

Claimant, a paramedic for Johnson County Med-Act, was injured on May 5, 1994, when she struck her head on the steel beam that is the door header of an ambulance, while carrying an infant seat into the back of a waiting emergency vehicle. She had instant pain to her head, neck and back. She advised her supervisor at the hospital and was provided care at the Shawnee Mission Hospital Emergency Room. She was treated with anti-inflammatory medication and muscle relaxers because of the spasms she was experiencing and was sent home for bed rest. She was then referred to Dr. Bernard Megaffin and taken off work.

An MRI taken at Dr. Megaffin's request revealed osteophytes in her cervical spine with a possible disc herniation. She underwent physical therapy and work hardening which provided little benefit and, at times, worsened the pain and muscle spasms. During work hardening claimant suffered migraine headaches, muscle spasms and numbness into her fingers. She was referred to Dr. Terrence Pratt at Mid-America Rehabilitation and Dr. Stephen Reintjes who recommended she pursue another course of employment. Dr. Pratt placed lifting limitations of forty (40) pounds on both arms, with a twenty (20) pound limit on each arm and opined that working overhead would inflame the muscles above claimant's shoulders and cause her additional symptomatology. Claimant has been unable to return to work as a paramedic and was assessed a five percent (5%) whole body permanent functional impairment by Dr. Pratt. This rating and the earlier described restrictions were due to claimant's cervical spondylosis at C4-5 and C5-6.

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 44-501(a).

"'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." K.S.A. 44-508(g); Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

As a result of the restrictions placed upon claimant from this injury, she was unable to return to her employment as a paramedic.

K.S.A. 44-510e(a) states in part:

"[A]n 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."

The Appeals Board finds, as claimant has not returned to work and is not engaging in work equal to ninety percent (90%) or more of her pre-injury average weekly wage, claimant is entitled to a work disability in this matter.

K.S.A. 44-510e(a) goes on to state:

“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.”

Claimant was referred to two vocational experts for an analysis of her task-performing abilities or loss thereof. Mr. Michael Dreiling, with Menninger Return to Work Center, created a list of pre-injury tasks attributed to claimant's prior work history. He analyzed these tasks and reached a conclusion regarding which of these tasks claimant was capable of performing subsequent to the injury. Claimant was also referred to Kathy Schauwecker, a vocational rehabilitation consultant, who performed a similar service in analyzing claimant's task performing abilities over her prior work history. Both Mr. Dreiling and Ms. Schauwecker reached an opinion regarding what, if any, task loss ability claimant suffered.

Both the reports from Mr. Dreiling and Ms. Schauwecker, were provided to Dr. P. Brent Koprivica, a board-certified emergency medicine specialist, who has performed many workers compensation evaluations in the past. Dr. Koprivica was also provided the records of Dr. Megaffin, Dr. Reintjes and Dr. Pratt. In reviewing the information available, Dr. Koprivica opined claimant had suffered a thirty-six percent (36%) loss of task performing ability. Dr. Koprivica's testimony indicates that while he had Ms. Schauwecker's information available, he rejected her analysis in favor of Mr. Dreiling's. Respondent objects to the opinion of Dr. Koprivica alleging both Mr. Dreiling and Ms. Schauwecker's information should have been utilized by Dr. Koprivica. K.S.A. 44-510e requires an analysis of claimant's ability to perform work tasks that she performed in her past employment. This statute provides no guidance as to how this analysis is to be created other than merely stating that it must be “in the opinion of the physician.”

The Appeals Board, as the trier of facts, does have the right to analyze evidence and to rule on which is more accurate and/or credible regarding the question of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991). While the Appeals Board has the right to rule on the credibility of witness testimony and to decide how much weight that testimony is to be given, the Appeals Board has not been put into a position by the legislature to dictate to the physicians or any other witnesses in a workers compensation matter what information they must consider in reaching their opinion regarding work disability or task loss analysis. In this instance, Dr. Koprivica elected to give more weight to the opinion of Mr. Dreiling than to Ms. Schauwecker. In analyzing the information available he then reached his own opinion regarding the task performing analysis loss suffered by the claimant. The Appeals Board, in reviewing the uncontroverted deposition of Dr. Koprivica, finds his opinion to be neither improbable nor unreasonable and, as such, his testimony will not be disregarded as it has not been shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976). As such, the Appeals Board finds that Dr. Koprivica's opinion that claimant has suffered a loss of task performing abilities of thirty-six percent (36%) is supported by the evidence and the Appeals Board adopts same as its own opinion.

K.S.A. 44-510e requires, in analyzing work disability, a two-prong analysis. In addition to the task performing loss above discussed, the Appeals Board must also

average together the difference between claimant's average weekly wage at the time of injury and the average weekly wage the worker is earning after the injury. It was acknowledged by the parties that claimant was not working subsequent to her injury with respondent. Respondent contends claimant has not made a good-faith effort to return to employment and should be given no credit for her loss of wage-earning capacity, for that reason.

The medical evidence shows claimant to have suffered a physical injury which resulted in significant physical restrictions. Claimant has attempted to obtain employment but has been unsuccessful in so doing. She is currently undergoing training and may, in the near future, have the ability to return to the open labor market and possibly earn a comparable wage. If that occurs, it will be respondent's right to file for review and modification under K.S.A. 44-528.

Respondent further objects to an analysis of claimant's wage earning ability contending no evidence has been provided to show what average weekly wage claimant was earning at the time of her injury. Respondent acknowledges that a wage statement created by respondent's own personnel was submitted to claimant and was placed into evidence with no objection at the regular hearing. Respondent argues this wage statement should not be considered as it was not testified to by claimant and, thus, is not credible evidence. Not only did respondent not raise this issue before the Administrative Law Judge, but the respondent actually created, acknowledged and stipulated to the admission of this evidence at the regular hearing. An issue not raised before the Administrative Law Judge cannot later be raised on appeal. Therefore, the Appeals Board finds claimant currently suffers a one hundred percent (100%) loss of wage earning ability as a result of this injury.

In averaging together the two figures, the Appeals Board finds claimant has suffered a sixty-eight percent (68%) permanent partial general body work disability as a result of the injuries suffered on May 5, 1994.

Respondent provided additional argument that claimant should be denied work disability based on the logic of Fouk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995). In Fouk the claimant was offered a specific job within the claimant's restrictions. The Appeals Board finds, in this instance, claimant has not been offered a specific job within the claimant's physical abilities. Instead, there was discussed potential openings with respondent. As such, the rationale of Fouk does not apply to this situation and respondent's argument that claimant be awarded a functional impairment only is rejected by the Appeals Board.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated August 8, 1995 shall be, and is hereby, modified and the claimant, Georgia Boston, shall be and is granted an award against the respondent, Johnson County Med-Act, a self-insured, for an injury occurring on May 5, 1994, and based upon a maximum permanent partial rate of \$313.00 per week, for a 68% permanent partial general body work disability.

Claimant is entitled to 20.43 weeks temporary total disability at the rate of \$313.00 per week totalling \$6,394.59, followed by 278.51 weeks permanent partial general body

work disability at the rate of \$313.00 per week totalling \$87,173.63, for a total award of \$93,568.22.

As of December 21, 1995, claimant would be entitled to 20.43 weeks temporary total disability compensation at the rate of \$313.00 per week, totalling \$6,394.59, followed thereafter by 64.57 weeks permanent partial general body work disability at the rate of \$313.00 per week totalling \$20,210.41, for a total of \$26,605.00 due and owing in one lump sum minus any amounts previously paid. Thereafter, the remaining 213.94 weeks shall be paid at the rate of \$313.00 per week totalling \$66,963.22 until fully paid or further order of the Director.

Future medical treatment is approved upon proper application to and approval by the Director.

Costs of the administration of the Kansas Workers Compensation Act are assessed against the respondent as follows:

Metropolitan Court Reporters, Inc.	\$721.40
Richard Kupper & Associates	\$402.25
Karen Kellerman, C.S.R.	\$158.45

IT IS SO ORDERED.

Dated this ____ day of January 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Terri Z. Austenfeld, Overland Park, Kansas
- Karen D. Pendland, Kansas City, Missouri
- Robert H. Foerschler, Administrative Law Judge
- Philip S. Harness, Director