

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

<b>MIRANDA CRISP</b>	)	
Claimant	)	
	)	Docket Nos. 1,005,184
VS.	)	1,005,185
	)	
<b>IBP, INC.</b>	)	
Self-Insured Respondent	)	

**ORDER**

Respondent requested review of the December 18, 2003 Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on June 8, 2004.

**APPEARANCES**

Diane F. Barger, of Wichita, Kansas, appeared for the claimant. Gregory D. Worth, of Roeland Park, Kansas, appeared for the self-insured respondent.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed that there was a mathematical calculation error in the Administrative Law Judge's (ALJ's) Award. The parties stipulated that based upon the claimant's gross average weekly wage of \$400.11 and claimant's post-injury wage of \$197.35 the resulting wage loss would calculate to 51 percent rather than the 66 percent noted in the Award.

**ISSUES**

In Docket No. 1,005,184 respondent argued claimant should be limited to a scheduled disability to her shoulder. The ALJ determined that as a result of her work-related injuries the claimant suffered permanent impairment not only in her shoulder but also in her neck. Consequently, the ALJ found claimant suffered a 5 percent functional impairment to the whole body. Because respondent could not accommodate claimant's permanent restrictions, she was terminated from her employment. Accordingly, the ALJ further determined claimant was entitled to a 54 percent work disability based upon a 66 percent wage loss and a 42 percent task loss.

In Docket No. 1,005,185, the ALJ determined claimant had only suffered a temporary aggravation of the same body parts that she had injured in Docket No. 1,005,184. Accordingly, the work disability award was entered in Docket No. 1,005,184.

The sole issue raised on review by respondent is the nature and extent of claimant's disability. Initially, the respondent requests the Board to affirm the ALJ's finding in Docket No. 1,005,185, that claimant suffered a temporary exacerbation of the injuries she had previously suffered in her first accident in Docket No. 1,005,184.

Respondent next argues claimant's injuries are limited to her right upper extremity and shoulder. Consequently respondent argues claimant's award in Docket No. 1,005,184 should be limited to a scheduled disability to the right shoulder.

If it is determined claimant suffered a whole body injury and she is entitled to a work disability, respondent further argues the opinions of both Drs. Vito J. Carabetta and Sergio Delgado using the task lists of both vocational experts should be adopted in determining the task loss component of the work disability.

Claimant argues that it is apparent that the health care providers all treated and/or diagnosed claimant with a neck impairment and that even though claimant's initial pain was in the shoulder, it is situs of the resulting disability, not the situs of the trauma, which determines the level of the disability for compensation purposes. Claimant argues that the ALJ's award should be affirmed.

#### **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:

#### **Docket No. 1,005,184**

Respondent contends claimant should be limited to compensation for a scheduled disability to her right shoulder. Conversely, claimant contends that she suffered disability to her neck as well as the shoulder and her compensation should be based upon a disability to the whole person.

Initially, it must be determined whether claimant suffered a scheduled injury to the right shoulder for which her entitlement to benefits would be pursuant to K.S.A. 44-510d(a)13 (Furse 2000) or whether she also suffered permanent impairment to her neck for which her entitlement to benefits would be pursuant to K.S.A. 44-510e (Furse 2000).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to assess the medical testimony, along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by the medical evidence presented in the case and has a responsibility of making its own determination.<sup>1</sup>

It is undisputed claimant suffered a work-related injury on September 20, 2001. Claimant was performing her job duty as a short plate bagger. The job required claimant to repetitively take cuts of meat weighing 12 to 25 pounds off the line, place them into a bag and then place the bag on a conveyor belt. As claimant was throwing a bag onto the conveyor belt her shoulder popped and she felt pain through her shoulder and into her neck.

Claimant initially received treatment consisting of rotation of heat and ice packs at the plant dispensary. When claimant's pain persisted she was referred to Dr. J. Robert Hutchison for treatment. Although claimant's primary complaint was right shoulder pain, the contemporaneous medical records also note complaints of neck pain. The doctor referred claimant for physical therapy.

The physical therapist noted claimant complained of pain in her right shoulder, upper arms and neck. The physical therapy included ultrasound and moist heat treatments to claimant's shoulder and neck.

Dr. Hutchison referred claimant to Dr. Carabetta for additional treatment. Claimant continued to complain of right shoulder pain as well as pain at the base of her neck. Dr. Carabetta provided a trigger point injection in the right scapula. The injection did not provide claimant much relief and the doctor then ordered an FCE to establish claimant's permanent restrictions.

Dr. Carabetta ultimately determined claimant suffered a 5 percent permanent partial whole person impairment based upon DRE Cervicothoracic Category II. Dr. Pedro A. Murati also determined claimant suffered a 5 percent permanent partial whole person impairment based upon DRE Cervicothoracic Category II. Dr. Sergio Delgado, the court ordered independent medical examiner, concluded claimant suffered myofascial injury to her cervicothoracic region and determined claimant suffered a 2 percent permanent partial whole person impairment because claimant fit both DRE Cervicothoracic Categories I and II. Conversely, Dr. Phillip L. Baker concluded claimant's impairment was limited to her shoulder.

The Board finds the claimant's complaints of neck as well as shoulder pain were corroborated by the medical and physical therapy records. As the ALJ noted, three of the

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<sup>1</sup> *Tovar v. IBP, Inc.*, 15 Kan App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

four doctors to express an opinion, including the court ordered independent medical examiner, concluded claimant suffered a whole person impairment including the neck. The Board affirms the ALJ's determination that claimant suffered permanent injury to her neck as well as her shoulder and is entitled to compensation based upon K.S.A. 44-510e(a) (Furse 2000).

Because claimant's injuries comprise an "unscheduled" injury, her permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a) (Furse 2000). 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.

But this statute must be read in light of *Foulk*<sup>2</sup> and *Copeland*.<sup>3</sup> In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a), that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages being received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury. If a finding is made that a claimant has not made a good faith effort to find post-injury employment, then the factfinder must determine an appropriate post-injury wage based on all the evidence before it.

When claimant received her permanent restrictions from Dr. Carabetta she was told by respondent that she would have 30 days to bid on and receive a permanent job within the doctor's restrictions. Claimant was unable to obtain a job and her last day of employment with respondent was June 21, 2002.

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

<sup>3</sup> *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

After claimant was terminated she would check the bid sheets with respondent on a weekly basis seeking re-employment. And claimant noted that there were jobs listed that she felt were within her restrictions. At regular hearing the claimant provided a partial list of the various employers she had contacted seeking employment but she noted that she had recently moved and the list was incomplete. Claimant further noted that she did not seek employment on a daily basis because she did not have sufficient resources and she was under the impression that she would be rehired by respondent. Claimant explained:

Q. [Mr. Worth] So would it be fair to say that you did not look for work every day since leaving the employ of IBP, wouldn't it ma'am?

A. Every day, no, I did not. I planned, I figured that I would get hired on back on at IBP and when I was released from LOA and if I had no job to make any money how was I going to afford to pay any baby-sitter to go every day to look for a job every day and pay for gas. But I, as best as I could I went to look for as many jobs as I possibly could. I was informed many times that there, within a year's time I should be able to find a job and be hired back on at IBP and that was, that was my hope.<sup>4</sup>

Claimant relocated to Winfield, Kansas, because her efforts to locate employment in the Emporia area had been unsuccessful and she had a sister there who would help her out. Eventually, claimant obtained employment with the Winfield Middle School as a paraprofessional.

The claimant testified that although she could not afford daily trips to look for a job she testified that she did the best she could which consisted of weekly applications at respondent as well as contacting other employers. There are some significant time gaps in the exhibits offered at regular hearing regarding claimant's job search. But it appears that claimant consistently checked with respondent because she was under the impression she would be re-hired. The gaps in the records were also explained by the fact that claimant had moved before the regular hearing and part of the lists of job contacts she had made had not been found. And claimant testified that she contacted additional employers not reflected on the exhibits.

Based upon the entire record, and considering the fact that claimant was under the impression respondent would re-hire her as well as the fact claimant did not have the resources to conduct daily job searches, the Board affirms the ALJ's determination that claimant made a good faith job search.

Accordingly, claimant is entitled to a 100 percent wage loss until August 11, 2003, when she began work for the Winfield Middle School, at that point her actual wage loss was reduced to 51 percent.

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<sup>4</sup> R.H. Trans. at 68-69.

The next issue for determination is the percentage of task loss, if any. Respondent argues the determination of task loss should take into consideration Drs. Baker, Carabetta and Delgado's task loss opinions.

James T. Molski and Janice S. Hastert each met with claimant and prepared a task list based upon claimant's job history for the 15 years preceding her work-related injury. Using the task list prepared by Mr. Molski, Dr. Carabetta initially determined claimant had a 42 percent task loss. At Dr. Carabetta's second deposition he determined claimant could no longer perform three additional tasks from that list which increased the task loss percentage to 52 percent. Using the task list prepared by Ms. Hastert, and eliminating the light-duty work claimant performed for respondent after her work-related injury, Dr. Carabetta determined claimant had a 9 percent task loss.

Dr. Delgado reviewed the task list prepared by Mr. Molski and determined claimant had a 42 percent task loss. Utilizing the task list prepared by Ms. Hastert and eliminating the light-duty work claimant performed for respondent after her work-related injury, Dr. Delgado concluded claimant had an 11 percent task loss.

Task loss opinions were also provided by Drs. Murati and Baker. However, Dr. Murati's task loss opinion was based upon physical restrictions provided for physical findings that none of the other doctors detected in their examinations of claimant. Dr. Baker's testimony regarding task loss was so equivocal as to be unpersuasive. Accordingly, the Board does not adopt either Dr. Murati's or Dr. Baker's opinion regarding claimant's task loss.

The Board finds the opinions expressed by the treating physician Dr. Carabetta and, the court ordered independent medical examiner, Dr. Delgado persuasive. The range of task loss provided by those doctors is between 9 and 52 percent. The Board finds claimant has a 31 percent task loss.

When the 31 percent task loss is averaged with claimant's wage loss, the work disability calculates to 66 percent until claimant obtained employment and then decreases to a 41 percent work disability. But due to the accelerated pay out formula and because the compensation rate does not change, the change in the percentage of work disability makes no difference in the calculation of this award or in the final amount due. Therefore, this award simply uses the final percentage of work disability to compute the total number of weeks of permanent partial disability compensation. Consequently, the Board modifies the ALJ's Award in Docket No. 1,005,184 to reflect claimant's work disability is 41 percent.

#### **Docket No. 1,005,185**

On February 6, 2002, claimant was performing light-duty work removing tags from sides of cows before they went into the sanitizer machine. As she pushed on some sides stuck on the rail she felt pain in her shoulder which radiated into her neck. Claimant was

examined by Dr. J. Robert Hutchison the following day. Dr. Hutchison noted claimant's complaints were the same as she had expressed when he had previously treated her in October 2001.

Claimant testified that she had increased pain for a couple of days but then the pain returned to the previous level. Claimant testified that she did not feel like she had suffered a new injury but had suffered a flare up of symptoms from her first injury.

Dr. Hutchison concluded that the February 6, 2002 incident was a temporary condition that did not result in permanent injury. Dr. Murati concluded that the February 6, 2002 incident was an aggravation and continuation of her previous injury. But he was unable to apportion any part of his permanent impairment rating to that incident. Dr. Carabetta's diagnosis and impairment rating made before the February 6, 2002 incident remained the same after his later examination of claimant.

The Board adopts and affirms the ALJ's finding that the February 6, 2002 incident resulted in a temporary exacerbation of claimant's condition but did not result in permanent injury.

**AWARD IN DOCKET NO. 1,005,184**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated December 18, 2003, is modified to reflect claimant has suffered a 41 percent work disability.

The claimant is entitled to 170.15 weeks of permanent partial disability compensation at the rate of \$266.75 per week or \$45,387.51 for a 41 percent work disability, making a total award of \$45,387.51.

As of June 24, 2004, there would be due and owing to the claimant 144 weeks permanent partial disability compensation at the rate of \$266.75 per week in the sum of \$38,412 for a total due and owing of \$38,412, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$6,975.51 shall be paid at the rate of \$266.75 per week for 26.15 weeks or until further order of the Director.

**AWARD IN DOCKET NO. 1,005,185**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated December 18, 2003, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

- c: Diane F. Barger, Attorney for Claimant  
Gregory D. Worth, Attorney for Self-Insured Respondent  
Brad E. Avery, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director