

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

<b>BRUCE EFFRESS</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>MANPOWER</b>	)	
Respondent	)	Docket No. 1,033,419
	)	
AND	)	
	)	
<b>CONTINENTAL CASUALTY COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent requested review of the June 1, 2010 Award by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on September 8, 2010.<sup>1</sup>

**APPEARANCES**

William L. Phalen, of Pittsburg, Kansas, appeared for the claimant. Terry J. Torline, of Wichita, Kansas, appeared for respondent and its insurance carrier (Respondent).

**RECORD AND STIPULATIONS**

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

**ISSUES**

The claimant sustained an injury on February 13, 2007. Immediately following the accident he was taken to the hospital. While undergoing treatment he was subjected to

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<sup>1</sup> Due to the sudden retirement of Carol Foreman, Stacy Parkinson, of Topeka, Kansas, was appointed to serve as a pro tem in this matter.

a urinalysis. Test results later revealed the presence of controlled substances for which claimant had no prescription. Respondent denied liability based upon these test results and asserted the absolute defense embodied in K.S.A. 44-501(d)(2). The ALJ denied the applicability of the defense and instead, awarded claimant a 16 percent functional impairment as well as a 70.5 percent permanent partial general (work) disability, all as a result of a work-related injury on February 13, 2007. The ALJ also excluded a number of medical records that were offered into evidence by way of an affidavit of the custodian of records reasoning that “without foundation or explicit stipulation based on the correspondence” were inadmissible.<sup>2</sup>

The respondent has appealed this decision asserting a number of issues. Respondent first and foremost maintains the absolute defense contained within K.S.A. 44-501(d)(2) applies and eliminates any and all liability in this matter for claimant’s injuries and resulting impairment, if any. Simply put, respondent argues that the drug test taken in the hospital conclusively establishes that claimant was impaired at the time of his accident as that term is used in K.S.A. 44-501(d)(2). Thus, it has no liability in this matter and the Award should be reversed.

Alternatively respondent contends that although claimant admittedly sustained an accident on the date at issue, he nonetheless failed to establish that he sustained personal injury arising out of and in the course of his employment. Respondent also argues that claimant’s present impairment, if any, is not causally connected to his work-related accident. Rather, that the medical records produced and supported by the affidavit of the records custodian, support respondent’s contention that claimant’s physical complaints pre-date the February 13, 2007 accident. Accordingly, respondent suggests the Award be reversed to deny claimant any recovery as he has failed to establish a compensable claim and/or that he sustained any permanency.

Claimant asks the Board to modify the Award and find claimant permanently and totally disabled as a result of his February 13, 2007 accidental injury. Alternatively, claimant asks the Board to affirm the ALJ’s Award.

#### **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 Board finds the ALJ’s recitation of the facts are generally accurate and supported by the record. Thus, it is not necessary to repeat those findings and conclusions in this Order except as necessary to explain the findings contained herein.

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<sup>2</sup> ALJ Award (June 1, 2010) at 5.

Admissibility of Drug Test Results

Inasmuch as respondent contends it has no liability in this matter pursuant to K.S.A. 44-501(d)(2), the Board must first consider whether the drug tests offered by respondent were admissible. Respondent argues that the urinalysis results which were offered at the trial in this matter conclusively established claimant was conclusively impaired at the time of his accident. Respondent maintains the test results showed that claimant had benzodiazepine and an opiate derivative in his urine and that the expert testimony contained within the record further establish that claimant's accident was contributed to by these substances.

The Kansas Workers Compensation Act (Act) provides an absolute defense to an employer for an employee's work-related accident when

. . . the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances, including but not limited to, any drugs or medications which are available to the public without a prescription from a health care provider, prescription drugs or medications, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens.<sup>3</sup>

This statute goes on to provide a statutory scheme whereby drug tests can be used as a complete defense to a workers compensation claim. In order to properly enter these test results into evidence and thereby gain the benefits of this defense, certain statutory criteria must be met.<sup>4</sup>

(A) There was probable cause to believe that the employee used, had possession of, or was impaired by the drug or alcohol while working;

(B) the test sample was collected at a time contemporaneous with the events establishing probable cause;

(C) the collecting and labeling of the test sample was performed by a licensed health care professional;

(D) the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;

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<sup>3</sup> K.S.A. 2006 Supp. 44-501(d)(2).

<sup>4</sup> *Id.*

(E) the test was confirmed by gas chromatography, gas chromatography-mass spectroscopy [GCMS] or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample; and

(F) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee.<sup>5</sup>

The failure to establish any one of these criteria renders the test results inadmissible. The probable cause requirement can be satisfied by establishing any one of the following criteria:

(A) The testing was done as a result of an employer mandated drug testing policy, in place in writing prior to the date of accident, requiring any worker to submit to testing for drugs or alcohol if they are involved in an accident which requires medical attention;

(B) the testing was done in the normal course of medical treatment for reasons related to the health and welfare of the injured worker and was not at the direction of the employer; however, the request for GCMS testing for purposes of confirmation, required by subsection (d)(2)(E) of this section may have been at the employer's request;

(C) the worker, prior to the date and time of the accident, gave written consent to the employer that the worker would voluntarily submit to a chemical test for drugs or alcohol following any accident requiring the worker to obtain medical treatment for the injuries suffered. If after suffering an accident requiring medical treatment, the worker refuses to submit to a chemical test for drugs or alcohol, this refusal shall be considered evidence of impairment, however, there must be evidence that the presumed impairment contributed to the accident as required by this section; or

(D) the testing was done as a result of federal or state law or a federal or state rule or regulation having the force and effect of law requiring a post accident testing program and such required program was properly implemented at the time of testing.<sup>6</sup>

The ALJ noted the pertinent facts as follows:

After his fall, the [c]laimant was transported by EMS to the Coffeyville Regional Medical Center. As a result of that hospitalization, a drug screen was initiated. Robert Foster, an R.N., initiated the drug screen pursuant to what he believed was protocol. (Foster Depo., P. 18) The protocol that Foster relied on is represented in his deposition exhibit 4. That drug screen identified a benzodiazepine and an opiate

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<sup>5</sup> K.S.A. 2006 Supp. 44-501(d)(2)(A-F).

<sup>6</sup> K.S.A. 2006 Supp. 44-501(d)(3)(A-D).

derivative. (McMaster Ex 3). None of these results are within the exclusive [sic] presumption provided for in [sic] statute. Moreover, Dr. McMaster hedged his testimony with respect to these tests, and described what “typically” is done with these tests. (McMaster p. 15).<sup>7</sup>

After noting these facts, the ALJ concluded as follows:

The Court finds no objective evidence that GCMS [gas testing was ever done, or requested. The Court further finds that any verifiable chain of custody cannot be determined after Foster dropped off the sample in the lab at Coffeyville Regional Medical Center. . . The Court can find no basis on which to include the results of the test under these circumstances, as the test was administered by Foster based on what he believed was procedure, not on any exception to the probable cause exceptions contained in the statute. In the absence of a conclusive presumption, or a probable cause exception, the Court is unable to conclude, based on the evidence, that the injury was contributed to by any use of drug by the [c]laimant.<sup>8</sup>

The ALJ focused his analysis on 1) the type of testing that was purportedly done; 2) the lack of probable cause to implement the drug test; 3) the lack of a verifiable chain of custody of the urine sample and 4) the lack of evidence to establish contribution of the drug(s) to claimant’s accident.

Respondent contends the ALJ erred in excluding the drug test results. Respondent argues that Dr. John F. McMaster, the physician it retained to examine claimant’s medical records, including the test results, testified that LabCorp, the entity which performed the drug test was properly certified and in fact, performed the GCMS required by the statute.<sup>9</sup> Respondent also contends there was sufficient evidence to establish that it was claimant’s urine that was tested, and that by virtue of respondent’s drug testing policy that was in place before the accident, there was probable cause for the test under K.S.A. 44-501(d)(3).

The Board has carefully reviewed the entire record and concludes the ALJ properly excluded the tests results from evidence. As noted above, the statute requires *each* of the 6 elements to be proven in order to admit the rest results into evidence. And with respect to the first element, probable cause, that element can alternatively be satisfied by providing evidence as to any one of the four alternatives designated in K.S.A. 44-501(d)(3).

Here, the most glaring issue is the evidence bearing on the chain of custody relating to the urine that was tested. The statute requires that “foundation evidence *must*

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<sup>7</sup> ALJ Award (June 1, 2010) at 4-5.

<sup>8</sup> *Id.* at 5.

<sup>9</sup> McMaster Depo. at 15.

establish, ***beyond a reasonable doubt***, that the test results were from the sample taken from the employee.”<sup>10</sup>

There is no dispute that Nurse Foster assisted claimant in providing a urine sample while at the emergency room in the hours after his accident. Nurse Foster is a licensed health care professional and he collected and labeled the samples himself.<sup>11</sup> But Nurse Foster admitted that the urine taken from claimant was not deposited directly into the sterile cups. Rather, Nurse Foster reached for an open plastic portable urinal in order to collect the sample and then transferred the urine into the sterile cups for marking and transporting to the lab.

Although Nurse Foster testified that such plastic urinals are thrown away as hazardous waste after being used, they are nonetheless stored out in the open, unwrapped, unattended, on the wall within the treatment room before used. While Foster testified that the urinal appeared to be clean, he conceded that he had no idea how long the urinal was left there nor how many people had access to it before it was used during the collection process.<sup>12</sup> In fact, he admitted there was no way to know if there had been any tampering with the urinal.<sup>13</sup>

Based on these facts, the Board has serious doubts about whether the urine taken from claimant was unadulterated at the time of collection. In other words, it is plausible that there was another substance within the urinal that was inadvertently included in the claimant’s urine. Independent of this concern, there are more significant deficiencies revealed in the evidence with respect to the chain of custody of the urine sample.

Nurse Foster testified that after the sample was collected, marked and sealed, he “would have” taken the collection cups around the corner to the lab. He has no independent recollection of taking the samples to the lab, only that he is “guessing” as to his actions.<sup>14</sup> From there, he testified that he would have put the cups on the counter and that he usually gets the attention of a lab worker to signify that he is dropping off samples.<sup>15</sup>

The documentation relating to the delivery of this sample to the hospital lab does not contain any signature of the individual within the hospital’s lab which would signify that

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<sup>10</sup> K.S.A. 44-501(d)(2)(F).

<sup>11</sup> K.S.A. 44-501(d)(2)(C).

<sup>12</sup> Foster Depo. at 29-30.

<sup>13</sup> *Id.* at 30.

<sup>14</sup> *Id.* at 35.

<sup>15</sup> *Id.* at 36.

the samples were received. There is a place within the form for the lab to acknowledge receipt of the sample, yet the form remains blank and contains only a signature of the claimant and Nurse Foster. It is also worth noting that the form also compels the medical provider collecting the sample to confirm the identity of the individual providing the sample with a photo I.D.. Nurse Foster admits this was not done.<sup>16</sup>

More importantly, the sample itself was not tested at the hospital. Rather, it was in some fashion, transferred to a LabCorp facility in the state of Mississippi. Again, there is no evidence in this record that would explain how or when the urine sample was transferred to that facility, the conditions of that transfer, the custodian of the sample during transfer, much less the identity of the individual(s) who tested the sample. The only evidence contained within the record that bears upon this issue came from Dr. McMaster, an individual who has testified that he is “familiar” with LabCorp and similarly, knows how they “typically” conducts their drug screens.<sup>17</sup>

The ALJ found the lack of evidence as to the chain of custody precluded a conclusion that the test results were from claimant’s urine sample. Respondent brushes aside this conclusion as error, arguing:

. . . a close review of the statute reveals that there is no requirement for the respondent to establish a “verifiable” chain of custody for drug test results. In fact, the Act does not even have a chain of custody requirement at all. Rather, it requires simply that the foundation evidence must establish that the test results were from a sample taken from the claimant. K.S.A. 44-501(d)(2)(F). Because the Act does not require a chain of custody, such a requirement cannot be imposed by the courts.<sup>18</sup>

Respondent’s contention is illogical and ignores crucial statutory language. In order to prevail on this defense, respondent must establish each of the statutory elements. One of those elements mandates an evidentiary foundation be laid which proves “**beyond a reasonable doubt**,” that the test results were from the sample taken from the employee.”<sup>19</sup>

Our Courts have concluded that “[e]stablishing the chain of custody is part of the foundation for the admission of physical evidence.”<sup>20</sup> Thus, while the statute does not expressly use the term “chain of custody” it nonetheless requires evidence which

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<sup>16</sup> *Id.* at 32-33.

<sup>17</sup> McMaster Depo. at 15.

<sup>18</sup> Respondent’s Reply Brief at 4-5 (filed Aug. 24, 2010) (citations omitted).

<sup>19</sup> K.S.A. 44-501(d)(2)(F).

<sup>20</sup> *State v. Taylor*, 231 Kan. 171, 642 P.2d 989 (1982).

establishes “beyond a reasonable doubt” that the results are from tests performed on claimant’s urine. Absent a demonstrable and reliable chain of custody, it would be impossible to conclude, beyond a reasonable doubt, that a given sample was from the claimant and that the same sample that was used for the drug test.

The Board has examined the evidence contained within the record and like the ALJ, finds that there is a significant break in the chain of custody and as a result, respondent has failed to establish, beyond a reasonable doubt, that the test results were from claimant’s urine sample. As noted above, there is some question surrounding the collection of the sample as the plastic urinal used in the retrieval may have been contaminated. But that is not the only foundational concern presented in this case. The more problematic evidentiary deficiency is found in the total absence of a chain of custody once the urine sample was delivered by Nurse Foster to the hospital’s lab.

Once the two plastic cups were delivered to the lab in the hospital, it is unclear what happened to and who was in control of the sample. It seems the two cups somehow were transferred to another lab in Mississippi and certain tests were run. But how they came to be transferred and the circumstances surrounding that transfer are unexplored in this record. Distilled to its essence, the integrity of the urine sample was compromised once the sample left Nurse Foster’s hands. As a result, one of the essential statutory elements was not satisfied and this renders the test results inadmissible. For these reasons, the ALJ’s decision to exclude the drug test from evidence is affirmed.

The failure to meet any one of the necessary elements contained in K.S.A. 44-501(d)(2) renders the test results inadmissible and the defense inapplicable. Nonetheless, it is worth noting that it appears from the record that there was probable cause in this record to test claimant following the accident.

The ALJ concluded the drug test “was administered by Foster based on what he believed was procedure, not on any exception to the probable cause exceptions contained in the statute.”<sup>21</sup> It is true that Nurse Foster collected a urine sample pursuant to a physician’s order<sup>22</sup> and Foster had no direct communication from respondent about this individual and the need for a drug screen. Rather, based upon his own experience, once he learned claimant was involved in a work-related accident, he decided on his own to consult the appropriate book and utilize the protocol purportedly provided by this respondent. The fact is that the protocol Nurse Foster followed is a policy aimed directly at pre-employment testing, not at post-accident testing.<sup>23</sup> Thus, he was following a policy that was not applicable to the instant facts. Moreover, there is some question as to

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<sup>21</sup> ALJ Award (June 1, 2010) at 5.

<sup>22</sup> Foster Depo. at 17-18.

<sup>23</sup> R.H. Trans., Resp. Ex. 3 & 4.

whether the policy he followed was one implemented by this respondent. The identity of the employer on the policy is the same as the one involved here, but the address listed on the policy form is not the same as the office involved in this claim.

Nonetheless, it is undisputed this respondent had a drug testing policy in place before this accident which required testing for drugs or alcohol if an employee was involved in an accident requiring medical attention.<sup>24</sup> Additionally, at the time of hiring claimant consented to post-accident drug testing.<sup>25</sup> Thus, respondent has met two of the criteria, each of which satisfied the probable cause element required by K.S.A. 44-501(d)(2)(A). Accordingly, the Board finds that respondent has established the requisite probable cause in this claim and the ALJ's Award is therefore reversed as to this factual finding. This conclusion, however does not render the drug test admissible for the reasons set forth above.

The ALJ also took issue with the type of testing that was performed. K.S.A. 44-401(c)(2)(E) requires the drug test to be "confirmed by gas chromatography-mass spectroscopy or other comparably reliable analytical method...". Dr. McMaster, a physician retained by respondent to review the records and educate the fact finder as to the test results and the physical affect of the two substances found in the urine sample, testified that he was "familiar" with the LabCorp facility and that "typically" GCMS testing is done on such samples.<sup>26</sup>

Although there is some suggestion in this record, through Dr. McMaster's testimony, that this urine sample was subjected to the statutorily required GCMS analysis, there is no substantiation of that assertion. And it is unclear precisely how Dr. McMaster is "familiar" with this lab and how he knows this lab would "typically" conduct GCMS analysis.<sup>27</sup> Put simply, the foundation for his testimony is unknown. The test results themselves do not explain the method of testing used and there is no testimony from anyone from within the lab to corroborate Dr. McMaster's assertion. Based upon this evidence, or lack thereof, the Board finds that the ALJ's conclusion that there was little credible evidence to suggest that the urine sample was properly tested as required by the statute should be affirmed. Thus, independent of the finding with respect to the chain of custody, this deficiency is fatal to the respondent's absolute defense under K.S.A. 44-501(d)(2).

In summary, the Board agrees with and affirms the ALJ's conclusion with respect to elements in subparagraphs (E) and (F) of K.S.A. 44-501(d)(2). Thus, the drug test was

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<sup>24</sup> K.S.A. 44-501(d)(3)(A).

<sup>25</sup> R.H. Trans. at 27-28.

<sup>26</sup> McMaster Depo. at 15-16.

<sup>27</sup> *Id.* at 15-16.

properly excluded from consideration. In light of this conclusion, there is no need to consider whether the drug(s) allegedly found within claimant's urine contributed to the accident.

#### Admissibility of Medical Records

During the trial of this matter, respondent's counsel frequently posed questions to the physicians regarding their knowledge of claimant's earlier medical care and the existence of prior injuries. It appears from the record that there may have been a number of events that necessitated claimant seeking out medical care, dating back to 2003 and as late as January 2007, a little more than a month before the accident at issue in this claim. Claimant apparently did not disclose these events to the physicians that were treating him for his work-related accident. And the records were not made available to each of these physicians.

Then, in the process of completing the evidence in this case, respondent filed with the Court an affidavit along with copies of the records which reflect the earlier medical evaluations and treatment. Respondent provided a copy of the records to claimant's counsel and informed him that respondent intended on relying upon them for purposes of this case, allowing claimant's counsel 10 days to object. At the conclusion of the 10 days, respondent presented the records to the Court (on March 25, 2010), along with the affidavit of the records custodian and announced its belief that these records were to be considered part of the record because claimant had failed to file any sort of objection.

The ALJ excluded the proffered medical records finding that there was no stipulation nor was there sufficient foundation provided for the admission of the records.<sup>28</sup> Respondent contends that claimant waived his right to object as he failed to respond to the presentation of the records and object within the unilaterally imposed 10 days provided by respondent. Moreover, respondent contends the records are independently admissible as the physicians who testified in this matter relied upon them in making their opinions, specifically Dr. Do and Dr. McMaster.

While it is true that a testifying physician can rely upon records generated by another medical provider in formulating his or her own opinions<sup>29</sup>, that rule does not render *any* medical records admissible if offered, particularly in the method employed here by respondent.

Like the ALJ, the Board is unpersuaded that the method employed by respondent's counsel is sanctioned by statute and effectively established any sort of waiver of claimant's

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<sup>28</sup> ALJ Award (June 1, 2010) at 5.

<sup>29</sup> *Roberts v. J.C. Penney Co.*, 263 Kan. 270, 279, 949 P.2d 613 (1997).

right to object. Moreover, there is no showing in this record that Dr. Prostic or Dr. McMaster relied upon these records in formulating their opinions. And while it seems that Dr. Do might have had some of those records in his possession,<sup>30</sup> it is unclear if he had them before he rendered his opinion as to claimant's diagnoses, impairment and need for restrictions. Rather, it was respondent's approach to pose hypothetical questions to these physicians *after* they rendered their opinions in order to challenge the thoroughness of the history provided by claimant and/or determine if the existence of the earlier medical treatment would alter the physicians' testimony. In fact, these records were first offered by respondent, without foundation, during claimant's evidentiary deposition and were the focus of a contemporaneous objection on the part of claimant's counsel. Under these facts, the Board finds the ALJ was correct in excluding these medical records from evidence.

#### Nature and Extent of Impairment

Having concluded that the drug test results and the proffered medical records are excluded from evidence, the Board can now consider the balance of the issues framed by the parties' briefs. The respondent not only appealed the ALJ's findings as to nature and extent, but also argued that claimant failed to prove he sustained an injury that arose out of and in the course of his employment.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.<sup>31</sup> Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.<sup>32</sup>

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which

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<sup>30</sup> Do Depo. at 30-31.

<sup>31</sup> K.S.A. 2006 Supp. 44-501(a).

<sup>32</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

the accident occurred and means the injury happened while the worker was at work in the employer's service.<sup>33</sup>

When respondent's contentions are closely examined, it is clear that the essence of its argument is that claimant's present physical and psychological complaints and impairment are not causally connected to his February 13, 2007 accident. There is no doubt that claimant fell approximately 20 feet while cleaning out a railroad car. He was rushed to the hospital where he remained for a period of time and treatment followed. His injuries were significant and include pain in his neck and lower back. There is simply no question that claimant was injured as a result of his work-related accident. Rather, the true nature of respondent's argument is that his present complaints are not due to his accident and/or are not as severe as he purports them to be.

In May 2007, claimant was evaluated by Dr. Edward Prostic, at his attorney's request. Dr. Prostic diagnosed an injury to the spine, specifically a sprain and strain to the lumbar spine as well as thoracic outlet syndrome.<sup>34</sup> He recommended shoulder exercises, work hardening and medications, including anti-depressants. Dr. Prostic did not identify any abnormal findings within the cervical spine.<sup>35</sup> In fact, other than the thoracic outlet syndrome, all of Dr. Prostic's exam findings were normal following this May 2007 examination.<sup>36</sup>

Dr. Prostic examined claimant again, in January 2008. He noted that claimant had received treatment from Dr. Do for neck complaints as well as the MRI results which identified minimal disc desiccation at C4-5. Dr. Prostic noted that claimant's low back problems were more prominent than those in his neck and that claimant occasionally noted numbness in both his arms and legs as well as headaches. He assigned a 5 percent permanent partial impairment for the cervical complaints and an additional 8 percent for the lumbar complaints, for a combined 13 percent impairment.<sup>37</sup>

Dr. Prostic opined that all of claimant's diagnoses were caused or contributed to by the work related accident that occurred on February 13, 2007. He then adopted the restrictions imposed by Dr. Do as follows:

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<sup>33</sup> *Id.*

<sup>34</sup> Prostic Depo. (Sept. 14, 2009) at 10.

<sup>35</sup> *Id.* at 31.

<sup>36</sup> *Id.*

<sup>37</sup> All ratings herein are to the whole body and are issued pursuant to the 4<sup>th</sup> edition of the *guides*.

lifting up to 50 pounds occasionally and 20 pounds frequently; occasional bending, twisting, squatting, kneeling, reaching overhead, and climbing; and more than frequent standing or walking.<sup>38</sup>

Dr. Prostic also reviewed the February 4, 2010 task analysis prepared by Karen Terrill. This report reflected no less than 5 interviews Ms. Terrill had with claimant. It is clear from her testimony that claimant was, at best, a poor historian regarding his work history. And there are some musings in the record that claimant's father might have been using his social security information in order to obtain employment and as a result, the social security records are inconsistent with claimant's sometimes vague recollection of his work history. But Ms. Terrill finally received what she believed to be a complete listing of claimant's past employment history and prepared a final task list. According to Dr. Prostic, claimant lost the ability to perform 26 of 63 tasks (41 percent loss) when the restrictions itemized above are used.<sup>39</sup> Independent of this task loss, he opined that claimant was permanent totally disabled.<sup>40</sup> Ms. Terrill also believed claimant was permanently and totally disabled.

Dr. Pat Do, the treating physician, began seeing claimant in July of 2007. He had claimant undergo an MRI to the neck and lumbar spine due to claimant's subjective complaints. According to Dr. Do, claimant had a "little bit of a dry disc at C4-5" but otherwise the MRIs were normal. He testified that the dry disc is considered a degenerative condition.<sup>41</sup> He saw claimant again in August 2007 and at that point he recommended trigger point injections to claimant's thorocolumbar area.<sup>42</sup> He ultimately assigned a 5 percent impairment as a result of claimant's cervical and lumbar complaints.<sup>43</sup> Dr. Do opined that claimant sustained a 41 percent task loss based upon Ms. Terrill's task analysis.<sup>44</sup>

Claimant was also evaluated by Dr. John Pro, a board certified physician and psychiatrist on May 4, 2009. Dr. Pro examined claimant's history of his present injury and concluded claimant had developed a major depressive disorder as a result of the February 13, 2007 accident. He opined that claimant sustained a 22 percent impairment,

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<sup>38</sup> Prostic Depo. (Sept. 14, 2009) at 16.

<sup>39</sup> *Id.* (Feb. 22, 2010) at 8.

<sup>40</sup> *Id.* (Sept. 2009) at 19.

<sup>41</sup> Do Depo. at 5.

<sup>42</sup> *Id.* at 6.

<sup>43</sup> *Id.* at 41.

<sup>44</sup> *Id.* at 34-35.

12 percent of which was attributable to the work-related injury.<sup>45</sup> This is the only opinion within the record bearing on claimant's alleged psychiatric component of his injury. Claimant acknowledges he had a troubled childhood but denies any significant treatment for prior psychiatric problems. Dr. Pro believed claimant was capable of working from a psychological perspective but he would need some accommodations and restrictions.<sup>46</sup> According to Dr. Pro, claimant would require a structured job, "perhaps beginning with half-time with managerial support, structure, and relatively low stress."<sup>47</sup>

The ALJ adopted the opinions of Drs. Pro and Do and found claimant sustained a combined functional impairment of 16 percent.<sup>48</sup> He made no comment with respect to claimant's assertion that he was permanently and totally disabled. The ALJ did, however, award claimant a permanent partial general (work) disability of 70.5 percent which is comprised of the uncontroverted 41 percent task loss (as opined by Drs. Prostic and Do) and the uncontroverted 100 percent wage loss.<sup>49</sup>

Respondent appealed the ALJ's findings with respect to both the functional impairment and the work disability. Simply put, respondent contends both Drs. Do, Pro and Prostic were misinformed as to claimant's true medical history and therefore, the ALJ erred in relying upon their opinions. Thus, claimant has failed in his evidentiary burden to establish a permanent impairment or a work disability as a result of his work-related injury.

In support of this contention, respondent refers to the medical records that it attempted to enter into evidence which purport to evidence claimant's prior medical history, most of which claimant has denied. As noted earlier, respondent's methodology at entering those into evidence was not proper and those records are not in evidence. And although respondent orally argued that the medical records should be considered part of the record because the physicians' relied upon them in forming their opinions<sup>50</sup> the record does not support respondent's contention.

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<sup>45</sup> Pro Depo. at 16.

<sup>46</sup> *Id.* at 19-20.

<sup>47</sup> *Id.*, Ex. 2 at 5 (Dr. Pro's May 4, 2009 report).

<sup>48</sup> This is the combined value of a 5 percent for the neck and cervical impairment and 12 percent for the psychological component of the claim.

<sup>49</sup> Since his termination, claimant has not retained comparable employment and has therefore suffered a 100 percent actual wage loss. See e.g., *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

<sup>50</sup> *Roberts v. J.C. Penney Co.*, 263 Kan. 270, 279, 949 P.2d 613 (1997).

Rather, the record shows that respondent's counsel consistently asked Drs. Prostic and Dr. Pro about claimant's prior medical history but there is no evidence that their opinions were formulated by using those records. Indeed, those records were not attached to their depositions as exhibits. The physicians were merely questioned about their knowledge as to the content of those records, thereby challenging the thoroughness of their opinions. It did appear that Dr. Do might have known about earlier accidents and need for treatment but he ultimately testified that regardless of the earlier events, claimant sustained a 5 percent functional impairment as a result of the February 2007 accident.<sup>51</sup>

Claimant, on the other hand, argues that claimant is permanently and totally disabled as a result of this accident and asks the Board to modify the Award to reflect this finding.

After considering the evidence offered by the parties (excluding the medical records which respondent attempted to enter into evidence via an affidavit of the records custodian) the Board finds that the ALJ's findings with respect to permanent partial general (work) disability should be affirmed.

Permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which 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.

Until recently, this statute was to be read in tandem with *Foulk and Copeland*.<sup>52</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 (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, that a worker's

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<sup>51</sup> Do Depo. at 35.

<sup>52</sup> *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995); *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

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.

In *Bergstrom*<sup>53</sup>, the Kansas Supreme Court overruled the *Foulk* and *Copeland* holdings, disavowing the “good faith” doctrine in favor of strict construction of the statutory language. Accordingly, the wage loss component of the work disability formula is determined by comparing the pre-injury average weekly wage with the actual post-injury earnings, if any. This determination is merely a mathematical calculation and made regardless of the reasons for the wage loss.<sup>54</sup> The Court further noted that it had consistently elected to refrain from reading language into the statutes that the legislature did not include.<sup>55</sup>

In this instance, claimant has not returned to work and bears a 100 percent wage loss. And as for task loss, the only evidence contained within the record is that claimant bears a 41 percent task loss (as per the opinions of Dr. Do and Dr. Prostic). Although respondent argues that claimant never reviewed the final task analysis which was prepared by Ms. Terrill for accuracy and should be disregarded, the Board is not persuaded. Ms. Terrill went to great lengths to obtain the most accurate information she could, re-interviewing claimant (who is by all accounts a rather poor historian). She also consulted the social security records which listed employment associated with claimant’s social security number. Under the circumstances, the list of tasks is as accurate as it can be and the Board finds no reason to wholly disregard either the list of the physicians’ opinions regarding claimant’s task loss. Accordingly, the ALJ’s finding that claimant bears a 70.5 percent work disability is affirmed.

As for claimant’s contention that he is permanently and totally disabled, the Board finds that claimant has failed to prove it is more likely than not that he is unable to engage in any substantial gainful employment.

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

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<sup>53</sup> *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

<sup>54</sup> *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 224 P.3d 1197, 224 P.3d 1197 (2010).

<sup>55</sup> *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

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 injury suffered by the claimant was not an injury 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>56</sup>

In *Wardlow*<sup>57</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.

Here, claimant has a varied and inconsistent work history, always working at low level unskilled jobs and sometimes just for a day at a time. Claimant has a limited educational background. Nevertheless, the physical restrictions that have been imposed do not appear to be overly limiting. Dr. Pro, the psychiatrist, testified that claimant was able to work, albeit with some accommodation. Although claimant sustained a physical injury as a result of his work-related accident, the Board is not persuaded that claimant is permanently and totally disabled.

Lastly, both parties suggest the ALJ's findings with respect to functional impairment should be modified. Claimant maintains the functional impairment should be increased to reflect the 13 percent assigned by Dr. Prostic (for the cervical and lumbar impairment) and combined with the 12 percent assigned by Dr. Pro (for the psychiatric impairment). Respondent maintains claimant has failed to prove any functional impairment attributable to this accident. This argument stems, in large part, from the medical records which reflect claimant's prior hospital visits and physical complaints and his lack of credibility in this matter.

The ALJ adopted Dr. Do's analysis with respect to claimant's impairment, awarding a 5 percent to the whole body, which reflects a 2.5 percent impairment each to the cervical and low back. He reasoned that as the treating physician, Dr. Do was the most credible with respect to claimant's physical impairment. And as to the psychological impairment,

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<sup>56</sup> *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

<sup>57</sup> *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

Dr. Pro's opinion that claimant bears a 12 percent psychological impairment as a result of this accident remains uncontroverted. While it is true that claimant had a troubled childhood, and he acknowledged receiving therapy and counseling, Dr. Pro explained how this accident caused claimant's depression and irritability. The ALJ combined these two ratings and awarded a 16 percent functional impairment. Under these facts and circumstances, the Board finds this conclusion should be affirmed.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated June 1, 2010, is affirmed in all respects except as it relates to the ALJ's conclusion regarding probable cause and K.S.A. 44-501(d)(2)(A). That factual conclusion is reversed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October 2010.

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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
- Terry J. Torline, Attorney for Respondent and its Insurance Carrier
- Thomas Klein, Administrative Law Judge
- Stacy Parkinson, Pro Tem Board Member