

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

<b>MICHELLE EWAN</b>	)	
Claimant	)	
	)	
VS.	)	Docket Nos. 1,010,053 &
	)	1,010,125
	)	
<b>SUPERIOR INDUSTRIES</b>	)	
<b>INTERNATIONAL</b>	)	
Self-Insured Respondent	)	

**ORDER**

Respondent requested review of the September 19, 2005, Award by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on January 4, 2006.

**APPEARANCES**

William L. Phalen, of Pittsburg, Kansas, appeared for the claimant. Troy A. Unruh, of Pittsburg, Kansas, appeared for respondent.

**RECORD AND STIPULATIONS**

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

**ISSUES**

The Administrative Law Judge (ALJ) found that claimant exhibited good faith in seeking and obtaining post-injury employment and used her actual post-injury earnings to determine wage loss. In both of claimant's cases, the ALJ found that she was entitled to work disability from March 28, 2003, to January 18, 2005, when she returned to full time employment.

In Docket No. 1,010,053, the ALJ found the functional rating of Dr. Edward Prostic to be more credible than that of Dr. Paul Toma and awarded claimant a 14 percent functional disability to the body as a whole for her bilateral upper extremity injuries. The ALJ also found Dr. Prostic's task loss assessment to be more credible and found that

claimant had a 30 percent task loss. Accordingly, the ALJ awarded claimant permanent partial disability compensation as follows:

For the period of January 6, 2003, the date of accident, to March 27, 2003, the last day claimant worked for respondent, claimant's permanent partial disability was 14 percent based on her functional impairment.

For the period of March 28, 2003, to November 1, 2003, the claimant's permanent partial disability was 65 percent based on a 100 percent wage loss and a 30 percent task loss.

For the period of November 1, 2003, to January 17, 2005, the claimant's permanent partial disability was 56 percent based on an 82 percent wage loss and a 30 percent task loss.

For the period after January 18, 2005, claimant's permanent partial disability was 14 percent based on functional impairment.

In Docket No. 1,010,125, the ALJ found the opinion of the independent medical examiner (IME), Dr. Kathryn Hedges, to carry more weight than the opinions of the other experts, and awarded claimant permanent partial disability compensation based upon Dr. Hedges' 2 percent permanent impairment rating for headaches. The ALJ also found that as there was no evidence of task loss due to the March 26, 2003, injury, claimant's task loss percentage is 0. Accordingly, the ALJ awarded claimant the following:

For the period of March 26, 2003, to March 27, 2003, claimant's permanent partial disability was 2 percent based on functional impairment.

For the period of March 28, 2003, to November 1, 2003, the claimant's permanent partial disability was 50 percent based on a 100 percent wage loss and a 0 percent task loss.

For the period of November 1, 2003, to January 17, 2005, the claimant's permanent partial disability was 41.5 percent based on an 83 percent wage loss and a 0 percent task loss.

For the period after January 18, 2005, claimant's permanent partial disability was 2 percent based on functional impairment.

The ALJ found that the award of work disability in Docket No. 1,010,125 shall be credited 100 percent for work disability benefits simultaneously payable in Docket No. 1,010,053. The ALJ also found that claimant's initial functional disability in Docket No. 1,010,053 overlapped by one day the functional disability in Docket No. 1,010,125.

Accordingly, the ALJ found that claimant is entitled to the functional disability benefits awarded in both cases for that .14 week.

The respondent argues that claimant was terminated for cause from an accommodated position and, therefore, is not entitled to work disability. Respondent also argues that claimant did not suffer a work-related injury to her head that led to a permanent impairment. Respondent claims that claimant's subjective complaints of pain are not credible, that Mitchel Woltersdorf, Ph.D., concluded that claimant was malingering and that the AMA *Guides*<sup>1</sup> state that an individual who complains of constant pain but who has no objectively validated limitations in daily activities has no impairment. Respondent further argues that claimant has no residual impairment to her hands, claiming the court ordered IME, Dr. Hedges, found no impairment to claimant secondary to her carpal tunnel.

Claimant likewise argues the ALJ erred in his determination of the nature and extent of disability in both docket numbers. Claimant asserts that the ALJ erroneously found that claimant continued to work at a part-time job after completion of her college education and she started her full-time employment as the book store manager at Neosho County Community College (NCCC). Claimant contends that she did not work both jobs at the same time. Accordingly, claimant argues that even after imputing claimant's earnings at NCCC, she is entitled to a work disability from January 18, 2005. In Docket No. 1,010,125, claimant also contends that Dr. Bernard Abrams was the only credible witness to testify concerning her head injury and impairment and that she should be entitled to an award based upon a 25 percent impairment of function to the body as a whole as a result of the March 26, 2003, injury.

#### **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 finds and concludes that the claimant stopped working her part-time job at the convenience store when she was hired to work full time at NCCC. And because her average weekly wage at NCCC was less than 90 percent of her preinjury average weekly wage, claimant is entitled to a work disability. The Board otherwise agrees with and adopts the ALJ's findings of fact and conclusions of law.

Claimant started working for respondent in June 1996. During the time she was working at respondent as a painter, her job duties included vacuuming the back of the wheels with a thick vacuum hose. She also touched up the wheels as needed with a power paint gun. She also would hold a small hose and poke in lug holes of each wheel to clean out dry paint. It was while performing these duties that she began developing

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<sup>1</sup>American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

problems with her upper extremities. Claimant stated that her hands were tingling, going numb and hurting. She reported the injury to Harvey Stevens, whom she considered to be her immediate supervisor, and to Fred Turner, the supervisor of the whole department. She was sent to Mt. Carmel Medical Center by respondent.

Claimant first saw Dr. A. Ramierz, who sent her for an EMG. The EMG study showed that she had carpal tunnel syndrome in both hands. She was then referred to Dr. Paul Toma, who performed surgery on her left hand on March 14, 2003, and on her right hand on April 1, 2003.

On March 26, 2003, claimant sustained another injury while working at respondent. Claimant testified that she was pulling plugs out of wheels, which was a light duty job. She testified she was having problems lifting the plugs out of the wheels because she is short, and her supervisor told her to stand on a pallet. As she was pulling a pallet, she tripped backwards and hit the back of her head on a line of wheels and landed on the concrete. She reported the accident to Mr. Stevens but claimed she did not tell Mr. Turner about her fall because she could not find him and she felt so badly. Claimant stated her head was hurting, she was nauseous, and her whole body, including her arm, back and neck, hurt, but she did not lose consciousness. As she only had about 30 more minutes on her shift, she went to another room and sat down and waited for her shift to end. She stated she told Mr. Stevens she was going to do that, and he was okay with it. Driving home that evening, she vomited most of the way.

The next day, claimant was told she had been written up for failure to report her accident. Shortly thereafter she was terminated. She did not challenge her reprimand for failing to report. Claimant stated she had worked for respondent for over six years. In that time, she had only been suspended once for sleeping on the job but stated that she was later called and told respondent was dropping the suspension as it had been a misunderstanding. Claimant stated other than that, she had not been written up for poor work performance.

Tim Rakestraw, the safety supervisor at respondent, testified concerning a disciplinary action form dated March 27, 2003, at which time claimant was suspended until final evaluation. Although Mr. Rakestraw was not present nor directly involved in this process, he said the incident indicated on the form was that claimant had alleged an accident occurred on March 26, 2003, but failed to report it until March 27, 2003. Mr. Rakestraw stated that respondent's policy required that accidents be reported before leaving the company's property. Mr. Rakestraw testified that claimant's reporting her accident to Mr. Stevens was not adequate because he was not claimant's supervisor but was just a coworker. Although the disciplinary action report on claimant states: "Most recently alleged an accident on 3/26/03, which you failed to report, and which cannot be

corroborated,<sup>2</sup> Mr. Rakestraw testified claimant was not disciplined because she reported an accident that could not be corroborated but because she failed to report the injury to her supervisor on the date of the accident.

The discipline form also noted that on March 27, 2003, claimant twice told her department trainer to go to hell and then left the facility, saying she needed to go home. Mr. Rakestraw conceded that the trainer was not claimant's supervisor.

Claimant's termination form was dated April 1, 2003, and the reason given for termination was job performance. At the time claimant was terminated, she was under the care and treatment of Dr. Toma and was performing light duty work at respondent because of her bilateral carpal tunnel injuries. Mr. Rakestraw testified that had claimant not been terminated, respondent would have continued to accommodate her restrictions.

Mr. Rakestraw said claimant was terminated because of the totality of her job performance. However, he was not personally involved in that process. Mr. Rakestraw testified that claimant had a disciplinary action report on February 17, 2000, for inattention to job duties. On November 16, 2001, claimant was counseled about her inattention to job duties. She received another disciplinary action April 15, 2002, for excessive absenteeism. She also had an incident report dated August 13, 2002, which asserted she was found asleep by coworkers. Claimant admitted she had been suspended without pay in August 2002 for sleeping on the job but did not recall being written up for excessive absenteeism in April 2002 or December 2000. None of these incidents was given at the time as being the reason for claimant's termination. These incidents do not rise to the level of bad faith nor a lack of good faith.

Mr. Rakestraw also testified that claimant had complained of headaches before her March 26, 2003, work injury. He said claimant would come into the office for aspirin about once a month complaining of migraines, but he had no documentation that this occurred. Claimant testified she did not remember ever calling in sick with headaches before her second accident.

A termination for cause does not always result in a denial of work disability. The test is good faith on the part of both the employee and the employer.<sup>3</sup> The Board finds claimant did not fail to act in good faith with respondent.

After she was terminated, claimant contacted respondent and told them she was having headaches and pain in the back and top of her head, and respondent sent her to Dr. Kevin Komes for treatment.

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<sup>2</sup>Rakestraw Depo., Ex. 1.

<sup>3</sup>*Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999).

At the time of her injuries, claimant was enrolled in college as a full-time student. She continued to be a full-time student after her injuries. Also during the time she worked at respondent, she was working a part-time job. Although she stopped working the part-time job for several months after her fall at respondent, she started again in November 2003, working from 15-20 hours per week as a cashier. When claimant was asked during the regular hearing where she was working, she testified that she was working at NCCC. There was no mention of any other employment. Accordingly, the Board finds that she stopped working the part-time job when she went to work full time at NCCC on January 18, 2005.

After claimant was terminated by respondent, she made a good faith search for other jobs. Her search included factory work, Wal-Mart, convenience stores and secretarial jobs. She checked the newspaper and signed up at Job Service. She applied at two or three businesses a week. As she got closer to her college graduation, she prepared a résumé and has sent it out to 40 to 50 places. She applied for jobs in marketing, management, bookkeeping and clerical. After receiving her degree, claimant stopped looking for production jobs. She does not believe that she can do the manual labor.

Claimant completed her undergraduate studies at Pittsburg State University in December 2004. She now is employed at NCCC as the book store manager. This is a full-time salaried position, and she earns \$20,000 per year plus benefits. She continues to look for other employment paying higher wages. She is also working on her masters in Business Administration at Pittsburg State.

Claimant stated she has pain if she does computer work. Her hands hurt if she writes for an extended period, cooks or crochets. She has numbness and tingling at night and has loss of grip strength. She takes Tylenol for the pain in her hands and Betatrex and Elavil for her headaches. She has daily headaches, which can escalate frequently. Claimant contends she has short term memory loss. She claims she forgets to pick up her children from school, forgets to do her homework, forgets to pay bills and forgets appointments.

Dr. Toma saw claimant on March 10, 2003, for complaints of numbness and tingling in her hands that woke her up at night. After examining her and reviewing the results of nerve studies, Dr. Toma diagnosed claimant with bilateral carpal tunnel syndrome, severe on the right and mild on the left. He performed a carpal tunnel release on claimant's left hand on March 14, 2003. He performed surgery on her right hand on April 1, 2003. He followed up with claimant on April 8, 2003, at which time she reported she was doing well but had some numbness in her left small finger. He saw claimant on April 22, 2003, at which time he issued restrictions of no lifting over five pounds and no repetitive use of the hands. Claimant was sent to physical therapy, and in May 2003, Dr. Toma ordered repeat nerve conduction studies. The studies showed that claimant's left hand was normal and the right hand was improved to where it had only mild carpal tunnel syndrome. He saw her

on June 5, 2003, at which time he gave her a full release to work with no restrictions. He rated her, giving her a 5 percent impairment of the right upper extremity and a 5 percent impairment of the left upper extremity. Using the *AMA Guides*,<sup>4</sup> he combined these rating and rated claimant as having a 6 percent impairment to the body as a whole. Dr. Toma stated that the *AMA Guides* do not address carpal tunnel syndrome well, and there is some indication he used the 5th edition when he rated claimant's impairment. Accordingly, the Board will give greater weight to the rating opinion of Dr. Prostic.

Dr. Toma stated that since he released claimant with no restrictions, she would have no task loss. Dr. Toma agreed that the final nerve conduction studies on claimant showed she still had mild carpal tunnel syndrome on the right; however, he was of the opinion that if he were to order another nerve conduction study, it would show that the carpal tunnel on the right would be normal. Dr. Toma stated he placed permanent restrictions on post-surgery carpal tunnel patients only if a patient showed no improvement following surgery. He did not give claimant any restrictions, in part because she was not working and in part because her left hand was back to normal, her right hand had gone from severe to mild and he expected her to continue to improve.

Dr. Bernard Abrams, a board certified neurologist, saw claimant on July 11, 2003, at the request of claimant's attorney. He was asked to evaluate both her repetitive trauma work injuries to her hands and the March 26, 2003, injury to her head, neck, back and right elbow. After examining claimant, Dr. Abrams diagnosed her with bilateral carpal tunnel syndrome, which had been addressed by Dr. Toma. He also diagnosed her with a head injury with residual headache and memory loss, which he attributed to claimant's March 26, 2003, accident at respondent. Using the *AMA Guides*, Dr. Abrams opined that claimant had a 5 percent permanent partial impairment for posttraumatic headaches and a 20 percent permanent partial impairment for her problems with memory and cognition. The combined rating for those two diagnoses was 25 percent permanent partial impairment. Although Dr. Abrams' report indicates claimant has bilateral carpal tunnel syndrome, he did not rate those injuries, stating only that the injuries were being treated by Dr. Toma and "have been rated."<sup>5</sup>

Dr. Edward Prostic is a board certified orthopedic surgeon who examined claimant on August 12, 2003, at the request of claimant's attorney regarding her work injuries of January 6, 2003, and March 26, 2003. He took a history from claimant concerning both dates of accident. Claimant denied previous difficulties with her neck, right elbow or hands. Claimant reported to him that her greatest concern currently was headaches, which she suffered several times a week. She stated she continued to have soreness of her hands

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<sup>4</sup>American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

<sup>5</sup>Abrams Depo., Ex. 2 at 4.

that worsened with active use, weakness of grip and occasionally wakes up at night with numbness and tingling. Claimant made no complaints about her right shoulder or either elbow. Dr. Prostic diagnosed claimant with bilateral carpal tunnel syndrome which was caused or aggravated by the work she performed for respondent. He opined that claimant had 14 percent permanent partial impairment of the body as a whole on a functional basis based upon the *AMA Guides* for her bilateral upper extremities injuries. He did not rate her injuries of March 26, 2003, stating:

Her residual complaint from this injury is headaches. At this time, I find no orthopedic source of the headaches. My advice is that she follow the direction of Dr. Bernard Abrams who has evaluated her for closed head injury.

Dr. Prostic reviewed the task list prepared by Karen Terrill and opined that claimant had lost the ability to perform 11 of the 37 tasks for a task loss of 30 percent, based upon his restrictions of avoiding activities that require repetitious forceful gripping, use of vibrating equipment or prolonged keying or handwriting. These restrictions appear to be for only the upper extremities injuries which are the subject of Docket No. 1,010,053.

Mitchel Woltersdorf, Ph.D., is in the private practice of neuropsychology. Dr. Woltersdorf conducted a one-day evaluation on claimant on November 10, 2003, at the request of respondent. Claimant reported to Dr. Woltersdorf that on March 26, 2003, she slipped at work and struck her head. She did not report a loss of consciousness but did report that her senses the rest of the day were not clear. Claimant had initial symptoms of dizziness, headache and nausea. After several weeks passed, claimant noticed memory problems. Her current complaints were daily headaches, forgetfulness and inattention. The headaches were on the vertex of the head. Dr. Woltersdorf ran a battery of tests on claimant and opined that there was nothing wrong with her cognitive functioning and that she was trying to appear more damaged than she actually was. It was Dr. Woltersdorf's opinion that claimant was malingering, her profile was not believable and her conduct was intentional. His testing of claimant showed no attention problems or memory problems. He admitted that there were no tests to rule in or out whether a patient has headaches.

Kathryn Hedges, M.D., examined claimant at the request of the ALJ on September 13, 2004. Claimant gave her a history of tripping and falling, hitting her head first on some wheels and then on the concrete floor. Claimant reported that she was foggy for about three days afterwards. She continued to work 30 minutes, until the end of her shift, but developed nausea, vomiting and a pounding headache. She later developed dizziness. Claimant told Dr. Hedges that she was taking pain killers for the headaches and was having memory problems as well. Claimant completed a Mini-Mental status exam.

Dr. Hedges' report states:

Based upon review of the medical records and my neurologic exam, I find that she has no neurologic injury. Generally, most people who undergo a concussion that do not have loss of consciousness, in my experience, resolve completely within a two month period with no further sequelae. Her neuropsychological testing and her MRI would suggest that she does not have any permanent sequelae.<sup>6</sup>

Dr. Hedges found that claimant did have headaches occurring two to three times per week which appeared to be triggered by the accident. She stated that these headaches could last for years. Dr. Hedges rated claimant with a 2 percent permanent partial impairment based upon her headaches, using the *AMA Guides*, but found no impairment based on cognitive dysfunction. Dr. Hedges was only asked to provide an IME in Docket No. 1,010,125, the March 26, 2003, injury, so there was no examination of claimant's hands and no rating for claimant's carpal tunnel syndrome.

Karen Terrill is a qualified rehabilitation professional who conducted an interview with claimant at the request of claimant's attorney on February 10, 2005. During that interview, Ms. Terrill helped claimant make a list of 37 tasks in her 15-year work history before her injuries at respondent. Ms. Terrill testified that had claimant not earned her college degree, she would have expected her to earn only \$7 per hour in the labor market. With her college degree, claimant would start a job out somewhere between \$18,000 and \$28,000 per year. Claimant was currently earning \$20,000 per year at NCCC. Considering the location claimant resides, Ms. Terrill opined that \$20,000 is a good entry level salary for claimant.

The parties have stipulated to average weekly wages in both cases. In Docket No. 1,010,053, the parties have stipulated to a wage of \$615.01, which includes straight time, bonuses and fringe benefits. The record does not indicate a breakdown between wages and fringe benefits. In Docket No. 1,010,125, the parties have stipulated to a wage of \$652.77. The record does not indicate whether this figure contains fringe benefits. The wage used to calculate benefits during the time claimant still worked for respondent need not include fringe benefits, since claimant was still receiving those benefits. But once those benefits cease to be provided by respondent, their value should be added to the average weekly wage and disability compensation rate.<sup>7</sup> However, since the parties have stipulated to the above wages, without any breakdown showing the amounts of regular wages, fringe benefits or any other additional compensation, and since this was not made an issue in either the briefs or during oral argument, the Board will use the stipulated figures in determining the compensation rate for each of the awards.

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<sup>6</sup>IME report of Dr. Hedges (Sept. 13, 2004), at 4.

<sup>7</sup>K.S.A. 44-511.

Claimant's salary at NCCC is \$20,000 per year, which calculates to \$384.62 per week. The weekly value of her benefits include health insurance, \$93.68, and KPERS, \$15.38. Therefore, her gross average weekly wage at NCCC for workers compensation purposes is \$493.68. The stipulated average weekly wage in Docket No. 1,010,053 is \$615.01. Therefore, claimant's wage at NCCC represents a 20 percent wage loss. Combining this with the 30 percent task loss computes to a 25 percent work disability in Docket No. 1,010,053 for the period after January 17, 2005. The stipulated average weekly wage in Docket No. 1,010,125 is \$652.77. Claimant's wage at NCCC represents a 24 percent wage loss. Combining this with a 0% task loss computes to a 12 percent work disability in Docket No. 1,010,125 for the period after January 17, 2005.

The Board also notes the ALJ used incorrect compensation rates in calculating the awards in each of these cases. The correct compensation rate in Docket No. 1,010,053 is \$410.03. The correct compensation rate in Docket No. 1,010,125 is \$432. Neither party mentioned the rate of compensation used by the ALJ in their briefs or in oral argument. Nevertheless, the Board will use the correct compensation rate in calculating these awards.

### AWARD

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated September 19, 2005, is modified as follows:

#### Docket No. 1,010,053

Claimant is entitled to 11.43 weeks of permanent partial disability compensation at the rate of \$410.03 per week or \$4,686.64 for a 14 percent functional disability, followed by 31.14 weeks of permanent partial disability compensation at the rate of \$410.03 per week or \$12,768.33 for a 65 percent work disability, followed by 61.18 weeks of permanent partial disability compensation at the rate of \$410.03 per week or \$25,085.64 for a 56 percent work disability, making a total award of \$42,540.61. Claimant's permanent partial general disability decreased to 25 percent on January 17, 2005, however, no additional permanent partial disability compensation was payable due to the accelerated payout formula.

#### Docket No. 1,010,125

The award of work disability in this case shall be credited 100 percent for work disability benefits simultaneously payable in Docket No. 1,010,053. Therefore, for the period after March 28, 2003, the compensation rate will be \$21.97, the difference between the compensation rate in Docket No. 1,010,053 of \$410.03 and the compensation rate in Docket No. 1,010,125 of \$432.

Claimant is entitled to 0.14 weeks of permanent partial disability compensation at the rate of \$432 per week or \$60.48 for a 2 percent functional disability followed by 31.14 weeks of permanent partial disability compensation at the rate of \$21.97 per week or

684.15 for a 50 percent work disability, followed by 18.52 weeks of permanent partial disability compensation at the rate of \$21.97 per week or \$406.88 for a 41.5 percent work disability, making a total award of \$1,151.51 after deducting the credit to respondent in Docket No. 1,010,053. Claimant's permanent partial general disability decreased to 12 percent on January 17, 2005. No additional permanent partial disability compensation is payable due to the accelerated payout formula. However, since this amount is less than her functional disability, claimant is entitled to an award based upon her 2 percent permanent partial disability in the amount of \$3,585.60.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of January, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

- c: William L. Phalen, Attorney for Claimant
- Troy A. Unruh, Attorney for Respondent
- Kenneth J. Hursh, Administrative Law Judge
- Paula S. Greathouse, Workers Compensation Director