

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

SUSAN E. HUDSON
Claimant

VS.

HARPER TRUCKS, INC.
Respondent
Self-Insured

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Docket No. 198,149

ORDER

Claimant appeals from the Award of Review and Modification entered by Administrative Law Judge Jon L. Frobish dated October 28, 1998. The Administrative Law Judge found claimant suffered a 63.5 percent permanent partial general disability and a 20 percent preexisting functional impairment, which resulted in a 43.5 percent work disability award for the injuries suffered to claimant's bilateral knees. Respondent argues claimant should be limited to the original 12.5 percent permanent partial functional impairment from the January 10, 1996, agreed award. Claimant argues entitlement to permanent total disability. Oral argument was held on May 14, 1999.

APPEARANCES

Claimant appeared by her attorney, James R. Roth of Wichita, Kansas. Respondent appeared by its attorney, Gary A. Winfrey of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations set forth in the Award of the Administrative Law Judge are adopted by the Appeals Board for the purposes of this Award.

The Award of January 10, 1996, states that the parties stipulated to a date of accident of November 20, 1993, and each and every working day thereafter through February 28, 1994. But, in the Award, the Administrative Law Judge listed only

November 20, 1993, as the single date of accident. In the Award of Review and Modification, the Administrative Law Judge also found a date of accident of November 20, 1993. No issue was raised to the Board regarding these discrepancies. Therefore, the date of accident for the purposes of this appeal shall be November 20, 1993.

ISSUES

- (1) What is the nature and extent of claimant's injury and/or disability?
- (2) Is respondent entitled to a deduction under K.S.A. 44-501(c) for the amount of functional impairment determined to preexist claimant's alleged injury?
- (3) Did claimant have an increase in disability post-injury which would justify a review and modification of the agreed award of 12.5 percent to the body as a whole entered into by the parties on January 10, 1996?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Claimant began working for respondent in January 1991. Respondent, Harper Trucks, Inc., is a business that makes hand dollies or hand trucks. On November 20, 1993, these hand dollies or hand trucks fell on claimant, knocking her out and causing serious injury to both of claimant's knees. She was referred for treatment to Kenneth A. Jansson, M.D., a board certified orthopedic surgeon. Dr. Jansson first saw claimant on February 3, 1994. At that time, claimant was treated with physical therapy and knee sleeves, but did not improve. Dr. Jansson performed a chondroplasty on the patella of her right knee on May 27, 1994, and an arthroscopy on her left knee on August 23, 1994. He found the left knee had a loss of articular cartilage in the back of the kneecap. Despite physical therapy, claimant continued in significant pain.

On May 26, 1995, Dr. Jansson performed an arthroscopy and a lateral release of her right knee, which seemed to somewhat improve claimant's knee. Claimant returned

to work at an accommodated position after the surgery. Claimant reported a fall at work on July 17, 1995. However, that fall does not appear to be of significance.

Claimant continued in therapy but, because of ongoing pain, claimant was again examined by Dr. Jansson on June 24, 1996. An injection into the right knee provided no benefit. Dr. Jansson then recommended a patellectomy, which involved the removal of the patella and quadriceps advancement. That was performed on July 9, 1996. He saw claimant on August 28, 1996, at which time she could do straight leg raises which was an improvement. He recommended claimant undergo leg strengthening and referred her for a functional capacity evaluation. Pursuant to the results of the functional capacity evaluation, he placed permanent limitations on claimant, due to his findings associated with claimant's knees, of no lifting over 25 pounds and only occasional standing and walking. He considered her at maximum medical improvement on September 22, 1997, and released her with the permanent restrictions.

Dr. Jansson saw claimant again on July 20, 1998, at which time she was unable to do a straight leg raise and was very weak. Claimant admitted she had not been doing any of her exercises. The doctor opined that claimant had allowed her legs to get weak and merely needed exercising. At the time, she was ambulating with the assistance of one cane. The restrictions in 1998 remained relatively consistent with those in 1997. Claimant was to do no lifting over 25 pounds, and limit herself to occasional standing and walking, with no kneeling, squatting, climbing stairs or ladders, and no crawling. In defining occasional standing and walking, Dr. Jansson opined she could stand and walk up to 66 percent of an eight-hour day. He recommended she be on her feet 40 minutes out of each hour and off 20 minutes out of each hour. He was aware claimant had undergone previous back surgery and previous carpal tunnel syndrome surgery in both upper extremities, but his restrictions related to claimant's knees only. He rated claimant at 10 percent to the left lower extremity which is 4 percent to the body, and 15 percent to the right which is 6 percent to the body. Combining those ratings would equate to a 9 percent whole body functional impairment.

On January 10, 1996, claimant and respondent entered into a running award for a 12.5 percent whole body functional impairment with additional medical treatment upon application to the Director. On March 26, 1996, claimant was laid off from respondent's employment during a general layoff that involved several other workers. Claimant has since attempted to obtain employment with several employers, applying at several locations in the Wichita area.

Claimant interviewed with Norland Plastics on several occasions, and on September 30, 1997, was offered a job which would have paid \$5.50 per hour plus a \$.15 per hour shift differential. When compared to claimant's average weekly wage of \$307.78, this would result in a 27 percent loss of wage earning ability. Claimant refused the job, providing at various times different reasons, including the fact that the pay was too low, it

was approximately 20 miles one way from her house and it would be too difficult to drive, and she was concerned that the job might require use of her right leg which she did not believe she could perform.

Respondent deposed two individuals from Norland Plastics. Donald Leidheiser, the human resource manager, was involved in the interviews with claimant. When he first met claimant, she was using a cane. He was aware of her limitations and testified Norland Plastics was in a position to accommodate those limitations and restrictions placed upon claimant. Claimant also interviewed with William Mark Ayres, the cable systems business unit manager with Norland Plastics. He made the job offer to claimant during a telephone conversation on September 30, 1997. Claimant indicated to him that she would not accept employment below \$6 per hour, but gave him no other justification for refusing the job. Mr. Ayres was also aware that claimant used a cane when ambulating, but the job offer in the cable area would have accommodated claimant's limitations.

Claimant was referred to Karen Crist Terrill of Terrill & Associates, a vocational specialist, for an evaluation. Ms. Terrill testified that there were jobs available for which claimant was qualified in the Wichita area. She first noted that claimant was capable, based upon the restrictions of either William H. Mitchell, D.O., or Dr. Jansson, of performing the Norland Plastics job. Even the restrictions of Philip R. Mills, M.D., would have required very little accommodation, which Norland Plastics expressed a definite willingness to provide. In addition, both David A. Tillema, M.D., and Bernard T. Poole, M.D., testified that claimant should be able to do the Norland Plastics job. James A. Rucker, a job placement specialist, attempted to provide assistance to claimant in locating a job. Claimant advised Mr. Rucker she would not work second shift and refused to work weekends. She further refused to look for work on Wednesdays, Thursdays or Fridays.

In 1997, respondent contacted RK Investigations, Inc., a private detective agency, to investigate claimant. Claimant was videotaped in 1997 and again in 1998. Robert Killingsworth, the owner and operator of RK Investigations, was involved in the surveillance on claimant, as was Kristen A. Gillmore-Smith. Ms. Smith, a staff investigator, investigates various types of cases, including workers' compensation disputes. During the investigation, claimant was videotaped performing numerous activities, such as cleaning windows on her motor vehicle, sweeping her yard, winding up garden hoses, traveling and fishing. Claimant was seen both driving and riding in vehicles with no apparent limitations. Claimant would spend up to an hour at a time standing with no apparent difficulties noted. Claimant was followed from her home near Wichita, Kansas, to Kansas City, and traveled in a motor vehicle for up to three hours at a time with no stops required. Claimant, on occasion, did use a cane and, on occasion, did limp; however, claimant did not always use the cane in public. When at home and when fishing, claimant did not utilize the cane. Claimant was videotaped standing for long periods of time and walking while fishing, with no apparent limitation.

An employee of respondent Harper Trucks, Inc., by the name of Ira Woodward, Jr., the supervisor of the paint line, observed claimant in August 1998 at Marion Reservoir, fishing. He observed claimant walking over a flat dirt surface, carrying fishing poles and a tackle box. He did note that, when claimant was walking, she would, at times, limp. She did not, however, use a cane.

During the litigation, claimant was examined by several physicians, including Dr. Mills, a physical medicine and rehabilitation specialist, board certified by the American Academy of Electroneurodiagnostic Medicine and the American Board of Certified Independent Medical Evaluators. Dr. Mills examined claimant at her attorney's request on November 4, 1996. He diagnosed claimant as postpatellectomy on the right with internal derangement of the right knee and postarthroscopy on the left with chondromalacia patella in the left lower extremity. Based upon the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, he assessed claimant a 22 percent impairment of the right knee, which equates to a 9 percent whole body impairment. He opined claimant had a 5 percent impairment to the left knee and a total impairment of 11 percent to the body as a whole bilaterally. He found claimant to be at maximum medical improvement and recommended she avoid squatting, stair climbing, ladder climbing, avoid prolonged standing greater than 15 minutes at a time, and that she perform no crawling, kneeling or ambulating for more than 15 minutes at a time.

Dr. Mills did a follow-up examination on April 22, 1998, again diagnosing postpatellectomy on the right with internal derangement, postarthroscopy of the left with chondromalacia patella, chronic back pain and post-bilateral carpal tunnel releases with aggravation of her wrists from using the cane. He felt claimant's condition in her knees had progressed and she would likely be a candidate for further surgical interventions. He did not believe at that point claimant could realistically perform a job in the competitive labor market and believed claimant to be essentially and realistically unemployable. His opinions concerning claimant's employability included consideration of claimant's previous low back and bilateral carpal tunnel surgeries.

Dr. Mills also diagnosed claimant with compensatory lordosis, which is lumbar lordosis secondary to obesity. He opined claimant had gained weight due to her sedentary lifestyle after the knee injuries. He reviewed a 15-year history of claimant's work tasks and opined claimant could perform none of the tasks on the list.

Dr. Mills assessed claimant a 10 percent impairment to each upper extremity resulting from the bilateral carpal tunnel syndrome, which computes to a 6 percent whole body impairment for each extremity and combines for a 12 percent whole body impairment, all of which preexisted the November 20, 1993, injury. He assessed claimant an additional 10 percent functional impairment preexisting for the injuries and resulting surgery to her low back. His final opinion was that claimant had a 33 percent whole body functional impairment not including the preexisting back condition, and a 40 percent whole body

functional impairment including both the back condition and the bilateral carpal tunnel syndrome. He felt claimant had increased impairment of function to both wrists as a result of using the cane and an increased impairment of function to her low back as a result of her altered gait from the knee injuries, but was unable to say how much.

Claimant was examined on two occasions by Dr. Poole, an orthopedic surgeon. The examinations were performed at the request of respondent's attorney. He first saw claimant on July 16, 1997, and again on November 26, 1997. He found claimant to be extremely restricted in her ability to obtain gainful employment and in his professional opinion felt she was realistically unemployable. He also felt claimant would require additional surgeries to both knees at some point in the future. He opined claimant was a heavy lady with valgus (knock-knees), laterally riding kneecaps, with a significant trauma superimposed over the preexisting variation of her knee anatomy. He believed the injury to claimant's knees in November 1993 had accelerated the degenerative changes in her knees. The history provided to Dr. Poole by claimant was that, if she sat for even a short period of time, her knee pain became unbearable and she had to get up. Claimant also advised that she was unable to stand in one place for more than a very short period of time without having significant problems. She was also unable to walk more than a very short distance without experiencing severe problems. He acknowledged that he was limited in his evaluation of claimant and had to rely on the honesty of the patient regarding her limitations and restrictions.

Claimant was examined by Dr. Tillema, a board certified orthopedic surgeon, at the request of respondent's attorney on July 2, 1998. At that time, Dr. Tillema was provided a history, performed an examination, reviewed x-rays and reviewed claimant's prior records. He also had claimant undergo a functional capacity evaluation, which was performed on July 2, 1998, and which was utilized in rendering his opinion regarding claimant's limitations. It was noted during the functional capacity evaluation that the evaluator felt claimant's testing was not valid, but Dr. Tillema was unable to explain what that meant.

Dr. Tillema was asked if claimant had reached maximum medical improvement and responded both yes and no. He explained that, if claimant was motivated and interested, a work hardening program would be appropriate and would perhaps help her regain some strength, ability and agility. However, he felt, in her present state of mind, she was not willing to put forth the required effort and because of that he felt she was at maximum medical improvement. He restricted her because of her knees and prior back problems from lifting from one table to another over 25 to 30 pounds. From floor level, he felt claimant could lift up to 15 pounds. While carrying and bending over, for instance placing something into the trunk of a car, he felt claimant could lift up to 30 pounds. She could occasionally stoop and squat. By occasionally, he meant approximately once an hour. He felt she could walk for 15 to 20 minutes at a time but then would have to sit down and rest, and then could walk for another 15 to 20 minutes. He felt walking would be good for her

even with her bad knees. He did believe she would be able to perform a sedentary sit-down job as long as she had the ability to occasionally get up and move around. He opined claimant could do the job offered by Norland Plastics.

Using the AMA Guides, Third Edition (Revised), he assessed claimant a 20 to 25 percent impairment to the right lower extremity, which would be an 8 to 10 percent whole body impairment. He assessed claimant a 10 percent impairment to the left lower extremity, which is 4 percent to the whole body, which, when combined, equals 12 to 14 percent to the body as a whole. He also assessed claimant a 10 to 13 percent impairment for preexisting low back problems and felt there had been no increased impairment to her back from the knee injuries. He assessed claimant an 8 to 10 percent impairment for each upper extremity which would equate to a 5 to 6 percent whole body impairment for each upper extremity, which equals an 8 to 10 percent whole body impairment when combined, and an additional 8 to 10 percent whole body impairment for the bilateral carpal tunnel syndrome. All combined, he felt claimant had a 33 percent whole body functional impairment with 10 percent to the body preexisting due to the bilateral carpal tunnel syndrome and 10 to 13 percent to the body preexisting from claimant's low back injuries and prior surgery. He was asked about Dr. Jansson's evaluation of claimant and opined that, as Dr. Jansson had had the opportunity to examine and treat claimant over a long period of time, Dr. Jansson would be in a much better position to determine claimant's limitations and restrictions than he would.

Dr. Tillema was provided the work tasks list from claimant's 15-year prior history. In reviewing these tasks and considering claimant's restrictions to her knees, back and wrists, the doctor felt that all the tasks would require claimant to be on her feet at least 60 percent of the time, which he did not believe she could perform. The only task which did not require her to be on her feet regularly was driving a forklift, and he did not feel she would be capable of performing that job with her limitations. Therefore, he felt claimant would have a 100 percent loss of task performing abilities from the jobs performed during the 15 years prior to her injury.

Claimant was also examined by Dr. Mitchell, an osteopathic physician, board certified by the American College of Osteopathic Family Practitioners. He had been examining and treating claimant for approximately 15 years. He did note, however, that his chart on claimant had been "thinned out." He had at one time treated claimant for the back problems, but his records showed no treatment for the back until February 1993. He felt claimant's back problems were in some way associated with the knee problems, although he was aware that she had had upper back treatments preexisting the knee injuries. Dr. Mitchell was asked about claimant's ability to obtain gainful employment, and he opined that she was realistically unemployable. Claimant would have to be in a very sheltered, low effort job, if one were available. Other than that, claimant would be unable to work in the labor market.

In the Award, the Administrative Law Judge found claimant to be 100 percent disabled from performing any of the tasks she had performed in her prior history. The Administrative Law Judge, however, felt claimant should have attempted the job at Norland Plastics that was offered to her on September 30, 1997. The Administrative Law Judge found claimant had violated the policies of Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997), and felt that a post-injury wage should be imputed to claimant equal to the Norland Plastics job offer. Therefore, claimant was assessed a 27 percent loss of wage earning ability under K.S.A. 44-510e. Claimant contends she is unable to perform the Norland Plastics job and should, therefore, be found permanently and totally disabled.

CONCLUSIONS OF LAW

In proceedings under the Workers Compensation Act, the burden of proof shall be on claimant to establish claimant's right to an award of compensation by proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. See K.S.A. 1998 Supp. 44-501 and K.S.A. 1998 Supp. 508(g). As part of the agreed award, claimant was granted 32.32 weeks temporary total and temporary partial disability compensation at \$205.19 per week for a total of \$6,631.74. This is not disputed by the parties.

Several physicians, including Dr. Poole, Dr. Mills and Dr. Mitchell, find claimant basically unemployable. However, Dr. Tillema felt claimant could perform the accommodated job with Norland Plastics, but also agreed claimant would not have been able to perform any of the prior job tasks that she performed over the last 15 years. Dr. Jansson, the claimant's treating physician for her knees, felt that claimant could perform some tasks if the requirements of those tasks were changed. However, in reviewing that testimony, it appears as though, without accommodation or some type of task change, Dr. Jansson felt claimant unable to perform 89 percent of the prior tasks from the last 15 years due to her knee injuries only.

The Appeals Board finds claimant has proven that she suffered substantial injury to her bilateral knees. The Appeals Board finds most credible the testimony of Dr. Jansson, claimant's treating physician for her knees, who felt that claimant could perform some tasks from her prior history, but also felt she was substantially limited in her ability to find employment. In finding the testimony of Dr. Jansson to be the most credible, the Appeals Board adopts Dr. Jansson's opinion that claimant has suffered an 89 percent loss of task performing ability as a result of the injuries to her knees.

The Administrative Law Judge granted respondent a reduction of the Award pursuant to K.S.A. 44-501(c) which states:

The 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. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

The Board finds that claimant's preexisting impairment, both to the back and to the bilateral upper extremities, is irrelevant when dealing with a task loss associated with an injury to claimant's knees only.

Therefore, the decision by the Administrative Law Judge to reduce claimant's work disability award by 10 percent preexisting to the back and 10 percent preexisting to the upper extremities is reversed.

The Appeals Board, in considering the policies set forth in Copeland v. Johnson Group, Inc., *supra*, must determine whether claimant made a good faith effort to obtain post-injury employment. While claimant listed numerous job applications that she filled out, it is significant that the one job offered to claimant was rejected. Claimant voiced several reasons for rejecting that, including the salary and the roughly 20-mile one-way trip it would have required. But the results of the security investigations do not support claimant's contentions that she would have been unable to drive the 20-mile distance. Claimant was observed traveling for three hours to Kansas City without stopping. In addition, the Appeals Board questions claimant's alleged inability to stand for more than 20 to 40 minutes at a time when she stood for longer periods of time while fishing and while cleaning her motor vehicle.

In addition, claimant was less than cooperative with Mr. Rucker in her post-injury job search. Claimant refused jobs which she felt were too far away, objected to drives as short as 20 miles, and refused second shift work and weekend work. She also refused to look for work on Wednesdays, Thursdays and Fridays.

The Appeals Board concludes that claimant did not make a good faith effort, post injury, to obtain employment. Therefore, the trier of fact is obligated to impute a wage based upon the evidence in the record as to claimant's post-injury wage earning abilities. The Appeals Board believes the salary offer by Norland Plastics is appropriate evidence of claimant's ability to earn wages, post injury. Therefore, claimant has suffered a 27 percent loss of wage earning ability when comparing the Norland Plastics job to the \$307.78 average weekly wage found in the Award.

In averaging the 89 percent loss of task performing abilities with the 27 percent wage loss, the Appeals Board finds claimant has a 58 percent permanent partial general disability resulting from the bilateral knee injuries suffered on November 20, 1993.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that an award of compensation is made in accordance with the above findings in favor of the claimant, Susan E. Hudson, and against the respondent, Harper Trucks, Inc., a qualified self-insured, for an accidental injury sustained on November 20, 1993, for a 58 percent permanent partial disability and based upon an average weekly wage of \$307.78 per week.

Claimant is entitled to 32.32 weeks of temporary total disability compensation at the rate of \$205.19 per week totaling \$6,631.74, followed by 49.71 weeks of permanent partial disability compensation at the rate of \$205.19 per week totaling \$10,199.99 which was paid under the original award, and then followed by 180.94 weeks (230.65 weeks minus 49.71 weeks paid under the original Agreed Award) at the rate of \$205.19 per week totaling \$37,127.08 for a 58 percent permanent partial disability, for a total award of \$53,958.81. As of February 29, 2000, the entire award would be due and owing to claimant and is ordered paid in one lump sum minus any amounts previously paid.

Claimant is further entitled to unauthorized medical up to the statutory maximum upon presentation of an itemized statement verifying same.

Future medical will be awarded upon proper application to and approval by the Director of Workers Compensation.

The claimant's attorney fee contract is approved insofar as it is not in contravention to the applicable version of K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

Deposition Services

Deposition of Bernard T. Poole, M.D.	\$117.90
Deposition of Philip R. Mills, M.D.	\$280.00
Deposition of James T. Molski	\$307.60
Deposition of William H. Mitchell, D.O.	\$173.80
Deposition of Kenneth A. Jansson, M.D.	\$359.20
Deposition of Philip R. Mills, M.D.	\$156.00

Barber & Associates

Transcript of Regular Hearing	\$356.40
Deposition of Hugh Sales	\$123.00
Deposition of Donald G. Leidheiser	\$337.60
Deposition of James A. Rucker	\$387.00

Deposition of Ira Woodward	\$158.00
Deposition of Kristen Smith	\$111.80
Deposition of Robert Killingsworth	\$ 92.20
Deposition of Karen Crist Terrill	\$206.80
Deposition of Bernard T. Poole, M.D.	Unknown
Deposition of Mark Ayres	Unknown

Mary K. Martin, CSR, RPR	
Deposition of David A Tillema, M.D.	Unknown

IT IS SO ORDERED.

Dated this ____ day of March 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: James R. Roth, Wichita, KS
- Gary A. Winfrey, Wichita, KS
- Jon L. Frobish, Administrative Law Judge
- Philip S. Harness, Director