

(3) he suffered any functional impairment or disability as a result of a work-related accidental injury. Claimant did not make a claim for temporary total disability benefits and has incurred medical bills in the amount of \$13,631.66.

Respondent maintains: (1) claimant's alleged injuries did not arise out of and in the course of his employment with respondent; (2) claimant did not provide respondent with timely notice of his alleged work-related injuries; and (3) claimant is not entitled to an award of permanent partial disability benefits. Respondent requests the Board affirm the December 29, 2010, Award.

The issues before the Board on this appeal are:

1. Whether claimant met with personal injury by accident arising out of and in the course of his employment.
2. If so, whether claimant gave respondent timely notice of the accident.
3. If so, the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant began working for respondent in August 2005 as a welder. His job duties were to construct sterilizers for hospitals. Claimant's job required him to handle materials weighing 50 pounds or more. While working, claimant often stood on scaffolding to weld. The scaffolds have wheels to move them into place and the wheels are then locked.

On February 25, 2009, claimant, along with a co-worker, was welding while standing on a scaffold approximately four feet off the ground. He was leaning with one elbow on the sterilizer unit he was welding when the scaffold began moving away from the unit because the scaffold wheels were not properly locked. Claimant stopped welding and reached back with his left leg to pull the scaffold back towards the sterilizer unit. He continued working, but felt as though he pulled a muscle in his leg. By the end of the day, claimant was limping.

Claimant told no one at respondent about the injury the day it occurred. He testified, "I guess I made a mistake and I didn't tell anybody."¹ At the end of the workday claimant went home, and he indicated he fell asleep for an hour, then ate supper and fed his dogs.

¹ Starks Depo. at 60.

Later that evening claimant and his wife went out and got ice cream, and then claimant went to bed. When claimant woke the next morning (February 26, 2009) around 4 a.m., he could not stand due to severe lower back pain that shot into his legs. His wife called an ambulance, but claimant had no health insurance, so he had his wife take him to the emergency room. Claimant received an injection and medication and was sent home. At the emergency room, claimant told the nurse he did not know what happened and did not know the cause of his back problems.²

After returning home, claimant went to bed. Later that day, he awoke to severe pain in his back radiating into his legs. Claimant indicated he had not previously experienced back pain of a similar nature. Claimant's wife again called an ambulance and because claimant's pain was so severe he rode in the ambulance to the hospital emergency room. At the hospital claimant underwent an MRI that showed a disc herniation at L5. Claimant admitted he told emergency room personnel that he was not aware of any recent injuries and he told EMS personnel that his back did not hurt the day before.³ Claimant was given pain medication (claimant believes OxyContin) and stayed off work three to four days.

Approximately a week or so later, claimant had difficulty walking and went back to the hospital, where he stayed from March 10-13, 2009. While in the hospital he received a cortisone shot, was given Dilaudid, and was treated for diabetes. After being released from the hospital claimant received two additional cortisone shots and was weaned or taken off the Dilaudid. He also attended physical therapy three times a week for about a month, which ended around the end of April 2009. He was then released to work without restrictions by his family physician, Dr. McReynolds. When claimant was released from physical therapy, he had no pain radiating into his legs and his back pain was a 1 or 2 on a scale of 1-10. Claimant was able to return to work as a welder without accommodations, but was terminated on December 3, 2009, due to an apparent safety violation.

Claimant indicated that prior to the February 25, 2009, incident he only suffered one serious work-related injury. When claimant was around 24 years of age, he burned his hand while working as a hot tar roofer, which is the only time he has been hospitalized. Claimant indicated that prior to February 25, 2009, he has never been involved in a motor vehicle accident that caused him to be hospitalized, never had a sports injury and did not remember having any back problems. Claimant is a diabetic and gives himself four insulin injections every day.

Claimant admitted at regular hearing he did not report the scaffold incident to respondent on the date of the accident. However, he testified, "I believe my wife called in

² R.H. Trans. at 20-21.

³ *Id.*, at 23-24.

for me on the 26th.”⁴ Claimant also indicated that after he went to the hospital, he was treated with narcotic medication and did not know what was going on. Claimant’s wife also testified about the situation. She indicated when claimant came home from work on February 25, 2009, he informed her he felt he pulled a leg muscle. Being a former athlete, she told him to walk it off. Claimant’s wife then questioned him about the injury and he told her about the incident on the scaffold. She testified he told her his leg hurt and it was shooting up into his back.

The day after the scaffold incident, claimant’s wife called respondent’s office and first spoke to an individual by the name of Roger and later to another person by the name of Dan. Claimant’s wife told Roger that claimant hurt his back, was unable to move and they did not know what was going on for sure. She would then call respondent’s office on the days when claimant was unable to work to let them know he was not coming to work. Upon cross-examination, claimant’s wife again indicated she told personnel in respondent’s office on February 26, 2009, that claimant got hurt at work the day before.

On March 3, 2009, claimant was interviewed by a claims adjustor from Travelers Insurance. Claimant told the adjustor that he was not sure how he was injured, but thought it was work related because it could not have been anything else that caused his injury. During this conversation, claimant did not relate the incident on the scaffold to the claims adjustor. The claims adjustor apparently told claimant the claim was being denied because claimant could not tell the adjustor any specific event that happened at work to cause the injury.

On March 9, 2009, claimant’s wife had a telephone conversation with Leslie Coleman, a claims adjustor with Travelers Insurance. Claimant’s wife told Ms. Coleman that she disagreed with the fact that the claim was denied. Claimant’s wife indicated she also told the claims adjustor the injury was work related.

Claimant called work on March 18, 2009, to tell a representative of the respondent about the incident on the scaffold. He was instructed to call the claims adjustor, which he did. Claimant told the adjustor he was off of narcotic medications and could think more clearly. He then told the adjustor about the incident on the scaffold.

On January 4, 2010, at his attorney’s request claimant underwent a medical examination by Dr. George G. Flutter, a physical medicine and rehabilitation physician. He diagnosed claimant with lumbar discopathy at L5-S1 with probable lower extremity radiculitis. He opined that: “Based upon the available information and to a reasonable degree of medical probability, there is a causal/contributory relationship between

⁴ *Id.*, at 37.

Mr. Starks' current condition and the reported injury on or about 02/25/09."⁵ Dr. Fluter indicated claimant fell between DRE Category II and DRE Category III of the AMA *Guides*⁶ and assigned claimant a 10% permanent functional impairment rating to the body as a whole related to claimant's lumbar spine.

Claimant related to Dr. Fluter the scaffolding incident and leg symptoms at work.⁷ Claimant told Dr. Fluter that he worked the rest of the day, but was unable to get out of bed the next morning because of severe back and lower extremity pain. Relying on the February 26, 2009, MRI report, Dr. Fluter indicated the MRI of claimant's lumbar spine revealed an extruded disc fragment in claimant's back. Dr. Fluter also indicated that upon his examination claimant had a positive straight leg raising test on the right. Although he did not have the scan itself, the doctor testified the February 26, 2009, MRI scan showed definite structural changes within the spine.⁸

Dr. Fluter stated: "You can't really tell how long the extruded disc fragment has been there just based on an MRI scan It certainly could have herniated at that time where he pulled himself towards the sterilizer with his leg."⁹ Dr. Fluter indicated the leg pain could have been the initial manifestation of claimant's back condition. Dr. Fluter admitted the fact that claimant did not immediately experience back pain is atypical. However, he also indicated that the onset of pain may be delayed by a few hours or even longer.¹⁰

Dr. Fluter opined claimant could not perform 14 of 15 work tasks for a task loss of 93%, which was based upon the following restrictions he placed upon claimant:

1. Restrict lifting, carrying, pushing and pulling to 35 lbs. occasionally and 15 lbs. frequently (physical demand level between light and medium).
2. Restrict bending, stooping and twisting to an occasional basis.
3. Restrict squatting, kneeling, crawling and climbing to an occasional basis.
4. Avoid prolonged sitting, standing, and walking. Allowance should be made to alternate these activities and change position periodically for comfort.¹¹

⁵ Fluter Depo., Ex. 2 at 4.

⁶ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

⁷ In reference to this incident, claimant refers to the left leg in his testimony, but the history in Dr. Fluter's report refers to the right leg.

⁸ Fluter Depo. at 35-36.

⁹ *Id.*, at 37.

¹⁰ *Id.*, at 28-29.

¹¹ *Id.*, Ex. 3 at 1-2.

At respondent's request, claimant underwent a medical examination on August 30, 2010, by Dr. John F. McMaster, an emergency physician and a Fellow in the American Academy of Disability Evaluating Physicians. His diagnoses of claimant included: "Lumbosacral spondylosis. a) L5-S1 degenerative disk disease. b) Transient lower extremity radiculitis."¹² He also indicated claimant has insulin-requiring diabetes mellitus, had a history of hepatitis C and kidney stones and suffered from a tobacco use disorder.

Dr. McMaster reviewed a CD of claimant's February 26, 2009, MRI scan, which he believed showed a bulging disc at L5-S1 and spondylosis. Dr. McMaster opined that:

Based upon the available information, I am unable to causally relate any impairment identified to the occupational occurrence of February 25, 2009. Based upon a reasonable degree of medical certainty, given the history and objective findings identified, no occupational injury, illness or permanent aggravation of any pre-existing condition occurred as a result of the normal activities of day to day living he may have performed in the course of his employment duties as a welder on this date. To suggest that an occupational injury or aggravation (condition that is permanently worsened as a result of the occurrence) occurred on February 25, 2009, cannot be supported based upon the medical and scientific evidence presented.¹³

Despite the fact Dr. McMaster opined claimant's injury was not work related, he did place claimant in DRE Category II of the *AMA Guides*, giving claimant a 5% permanent functional impairment rating to the body as a whole as related to the lumbar spine. He opined that impairment preexisted the February 25, 2009, incident and that claimant's work activities on February 25, 2009, did not result in any greater impairment. Dr. McMaster indicated there was no objective clinical evidence of radiculopathy that could be verified. Contrary to the opinion of Dr. Fluter, Dr. McMaster opined claimant had a negative straight leg raising test.

Dr. McMaster did not give claimant any restrictions as a result of the February 25, 2009, incident. He opined claimant's physical capacity was not altered as a result of the incident on February 25, 2009. Dr. McMaster indicated claimant could perform job tasks within the physical demand category of medium to heavy and, thus, claimant suffered no task loss.

¹² McMaster Depo., Ex. 2 at 10.

¹³ *Id.*, Ex. 2 at 11.

Whether claimant met with personal injury by accident arising out of and in the course of his employment

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.¹⁴ A claimant must establish that his personal injury was caused by an “accident arising out of and in the course of employment.”¹⁵ The phrase “arising out of” employment requires some causal connection between the injury and the employment.¹⁶ The existence, nature and extent of the disability of an injured workman is a question of fact.¹⁷ A workers compensation claimant’s testimony alone is sufficient evidence of the claimant’s physical condition.¹⁸

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.¹⁹ Whether an accident arises out of and in the course of the worker’s employment depends upon the facts peculiar to the particular case.²⁰

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

¹⁴ K.S.A. 2008 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

¹⁵ K.S.A. 2008 Supp. 44-501(a).

¹⁶ *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

¹⁷ *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995).

¹⁸ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

¹⁹ K.S.A. 2008 Supp. 44-501(a).

²⁰ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

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.²¹

The ALJ indicated in the Award that other than claimant's testimony, there is no evidence that claimant suffered a personal injury at work, or while performing the duties of his employment. This is only partially correct. Only the claimant testified concerning the incident that occurred on February 25, 2009, involving the scaffold. This in and of itself is not unusual, as many accidents in the workplace occur when the worker is alone or there are few co-workers present. None of the parties called as a witness the co-worker who was present at the time of the incident on February 25, 2009. Thus, claimant is the only witness to testify concerning the incident that occurred February 25, 2009. However, in addition to claimant's testimony, Dr. Flutter opined that within a reasonable degree of medical probability, there is a causal/contributory relationship between claimant's current condition and the reported injury on February 25, 2009.

The testimony of claimant and his wife, claimant's medical history and the sequence of events bolster Dr. Flutter's conclusion that there is a causal/contributory relationship between claimant's injury and the incident on February 25, 2009. Claimant indicated that when he pulled the scaffolding back in place with his left leg he felt he pulled a muscle in that leg. At the end of the day his leg "was aching pretty good"²² and he was limping. He then went home for the evening, where he engaged in no activity that would likely cause a back injury such as the one suffered by claimant.

When claimant woke up the next day, he was in severe pain, and when he initially went to the hospital, he was given an injection for his pain. Later that day claimant was in such excruciating pain that he was given an injection of morphine before he was taken by ambulance to the hospital. Claimant has since been treated with medication, cortisone injections and therapy. Due to his back symptoms he was also hospitalized for four days in March 2009.

Claimant indicated he had no history of back problems prior to the February 25, 2009, incident. In fact, his only previous significant work injury was for a severe burn on his hand. Dr. McMaster indicated claimant reported no prior back injuries that were work related, recreational or as a result of motor vehicle accidents and under "Daily Living Activities" in the social history portion of his report Dr. McMaster stated no extraordinary outside recreational or avocational pursuits were identified or reported.

²¹ *Id.*

²² Starks Depo. at 59.

The reports of Dr. Fluter and Dr. McMaster indicate claimant was cooperative. The diagnoses of claimant by Dr. Fluter and Dr. McMaster are not dissimilar. According to Dr. Fluter, an MRI taken on February 26, 2009, revealed a “. . . disc bulge, having mild convex mass effect on the anterior thecal sac and may possibly contact the S1 nerve roots, particularly on the right although it is equivocal.”²³ In his report Dr. McMaster also indicates claimant has a disc bulge. Dr. Fluter and Dr. McMaster determined claimant had radiculitis; however, Dr. McMaster indicated it was transient radiculitis. Both physicians note degenerative changes in claimant’s lower back as well as spondylosis and indicate claimant has a permanent functional impairment to the back.

Dr. McMaster and Dr. Fluter disagree as to the causation of claimant’s back symptoms. Dr. Fluter indicated that within a reasonable degree of medical probability, there is a causal/contributory relationship between the February 25, 2009, incident and claimant’s back injury. Conversely, Dr. McMaster stated that within a reasonable degree of medical certainty, claimant “sustained an exacerbation (transient worsening of a prior medical condition) upon awakening on the morning of February 26, 2009.”²⁴ Dr. McMaster opined claimant exacerbated his back because of a combination of preexisting genetics, tobacco abuse, diabetes and customary activities of aging and daily living.²⁵

Claimant’s wife testified that during the evening of February 25, 2009, claimant told her about the incident on the scaffold. She testified claimant told her “his leg hurt and it was shooting up into his back.”²⁶ Claimant’s wife verified the pain was in claimant’s left leg. She verified claimant’s version of events that occurred after claimant got off work on the evening of February 25, 2009. On February 26, 2009, claimant’s wife told respondent claimant had injured himself.

The Board finds claimant has proven by a preponderance of the evidence that on February 25, 2009, he met with personal injury by accident arising out of and in the course of his employment. The MRI of claimant’s back revealed an extruding disc. Dr. Fluter and Dr. McMaster found claimant has a ratable permanent functional impairment to his lower back, but differ on the issue of causation. Dr. Fluter opined the MRI scan conducted on February 26, 2009, showed definite structural changes within the spine. Prior to the incident of February 25, 2009, claimant indicated he had no history of back problems. Dr. Fluter indicated that after an accident occurs, the onset of back pain may be delayed for hours or longer.

²³ Fluter Depo., Ex. 2 at 2.

²⁴ McMaster Depo., Ex. 2 at 10.

²⁵ *Id.*, at 29.

²⁶ R.H. Trans. at 53.

Whether claimant gave respondent timely notice of the accident

K.S.A. 44-520 states:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

Respondent asserts that claimant had 10 days, or until March 11, 2009, to report the injury to respondent, but that claimant did not report his injury until March 18, 2009. Respondent alleges that claimant did not have just cause to extend the notice deadline to 75 days as set out in K.S.A. 44-520. Claimant's wife testified that she called respondent's office on February 26, 2009, and that she spoke to Roger. She told Roger claimant hurt his back, was unable to move and they did not know what was going on for sure. Claimant's wife testified:

Q.(Mr. Rice) Okay. Was there ever a point that you would have told anyone at Primus how the accident happened or what you think may have caused his back injury?

A. (Ms. Starks) Yes.

Q. When was that?

A. The 26th.

Q. Okay. And that's where I'm a little confused because I asked you what the conversation was, and your statement was, you told them that Terry had hurt his back and you weren't sure what happened.

A. It's not that I wasn't sure what happened, I didn't know the degree of the injury. I knew he'd hurt himself badly.

I had to call the ambulance twice that day to help him to the hospital.

Q. And it's your testimony that that day you would have told Roger that this happened with some incident with scaffolding?

A. Yes, sir.²⁷

Apparently, on March 3, 2009, a claims adjustor contacted claimant about the incident on February 25, 2009. Claimant apparently told the claims adjustor that he believed the injury was work related because it could not have been anything else. Claimant indicated at that time he was on narcotic medications due to his severe back pain. Respondent's claims representative told claimant the claim was being denied because claimant could not tell the adjustor what happened. An adjustor spoke to claimant's wife on March 9, 2009, and claimant was listening in on a speaker phone. At the regular hearing claimant only recalled a small part of that conversation.

Respondent presented scant evidence to rebut claimant's allegation that he gave timely notice of the accident to respondent. Claimant's wife clearly indicated she notified Roger at respondent's office of the accident on February 26, 2009. Respondent did not have Roger testify to rebut this testimony. On March 3, 2009, a claims adjustor called claimant concerning the accident. Yet respondent did not call the claims adjustor as a witness, nor were any transcripts of the recorded telephone conversations between the claims adjustor and claimant entered into evidence.

Claimant asserts that during the 10 days in which he had to give respondent notice of the accident he was under the influence of narcotic medication for his pain. He also claims he was being treated for diabetes and because of these two factors he was unable to give timely notice. In essence, he is arguing he had just cause to wait until March 18, 2011, to give respondent notice of the accident.

The claims adjustor called claimant on March 3, 2009, to discuss the accident. This substantiates claimant's assertion that his wife called respondent and gave notice of the accident on February 26, 2009. In the case of *Roberts*,²⁸ the Board held: "The purpose of notice is to give the respondent an opportunity to investigate the claimant's claim." Under these facts, the Board finds claimant provided timely notice of the accident to respondent on February 26, 2009, the date claimant's wife called Roger at respondent's office and informed him of the scaffold incident.

²⁷ *Id.*, at 49-50.

²⁸ *Roberts v. Lawrence Decorating Service*, No. 1,021,638, 2005 WL 1983422 (Kan. WCAB 2005).

The nature and extent of claimant's disability

After the incident on February 25, 2009, claimant remained off work until sometime in either April or August 2009, when he was released to return to work. At a discovery deposition, claimant indicated he returned to work in April or early May 2009, while at the regular hearing he testified he returned to work in August 2009. After reviewing the entire record, the Board believes the claimant returned to work with respondent in April or early May 2009. When claimant returned to work, he performed all of his work duties, without restrictions. Claimant was discharged on December 3, 2009, for an apparent safety violation. While claimant was off work, he received no temporary total disability benefits and claimant has made no claim for temporary total disability benefits. Therefore, the Board finds claimant suffered a 100% wage loss beginning December 3, 2009.

Dr. McMaster did place claimant in DRE Category II of the *AMA Guides* and gave claimant a 5% permanent functional impairment rating to the body as a whole as related to the lumbar spine. However, as previously noted, Dr. McMaster opined the impairment preceded claimant's accident.

Dr. Fluter indicated claimant's impairment placed him between DRE Lumbosacral Spine Categories II (minor impairment – 5%) and III (radiculopathy – 10%). However, Dr. Fluter ultimately placed claimant in DRE Category III of the *AMA Guides* and gave claimant a permanent functional impairment rating of 10% related to the lumbar spine. Dr. Fluter felt claimant had clinical findings of radiculopathy which included L5-S1 changes, the extruded disc which appeared to be in the right lateral recess and a positive straight leg raising test.

Dr. Fluter indicated that placing claimant in DRE Category II underestimates claimant's impairment to a degree, while placing him in DRE Category III overestimates his impairment to a degree.²⁹ The Board determines that both the opinions of Dr. Fluter and Dr. McMaster are credible and averages their impairment ratings and finds claimant has a permanent functional impairment rating of 7.5% to the body as a whole attributable to his back injury.

After taking into consideration his training, education, experience and knowledge of the current medical and occupational literature with regard to back pain, Dr. McMaster opined claimant required no permanent restrictions. He also indicated claimant possesses the physical capacity and tolerance to perform job tasks within a physical demand category of medium to heavy. He specifically testified that claimant could return to his occupation with respondent and all of his previously enjoyed daily living activities before the exacerbation he suffered in February 2009. Dr. McMaster opined claimant has no task

²⁹ Fluter Depo. at 41-42.

loss and that claimant reached maximum medical improvement no later than April 23, 2009.

Claimant returned to work in April or May 2009 with no restrictions by his family physician. Since being released to work, claimant has received no significant treatment for his back injury. From the end of April or early May 2009 until claimant was discharged on December 3, 2009, (a period of approximately seven months) he was able to perform all of his work duties without accommodations. At his May 19, 2009, deposition, claimant testified then when he returned to work, he was able to perform his work duties with no problems. Claimant's welding job required handling materials weighing 50 pounds or more and using a grinder weighing 25 pounds. It appears claimant's job required him to perform job tasks in the medium to heavy category.

In essence, claimant exceeded all of Dr. Fluter's restrictions from the time he returned to work in April or May 2009 through December 3, 2009. During this seven-month period, claimant performed all of his work duties without problems. Since April 2009, claimant has received no significant treatment for his back condition. Accordingly, the Board finds claimant suffered no task loss as a result of his February 25, 2009, injury. Commencing with December 3, 2009, the Board finds claimant has a 100% wage loss averaged with a 0% task loss for a 50% work disability.

CONCLUSION

1. Claimant proved by a preponderance of the evidence that he suffered a lower back injury on February 25, 2009, that arose out of and in the course of his employment.
2. That claimant has pursuant to the *AMA Guides* a permanent functional impairment of 7.5% to the body as a whole attributable to his lower back injury.
3. That beginning December 3, 2009, claimant has a wage loss of 100% and a 0% task loss, resulting in a work disability of 50%.
4. Claimant made no claim for temporary total disability benefits and, therefore, none are due and owing.
5. Respondent is liable for payment of claimant's medical bills in the amount of \$13,631.66, which is due and owing.
6. Future medical benefits will be determined upon proper application.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.³⁰ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board reverses the December 29, 2010, Award entered by ALJ Moore.

Terry L. Starks is granted compensation from Primus Sterilizer Company, Inc., and its insurance carrier for a February 25, 2009, accident and the resulting disability. Based upon an average weekly wage of \$713.43, claimant is entitled to receive the following disability benefits:

For the period through December 2, 2009, claimant is entitled to receive 31.13 weeks of permanent partial disability benefits at \$475.64 per week, or \$14,806.67, for a 7.5% permanent partial disability.

Commencing December 3, 2009, claimant is entitled to receive 176.37 weeks of permanent partial disability benefits at \$475.64 per week, or \$83,888.63, for a 50% permanent partial disability and a total award of \$98,695.30.

As of June 10, 2011, claimant is entitled to receive 110.42 weeks of permanent partial disability compensation at \$475.64 per week in the sum of \$52,520.17, for a total due and owing of \$52,520.17, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$46,175.13 shall be paid at \$475.64 per week until paid or until further order of the Director.

Respondent is ordered to pay claimant's medical bills in the amount of \$13,631.66, which are due and owing.

Future medical benefits will be determined upon proper application by claimant.

Mitchell W. Rice, claimant's former counsel, is granted a lien for attorney fees. If claimant and his former counsel cannot reach an agreement concerning attorney fees, the ALJ shall hold a hearing pursuant to K.S.A. 44-536(h) to determine the issue of attorney fees.

³⁰ K.S.A. 2010 Supp. 44-555c(k).

The Board adopts the remaining orders set forth in the ALJ's Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of June, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Terry L. Starks, 2213 McCormick St., Great Bend, KS 67530
Mitchell W. Rice, Former Attorney for Claimant
William L. Townsley, III, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge