settlement conference.

Claimant could have requested extension of time to take depositions and obtain additional evidence regarding the average gross weekly wage. There was sufficient time as demonstrated by other agreed extensions of the terminal dates after her submission letter was filed. The claimant was certainly present at the regular hearing and could have testified regarding her average gross weekly wage if she disputed the alleged amount referred to at the regular hearing. Claimant noted the amount of her average gross weekly wage was in issue and cannot now complain when the issue is resolved by the only evidence contained in the record.

The SALJ determined the employee's average gross weekly wage based upon the evidence in the record. While that evidence may have been hearsay and may well have been faulty, it was sufficient under all the circumstances to support the award.[11] The Board affirms the SALJ's finding that the claimant's average gross weekly wage was $428.

The Board affirms the SALJ's determination of the claimant's average gross weekly wage and modifies the determination of the nature and extent of disability to find claimant suffers a 27 percent permanent partial functional impairment.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Special Administrative Law Judge Marvin Appling dated November 10, 2004, is modified to a 27 percent permanent partial functional impairment and otherwise affirmed.

The claimant is entitled to 14.78 weeks of temporary total disability compensation at the rate of $285.35 per week or $4,217.47 followed by 112.05 weeks of permanent partial disability compensation at the rate of $285.35 per week or $31,973.47 for a 27 percent functional disability, making a total award of $36,190.94 which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

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[11] See *Neal v. Hy-Vee, Inc.*, 277 Kan. 1, 81 P.3d 425 (2003).

Dated this _____ day of June 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Garry Lassman, Attorney for Respondent and its Insurance Carrier
Marvin Appling, Special Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director