

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

<b>MIRNA RAMIREZ</b>	)	
Claimant	)	
	)	
V.	)	Docket Nos. 1,040,772
	)	& 1,047,018
<b>TYSON FRESH MEATS, INC.</b>	)	
Self-Insured Respondent	)	

**ORDER**

Claimant requested review of the May 23, 2013 Review and Modification Award (Award) entered by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on September 10, 2013. Scott Mann of Hutchinson, Kansas, appeared for claimant. Bruce Levine of Kansas City, Missouri, appeared for self-insured respondent.

In Docket No. 1,040,772, claimant was granted a 50% work disability, but based on new medical evidence, her previous 10% whole body impairment was reduced to a 5% whole body impairment. The Award gave respondent a credit for a 5% overpayment.

According to the Award, Docket No. 1,047,018 was not modified because: (1) claimant's functional impairment had not changed and (2) the claim only concerned bilateral upper extremity injuries for which work disability could not be ordered.

The Board has considered the record and adopted the stipulations listed in the Review and Modification Award. While Dr. C. Reiff Brown's April 1, 2013 deposition was not listed in the record, the parties have agreed to allow Dr. Brown's deposition to be considered by the Board and it is part of the record. The Board considers the record to further consist of the December 8, 2008 preliminary hearing transcript, exclusive of medical exhibits, the November 20, 2009 settlement hearing transcript, the October 10, 2011 review and modification hearing transcript and the February 22, 2012 deposition of Vito J. Carabetta, M.D., including exhibits.

**ISSUES**

There is some confusion regarding the issues because claimant's application for review attributes some issues in Docket No. 1,040,772 as relating to Docket No. 1,047,018 and *vice versa*.

Docket No. 1,040,772 relates to an August 25, 2007 injury in which claimant alleged injury to her low back when she was hit by a forklift. In this case, an Agreed Award was filed with the Division of Workers Compensation on March 9, 2009.

In Docket No. 1,047,018, claimant's application for hearing alleged repetitive injuries to her bilateral upper extremities, neck and back. Such claim was settled utilizing an 11.3% whole body impairment on an agreed award basis at a November 20, 2009 settlement hearing. Claimant was awarded benefits based on an additional 9.8% whole body impairment in a March 28, 2012 Agreed Award of Review and Modification.

While claimant filed no appeal brief, she asserts entitlement to separate work disability awards in both cases based on task loss and 100% wage loss.

In Docket No. 1,040,772, claimant asks the Board to address the nature and extent of her disability. Respondent contends claimant sustained a 50% work disability and it is entitled to a credit for previously overpaying for claimant's functional impairment.

In Docket No. 1,047,018, claimant contends *res judicata* and *Bailey v. Cessna Aircraft*<sup>1</sup> preclude the parties and/or the judge from re-adjudicating the permanent partial disability/whole person Award entered at the November 20, 2009 settlement hearing and the March 26, 2012 Agreed Award of Review and Modification. While the May 23, 2013 Award viewed claimant's underlying impairment as merely involving scheduled injuries to the upper extremities, claimant argues she is entitled to an award of work disability benefits because the case was previously resolved based on whole body impairment.

Respondent argues claimant's request to modify the Award in Docket No. 1,047,018 should be denied because her injuries should only be compensated under the schedule set forth in K.S.A. 44-510(d), and the holding in *Casco*.<sup>2</sup>

The issues in Docket No. 1,040,772 concern the nature and extent of claimant's disability and respondent's assertion to a credit for overpaying the value of claimant's functional impairment. The issues for the Board's review in Docket No. 1,047,018 are:

1. Once claimant's disability is adjudicated as involving whole body impairment, does *res judicata* preclude revisiting the nature of disability and classifying it differently?
2. Is claimant entitled to work disability benefits based on review and modification of the Agreed Award of Review and Modification entered March 28, 2012?
3. What is the nature and extent of claimant's disability?

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<sup>1</sup> *Bailey v. Cessna Aircraft*, No. 1,023,376, 2008 WL 375794 (Kan. WCAB Jan. 15, 2008).

<sup>2</sup> *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

FINDINGS OF FACT

Claimant began working for respondent as a meat trimmer on February 15, 1994. Claimant held this position through 2002, until she injured her shoulders and required accommodations as a picker, in which she picked meat off a conveyor belt.

On August 25, 2007, a forklift struck claimant's low back while she was working at a conveyor. This accidental injury was the basis for Docket No. 1,040,772.

Claimant's low back was treated conservatively with medication and physical therapy. A March 2008 MRI of claimant's lumbar spine revealed what appeared to be a herniated disk at L4-5. Electrodiagnostic studies of the lumbar spine and lower extremity region were normal. Claimant had epidural steroid injections. She was not a candidate for lumbar surgery.

Claimant also complained of pain in both shoulders. She testified she had right shoulder symptoms prior to the 2007 incident, and afterward had worsening right shoulder symptoms and noticeable left shoulder symptoms. Claimant's shoulders were treated primarily with physical therapy, although she had an injection in each shoulder.

C. Reiff Brown, M.D., evaluated claimant on November 6, 2008, at the request of her attorney. Dr. Brown is board certified in orthopedic surgery and certified by the American Academy of Disability Evaluating Physicians. Dr. Brown noted claimant voiced complaints of low back, left leg and bilateral shoulder pain extending upward into the low cervical area and downward to the shoulder blades, along with numbness in the left upper extremity. He attributed claimant's symptoms to her August 25, 2007 accidental injury. Among other findings, his examination revealed tenderness over the low cervical paraspinal musculature, the upper trapezius, the rotator cuffs, and the left gluteosacral area. Dr. Brown diagnosed claimant with bilateral rotator cuff tendonitis and acromial impingement, myofascial pain syndrome involving the upper trapezius, low cervical paraspinals and scapular musculature, left carpal tunnel syndrome, degenerative arthrosis at L4-5 with a left-sided herniation impinging on the L5 nerve root. Dr. Brown issued various restrictions and recommended a variety of medical treatment.

Vito J. Carabetta, M.D., a board certified physician specializing in physical medicine and rehabilitation, conducted a court-ordered independent evaluation (IME) on February 9, 2009. After reviewing claimant's history and performing a physical examination, Dr. Carabetta diagnosed claimant with what he termed a herniating lumbar disk and bilateral shoulder pain. Dr. Carabetta relied on claimant's 2008 MRI report for his diagnosis.

Using the *AMA Guides*,<sup>3</sup> Dr. Carabetta rated claimant with a 10% impairment to the body as a whole based upon the lumbar spine. His report stated:

Though the electrodiagnostic studies did not show evidence of radiculopathy, and though the physical examination appears to show some inconsistencies, there appears to have been some anatomic changes on the MRI scan suggestive of potential nerve root compromise. Consequently, this is consistent with a Category III presentation, and therefore a 10 percent whole person impairment would apply.<sup>4</sup>

Dr. Carabetta did not initially address shoulder impairment. He recommended a left shoulder MRI and noted the possibility of left shoulder surgery. Dr. Carabetta specifically stated claimant was not at maximum medical improvement for her left shoulder and an impairment rating would be premature.

On March 9, 2009, the parties, in an Agreed Award for Docket No. 1,040,772, stipulated to a 10% whole body impairment due to claimant's low back injury based upon Dr. Carabetta's rating. Claimant was awarded \$13,245.13 in permanent partial disability benefits and the rights to future medical treatment and future modification of the Award.

Claimant filed a claim for repetitive injuries to her upper extremities, neck and back on August 18, 2009. Such repetitive trauma was the basis for Docket No. 1,047,018. For reasons unexplained in the record, the parties arrived at a November 6, 2008 date of accident for claimant's repetitive use injuries.

An Agreed Preliminary Hearing Order was received by the Division on November 2, 2009. Such Order granted claimant medical treatment for her neck and cervical spine in Docket No. 1,047,018. Curiously, this Order was not signed by a judge.

In spite of the lack of an impairment rating for claimant's shoulders and Dr. Carabetta's recommendation for additional testing and treatment of the left shoulder, the parties settled Docket No. 1,047,018 on November 20, 2009, with all future rights left open. The settlement document specifically noted the case was being settled based on an "11.3% permanent partial impairment to the body as whole (for bilateral shoulder injuries)."<sup>5</sup> The settlement document did not indicate claimant's permanent injury was being resolved based on the schedule in K.S.A. 44-510d.

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<sup>3</sup> 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.

<sup>4</sup> Carabetta Depo. (Mar. 3, 2013), Ex. 2 at 5.

<sup>5</sup> Settlement Hearing Trans. (dated Nov. 20, 2009), Worksheets [sic] for Settlement.

Medical documents attached to the worksheet for settlement from William O. Reed, Jr., M.D., and Dr. Carabetta indicated claimant had a cervical spine MRI, which was read as normal, physical therapy for her cervical spine and that she reported generalized aching of the shoulders, with the left shoulder worse than the right.<sup>6</sup> No impairment rating report concerning claimant's shoulders was entered into evidence.

Special Administrative Law Judge (SALJ) Richardson asked claimant if she was settling her case "based upon [an] 11.3 percent permanent partial disability to your whole body for two shoulder injuries . . . ?" Claimant responded affirmatively. SALJ Richardson further stated, "Based on the testimony of the claimant and statements of counsel I'll enter an award in favor of the claimant and against the respondent in a sum of \$15,000 on a running award upon [an] 11.3 percent permanent partial impairment to the body as a whole, and all other rights are left to be determined. Is there anything else?" Neither counsel clarified that the case was to be settled based on injuries covered by the schedule under K.S.A. 44-510d. This settlement award was not appealed within ten days.

Subsequently, claimant had additional treatment and testing. Claimant had a left carpal tunnel release procedure and a left ulnar nerve transposition procedure on January 21, 2011. An April 29, 2011 MRI of the lumbar spine was interpreted as negative.

Dr. Brown again evaluated claimant at her attorney's request on August 16, 2011. His report noted claimant complained of pain involving her neck, shoulders, left elbow, left hand, right hand, low back and legs and had treatment for all such injuries. Dr. Brown's physical examination was similar to his November 6, 2008 evaluation, but claimant had limited cervical spine range of motion and mild cervical paraspinal muscle spasm.

Using the *Guides*, Brown rated claimant at 5% whole body impairment for the cervical spine based on DRE Cervicothoracic Category II, a 5% whole body impairment under DRE Cervicothoracic Category II for myofascial pain syndrome,<sup>7</sup> a 5% whole body impairment based on aggravation of preexisting lumbar degenerative changes, a 7% impairment of her right upper extremity at the level of the right shoulder, a 9% impairment of her left upper extremity at the level of the left shoulder, a 10% impairment for left carpal tunnel syndrome, and a 5% impairment for left ulnar nerve entrapment at the elbow. Dr. Brown attributed such impairment to the August 25, 2007 accidental injury. Dr. Brown basically provided claimant with light duty restrictions.

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<sup>6</sup> Claimant objected to admission of Dr. Reed's report, essentially based on K.S.A. 44-519. (Carabetta Depo. [Feb. 22, 2012] at 29-30). However, the history of claimant having treatment listed in Dr. Reed's report was also contained in the Dr. Carabetta's December 12, 2011 report.

<sup>7</sup> It appears Dr. Brown assigned claimant two 5% whole body ratings for her cervicothoracic spine.

A second court-ordered IME with Dr. Carabetta occurred December 9, 2011. Claimant reported cervical pain, generalized aching in the shoulders and sharp pain across the lower back. Dr. Carabetta reported claimant had constant, variable complaints of pain and dysesthesias in both hands. Dr. Carabetta's impressions included low back pain, bilateral shoulder pain, neck pain, status-post left carpal tunnel release, and status-post left ulnar nerve transposition.

Dr. Carabetta testified claimant's second lumbar spine MRI showed no disk herniation. He agreed claimant never had a disk herniation that dissipated, but rather poor film was misread at the time of the first MRI.

Due to the clarity of the second MRI, Dr. Carabetta noted claimant only had subjective low back pain. He reduced claimant's lumbosacral impairment to 0% based on DRE Category I of the *Guides*. Dr. Carabetta also examined claimant's cervical spine. His physical examination findings did not match claimant's complaints; her subjective complaints were substantial and objective findings were lacking. Dr. Carabetta opined claimant had no impairment attributable to the cervical spine area.

Dr. Carabetta assessed claimant as having a 10% impairment of the left forearm attributable to her carpal tunnel release and a 10% impairment of the left elbow attributable to her ulnar nerve transposition. Dr. Carabetta rated claimant's shoulders at 5% impairment of the right upper extremity and 5% impairment of the left upper extremity, both at the level of the shoulder. Combining all left upper extremity impairments, Dr. Carabetta opined claimant had a 23% impairment to the left upper extremity.

Dr. Carabetta testified for the first time on February 22, 2012. Aside from reiterating what was contained in his reports, he agreed respondent already paid claimant permanent partial disability benefits based on shoulder impairment that exceeded his shoulder ratings and those of Dr. Brown.<sup>8</sup> He also noted that claimant's low back injury was due to the August 25, 2007 event, while all other injuries were due to repetitive use.

On March 28 2012, the parties entered into an Agreed Award of Review and Modification in Docket No. 1,047,018. The parties indicated claimant had additional BAW (body as a whole) impairment of 9.8%, even though such impairment was listed as emanating from her left elbow and wrist. The agreement that claimant had additional whole body impairment was noted four times in the Agreed Award of Review and Modification. This award was in addition to the 11.3% whole body impairment previously awarded in the case. The rights to review and modification and future medical were left open. Claimant was paid \$13,085.56 for permanent partial disability benefits. The Agreed Award of Review and Modification was not appealed within ten days.

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<sup>8</sup> Carabetta Depo. (Feb. 22, 2012) at 32-34.

Claimant continued as a picker until resigning May 18, 2012. She testified she could no longer perform her job due to low back pain. She applied for Social Security Disability. She is unemployed and has a 100% wage loss. She testified she must alternate sitting, standing and walking about every 15 minutes. She stated she has pain in her entire body, but mainly in her low back and left leg.

Dr. Carabetta testified a second time on March 3, 2013. While he previously indicated in his second report that claimant had a 0% rating for her low back, he agreed she had a 5% whole body impairment using DRE Category II of the *Guides*.

Dr. Carabetta testified claimant should exercise caution in the open labor market. He limited claimant to “occasional lifting of 50 pounds . . . and more frequent lifting or carrying not exceed the 25 or 30-pound range.”<sup>9</sup> Further, Dr. Carabetta noted overhead activity would be inappropriate and only done occasionally. Additionally, he noted claimant should be selective about repetitive activity with her left arm.

Dr. Carabetta reviewed task lists prepared by Robert Barnett, Ph.D.,<sup>10</sup> and Michelle Sprecker<sup>11</sup> and opined claimant could perform all tasks on both lists. Dr. Carabetta testified that if Dr. Barnett’s task descriptions were taken literally, claimant could not perform two of the five listed tasks. He also stated that if he were to view the tasks interpretively, claimant would be able to perform all of the tasks.

Dr. Brown testified on April 1, 2013. Prior to his deposition, Dr. Brown was only aware of claimant having an August 25, 2007 injury.<sup>12</sup> At his deposition, Dr. Brown separated claimant’s permanent restrictions related solely to her low back as compared to her upper extremities.<sup>13</sup> Dr. Brown opined that claimant had a 60% task loss due to her low back injury and an 80% task loss due to her upper extremity injuries, as based upon his review of Dr. Barnett’s task list.<sup>14</sup>

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<sup>9</sup> Carabetta Depo. (Mar. 3, 2013) at 23.

<sup>10</sup> Dr. Barnett, a clinical psychologist with credentials as a rehabilitation counselor, rehabilitation evaluator, and job placement specialist, interviewed claimant at her attorney’s request on September 14, 2012.

<sup>11</sup> Ms. Sprecker, a certified vocational rehabilitation counselor, conducted a vocational evaluation of claimant at respondent’s request on January 8, 2013.

<sup>12</sup> Brown Depo. at 17.

<sup>13</sup> *Id.* at 9.

<sup>14</sup> Brown Depo. at 10-13.

PRINCIPLES OF LAW

K.S.A. 44-510a states:

(a) If an employee has received compensation or if compensation is collectible under the laws of this state or any other state or under any federal law which provides compensation for personal injury by accident arising out of and in the course of employment as provided in the workers compensation act, and suffers a later injury, compensation payable for any permanent total or partial disability for such later injury shall be reduced, as provided in subsection (b) of this section, by the percentage of contribution that the prior disability contributes to the overall disability following the later injury. The reduction shall be made only if the resulting permanent total or partial disability was contributed to by a prior disability and if compensation was actually paid or is collectible for such prior disability. Any reduction shall be limited to those weeks for which compensation was paid or is collectible for such prior disability and which are subsequent to the date of the later injury. The reduction shall terminate on the date the compensation for the prior disability terminates or, if such compensation was settled by lump-sum award, would have terminated if paid weekly under such award and compensation for any week due after this date shall be paid at the unreduced rate. Such reduction shall not apply to temporary total disability, nor shall it apply to compensation for medical treatment.

(b) The percentage of contribution that the prior disability contributes to the later disability shall be applied to the money rate actually collected or collectible for the prior injury and the amount so determined shall be deducted from the money rate awarded for the later injury. This reduced amount of compensation shall be the total amount payable during the period of time provided in subsection (a), unless the disability award is increased under the provisions of K.S.A. 44-528 and amendments thereto.

K.S.A. 2009 Supp. 44-510d states in relevant part:

(a) If there has been an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

...

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

...

(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the [Guides], if the impairment is contained therein.

(b) Whenever the employee is entitled to compensation for a specific injury under the foregoing schedule, the same shall be exclusive for all other compensation except [medical benefits] and no additional compensation shall be allowable or payable for any temporary or permanent, partial or total disability . . . .

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. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the [Guides], if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

*Casco* states:

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

When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof, the calculation of the claimant's compensation begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c.

When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof and the presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in some type of substantial and gainful employment, the claimant's award must be calculated as a permanent partial disability in accordance with K.S.A. 44-510d.

K.S.A. 44-510e permanent partial general disability is the exception to utilizing 44-510d in calculating a claimant's award. K.S.A. 44-510e applies only when the claimant's injury is not included on the schedule of injuries.<sup>15</sup>

K.S.A. 44-528 states in part:

(a) Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitation provided in the workers compensation act.

Both K.S.A. 2007 Supp. and 2008 Supp. 44-551(i)(1) state, in part:

All final orders, awards, modifications of awards, or preliminary awards under K.S.A.44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days. . . . On any such review, the board shall have authority to grant or refuse compensation, or to increase or diminish any award of compensation or to remand any matter to the administrative law judge for further proceedings.

"It is the function of the district court to decide which testimony is more accurate and/or credible, and to adjust the medical testimony along with the testimony of the claimant and any other testimony which may be relevant to the question of disability."<sup>16</sup>

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<sup>15</sup> *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, Syl. ¶¶ 7, 8, 9, 10, 11, 154 P.3d 494 (2007).

<sup>16</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 786, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

ANALYSIS

**1. Under *Scheidt*,<sup>17</sup> a settlement which determines the nature of a claimant's disability is subject to *res judicata*.**

Claimant was twice previously awarded benefits based on whole body impairment, based on agreement of the parties. Such agreement that claimant had whole body impairment, covered under K.S.A. 44-510e, and not under the schedule, K.S.A. 44-510d, was ratified by a special administrative law judge at a 2009 settlement hearing and by Judge Fuller in a 2012 Agreed Award of Review and Modification. Interestingly, both the settlement and the modified award specifically referenced injuries covered by the schedule. A valid argument exists to confine claimant's permanent partial disability benefits in Docket No. 1,047,018 to benefits available under the schedule.

Despite the temptation to limit compensation in Docket No. 1,047,018 to benefits for scheduled upper extremity injuries only, the Board is duty bound to follow binding precedent.<sup>18</sup> The Board is constrained to reach the same result as in *Scheidt*, in which the Kansas Court of Appeals ruled on a very similar factual and legal dispute.

In *Scheidt*, the parties settled claimant's bilateral arm injuries – not as two scheduled injuries – but based on whole body impairment. The settlement was approved in 2002. *Scheidt* last worked for his employer in 2005 and he sought a work disability award on review and modification.<sup>19</sup> The employer argued that *Casco*, decided in 2007, limited the underlying award to two scheduled injuries and precluded a work disability award. Both the Board and the Kansas Court of Appeals agreed in *Scheidt* that the prior settlement, which was based on a whole body impairment, and not impairment limited to two scheduled injuries, already affixed the nature of *Scheidt*'s disability and such determination could not be modified. *Res judicata* precluded the matter being litigated a second time.

"[R]es judicata . . . applies when issues were previously raised and decided on the merits, or could have been presented but were not. [Citations omitted]. *Res judicata* consists of four elements: (1) same claim; (2) same parties; (3) claims were or could have been raised; and (4) a final judgment on the merits."<sup>20</sup>

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<sup>17</sup> *Scheidt v. Teakwood Cabinet & Fixture, Inc.*, 42 Kan. App. 2d 259, 261-62, 211 P.3d 175 (2009), *rev. denied* 290 Kan. \_\_\_\_ (2010).

<sup>18</sup> See *Gadberry v. R. L. Polk & Co.*, 25 Kan. App. 2d 800, 808, 975 P. 2d 807 (1998).

<sup>19</sup> See *Scheidt v. Teakwood Cabinet & Fixture, Inc.*, Nos. 1,003,641 & 1,021,836, 2008 WL 3280293 (Kan. WCAB July 29, 2008).

<sup>20</sup> *State v. Martin*, 294 Kan. 638, 640-41, 279 P.3d 704 (2012) *cert. denied*, 12-10442, 2013 WL 2289952 (U.S. Oct. 7, 2013) (citing *Winston v. Kansas Dept. of SRS*, 274 Kan. 396, 413, 49 P.3d 1274, *cert. denied* 537 U.S. 1088, 123 S.Ct. 700, 154 L.Ed.2d 632 (2002)).

*Scheidt* states:

This dispute is resolved by clarifying the nature both of the original award and of a modification proceeding. A workers'-compensation award is in most respects like a court judgment and subject to *res judicata*: issues necessarily decided in determining the award may not be relitigated unless specifically provided for by statute. See *Randall v. Pepsi-Cola Bottling Co., Inc.*, 212 Kan. 392, 396, 510 P.2d 1190 (1973); *Bazil v. Detroit Diesel Central Remanufacturing*, 2008 WL 5401467, at \*5 (Kan. App. 2008) (unpublished opinion). The very nature of the employee's disability is an issue that must be decided in every final award, and both *Scheidt* and *Teakwood* agreed in a written stipulation that he had a 22.5% permanent partial general disability, not a scheduled injury. An administrative law judge approved that settlement, and neither side appealed the judge's ruling.

Given that workers'-compensation awards are much like court judgments and subject to *res judicata*, one would expect that the very nature of the injury—a central aspect of the award—would not be subject to relitigation. But the legislature could make it so by statute, so we turn next to the statutory authority for modification: K.S.A. 44-528(a). In the portion relevant to *Scheidt's* case, that statute provides that an award may be modified based on evidence “that the functional impairment or work disability of the employee has increased or diminished.” In such a case, the administrative law judge “may modify such award, . . . upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.” So the statute provides for modification when an employee's functional impairment or work disability has changed but says nothing about modifying an award when caselaw changes. And the statute provides for a modification either increasing or decreasing *the compensation*, not modifying the award's determination of the very nature of the employee's disability. We find no suggestion in the statute that the nature of the employee's disability may be relitigated in a modification proceeding.

We conclude, then, that the finding made in the 2002 award that *Scheidt* had a 22.5% whole-body injury, not a scheduled injury, is binding on the parties in a proceeding to modify that award. *Teakwood* may not use the *Casco* decision in an attempt to modify the necessary findings that were made in *Scheidt's* 2002 award.

Our court has previously concluded that the *Casco* ruling should be applied to all workers'-compensation cases that were pending when *Casco* was decided. *Myers v. Lincoln Center OB/GYN*, 39 Kan. App. 2d 372, Syl. ¶ 4, 180 P.3d 584, *rev. denied* 286 Kan. 1179 (2008). We agree, but that doesn't determine the issue in *Scheidt's* case. The *Myers* appeal of the initial award was still pending when *Casco* was decided; thus, the rule announced in *Casco* was properly applied as it reflected a revised interpretation of existing statutes, not an actual change in the workers'-compensation statutes. In *Scheidt's* case, however, the initial award came 5 years before *Casco*, and *Scheidt's* award resolved the essential issues of the case and may not be relitigated.

The issue we've just addressed is purely a legal issue, so the Board's view on this issue, while persuasive, is not binding on us. See *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554, 161 P.3d 695 (2007). But the Board reached the same conclusion we have: it noted that the 2002 settlement award became final—and thus not subject to redetermination—when no party appealed from it. Thus, the Board concluded, “[t]he doctrine of res judicata applies to the determination that [Scheidt's] impairment is to the body as a whole.” We agree.<sup>21</sup>

A similar result as reached in *Scheidt*—that some bells cannot be unrung—was also reached in *Bazil*.<sup>22</sup> In such case, the parties agreed to a settlement in which medical evidence demonstrated that Bazil's inflammatory arthritis was work related. The respondent in such case “made no request for limitations to the agreement or the medical evidence and did not request the addition of medical evidence that provided contrary assessments regarding the causation and permanency of Bazil's injury. The ALJ approved the settlement based on Bazil's testimony, the worksheet, and [the medical evidence].”<sup>23</sup>

The *Bazil* decision states:

Parties may agree to settle workers compensation claims pursuant to K.S.A. 44-521. Importantly, Kansas law favors the settlement of disputes, and when parties enter into an agreement settling a dispute, neither party is permitted to repudiate it. *Lewis v. Gilbert*, 14 Kan.App.2d 201, 202, 785 P.2d 1367 (1990). Once the parties settle a dispute, the courts will not, absent a showing of fraud or bad faith, examine the merits of the original controversy. *Nauman v. Kenosha Auto Transport Co.*, 186 Kan. 305, 310, 349 P.2d 931 (1960). Detroit Diesel does not allege bad faith or fraud in this settlement agreement, but rather alleges that the original settlement and award should not bar Detroit Diesel from contending that Bazil's inflammatory arthritis was not work-related.

. . . The original award in this case resolved the issue of whether Bazil's inflammatory arthritis was work-related. Moreover, the ALJ's original award was a final and appealable order. K.S.A. 44-551(b)(1). Detroit Diesel did not appeal any aspect of the ALJ's original award—including whether the inflammatory arthritis was work-related.

Our Supreme Court has held that workers compensation awards, like other monetary installments, represent a final judgment with each payment, which cannot later be modified or dissolved. *Acosta v. National Beef Packing Co.*, 273 Kan. 385, 394, 44 P.3d 330 (2002); *Ferrell v. Day & Zimmerman, Inc.*, 223 Kan. 421, 423, 573 P.2d 1065 (1978). In both *Acosta* and *Ferrell*, our Supreme Court was faced with

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<sup>21</sup> *Id.* at 261-62. For a similar result, see also *Bailey v. Cessna Aircraft*, *supra*.

<sup>22</sup> *Bazil v. Detroit Diesel Central Remanufacturing*, No. 99,613, 197 P.3d 905, 2008 WL 5401467 (Kansas Court of Appeals unpublished opinion filed Dec. 19, 2008).

<sup>23</sup> *Id.*, 2008 WL 5401467 at 3.

requests to modify workers compensation awards under K.S.A. 44-528. *Acosta*, 273 Kan. at 394, 44 P.3d 330; *Ferrell*, 223 Kan. at 423, 573 P.2d 1065. In both cases, the court held that a modification hearing was not the proper means to attack the validity of the original award. Rather, a party must appeal the original award pursuant to the workers compensation appeals procedure. *Acosta*, 273 Kan. at 394, 44 P.3d 330; *Ferrell*, 223 Kan. at 423, 573 P.2d 1065.

. . . A plain reading of K.S.A. 44-510k makes clear that at the post-award medical benefits stage, the work-related nature of Basil's inflammatory arthritis was already established by the original award, and neither Detroit Diesel, the ALJ, or the Board may undermine that finding.

As the Board concluded:

“By their settlement terms, the parties stipulated that claimant's inflammatory arthritis in her upper extremities is both work related and permanent. That stipulation was made a part of the Special ALJ's award. The award was not appealed within 10 days and is final. The permanency of claimant's injury and her right to compensation are *res judicata*.

“Respondent argues that it does not deny the diagnosis of inflammatory arthritis, which was also its position at the settlement hearing, but it now denies its relationship or causal connection to claimant's work. This begs the question, if the work-related aggravation was only temporary and not permanent, what was the meaning of the stipulation to a 23 percent permanent partial disability?”

We agree with the Board's conclusion. When an ALJ's original award becomes final, the doctrine of *res judicata* may apply to preclude a party from raising the issue of causation during a modification hearing. *Randall v. Pepsi-Cola Bottling Co., Inc.*, 212 Kan. 392, 396, 510 P.2d 1190 (1973). Similarly, in this post-award medical benefits proceeding, the work-related nature of the injuries was established at the time the award became final.

Of course, an ALJ may consider evidence regarding the exacerbation of an injury after an initial award without being subject to *res judicata*. *Garrison v. Beech Aircraft Corp.*, 23 Kan.App.2d 221, 225, 929 P.2d 788 (1996). But issues relating to the initial injury and causation that were previously litigated in the original award may not be relitigated. *Nance v. Harvey County*, 263 Kan. 542, 552, 952 P.2d 411 (1997); *Brandt v. Kansas Workers Compensation Fund*, 19 Kan.App.2d 1098, 1101, 880 P.2d 796, *rev. denied* 256 Kan. 994 (1994). The Board did not err in this regard.<sup>24</sup>

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<sup>24</sup> *Id.*, 2008 WL 5401467 at 3-5.

While it may appear inequitable to allow claimant whole body impairment for what may have only been scheduled injuries involving her upper extremities, the Board is boxed-in based on *Scheidt*. The very nature of claimant's whole body disability, which was already determined twice based on the agreement of the parties and the approval of both SALJ Richardson and Judge Fuller, cannot now be altered. *Scheidt* illustrates that a workers compensation settlement determining the very nature of a claimant's disability, i.e., whether limited to the schedule or to the whole body, is an unalterable final ruling.

The dissent would limit compensation in Docket No. 1,047,018 to the schedule because: (1) the injuries, in hindsight, should not have been compensated based on whole body impairment; (2) *Casco* changed the law and prohibited whole body awards if the underlying injuries should have been compensated using the schedule, such that *Scheidt* is inapplicable; (3) *res judicata* does not apply in this case; and (4) the underlying settlement was invalid because there was no impairment rating to support the settlement.

The dissent concludes the settlement award and subsequent review and modification of that award could not have been based on whole body impairment because the underlying injuries involved injuries covered by the schedule. The dissent assumes the prior rulings only involved the upper extremities because the parties parenthetically mentioned shoulder injuries in the worksheet for settlement and arm injuries are noted in the Agreed Award of Review and Modification. The mention of upper extremity injuries does not diminish the fact that the parties nonetheless settled the case based on whole body impairment. We do not know why the parties agreed to a whole body settlement, but we know claimant had neck complaints, she had neck treatment and the file contains an unsigned order for neck treatment. If respondent so desired, it could have litigated the case and might have obtained an award or awards with compensation based on scheduled injuries. Perhaps the parties desired to avoid the time and expense of hearings, medical evaluations and ongoing litigation. Maybe claimant opted not to pursue potential avenues of recovery if respondent agreed to settle on a whole body basis. Whatever may have occurred in settlement negotiations, claimant's impairment was ultimately compromised based on a whole body impairment. If the parties' intent was to provide claimant compensation merely for scheduled injuries, there would be no valid reason to indicate in writing that claimant was being compensated based on impairment to the body as a whole.

A factual basis existed for the underlying settlement and subsequent modification to be based on impairment to the body as a whole because the parties compromised their differences based on impairment to the body as a whole. SALJ Richardson made clear that he was awarding benefits based on claimant having whole body impairment. Whether SALJ Richardson should have reached a different result ignores the fact that he ratified the parties' compromise agreement, it was never appealed and it became a final award. Claimant's whole body impairment was an agreed-upon fact. The parties also voluntarily stipulated that the review and modification award was based on a whole body impairment. The review and modification award was not appealed and it became final.

The parties were free to negotiate and compromise their settlement and the later modification based on whole body impairment. Neither the Kansas Workers Compensation Act nor case law prohibits a voluntary settlement. The law favors compromise and settlements of disputes.<sup>25</sup> Absent bad faith, fraud or mutual mistake, parties may not renege on their settlement.<sup>26</sup>

The dissent argues *Scheidt* is distinguishable because it was decided before *Casco*. The dissent argues the whole body settlement in *Scheidt* was based on the law in effect at the time of the settlement and *Casco* changed the law. It is true there was an ongoing practice, based on *Honn*,<sup>27</sup> in which combinations of scheduled injuries were resolved based on whole body impairment. However, the dissent's assertion that *Casco* changed the law is inaccurate.<sup>28</sup> *Scheidt* was settled in 2002, after *Pruter*<sup>29</sup> was decided in 2001. "*Pruter* effectively overruled *Honn*" and "*Casco* did not establish a new rule of law."<sup>30</sup> The settlement in *Scheidt* was actually contrary to how the law should have been applied all along. *Scheidt* was a bilateral upper extremity impairment case that should have been settled as two scheduled injuries, instead of being settled as a whole body impairment. When the parties in *Scheidt* settled, they relied on an incorrect interpretation of the law.

This case, was initially settled based on whole body impairment in 2009. *Casco* was decided in 2007. If *Casco* changed the law, and claimant merely had two upper extremity injuries covered by the schedule, it is puzzling why the settlement was specifically based on whole body impairment. Both this case and *Scheidt*, had they been based on a proper interpretation of the law, should have been settled as scheduled injuries, not based on whole body impairment. However, the settlement affixing the nature of claimant's disability in *Scheidt* was not subject to alteration. The same holds true in this case. Even if the parties were incorrect as to their understanding of the law, parties agreeing to a settlement based on mistake in the law are still held to their settlement agreement.<sup>31</sup> Of note, respondent has not raised allegations that the settlement or later modification of such settlement were based on bad faith or fraud.

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<sup>25</sup> See *Krantz v. University of Kansas*, 271 Kan. 234, 241, 21 P.3d 561 (2001).

<sup>26</sup> *Id.* at 241-42.

<sup>27</sup> *Honn v. Elliott*, 132 Kan. 454, 295 P. 719 (1931).

<sup>28</sup> See *Scheidt*, 42 Kan. App. 2d at 261 ("But *Casco* arguably represented no real change in Kansas law because the statutes in effect from 1931 to the present have remained substantially unchanged in their definition of scheduled and whole-body disabilities.").

<sup>29</sup> *Pruter v. Larned State Hosp.*, 271 Kan. 865, 26 P.3d 666 (2001).

<sup>30</sup> *Hall v. Dillon Companies, Inc.*, 286 Kan. 777, 788, 189 P.3d 508 (2008).

<sup>31</sup> See *Krantz v. University of Kansas*, 271 Kan. 234, 244-45, 21 P.3d 561 (2001).

The dissent further contends *res judicata* does not apply because Docket No. 1,047,018 was not settled on the merits. This is incorrect. A judgment on the merits is one “which determines the rights and liabilities of the parties based upon the ultimate fact[s] as disclosed by the pleadings or issues presented for trial.”<sup>32</sup> Both the settlement award and the review and modification award determined the parties’ rights and liabilities based on the record agreed to by the parties.

“A judgment entered based on a settlement agreement is a judgment on the merits.”<sup>33</sup> *Res judicata* applies: “A voluntary dismissal of a case with prejudice, based on a settlement agreement that is approved by the court and journalized, is a final judgment on the merits.”<sup>34</sup>

Additionally, the dissent implies that the initial settlement was defective because no impairment rating justified whole body impairment in Docket No. 1,047,018, purportedly contrary to K.A.R. 51-3-9. Respondent did not raise this argument. Even so, contrary to the dissent’s implication, K.A.R. 51-3-9 does not say that an *impairment rating* is necessary for a settlement, only that there be documentation of the extent of claimant's disabilities. Dr. Carabetta's initial report noted claimant's shoulder complaints, which is documentation of the extent of her disabilities. K.A.R. 51-3-9 does not state that a settlement agreed upon by the parties and approved by an administrative law judge is null and void absent the attachment of an *impairment rating* report. The dissent also ignores that Judge Fuller also subsequently awarded whole body impairment, as based on medical documentation and actual impairment ratings, in the Agreed Award of Review and Modification.

The parties compromised and entered into a settlement based on whole body impairment. Their intent was echoed when the settlement was reviewed years later and still based on whole body impairment. The parties did not make a simple mistake by specifically indicating that claimant was to be compensated based on whole body impairment. The language used by the parties at both the settlement hearing and in the Agreed Award of Review and Modification was not mere surplusage that can be conveniently disregarded. Similarly, binding legal precedent, such as *Scheidt*, should not be ignored. The parties should be held to their agreement that was drafted knowingly, intelligently and voluntarily by qualified counsel. Both the settlement hearing and later modification were settled based on whole body impairment and not appealed. The prior decisions were final and became the law of the case. The nature of claimant’s injury in Docket No. 1,047,018 was affixed as whole body impairment, not subject to change.

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<sup>32</sup> *Thompson-Hayward Chem. Co. v. Cyprus Mines Corp.*, 8 Kan. App. 2d 487, 489, 660 P.2d 973 (1983).

<sup>33</sup> *Guillian v. Watts*, 249 Kan. 606, 615, 822 P.2d 582 (1991).

<sup>34</sup> *Honeycutt By & Through Phillips v. City of Wichita*, 251 Kan. 451, 458, 836 P.2d 1128 (1992).

**2. Claimant is entitled to a work disability award in Docket No. 1,047,018.**

A claimant with a whole body impairment who earns less than 90% of his or her average weekly wage is entitled to a work disability award. Claimant has a whole body impairment in Docket No. 1,047,018 and also has a 100% wage loss because she is not working. Such change in circumstances is sufficient in a review and modification hearing to award claimant a work disability.<sup>35</sup>

**3. Claimant's functional impairment awards for her injuries, having been completely paid out, are not subject to modification; claimant has a 65% work disability due to her low back injury and a 70% work disability due to her repetitive injuries.**

The preponderance of the evidence shows that claimant's functional impairment has not increased. All of claimant's functional impairment has been paid. As noted in *Bazil*, "workers compensation awards, like other monetary installments, represent a final judgment with each payment, which cannot later be modified or dissolved."<sup>36</sup> Insofar as all of the functional impairment has been paid, it is too late to modify such awards.

The two components of a work disability are wage loss and task loss. From May 18, 2012 forward, claimant has a 100% wage loss. The Board finds both Dr. Brown and Dr. Carabetta's task loss opinions credible. An average of the high and low of the task loss opinions results in a 30% task loss due to Docket No. 1,040,772 and a 40% task loss due to Docket No. 1,047,018. Claimant has a 100% wage loss and a 30% task loss, resulting in a 65% work disability in Docket No. 1,040,772 and a 70% work disability in Docket No. 1,047,018, both beginning May 18, 2012.

In Docket No. 1,047,018, the Board, pursuant to K.S.A. 44-510a, reduces claimant's permanent partial disability benefits by deducting the number of weeks of overlapping work disability awarded in Docket No. 1,040,772.<sup>37</sup> The primary purpose of the Kansas Workers Compensation Act is to compensate for actual wage loss.<sup>38</sup> Claimant has just one wage loss and one work disability.

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<sup>35</sup> See generally *Edwards v. Boeing Co.*, 37 Kan. App. 2d 469, 154 P.3d 532, rev. denied 284 Kan. 945 (2007).

<sup>36</sup> *Bazil*, 2008 WL 5401467 at 4 (citing *Acosta v. National Beef Packing Co.*, 273 Kan. 385, 394, 44 P.3d 330 (2002) and *Ferrell v. Day & Zimmerman, Inc.*, 223 Kan. 421, 423, 573 P.2d 1065 (1978)).

<sup>37</sup> See *Corns v. City of Wichita*, Nos. 1,052,342 & 1,052,343, 2012 WL 5461463 (Kan. WCAB Oct. 11, 2012).

<sup>38</sup> *Brown v. Goodyear Tire & Rubber Co.*, 3 Kan. App. 2d 648, 599 P.2d 1031 (1979) *aff'd*, 227 Kan. 645, 608 P.2d 1356 (1980).

The Kansas Court of Appeals decision in *Rivas*<sup>39</sup> provides guidance. Rivas had two claims based on a low back injury and subsequent bilateral shoulder injuries. In the shoulder claim, IBP requested a reduction in benefits pursuant to K.S.A. 44-510a because claimant's low back injury contributed to his wage loss. The Kansas Court of Appeals found that the back injury and bilateral shoulder injuries contributed together to cause Rivas' loss of earning power. The Court stated:

In this case, Rivas' earning power was restored when the wage loss was awarded in the case involving Rivas' low back injury. K.S.A. 44-510a(a) only allowed the Board to reduce the award for the bilateral shoulder injuries "by the percentage of contribution that the prior disability contributes to the overall disability following the later injury." In order to properly apply K.S.A. 44-510a to the present case, the term "disability" must refer to a disability award. Under this interpretation, Rivas' disability award for the lower back claim contributed 100% to the wage loss portion of the disability award in the bilateral shoulder claim. Thus, K.S.A. 44-510a is applicable. Accordingly, the Board did not err in granting a credit to IBP, Inc.

Claimant's disability is the result of both claims. Her August 25, 2007 injury contributes 100% to her disability from her November 6, 2008 accident by repetitive motion. The Board gives respondent a 100% credit for overlapping weeks of permanent partial work disability only, but is not giving respondent any credit for overlapping weeks of permanent partial functional disability.

Payments for permanent partial disability benefits for work disability in Docket No. 1,040,772 must stop on August 8, 2015, pursuant to K.S.A. 44-510e, but payments for permanent partial disability in Docket No. 1,047,018 will continue until paid fully.

#### **CONCLUSIONS**

1. *Res judicata* precludes revisiting the nature of claimant's disability, which was already affixed as whole body impairment.
2. Claimant is entitled to review and modification of the Agreed Award of Review and Modification entered March 26, 2012.
3. Claimant is entitled to a 65% permanent partial general bodily disability in Docket No. 1,040,772 and a 70% permanent partial general bodily disability in Docket No. 1,047,018, both beginning on May 18, 2012.
4. K.S.A. 44-510a reduces claimant's permanent partial disability payments in Docket No. 1,047,018 by overlapping payments in Docket No. 1,040,772.

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<sup>39</sup> *Rivas v. IBP, Inc.*, Nos. 94,649 & 94,650, 2006 WL 2265087 (Kansas Court of Appeals unpublished opinion filed Aug. 4, 2006), *rev. denied* 282 Kan. 791 (2006).

**AWARD**

The Board modifies the May 23, 2013 Award. The parties stipulated to an average weekly wage of \$478.74 per week, which results in a compensation rate of \$319.18. All permanent partial disability benefits for functional impairment have been paid.

**Docket No. 1,040,772**

Claimant is entitled to 168.14 weeks of permanent partial disability compensation for work disability in excess of his previously paid functional impairment at the rate of \$319.18 per week or \$53,666.93 for a 65% work disability, starting May 18, 2012 and ceasing August 8, 2015, 415 weeks after the date of accident.

As of November 8, 2013 there would be due and owing to claimant 77 weeks of permanent partial disability compensation at the rate of \$319.18 per week in the sum of \$24,576.86, all due and owing, which is ordered paid in one lump sum. Thereafter, the remaining balance in the amount of \$29,090.07 shall be paid at the rate of \$319.18 per week until fully paid or until further order.

**Docket No. 1,047,018**

Claimant is entitled to 202.51 weeks of permanent partial disability compensation for work disability in excess of his previously paid functional impairment at the rate of \$319.18 per week or \$64,637.14 for a 70% work disability.

As of November 8, 2013 there would be due and owing to claimant 77 weeks of permanent partial disability compensation at the rate of \$319.18 per week in the sum of \$24,576.86, all due and owing, which is ordered paid in one lump sum. Thereafter, the remaining balance in the amount of \$40,060.28 shall be paid at the rate of \$319.18 until fully paid or until further order.

Beginning with the permanent partial disability compensation commencing on May 18, 2012, respondent is given a K.S.A. 44-510a credit for 168.14 weeks of permanent partial general disability benefits at \$319.18 per week, or \$53,666.93, that was awarded claimant in Docket No. 1,040,772.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of November, 2013.

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BOARD MEMBER

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BOARD MEMBER

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Pamela J. Fuller, Administrative Law Judge

#### **DISSENTING OPINION**

The undersigned respectfully disagree with the majority holding that *res judicata* applies in this matter. This case is particularly troubling because in the initial settlement and subsequent modification from which *res judicata* is being claimed, there was no basis in law or fact for an award of disability. K.A.R. 51-3-9 states that “[t]he administrative law judge shall not issue a settlement award unless . . . (b) medical testimony by a competent physician is introduced as evidence, either by the oral testimony of that physician, or through a documentary report of a recent physical examination of the claimant as to the extent of the claimant's disabilities.”

There was no medical evidence in the record supporting a finding of whole body impairment upon which to make a finding of disability. The parties state the settlement was for “two shoulder injuries,”<sup>40</sup> but the rating attached to the transcript was for an unrelated low back impairment provided by Dr. Carabetta on February 10, 2009. The report stated claimant had not reached maximum medical improvement for the left shoulder. There was no statement regarding the extent of claimant’s shoulder impairment/disability in the record of the settlement hearing. The special administrative law judge should never have approved the initial settlement.

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<sup>40</sup> S.H. Trans. at 3, L. 24-25.

The second problem with the settlement is that the parties did not follow the law in effect at the time of the settlement. This case was settled after the *Casco*<sup>41</sup> decision declared that bilateral scheduled injuries could no longer be converted to whole body injuries for the purpose of awarding work disability. An agreement to call the impairment something other than what it is does not change the nature of the impairment. Claimant suffered an injury to both her shoulders, scheduled injuries. The parties, as noted in the settlement hearing transcript and in the Worksheet for Settlement, state clearly that the case involved bilateral shoulders.

Claimant cites *Bailey v. Cessna Aircraft*<sup>42</sup> in support of her argument that the doctrine of *res judicata* prevents the ALJ from re-adjudicating the scheduled versus whole body issue in this case. *Bailey* is distinguished from this case because the issues in *Bailey* were fully litigated on the merits before an ALJ, prior to the application for review and modification. In this case, the parties agreed to settle the claim without a hearing on the merits or any basis in fact. The evidence included in the settlement hearing did not provide a basis for any finding of impairment. In the following agreed modification Order, the parties agreed to include the left forearm and elbow, another scheduled body part, without any reference to why it would be a whole body impairment.

Other cases have held that a settlement award is final and “not subject to redetermination.”<sup>43</sup> Once the parties settle a dispute, the courts will not, absent a showing of fraud or bad faith, examine the merits of the original controversy.<sup>44</sup> *Scheidt* is distinguished because it involved a bilateral upper extremity case that was settled prior to the *Casco* decision. Prior to *Casco*, some bilateral scheduled injury claims were granted permanent partial general disability benefits pursuant to K.S.A. 44-510e. The claim in *Scheidt* was settled based upon a 22.5% permanent partial general disability based based upon a medical opinion combining the impairments. The court in *Scheidt* stated that because the case was settled five years prior to the *Casco* decision, all issues had been resolved and could not be relitigated.

*Bazil* involved an appeal on an award of post-award medical treatment where the respondent wanted to relitigate whether a medical condition was work-related. The medical condition, inflammatory arthritis, and the causal relationship were supported by

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<sup>41</sup> *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, Syl. ¶ 4, 154 P.3d 494, 496 (2007).

<sup>42</sup> *Bailey v. Cessna Aircraft*, No. 1,023,376, 2008 WL 375794 (Kan. WCAB Jan. 15, 2008).

<sup>43</sup> *Scheidt v. Teakwood Cabinet & Fixture, Inc.*, 42 Kan. App. 2d 259, 260, 211 P.3d 175 (2009), rev. denied 290 Kan. \_\_\_\_ (2010).

<sup>44</sup> *Bazil v. Detroit Diesel Cent. Remanufacturing*, No. 99,613, 197 P.3d 905, 2008 WL 5401467 (Kansas Court of Appeals unpublished opinion filed Dec. 19, 2008).

medical records entered into evidence at the settlement hearing. The Board noted, and the Court of Appeals affirmed, a finding that the parties stipulated that claimant's inflammatory arthritis in her upper extremities is both work-related and permanent.

A significant difference between this claim and *Bailey* and *Scheidt* is that both *Bailey* and *Scheidt* were tried or settled prior to the *Casco* decision. The cited cases were settled based upon medical evidence that justified whole body injury and supported by the law in effect at the time of the settlement. The same is true for *Bazil*. The initial settlement was supported by medical evidence. In this case, there is no support in the record for the 11.3% whole body impairment. In fact, unlike the cases that hold *res judicata* applicable, there is nothing in the initial settlement hearing in this claim that supports any scheduled or whole body impairment related to this claim. It is also significant that the settlement in this claim failed to comply with K.A.R. 51-3-9 and was settled on terms contrary to the application of the law set forth in the *Casco* decision.

The majority cites *Pruter* in support of the position that the Supreme Court, prior to *Casco*, held that the *Honn* principle no longer applied and that K.S.A. 44-510e no longer applied in cases involving multiple scheduled injuries. *Pruter* did not overrule *Honn*, it modified *Honn*. Because *Pruter* did not involve scheduled injuries at the same level on both sides of the body, the common interpretation after *Pruter* was that an injured worker was still entitled to work disability if the two scheduled injuries involved parallel members,<sup>45</sup> as in this claim. It was not until the *Casco* decision that all multiple scheduled injury claims were limited to the schedule.

For these reasons and because the issues were never subject to a hearing on the merits, *res judicata* does not apply. The ALJ's ruling should be affirmed.

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<sup>45</sup> See *Mathena v. IBP, Inc.*, 33 Kan. App. 2d 956, 111 P.3d 1086 (2005).