

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

**WANDA E. WRIGHT** )  
Claimant )  
 )  
VS. )  
 )  
**PALMENTERE BROS. CARTAGE SERV.** )  
Respondent )  
 )  
AND )  
 )  
**COMMERCE & INDUSTRY INS. CO.** )  
Insurance Carrier )

Docket No. **1,015,068**

**ORDER**

Respondent and its insurance carrier request review of the March 3, 2011 Award by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on June 22, 2011.

**APPEARANCES**

Donald T. Taylor of Kansas City, Kansas, appeared for the claimant. Eric T. Lanham of Kansas City, 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**

It was undisputed claimant suffered a compensable work-related injury. Following surgeries on her knee claimant developed an antalgic gait which resulted in back complaints and she then developed psychological problems. Claimant argued that as a result of her physical and psychological conditions she is permanently and totally disabled. Respondent argued that psychological conditions are not compensable under a strict reading of the statutory definition of personal injury under the Workers Compensation Act

(Act). Consequently, respondent argued that absent the psychological component, claimant's compensation should be limited to a work disability. The Administrative Law Judge (ALJ) found claimant sustained her burden of proof that she is permanently and totally disabled on account of her work-related injury.

Respondent requests review and asks the Board to reverse a long history of appellate court cases in Kansas finding psychological conditions compensable if the psychological condition is directly traceable to a compensable physical injury. Respondent argues the statutory definition of personal injury does not encompass a psychological condition.

Claimant argues the evidence is uncontroverted that she is permanently and totally disabled and requests the Board to affirm the ALJ's Award.

The issues for Board determination are whether the Act permits benefits for a psychological injury/traumatic neurosis and, if so, did claimant meet her burden of proof to establish that she is permanently and totally disabled.

#### **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:

The ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate and supported by the record. It is not necessary to repeat those findings and conclusions herein. The Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein except as hereinafter noted.

The facts of this case are essentially undisputed. Briefly stated, claimant was employed as a truck driver by respondent when she was injured on December 2, 2003. She was going from the passenger seat to the back of the truck when it swerved off the road and then back onto the roadway. Claimant injured her left knee but also received treatment for cervical strain, lumbar strain and following an extended course of conservative treatment she underwent a partial medial meniscectomy and ACL repair on her left knee on September 22, 2005.<sup>1</sup> In 2008 she underwent a partial left knee replacement. Claimant testified that her knee was worse after surgery. When claimant was advised by the surgeon that she would not be able to return to truck driving she had

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<sup>1</sup> Although the ALJ noted that it did not appear claimant had received any treatment for her neck or back injuries, Dr. Jones' May 13, 2010 report details she was treated for those complaints at Concentra Medical Center.

thoughts of suicide and was temporarily admitted to a psychiatric hospital. Claimant also developed an antalgic gait as well as symptoms of psychological neurosis.

Dr. Lowry Jones performed a court ordered medical examination of claimant on May 13, 2010. Based on the *AMA Guides*<sup>2</sup>, Dr. Jones placed claimant in the DRE Category II to the cervical thoracic area which is consistent for a 5 percent whole body impairment due to no evidence of radiculopathy. An additional 5 percent lower back impairment due to no radiculopathy also placed claimant in the DRE Category II. For the knee replacement, claimant received a 20 percent impairment whole body impairment. Using the Combined Values Chart, these whole body impairments combine for a 28 percent impairment. The doctor placed restrictions on the claimant of no repetitive bending or lifting and limited to sedentary activity. Dr. Jones opined that claimant is employable but she should not be doing any type of driving or activities that require prolonged standing, walking or lifting.

Dr. Kathleen Keenan performed a court ordered psychological evaluation of claimant. Dr. Keenan diagnosed claimant with severe major depressive disorder, somatoform pain disorder and severe personality disorder. Dr. Keenan opined claimant's injury triggered her downward emotional slide and exacerbated her preexisting problems. Dr. Keenan rated claimant's psychological impairment at 65 percent but 30 percent was preexisting and the remaining 35 percent was due to the work-related injury. Dr. Keenan further opined that claimant is not capable of substantial gainful employment. Dr. Keenan testified:

Q. Can you explain to us what your conclusions were with regard to that? I think it's in your report.

A. I don't think any reasonable employer would hire her.

Q. That takes into consideration both her physical injury and her psychological injury?

A. It's the whole package. It's the way she comes across, it's the way she looks, it's her injury, it's her lack of skills, it's her bad attitude, personality, it's the package. She's not employable.<sup>3</sup>

Michael Dreiling, vocational expert, evaluated claimant on July 2, 2010. Mr. Dreiling opined that although Dr. Jones indicated claimant had the physical ability to perform sedentary employment, when claimant's additional emotional conditions and limitations

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<sup>2</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *AMA Guides* unless otherwise noted.

<sup>3</sup> Keenan Depo. at 30.

were considered, claimant is essentially and realistically unemployable in the open labor market.

In summary, the uncontroverted evidence establishes claimant suffered permanent impairment due to her whole person orthopedic as well as psychological conditions. Dr. Jones opined claimant's physical injuries would limit her to sedentary employment. Dr. Keenan opined claimant is unable to engage in substantial gainful employment and Mr. Dreiling likewise concluded claimant is unable to engage in substantial gainful employment due to the combination of her orthopedic and psychological impairments.

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.<sup>4</sup> The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.<sup>5</sup> An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.<sup>6</sup>

The Kansas Supreme Court has long held that traumatic neurosis, as well as other psychiatric problems are compensable. "[W]e have held that traumatic neurosis *following physical injury*, and shown to be directly traceable to such injury, is compensable under the act."<sup>7</sup> However, the court in *Berger*<sup>8</sup> cautioned:

Even though this court has long held that traumatic neurosis is compensable; we are fully aware that great care should be exercised in granting an award for such injury owing to the nebulous characteristics of a neurosis. An employee who predicates a claim for temporary or permanent disability upon neurosis induced by trauma, either scheduled or otherwise, bears the burden of proving by a preponderance of the evidence that the neurosis exists and that it was caused by an accident arising out of and during the course of his employment.

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<sup>4</sup> *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

<sup>5</sup> *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

<sup>6</sup> *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

<sup>7</sup> *Jacobs v. Goodyear Tire & Rubber Co.*, 196 Kan. 613, 616, 412 P.2d 986 (1966).

<sup>8</sup> *Berger v. Hahner, Foreman & Cale, Inc.*, 211 Kan. 541, 550, 506 P.2d 1175 (1973).

In *Love*<sup>9</sup>, the Kansas Court of Appeals stated:

In order to establish a compensable claim for traumatic neurosis under the Kansas Workers' Compensation Act, K.S.A. 44-501 *et seq.*, the claimant must establish: (a) a work-related physical injury; (b) symptoms of the traumatic neurosis; and (c) that the neurosis is directly traceable to the physical injury.

A psychological injury is not compensable under Kansas law unless it is directly traceable to a work-related physical injury.<sup>10</sup> A preexisting mental condition is treated like any other health condition and if a work related accident aggravates, accelerates or intensifies the condition it is compensable under the Workers Compensation Act.<sup>11</sup>

Although the respondent requests the Board to reverse the longstanding Kansas appellate court cases dealing with psychological injuries, the Board does not have the authority to ignore *stare decisis* and adopt respondent's argument. The uncontroverted evidence establishes that claimant suffered work-related physical injuries and now has severe depression, somatoform pain disorder and personality disorder. Dr. Keenan testified claimant's injuries triggered her downward emotional slide, exacerbated her preexisting problems and caused a 35 percent permanent functional impairment.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injuries suffered by the claimant were not injuries that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.<sup>12</sup>

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<sup>9</sup> *Love v. McDonald's Restaurant*, 13 Kan. App. 2d 397, Syl., 771 P.2d 557, *rev. denied* 245 Kan. 784 (1989).

<sup>10</sup> *Adamson v. Davis Moore Datsun, Inc.*, 19 Kan. App. 2d 301, 868 P.2d 546 (1994).

<sup>11</sup> *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P. 2d 469, *rev. denied* 265 Kan. 884 (1998).

<sup>12</sup> *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

In *Wardlow*<sup>13</sup>, the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work. The court in *Wardlow* looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

The ALJ analyzed the uncontroverted evidence in the following fashion:

The claimant argued that she is permanently totally disabled on account of the injuries. K.S.A. 44-510c defines permanent total disability as when the employee has been rendered completely and permanently incapable of engaging in any type of substantial gainful employment. Dr. Jones, based on the claimant's physical injuries, restricted the claimant to sedentary employment and no driving. Given the claimant's employment history of cashier, bartender, Certified Nurse's Aide, auto repair technician, and truck driver, these restrictions leave her little, if any, employment options. Dr. Keenan felt that the claimant's psychological condition renders the claimant unemployable, and vocational expert, Michael Dreiling, testified the claimant was essentially and realistically unemployable from a combination of her orthopedic and emotional limitations.

The record proved the claimant is permanently and totally disabled.<sup>14</sup>

The Board agrees and affirms.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>15</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

### **AWARD**

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated March 3, 2011, is affirmed.

**IT IS SO ORDERED.**

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<sup>13</sup> *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

<sup>14</sup> ALJ Award at 4.

<sup>15</sup> K.S.A. 2010 Supp. 44-555c(k).

Dated this 22nd day of July, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Donald T. Taylor, Attorney for Claimant  
Eric T. Lanham, Attorney for Respondent and its Insurance Carrier  
Kenneth J. Hursh, Administrative Law Judge