

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

<b>RITA DEL RIO</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 199,329
<b>RIVERSIDE HOSPITAL</b>	)	
Respondent	)	
AND	)	
	)	
<b>PHICO INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent appeals from an Award entered by Administrative Law Judge Nelsonna Potts Barnes (ALJ) on September 10, 1997. The Appeals Board heard oral argument June 3, 1998.

**APPEARANCES**

Gerard C. Scott of Wichita, Kansas, appeared on behalf of the claimant. Daniel L. Doyle of Kansas City, Missouri, appeared on behalf of the respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The sole issue on appeal is the nature and extent of claimant's disability. The ALJ awarded benefits for an 87.5 percent work disability. Respondent contends claimant failed to make a good faith effort to find employment after her injury and the award should be limited to functional impairment in accordance with principles stated in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments, the Appeals Board has determined that the Award should be affirmed.

**Findings of Fact**

1. Claimant injured her low back on February 17, 1995, while cleaning an orthopedic bed. The bed slipped, a mattress fell on top of her, and she was thrown against a wall.
2. On the day of the injury, claimant went to Riverside Hospital emergency room where she was given medication for a back strain. Claimant later saw several physicians, including Dr. Leonard A. Klawns who recommended surgery based on CT and myelogram studies. Surgery was not, however, done.
3. Claimant was referred instead first to Dr. Poole and then to Dr. Robert L. Eyster for a second opinion. Dr. Eyster saw claimant on February 28, 1996, and on March 8, 1996, released her with restrictions. He concluded surgery was not appropriate. He diagnosed degenerative disc disease and rated the impairment as 6 percent of the body as a whole. According to Dr. Eyster, 60 percent of the impairment was due to preexisting disease and 40 percent due to the work-related injury. Dr. Eyster recommended claimant not lift over 20 pounds repetitively and 35 pounds frequently. He also recommended claimant not do repetitive forward bending.
4. Dr. Lawrence R. Blaty examined claimant on July 16, 1996, at the request of claimant's counsel. He diagnosed chronic lumbosacral strain with left radiculopathy and rated the impairment as 9 percent of the body as a whole. Dr. Blaty recommended the following restrictions: no occasional lifting over 25 pounds, no frequent lifting over 15 pounds, only occasional bending, limit periods of weight bearing and non-weight bearing to two-hour intervals with positional changes, and avoid climbing activities.
5. Based on a task list prepared by Mr. Jerry D. Hardin, Dr. Blaty opined that claimant can no longer perform 75 percent of the tasks she performed in the work she did during the previous 15 years.<sup>1</sup>
6. Respondent employed Francine Knight, a vocational rehabilitation counselor, to help claimant find employment. Ms. Knight's staff began their efforts in September 1996, after a first meeting on August 5, 1996. Ms. Knight took over the efforts herself in November

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<sup>1</sup> Dr. Blaty agreed with the opinion of Mr. Hardin and in so doing Dr. Blaty stated the task loss was 75 percent. Mr. Hardin actually gave two percentages. The 75 percent was based on a time-weighted task analysis. Mr. Hardin's opinion was 50 percent when the tasks were not time weighted. On appeal, respondent does not challenge use of the time-weighted opinion and for that reason the Board has not addressed questions regarding which is more appropriate.

1996. Ms. Knight and/or her staff contacted building cleaning services, as well as hotels, to find out if they could accommodate claimant's restrictions. Several possible employers were found. With the exception of possible employment at Via Christi, where claimant did not believe she would be able to perform the duties, claimant made application to the various potential employers but none hired her.

7. Claimant made a good faith effort to find employment after the injury she suffered while working for respondent but was not able to find employment and, when she last testified in this case, was not earning a wage. Respondent points to testimony that claimant did not make an effort to find employment other than through Francine Knight. That testimony was given while the efforts through Francine Knight were ongoing and, in the Board's opinion, does not mean claimant was not making a good faith effort.

8. The evidence does not establish that claimant had a preexisting functional impairment. Dr. Eyster testified that 60 percent of his rating was from preexisting disease but this statement is different from a statement that claimant had a preexisting functional impairment. As Dr. Blaty testified, claimant was not experiencing significant symptoms before this injury. For that reason, although Dr. Blaty agreed claimant has preexisting disc disease, he concluded she did not have a preexisting functional impairment. The Board agrees with and adopts Dr. Blaty's opinion on this issue.

### Conclusions of Law

1. K.S.A. 44-510e(a) sets out the statutory definition of permanent partial general disability and an injured employee's entitlement to the same:

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.

2. K.S.A. 44-510e(a) also provides that an employee is not entitled to receive benefits beyond functional impairment so long as the employee earns a wage which is 90 percent or greater than his or her preinjury wage.

3. An employee who does not make a good faith effort to find employment is not entitled to use the actual wage loss. A wage will be imputed. Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

4. In this case, claimant made a good faith effort to obtain employment but was not able to do so. Claimant's wage loss is, therefore, 100 percent.

5. The Appeals Board finds claimant has lost the ability to perform 75 percent of the tasks she performed in the relevant 15-year work history. K.S.A. 44-510e(a). This finding is based on the opinion of Dr. Blaty.

6. Claimant has an 87.5 percent work disability based on a 100 percent wage loss and a 75 percent task loss.

7. Respondent has not argued for a reduction of the work disability based on preexisting impairment but did argue, when suggesting the appropriate functional impairment, that the preexisting functional impairment should be subtracted to determine the appropriate disability if the disability were based on functional impairment only. The Board has found the evidence does not establish a preexisting functional impairment and, therefore, none should be deducted from the disability awarded.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Nelsonna Potts Barnes on September 10, 1997, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 1998.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

- c: Gerard C. Scott, Wichita, KS
- Daniel L. Doyle, Kansas City, MO
- Nelsonna Potts Barnes, Administrative Law Judge
- Philip S. Harness, Director