

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

<b>JODY FERRER</b>	)	
Claimant	)	
<b>VS.</b>	)	
	)	
<b>WALMART STORES, INC.</b>	)	Docket No. 1,051,046
Respondent	)	
<b>AND</b>	)	
	)	
<b>ILLINOIS NATIONAL INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent requested review of Administrative Law Judge John D. Clark's February 11, 2013 Award. The Board heard oral argument on May 24, 2013. Melinda G. Young of Hutchinson, Kansas, appeared for claimant. Matthew R. Bergmann, of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

In a prior Award dated November 7, 2011, Judge Clark found claimant's date of injury to be in 2003 and that she failed to prove she suffered any permanent aggravation for an injury date of June 8, 2010. No benefits were awarded. Claimant appealed.

On March 19, 2012, the Board ruled that claimant suffered personal injury by a series of accidents while employed with respondent through 2009. The Board reversed Judge Clark's Award and remanded the matter.<sup>1</sup>

On remand, Judge Clark concluded in his February 11, 2013 Award that claimant's legal date of accident for a series of accidents was June 8, 2010. Judge Clark awarded claimant a 96.85% work disability by averaging a 93.75% task loss and a 100% wage loss. Respondent appealed.

The Board has considered the record and adopted the Award's stipulations.

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<sup>1</sup> Board Members Thomas D. Arnhold and Gary R. Terrill recused themselves from such prior appeal for potential conflicts that no longer exist.

ISSUES

Respondent requests the Board reverse Judge Clark's Award. Claimant maintains Judge Clark's Award should be affirmed. The issues before the Board are:

- (1) Did Judge Clark err in permitting respondent to take additional evidence after the Board remanded his initial ruling?
- (2) Is the Board bound by its March 19, 2012 Order that claimant sustained a series of accidental injuries?
- (3) Did claimant sustain personal injury by accident arising out of and in the course of employment?
- (4) Did claimant provide timely notice and timely written claim, as well as file an application for hearing in a timely manner?
- (5) What is the nature and extent of claimant's disability?
- (6) Is claimant entitled to medical expenses she incurred on her own?

FINDINGS OF FACT

Claimant began working for respondent on March 20, 2003. A few weeks after she started as a cashier in the automotive department, she fell about four feet backwards off of a ladder from the third or fourth rung and landed on her back. Claimant estimated that this event took place on April 5, 2003. Claimant completed an accident report and was treated by respondent's workers compensation physician, Cathy N. Cooper, M.D. According to claimant, x-rays displayed a spinal contusion. Dr. Cooper provided claimant with pain medication and released her to return to work with weight restrictions. Claimant did not recall the specifics of the restrictions or if they were permanent, but testified that she was not allowed to lift anything heavy. Claimant did not receive any additional medical treatment in 2003.

Claimant returned to work. She testified that after the 2003 accident, she had low back problems "off and on," or sporadically, and her back "gradually got worse."<sup>2</sup> She denied suffering any other specific low back accidents during her employment. Claimant was never pain free after the 2003 fall. She would occasionally have intense back pain for about five minutes, at work and away from work.<sup>3</sup>

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<sup>2</sup> Claimant's Depo. at 16-17, 31.

<sup>3</sup> *Id.* at 31, 33.

Claimant testified that her pain mostly occurred at work while performing heavy lifting, but there were days she would not have back pain while moving items. Some months she would have no pain and some months she would have bad pain four or five times. Sometimes she would go months without pain, but it would "just come back."<sup>4</sup>

Claimant remained in the automotive department for about three years, mainly as a cashier, but also as a night shelf stocker. She had to lift heavy things, like vehicle batteries, tires and cases, jugs and barrels of oil. Claimant switched to the electronics department for six months or a year, was promoted to a support manager in the automotive department for eight months and was transferred back to electronics. Claimant testified her duties were fairly physical and not sedentary. Her duties included:

... I was cashier in the automotive department. It was my duty to assist customers, write up work orders, do any kind of shelf stocking that needed to be done during the middle of the day, whether it be batteries, oil, sometimes tires. I would help like put tires up on the risers. And then when I was an overnight stockman I stocked most all of automotive and sometimes hardware, too. And that required me to do batteries, oil. There would be cases of oil and jugs of oil and then the big barrels of oil.

And then other things, there are air compressors that I would have to lift for hardware, because hardware and automotive were right next to each other and they shared an aisle and I would have to stock the aisle that the air compressors was on.

When I was a support manager in automotive I worked in the shop which required tires, working on cars, changing oil, cleaning. A lot of cleaning. And in electronics my duties it was as a sales floor associate, but I helped customers, stocked shelves, put up displays. Sometimes we would work overnight to like remodel the department and change everything around.<sup>5</sup>

Claimant testified that from the fall of 2003 until March 2009, she would complain to respondent that her back hurt. She testified that every three or four months after the 2003 accident, she would call respondent due to back pain. She would consistently miss two to four days from work from 2003 forward. She would see Dr. Cooper or her primary care physician, Richard Kuhns, M.D., and have treatment paid under her health insurance. Sometimes, she would simply take ibuprofen and her pain would go away.

In either 2004 or 2005, claimant had a shoulder injury at work. She filled out an accident report and respondent provided her with authorized medical treatment.<sup>6</sup>

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<sup>4</sup> *Id.* at 31-32.

<sup>5</sup> R.H. Trans. at 10-11.

<sup>6</sup> Claimant's Depo. at 11-12, 33.

Claimant once complained to her manager that her back hurt after working with a pallet of televisions and was told to take a break: "There would be days when my back pain was bad and I would complain, I would say, I would be working and my back hurts. Because I remember one time specifically is when a manager brought out a pallet of TVs for me to do, and I was doing that and by the time that I was done my back really hurt bad. And I remember telling him that and they would tell me, well, you could go take a break."<sup>7</sup> When this event occurred is not clear. Claimant testified that Jeff Livingston, the Tire Express Manager, saw her crying when she was moving oil, likely in 2005, and asked if she was okay. She also recalled having bad back pain from moving counters, maybe in 2007, when remodeling a store.

Claimant testified that in March 2009, she woke up with pain so bad that she could not get out of bed or walk and had to be carried to the restroom. She could not move her legs without severe pain. Claimant's pain was the worst she had ever experienced in her life.<sup>8</sup> She testified that her symptoms were different than any symptoms she experienced before. Claimant was asked if any particular activity caused the pain and she responded, "No. It was just I woke up one day and I couldn't move my legs, without very severe pain."<sup>9</sup> Claimant called respondent three consecutive days and relayed that she had really bad back pain and could not come to work.

When claimant was questioned about the development of her symptoms, the following exchange occurred:

- A. It came on, it gradually got worse. Like I would have back pain ever so often, but it gradually got worse.
- Q. When did you first notice it gradually getting worse?
- A. Probably in, when I first sought medical treatment for it, like, it was like in 2008, or '09, March.
- Q. March of 2009?
- A. Because it was where I couldn't get out of bed to walk, I couldn't get out of bed, with my legs.<sup>10</sup>

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<sup>7</sup> R.H. Trans. at 15.

<sup>8</sup> R.H. Trans. at 31.

<sup>9</sup> Claimant's Depo. at 18.

<sup>10</sup> *Id.* at 17.

Claimant made an appointment, on her own initiative, with Patrick Do, M.D., a board certified orthopedic surgeon. Claimant first met with Dr. Do on February 24, 2009. Claimant listed herself as responsible for Dr. Do's charges and submitted her health insurance information. A "Medical History Form" completed by claimant indicated, in part:

Is the pain the result of an injury?  
 What date did the injury occur? 4/2003 Fell off ladder at work  
 Where were you when the injury occurred? work  
 How did it occur? (fall, car wreck, sports, etc)? fall  
 Is the injury work related?  Yes  No  
 If yes, where do you work? old injury

Dr. Do's report noted claimant had low back pain for months that was worse the prior three days. Claimant told Dr. Do she did not have a recent injury, but fell from a ladder in 2003 and had been diagnosed with a lumbar sprain that improved. She testified that she told Dr. Do that her back had gotten worse subsequent to her prior injury because of her work. Claimant testified that Dr. Do then told her that her pain might be work-related, but he could not be sure because he did not have all of the facts.

Claimant testified she did not consider her injury work related when she first saw Dr. Do because she had not filled out an accident report or made a claim. She testified that she did not know she could file a claim for "continued things."<sup>12</sup> Claimant later learned from coworkers and family members that she did not need an accident report to file a claim.

Claimant testified that after her visit with Dr. Do, she went to respondent's personnel office and spoke with Kathy Ankrom (respondent's personnel director), Kerri Kelly (her department manager) and Robert Thomas (respondent's manager) about her back and report a claim.<sup>13</sup> Claimant testified that all three individuals knew she had back pain because she would call work due to back pain from 2003 forward. She testified that Ms. Ankrom asked her what her claim concerned and claimant advised that it concerned her back, but she "wasn't sure" if she had hurt herself at work because a few days earlier she was putting something in a cell phone cabinet and could not get back up without a coworker's assistance.<sup>14</sup> Claimant denied telling Ms. Ankrom that her back pain was specifically due to her 2003 fall. According to claimant, Ms. Ankrom gave her a phone number to call for workers compensation purposes. Claimant testified that she left a voice mail message, but her call was never returned. Ms. Ankrom denied ever giving any employee a phone number to call in the event of a workers compensation claim.

<sup>11</sup> R.H. Trans., Resp. Ex. 4.

<sup>12</sup> R.H. Trans. at 40.

<sup>13</sup> R.H. Trans. at 38-39.

<sup>14</sup> Claimant's Depo. at 35-36.

Dr. Do eventually referred claimant to Camden Whitaker, M.D., an orthopedic surgeon. Dr. Whitaker ordered an MRI which revealed degenerated discs. In December 2009, claimant had a procedure to determine which discs were causing her pain. Dr. Whitaker scheduled claimant for lumbar spine surgery to occur on April 8, 2010.

Claimant's last day of work for respondent was April 6, 2010. On April 7, 2010, claimant requested from Ms. Ankrom a leave of absence from April 8 through June 3, 2010. Claimant made no reference to a work accident or injury. Ms. Ankrom understood claimant was requesting time off due to impending back surgery. Various categories were listed on FMLA paperwork concerning the reason for leave, including "Workers' Compensation" and "Own Serious Health Condition."<sup>15</sup> Ms. Ankrom testified claimant indicated the category of "Own Serious Health Condition" should be marked as the reason she was requesting leave. Claimant signed the leave request.

As planned, Dr. Whitaker surgically fused claimant's L5-S1 vertebrae.<sup>16</sup> Claimant was eventually released to return to work with restrictions. She did not return to work.

On June 7, 2010, the Division of Workers Compensation received claimant's application for hearing in which claimant alleged falling off a ladder and injuring her back on March 29, 2010.

On June 10, 2010, claimant filled out and signed an associate statement<sup>17</sup> for respondent in which she reported a March 2003 date of accident, as follows:

3. Date and Time of Your Injury March 20-30 2003 circa 5pm  
 How Were You Injured I fell backwards off a ladder from the 4th rung up

If Your Injury is a Hernia or Fracture, Please Answer These Additional Questions.

1. On What Side is the Hernia \_\_\_\_\_ Have You Had a Hernia Before \_\_\_\_\_
2. At The Time You Were Injured, Did You Feel Pain yes Where lower back
3. How Long Did The Pain Last 7 years

<sup>15</sup> R.H. Trans., Resp. Ex. 3 at 1.

<sup>16</sup> Claimant's Depo. at 20-21.

<sup>17</sup> R.H. Trans. at 25-26, Resp. Ex. 1.

Claimant testified that she listed 2003 as the date of her injury because it was the "only time [she] had ever hurt her back."<sup>18</sup> She also completed a handwritten statement on June 10, 2010, noting that she fell from a ladder "7 years ago" and "had severe lower back pain since."<sup>19</sup> Claimant wrote that she went to an orthopedic doctor who said her low back problems "may be caused from back trauma and an injury that was never treated."<sup>20</sup>

Ms. Ankrom testified that prior to June 10, 2010, she was unaware of any workers compensation injury reports being made by claimant or if claimant had been involved in a workers compensation accident, apart from the 2003 accident. Ms. Ankrom indicated the completion of these forms prompted her to investigate claimant's complaints. She testified:

- A. After [claimant] had left, after filling her workman's comp statement and her personal statement the store manager, Jeremiah Zweifel, called the assistant manager who was at the store that day and asked if they had any knowledge of [claimant] reporting to them, if she had hurt her back on the job or had any complaints or anything that had to do with workman's comp to them. And the response was, they had none.
- Q. And Mr. Zweifel, the store manager, reported that directly back to you; is that right?
- A. Right.<sup>21</sup>

On June 23, 2010, claimant filed an amended application for hearing alleging an April 8, 2003 accident and a series of accidental injuries thereafter, with a statutory date of accident of June 8, 2010.

Claimant's attorney referred her to Pedro Murati, M.D., a board certified physical medicine and rehabilitation specialist, for an August 11, 2010 examination. Dr. Murati testified that claimant's fall and continued heavy lifting necessitated her back surgery, but later testified that he meant to say claimant's injury was only caused by repetitive lifting at work and there was no history of a 2003 injury or a sciatic injury when he physically examined claimant.<sup>22</sup> Dr. Murati's report does not mention that claimant woke up in early-2009 and was unable to get out of bed or had trouble walking. Dr. Murati's report noted that claimant admitted a 2003 injury, but does not specifically reference a fall from a ladder.

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<sup>18</sup> R.H. Trans. at 32.

<sup>19</sup> R.H. Trans., Resp. Ex. 2.

<sup>20</sup> *Id.*

<sup>21</sup> Ankrom Depo. at 18.

<sup>22</sup> Murati Depo. at 11-12, 21.

Dr. Murati testified that claimant's back injury, within reasonable medical probability, was a direct result of her repetitive work activities for respondent. He found claimant to be at maximum medical improvement and assigned temporary light duty restrictions.

On September 7, 2010, Dr. Murati issued a 20% whole person impairment rating based on Lumbosacral DRE Category IV of the 4th Edition of the *AMA Guides*<sup>23</sup> (hereinafter *Guides*). He also made claimant's restrictions permanent. Dr. Murati later reviewed the task list provided by Robert Barnett, Ph.D,<sup>24</sup> and opined that claimant could no longer perform 15 out of 16 tasks for a 93.75% task loss.

Dr. Do evaluated claimant at respondent's request on April 20, 2011. He opined that claimant had a 20% whole body impairment under the *Guides*. He restricted her against bending past 90° with the upper back 33% of the day and lifting greater than 50 pounds, but allowed occasional lifting of 20-50 pounds and constant lifting of 0-20 pounds.

Dr. Do provided a June 1, 2011 causation opinion that claimant's date of injury was probably 2003 because she had pain ever since her fall from the ladder. Dr. Do opined claimant's need for low back surgery was due to the 2003 fall from a ladder. He testified:

Q. What was your ultimate conclusion as to causation of the alleged work injury of Miss Ferrer?

A. That if you believe her testimony and what she wrote down in our intake form, she attributed it to a 2003 work injury.

...

A. When I read her deposition testimony, it's not in here right now, but there is a form that she fills out in her own handwriting and she says 2003, and I had no other injuries. So I, to try to answer your question, 2003 is the injury date, probably, because she's had pain all along. As far as repetitive, things causing her pain, anything you do in life can cause you a temporary aggravation of that 2003 injury. She even put in her deposition I read somewhere she gets, that a lot of times she's at home doing nothing and it just hurts. So it's possible but I don't know if I can say that it caused any kind of permanent aggravation or change in her anatomy. Some of those activities might cause temporary aggravations. I am not sure how to answer that.<sup>25</sup>

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<sup>23</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides*.

<sup>24</sup> Claimant was interviewed by Dr. Barnett on January 7, 2011, for a vocational assessment.

<sup>25</sup> Do Depo. (Aug. 3, 2011) at 9, 16.

Dr. Do testified that repetitive activities will cause pain and anything you do in life can cause a temporary aggravation of the type of injury claimant suffered in 2003. Dr. Do agreed that it would not be inconceivable that claimant's work activities of lifting "crates" of oil, tires and televisions on a regular basis could cause a permanent aggravation, but he could not say with any medical certainty or probability that such activities caused a permanent aggravation. He acknowledged that claimant did not require surgery until after 2009. Dr. Do agreed that claimant's lack of medical treatment from 2003 until early-2009 would tend to support her claim for a series of repetitive injuries.

After Judge Clark initially denied compensability, the Board reversed and remanded the case, finding that claimant suffered personal injury by a series of accidents with respondent through 2009. Thereafter, in a September 5, 2012 conference, respondent requested that Judge Clark allow it to take two additional depositions. Judge Clark issued a September 6, 2012 Order extending respondent's terminal date to November 5, 2012.

On October 3, 2012, Dr. Do's deposition was taken a second time.<sup>26</sup> Dr. Do testified having no recollection of claimant ever telling him that her 2003 injury worsened as a result of her work activities, only that she had continued pain since 2003. He said claimant told him that she had pain intermittently since the 2003 accident and woke up with pain in 2009. Dr. Do testified a scribe follows him and takes down "anything the [claimant] states" so if she told him that her condition worsened since 2003 due to her work activities, it would have been in his records. Dr. Do again opined that claimant's need for the surgery was caused by her 2003 injury. Dr. Do testified:

- Q. What, well, can you give me your opinion as to whether you believe any subsequent activities has [sic] caused any temporary aggravation or permanent aggravation or advised the Court as to your thoughts there.
- A. Sure. As a general statement, say you have a fairly significant back injury falling off the ladder, say it's always continued to hurt and anatomically changed and never been better. You could have activities that could temporarily aggravate it. You could have it lying in bed, waking up, you could have those activities working at Wal-Mart, you could have those activities cleaning your kitchen or walking around the mall. So there are a lot of different activities that would probably aggravate it. And as a general statement I would say temporarily aggravate it. You can have subsequent injuries that could change the anatomy, for instance, if you were involved in a pretty big car accident or have something fairly significant, it could permanently aggravate it. Waking up in bed in 2009 probably wouldn't cause a permanent aggravation. So that's how I would interpret temporary versus permanent.<sup>27</sup>

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<sup>26</sup> Claimant objected to the additional testimony on the basis that an award was previously rendered and respondent should not have two opportunities to present evidence.

<sup>27</sup> Do Depo. (Oct. 3, 2012) at 12-13.

Dr. Do further testified:

Q. . . . And then under trauma or injury it states, no recent injury, she had an injury in 2003 when she fell from a ladder and per her report was diagnosed [with] lumbar strain. She states it did improve. Do you know what caused or do you have an opinion, as you sit here today, what caused the pain to get worse, what caused an onset of pain over the months and increase in pain that was worse in the last three days?

A. I wouldn't know why.

Q. Okay. Do you have any opinion of what caused that increase in pain over the months preceding February 24th, 2009?

A. It's hard to say. You could have folks come in that have a lot of wear and tear in their knee, for instance, and you get an x-ray and they are standing on it and you go, wow, that looks really bad, and you know it's been ruined for a long period of time, but they swear it just started recently. And it can. It can flare up for different reasons at different periods of time, and you don't know why but most folks don't have to have a trauma to trigger, like this lady, she just woke up to that.

Q. And can that pain be triggered by just the repetition of activities instead of a traumatic event?

A. Yes.<sup>28</sup>

On October 29, 2012, the deposition of Kathy A. Ankrom was taken.<sup>29</sup> Ms. Ankrom testified that claimant was not supposed to lift over 30 pounds for respondent without assistance. Ms. Ankrom testified the policy regarding reporting a work accident was that if an associate had an accident, they were to report it and complete paperwork stating how the accident happened. Ms. Ankrom noted that respondent does not distinguish between injuries that occur over time due to repetitive activities at orientation, but employees are told to report all accidents and any pain that they believe is related to their job, whether it is from one specific accident or from lifting items over time, "no matter how small."<sup>30</sup>

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<sup>28</sup> *Id.* at 13-14.

<sup>29</sup> Ms. Ankrom believes that the name "Kathy Ingram" referenced in the regular hearing transcript and claimant's brief refers to her, as no Kathy Ingram works or worked for respondent. (Ankrom Depo. at 21-22). Claimant objected to Ms. Ankrom's testimony for the same reasons listed in footnote 26.

<sup>30</sup> Ankrom Depo. at 24, 32-34.

PRINCIPLES OF LAW

In workers compensation litigation, it is claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>31</sup> The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>32</sup>

K.S.A. 2009 Supp. 44-501(a) states the employer is liable to pay compensation for an employee's personal injury by accident arising out of and in the course of employment.<sup>33</sup> The two phrases "arising out of" and "in the course of" have

. . . separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."<sup>34</sup>

K.S.A. 2009 Supp. 44-508(d) states in part:

In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

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<sup>31</sup> K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

<sup>32</sup> K.S.A. 2009 Supp. 508(g).

<sup>33</sup> K.S.A. 2009 Supp. 44-501(a).

<sup>34</sup> *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

K.S.A. 2009 Supp. 44-523(b) states, in part:

[T]he administrative law judge shall set a terminal date to require the claimant to submit all evidence in support of the claimant's claim no later than 30 days after the first full hearing before the administrative law judge and to require the respondent to submit all evidence in support of the respondent's position no later than 30 days thereafter. An extension of the foregoing time limits shall be granted if all parties agree. An extension of the foregoing time limits may also be granted . . . (3) on application for good cause shown.

K.S.A. 44-534(b) states:

No proceeding for compensation shall be maintained under the workers compensation act unless an application for a hearing is on file in the office of the director within three years of the date of the accident or within two years of the date of the last payment of compensation, whichever is later.

K.S.A. 2009 Supp. 44-551(i)(1) states, in part:

Administrative law judges shall have power to administer oaths, certify official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, documents and records to the same extent as is conferred on the district courts of this state, and may conduct an investigation, inquiry or hearing on all matters before the administrative law judges. All final orders, awards, [or] modifications of awards . . . made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days. . . . Review by the board shall be a prerequisite to judicial review . . . . 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. The orders of the board under this subsection shall be issued within 30 days from the date arguments were presented by the parties.

#### ANALYSIS

##### **(1) Judge Clark Properly Allowed Respondent's Additional Evidence.**

Claimant argues Judge Clark erred by allowing respondent to obtain additional evidence after the Board remanded this matter to him for further proceedings. Under K.S.A. 2009 Supp. 44-523(b), an administrative law judge may extend terminal dates for good cause. Judge Clark presumably reopened the claim to receive additional evidence based on good cause. Under K.S.A. 2009 Supp. 44-551, administrative law judges have broad powers regarding depositions, hearings and investigations before them. The Board will not disturb Judge Clark's handling of his docket and terminal dates. The Board considers as evidence the transcripts and exhibits associated with Dr. Do's second deposition on October 3, 2012, and Kathy Ankrom's October 29, 2012 deposition.

**(2) The Board Has Authority to Reconsider its Prior Ruling.**

At oral argument, claimant asserted that the Board's prior decision that she suffered a series of accidental injuries constituted the "law of the case" and could not be revisited in this appeal. The law of the case doctrine has long been applied in Kansas and is generally described in 5 Am. Jur. 2d, Appellate Review, § 605, in the following manner:

The doctrine of the law of the case is not an inexorable command, or a constitutional requirement, but is, rather, a discretionary policy which expresses the practice of the courts generally to refuse to reopen a matter already decided, without limiting their power to do so. This rule of practice promotes the finality and efficiency of the judicial process. The law of the case is applied to avoid indefinite relitigation of the same issues, to obtain consistent results in the same litigation, to afford one opportunity for argument and decision of the matter at issue, and to assure the obedience of lower courts to the decisions of appellate courts.

The Kansas Supreme Court stated in *Connell*:

The doctrine of law of the case, as applied to the effect of previous rulings on later action of the trial court, is a salutary and utilitarian rule to be applied to pretrial orders, but it is not to be considered as a limitation on the power of a trial court to do justice or correct prior rulings which are clearly erroneous. A trial court has inherent power to review its own proceedings to correct errors or prevent injustices. The power to reconsider a ruling in a case resides in the trial court until a final judgment or decree is issued.<sup>35</sup>

The Board provides *de novo* review of all administrative law judge actions<sup>36</sup> and has the power and responsibility to review, and if necessary, correct its own prior rulings on issues brought before it. "[T]he law of the case rule is not inflexibly applied to require a court to blindly reiterate a ruling that is clearly erroneous . . . ."<sup>37</sup>

The Board does not share the dissenting Board Members' concern that a final award is being relitigated or that the parties might have detrimentally relied on the Board's prior Order. The Board's prior decision was not final and it was not an award. If it were a final award, there would have been no need to remand the matter to Judge Clark. If the prior Board Order was final, one or both parties could have sought judicial review, but neither party appealed the Board's prior Order to the Court of Appeals.

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<sup>35</sup> *Connell v. State Highway Commission*, 192 Kan. 371, 376, 388 P.2d 637 (1964).

<sup>36</sup> See *Butner v. Glazers Wholesale Drug Co.*, No. 1,048,515, 2011 WL 2693253 (Kan. WCAB June 16, 2011).

<sup>37</sup> *State v. Collier*, 263 Kan. 629, 632, 952 P.2d 1326 (1998).

Rather than the issue having been foreclosed, it was apparent that respondent was still challenging whether claimant suffered a series of injuries when the second deposition of Dr. Do was taken, along with that of Ms. Ankrom. The parties, in their briefs, set forth arguments for and against whether claimant sustained a compensable series of accidental injuries. Neither party indicated in their briefs that the Board was bound by its prior Order. Also, the infusion of additional evidence requires the Board to reconsider the case. The Board is not restricted to follow its prior Order if the prior Order was incorrect either factually, legally or both. The Board finds it was proper for respondent to again argue issues regarding compensability, including whether claimant proved a series of accidental injuries with an accident date of June 8, 2010.<sup>38</sup>

**(3) Claimant Was Injured in 2003 When She Fell From a Ladder; She Failed to Prove a Series of Accidental Injuries Through June 8, 2010.**

The Board concludes claimant did not prove a series of accidental injuries due to her continued work activities or that her repetitive work activities caused her need for surgery or her resulting permanent impairment and disability because: (A) the evidence points to a traumatic injury in 2003; (B) the Board adopts Dr. Do's opinions as more persuasive than those of Dr. Murati; and (C) claimant's testimony and her general complaints of pain are insufficient to prove that a series of accidental injuries occurred.

**(A) Claimant Sustained Traumatic Injury in 2003.**

Claimant fell from a ladder in 2003. She completed an accident report, received authorized medical treatment and had continued pain thereafter. If claimant gradually worsened from 2003 forward as a result of her work activities, the Board would expect a paper trail corroborating her assertion. Such proof is lacking. Claimant testified that she first noticed her gradual worsening around the time that she simply woke up at home and was bedridden in early-2009. Suddenly being bedridden is not a gradual worsening. The following evidence shows claimant attributed her injury to her 2003 fall from a ladder or not due to her work activities:

February 24, 2009: In her medical history form for Dr. Do, claimant attributed her low back problems to her 2003 fall from a ladder. She did not pursue treatment through workers compensation insurance, but rather processed her bills through health insurance. While claimant testified that she did not know that she could have a claim for "like continued things," she previously had reported work injuries to respondent for which she received authorized medical treatment, including her fall from a ladder in 2003 and her shoulder injury in 2004 or 2005.

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<sup>38</sup> See *Holtke v. Holy Cross School*, No. 1,051,759, 2013 WL 1384384 (Kan. WCAB Mar. 29, 2013).

Claimant did not tell Dr. Do that she was injured due to repetitive work. While the Board's March 19, 2012 Order states that claimant told Dr. Do that she told him her back worsened due to her work for respondent, Dr. Do testified at his second deposition that if claimant had made such complaints, his records would have corroborated her story, but his records only reference a 2003 accidental injury.<sup>39</sup>

April 7, 2010: Claimant signed FMLA paperwork. She had the opportunity to indicate her low back condition was work-related. She did not, opting to classify her ailment as her own serious health condition.<sup>40</sup>

June 7, 2010: The Division of Workers Compensation received claimant's original application for hearing. Claimant alleged that she fell from a ladder on March 29, 2010. Her fall actually took place in 2003, not 2010. The original application for hearing did not attribute claimant's injury to repetitious work throughout her years of employment with respondent.

June 10, 2010: In her associate statement, claimant attributed her injury to falling from a ladder in 2003. Such document says nothing about continued work causing claimant to have any symptoms. An accompanying handwritten document claimant completed the same day also references that she had pain ever since the 2003 fall and her apparent understanding that her symptoms may have been due to an injury that never healed, but holds no mention of general and repetitious work duties causing her ongoing back pain.

These documents do not support claimant's theory that she was injured as a result of repetitive job duties. Rather, such documents either attribute claimant's injury as a result of her 2003 accident or her own serious health condition, not workers compensation.

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<sup>39</sup> The Board's prior Order indicated claimant tried to pursue a claim under workers compensation insurance by speaking to Ms. Ankrom after her initial appointment with Dr. Do. This conversation would have occurred in early-2009. Claimant testified that Ms. Ankrom gave her a phone number for workers compensation (which Ms. Ankrom denied) and that claimant left a phone message that was simply never returned. The Board indicated claimant hired an attorney after meeting with Ms. Ankrom (previously identified by the Board as Ms. Ingram). However, claimant apparently did not hire an attorney until mid-2010, well over a year later. The Board finds it implausible that claimant would try to make a workers compensation claim in early-2009 and leave a phone message with someone purportedly connected to workers compensation claims, only to idly sit back and do nothing else concerning her asserted work injury until mid-2010.

<sup>40</sup> Claimant not listing workers compensation as the reason for her leave is inconsistent with her contention that she tried to pursue a workers compensation claim by speaking to Ms. Ankrom shortly after her initial appointment with Dr. Do in early-2009.

(B) The Board Adopts Dr. Do's Causation Opinion.

Dr. Do, a treating doctor, attributed claimant's injury and need for surgery to her 2003 fall from a ladder. The Board agrees and adopts Dr. Do's conclusions. The Board disagrees with its March 19, 2012 Order, where it concluded Do's causation opinion was not specific. Such conclusion was incorrect. Dr. Do, in a straightforward manner, attributed claimant's permanent injury and need for surgery to the 2003 fall from a ladder.

The Board, in its March 19, 2012 Order, applied incorrect legal standards in analyzing Dr. Do's testimony when it noted: "[Dr. Do] agreed that it is not inconceivable that the ongoing work activities, including the lifting of crates of oil, tires and TVs on a regular basis could cause permanent aggravation of her earlier physical problems. He was unable to say with any medical certainty that the work activity did cause permanent aggravation."<sup>41</sup>

Whether something is "inconceivable" or "could" happen is not relevant; the need for medical "certainty" is not required. The standard of proof is whether a party's position on an issue is more probably true than not true. Dr. Do was comfortable saying claimant's work "could" cause a temporary worsening, but he could not testify that claimant's work caused a permanent worsening.<sup>42</sup> Such opinion is enough to *defeat* compensability. The Board imposed upon respondent a higher burden of proof than allowed by law.

The Board's initial Order also noted that Dr. Murati's opinion was more persuasive. This conclusion was also incorrect. Dr. Murati's causation opinion was inconsistent; he initially testified claimant's back injury was due to falling from a ladder and her repetitive work, but later confined causation to claimant's repetitive work. Dr. Murati's causation opinion was also based on an inaccurate history. Dr. Murati's report made no mention of claimant simply waking up in 2009 with extreme pain. While claimant told Dr. Do that she fell from a ladder in 2003, Dr. Murati's report says nothing about a fall from a ladder, only that claimant had a prior back injury in 2003. Dr. Murati minimized the significance of such injury by simply noting claimant had been diagnosed with a muscle contusion, was given pain medication and just went back to work. Unlike Dr. Do, Dr. Murati never echoed claimant's testimony that she had never been pain free subsequent to the 2003 fall.

Additionally, the Board's prior decision improperly enhanced Dr. Murati's opinion without evidentiary support, by stating, "Dr. Murati determined that, within a reasonable degree of medical certainty, claimant had suffered increased pain and injury during her several years of heavy work for respondent."<sup>43</sup> This statement is wrong. Dr. Murati's causation opinion was based on medical *probability*, both in his report and his testimony.

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<sup>41</sup> Appeals Board Order (March 19, 2012) at 7.

<sup>42</sup> Dr. Do Depo. (August 3, 2011) at 17, 26-27.

<sup>43</sup> Appeals Board Order (March 19, 2012) at 7. The Board did state on page five of the prior Order that Dr. Murati assigned diagnoses to claimant within a reasonable degree of medical probability.

**(C) Claimant's Testimony and Generalized Pain Complaints Do Not Prove that a Series of Accidental Injuries Occurred.**

The Board acknowledges claimant's 2010 discovery deposition and 2011 regular hearing testimony that her low back condition worsened due to repetitive work activities. Such testimony is inconsistent with claimant's representations in paperwork to Dr. Do, her FMLA paperwork, her associate statement and the accompanying handwritten document, as well as her original application for hearing, as noted in subsection (A) above.

The Board's prior Order seemed to equate claimant's complaints of pain as establishing that her repetitive work duties caused permanent injury and that respondent was aware of such causal connection. The Board disagrees with the prior Order.

While claimant testified that her superiors knew she had back pain based on her complaints and phone calls, merely voicing complaints is not synonymous with informing respondent that she had low back symptoms due to her ongoing work activities. The Board's prior Order indicates respondent knew claimant was hurting due to her work activities and would be given extra work breaks as needed. The evidence actually establishes that claimant was told to take a single break, i.e., one break, at some unknown time, not multiple breaks.<sup>44</sup> Even assuming one or more of respondent's representatives knew claimant had back pain, a single mention of one incident at some unknown time does not establish that a series of accidental injuries occurred.

More significantly, there is no proof respondent's representatives knew claimant's ongoing back pain was due to work activities. Simply because claimant was at work and complained about pain does not necessarily supply proof that work duties caused the pain. The Board's prior Order indicates "tire manager Jeff [Livingston] was present one day in 2005 when [claimant] had a back spasm so bad she started to cry."<sup>45</sup> The Board assumed Mr. Livingston knew she was crying due to back pain that was related to her work because he saw her crying while she was working. There are many reasons people cry; the assumption should not be that work activities were the cause. There is no proof that Mr. Livingston actually knew claimant had low back pain due to lifting activities.

The Board concludes claimant was injured from a fall from a ladder in 2003. She did not prove a series of accidental injuries thereafter.

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<sup>44</sup> R.H. Trans. at 15.

<sup>45</sup> Appeals Board Order (March 19, 2012) at 4.

**(4) Claimant Failed to File Her Application for Hearing in Timely Fashion.**

Filing a 2010 application for hearing for a 2003 accident is out of time. Claimant is time barred under K.S.A. 44-534(b).

The Board is aware that just over two weeks after claimant filed the initial application for hearing, her allegations changed and she opted to allege a series of accidental injuries with a statutory date of accident of June 8, 2010. Extending the date of accident to June 8, 2010, by using the legal fiction of a series of repetitive microtraumas, appears to have been an attempt to circumvent the application of K.S.A. 44-534(b).

**CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board reverses Judge Clark’s February 11, 2013 Award. Claimant was injured in 2003. She did not file a timely application for hearing to maintain a claim. She failed to prove a series of accidental injuries subsequent to her 2003 fall from a ladder. Other issues, including notice, written claim, nature and extent of disability, and addressing claimant’s medical bills, are moot.

**AWARD**

**WHEREFORE**, the Board reverses Administrative Law Judge John D. Clark’s February 11, 2013 Award.

**IT IS SO ORDERED.**

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

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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Honorable John D. Clark

### DISSENTING OPINION

The undersigned Board Members dissent from the majority's finding that the Board may reconsider whether claimant sustained a personal injury by accident arising out of and in the course of her employment with respondent. In its Order of March 19, 2012, the Board listed the sole issue as whether the ALJ erred in concluding that claimant failed to sustain her burden of proof that she suffered personal injury by accident arising out of and in the course of her employment at respondent through a series of accidents ending on June 8, 2010. Other issues such as timely notice, timely written claim, nature and extent of claimant's disability and whether claimant was entitled to repayment of medical expenses she paid were not decided by the ALJ or the Board. The Board determined the ALJ erred and remanded the claim for further proceedings stating, "The denial of the benefits by the ALJ is reversed. This matter is remanded to the ALJ for a determination of the remaining issues before the court."<sup>46</sup>

After the remand, the ALJ and the parties relied on the Board's ruling that claimant sustained a personal injury by accident arising out of and in the course of her employment and proceeded accordingly. The parties may have proceeded differently on remand, including taking the depositions of additional witnesses or presenting additional evidence, had they known the Board was going to reconsider whether claimant's injury was work related.

That part of the Board's November 7, 2011 Award finding that claimant sustained a back injury resulting from a series of repetitive work activities was a final, not an interlocutory, decision. The issue whether claimant sustained a personal injury by accident arising out of and in the course of her employment should not be revisited, as it is res judicata. In *Scheidt*,<sup>47</sup> Kansas Court of Appeals stated:

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<sup>46</sup> Appeals Board Order (Mar. 19, 2012) at 7.

<sup>47</sup> *Scheidt v. Teakwood Cabinet & Fixture, Inc.*, 42 Kan. App. 259, 211 P.3d 175 (2009).

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 undersigned Board Members do not disagree with the majority's finding that claimant failed to sustain her burden of proof that she sustained a series of injuries by accident arising out of and in the course of her employment with respondent. However, the undersigned Board Members are of the opinion that such specific issue was previously decided by the Board and was not remanded to the ALJ. While the Board membership has changed significantly in recent years and only one Board Member who participated in the prior Board decision is participating in the instant decision, the majority is, in essence, reversing a previous ruling. The Board should not engage in second-guessing itself.

Reconsidering an issue, where there is no clear indication the majority erred in fact or law, promotes judicial inefficiency. As was previously stated by the dissent in *Holtke*,<sup>48</sup> the majority's ruling is an invitation to parties in future cases to re-litigate issues already decided. The undersigned Board Members fear that is an invitation many parties will eagerly accept.

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BOARD MEMBER

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BOARD MEMBER

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<sup>48</sup> *Holtke v. Holy Cros School*, No. 1,051,759, 2013 WL 1384384 (Kan. WCAB Mar. 29, 2013).