

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

<b>BILLY J. GREENE</b>	)	
Claimant	)	
V.	)	
	)	
<b>MT SETUP CREW</b>	)	Docket No. 1,057,451
Respondent	)	
AND	)	
	)	
<b>SENTINEL INSURANCE CO., LTD.</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent requested review of Administrative Law Judge Clark's January 17, 2013 Nunc Pro Tunc Award. The Board heard oral argument on May 24, 2013. Scott J. Mann, of Hutchinson, Kansas, appeared for the claimant. Timothy A. Emerson, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

Judge Clark found claimant's injury arose out of and in the course of his employment and that respondent had notice. Judge Clark awarded claimant a 75% work disability based on averaging a 50% task loss and a 100% wage loss.

The Board has considered the record and adopted the Award's stipulations. However, the Board notes that only Claimant's Exhibit 2 from the Preliminary Hearing is part of the evidentiary record. Claimant's Exhibits 1 and 3 are not in the record, pursuant to the parties' agreement.

**ISSUES**

Respondent requests that the Board reverse Judge Clark's Award and find claimant failed to prove injury arising out of and in the course of his employment, including whether claimant proved that his accident was the prevailing factor in causing his injury, medical condition and resulting disability or impairment. Respondent, at oral argument, asserted claimant's injury is not compensable because it was solely an aggravation, acceleration or exacerbation of his preexisting condition or rendered his preexisting condition symptomatic. Should the Board find the case compensable, respondent argues claimant should be limited to Dr. Hufford's functional impairment. If a work disability is appropriate, respondent asserts Dr. Hufford's opinion should be utilized, rather than that of Dr. Murati.

Claimant argues for a work disability award. At oral argument, claimant waived his request that the Board award a penalty interest against respondent for failure to pay benefits prior to Award under K.S.A. 44-512b.

The issues before the Board are:

- (1) Did claimant meet with personal injury arising out of and in the course of his employment on July 23, 2011? Was the alleged work related accident the prevailing factor in causing the injury, medical condition, need for treatment and resulting disability or impairment? Did claimant's injury solely aggravate, accelerate or exacerbate a preexisting condition or render his preexisting condition symptomatic?
- (2) Did claimant provide timely and adequate notice?
- (3) What is the nature and extent of claimant's disability?

#### FINDINGS OF FACT

Respondent performs agricultural setup of farm machinery. Claimant began working for respondent in March 2011. On July 23, 2011, he and two coworkers were assembling a cotton stripper<sup>1</sup> in Ennis, Texas. Claimant was in a "man cage" attached to a forklift, placing a nine-foot, perhaps 80-100 pound piece, near the top of the cotton stripper. The piece slipped and claimant caught it to keep it from falling. A coworker, Sam Martin, who is claimant's brother, helped him lift the piece back into place. Claimant immediately had low back pain. He told another coworker, Martine Sanchez Galvan, that he had hurt his back. As they were finished for the day due to the heat, claimant went back to his motel room and rested. He worked the following day, but only drove the forklift due to back pain.

Claimant continued to work. Some time after the accident, claimant borrowed prescription medication from Mr. Galvan.<sup>2</sup> On July 25 and July 27, claimant went on his own to William Davis, D.C., a chiropractor in Ennis, Texas, who performed an adjustment and attempted decompression therapy. Claimant reported the accident during a telephone conversation with his supervisor, Mark Binder, on July 27, 2011. Claimant returned to Kansas on July 28, 2011. He testified he stayed in his house on the couch all weekend.

On August 1, 2011, claimant was assigned another job in Hillsboro, Texas. His back continued to hurt. He testified he took ibuprofen and Tylenol for pain, and used ice packs. He returned to Kansas on August 6, 2011, and went on his own to the Hutchinson Clinic on August 8, 2011. He was prescribed Lortab and Flexeril and given restrictions against repetitive bending or lifting. He then went to his chiropractor in Valley Center for an adjustment and was told he should probably take a few days off. When claimant notified Mr. Binder of his restrictions, he was told not to return to work until he had a full release from the doctor. Claimant has not worked since August 6, 2011.

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<sup>1</sup> A cotton stripper is pictured in the P.H. Trans., Cl. Ex. 2.

<sup>2</sup> P.H. Trans. at 49.

Claimant had prior back problems. He admitted having low back pain for four or five years before his accidental injury, even having preexisting pain down his left leg. He denied any prior specific low back injury, but attributed his prior symptoms to heavy labor. Approximately one and one-half years before the accident, he had an MRI which showed disc herniations at L4-5 and L5-S1. A surgical consultation was recommended. However, after talking with his chiropractor, claimant felt decompression therapy would most likely eliminate his symptoms. He underwent more than 20 decompression therapies with Daniel Hurst, D.C., as well as an epidural injection. He also treated with Sid Unruh, D.C., perhaps around Christmas 2010. Claimant testified that after treatment, he no longer had back pain nor pain radiating into his left leg. He did not have prior restrictions.

On October 6, 2011, a preliminary hearing was held in which claimant, Mr. Binder and Mr. Galvan testified. Claimant testified he was not under any restrictions nor receiving medical care when he went to work for respondent. He indicated he was able to perform the setup work with no problems up until July 23, 2011.

Mr. Galvan testified claimant complained of back pain and was seen taking non-prescription pain medication “way before” July 23, 2011.<sup>3</sup> Claimant denied using medication just prior to his accident. It was Mr. Galvan’s belief claimant was treating with a chiropractor in the weeks and months prior to the accident date. He testified claimant told him he “needed” to see the chiropractor twice a month and since starting work for respondent, he had missed two chiropractic visits because he was too busy with work.<sup>4</sup> Additionally, Mr. Galvan testified that before July 23, 2011, claimant had shown him x-rays and relayed that a doctor said his pain would be there for life.

When questioned regarding claimant seeing a chiropractor while in Texas, Mr. Galvan testified as follows:

- Q. And do you know if [claimant] saw a chiropractor in Texas prior to this accident occurring?
- A. Yes, he went to see a chiropractor in Texas.
- Q. Do you know if it was before or after July 23rd, 2011, which was a Saturday?
- A. It was a Friday. I don’t know if it was the 22nd when he went to see a chiropractor.

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<sup>3</sup> P.H. Trans. at 47-48.

<sup>4</sup> *Id.* at 46, 49, 54-55.

- Q. Do you know if he had tried to schedule an appointment and just couldn't get in, or do you know if he actually saw the chiropractor prior to July 23rd of 2011?
- A. He did see the chiropractor, because he said that he had used a different machine and he had messed him.
- Q. And you think that was prior to July 23rd of 2011?
- A. Yes, around that time.<sup>5</sup>

Mr. Galvan was driving the forklift on the date of accident. While claimant testified Mr. Martin and Mr. Galvan "definitely" saw the accident, Mr. Galvan testified he does not remember or recall any kind of work accident, nor does he recall a time when the nine-foot piece slipped causing injury to anyone. Mr. Galvan testified that there was no accident and he never witnessed an accident, adding that he was very cautious about the basket or man cage and "saw everything up there."<sup>6</sup> He admitted that claimant did complain of back pain that day and he suggested claimant "call Mr. Mark and explain so he could find help, find him a doctor or something if he was hurting at work."<sup>7</sup> Mr. Galvan also indicated claimant told him that the chiropractor made his back worse after July 23, 2011.

Mr. Binder testified that claimant had complained of back problems since starting work for respondent and it was his understanding that claimant had received chiropractic treatment prior to July 23, 2011. Mr. Binder indicated that while picking up the nine-foot piece is part of the job, there is another employee up on top who is supposed to help. Mr. Binder acknowledged that claimant alleged a work-related accidental injury from either picking up the nine-foot piece of equipment or rocking back and forth in the man cage, during both his phone conversation with claimant on July 27, 2011, and speaking to claimant when he returned to Kansas from Ennis, Texas.

Mr. Binder testified that while working with claimant in Hillsboro, Texas, claimant mentioned to him that a chiropractor had "screwed him up." During the first week of August, claimant complained of increased back pain. Claimant continued working and was able to perform his work duties through August 6, 2011. After returning to Kansas, claimant contacted Mr. Binder on August 8 to let him know the doctor said he needed another MRI and possible surgery. Mr. Binder told claimant not to return to work until he had a doctor's release.

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<sup>5</sup> *Id.* at 47.

<sup>6</sup> *Id.* at 50.

<sup>7</sup> *Id.* at 50.

Judge Clark issued a preliminary hearing Order dated October 12, 2011, in which he appointed Anthony G. Pollock, M.D., an orthopedic surgeon, as the authorized treating physician. On November 28, 2011, claimant underwent a lumbar MRI which revealed a moderate to large posterior left paramedian disc protrusion at L5-S1. Dr. Pollock referred claimant to Matthew Henry, M.D., a neurosurgeon. Dr. Henry performed a left L5-S1 microdiscectomy with a left L4-L5 foraminotomy on March 1, 2012. Claimant had physical therapy. Dr. Henry released claimant on July 19, 2012.

Pedro Murati, M.D., evaluated claimant at his attorney's request, on July 30, 2012. Dr. Murati is board certified in rehabilitation and physical medicine, as well as certified as an independent medical examiner. Dr. Murati diagnosed claimant as having low back pain with symptoms of radiculopathy, and left sacroiliac joint dysfunction. Dr. Murati provided a 15% whole person impairment based upon Lumbosacral DRE Categories III & IV of the *AMA Guides (Guides)*.<sup>8</sup> Dr. Murati recommended light duty to light-medium duty restrictions. In addressing prevailing factor, Dr. Murati stated:

The examinee admits to preexisting low back pain with no specific injury, however it appears it had completely resolved prior to this last incident in question. Therefore, it is under all reasonable medical certainty, the prevailing factor in the development of his conditions, is the accident at work while employed at [respondent].<sup>9</sup>

David Hufford, M.D., who is board certified in family practice and is certified as an independent medical examiner, examined claimant at respondent's request on August 23, 2012. Dr. Hufford diagnosed claimant with a work-related hyperflexion injury to the lumbar spine with two disc herniations. Dr. Hufford provided a 10% whole person impairment using DRE Category III of the *Guides*, but recommended no permanent restrictions.

The regular hearing was held September 4, 2012. Claimant testified that after his surgery, he called Mr. Binder a couple of times and left messages, but never received a response. Claimant admitted that his messages did not indicate he was ready to return to work, but only asked Mr. Binder to call him back. Claimant testified that he was working a two-week temporary job at Trails West Motel performing drywall mudding and taping for \$8 per hour and working 38-40 hours per week. Claimant testified that he applied for three specific jobs, but was turned down for not passing the functional capacity test. Claimant also performed some drywall labor for his church on a volunteer basis.

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<sup>8</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

<sup>9</sup> Murati Depo. (August 29, 2012), Ex. 2 at 5.

Robert W. Barnett, Ph.D., a vocational expert, interviewed claimant on September 28, 2012, at claimant's attorney's request. He compiled a list of 16 unduplicated tasks claimant performed in the 15-year period before his July 23, 2011 work-related accident.<sup>10</sup> Claimant told Dr. Barnett that he was employed and earning \$304 to \$320 per week. Dr. Barnett testified on October 12, 2012. Dr. Barnett acknowledged that the only medical report made available to him was Dr. Murati's report. He noted claimant had the ability to earn \$304 to \$320 per week.

Dr. Murati testified on October 15, 2012. Dr. Murati opined claimant was unable to perform all 16 tasks identified by Dr. Barnett for a 100% task loss. Dr. Murati acknowledged that while claimant has a 100% work disability, it is his opinion that claimant is employable.

Dr. Hufford testified on November 8, 2012. He testified that the prevailing factor in claimant's condition was the work accident.<sup>11</sup> Dr. Hufford maintained claimant had no task loss because he had no restrictions. Dr. Hufford agreed that he often gives permanent restrictions following spine surgery, but did not in this case, as follows:

Q. And in this particular case, you felt that restrictions weren't appropriate why?

A. I anticipated being asked this question as I was preparing for the deposition. And I cannot say that I have clear and absolute recollection of my interaction with [claimant]. I do know that in general, when I see someone who has had back surgery, my usual routine is to try to make an assessment of both the injury, which in his case was to levels of herniated disk, combined with their current symptoms, and whether or not I felt that by having unrestricted activity, further harm will be caused.

...

In this case, it is my recollection that he wanted to be employed, that he felt that his back pain was manageable, that he was taking some medications to try to mediate his symptomology, and that based on the MRI pathology that I saw as well as his postoperative course and recovery, that he could go back to full and unrestricted activity without restrictions and without fear of further injury resulting from full and unrestricted activity.<sup>12</sup>

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<sup>10</sup> K.S.A. 2011 Supp. 44-510e(a)(2)(D) notes that the relevant period is now five years, not 15 years. Claimant performed the same tasks from 1995 to March 2011, so the fact that Dr. Barnett's list concerns tasks performed earlier than the relevant time period is immaterial.

<sup>11</sup> Hufford Depo. at 8.

<sup>12</sup> *Id.* at 14-16.

PRINCIPLES OF LAW

Under K.S.A. 2011 Supp. 44-501b(c), claimant carries the burden of proof to establish his right to an award of compensation based upon the whole record.

K.S.A. 2011 Supp. 44-508 states in part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

...

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

...

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

...

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

...

(u) "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 American medical association guides to the evaluation of impairment, if the impairment is contained therein.

K.S.A. 2011 Supp. 44-510e states:

(a) In case of whole body injury resulting in temporary or permanent partial general disability not covered by the schedule in K.S.A. 44-510d, and amendments thereto, the employee shall receive weekly compensation as determined in this subsection during the period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks.

(1) Weekly compensation for temporary partial general disability shall be 66⅔% of the difference between the average weekly wage that the employee was earning prior to the date of injury and the amount the employee is actually earning after such injury in any type of employment. In no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c, and amendments thereto.

(2) (A) 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.

...

(B) The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

(C) An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:

(i) The percentage of functional impairment determined to be caused solely by the injury exceeds 7½% to the body as a whole or the overall functional impairment is equal to or exceeds 10% to the body as a whole in cases where there is preexisting functional impairment; and

(ii) the employee sustained a post-injury wage loss, as defined in subsection (a)(2)(E) of K.S.A. 44-510e, and amendments thereto, of at least 10% which is directly attributable to the work injury and not to other causes or factors.

In such cases, the extent of work disability is determined by averaging together the percentage of post-injury task loss demonstrated by the employee to be caused by the injury and the percentage of post-injury wage loss demonstrated by the employee to be caused by the injury.

(D) "Task loss" shall mean the percentage to which the employee, in the opinion of a licensed physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the five-year period preceding the injury. The permanent restrictions imposed by a licensed physician as a result of the work injury shall be used to determine those work tasks which the employee has lost the ability to perform. If the employee has preexisting permanent restrictions, any work tasks which the employee would have been deemed to have lost the ability to perform, had a task loss analysis been completed prior to the injury at issue, shall be excluded for the purposes of calculating the task loss which is directly attributable to the current injury.

(E) "Wage loss" shall mean the difference between the average weekly wage the employee was earning at the time of the injury and the average weekly wage the employee is capable of earning after the injury. The capability of a worker to earn post-injury wages shall be established based upon a consideration of all factors, including, but not limited to, the injured worker's age, physical capabilities, education and training, prior experience, and availability of jobs in the open labor market. The administrative law judge shall impute an appropriate post-injury average weekly wage based on such factors. Where the employee is engaged in post-injury employment for wages, there shall be a rebuttable presumption that the average weekly wage an injured worker is actually earning constitutes the post-injury average weekly wage that the employee is capable of earning. The presumption may be overcome by competent evidence.

(i) To establish post-injury wage loss, the employee must have the legal capacity to enter into a valid contract of employment. Wage loss caused by voluntary resignation or termination for cause shall in no way be construed to be caused by the injury.

...

(iii) The injured worker's refusal of accommodated employment within the worker's medical restrictions as established by the authorized treating physician and at a wage equal to 90% or more of the pre-injury average weekly wage shall result in a rebuttable presumption of no wage loss.

(F) The amount of compensation for whole body injury under this section shall be determined by multiplying the payment rate by the weeks payable. As used in this section: (1) The payment rate shall be the lesser of: (A) The amount determined by multiplying the average weekly wage of the worker prior to such injury by 66 $\frac{2}{3}$ %; or (B) the maximum provided in K.S.A. 44-510c, and amendments thereto; (2) weeks payable shall be determined as follows: (A) Determine the weeks of temporary compensation paid by adding the amounts of temporary total and temporary partial disability compensation paid and dividing the sum by the payment rate above; (B) subtract from 415 weeks the total number of weeks of temporary compensation paid as determined in (F)(2)(A), excluding the first 15 such weeks; (3) multiply the number of weeks as determined in (F)(2)(B) by the percentage of functional impairment pursuant to subsection (a)(2)(B) or the percentage of work disability pursuant to subsection (a)(2)(C), whichever is applicable.

(3) When an injured worker is eligible to receive an award of work disability, compensation is limited to the value of the work disability as calculated above. In no case shall functional impairment and work disability be awarded together.

The resulting award shall be paid for the number of disability weeks at the payment rate until fully paid or modified. In any case of permanent partial disability under this section, the employee shall be paid compensation for not to exceed 415 weeks following the date of such injury. If there is an award of permanent disability as a result of the compensable injury, there shall be a presumption that disability existed immediately after such injury. Under no circumstances shall the period of permanent partial disability run concurrently with the period of temporary total or temporary partial disability.

K.S.A. 2011 Supp. 44-510f states in part:

(a) Notwithstanding any provision of the workers compensation act to the contrary, the maximum compensation benefits payable by an employer shall not exceed the following:

. . .

(2) for temporary total disability, including any prior permanent total, permanent partial or temporary partial disability payments paid or due, \$130,000 for an injury;

(3) subject to the provisions of subsection (a)(4), for permanent or temporary partial disability, including any prior temporary total, permanent total, temporary partial, or permanent partial disability payments paid or due, \$130,000 for an injury; . . .

K.S.A. 44-519 states:

Except in preliminary hearings conducted under K.S.A. 44-534a and amendments thereto, no report of any examination of any employee by a health care provider, as

provided for in the workers compensation act and no certificate issued or given by the health care provider making such examination, shall be competent evidence in any proceeding for the determining or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible.

K.S.A. 2011 Supp. 44-520 states:

(a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

...

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

#### ANALYSIS

#### **(1) Claimant Sustained Personal Injury by Accident Arising Out of and in the Course of his Employment.**

Claimant testified that he was hurt while performing work duties. Mr. Galvan asserts no accident occurred. Mr. Galvan testified that he would have seen the accident and claimant testified that Mr. Galvan saw the accident. Judge Clark had two opportunities to assess claimant's credibility and apparently viewed him as more credible. Mr. Galvan's testimony does not convince the Board that claimant failed to meet the "more probable than not true" burden of proof. Other than the discrepancy between the testimony of Mr. Galvan and claimant, there is little evidentiary basis for the Board to conclude that claimant is not to be believed.

Respondent's prevailing factor argument is under the umbrella of what is an accident, pursuant to K.S.A. 2011 Supp. 44-508(d), and whether an injury by accident arises out of employment, pursuant to K.S.A. 2011 Supp. 44-508(f)(2)(B)(ii). Dr. Murati indicated that the accident was the prevailing factor causing claimant's injury, medical condition, and resulting disability or impairment. There is no contrary medical opinion in the record. In fact, respondent's medical expert, Dr. Hufford, testified that the prevailing factor in claimant's condition was the accident.

Claimant had a prior MRI, chiropractic treatment and an epidural steroid injection for low back pain with some pain radiating into his left leg. There are no records in evidence that are contemporaneous with claimant's prior complaints or treatment. While medical evidence is not absolutely necessary to prove a sole aggravation, acceleration or exacerbation of a preexisting condition or that a preexisting condition was rendered symptomatic, expert medical testimony would have been helpful to the Board. The record contains no testimony, from medical experts or otherwise, that claimant's injury "solely" aggravated, accelerated or exacerbated a preexisting condition or rendered a preexisting condition symptomatic. No physician reviewed claimant's pre-injury records or pre-injury MRI and provided an opinion relevant to K.S.A. 2011 Supp. 44-508(f)(2). While claimant acknowledged a prior low back problem, there is insufficient evidence to support respondent's argument advanced under K.S.A. 2011 Supp. 44-508(f)(2).

**(2) Claimant Provided Timely and Sufficient Notice.**

Claimant gave notice both by phone and in person to Mr. Binder. While claimant may have provided slightly different accounts of why he was hurt, i.e., handling a heavy piece of metal versus rocking in the man cage, claimant sufficiently provided respondent with the particulars of his injury.

**(3) Claimant Has a 12.5% Whole Body Functional Impairment and a 53.45% Work Disability.**

The Board concludes claimant has a 12.5% whole body functional impairment based on averaging the ratings set forth by Drs. Murati and Hufford. Neither physician indicated that any of claimant's impairment predated his July 23, 2011 accidental injury.

Regarding task loss, the Board affirms the portion of Judge Clark's ruling that claimant has a 50% task loss. Dr. Murati's conclusion that claimant lost the ability to perform all the tasks he performed in the five years prior to his accidental injury is too liberal, while Dr. Hufford's finding that claimant required no restrictions is too conservative. The Board, like Judge Clark, affords each opinion equal weight.

The Board is not considering Dr. Henry's July 18, 2012 letter indicating claimant would return to work without restrictions.<sup>13</sup> Dr. Henry did not testify. Under K.S.A. 44-519, medical reports that are not supported by the health care provider's testimony are not considered part of the evidentiary record. Claimant objected to admission of Dr. Henry's report.<sup>14</sup> Dr. Henry's report is not properly in evidence.

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<sup>13</sup> Hufford Depo., Ex. 3.

<sup>14</sup> Hufford Depo. at 12.

Regarding wage loss, Judge Clark concluded that claimant's post-injury jobs were brief or temporary in nature, such that he proved 100% wage loss. While claimant testified at the regular hearing that his job at Trails West Motel would only last one more week, or until roughly September 4, 2012, claimant was still working and earning \$304 to \$320 per week when Dr. Barnett interviewed him on September 28, 2012. There is no evidence that claimant is currently unemployed. Dr. Barnett agreed claimant had the post-injury capacity to earn \$320 per week. Claimant even argued in his brief to Judge Clark for a 56.8% wage loss based on his capacity to earn \$320 per week. The Board finds that claimant demonstrated the post-injury ability to earn \$320 per week based on 40 hours at \$8 per hour, as based on the rebuttable presumption that claimant's post-injury earnings represent his wage earning capacity.

Claimant testified that Mr. Binder never called him after claimant left voice mail messages asking for a return call. Respondent argues claimant should have overtly advised Mr. Binder that he had no restrictions and would be able to return to work. While claimant perhaps could have been more aggressive in trying to explore post-injury employment with respondent (if that was his intent in making the phone calls), respondent certainly had the option of determining claimant's restrictions, if any, and offering claimant post-injury work.<sup>15</sup> If respondent would have offered accommodated employment within claimant's medical restrictions as established by the authorized treating physician and at a wage equal to 90% or more of the pre-injury average weekly wage, there would be a rebuttable presumption of no wage loss. There is no evidence in the record that respondent ever made any such job offer.

The Board disagrees with Judge Clark's conclusion that claimant has a 75% work disability based on a 100% wage loss and a 50% task loss. The Board finds that claimant has the current capacity to earn \$320 per week for a 56.9% wage loss. Averaging a 56.9% wage loss with a 50% task loss results in a 53.45% work disability.

#### **(4) Claimant May Apply for Future Medical Treatment.**

The Board will not disturb Judge Clark's ruling concerning future medical treatment. Claimant is free to seek additional medical treatment through the review and modification process or upon agreement with respondent.

#### **CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds Administrative Law Judge John D. Clark's Nunc Pro Tunc Award should be modified to reflect a 53.45% work disability, but is otherwise affirmed.

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<sup>15</sup> Respondent's attorney and insurance carrier, agents for respondent, most likely possessed or could have obtained restrictions from the authorized treating physician, Dr. Henry.

**AWARD**

**WHEREFORE**, the Board orders that Administrative Law Judge John D. Clark's January 17, 2013 Nunc Pro Tunc Award is modified.

The claimant is entitled to 50 weeks of temporary total disability compensation at the rate of \$494.56 per week or \$24,728 followed by permanent partial disability compensation at the rate of \$494.56 per week for 203.11 weeks for a total Award not to exceed \$125,178.08 for a 53.45% work disability.

As of May 29, 2013, there would be due and owing to the claimant 50 weeks of temporary total disability compensation at the rate of \$494.56 per week in the sum of \$24,728 plus 46.57 weeks of permanent partial disability compensation at the rate of \$494.56 per week in the sum of \$23,031.66 for a total due and owing of \$47,759.66, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$77,418.42 shall be paid at the rate of \$494.56 per week until fully paid or until further order from the Director.

**IT IS SO ORDERED.**

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

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

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

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

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Honorable John D. Clark