

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

JOSE S. ROBLES)	
Claimant)	
VS.)	
)	Docket No. 1,002,378
CARPET EXPRESS)	
Respondent)	
AND)	
)	
CONTINENTAL WESTERN INSURANCE CO.)	
Insurance Carrier)	

ORDER

Both claimant and respondent appealed the July 11, 2003 Award entered by Administrative Law Judge Jon L. Frobish. The Board heard oral argument on January 13, 2004.

APPEARANCES

C. Albert Herdoiza of Kansas City, Kansas, appeared for claimant. Nathan D. Burghart of Topeka, 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

Claimant alleges he injured his back on August 24, 2001, while working for respondent. In the July 11, 2003 Award, Judge Frobish determined claimant's back injury arose out of and in the course of his employment with respondent. Consequently, the Judge awarded claimant a 27.5 percent permanent partial general disability after finding claimant had sustained a 33 percent wage loss and a 22 percent task loss.

After reviewing the parties' briefs to this Board and after hearing their oral arguments, the following issues are before the Board on this appeal:

1. Did claimant injure his back in an accident that arose out of his employment with respondent?

Respondent and its insurance carrier argue claimant had preexisting back problems and that he injured his back by merely bending over to pick up trash. They argue claimant's injury occurred as the result of daily living and, therefore, his request for workers compensation benefits should be denied.

2. If claimant sustained an accidental injury that entitles him to workers compensation benefits, what is the nature and extent of his injury and disability?

Claimant contends the Judge erred by limiting his permanent partial general disability to 27.5 percent. Claimant argues he is essentially unemployable and, therefore, entitled to receive permanent total disability benefits. In the alternative, claimant argues his permanent partial general disability is much higher than 27.5 percent.

Conversely, respondent and its insurance carrier argue claimant unreasonably refused to undergo back surgery and, therefore, his permanent partial general disability should be limited to his whole body functional impairment rating. In the alternative, respondent and its insurance carrier contend the Judge's finding of a 27.5 percent permanent partial general disability should be affirmed.

3. Does the record establish a preexisting functional impairment rating that would reduce an award of permanent partial general disability benefits under K.S.A. 44-501(c)?

Respondent and its insurance carrier contend the record establishes claimant had either a five or six percent whole body functional impairment due to his back before he sustained the August 24, 2001 back injury. Accordingly, respondent and its insurance carrier contend any award of permanent disability benefits should be reduced as provided by K.S.A. 44-501(c).

Conversely, claimant contends respondent and its insurance carrier have failed to prove he had a preexisting functional impairment before the August 2001 injury as recognized by the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA Guides).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and after considering the parties' arguments, the Board finds and concludes:

Respondent is a carpet cleaning company. Claimant alleges he injured his low back while working for respondent on August 24, 2001, while bending down to pick up trash. Claimant testified, in part:

Yes, I was cleaning a town home, it has stairwells, and I was cleaning the basement, and there was a lot of -- there was some trash on the floor that the cleaner wasn't picking it up, so I bent down to pick it up, and that's when I felt a sharp pain in my lower back, like a sharp pain. And I tried to do this three times, I was working and I was trying to do it quickly, and the third time I actually fell down on the floor.¹

. . . .

I was -- I was holding onto the vacuum cleaner with one hand, and I leaned over sideways to pick up this --²

According to claimant, he immediately telephoned respondent's owner, Bob Smith, and advised him of the accident. Claimant then left the town home, met his son and went home. When two days of rest did not relieve his symptoms, claimant began seeking treatment.

As a result of the August 2001 incident, claimant now has a symptomatic herniated disc. At least three doctors have either recommended or suggested back surgery, which claimant has thus far declined. According to claimant, the doctors have told him surgery could improve his condition, but it could also make it worse. And the doctors have also advised claimant there was a chance he could improve without surgery. In short, claimant's medical treatment through the date of regular hearing has included anti-inflammatory, muscle relaxant and pain medications, physical therapy, chiropractic treatment, magnetic resonance imaging (MRI), nerve conduction studies and two epidural steroid injections.

Claimant has not worked for any employer since August 24, 2001. At his December 2002 regular hearing, claimant testified he did not believe he was able to work anywhere

¹ R.H. Trans. at 12.

² *Id.* at 33.

in the Wichita area due to his August 2001 back injury. Consequently, claimant has not made a concerted effort to find other employment.

1. Did claimant injure his back in an accident that arose out of his employment with respondent?

Only those accidents that arise out of and in the course of employment are compensable under the Workers Compensation Act.³ Before an accident arises out of employment, there must be a causal connection between the accident and the nature, conditions, obligations, or incidents of the employment.⁴

This court has had occasion many times to consider the phrase “out of” the employment, and has stated that it points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. . . .⁵

And the Workers Compensation Act defines an accident as any undesigned, sudden and unexpected event usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force, and to be construed in a manner to effectuate the purpose of the Act to place the burden of work-related injuries upon industry. K.S.A. 2001 Supp. 44-508(d) states:

“Accident” means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

But the Workers Compensation Act also specifically provides that an injury shall not be deemed to have been caused by the employment where the worker suffers a “disability” due to the natural aging process or by the normal activities of day-to-day living.⁶ The Act also provides that the words “arising out of and in the course of employment” shall not be

³ See K.S.A. 44-501(a).

⁴ See *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

⁵ *Siebert v. Hoch*, 199 Kan. 299, 303, 428 P.2d 825 (1967).

⁶ K.S.A. 2001 Supp. 44-508(e).

construed to include injuries to employees engaged in recreational or social events, which the worker was not required to attend.⁷

The Board concludes that on August 24, 2001, claimant sustained personal injury by an accident that arose out of his employment with respondent. At the time of the accident, claimant was operating a vacuum cleaner and bending sideways to pick up trash. Thus, there is a causal connection between claimant's accident and the nature, conditions, obligations and incidents of his employment with respondent. Accordingly, claimant's accident and the resulting herniated disc are directly traceable to his employment. Conversely, the Board concludes claimant's herniated disc did not result from activities of day-to-day living nor did it result from a "disability" due to the natural aging process.

Based upon the above, the Board concludes claimant sustained an accidental injury on August 24, 2001, which is compensable under the Workers Compensation Act.

2. If claimant sustained an accidental injury that entitles him to workers compensation benefits, what is the nature and extent of his injury and disability?

Four doctors testified regarding the extent of claimant's back injury. The first, orthopedic surgeon Dr. Bernard T. Poole, treated claimant from early October 2001 through early March 2002 and determined claimant had a right-sided herniated disc between the fourth and fifth lumbar vertebrae (L4-5). According to Dr. Poole, claimant is unable to return to his former work but may be capable of performing light sedentary work. The doctor testified, in part:

I found him [claimant] basically to be unemployable in his usual and customary work but, had it been available to him, capable of doing light sedentary work that did not involve any significant manual laboring work at all.⁸

.....

Without any reference to the patient's ethnic background, language command or age, this patient had a medical condition in his back precluding him at the time of my last examination from performing the work that he had been used to doing or

⁷ K.S.A. 2001 Supp. 44-508(f).

⁸ Poole Depo. at 11.

any other work involving prolonged standing, bending, stooping and any lifting and was capable of no more than sedentary work.⁹

Dr. Poole rated claimant as having a 50 percent whole body functional impairment but the record fails to establish the rating was formulated according to the *AMA Guides*. According to Dr. Poole, claimant needs decompression and diskectomy with possible fusion at the L4-5 level although the doctor acknowledges he gave claimant the options of either pursuing surgery or continuing with conservative treatment.

Basically I advised him that he was probably going to end up needing surgery; that if he were going to get spontaneous improvement it would probably be over a long period of time; that he had the option at that time of considering surgery or continuing with conservative treatment in that at least he was not worsening at that time.¹⁰

The doctor further explained it is probable claimant's herniated disc will spontaneously improve in time as the vast majority do, but it is not possible to predict the extent of that improvement. On the other hand, the doctor advised the disc rupture could worsen.

Dr. Poole testified that if claimant underwent surgery and obtained an excellent result claimant could, at best, have no more than a 10 percent whole body functional impairment. But the doctor also stated claimant could have a major complication from surgery and be worse or, in the rare instance, die. Dr. Poole did not find it unreasonable for claimant to decline surgery.

Finally, Dr. Poole did not provide a task loss opinion that could be used for determining claimant's permanent partial general disability.

The second doctor who testified in this claim was orthopedic surgeon Dr. Edward J. Prostic. Dr. Prostic saw claimant at claimant's attorney's request in March and October 2002. Dr. Prostic also diagnosed a herniated L4-5 disc and agreed with Dr. Poole that claimant could either be treated by diskectomy or be kept on light duty employment until spontaneous remission might occur. Dr. Prostic, like Dr. Poole, concluded it was not unreasonable for claimant to decline back surgery as his symptoms were gradually improving with the passage of time. The doctor testified, in part:

⁹ *Id.* at 14-15.

¹⁰ *Id.* at 10.

It is my opinion that there are several good reasons for turning down surgery such as this: One, we do the preoperative discussion with the patients before diskectomy. We tell them the complications that can occur, including death. It is possible to go through the anterior longitudinal ligament and nick the anterior iliac artery or vein which may lead to insanguination into the abdomen. It is possible to go through the anterior longitudinal ligament and nick bowel or ureter causing life-threatening conditions.

It is possible to injure a nerve as we're proceeding toward the disk and having permanent nerve injury. It is possible to have dural leaks or subdural or epidural hematomas which can lead to paralysis. It is possible to have infections. So this is major surgery. It is occasionally associated with death from immediate surgical problems or postoperative pulmonary emboli or other complications. Also, the general public understands that a significant number of people who have disk removals do not have good quality relief of their symptoms. And we should tell patients prior to surgery that there is a significant percentage of people who get good quality healing spontaneously. So based upon the known hazards of the operation, the known poor results on some people, and the ability to spontaneously recover, it is not unreasonable to turn down lumbar disk surgery.¹¹

Dr. Prostic rated claimant as having a 20 percent whole body functional impairment using the *AMA Guides*. Dr. Prostic reviewed a list of the work tasks claimant performed during the 15 years before his August 2001 back injury as prepared by vocational consultant Michael Dreiling and the doctor concluded claimant had lost the ability to perform 15 of the 17 tasks, or approximately 88 percent, due to the low back injury.

Following the March 2002 evaluation, Dr. Prostic believed claimant could return to work performing light duty as long as he limited occasional lifting to no more than 10 to 15 pounds, avoided frequent bending and twisting at the waist, avoided forceful pushing and pulling, avoided vibrating equipment, and had the ability to change positions as needed for comfort. But after receiving a letter from claimant's attorney along with records indicating Dr. Poole had taken claimant off work, Dr. Prostic changed his opinion, concluding claimant was not employable.

The third doctor to testify in this claim was Dr. Robert L. Eyster, another orthopedic surgeon. Dr. Eyster, who saw claimant once in September 2001 and once in January 2002, diagnosed claimant as having degenerative disc disease with bulging at L4-5. Like both Dr. Poole and Dr. Prostic, Dr. Eyster believed claimant would benefit from surgery.

¹¹ Prostic Depo. at 31-32.

Dr. Eyster rated claimant's whole body functional impairment at 10 percent using the *AMA Guides* (4th ed.). More importantly, the doctor concluded claimant could return to work. Dr. Eyster concluded claimant should never lift more than 20 pounds, should avoid repetitive lifting of more than 10 pounds, and avoid forward bending and twisting except at the hips. The doctor also felt claimant should not be required to sit more than 15 minutes before being able to change positions or stretch.

At his deposition, Dr. Eyster reviewed a list of 44 work tasks prepared by vocational consultant Dan R. Zumalt. The doctor indicated claimant should no longer perform 10 of those 44 tasks, which creates a task loss of approximately 23 percent.

The last doctor to testify in this claim was Dr. John F. McMaster, who is board-certified in family practice, emergency medicine, and undersea and hyperbaric medicine. At the request of respondent and its insurance carrier's attorney, Dr. McMaster examined claimant in early December 2002 and diagnosed a herniated lumbar disc and radiculopathy into the right leg.

According to Dr. McMaster, claimant aggravated a preexisting problem and now has a 10 percent whole body functional impairment under the *AMA Guides* (4th ed.). Like the other three doctors who testified before him, Dr. McMaster on direct examination testified he thought claimant would benefit from surgery. But on cross-examination, the doctor recanted and testified he did not have adequate knowledge to recommend surgery at that time. Moreover, the doctor testified it was not unreasonable for claimant to have declined surgery.

Initially, Dr. McMaster concluded claimant should be restricted to sedentary work activities. But after reviewing a videotape of claimant's activities, which was taken surreptitiously and which showed claimant looking under the hood of his pickup, getting a small item (approximately the size of a quart of oil) from the cab of his truck and shortly afterwards returning the item to the cab, mowing his lawn, dumping grass clippings and sitting on his porch, the doctor concluded claimant could return to his regular job cleaning carpets.

In short, after reviewing the videotape, Dr. McMaster reconsidered claimant's abilities and concluded claimant could perform moderately strenuous activity. According to Dr. McMaster, claimant could lift up to 25 pounds on a regular basis and bend, twist, drive and stand anywhere from 30 minutes to hours. Dr. McMaster reviewed the list of former work tasks prepared by Mr. Zumalt and indicated claimant is unable to perform five tasks out of the 44 tasks, or approximately 11 percent, as compared to the approximately 52 percent task loss his initial work restrictions would have created.

The Board concludes claimant has sustained a 15 percent whole body functional impairment as a result of the August 2001 accident. The medical experts who testified they utilized the *AMA Guides* indicated claimant had a 10 percent whole body functional impairment at the minimum and 20 percent at the maximum. The Board finds claimant's impairment lies somewhere between those parameters and, accordingly, the Board concludes claimant now has a 15 percent whole body functional impairment due to his August 2001 back injury.

Considering the various expert medical opinions regarding claimant's injury, the Board affirms the Judge's finding that claimant is not permanently and totally disabled. The greater weight of the medical evidence indicates claimant retains the ability to perform sedentary and some light duty work. Accordingly, claimant's entitlement to permanent partial general disability benefits is governed by K.S.A. 44-510e, which provides, in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **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.** 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. **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.)

But that statute must be read in light of *Foulk*¹² and *Copeland*.¹³ In *Foulk*, the Kansas Court of Appeals held a worker could not avoid the presumption against work

¹² *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

¹³ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon ability rather than actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

If a finding is made that a good faith effort has not been made, the factfinder [*sic*] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .¹⁴

The Kansas Court of Appeals in *Watson*¹⁵ more recently held the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the capacity to earn wages.

In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder [*sic*] must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.¹⁶

Respondent and its insurance carrier argue that due to claimant's refusal to undergo surgery, under K.A.R. 51-9-5 claimant's permanent partial general disability should be limited to his functional impairment rating. That administrative regulation provides:

An unreasonable refusal of the employee to submit to medical or surgical treatment, when the danger to life would be small and the probabilities of a permanent cure great, may result in denial or termination of compensation beyond the period of time that the injured worker would have been disabled had the worker submitted to medical or surgical treatment, but only after a hearing as to the reasonableness of such refusal.

The Board rejects respondent and its insurance carrier's argument. First, respondent and its insurance carrier have failed to prove claimant acted unreasonably in declining surgery to repair his herniated disc, which would possibly require a fusion with

¹⁴ *Id.* at 320.

¹⁵ *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

¹⁶ *Id.* at Syl. ¶ 4.

or without instrumentation. Conversely, the evidence establishes the proposed surgery bore significant risks and uncertainty as to the ultimate result.¹⁷ Both Dr. Poole and Dr. Prostic testified it was not unreasonable for claimant to decline the proposed surgery. And respondent and its insurance carrier's expert medical witness, Dr. McMaster, testified he did not have sufficient information to determine if claimant needed surgery.

Regarding claimant's wage loss for purposes of the permanent partial general disability formula, the Board concludes claimant has failed to prove he has made a good faith effort to find work in the open labor market. Consequently, the law requires the Board to impute a post-injury wage.

Claimant's vocational expert, Mr. Dreiling, concluded claimant retained the ability to earn approximately \$8 per hour, assuming he could perform light duty type work. On the other hand, Mr. Zumalt, who is respondent and its insurance carrier's vocational expert, concluded claimant could anticipate earning between \$7 and \$8 per hour, assuming he was restricted to sedentary type work.

The Judge imputed a post-injury wage of \$320 per week. The Board agrees. Comparing claimant's pre-injury wage of \$475.25, which the parties did not contest on this appeal, to \$320 yields a wage loss of approximately 33 percent.

There is a great disparity in the doctors' opinions regarding claimant's ability to perform former work tasks. According to Dr. McMaster, claimant could return to his former job as a carpet cleaner as he has only lost the ability to perform approximately 11 percent of his former work duties. But at the other end of the range is Dr. Prostic, who believes claimant has lost the ability to perform approximately 88 percent of his former work tasks. Dr. Poole was not asked about claimant's former work tasks. Although Dr. Eyster's work restrictions were not as limiting as Dr. Prostic's, they were more confining than Dr. McMaster's. Consequently, Dr. Eyster's task loss of 23 percent fell within the range of task loss set by Dr. Prostic and Dr. McMaster.

The Board finds Dr. Eyster's opinions regarding work restrictions and task loss are persuasive. Accordingly, the Board concludes claimant has sustained a 23 percent task loss for purposes of the permanent partial general disability formula.

Averaging claimant's 33 percent wage loss with his 23 percent task loss yields a 28 percent permanent partial general disability.

¹⁷ See *Martinez v. Excel Corp.*, ___ Kan. App. 2d ___, 79 P.3d 230 (2003).

3. Does the record establish a preexisting functional impairment rating that would reduce an award of permanent partial general disability benefits under K.S.A. 44-501(c)?

According to claimant, in the early 1990s he injured his back in an automobile accident and received treatment from a Dr. Garcia, who initially gave him work restrictions. But when the packing plant where claimant worked would not permit claimant to work with those restrictions, claimant asked the doctor to lift the restrictions, which the doctor apparently did as claimant then returned to work for that employer.

At the regular hearing, claimant's attorney listed a number of medical restrictions that he represented were placed on claimant by Dr. Garcia. Claimant testified he violated those restrictions in the work that he performed following the 1991 automobile accident when he lifted more than 75 pounds and when he frequently bent and stooped.

According to Dr. Eyster, 60 percent of claimant's ultimate 10 percent whole body functional impairment was from preexisting degenerative disc disease. But Dr. Eyster did not testify whether before the August 2001 accident claimant's preexisting condition would have warranted a functional impairment rating under the *AMA Guides* (4th ed.).

On direct examination, Dr. McMaster testified claimant had a five percent whole body functional impairment before the August 2001 accident and a 10 percent whole body functional impairment afterwards. But on cross-examination, claimant's attorney established that Dr. McMaster's conclusion regarding claimant's preexisting functional impairment was not based upon the fourth edition, or any other edition, of the *AMA Guides*. Cross-examination further revealed the purported five percent preexisting whole body functional impairment rating was not necessarily Dr. McMaster's opinion as the doctor did not attempt to measure claimant's preexisting functional impairment but he merely lifted the number from the records of Dr. Garcia, who did not testify. Unfortunately, Dr. McMaster was not asked to provide his own opinion of the extent of claimant's preexisting functional impairment immediately before the August 2001 accident. Dr. McMaster testified, in part:

Q. (Mr. Herdoiza) I'm asking you how you look at it.

A. (Dr. McMaster) I said in my report that it was obvious or it was more likely than not that he had some sort of preexisting impairment rating, the exact number of which I was unaware of and I was produced no records to attest to that. Given that information, I did not make any assumptions and, therefore, used the Fourth Edition exclusively to come up with my calculation for his impairment. That's how I got 10 percent.

Q. That wasn't my question. My question was the assumption part. We really don't know what to deduct, do we? Because we don't know the basis of where the 5 percent that you are talking about came from.

A. It depends how you look at it.

Q. And we don't know how Dr. Garcia looked at it.

A. That's correct.

Q. So would it be a fair statement it is kind of hard to deduct that when we don't know what the basis of that was?

A. However you want to look at it, I identified there was a preexisting impairment, the exact quantification of which I was unaware of, nor was I aware of any methodology used to arrive at a number. Therefore, I assumed that number was zero. Okay.

Q. But despite that, you went ahead and gave testimony today that you were deducting 5 percent.

A. That was based upon a number that was provided that identified a preexisting impairment of 5 percent, however it was arrived at the impairment as defined.

Q. Kind of certain, very certain, pretty certain, apples to oranges? I don't know what Guides were used. How certain are we of the deduction used?

A. Okay, in the Fourth Edition the definition of impairment is the loss, loss of use or derangement of any body part, system or function. Given that as the definition and given the fact that he had a preexisting impairment of some degree quantified by somebody using some methodology, it is assumed a given that Dr. Garcia is a very competent orthopedic physician, that he utilized a reputable methodology to arrive at that 5 percent. Based upon that information, I subtract 10 from 5 [sic] and get 5 percent.

Q. That's a bunch of assumptions, would you agree with me, to get to that opinion?

A. However you want to take it.¹⁸

¹⁸ McMaster Depo. at 57-59.

The Workers Compensation Act provides that awards should be reduced by the amount of preexisting functional impairment when the later injury aggravates a preexisting condition. The Act reads:

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.**¹⁹ (Emphasis added.)

And functional impairment is defined by K.S.A. 44-510e, as follows:

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. (Emphasis added.)

Consequently, for the date of accident in question the Act requires that before an award may be reduced for a preexisting functional impairment, the worker must have a functional impairment that is ratable under the *AMA Guides* (4th ed.), if the impairment is contained in those *Guides*. Moreover, the Act requires the amount of the functional impairment be established by competent medical evidence.

On the other hand, the Act does not require that the preexisting functional impairment was evaluated by a doctor or that it was rated before the later work-related accident occurred. Nor does the Act require that the worker had been given work restrictions for the preexisting condition before the later work-related accident occurred. Nonetheless, the Act does require that the preexisting condition must have actually constituted a functional impairment.

The Kansas Court of Appeals has recognized that previous settlement agreements and previous functional impairment ratings are not necessarily determinative of a worker's functional impairment for purposes of the K.S.A. 44-501(c) reduction. In *Mattucci*,²⁰ the Kansas Court of Appeals stated:

Hobby Lobby erroneously relies on *Baxter v. L. T. Walls Const. Co.*, 241 Kan. 588, 738 P.2d 445 (1987), and *Hampton v. Profession [sic] Security Company*, 5

¹⁹ K.S.A. 44-501(c).

²⁰ *Mattucci v. Western Staff Services and Hobby Lobby Stores, Inc.*, Nos. 83,268 and 83,349 (Kansas Court of Appeals June 9, 2000) (unpublished opinion).

Kan. App. 2d 39, 611 P.2d 173 (1980), to support its position. In attempting to distinguish the facts of the present case, Hobby Lobby ignores that both Baxter and Hampton instruct that a previous disability rating should not affect the right to a subsequent award for permanent disability. *Baxter v. L.T. Walls Const. Co.*, 241 Kan. at 593; *Hampton v. Profession [sic] Security Company*, 5 Kan. App. 2d at 41. Furthermore, the *Hampton [sic]* court declared that “settlement agreements regarding a claimant’s percentage of disability control only the rights and liabilities of the parties at the time of that settlement. The rating for a prior disability does not establish the degree of disability at the time of the second injury.” 241 Kan. at 593.

It may be true claimant had a functional impairment due to his low back before the August 2001 accident. But, for purposes of K.S.A. 44-501(c), respondent and its insurance carrier have failed to prove that before August 2001 claimant had a functional impairment due to his low back and, if so, the extent of that preexisting impairment.

The burden of proving a workers compensation claimant’s amount of preexisting impairment as a deduction from total impairment belongs to the employer and/or its carrier once the claimant has come forward with evidence of aggravation or acceleration of a preexisting condition.²¹

Consequently, the award should not be reduced for preexisting functional impairment.

An important evidentiary issue arose during litigation at the deposition of Carrie Barrett, the investigator who recorded the videotape that Dr. McMaster reviewed. Due to a lack of foundation, the Board sustains respondent and its insurance carrier’s objections to the videotapes marked as exhibits 2 and 3 to Ms. Barrett’s deposition transcript. Accordingly, those videotapes are not part of the evidentiary record and have not been viewed by the Board.

AWARD

WHEREFORE, the Board modifies the July 11, 2003 Award, as follows:

Jose S. Robles is granted compensation from Carpet Express and its insurance carrier for an August 24, 2001 accident and resulting disability. Based upon an average weekly wage of \$475.25, Mr. Robles is entitled to receive 20.71 weeks of temporary total disability benefits at \$316.85 per week, or \$6,561.96, plus 114.60 weeks of permanent

²¹ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, Syl. ¶ 5, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

partial general disability benefits at \$316.85 per week, or \$36,311.01, for a 28 percent permanent partial general disability and a total award of \$42,872.97.

As of January 20, 2004, Mr. Robles is entitled to receive 20.71 weeks of temporary total disability compensation at \$316.85 per week in the sum of \$6,561.96, plus 104.86 weeks of permanent partial general disability compensation at \$316.85 per week in the sum of \$33,224.89, for a total due and owing of \$39,786.85, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$3,086.12 shall be paid at \$316.85 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 January 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: C. Albert Herdoiza, Attorney for Claimant
- Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier
- Jon L. Frobish, Administrative Law Judge
- Anne Haught, Acting Workers Compensation Director