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

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| **ROGER W. WYRE**<br>Claimant | ) | |
| VS. | ) | |
| **CARLSON UTILITY**<br>Respondent | ) | Docket Nos. 1,042,148 and 1,042,301 |
| AND | ) | |
| **TRAVELERS INDEMNITY CO.**<br>Insurance Carrier | ) | |

# ORDER

## STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the June 30, 2009, Award entered by Administrative Law Judge Rebecca A. Sanders. The Board heard oral argument on October 16, 2009. Daniel L. Smith, of Overland Park, Kansas, appeared for claimant. Ronald A. Prichard, of Overland Park, Kansas, appeared for respondent.

In Docket No. 1,042,148, the Administrative Law Judge (ALJ) computed claimant's average weekly wage (AWW) to be $822.64 based on an hourly wage of $19.03[1] and an average of $61.44 overtime for the 26-week period before the July 24, 2007, accident. However, the ALJ found that claimant had no permanent functional impairment as a result of his July 24, 2007, work-related accident.

In Docket No. 1,042,301, the ALJ found that claimant had a work-related accident on July 28, 2008. In computing claimant's AWW as relates to the July 28, 2008, accident,

[1] The evidence was uncontroverted that as of July 24, 2007, claimant's hourly wage was $19.85. See R.H. Trans. at 11.

the ALJ found that claimant's base hourly wage was $22.02[2] and that claimant had an weekly average overtime of $14.34. The ALJ, therefore, calculated claimant's AWW to be $895.14. The ALJ found claimant sustained a work disability of 57 percent from July 28, 2008, through February 19, 2009, based on a wage loss of 28 percent and a task loss of 86 percent. The ALJ found that as of February 20, 2009, claimant has a 93 percent work disability, based on a 100 percent wage loss and an 86 percent task loss.

With the exception of the testimony and report by Dr. Prostic, which are addressed below, the Board has considered the record and adopted the stipulations listed in the Award.

## ISSUES

Respondent argues that the ALJ erred in finding that claimant sustained a work-related injury on or about July 28, 2008. In the event the Board finds that claimant did sustain an injury on or about July 28, 2008, respondent argues that claimant did not sustain any permanent impairment as a result of that injury. Respondent further argues that the evidence does not support an award of work disability for either claimant's July 24, 2007, accident or his alleged July 28, 2008, accident.

Claimant argues the ALJ erred in finding that he had no permanent functional impairment as a result of his July 24, 2007, accident, and contends he is entitled to an award of 29 percent functional disability pursuant to the opinion of Dr. Daniel Zimmerman. Claimant agreed with the ALJ's finding that he is entitled to a work disability; however, he argues the work disability resulted from his July 2007 accident rather than his July 2008 accident. Claimant contends that the deposition testimony and medical report of Dr. Edward Prostic should not be part of the record in this case because he was not provided with a copy of Dr. Prostic's medical report within 15 days after his examination of claimant, as required by K.S.A. 44-515. Claimant further argues that the ALJ incorrectly calculated his average weekly wage for his July 24, 2007, accident.

The issues for the Board's review are:

(1) Should Dr. Prostic's deposition and report be stricken from the record because claimant was not timely provided a copy of his medical report?[3]

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[2] The $22.02 figure used by the ALJ is erroneous. The evidence in the record shows that on July 28, 2008, claimant's hourly wage had been raised from $19.85 to $22.20. Claimant's base weekly wage on July 28, 2008, was $888. R.H. Trans., Resp. Ex. A.

[3] During the oral argument before the Board, the parties agreed that claimant's counsel sent a letter to respondent's counsel on October 3, 2008, requesting a copy of all medical records and reports then in respondent's possession or obtained in the future.

(2) What is claimant's average weekly wage as relates to his July 24, 2007, date of accident?

(3) Did claimant sustain an accidental injury on or about July 28, 2008, that arose out of and in the course of his employment with respondent?

(4) Did claimant suffer a permanent impairment of function either as a result of his work-related accident on July 24, 2007, or his alleged work-related accident of July 28, 2008, or both? If so, what is the nature and extent of his functional impairment for either or both accidents?

(5) Is claimant entitled to a work disability as a result of either the July 24, 2007, work-related accident or the alleged July 28, 2008, work-related accident or both?

## FINDINGS OF FACT

Claimant worked for respondent as a laborer. He earned a base wage of $794 per week. He testified that he also earned overtime and "we was supposed to average out at 10 hours a week overtime."[4] An "Earnings Statement" submitted as an exhibit by claimant shows that from January 1, 2007 through July 15, 2007, claimant earned a total of $1,597.50 in overtime wages for an average of $57.05 a week ($1,597.50 ÷ 28= $57.05).[5]

On July 24, 2007, a 2,000 pound excavator bucket flew off a backhoe and struck claimant on the head, left shoulder, ribs and chest. He sustained fractures of his shoulder, collar bone and some ribs, and had a laceration to his head. He later suffered a collapsed lung. He was in the hospital four days and returned home to convalesce. On September 6, 2007, he was released to return to work four hours a day and then progress longer as tolerated. He had a 30-pound lifting restriction and a restriction of pushing and pulling to 30 pounds.

Claimant testified that he gradually increased his working hours to 8 to 10 hours per day. He was doing the same work he did before the accident, which included digging ditches and laying pipe. After the accident, claimant had pain in his back that went down into his hips and thighs. The pain started to increase to the point where at times he could not stand and had to sit down. He also had problems with his left shoulder.

On July 28, 2008, claimant was using a shovel to hand-dig around a gas main in preparation for laying some pipe when he experienced a sharp increase in his back pain

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[4] R.H. Trans. at 12.

[5] January 1, 2007, thru July 15, 2007, is a period of 28 weeks. The ALJ divided $1,597.50 by 26 to compute claimant's average weekly overtime wages as $61.44 during that period. Dividing $1,597.5 by 28 yields an average weekly overtime of $57.05.

and had general pain. He said the pain worsened to a point where he had to sit down. Claimant testified that he told respondent's owner, Craig Carlson, that he was sitting down because his back was hurting him too badly to work. Mr. Carlson allowed claimant to sit awhile, and then he went back to work. Although his condition had not changed, he worked on July 29. On July 30, claimant went back to work, but about the middle of the day his pain was so bad that he called Mr. Carlson and told him he could not continue to work for respondent. Claimant believes that his condition was caused by his accident in July 2007 and the work he performed after his subsequent return to work.

On August 2, 2008, claimant went to the emergency room complaining of pain in his thoracic region with an onset of three days that was different than his usual back aches. He also complained of pain in his hips and legs, shortness of breath and general flu-like symptoms. He was having a hard time breathing and was wheezing. At the hospital, he had blood work, chest x-rays, and a CT arteriogram of his chest, abdomen and pelvis. He was discharged that day with a diagnosis of thoracic strain. He was told to take a couple of days off to rest and not to lift anything. He was given anti-inflammatory medication, a muscle relaxant and an analgesic. Claimant has not been treated by any medical provider since August 2, 2008.

On August 11, 2008, claimant took a job with P1 Group as a helper and running a forklift. His starting wage was $12 per hour, which was soon raised to $13 per hour. Claimant testified that most of his work was sedentary and was much easier than the work he had done for respondent. Although he still suffered back pain, it was not as bad as the episode he had in July 2008. He was laid off from his job at P1 Group on February 19, 2009, because of lack of work and has been unable to find other employment since that day, although he continues to look.

Dr. Daniel Zimmerman, a board certified independent medical examiner, examined claimant on November 25, 2008, at the request of claimant's attorney. He took a history of claimant's accident of July 24, 2007, where he was hit by a 2,000 pound bucket that fell from a backhoe. Claimant also related that he was injured one year later on July 28, 2008, when he twisted his back while shoveling dirt.

Dr. Zimmerman found that claimant sustained injuries to his head, neck, left shoulder, thoracic spine and rib cage on July 24, 2007. He believed claimant sustained a permanent partial impairment of his left upper extremity at the shoulder level of 19 percent. This would be a rating of 11 percent to the body as a whole. Due to claimant's thoracic spine injury and rib injuries, Dr. Zimmerman diagnosed claimant with chronic thoracic paraspinous myofascitis and osteoarthritis affecting the mid-thoracic spine. He rated claimant's permanent partial impairment to the thoracic spine at 5 percent to the body as a whole. Due to lumbar disc disease with range of motion restrictions and radicular weakness, he opined that claimant sustained a permanent partial impairment of the body as a whole of 16 percent. Using the Combined Values Chart, Dr. Zimmerman rated claimant as having a 29 percent permanent partial impairment to the whole body. All

ratings are based on the AMA *Guides*.[6] Dr. Zimmerman attributed all of his impairment ratings to claimant's July 24, 2007, work-related accident.

Dr. Zimmerman placed restrictions on claimant. He said claimant was capable of lifting 20 pounds on an occasional basis and 10 pounds on a frequent basis. He should avoid work activity at shoulder height or above using the left upper extremity, and he should avoid frequent flexing of the thoracolumbar spine, *i.e.*, avoid frequent bending, stooping, squatting, crawling, kneeling and twisting activities. Dr. Zimmerman opined that claimant's shoulder condition is attributable to the first accident, and the restrictions regarding the use of the upper extremity are a result of that accident. He further stated that claimant's injuries to the thoracic and lumbar spine were the result of a combination of both his accidents, and he could not apportion his restrictions between the two accidents.

Dr. Zimmerman reviewed the job task list prepared by Michael Dreiling and opined that claimant is unable to perform any of the 8 tasks on the list and, therefore, has a 100 percent task loss.

Michael Dreiling, a vocational consultant, interviewed claimant by telephone on February 17, 2009, at the request of claimant's attorney. He prepared a list of eight tasks claimant had performed in the 15-year period before his injuries.

Claimant told Mr. Dreiling that he had completed the ninth grade. He had not acquired a GED. He had no computer or typing skills. He had no formal training after leaving high school. At the time of the interview, claimant was working 40 hours per week earning $13 per hour. In Mr. Dreiling's opinion, claimant had conducted a good faith job search and found appropriate employment for his background and prior skills.

Dr. Edward Prostic, a board certified orthopedic surgeon and medical examiner, examined claimant on April 15, 2009, at the request of respondent. At the deposition of Dr. Prostic taken May 26, 2009, claimant's attorney objected to respondent's attorney's questioning of Dr. Prostic about the contents of his medical report because "the medical report here was not provided to claimant's counsel within 15 days, as required by statute."[7] In his submission letter to the ALJ, claimant's attorney stated that the medical report was not furnished to him until May 19, 2009.

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[6] 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.

[7] Prostic Depo. at 8.

## PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts 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."

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.[8] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[9]

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 the accident occurred and means the injury happened while the worker was at work in the employer's service.[10]

In general, the question of whether the worsening of claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether claimant's subsequent work activity aggravated, accelerated or intensified the underlying disease or affliction.[11]

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[8] K.S.A. 2008 Supp. 44-501(a).

[9] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[10] *Id.* at 278.

[11] *See Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998).

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson,*[12] the court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman,*[13] the court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig,*[14] the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber,*[15] the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury,

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[12] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

[13] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[14] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[15] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."[16]

In *Logsdon*,[17] the Kansas Court of Appeals reiterated the rules found in *Jackson* and *Gillig*:

> Whether an injury is a natural and probable result of previous injuries is generally a fact question.
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> When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.
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> When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

Finally, in *Casco*,[18] the Kansas Supreme Court states: "When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury."

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

> 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. . . . 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

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[16] *Id.* at 728.

[17] *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 3, 128 P.3d 430 (2006); see also *Leitzke v. Tru-Circle Aerospace*, No. 98,463, unpublished Court of Appeals opinion filed June 6, 2008.

[18] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494, *reh. denied* (2007).

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.

In *Bergstrom*,[19] the Kansas Supreme Court stated:

> K.S.A. 44-510e(a) contains no requirement that an injured worker make a good-faith effort to seek postinjury employment to mitigate the employer's liability. *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, 320, 944 P.2d 179 (1997), and all subsequent cases that have imposed a good-faith effort requirement on injured workers are disapproved.

K.S.A. 2008 Supp. 44-511(4) states:

> If at the time of the accident the employee's money rate was fixed by the hour, the employee's average gross weekly wage shall be determined as follows: . . . (B) if the employee is a full-time hourly employee, as defined in this section, the average gross weekly wage shall be determined as follows: (I) A daily money rate shall first be found by multiplying the straight-time hourly rate applicable at the time of the accident, by the customary number of working hours constituting an ordinary day in the character of work involved; (ii) the straight-time weekly rate shall be found by multiplying the daily money rate by the number of days and half days that the employee usually and regularly worked, or was expected to work, but 40 hours shall constitute the minimum hours for computing the wage of a full-time hourly employee, unless the employer's regular and customary workweek is less than 40 hours, in which case, the number of hours in such employer's regular and customary workweek shall govern; (iii) the average weekly overtime of the employee shall be the total amount earned by the employee in excess of the amount of straight-time money earned by the employee during the 26 calendar weeks immediately preceding the date of the accident, or during the actual number of such weeks the employee was employed if less than 26 weeks, divided by the number of such weeks; and (iv) the average gross weekly wage of a full-time hourly employee shall be the total of the straight-time weekly rate, the average weekly overtime and the weekly average of any additional compensation.

K.A.R. 51-3-8 states in part:

> The parties shall be prepared at the first hearing to agree on the claimant's average weekly wage except when the weekly wage is to be made an issue in the case. (a) Before the first hearing takes place, the parties shall exchange medical information and confer as to what issues can be stipulated to and what issues are to be in dispute in the case. . . .
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[19] *Bergstrom v. Spears Manufacturing Company*, __ Kan. __, 214 P.3d 676 (2009).

> (c) The respondent shall be prepared to admit any and all facts that the respondent cannot justifiably deny and to have payrolls available in proper form to answer any questions that might arise as to the average weekly wage. Evidence shall be confined to the matters actually ascertained to be in dispute. The administrative law judge shall not be bound by rules of civil procedure or evidence. Hearsay evidence may be admissible unless irrelevant or redundant.

K.S.A. 44-515 requires an employee to submit to an examination by a reputable health care provider during the pendency of the employee's claim for compensation. That statute further states:

> (a) . . . Any employee so submitting to an examination or such employee's authorized representative shall upon request be entitled to receive and shall have delivered to such employee a copy of the health care provider's report of such examination within 15 days after such examination, which report shall be identical to the report submitted to the employer. . . .
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> . . . .
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> (c) Unless a report is furnished as provided in subsection (a) and unless there is a reasonable opportunity thereafter for the health care providers selected by the employee to participate in the examination in the presence of the health care providers selected by the employer, the health care providers selected by the employer or employee shall not be permitted afterwards to give evidence of the condition of the employee at the time such examination was made.

## ANALYSIS AND CONCLUSION

(1) On April 15, 2009, at respondent's request, claimant submitted to an examination by Dr. Prostic. A report of that examination dated April 15, 2009, and addressed to respondent's attorney was offered by respondent marked as Exhibit 2 at the May 26, 2009, deposition of Dr. Prostic. Claimant's counsel objected to the admission of that report, as well as to Dr. Prostic's testimony concerning his examination of claimant. Although it had been requested, the report of that examination was not furnished to claimant or his attorney within the 15 days required by K.S.A. 44-515(a). In prior cases, the Board has tried to employ a reasonableness standard to K.S.A. 44-515 and sometimes required a showing of prejudice before excluding such evidence. However, since *Casco*,[20] the Board has tried to follow the guidance of the Kansas Supreme Court and apply the literal language of the statute. It is difficult to make sense of subsection (c), but subsection (a) clearly requires production within 15 days. And K.S.A. 44-515(c) prohibits Dr. Prostic from giving evidence of the claimant's condition at the time of his examination. Claimant's objection to the deposition testimony given by Dr. Prostic and the admission of Dr. Prostic's records and report of his examination of claimant is sustained. Dr. Prostic's deposition testimony and report are stricken from the record.

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[20] *Casco*, 283 Kan. 508.

(2) Claimant's gross average weekly wage for his July 24, 2007, date of accident was $1,091.80. This represents the base wage of $794 ($19.85 x 40 hrs.) plus his average weekly overtime of $297.80 (the amount of 10 hours overtime per week as testified to by claimant, at time and a half). Absent evidence, the Board cannot speculate as to what weeks claimant worked or did not work or the amount of overtime claimant earned. The record does not contain a wage statement that itemizes the hours of overtime claimant worked during the 26 weeks claimant worked immediately preceding the date of accident. The Earnings Statement, claimant's Exhibit 1 to the Regular Hearing, shows overtime for a 28 week period ending July 15, 2007, which is not itemized by week and which does not include the week ending July 22, 2007. Therefore, the Board adopts claimant's testimony that he worked an average of 10 hours overtime per week.

(3) Claimant's accident and injury of July 28, 2008, was a direct and probable consequence of his earlier work-related accident on July 24, 2007. As such, all of claimant's compensation award is attributable to his July 24, 2007, accident.

(4) Based upon the uncontradicted testimony of Dr. Zimmerman, claimant suffered a 29 percent permanent impairment to the body as a whole as a result of his July 24, 2007, work-related accident. Claimant is entitled to a permanent partial disability based upon this percentage of functional impairment during the period of time post-accident that he was earning 90 percent or more of his preinjury average weekly wage.

(5) Once claimant's wages after July 24, 2007, fall below 90 percent of his preinjury gross average weekly wage, he is entitled to receive an award of permanent partial disability based upon the average of his percentage of task loss and his percentage of wage loss. Beginning July 31, 2008, claimant has a 100 percent task loss based upon the uncontradicted testimony of Dr. Zimmerman, and a 100 percent wage loss, for a 100 percent permanent partial disability. Beginning August 11, 2008, through February 19, 2009, claimant's wage loss was 52 percent. When this is averaged with his 100 percent task loss, claimant's permanent partial disability is 76 percent. Beginning February 20, 2009, claimant was again unemployed and had a 100 percent wage loss, a 100 percent task loss, and a 100 percent permanent partial disability.

## AWARD

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated June 30, 2009, is modified to find:

From July 24, 2007, through July 30, 2007, claimant has a 29 percent functional impairment.

From July 31, 2007, through August 10, 2007, claimant has a 100 percent work disability.

From August 11, 2007, through February 19, 2009, claimant has a 76 percent work disability.

From February 20, 2009, forward, claimant has a 100 percent work disability.

Claimant is entitled to 53.14 weeks of permanent partial disability compensation at the rate of $510 per week or $27,101.40 for a 29 percent functional disability, followed by 1.57 weeks of permanent partial disability compensation at the rate of $510 per week or $800.70 for a 100 percent work disability, followed by 27.57 weeks of permanent partial disability compensation at the rate of $510 per week or $14,060.70 for a 76 percent work disability, followed by permanent partial disability compensation at the rate of $510 per week not to exceed $100,000 for a 100 percent work disability.

As of November 30, 2009, there would be due and owing to the claimant 122.85 weeks of permanent partial disability compensation at the rate of $510 per week in the sum of $62,653.50 for a total due and owing of $62,653.50, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $37,346.50 shall be paid at the rate of $510 per week until fully paid or until further order from the Director.

**IT IS SO ORDERED.**

Dated this _____ day of December, 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

## DISSENT

The majority's opinion excludes Dr. Prostic's report under the guises of K.S.A. 44-515(a) and (c). However, the statute upon which the majority relies does not compel that result.

K.S.A. 44-515(a) requires a party to produce the health care provider's report within 15 days after an examination. But this section provides no remedy for a party's failure to do so. Only section (c) gives any guidance as to what, if any, remedy there is for a party's failure to disclose that report.

K.S.A. 44-515(c) provides:

> Unless a report is furnished as provided in subsection (a) **and** unless there is a reasonable opportunity thereafter for the health care providers selected by the employee to participate in the examination in the presence of the health care providers selected by the employer, the health care providers selected by the employer or employee shall not be permitted afterwards to give evidence of the condition of the employee at the time such examination was made. [Emphasis added.]

By the statute's own language, the provision seems to contemplate two elements must be met before the penalty (exclusion of the evidence) is imposed. First, a party must fail to deliver a copy of the report within the 15-day period following the examination. Second, it must be shown that *after* the report is tendered, there was a reasonable opportunity for the claimant's chosen physician to participate in the examination (which has presumably already occurred). Setting aside the absurdity of the second element,[21] this has not been shown. There is nothing in the record that suggests that Dr. Zimmerman (claimant's chosen physician) was given an opportunity to observe Dr. Prostic's examination.

Admittedly, the language of the statute contemplates a nonsensical process. But our Supreme Court has recently reiterated its admonition that statutes are to be construed strictly and we are not to read anything into statutes that is not there.[22] And if that

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[21] It is unclear how a physician is to be afforded "reasonable opportunity" to participate in an examination that has already occurred and been the subject of report unless the statute contemplates a second examination.

[22] *Bergstrom v. Spears Manufacturing Company*, ___ Kan. ___, 214 P.3d 676 (2009).

admonition is to be followed, then the elements of the statute have not been met, and Dr. Prostic's report and his testimony should not be excluded as the majority has done.

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BOARD MEMBER

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BOARD MEMBER

c: Daniel L. Smith, Attorney for Claimant
Ronald A. Prichard, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge