

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

<b>SHAVONDA GALES</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,034,467
<b>WICHITA CLINIC, P.A.</b>	)	
Respondent	)	
AND	)	
	)	
<b>LIBERTY MUTUAL INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent appeals the September 4, 2008, Award of Administrative Law Judge Nelsonna Potts Barnes (ALJ). Claimant was awarded a 64 percent permanent partial work disability after the ALJ determined that claimant's slip and fall in the parking lot constituted an accident which arose out of and in the course of her employment.

Claimant appeared by her attorney, Brian D. Pistotnik of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, John R. Emerson of Kansas City, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on December 3, 2008.

**ISSUES**

1. Did claimant's injury arise out of and in the course of her employment with respondent? Respondent contends that claimant's slip and fall in the parking lot did not constitute a compensable accident as the parking lot was not respondent's property and claimant was still coming to work at the time of the accident. Claimant argues the parking lot was the location where she was instructed to park and was

property controlled by respondent. Therefore, the claimant contends the premises exception to the “going and coming” rule applies.<sup>1</sup>

2. Does claimant’s failure to accept, for personal reasons, proffered accommodated employment, that would have paid a wage of at least 90 percent of her average weekly wage, constitute a lack of good faith in her post-injury job search? Claimant was offered a job with T-Mobile that paid \$10.00 per hour. Claimant was forced to decline the job as the offer, given on a Friday, required claimant to begin training the following Monday, and claimant could not arrange daycare for her two children and three foster children in that amount of time.
3. If claimant’s failure to accept the offered job constituted a lack of good faith, should a wage be imputed to claimant, or should her actual 100 percent wage loss be utilized in the disability formula pursuant to K.S.A. 44-510e?
4. What is the nature and extent of claimant’s injury and disability?

#### FINDINGS OF FACT

Claimant began working for respondent as a medical assistant on March 16, 2007. On April 6, 2007, while exiting a parking lot, claimant slipped and fell on ice, suffering injuries to her back, left elbow and left shoulder. Claimant’s supervisor was notified, and claimant was referred to Mark S. Dobyms, M.D. She was diagnosed with a lumbar contusion, lumbar sprain, cervical sprain and left shoulder sprain. Claimant was off work until April 10, 2007, and then returned to work light duty. After a period of conservative care, claimant became frustrated with her treatment by Dr. Dobyms and requested a change of treating physician. She was then referred, after a preliminary hearing was scheduled but not held, to board certified family practice specialist Daniel W. Hufford, M.D.

Dr. Hufford treated claimant conservatively until August 30, 2007, at which time he determined that claimant was at maximum medical improvement (MMI). He rated claimant at 5 percent to the whole person, pursuant to the fourth edition of the *AMA Guides*,<sup>2</sup> but did not assign any permanent restrictions. At the time of his final assessment of claimant, claimant displayed no SI tenderness and no tenderness of either greater trochanter, her strength and reflexes were normal at the knees and ankles and he

---

<sup>1</sup> K.S.A. 2006 Supp. 44-508(f).

<sup>2</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

determined her back pain and sciatica were improved. Claimant did report that her improvement was at 85 percent of normal but described no weakness or pain or parasthesias of her lower extremities. Dr. Hufford was provided a task analysis created by vocational expert Steve Benjamin and opined that claimant had suffered no task loss associated with that list of job tasks.

Claimant was referred by her attorney to board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D., for an evaluation on October 22, 2007. Dr. Murati diagnosed claimant with low back pain with signs and symptoms of radiculopathy, and left SI joint dysfunction. He stated that these diagnoses were directly related to the work-related injury on April 6, 2007. Claimant was rated at a 10 percent whole person impairment, pursuant to fourth edition of the *AMA Guides*.<sup>3</sup> Claimant was restricted to no lifting over 20 pounds, occasional lifting up to 20 pounds, and frequent lifting up to 10 pounds. She was prohibited from crawling, and was to only rarely bend, crouch or stoop. Her sitting, standing, climbing stairs, climbing ladders and driving were limited to occasional with frequent walking allowed. She was also cautioned to alternate sitting, standing and walking. Dr. Murati reviewed the task list created by vocational expert Jerry Hardin and determined that claimant was unable to perform 27 of 52 non-duplicative tasks. This results in a task loss of 52 percent.

The parking garage in which claimant was instructed to park has three covered levels and one uncovered level. The uncovered top level has 280 parking spaces of which respondent had the right to use 130. The spaces were not assigned. The remaining 150 spaces were used by Wesley Medical Center (Wesley) employees, employees of other tenants, visitor parking or patient parking. The garage is owned and controlled by Wesley, and the security for the garage and maintenance of the garage were the responsibility of Wesley. While respondent did have security at its building, they were only called to the parking garage if there was a problem with one of respondent's employees. Respondent did provide security for surface parking lots adjacent to respondent's building. But claimant was not allowed to park there. In the event of inclement weather, Wesley security personnel had the authority to block off the top level of the parking garage and allow respondent's employees to park in the covered sections. Respondent's security personnel did not have that authority. Respondent's building was approximately one block east of the parking garage, across Rutan street.

---

<sup>3</sup> *AMA Guides* (4th ed.).

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>4</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>5</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>6</sup>

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the 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 if it arises out of the nature, conditions, obligations and incidents of the employment."<sup>7</sup>

K.S.A. 2006 Supp. 44-508(f) limits injuries arising out of and in the course of employment to not include,

. . . injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence.<sup>8</sup>

---

<sup>4</sup> K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

<sup>5</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

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

<sup>7</sup> *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

<sup>8</sup> K.S.A. 2006 Supp. 44-508(f).

This is commonly known as the “going and coming” rule. The legislature's rationalization for this is that while on the way to or from work, the employee is subjected only to the same risks or hazards as those which the general public is subjected. Thus, those risks are not causally related to the employment.<sup>9</sup>

An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer.<sup>10</sup>

The “premises” rule creates an exception to the “going and coming” rule where the employee is on the employer's premises even if the employee is on his or her way to or from work. The dispute in this matter centers around the parking garage and whether the top floor of that garage can be construed as respondent's “premises”.

The Kansas Supreme Court has addressed the going and coming rule and the premises exception in two fairly recent cases. In *Rinke*, the claimant was injured while walking in a parking lot adjacent to the Bank of America, her employer's building. The parking lot in *Rinke* had 757 parking spaces, of which 737 were “reserved spaces” for Bank employees only. The remaining 20 spaces were reserved for employees of Wesley Occupational Services, the remaining tenant in the bank building. According to the lease agreement rider, the reserved spaces represented by the “reserved parking permits” would at all times be located within an area of the lot designated for use solely by the Bank. There was no walk-in traffic as the only activity in the building, other than the Bank and Wesley, was an ATM on the first floor. The Bank also had the right to install and maintain a drive-up ATM facility, at the bank's expense in an area along the lot's eastern edge.

The claimant, in *Rinke*, was injured as she approached her car after exiting the building using the only door authorized for anyone to exit and enter the building. In construing the “premises” exception, the Court in *Rinke* noted that precedent required the employer to exercise “control” of an area in order for the place to be part of the employer's premises.<sup>11</sup> The Court determined that *Rinke* was injured on the Bank's premises because: (1) the parking lot was adjacent to the building where she worked; (2) the Bank leased a substantial portion of the building and the parking lot; (3) the Bank was allocated a certain portion of the lot; (4) the Bank specifically requested her to park in the allocated spaces; and (5) she was injured in that designated area of the lot leased by the Bank.

---

<sup>9</sup> *Rinke v. Bank of America*, 282 Kan. 746, 148 P.3d 553 (2006).

<sup>10</sup> K.S.A. 2006 Supp. 44-508(f).

<sup>11</sup> *Rinke* at 753.

The Kansas Supreme Court also considered the “going and coming” rule and the “premises” exception in *Thompson*.<sup>12</sup> In *Thompson*, the claimant was furnished parking in a public parking garage across a public street from the office building in which she worked. On the date of accident, the claimant went to the fourth floor of the garage, crossed the public street in an overhead walkway and took the elevator to the eighth floor of the building. As she exited the elevator, she fell, injuring herself. Neither the elevator, the parking garage nor the building in which the claimant worked were owned, controlled or maintained by her employer, although the firm did pay for the claimant’s parking as part of her employment contract. The Kansas Court of Appeals, in *Thompson*, construed the Kansas cases to,

. . . indicate that Kansas narrowly construes the term “premises” to be a place controlled by the employer or a place where an employee may reasonably be during the time he or she is doing what a person so employed may reasonably do during or while the employment is in progress.<sup>11</sup>

The Kansas Supreme Court found the Kansas Court of Appeals’ construction of the term “premises” to be accurate.

Kansas case law requires control by an employer in order for an area to be part of the employer’s premises for purposes of the “premises” exception to the “going and coming” rule.<sup>12</sup> The Court in *Thompson* discussed the “proximity” or “zone of employment” rule but refused to adopt such a rule for Kansas.

Both *Rinke* and *Thompson* discuss in detail the joint ownership of the respondent’s building and the parking lot by the same entity. Both consider cases from other jurisdictions where joint ownership of the building and the parking lot leased to and used by the respondent is considered significant in determining “premises”. The Court in *Thompson* found no evidence that the owner of the building where the employer rented office space also owned the public parking garage where the claimant parked her car. The Court in *Rinke*, after discussing this finding, went on to hold “[i]n our view, this distinction includes a significant difference”.<sup>13</sup> The Court went on to hold that the cases which involved joint ownership of both respondent’s building and the parking lot involved “a much more substantial landlord and employer tenant relationship covering employee

---

<sup>12</sup> *Thompson v. Law Offices of Alan Joseph*, 256 Kan. 36, 883 P.2d 768 (1994).

<sup>11</sup> *Id.* at 39, citing *Thompson v. Law Offices of Alan Joseph*, 19 Kan. App. 2d 367, 373-374, 869 P.2d 761 (1994).

<sup>12</sup> *Id.* at 40.

<sup>13</sup> *Rinke* at 757.

parking existed than in *Thompson*".<sup>14</sup> In the instant case, respondent leased a substantial portion of space in the Wesley Medical Center's complex, including the space where respondent's clinic is located as well as portions of the top floor of the parking lot, also owned by Wesley. Because of that fact, this matter appears more in line with the facts in *Rinke* rather than those of *Thompson*. The Board finds claimant did suffer an accidental injury which arose out of and in the course of her employment, with the parking lot on which claimant was injured being a part of respondent's "premises". Therefore, the Board finds that the "going and coming" rule does not apply to deny claimant benefits in this case. The ruling by the ALJ granting claimant benefits is affirmed.

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.<sup>15</sup>

In determining what, if any, wage loss claimant has suffered, the statute must be read in light of both *Foulk*<sup>16</sup> and *Copeland*.<sup>17</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 an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

If a finding is made that a good faith effort has not been made, the factfinder [*sic*] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .<sup>18</sup>

---

<sup>14</sup> *Id.* at 757.

<sup>15</sup> K.S.A. 44-510e.

<sup>16</sup> *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

<sup>17</sup> *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

<sup>18</sup> *Id.* at 320.

Respondent argues that claimant's failure to timely arrange for daycare and the loss of the T-Mobile job constitutes a lack of good faith on claimant's part. The ALJ disagreed as does the Board. Claimant was given little time to arrange daycare for five children, four under the age of three. When she did successfully arrange for the daycare, she contacted T-Mobile but received no response. The fact claimant had made up to 200 applications indicates a good faith effort on her part. The one misstep with T-Mobile will not work as a penalty in this instance. As claimant was without income at the time of the regular hearing, the Board finds claimant has suffered a 100 percent loss of wages.

The ALJ averaged the task loss opinions of Dr. Hufford and Dr. Murati, finding a 27.5 percent task loss. The Board affirms this finding as well. In averaging the task loss and wage loss figures, the Board also affirms the finding by the ALJ that claimant has suffered a permanent partial general work disability of 64 percent. Therefore, the award of the ALJ is affirmed.

### CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

### AWARD

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated September 4, 2008, should be, and is hereby, affirmed.

Although the ALJ's Award approves claimant's contract of employment with her attorney, the record does not contain a filed fee agreement between claimant and claimant's attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.<sup>19</sup>

---

<sup>19</sup> K.S.A. 44-536(b).

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December, 2008.

---

BOARD MEMBER

---

BOARD MEMBER

---

BOARD MEMBER

**DISSENT**

The undersigned Board Member respectfully dissents from the majority's opinion and would find the claimant's accident is not compensable. Admittedly, there is a conceptual shift in the analysis behind *Thompson*<sup>20</sup> and the more recent *Rinke*<sup>21</sup> and the rationale for this shift lies in commonality of ownership of the respondent's leased office space and the parking area provided by the respondent. The majority seems to believe that *Rinke* compels a factual finding that when a respondent leases building space *and* parking space from the same entity or individual, that commonality of ownership equates to control. This Board Member disagrees with this approach.

While the commonality of ownership was expressly considered a "significant" factor<sup>22</sup> when determining if an employee's injury occurred on the employer's "premises", this member believes the legal analysis does not stop there. Case law nevertheless requires some element of control. And that control is absent in these facts.

Respondent leased space in an adjacent parking garage and its office space from the same entity. Respondent advised its employees (including claimant) to park on a

---

<sup>20</sup> *Thompson, supra.*

<sup>21</sup> *Rinke, supra.*

<sup>22</sup> *Id.* at 757.

designated level but not in any particular space. Employees were allowed to park anywhere on the top level. There was no mechanism to limit access to this area so that others who were using the surrounding facilities could park on this upper level if need be.

When the *owner* determined that the parking area should be closed due to inclement weather, claimant was permitted to park on lower levels. The *owner* of the parking garage maintained the garage and patrolled the levels. While respondent could, *like anyone else using the parking garage*, contact the owner or manager of the parking garage regarding an issue or concern, that alone should not give rise to a conclusion that there was control. In fact, respondent's employees comprised far less than 20 percent of the total number of parking spaces available in the garage.

These facts make the instant case distinguishable from *Rinke* and based on that distinction, I would find the claimant's injury did not arise out of and in the course of her employment. This set of facts is more like *Thompson* than *Rinke*, in that the necessary element of control is simply not present regardless of the commonality of ownership.

---

BOARD MEMBER

c: Brian D. Pistotnik, Attorney for Claimant  
John R. Emerson, Attorney for Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge