BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KENNETH W. CARLETON Claimant	)	
VS.	)	
THE BOEING COMPANY Respondent	)	Docket No. 1,023,991
AND	)	
INDEMNITY INSURANCE CO. OF NORTH AMERICA Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the March 9, 2007, Award entered by Special Administrative Law Judge Marvin Appling. The Board heard oral argument on June 15, 2007. Robert R. Lee and Lawrence Gurney, of Wichita, Kansas, appeared for claimant. Eric K. Kuhn, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The Special Administrative Law Judge (SALJ) found that claimant had a 23 percent permanent partial impairment of function to the body as a whole but found that claimant was not entitled to a work disability because he failed to make a good faith effort to find post-accident employment. As a result, the SALJ awarded claimant compensation based upon a 23 percent permanent partial general disability.

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

ISSUES

Claimant argues that he is entitled to a work disability even though he failed to make a good faith effort to find appropriate employment after his job with respondent ended. Claimant contends his work disability is 82.5 percent based upon an 86 percent task loss and a 79 percent wage loss.[1] Claimant concedes that he did not make a good faith job search and, therefore, computes his wage loss using an imputed wage-earning ability of $320 per week. In the event the Board finds claimant is entitled to a work disability, claimant also argues that respondent is not entitled to receive a credit for claimant's withdrawal of retirement benefits because no life expectancy tables were entered into the record.

Respondent argues that claimant's neck and upper back injuries were preexisting and were not impaired as a result of any accidents claimed in this case. Thus, the only injuries under consideration in this case are claimant's injuries to his bilateral upper extremities. Respondent argues that under *Casco*[2], claimant sustained two scheduled injuries, is not totally and permanently disabled, and is not entitled to a work disability. In the event the Board finds that claimant is entitled to a work disability, respondent originally contended it was entitled to a credit for withdrawals claimant made from his 401(k) account at respondent, but this issue was withdrawn by counsel for respondent during oral argument to the Board.

Also during oral argument to the Board, the parties disagreed as to the claimant's date or dates of accident and disagreed as to the meaning of stipulations taken by the ALJ at the Regular Hearing.[3] Claimant contends the parties agreed to claimant having been injured by a series of accidents ending May 31, 2005, and thus has a single date of accident of May 31, 2005, for all his injuries. Respondent denies that this was the intent of its stipulation. Respondent argues that claimant's neck/upper back injury occurred on May 13, 2005, with no subsequent aggravation and no permanency.

The issues for the Board's review are:

(1) What was claimant's date or dates of accident; specifically, did claimant's neck/upper back injuries result from a single traumatic accident that occurred on May 13, 2005, or are they instead the result of a series of accidents and traumas that occurred through to claimant's last day worked on May 31, 2005?

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[1] The wage loss is 78 percent based on the stipulated average weekly wage of $1,484 and a post-accident wage earning ability of $320.

[2] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh. denied* (2007).

[3] See Stipulations Nos. 1, 2, 3 and 4 of Award and Regular Hearing Trans. (Oct. 11, 2006) at 3-5.

(2) Are claimant's bilateral upper extremity injuries and resulting disabilities covered by the schedule contained in K.S.A. 44-510d? If so, is claimant permanently and totally disabled?

(3) Was claimant's impairment to his back and neck caused by or aggravated by an accident arising out of and in the course of his employment with respondent?

(4) If claimant's injuries resulted in a general body disability, is claimant entitled to a work disability even though he failed to make a good faith effort to find employment?

FINDINGS OF FACT

Claimant is 51 years old. He worked for respondent for 20 years as a quality assurance inspector. Claimant alleges he suffered a series of accidents beginning May 13, 2005, and continuing through May 31, 2005. However, he also describes a specific incident on May 13, 2005, when he twisted his neck performing an inspection. Claimant continued to work off and on through May 31, 2005, when he was laid off by respondent.

Claimant was seen by Dr. Paul Stein, a board certified neurosurgeon, on July 25, 2005, at the request of claimant's attorney. He reported to Dr. Stein that on May 13, 2005, he was working in an airplane when he turned his head and felt some resistance. He lost his balance for awhile. He went to respondent's medical clinic but was told to return on May 18. By May 18, claimant was having mild low back problems and had developed intermittent numbness in his right foot when walking. He reported that the soreness in his low back would go into the right hip. Claimant also complained to Dr. Stein of intermittent numbness in his right hand. About a week and a half after his initial injury of May 13, claimant woke up with numbness, tingling, and throbbing in both hands that lasted for one week. Claimant reported to Dr. Stein that he had been sent to Dr. John Estivo by respondent. Dr. Estivo ordered an MRI scan and a nerve conduction test. Dr. Estivo provided claimant with work restrictions of a 15 pound lifting limit, no constant activity with either hand, and no bending or stooping more than one-third of the day.

Claimant told Dr. Stein that he currently had pain in both shoulders, neck pain, headaches, pain that radiates down the right arm to the elbow, tingling and numbness in the right index finger and adjacent portions of the thumb and middle finger. He also complained of numbness and tingling in both hands which awakens him sometimes at night. He has low back pain with radiation into the right buttock and down the posterior aspect of the right lower extremity. He has numbness and tingling in the right foot.

Upon examination, Dr. Stein found claimant had stiffness and discomfort when he walked. Range of motion of his shoulders and neck was decreased. He had crepitus at both acromioclavicular joints at the shoulders and pain with movement of the shoulders. He had positive Phalen's test and carpal tunnel compression test, suggesting the possibility of carpal tunnel syndrome. He had a Tinel's sign at the left elbow and both palms.

Sensory examination was normal except claimant had a decrease in the fourth and fifth fingers of the left hand. Range of motion of claimant's low back was limited. He had mild tenderness but no spasm. He had no indication of nerve root damage in either lower extremity.

Dr. Stein diagnosed claimant with a disk herniation at C6-C7 on the right, which he indicated might be responsible for some of the numbness in claimant's index finger. Dr. Stein found substantial peripheral nerve entrapment in claimant's upper extremities. Regarding claimant's left shoulder, Dr. Stein noted that claimant had previous surgery and that an MRI scan suggested possible bursitis or tendinitis. Regarding claimant's right shoulder, Dr. Stein's examination was consistent with acromioclavicular degenerative disease and rotator cuff tear. Regarding claimant's low back, Dr. Stein recommended epidural steroid injections and physical therapy with back strengthening. If claimant did not respond to this, Dr. Stein stated that claimant would have to decide if his back symptomatology was severe enough to consider surgery.

Dr. Stein gave claimant temporary work restrictions of no lifting more than 20 pounds with a single lift and 10 pounds occasionally. Repetitive activity with the hands and any repetitive activity with the hands at or above shoulder level should be avoided. Claimant should do no prolonged or strong grasping.

Claimant returned to see Dr. Stein on April 19, 2006. Since his last examination by Dr. Stein, claimant had undergone bilateral carpal tunnel release surgeries at the wrists and bilateral ulnar nerve decompression at the elbows. Claimant also had arthroscopic surgery at the right shoulder for repair of a rotator cuff tear and right shoulder acromioplasty. These surgeries had been performed by Dr. J. Mark Melhorn. Claimant still complained of pain in the right shoulder, saying it ached at rest and he had discomfort with use. He also complained of intermittent pain in his neck and said it was difficult to look overhead for extended periods of time. He has aching in both wrists. Numbness and tingling are still present but to a lesser degree in the median nerve distribution bilaterally, thumb, index, middle, and adjacent half of the ring finger. This has improved since surgery. His hands tend to feel swollen and have some numbness with repetitive use. Low back pain is not present, but claimant has discomfort in both buttocks and into the thighs. He no longer has numbness or tingling in the lower extremities.

Upon examination, Dr. Stein found claimant's gait was slow but without a lateralizing limp. There was no tenderness or paraspinal muscular spasm in the low back. Range of motion to the low back was moderately to severely restricted. Strength was intact in the lower extremities. There was no nerve root damage in the lower extremities. Claimant had some restriction of motion in his neck and tenderness in the back of the neck, but no muscular spasm. There was a mild Tinel's sign at the elbows, more on the left than right. The Phalen's test was negative on both hands. Claimant had a decrease in grip strength.

Dr. Stein found claimant was at maximum medical improvement (MMI) for the peripheral nerve entrapment in both upper extremities and rotator cuff repair at the right shoulder. For the right shoulder, claimant has a positive drop arm test and a decrease in range of motion. If claimant is prepared to consider the possibility of further surgery, Dr. Stein recommended an MRI-arthrogram of the right shoulder to determine if there is persistent or recurrent tearing of the rotator cuff. If claimant is not willing to pursue further intervention, he is at MMI.

Based on the AMA *Guides*[4], Dr. Stein found claimant had a 10 percent upper extremity impairment on the right for carpal tunnel syndrome. For loss of range of motion of the right shoulder, he found claimant had a 5 percent right upper impairment for decreased flexion, a 1 percent right upper impairment for decreased extension, and a 6 percent right upper impairment for decreased abduction. Using the Combined Values Chart, Dr. Stein found that claimant had a 20 percent permanent partial impairment to the right upper extremity. These ratings convert to a 12 percent whole person impairment for the right upper extremity.

On claimant's left, Dr. Stein found that he had a 10 percent permanent partial impairment to his left upper extremity for ulnar nerve entrapment and a 10 percent impairment for carpal tunnel syndrome. These combine for a 19 percent permanent partial impairment to claimant's left upper extremity and converts to a 12 percent impairment to the body as a whole.

Dr. Stein also found that claimant had a 5 percent permanent partial impairment to the body as a whole for his cervical spine.

In converting claimant's impairments, Dr. Stein combined claimant's 12 percent for the right upper extremity, 12 percent for claimant's left upper extremity, and 5 percent for claimant's cervical spine, and found claimant had a 27 percent permanent partial impairment to the body as a whole.

Claimant had a previous neck condition in August 2002 which was diagnosed as a herniated disc. His neck bothered him, but not to the extent it did after the accident in May 2005. Dr. Stein stated that claimant's incident and work at respondent in May 2005 aggravated the symptoms in his cervical spine, which resulted in the restriction of his activities. In his deposition Dr. Stein stated that claimant had a 5 percent impairment for his preexisting neck/upper back condition at C6-7. If the 5 percent impairment to claimant's cervical spine was removed because it was from a preexisting condition, claimant's body as a whole impairment would be 23 percent. Nevertheless, Dr. Stein said that the restriction he gave for claimant to avoid overhead activity was to avoid neck

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[4] 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.

extension and is related to the work-related aggravation of claimant's preexisting neck condition. As such, even if there was no additional percentage of functional impairment, the restrictions were attributed to the work-related aggravation and were not preexisting.

Dr. Stein recommended that claimant permanently avoid activity overhead or with the hands above shoulder level or more than 24 inches from the body. He should also avoid lifting more than 15 pounds occasionally with the right hand up to chest level.

Jerry Hardin, a human resource consultant, met with claimant on June 5, 2006, at the request of claimant's attorney. He prepared a task list setting out 21 tasks claimant performed in the 15 years before his work-related injury. Dr. Stein reviewed the task list prepared by Mr. Hardin and of the 21 tasks on the list, opined that claimant could no longer perform 18, for a task loss of 86 percent. Dr. Stein testified that if he eliminated the restriction for the shoulder, his task loss opinion would not change. He did not, however, separate his task loss opinions for the neck and the upper extremity injuries.

At the time Mr. Hardin met with claimant, claimant had been laid off by respondent. Claimant told Mr. Hardin that he had been making $1,234 a week, and Mr. Hardin opined that claimant's fringe benefits could be about $200 to $250 per week. Mr. Hardin thought that claimant would currently be able to earn around $8 per hour or $320 per week in occupations such as truck driver or light equipment operator. Mr. Hardin also thought claimant could work in retail sales and parts sales. The parties have stipulated that claimant's average weekly wage, including fringe benefits, is $1,484.

Respondent was bought out by Spirit in 2005. Claimant was offered a quality assurance position with Spirit, but it was not an accommodated position. Nevertheless, claimant accepted the job. That job offer from Spirit, however, was rescinded before claimant could attempt it. Claimant has not worked since May 31, 2005. He was released from treatment in August 2006 and has looked for work but has been unsuccessful. Claimant lives in El Dorado. He has not looked for work in Wichita because he does not want to drive back and forth. His plans are to find a job, but he admits he has not made a lot of effort to do so. He applied for social security disability benefits but was denied.

PRINCIPLES OF LAW

In *Treaster*,[5] the Kansas Supreme Court held that the appropriate date of accident for injuries caused by repetitive use or mini-traumas (which this is) is the last date that a worker (1) performs services or work for an employer or (2) is unable to continue a particular job and moves to an accommodated position. In *Treaster*, the Kansas Supreme

[5] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

Court also approved the principles set forth in *Berry*,[6] in which the Court of Appeals held that the date of accident for a repetitive trauma injury is the last day worked when the worker leaves work because of the injury. The long line of cases applying the rule for the last date possible as the date of accident was altered by the Legislature's July 1, 2005, amendment to K.S.A. 44-508(d), which now states that a claimant's date of accident is the earliest of several triggering events:

> "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. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[7]

K.S.A. 44-510c(a)(2) states:

> 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.

K.S.A. 44-510d states in part:

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[6] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[7] K.S.A. 2006 Supp. 44-508(d)

(a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

. . . .

(11) For the loss of a hand, 150 weeks.

(12) For the loss of a forearm, 200 weeks.

(13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

. . .

(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

(b) Whenever the employee is entitled to compensation for a specific injury under the foregoing schedule, the same shall be exclusive of all other compensation except the benefits provided in K.S.A. 44-510h and 44-510i and amendments thereto, and no additional compensation shall be allowable or payable for any temporary or permanent, partial or total disability, except that the director, in proper cases, may allow additional compensation during the actual healing period, following amputation. The healing period shall not be more than 10% of the total period allowed for the scheduled injury in question nor in any event for longer than 15 weeks. The return of the employee to the employee's usual occupation shall terminate the healing period.

K.S.A. 44-510e(a) states in part:

If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of disagreement, except that in case of temporary or permanent partial general disability not covered by such schedule, the employee shall receive weekly compensation as determined in this subsection during such period of temporary or

permanent partial general disability not exceeding a maximum of 415 weeks. Weekly compensation for temporary partial general disability shall be 66 2/3% of the difference between the average gross weekly wage that the employee was earning prior to such injury as provided in the workers compensation act and the amount the employee is actually earning after such injury in any type of employment, except that in no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c and amendments thereto. 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.

K.S.A. 44-510f(a) states in part:

Notwithstanding any provision of the workers compensation act to the contrary, the maximum compensation benefits payable by an employer shall not exceed the following:

(1) For permanent total disability, including temporary total, temporary partial, permanent partial and temporary partial disability payments paid or due, $125,000 for an injury or any aggravation thereof;

. . .

(3) subject to the provisions of subsection (a)(4), for permanent or temporary partial disability, including any prior temporary total, permanent total, temporary partial, or permanent partial disability payments paid or due, $100,000 for an injury or any aggravation thereof; and

(4) for permanent partial disability, where functional impairment only is awarded, $50,000 for an injury or aggravation thereof.

K.S.A. 44-501(c) (Ensley 2000) states:

> 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.

In *Casco*,[8] the Kansas Supreme Court stated:

> Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.
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> When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof, the calculation of the claimant's compensation begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c.
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> When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof and the presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in some type of substantial and gainful employment, the claimant's award must be calculated as a permanent partial disability in accordance with the [*sic*] K.S.A. 44-510d.
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> K.S.A. 44-510e permanent partial general disability is the exception to utilizing 44-510d in calculating a claimant's award. K.S.A. 44-510e applies only when the claimant's injury is not included on the schedule of injuries.
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> K.S.A. 44-510c(a)(2) requires that the disability result from a single injury and that condition may be satisfied by the application of the secondary injury rule.

In *Rash*,[9] the Kansas Court of Appeals held:

> "If a finding is made that a good faith effort has not been made, the factfinder will have to determine an appropriate post-injury wage based on all the

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[8] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, Syl. ¶¶ 7, 8, 9, 10, 11, *reh. denied* (2007).

[9] *Rash v. Heartland Cement Company*, 37 Kan. App. 2d 175, 154 P.3d 15 (2006)

> evidence before it, including expert testimony concerning the capacity to earn wages."[10]

In *McLaughlin*,[11] the Kansas Court of Appeals stated:

> Where the evidence in a workers' compensation case supports the trial court's finding that the claimant suffered a work disability but no functional disability, proof of functional disability is not a prerequisite for recovery under K.S.A. 44-510e.
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> . . . .
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> Excel argues that, since a showing of functional impairment is required for permanent partial disability under K.S.A. 44-510d, the same requirement must exist under 44-510e. See *Gross v. Herb Lungren Chevrolet, Inc.*, 220 Kan. 585, 586-87, 552 P.2d 1360 (1976).
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> The *Gross* case does not support Excel's argument. In *Gross*, the court distinguished the statute applicable to scheduled injuries (44-510d) from the statute applicable to nonscheduled injuries (44-510e). Although the nature of the disability under the two statutes is the same, the compensation schemes differ. *Gross* limits the requirement of functional disability to scheduled injuries.

Casco addressed combinations of scheduled injuries and determined that they could not be treated as general body disabilities. *Casco*, however, did not change the longstanding rule that combinations of scheduled injuries with nonscheduled injuries should be treated together as general body disabilities. In *Bryant*,[12] the Supreme Court held:

> If a worker sustains only an injury which is listed in the -510d schedule, he or she cannot receive compensation for a permanent partial general disability under -510e. If, however, the injury is both to a scheduled member and to a nonscheduled portion of the body, compensation should be awarded under -510e.

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[10] *Id.* at 181, quoting *Copeland v. Johnson Group*, 24 Kan. App. 2d 306, 320, 944 P.2d 179 (1997).

[11] *McLaughlin v. Excel Corporation*, 14 Kan. App. 2d 44, Syl. ¶ 2, 47, 783 P.2d 348, *rev. denied* 245 Kan. 784 (1989).

[12] *Bryant v. Excel Corp.*, 239 Kan. 688, 689, 722 P.2d 579 (1986); see also *Reese v. Gas Engineering & Construction Co.*, 219 Kan. 536, 548 P.2d 746 (1976); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Bergemann v. North Central Foundry, Inc.*, 215 Kan. 685, 527 P.2d 1044 (1974); *Berger v. Hahner, Foreman & Cale, Inc.*, 211 Kan. 541, 506 P.2d 1175 (1973); *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972); *Fogle v. Sedgwick County*, 9 Kan. App. 2d 129, 673 P.2d 465 (1983), *aff'd* 235 Kan. 386, 680 P.2d 287 (1984).

ANALYSIS

(1) Claimant's date of accident is May 31, 2005.

Claimant left his employment with respondent due to economic reasons. The record does not establish a date that the authorized physician took claimant off work due to the conditions (injuries) or restricted him from performing the regular duty work that caused the conditions. Likewise, the record fails to establish "the date the condition [was] diagnosed as work related . . . [and] such fact [was] communicated in writing to the [claimant]."[13] Therefore, the date of accident for claimant's series of repetitive use, cumulative trauma injuries should be the date claimant gave written notice to respondent. In this case, the earliest date written notice was established as having been given is July 15, 2005, when claimant filed his Application for Hearing with the Division of Workers Compensation. As this was after claimant's last day working for respondent, the date of accident may be determined by the factfinder "based on all the evidence and circumstances."[14] Accordingly, the Board finds claimant's date of accident to be May 31, 2005, the last day he performed work for respondent.

(2) Claimant's disability resulting from his upper extremity injuries is not covered by the schedule.

In *Bryant*,[15] the Kansas Supreme Court stated the general rule:

> If a worker sustains only an injury which is listed in the -510d schedule, he or she cannot receive compensation for a permanent partial general disability under -510e. If, however, the injury is both to a scheduled member and to a nonscheduled portion of the body, compensation should be awarded under -510e.

Because claimant sustained injuries to his neck and upper back, which are nonscheduled injuries, all of his injuries, both scheduled and nonscheduled, are to be combined and compensated as a permanent partial disability under K.S.A. 44-510e. Furthermore, claimant is not permanently totally disabled. Vocational expert, Mr. Hardin, stated that claimant retained the ability to earn $320 per week. The Board agrees.

(3) Claimant aggravated his preexisting neck/upper back condition by a series of work-related traumas.

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[13] K.S.A. 2006 Supp. 44-508(d).

[14] *Id.*

[15] *Bryant v. Excel*, 239 Kan. 688, 689, 722 P.2d 579 (1986).

In addition to his injuries to his upper extremities, claimant's neck/upper back symptoms worsened during the period of May 13, 2005, through May 31, 2005. These symptoms were reported to respondent, and he was sent to Dr. Estivo, who recommended work restrictions. Dr. Stein found limitations in range of motion of claimant's neck and back. He also recommended restrictions for these injuries. Claimant was diagnosed with an aggravation to his preexisting cervical condition. Although this aggravation did not result in an increase in his percentage of permanent impairment rating under the AMA *Guides*, it did result in permanent restrictions. Claimant suffered a permanent worsening of his symptoms and limitations in his range of motion.

(4) Claimant is entitled to an award of work disability.

After he was laid off by respondent, claimant failed to make a good faith effort to find appropriate employment. Based upon his education, training and experience, claimant retains the ability to earn approximately $320 per week working within his restrictions in the open labor market. As this is less than 90 percent of his preinjury average weekly wage while working for respondent, claimant is entitled to a work disability (a permanent partial general disability in excess of the percentage of functional impairment).

CONCLUSION

Claimant has a 78 percent wage loss and an 86 percent task loss, which computes to an 82 percent work disability.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge Marvin Appling dated March 9, 2007, is modified as follows:

Claimant is entitled to permanent partial disability compensation at the rate of $449 per week not to exceed $100,000 for a 82 percent work disability.

As of July 6, 2007, there would be due and owing to the claimant 109.43 weeks of permanent partial disability compensation at the rate of $449 per week in the sum of $49,134.07 for a total due and owing of $49,134.07, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $50.865.93 shall be paid at the rate of $449 per week until fully paid or until further order from the Director.

Although the SALJ approved a "fee arrangement" in his award and placed a lien against the award in the amount of 25 percent in favor of claimant's attorney, the record does not contain a fee agreement between claimant and his attorney. K.S.A. 44-536(b)

requires that the Director review all fee agreements and approve such contract and fees in accordance with that statute. Should claimant's counsel desire a fee be approved in this matter, he must submit his contract with claimant to the ALJ for approval.

IT IS SO ORDERED.

Dated this _____ day of July, 2007.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

CONCURRING AND DISSENTING OPINION

The undersigned agree with the majority's factual findings and their determinations as to date of accident, that claimant's accident arose out of and in the course of his employment with respondent, including the injuries to his neck and back, and that claimant is entitled to a work disability for his nonscheduled injuries. However, we disagree with the majority's conclusion that the claimant's percentage of impairment and work restrictions (task loss) for his scheduled injuries to his hands, arms and shoulders should be combined with his percentage of impairment and work restrictions (task loss) for his general body injury to his back and neck for a single permanent partial disability award based upon the total of all his impairments. We read *Casco* to require these injuries to be compensated as separate scheduled injuries.

> Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.
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> . . . .

> K.S.A. 44-510e permanent partial disability is the exception to utilizing 44-510d in calculating a claimant's award. K.S.A. 44-510e applies only when the claimant's injury is not included on the schedule of injuries.[16]

Applying the "secondary injury rule," the Supreme Court in *Casco* found claimant sustained simultaneous parallel injuries to his upper extremities (shoulders). Nevertheless, instead of combining the permanent impairment of function percentages for these two shoulder injuries into a single percentage of functional impairment to the body as a whole, the court concluded that "the claimant's award must be calculated as a permanent partial disability in accordance with the [*sic*] K.S.A. 44-510d."[17] As such, the so-called parallel injury rule was not applied so as to take the parallel upper extremity injuries out of the schedule and compensate them as a general body disability under K.S.A. 44-510e.

In *Casco*, when discussing *Honn*[18] and its parallel injury rule as it relates to the statutes defining permanent total disability, permanent partial disability, scheduled injuries and general body disabilities, the Supreme Court makes an analogy to baseball.

> The Workers Compensation Act calculates compensation for injured workers in a specific and sequential manner, their order defined by statute as precisely as the four bases on a major league baseball diamond. *Honn* essentially allows the claimant, after successfully reaching first base, to be waived [*sic*] home and exempted from traversing to second and third bases, thus improperly converting a single into a home run.[19]

The majority, by combining the injuries to the hands, arms and shoulders with the back and neck injuries and awarding a general body disability, is skipping over K.S.A. 44-510d and, in effect, converting a single into a home run.

Because the hands, arms and shoulders are contained within the schedule of K.S.A. 44-510d(a), claimant's disability to these extremities must be compensated according to the schedule at the 225 week level. The back and neck, however, are not contained within the schedule and, therefore, must be compensated as a general body disability under K.S.A. 44-510e.

All of claimant's injuries occurred as a result of a series of work-related accidents and aggravations ending May 31, 2005. Nevertheless, claimant's right and left upper extremity injuries are contained within the schedule of injuries in K.S.A. 44-510d.

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[16] *Casco*, Syl. ¶¶ 7, 10.

[17] *Id.*, Syl. ¶ 9.

[18] *Honn v. Elliott*, 132 Kan. 454, 295 Pac. 719 (1931).

[19] *Casco* at 527.

Therefore, claimant's permanent disability resulting from his bilateral upper extremity injuries are compensable as two separate scheduled injuries based upon his percentage of functional impairment for each.

Claimant has a 5 percent permanent partial functional impairment to his neck/upper back, but all of this impairment rating preexisted his dates of accident in this case. Nevertheless, even though claimant has no additional permanent partial disability on a functional basis, as there was an aggravation of claimant's preexisting cervical condition which resulted in additional work restrictions, claimant is still entitled to a work disability if that injury resulted in a loss of his ability to earn wages of over 10 percent of his preinjury average weekly wage and a loss of ability to perform any of the job tasks he performed during the relevant 15 years before his accidental injury. Unfortunately, as this case was litigated before the Kansas Supreme Court's decision in *Casco* was issued, the parties did not attempt to separate what job tasks claimant lost the ability to perform due to the neck/upper back injury alone without also considering the restrictions given because of the upper extremity injuries. As such, in the interest of fairness, this case should be remanded to the ALJ with instructions that the record be reopened to allow the parties to present evidence of what wage and task loss claimant has solely as a result of the injury to his neck/upper back.

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BOARD MEMBER

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BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
Eric K. Kuhn, Attorney for Respondent and its Insurance Carrier
Marvin Appling, Special Administrative Law Judge
Thomas Klein, Administrative Law Judge