

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**ROBERT A. SWENSON** )  
Claimant )  
V. )  
**WHEELCHAIRS OF KANSAS<sup>1</sup>** )  
Respondent ) Docket Nos. 1,053,158  
AND ) & 1,054,096  
**TRAVELERS PROPERTY CASUALTY** )  
**COMPANY OF AMERICA** and )  
**TRAVELERS INDEMNITY COMPANY** )  
**OF CONNECTICUT** )  
Insurance Carriers )

**ORDER**

Claimant, by and through Matthew L. Bretz, of Hutchinson, requested review of Administrative Law Judge Pamela J. Fuller's August 27, 2014 Awards in the two separately docketed cases noted above. Jeffrey E. King, of Salina, appeared for respondent and its insurance carriers (respondent). The Board heard oral argument on January 6, 2015.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Awards, but notes the parties never stipulated to claimant's date of accident in Docket No. 1,054,096.

At oral argument, the parties agreed: (1) the Board may consult the *AMA Guides*<sup>2</sup> (hereafter *Guides*); (2) both regular hearings occurred on April 7, 2014, even though the transcript in Docket No. 1,053,158 says it occurred on April 28, 2014; (3) Dr. Estivo's deposition transcript and exhibits are in evidence in both docketed cases, even though the transcript only references Docket No. 1,053,158; and (4) if claimant proved notice of accident in Docket No. 1,054,096, the Board should determine the nature and extent of claimant's disability.

Additionally, respondent agreed that if the Board finds claimant's date of accident in Docket No. 1,054,096 to be October 27, 2010, a date it was insured by Charter Oak Fire Insurance Company, it would not assert prejudice or lack of due process.

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<sup>1</sup> Respondent is also identified as "Rayes" (Guthrie Depo. at 4-5) or "Rayes, Inc." (Barnett Depo. at 9-10).

<sup>2</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based on the fourth edition of the *Guides*.

ISSUES

Claimant has two separately docketed cases. Separate stipulations for the claims were taken and there are separate regular hearing transcripts for each claim, but the content of claimant's testimony is identical in both transcripts.

Docket No. 1,053,158 concerns claimant's October 14, 2009 accident in which he injured his low back and had bilateral leg symptoms. The judge found claimant sustained a 7.5% permanent partial impairment to the body and a 41% work disability, to be reduced by claimant's receipt of social security retirement benefits. The judge concluded claimant had an 82% wage loss, but failed to prove his task loss percentage because the task list was deficient and the physician task loss opinions were based on restrictions for more than just claimant's low back injury.

Claimant requests the Award be modified, arguing he proved task loss and the judge erred in entirely disregarding the task loss opinions. Claimant asserts while respondent complained of alleged inaccuracies in the task list prepared by claimant's expert, respondent produced no contradictory task list. Claimant did not appeal the social security offset. Respondent requests the Award be reversed, arguing claimant failed to prove he suffered permanent impairment as a result of his injury. In the alternative, respondent maintains the Award should be affirmed.

The sole issue in Docket No. 1,053,158 is: what is the nature and extent of claimant's disability?

In Docket No. 1,054,096, claimant alleges repetitive trauma injuries to his neck, shoulders, arms, wrists and hands from August 1, 2010 through August 24, 2010, his last day worked. The judge found claimant sustained personal injury by accident arising out of his employment and provided timely written claim. The judge awarded claimant a 10% permanent partial impairment to his right upper extremity at the level of the forearm. The judge denied compensability of claimant's other injuries for failure to give timely notice.

Claimant requests reversal. He argues his legal date of accident for his repetitive injuries was October 27, 2010, and he provided timely notice for such accident by giving written notice to respondent that same day. Claimant argues K.S.A. 2010 Supp. 44-520 does not require him to specify all body parts involved. Claimant also contends he is entitled to future medical treatment. Respondent maintains the Award should be affirmed.

The issues in Docket No. 1,054,096 are:

- (1) Did claimant give timely notice of his accident?
- (2) What is the nature and extent of claimant's disability?
- (3) Is claimant entitled to future medical treatment?

FINDINGS OF FACT

Claimant, who is 67 years old, began working for respondent on February 12, 2002. His employment file shows he started in the “paint & prep” department and switched to the machine shop on June 3, 2002. Starting December 30, 2002, claimant worked the remainder of his employment with respondent as an assembler. He built hospital beds. Claimant testified his job as an assembler required him to stand at a table to build half rail “mounds,”<sup>3</sup> headboards and bed accessories using a drill, mallets, arbor presses, wrenches and screwdrivers. He would put metal bushings into the half rail mounds. Claimant testified the heaviest thing he lifted was a 25 pound fold-down half rail.

Claimant testified he began experiencing symptoms in his neck and arms in 2005 or 2006 because he was building half rails and actuators, devices that make the beds go up, down, fold and tilt. He testified he had to perform the same activity “over and over again,” such as pulling down and raising an arbor press for “days on end.”<sup>4</sup>

On October 14, 2009, claimant had a shooting pain down his back and legs after he picked up a box of bolts and turned. He dropped the box. William Weber, claimant’s supervisor, witnessed him drop the box. Claimant was sent for medical treatment.

Claimant’s employment file shows the Hess Clinic gave him light duty restrictions from November 9 through December 10, 2009. Claimant had physical therapy those months. On December 22, 2009, a nurse practitioner released claimant to full duty, with the caveat that he engage in proper lifting.

Claimant testified the first time he had a conversation about his neck and arm symptoms with respondent was in early 2010, when Mr. Weber noticed he was in pain and asked him about it. Claimant testified:

He came up and asked me he says - - asked me if I was sore and I said, Yeah, I’m sore, and he said, Well, how sore are you, I says, I’m just sore, I’ll be all right. And then after that he kind of kept an eye on me but there was times it came and it went and just depended on what I was doing how bad I was hurting and if there was certain things were light they didn’t bother me.<sup>5</sup>

Claimant had additional treatment at the Hess Clinic starting in March 2010. A nurse practitioner returned him to light duty on March 12, 2010. Claimant had a lumbar MRI on March 19, 2010. Because of his low back and leg symptoms, claimant was referred to Vivek Sharma, M.D., an orthopedic surgeon.

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<sup>3</sup> R.H. Trans. (No. 1,053,158) at 8.

<sup>4</sup> Claimant Depo. at 11.

<sup>5</sup> R.H Trans. at 13.

Dr. Sharma examined claimant on April 14, 2010. Claimant reported low back pain radiating into his legs, without numbness or weakness. Dr. Sharma's report states that claimant's pain gradually developed six months earlier without injury, but also listed an October 14, 2009 date of injury. Dr. Sharma diagnosed claimant with lumbar spine stenosis. He released claimant to full duty. Dr. Sharma recommended epidural steroid injections and he intended to evaluate claimant following the injections. According to claimant, Dr. Sharma told him workers compensation would not pay for the injections. On June 25, 2010, claimant had an injection at the Veterans Administration (VA).

Dr. Sharma testified claimant's examination was essentially normal, apart from subjective low back pain, tenderness and decreased range of motion. Dr. Sharma testified claimant's lumbar MRI revealed preexisting degenerative changes without evidence of trauma. He opined claimant's spinal stenosis was unrelated to the injury, but admitted a specific incident could render the stenosis symptomatic and claimant only had symptoms after the October 14, 2009 accident. Dr. Sharma did not see evidence of permanent spinal injury, but was unsure because claimant never returned for additional treatment.

After claimant saw Dr. Sharma, he resumed his regular work. However, by August 2010, claimant's neck and upper extremity symptoms worsened, which he attributed to running a three-ton arbor press. Claimant reported increased symptoms to Mr. Weber, but did not request medical treatment or fill out paperwork.

Nancy Guthrie is the human resources manager for Sizewise Rentals, what she termed a company associated with respondent. Ms. Guthrie learned claimant was having problems with his hands on August 16, 2010, when he took time off work to go to a doctor's appointment.

According to claimant, on August 19, 2010, he awoke with a burning sensation in his right arm around 2:00 a.m. He testified he sought treatment at the VA that day or the next day and a VA doctor told him "it was [carpal] tunnel syndrome . . . ."<sup>6</sup> Claimant testified his right arm "got hot again" that Saturday and Sunday.<sup>7</sup>

On Monday, August 23, 2010, claimant left work early because of swelling in his hands. Claimant testified Mr. Weber asked him around 10:30 a.m. if he was hurting. Claimant confirmed he was hurting, but added he would be all right. Mr. Weber testified claimant told him he might have an infection and said nothing about a work injury. According to Ms. Guthrie, when claimant returned to work on August 23, he told her he had an infection in his hands and was given antibiotics. Claimant testified he may have told either Ms. Guthrie or Mr. Weber that he had an infection in his hands.

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<sup>6</sup> R.H. Trans. (No. 1,054,096) at 17.

<sup>7</sup> *Id.*

Claimant returned to work on August 24, 2010, but respondent sent him home after about one hour because he was unable to do his job. This was his last day worked. He was not under any work restrictions. Claimant did not tell respondent he had work related upper extremity or neck symptoms. He did not ask to report a workers compensation claim and did not ask for medical treatment. Claimant was placed on FMLA.

Ms. Guthrie testified claimant mentioned carpal tunnel several weeks after August 24, 2010. She testified that she suggested they fill out an accident report, but claimant declined. After Ms. Guthrie testified, claimant testified he and Ms. Guthrie had a conversation on August 24, 2010, in which he told her he might have carpal tunnel syndrome, but she said such condition was an illness not covered by workers compensation. Ms. Guthrie denied ever telling claimant such information, indicating she is familiar with carpal tunnel syndrome and would not say it could not be turned in to workers compensation insurance.

Mr. Weber recalled claimant mentioned he may have carpal tunnel during one of their conversations, but it would have occurred after their initial discussions about claimant's hand problem being due to an infection. Mr. Weber also testified claimant never told him his carpal tunnel was work related or asked to fill out an accident report.

Claimant continued treating at the VA. He had two more lumbar epidural steroid injections. According to claimant, VA testing showed he had carpal tunnel syndrome and shoulder and neck problems. The VA provided him wrist braces, right carpal tunnel surgery and bilateral shoulder injections. He did not receive any treatment for his neck, but testified he was told he may need surgery. Claimant testified a VA doctor told him he did not hurt his neck at work. He also testified that a VA doctor diagnosed him with rheumatoid arthritis in September 2010. Over multiple medical hearsay objections, claimant testified he decided to make a claim for workers compensation after being told by an unknown VA doctor that his problems with his neck, shoulders and wrists were most likely caused by his repetitive work activities for respondent over the prior five to seven years.

On October 25, 2010, claimant's attorney sent a notice of intent to respondent alleging "repetitive use" injuries "sustained while in the course of employment with your facility."<sup>8</sup> The nature or extent of such injuries was not specified in the letter.

Ms. Guthrie testified respondent first learned claimant was making a repetitive injury claim when she received claimant's attorney's letter on October 27, 2010. Ms. Guthrie testified claimant never reported any work-related neck and shoulder problems or asked that an accident report be filled out.

Claimant had right carpal tunnel surgery performed at the VA on November 17, 2010. C. Anderson, M.D., a VA doctor, placed claimant on a five pound lifting restriction, but noted claimant could return to full activity in six weeks.

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<sup>8</sup> R.H. Trans. (both dockets), Cl. Ex. 5.

Claimant filed his application for hearing in Docket No. 1,054,096 on January 11, 2011. He alleged repetitive injuries to his neck, shoulders, arms, wrists, hands and all parts affected from on or about August 2010 through August 24, 2010, with a statutory date of accident being October 27, 2010, pursuant to K.S.A. 44-508(d).

On January 21, 2011, James A. Wolter, M.D., of the VA, indicated claimant's neck condition warranted permanent restrictions of no lifting overhead or lifting more than 20 pounds. Respondent was unable to accommodate these restrictions and terminated claimant's employment on February 11, 2011.

On October 17, 2011, claimant was seen at his attorney's request by George Fluter, M.D., who is board certified in physical medicine and rehabilitation. Claimant complained of pain in his neck, upper back, shoulders, lower back, legs, and left thumb, with left thumb and right middle finger numbness. Dr. Fluter reviewed records, including VA records showing claimant had bilateral shoulder pain in 2007 and a June 2008 low back injury.

Dr. Fluter examined claimant and assessed claimant with low back, neck, upper back and bilateral shoulder injuries and bilateral carpal tunnel syndrome. Dr. Fluter suggested claimant: (1) restrict lifting, carrying, pushing and pulling up to 20 pounds occasionally and 10 pounds frequently; (2) avoid holding his head and neck in awkward or extreme positions; (3) restrict overhead activities to occasionally; (4) restrict activities at or above shoulder level to occasionally; (5) restrict activities greater than 24 inches away from the body using each arm to occasionally; (6) restrict repetitive flexion and extension of the wrists to occasionally; (7) restrict repetitive hand grasping to occasionally; (8) avoid use of power/vibratory tools with each hand; (9) provide appropriate thermal protection for the hands in the cold; (10) restrict bending, stooping, crouching and twisting to occasionally; and (11) restrict squatting, kneeling, crawling and climbing to occasionally. The lifting restrictions applied to both docketed cases. Restrictions 1, 10 and 11 pertained to claimant's low back. Restrictions 1-9 concerned claimant's neck and upper extremities.

Dr. Fluter assigned claimant the following impairments:

- a 5% whole person impairment based on DRE Lumbosacral Category II, a 1% whole person impairment for right sacroiliac joint dysfunction and 1% whole person impairment for left sacroiliac joint dysfunction;
- a 5% whole person impairment based on DRE Cervicothoracic Category II;
- a 12% impairment to the right upper extremity at the level of the shoulder, a 13% impairment to the left upper extremity at the level of the shoulder, an 8% impairment to the right upper extremity at the level of the wrist and a 7% impairment to the left upper extremity at the level of the wrist.

All of the impairments were based on the *Guides*, apart from the ratings for the sacroiliac joints. Dr. Fluter testified the *Guides* do not provide a specific rating for sacroiliac joint dysfunction, but allow a 10% impairment for sacroiliac joint fractures. Dr. Fluter testified claimant’s sacroiliac joint dysfunction warranted an impairment, but because claimant did not have a fracture, he assigned only a 1% impairment for each side.

Dr. Fluter acknowledged claimant’s rheumatoid arthritis affects the joints, more commonly the smaller joints of the hands and feet and sometimes the shoulders and hips, but it rarely affects the spine. Dr. Fluter could not say if claimant had any prior impairment, but even if claimant had preexisting degenerative spinal changes, claimant’s 2009 accident and repetitive work activity thereafter aggravated those degenerative changes.

Dr. Fluter gave claimant upper extremity restrictions to avoid a recurrence of carpal tunnel syndrome, but testified it is uncommon for someone to have recurring symptoms.

Dr. Fluter reviewed a task list prepared by Robert Barnett, Ph.D., a psychologist, rehabilitation counselor, rehabilitation evaluator and job placement specialist. Dr. Barnett had interviewed claimant on March 12, 2013, at the request of claimant's attorney. Dr. Fluter opined claimant was unable to perform 17 of 22 unduplicated tasks in Dr. Barnett’s list for a 77.3% task loss. Dr. Fluter testified all of the tasks claimant can no longer perform relate to both claimant’s upper extremities and his back as follows:

<b>Task</b>	<b>Able to Perform</b>	<b>If No, Body Part Involved (Upper Extremities/Back)</b>
1. Attend safety meetings	Y	
2. Use various hand tools	N	Both
3. Roll beds to slipping	N	Both
4. Install bed accessories	N	Both
5. Clean work area (with mop)	N	Both, mainly back
6. Take trash to dumpster	Y	
7. Wrap materials for shipping	N	Both
8. Operate machine tools (deburr, drill, lathe)	N	Both, mainly upper extremities
9. Load and unload trucks	N	Both, mainly back
10. Operate school bus	N	Both
11. Service bus (fuel, oil, tires)	N	Both, mainly back

12. Clean bus interior and exterior	Y	
13. Complete paperwork - communication w/office, etc.	Y	
14. Greet customers, make sales	N	Both, mainly back
15. Operate cash register	N	Both, mainly back
16. Operate push mower	N	Both, mainly back
17. Install carpet	N	Both, mainly back
18. Install floor tile	N	Both, mainly back
19. Operate semi-truck	N	Both
20. Connect and disconnect trailers	N	Both, mainly back
21. Tarp load	Y	
22. Change oil and lubricate	N	Both, mainly back

Dr. Flutter acknowledged the task list did not include picking up a box of bolts or specifically operating an arbor press. Dr. Flutter noted the description of claimant driving a bus for up to 12 hours a day differed from claimant's testimony that he worked about six hours a week as a substitute bus driver. Further, Dr. Flutter acknowledged that if claimant was still working as a substitute bus driver and could do the work, he would not object to claimant doing so. Dr. Flutter noted there were no tasks listed for work claimant performed at a funeral home. Dr. Flutter was unable to say whether claimant could perform tasks at Crown T.L. (Crown) and U.S.D. 473 because there were no tasks listed in the task list.

On October 22, 2013, claimant was seen at respondent's request by Paul Stein, M.D., a board certified neurosurgeon. Dr. Stein's report states:

The claimant's work activity involved making wheelchairs using a variety of tools and repetitive lifting up to 60 pounds. He reports lifting 40 times a day. "I had three tables I worked off of." The tables were about the height of a desk and Mr. Swenson could alternate sitting and standing. The claimant describes repetitive bending and twisting of the neck and back on a regular basis.<sup>9</sup>

Dr. Stein reviewed medical records and took a history. Claimant complained of low back pain going into his lower extremities. Claimant reported pain at the base of his neck without radiculopathy. He experienced pain in his shoulders which increased with movement, in addition to intermittent numbness and tingling in both hands.

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<sup>9</sup> Stein Depo., Ex. 2 at 1.

Dr. Stein's examination of claimant's low back revealed significant range of motion deficit. Claimant had no lower extremity neurological deficit. Dr. Stein reviewed claimant's lumbar spine MRI as showing multilevel degenerative disc disease and varying degrees of stenosis. Dr. Stein's physical examination further revealed both shoulders showed limited range of motion, crepitus consistent with degenerative disease and probable impingement. Claimant had no neurological deficit in the upper extremities. Dr. Stein's review of claimant's cervical spine MRI revealed moderately severe degenerative change at multiple levels and stenosis at C4-5 and C3-4.

Dr. Stein assigned claimant a 10% whole person impairment for his low back, a 5% whole person impairment for his cervical spine, a 13% impairment to the right upper extremity at the shoulder and an 11% impairment to the left upper extremity at the shoulder, all using the *Guides*.

For claimant's lumbar spine, Dr. Stein imposed permanent restrictions to: (1) avoid lifting more than 40 pounds with any single lift up to twice per day, 30 pounds occasionally; (2) avoid frequent repetitive lifting; (3) avoid lifting from below knuckle height or above chest height; (4) no repetitive bending or twisting of the lower back; and (5) sit for 5 or 10 minutes for every 30 minutes standing. For claimant's cervical spine, Dr. Stein imposed permanent restrictions to: (1) avoid repetitive bending and twisting of the neck on a frequent basis and (2) avoid repetitive or continuous overhead activity. For claimant's shoulders, Dr. Stein's restrictions were: (1) avoid repetitive or continuous activity with either hand above shoulder level and (2) avoid repetitive or continuous activity with either upper extremity fully outstretched. After reviewing Dr. Barnett's task list, Dr. Stein opined claimant was unable to perform 15 of the 22 tasks for a 68% task loss. Dr. Stein did not differentiate claimant's task loss between the two docketed cases.

Dr. Stein stated claimant's October 14, 2009 lifting incident was causally related to his symptoms. He noted claimant's degenerative spinal condition was preexisting, but the work incident was the precipitating factor in the development of symptoms. Dr. Stein noted claimant's repetitive work probably caused an aggravation or acceleration of claimant's lumbar degenerative disease and testified it was "hard to separate"<sup>10</sup> claimant's October 14, 2009 injury from repetitive injury. He did not think claimant's 2008 back strain was significant, unless records showed a chronic problem.

Dr. Stein also noted claimant's work activity aggravated claimant's cervical spine and shoulders. Dr. Stein acknowledged if claimant did not have neck symptoms until after he left work, he would probably not attribute any cervical spine impairment to claimant's work activities. However, Dr. Stein noted claimant contended his neck symptoms developed while he worked for respondent, but he simply did not have any neck treatment until April 2011.

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<sup>10</sup> Stein Depo. at 15.

Regular hearings were held on April 7, 2014. Claimant testified his back was doing "pretty good"<sup>11</sup> and he was not then experiencing any symptoms, but he has ongoing back problems due to pain, such as no longer being able to lift, shovel snow, perform yard work, mow the yard, run a weed eater or a vacuum, throw balls or shoot a basketball. He will have pain down his legs if he overexerts himself. Claimant complained of cracking and popping in his neck, constant pain in his left shoulder and increased right shoulder pain with activity. Claimant denied ongoing problems with his wrists.

Claimant testified he has an ongoing fungus problem with his hands due to military service. He broke his left arm in 1960 and broke his right arm in 1963. His left shoulder dislocated in 1973. He denied prior neck injuries.

Claimant was questioned regarding job tasks. He testified he did not have to lift anything heavy to operate a cash register at a hardware store. He testified work for a funeral home involved mowing, unloading caskets, dusting caskets and occasionally helping to put bodies in caskets, tasks not listed in Dr. Barnett's report. Claimant testified he worked for Midco Plastics for six years, starting in 1989, but also testified he did not work at Midco in 1994 and was not sure of the dates he worked for Midco. When working for U.S.D. 473, he did a security check of the school every evening and would occasionally mow with a riding lawn mower.

Around 2001, claimant made cabinet doors at Crown, which he described as being light duty and much lighter than his job for respondent. He disagreed with Dr. Barnett classifying the weights lifted at Crown as the same as what he lifted for respondent. For Crown, the weights were lighter than what he lifted at respondent, perhaps 12 to 15 pounds. He made front covers for cabinets using 1" x 2" boards. Claimant had a machine that notched the boards and cut the tongue and groove. He also used a radial arm saw and a pneumatic staple gun. Claimant put the 1" x 2" boards on a table, glued them together, put them in a rack and used a hydraulic machine to press everything together. He would then measure drawer sides and doors. Claimant sanded the four corners of the cabinet doors and would take a cartload of doors to a belt sander where he simply fed the doors into the sander before repeating the process on the other side of the door. The completed cabinet doors weighed maybe a couple pounds.

Claimant also started working as a substitute bus driver in 2001. At the time of his accident, he worked six hours a week driving three routes. He continues with that employment and earns \$29.50 per route. When asked if he put gasoline and oil in the bus, he testified that he just fuels the bus. Claimant testified he and his doctors agreed he could keep driving the bus. He disagreed with Dr. Barnett's indication he drove the bus up to 12 hours because a route took about two hours.

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<sup>11</sup> R.H. Trans. (No. 1,053,158) at 11.

The claimant began receiving social security retirement benefits in February 2011. He received \$13,695 in 2011, \$15,480 in 2012 and \$15,732 in 2013.

Dr. Barnett testified regarding the task list. He completed the task list based on his education, training and experience, as well as information claimant provided. For instance, Dr. Barnett testified claimant provided him with an estimate that a spool of plastic wrapping to wrap finished hospital beds weighed 50 pounds. The only job Dr. Barnett listed claimant performing for respondent was as an assembler.

Dr. Barnett testified claimant was likely wrong about having worked at Midcontinent Plastics from 1989 to 1995 because such employer was not listed in a print-out from the Social Security Administration that listed claimant's jobs dating back to 1994.

On May 9, 2014, claimant was seen at respondent's request by John Estivo, D.O., a board certified orthopedic surgeon. Dr. Estivo reviewed medical records and took a history. Claimant complained of lumbar spine pain radiating to his legs and episodes of cervical spine pain and numbness into his arms. Dr. Estivo noted claimant gave him a history of waking up on August 16, 2010, with burning pain in his right arm. According to Dr. Estivo, claimant denied having any injury to his cervical spine or shoulders while at work and claimant indicated the only problem he had with his cervical spine was when he slept wrong. Dr. Estivo testified claimant never said his work activities bothered his neck.

Dr. Estivo's examination of claimant's low back revealed no tenderness to palpation or during range of motion, negative straight leg raising, normal strength and reflexes and no antalgic gait. X-rays showed age related degenerative joint disease. Claimant's lumbar MRI showed mild congenital narrowing of the lumbar spine, degenerative bulging discs and facet arthritis, which Dr. Estivo characterized as age-related.

Dr. Estivo's examination of claimant's cervical spine revealed no tenderness to palpation or during range of motion and negative Spurling's test. Claimant's bilateral upper extremity deep tendon reflexes and strength were normal. Dr. Estivo opined there was nothing wrong with claimant's cervical spine other than age related degenerative changes. Claimant had decreased shoulder range of motion consistent with age related arthritis and normal function of both rotator cuffs. Right arm examination revealed full range of motion in his right wrist, full supination and pronation of his right forearm, no triggering to the digits of the right hand and no signs of any nerve irritation.

Dr. Estivo diagnosed claimant with: (1) age related lumbar spine degenerative changes resulting in multiple-level spinal stenosis; (2) congenital narrowing to the lumbar spine, predisposing claimant to stenosis; (3) age related cervical spine degenerative changes throughout the cervical spine; (4) age related bilateral shoulder degenerative joint disease; and (5) status post right carpal tunnel release.

Dr. Estivo noted claimant's October 14, 2009 accident resulted in an aggravation of claimant's preexisting age related advanced degenerative arthritis of the lumbar spine and spinal stenosis. Dr. Estivo expected any lumbar soft tissue injury would have healed. He stated claimant's current lumbar symptoms were due to claimant's age related lumbar arthritis. Dr. Estivo acknowledged claimant did not indicate nor did any medical records reflect that he was having any symptoms into his legs prior to the work injury.

Dr. Estivo opined claimant's work activities did not cause or aggravate the age related degenerative changes to his cervical spine or his shoulder arthritis and claimant's work in August 2010 only resulted in a temporary aggravation of preexisting degenerative cervical spine and shoulder conditions.

Dr. Estivo assigned a 10% impairment to the right upper extremity pursuant to the *Guides*. Dr. Estivo indicated claimant had no lumbar impairment related to the October 14, 2009 accidental injury and no impairment to his shoulders or cervical spine in relation to the alleged August 2010 injury. Dr. Estivo assigned no restrictions and opined claimant would require no further medical treatment as a result of his accidents.

The August 27, 2014 Award in Docket No. 1,053,158 states:

. . . After careful review of all the evidence presented, it is found that the claimant has pre-existing conditions in his lumbar spine. Those conditions were asymptomatic prior to his accident and became symptomatic/painful, after his accident. His accident caused a permanent aggravation of his preexisting conditions. As a result, the claimant suffers a 7.5% disability to the body as a whole for his lumbar spine injury which is an average of Dr. Flutter's and Dr. Stein's ratings. This does not include the additional 2% given by Dr. Flutter which he stated was not addressed in the *Guides*. Their evaluations and ratings are found to be credible and are similar. Further, Dr. Sharma admitted the accident could have made the stenosis symptomatic and Dr. Estivo didn't find prior leg symptoms, so their findings are not all that different.

The claimant's task loss is somewhat difficult. Dr. Stein found a 68% task loss but it was based on restrictions for more than just the lumbar spine injury. Dr. Flutter found a 72.7% task loss for the lumbar spine, stating that most of the restrictions were for the lumbar spine and the upper extremity and cervical area combined. From review of the testimony presented, there are some tasks that were not listed and others that were described inaccurately. These issues were not addressed prior to the doctors determining the claimant's task loss percentage. The claimant would suffer a task loss, but the percentage is unknown. Therefore, a task loss will not be used as a part of the calculation of the claimant's work disability. It is clear that the claimant has a wage loss beginning February 12<sup>th</sup>, 2011, when he was terminated. After his termination, he continues to work on a part time basis making \$88.50 per week currently. His average weekly wage was \$482.25. Therefore, the claimant would suffer an 82% wage loss. This with the undetermined task loss would result in a 41% work disability beginning February 12<sup>th</sup>, 2011.

The claimant has been receiving Social Security Benefits which began in February of 2011. Therefore, his weekly benefits for his 41% work disability shall be reduced by his weekly benefits received from Social Security, pursuant to K.S.A. 44-501(h). The claimant is entitled to 67.86 weeks of benefits with no reduction.

The August 27, 2014 Award in Docket No. 1,054,096 states:

The claimant did meet with personal injury by accident arising out of and in the course of his employment up through his last day worked, August 24<sup>th</sup>, 2010. All the medical doctors agree that the claimant's carpal tunnel syndrome was a result of his work activities. Further, all but Dr. Estivo believe the claimant's cervical and shoulder complaints are also a result of his work activities. Dr. Estivo believes the work activities could have caused a temporary aggravation. The issue is whether the claimant gave notice of accidental injury. K.S.A. 44-520 states that notice must be given within 10 days after the date of the accident, except that actual knowledge of the accident shall render the giving of notice unnecessary or within 75 days due to just cause. The respondent knew prior to the claimant's last day of work that he was having problems with his hands. The actual diagnosis came some time later but at least prior to October 25<sup>th</sup> of 2010, which is when the Notice of Intent was received. This Notice was received 62 days from the last day worked. The claimant did not know what the problem was with his hands until after his last day worked. When he was informed that they believed he had carpal tunnel, that was conveyed to the respondent, to Ms. Guthrie. She believed it to be work related as she requested the claimant fill out an accident report. There was just cause for the delay in notice as to the claimant's carpal tunnel and it was received within the 75 days. The claimant did not complain of shoulder or neck problems and did not report those when he informed the respondent of his carpal tunnel although his VA doctor had indicated it was all work related. The claimant's testimony varied as to what he told the respondent. Further, the notice received from claimant's counsel merely listed repetitive injury. The claimant failed to give notice of shoulder and neck injury even after diagnosis. The claimant testified that he does not have ongoing problems with his wrists. He did have surgery on the right and is entitled to benefits for that injury. Dr. Estivo provided a 10% impairment for operated right carpal tunnel which is found to be credible.

Thereafter, claimant filed timely appeals.

#### **PRINCIPLES OF LAW**

An employer is liable to pay an employee compensation where the employee sustains personal injury by accident arising out of and in the course of employment. Claimant has the burden to prove the right to an award of compensation by a preponderance of the evidence.

The date of accident for a repetitive injury is based on K.S.A. 2010 Supp. 44-508(d):

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.

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. 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.

K.S.A. 44-501(c) states an employee “shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability.” The test is not whether the injury causes the condition, but whether an injury aggravates the condition.<sup>12</sup>

The trier of fact must decide which testimony is more accurate and/or credible and adjust medical, lay and other testimony that may be relevant to the question of disability. The trier of fact is “free to consider all of the evidence and decide for itself the percentage of disability. The numbers testified to by the physicians are not absolutely controlling.”<sup>13</sup>

K.S.A. 44-520 provides, in part:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident . . . .

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<sup>12</sup> See *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 377, 573 P.2d 1036 (1978).

<sup>13</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, Syl. ¶ 1, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

ANALYSISDocket No. 1,053,158**Claimant sustained a 7.5% functional impairment and a 61.5% work disability.**

The Board affirms the judge's finding that claimant sustained a 7.5% permanent whole body functional impairment. In claimant's application for review, he listed his impairment as an issue, but he did not argue it on appeal. A physician may use his judgment to address impairments not addressed by the *Guides*,<sup>14</sup> such as claimant's sacroiliac impairment, but a 7.5% impairment fairly addresses his lumbar impairment.

Claimant argues the judge disregarded evidence he had between a 68% and a 77.3% task loss and respondent presented no contrary task list.<sup>15</sup> Respondent argues the physician task loss opinions are unreliably based on a task list which omitted tasks and overstated task requirements. Respondent further contends the judge correctly found claimant failed to prove task loss in Docket No. 1,053,158 because his task loss was based on restrictions combined from both this case and Docket No. 1,054,096.

The permanent partial general disability of an injured worker is measured, in part, by his task loss. After task requirements are identified, a physician compares those requirements to restrictions and opines whether the worker retains the ability to perform the tasks. The Kansas Workers Compensation Act does not define work tasks, but a task is not the same as a job. In general, a task can be described as being an essential job function. We are concerned with tasks performed in substantial gainful employment within the 15 years before a date of accident.

Claimant's task list is not conclusive because it is inaccurate and incomplete. Claimant's task list does not specifically include use of an arbor press for respondent. Lifting a box of bolts for respondent is not listed as a task. While not pointed out by respondent, Dr. Barnett's list does not specifically include either the "paint and prep" job claimant performed for respondent for about three and one-half months in 2002 or the machine shop position claimant held for six months that year. It is also difficult to reconcile claimant's testimony that the most he would lift for respondent was 25 pounds, while the task list states he would lift heavier items weighing 35, 50 and even 100 pounds.

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<sup>14</sup> K.S.A. 44-510e(a); See *Smith v. Sophie's Catering & Deli Inc.*, No. 99,713, 2009 WL 596551 (Kansas Court of Appeals unpublished opinion filed Mar. 6, 2009), *publication denied* Nov. 5, 2010, and *Kinser v. Topeka Tree Care, Inc.*, No. 1,014,332, 2006 WL 2632002 (Kan. WCAB Aug. 1, 2006).

<sup>15</sup> *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, Syl. ¶ 2, 558 P.2d 146 (1976) ("Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy, and is ordinarily regarded as conclusive.").

Dr. Barnett's description of claimant's tasks for U.S.D. 388 is at odds with claimant's testimony. Regarding task no. 10, claimant testified he drove a bus six hours a week, two hours at a time, not up to 12 hours at a time. For task no. 11, claimant testified he only put gasoline in the bus, nothing about putting oil in the bus or doing anything with bus tires. Claimant also testified he is able to continue his job as a bus driver.

Dr. Barnett testified claimant's work at Crown duplicated many of claimant's tasks for respondent. Claimant disagreed, characterizing his tasks at Crown as much lighter. Claimant had six distinct tasks at Crown: (1) using machines to make cabinet doors; (2) lifting 1" x 2" boards and completing cabinet doors weighing about two pounds; (3) measuring drawer sides and doors; (4) sanding cabinet door corners; (5) pushing a cart filled with cabinet doors; and (6) feeding cabinet doors through a belt sander.

In his task list, Dr. Barnett did not include claimant unloading caskets for Jon Londeen's funeral home, helping to put bodies in caskets and dusting caskets. Claimant testified he did not have to lift anything heavy to operate a cash register as a hardware store clerk for Jon Londeen (task no. 15), but the task list says he had to lift 50 pounds. Claimant used a riding mower for U.S.D. 473, different than a push mower for Jon Londeen. Claimant also did a security check to ensure that doors were locked at the U.S.D. 473 grade school and gym. These are tasks not in Dr. Barnett's task list.

The Kansas Court of Appeals gave direction on what to do when a task list may be inaccurate. In *Medlin*,<sup>16</sup> the Board ruled a claimant failed to prove any task loss because: (1) Mr. Medlin provided an employment history to his vocational expert, Mr. Dreiling, that was different than his regular hearing testimony, including failing to tell him about an entire job; and (2) Dreiling's task list was too broad because it provided general job descriptions and did not identify or describe individual tasks. The Kansas Court of Appeals stated:

Although there are discrepancies in Medlin's testimony and Dreiling's report, the discrepancies were not significant. Medlin was honest about the mistakes in the report, and there is no evidence that he intentionally misrepresented his work history to Dreiling. Contrary to the findings of the Board, Medlin provided a very detailed report, which outlined and described the work tasks. Rather than finding that Medlin failed to meet his burden of proof regarding work task loss, the Board should have accepted the uncontroverted evidence as a basis for its findings concerning disability. The Board then could have made adjustments and corrections as the Board deemed appropriate, instead of completely disregarding the expert's opinion concerning work task loss.

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<sup>16</sup> *Medlin v. Douglas County Public Works*, No. 83,240, 2000 WL 767043 (Kansas Court of Appeals unpublished opinion filed June 9, 2000).

The Board arbitrarily disregarded uncontroverted evidence that established work task loss. A zero percent task loss is not appropriate in light of the vocational expert's opinion, and the matter should be remanded for further proceedings to determine the appropriate work task loss.<sup>17</sup>

In *Portillo*,<sup>18</sup> a Dr. Drazek concluded Mr. Portillo lost the ability to perform 27 of 28 pre-injury tasks (96%), but the Board concluded Mr. Portillo failed to prove his task loss percentage because Dr. Drazek's opinion was based on a task list which omitted six jobs. The Kansas Court of Appeals reversed:

[I]t is important to put this issue in the larger factual picture shown by the undisputed evidence or . . . the Board's other findings regarding Portillo's functional disability and the lifting, bending, and stooping limitations imposed by Dr. Drazek. All of this evidence strongly suggests that Portillo, a common laborer, has suffered an inability to undertake work tasks he used to perform before the accident.

We believe the Board's reasoning to be flawed. To reach its negative finding, the Board only considered the fact of Portillo's failure to report five or six work tasks to the rehabilitation consultant and totally disregarded the uncontroverted evidence of 28 work tasks that were reported. In effect, the Board omitted uncontroverted, relevant evidence to arrive at its faulty conclusion that Portillo failed to provide evidence of task loss.

[W]e conclude the Board's findings of zero task loss must be set aside and the proceeding remanded for further consideration of the Board. Upon remand, the Board as factfinder must consider not only the work tasks not reported but the work tasks that were reported to the consultant. Then the Board may reconsider the weight to be given to Dr. Drazek's opinion and decide to what extent Portillo has lost his ability to perform work tasks as called for under K.S.A. 44-510e(a).<sup>19</sup>

On remand, the Board concluded Mr. Portillo had a 96% task loss and stated:

The Board is mindful that the Court of Appeals stated the Board on remand "must consider . . . the work tasks not reported" along with the tasks reported to the rehabilitation consultant. But the Board is unable to consider the omitted jobs in determining task loss because the record fails to disclose the work tasks included in those jobs. As used in the Workers Compensation Act, "work tasks" implies specific duties or specific acts that constitute the worker's job. To effectively break a job down into separate work tasks, one should consider the essential functions of the job and the physical requirements of each task.<sup>20</sup>

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<sup>17</sup> *Id.*, slip. op. at 6-7.

<sup>18</sup> *Portillo v. Carl Cole Masonry*, No. 220,294, 2000 WL 235506 (Kan. WCAB Feb. 29, 2000).

<sup>19</sup> *Portillo v. Carl Cole Masonry*, No. 84,988, slip op. at 6-7, 2001 WL 328731 (Kansas Court of Appeals unpublished opinion filed Mar. 23, 2001).

<sup>20</sup> *Portillo v. Carl Cole Masonry*, No. 220,294, 2001 WL 893601 (Kan. WCAB July 30, 2001).

The Kansas Court of Appeals reached a different result in *Keeting*.<sup>21</sup> The Board concluded Mr. Keeting failed to prove task loss because a physician's task loss opinion was not based on a task list, but just the general physical requirements of one of Mr. Keeting's prior ironworker jobs, the only work Mr. Keeting told the doctor about. Consequently, the physician did not consider tasks he performed as a fishing and hunting guide for three years. The physician, without considering a task list, summarily concluded Mr. Keeting had a 65% task loss. The Court of Appeals affirmed and stated there was "no real evidence . . . to show specifically what tasks Keeting lost the ability to perform" and "no support for the percentage of work task loss arrived at by [the physician]."<sup>22</sup>

The Board has ruled that a claimant failed to prove task loss where a claimant failed to tell a vocational expert about a job, which made calculating the precise task loss impossible without "pure speculation."<sup>23</sup> The Board has rejected a physician's task loss opinion where the vocational expert's task list was inaccurate.<sup>24</sup> However, in *Petsinger*,<sup>25</sup> even though there was serious disagreement as to the accuracy of task lists generated by experts hired by both sides, the omissions and errors in the task lists did not invalidate the task lists.<sup>26</sup> Additionally, even if tasks are omitted from a task list, task loss opinions based on such list will not be rejected if the omitted tasks are essentially duplicative of tasks already in the list.<sup>27</sup>

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<sup>21</sup> *Keeting v. Baker Concrete Const.*, No. 91,689, 2005 WL 217171 (Kansas Court of Appeals unpublished opinion filed Jan. 28, 2005).

<sup>22</sup> *Id.* at \*3; accord *Cunningham v. Love Box Co., Inc.*, No. 102,538, 2010 WL 2509962 (Kansas Court of Appeals unpublished opinion filed June 18, 2010).

<sup>23</sup> *Voorhies v. Cobalt Boats*, No. 1,000,243, 2004 WL 3094633 (Kan. WCAB Dec. 22, 2004).

<sup>24</sup> *Dekat v. Durham D & M, LLC*, No. 1,042,760, 2013 WL 862033 (Kan. WCAB Feb. 6, 2013), *aff'd* No. 109,501, 2014 WL 2401893 (Kansas Court of Appeals unpublished opinion filed May 23, 2014); see also *Miller v. Catholic Charity Community*, No. 1,042,450, 2011 WL 6122908 (Kan. WCAB Nov. 16, 2011); *Atkinson v. Major, Inc.*, No. 225,572, 1999 WL 1008037 (Kan. WCAB Oct. 26, 1999), *aff'd* No. 84,281, 2000 WL 1141825 (Kansas Court of Appeals unpublished opinion filed Aug. 4, 2000).

<sup>25</sup> *Petsinger v. Chet's Lock & Key*, No. 1,045,680, 2010 WL 769953 (Kan. WCAB Feb. 15, 2010); see also *Mason v. Presbyterian Manors, Inc.*, Nos. 251,750 & 267,092, 2003 WL 22401245 (Kan. WCAB Sept. 30, 2003) (task loss percentage should be based on all tasks, not just tasks listed in a task list).

<sup>26</sup> The Board has adjusted a physician task loss opinion where a task a physician concluded a claimant could not perform is actually within the claimant's task performing ability. *Wilson v. Lawrence Landscape*, No. 245,577, 2000 WL 1708332 (Kan. WCAB Oct. 26, 2000). Where a task list was incomplete, the Board modified a physician's task loss opinion to account for the missing tasks. *Pitt v. Boeing Co.*, No. 245,402, 2002 WL 31253318 (Kan. WCAB Sep. 25, 2002) [Because there was no evidence claimant lost the ability to perform any of 13 omitted tasks, the Board added 13 missing tasks to a task list to adjust physician's task loss opinion from 59% (16 of 27 tasks) to 40% (16 of 40 tasks)].

<sup>27</sup> *Miller v. Fibercare, Inc.*, No. 1,011,875, 2006 WL 2631998 (Kan. WCAB Aug. 1, 2006).

This case is distinguishable from *Keeting* because a task list was presented to physicians for task loss opinions and the doctors were not relying on an overly general description of a job instead of individual tasks. This case is more similar *Medlin* and *Portillo*. Based on *Medlin*, the Board should make “adjustments and corrections” to determine claimant’s task loss in lieu of completely disregarding the evidence. *Portillo* tells us to consider all tasks, whether reported to Dr. Barnett or not. When considering *Medlin* and *Portillo*, we conclude claimant’s low back injury resulted in him losing the ability to perform 14 of 34 tasks he performed in the 15 years prior to his October 14, 2009 accident.

However, the Board cautions the task list was vague, incomplete and at odds with claimant’s testimony. We questioned if the list established claimant’s relevant tasks by a preponderance of the credible evidence. The Board considered dismissing the list and the physician opinions derived from such list, but determined the list was just barely sufficient.

The Board has tried to be as mathematically accurate as possible even though we cannot arrive at a definite number of tasks because the evidence does not show how many tasks comprised claimant’s “paint and prep” and machine shop jobs that were not in Dr. Barnett’s list. Nonetheless, *Portillo* suggests we cannot disregard *all evidence* of task loss because some jobs are omitted from a list. At a minimum, these omitted jobs involved at least three tasks, i.e., painting, prepping and working in the machine shop. Claimant provided no physician opinion that he was unable perform these tasks.

Claimant’s use of various hand tools (task no. 2) and operation of machine tools (task no. 8) fairly accounts for his use of an arbor press. The task of lifting a box of bolts for respondent is also fairly duplicated frequently in the task list, based on the list showing claimant lifting objects weighing 8-100+ pounds.

Claimant can do all tasks associated with driving a school bus for U.S.D. 388. Dr. Fluter’s opinions that he cannot perform task nos. 10 and 11 were incorrect.<sup>28</sup>

Claimant presented no physician opinion that his low low back restrictions preclude him performing his tasks at Crown. The Board adds those six tasks to the task list.

Claimant testified he did not lift anything heavy when operating a cash register (task no. 15). We conclude claimant can still perform that task. Claimant likely lost the ability to unload caskets for Jon Londeen’s funeral home or help put bodies in caskets, but such tasks are comparable and duplicative to moving hospital beds and lifting associated with other tasks. Claimant presented no evidence he can no longer dust caskets.

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<sup>28</sup> A claimant’s testimony that he still performs a task after a work injury may establish that a physician’s opinion that claimant can no longer perform the task is incorrect. See *Goudy v. Exide Technologies*, No. 106,385, 2012 WL 3822798 (Kansas Court of Appeals unpublished opinion filed Aug. 31, 2012).

Claimant presented no physician opinion he can no longer use a riding mower for U.S.D. 473 or perform a security check.

Overall, claimant presented no physician opinion that he was unable to perform his paint and prep tasks, his machine shop task, his six tasks at Crown, dusting caskets, operating a riding mower or performing a security check. These 12 tasks will be added to the 22 tasks identified by Mr. Barnett.

The credible evidence shows claimant likely did not work for Midcontinent Plastics in the 15 years before his 2009 accident. The social security print-out of claimant's earnings does not list Midcontinent Plastics and claimant expressed doubt as to when he worked for such employer.

The judge ruled claimant's proof of task loss was based on combined restrictions from both claims, such that his task loss in Docket No. 1,053,158 is unknown. The Board agrees with this conclusion as it pertains to Dr. Stein's opinion. Dr. Stein gave claimant separate restrictions for his injuries, but did not separate task loss between the two claims, i.e., his low back as opposed to his neck and upper extremities. Thus, we cannot determine claimant's task loss in Docket No. 1,053,158 based on Dr. Stein's restrictions.

However, the evidence allows us to assess claimant's task loss in Docket No. 1,053,158 because every task Dr. Flutter indicated claimant could no longer perform was on account of claimant's injured lower back irrespective of restrictions for claimant's neck or upper extremities. Dr. Flutter did not indicate claimant's task loss was based on restrictions from both claims combined, but rather either claim. Insofar as claimant's task loss was already affixed due to his low back restrictions alone, we do not even need to consider claimant's task loss that might also be due to his neck and bilateral upper extremity injuries.

By carefully accounting for the evidence, including claimant's testimony as to his current ability and his description of relevant past tasks, the Board concludes claimant lost the ability to perform 14 of 34 tasks when considering the low back restrictions from Dr. Flutter. Therefore, claimant has a 41% task loss, which averaged with his 82% wage loss, results in him having a 61.5% permanent partial general (work) disability.

### **Docket No. 1,054,096**

#### **1. Claimant provided timely notice of his repetitive accident.**

Claimant was denied benefits for his neck, shoulders and left arm based on failure to provide respondent with timely notice that such body parts were injured as a result of his work activities through August 24, 2010, his last day actually worked.

As an initial matter, claimant's date of accident for repetitive trauma is not August 24, 2010. An accident date for a repetitive trauma injury is dependent upon alternative options established by K.S.A. 2010 Supp. 44-508(d). A worker's last day worked as the date of accident for a series of accidental injuries is not listed as a statutory option. The date of accident under the statute is "inherently artificial and represents a legal question, rather than a factual determination."<sup>29</sup>

No authorized physician took claimant off work due to the conditions or restricted claimant from performing the work which caused his conditions. Thus, the first and second criteria set forth in K.S.A. 2010 Supp. 44-508(d) were not met. However, claimant gave written notice to respondent on October 27, 2010. Therefore, pursuant to K.S.A. 2010 Supp. 44-508(d), the date of accident is the date written notice of the injury was given to respondent – October 27, 2010. Here, notice and the date of accident occurred on the same date. Therefore, timely notice of accident was provided.<sup>30</sup>

As a secondary matter, K.S.A. 44-520 does not require that the employee give the employer notice of each and every body part that may have been injured or affected by an accident.<sup>31</sup> K.S.A. 44-520 requires an injured worker to give notice to his employer of any work-related accident. "Knowledge of the accident by the employer, or his duly authorized agent, or notice to the employer within ten days of the accident is all that is required by K.S.A. 44-520."<sup>32</sup> In this case, claimant provided respondent with notice of his accident by repetitive use or cumulative trauma and he did so on the same day of his date of accident.

**2. Claimant sustained a 26.5% permanent whole body impairment and a 61.5% work disability.**

The Board considers, but rejects Dr. Estivo's opinions regarding claimant not having permanent impairment of function for his neck, shoulders or left wrist. Drs. Stein and Fluter found claimant had more diffuse permanent impairment of function. The Board concludes claimant has a 5% whole person cervicothoracic impairment, a 12.5% impairment to the right shoulder, a 9% impairment to the right forearm, a 12% impairment to the left shoulder, and a 7% impairment to the left forearm. Claimant's total whole body impairment is 26.5%.

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<sup>29</sup> *Saylor v. Westar Energy, Inc.*, 292 Kan. 610, 615, 256 P.3d 828 (2011).

<sup>30</sup> See *Saylor v. Westar Energy, Inc.*, 292 Kan. 610, 256 P.3d 828 (2011). Our Supreme Court literally applied K.S.A. 44-508(d) and found a date of accident subsequent to Mr. Saylor's last day worked despite the employer's arguments that doing so would be absurd, illogical and unreasonable.

<sup>31</sup> *Watts v. Midwest Painting*, Nos. 1,022,574 & 1,022,575, 2007 WL 4296014 (Kan. WCAB Nov. 28, 2007).

<sup>32</sup> *Odell v. Unified School District No. 259*, 206 Kan. 752, 755, 481 P.2d 974 (1971).

Claimant also has a work disability in this docketed case. As noted above, Dr. Stein's task loss opinion is based on both claims and he did not assign a task loss opinion based on this docketed case. Consequently, the evidence from Dr. Stein does not allow us to determine claimant's task loss percentage for this claim. However, every task Dr. Fluter concluded claimant was unable to perform because of his low back would also be precluded based on claimant's neck and upper extremity restrictions. Therefore, claimant also has a 41% task loss in Docket No. 1,054,096. With 82% wage loss, he also has a 61.5% permanent partial general (work) disability.

In Docket No. 1,054,096, 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. 1,053,158.<sup>33</sup> The primary purpose of the Kansas Workers Compensation Act is to compensate for actual wage loss.<sup>34</sup> Claimant has just one wage loss and one work disability.

*Rivas*<sup>35</sup> provides guidance. *Rivas* had two claims based on a low back injury and subsequent bilateral shoulder injuries. IBP requested a K.S.A. 44-510a reduction in benefits for the shoulder claim 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. His October 14, 2009 injury contributes 100% to his disability from his October 27, 2010 accident by repetitive motion. The Board gives respondent a 100% credit for overlapping weeks of permanent partial work disability only, but not for overlapping weeks of permanent partial functional disability.

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<sup>33</sup> See *Ramirez v. Tyson Fresh Meats*, Nos. 1,040,772 & 1,047,018, 2013 WL 6382897 (Kan. WCAB Nov. 13, 2013); *Corns v. City of Wichita*, Nos. 1,052,342 & 1,052,343, 2012 WL 5461463 (Kan. WCAB Oct. 11, 2012).

<sup>34</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).

<sup>35</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).

**3. Claimant is entitled to future medical treatment.**

Dr. Fluter recommended medication and noted the possibility claimant may need surgery in the future. Dr. Stein suggested MRI-arthrogram of claimant's shoulders. Claimant is entitled to future medical treatment.

**CONCLUSIONS****Docket No. 1,053,158**

Claimant has a 7.5% whole body functional impairment and a 61.5% work disability based on a 41% task loss with an 82% wage loss. His award is reduced by receipt of social security retirement benefits as noted in the "Award" section below.

**Docket No. 1,054,096**

Claimant has a 26.5% whole body functional impairment and a 61.5% work disability based on a 41% task loss with an 82% wage loss. His award is reduced by receipt of social security retirement benefits as noted in the "Award" section below. Respondent gets a K.S.A. 44-510a credit for overlapping disability payments from Docket No. 1,053,158.

**AWARDS****Docket No. 1,053,158**

**WHEREFORE**, the Board modifies the August 27, 2014 Award. Claimant is entitled to 255.23 weeks of permanent partial general (work) disability benefits at \$321.52 per week, or \$82,061.55, for a 61.5% permanent partial general (work) disability, less permanent partial disability benefits previously paid for functional impairment, and less a social security offset as noted below:

From October 14, 2009 to May 18, 2010, claimant is entitled to 31.13 weeks permanent partial disability at \$321.52 per week, or \$10,008.92, for a 7.5% whole body functional impairment.

From May 19, 2010 to August 24, 2010, claimant was earning comparable wages and not entitled to a permanent partial general (work) disability award.

From August 25, 2010 to January 31, 2011, claimant is entitled to 23 weeks of permanent partial general (work) disability at \$321.52 per week, or \$7,394.96.

From February 1, 2011 to December 31, 2011, claimant is entitled to 47.71 weeks of permanent partial general (work) disability at \$321.52 per week, less \$287.05 per week for a social security offset (based on \$13,695 in social security benefits) for a total of \$34.47 per week, or \$1,644.56.

From January 1, 2012 to December 31, 2012, claimant is entitled to 52.29 weeks of permanent partial general (work) disability at \$321.52 per week, less \$296.04 per week for a social security offset (based on \$15,480 in social security benefits), for a total of \$25.48 per week or \$1,332.35.

From January 1, 2013 to December 31, 2013, claimant is entitled to 52.14 weeks of permanent partial general (work) disability at \$321.52 per week, less \$301.73 per week for a social security offset (based on \$15,732 in social security benefits per year), for a total of \$19.79 per week, or \$1,031.85.

Starting January 1, 2014, claimant is entitled to 48.95 weeks of permanent partial general (work) disability at \$321.52 per week, less \$301.73 per week for a social security offset (based on \$15,732 in social security benefits per year), for a total of \$19.79 per week, or \$968.72.

The full balance of \$22,381.36 is due and owing.

**Docket No. 1,054,096**

**WHEREFORE**, the Board modifies the August 27, 2014 Award.

Claimant is entitled to 255.23 weeks of permanent partial general (work) disability benefits at \$321.52 per week, or \$82,061.55, for a 61.5% permanent partial general (work) disability, less permanent partial disability benefits previously paid for functional impairment, less a social security offset of \$296.04 from January 1, 2012 forward and a \$301.73 social security credit from January 1, 2013 forward, and less a K.S.A. 44-510a credit for overlapping disability, as follows:

From October 27, 2010 to December 5, 2012, claimant is entitled to 109.98 weeks of permanent partial disability at \$321.52 per week, or \$35,360.77, for a 26.5% whole body functional impairment.

From December 6, 2012 through December 9, 2014, the social security offset and K.S.A. 44-510a credit result in weekly payments of \$0. This results in no permanent partial disability benefits until December 10, 2014.

Starting December 10, 2014, claimant is entitled to weekly permanent partial general (work) disability benefits at \$321.52 per week, less \$301.73 per week for a social security offset (based on \$15,732 in social security benefits per year), for a total of \$19.79 per week, for 40.54 weeks, or \$802.29.

The full balance of \$36,163.06 is due and owing.

Future medical is left open upon proper application to the Director of Workers Compensation.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February, 2015.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

**DISSENT**

The undersigned Board Members respectfully dissent. While we understand the rationale of *Portillo*, the facts of this case call into question the accuracy of the entire task list. Claimant has the burden of proving task loss. The foundation of a task loss opinion begins with an accurate assessment of the tasks claimant performed in the 15 years prior to his accidental injury. Quite simply, the task list in this case is so deficient that the validity of the entire list is in question.

Dr. Barnett's task list is rife with inaccuracies. Claimant's work for respondent involving an arbor press or lifting a box of bolts is not specifically in the task list. Claimant's two prior positions for respondent, "paint and prep" and working in the machine shop, are not in the list. Claimant's tasks at Crown, which he described as much lighter than his work for respondent, were not duplicative of work he did for respondent. Mr. Barnett inaccurately described two of claimant's tasks as a school bus driver for U.S.D. 388, at least compared to the actual requirements of the tasks as described by claimant. The same is true for claimant's work in Jon Londeen's hardware store. Why is it that Dr. Barnett indicated claimant had to lift 50 pounds to operate a cash register, but claimant testified he did not have to do any heavy lifting to perform such task? Claimant's tasks for Jon Londeen that involved a funeral home business (moving caskets, moving bodies, dusting caskets) were omitted. Tasks claimant performed for U.S.D. 473, such as operating a riding mower and performing a security check, were not in the task list.

In *Portillo*, the task list created by the vocational expert was incomplete due to the claimant's failure to advise her of all of his previous jobs. The list actually created by the expert was as complete as she could make it with the information provided. Here, the task list was incomplete and inaccurate based both on the lack of information from the claimant and a poor work product generated by the vocational expert. Claimant's testimony directly contradicts his own expert in numerous instances. It is not the responsibility of the courts to "bail out" an expert's inaccurate and sloppy work product. Such poor effort calls into question the accuracy of the entire report.

This task list is not a valid indicator of claimant's tasks. A physician's task loss opinion based on an inaccurate task list is not valid. At some point, unreliable evidence simply must be rejected. Instead, the Board, based on *Portillo*, has gone out of its way to salvage some evidence of task loss from an inaccurate, incomplete and poorly generated task list. The Board should not assume claimant's role and burden of proving task loss. The decision of the Board to "bail out" claimant only encourages inaccurate and faulty task lists and bad evidence. Claimant failed in his burden of proving his percentage of task loss.

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BOARD MEMBER

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BOARD MEMBER

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Honorable Pamela J. Fuller