

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

<b>BRUCE TERRY</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 216,122
<b>CITY OF TOPEKA</b>	)	
Respondent	)	
Self-Insured	)	

**ORDER**

Respondent and its insurance carrier appeal from an Award entered by Administrative Law Judge Brad E. Avery on October 21, 1999. The Appeals Board heard oral argument March 22, 2000.

**APPEARANCES**

Roger D. Fincher of Topeka, Kansas, appeared on behalf of claimant. Larry G. Karns of Topeka, Kansas, appeared on behalf of respondent, a qualified self-insured.

**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 ruled claimant was not entitled to a work disability because he refused to attempt an appropriate accommodated job offered by respondent. The ALJ then adopted the rating of 37 percent of the whole person given by Dr. P. Brent Koprivica, finding it was the only rating based on the Third Edition (Revised) of the *AMA Guides to the Evaluation of Permanent Impairment*.

On appeal, respondent argues that even though the accident occurred at a time when the Third Edition (Revised) was applicable, the Third Edition (Revised) should not be used. Respondent also disputes the use of Dr. Koprivica's rating because it includes impairment for cauda equina syndrome, a condition respondent contends claimant does not have. Finally, respondent argues that even if Dr. Koprivica's rating is used, the rating

was 35 percent, not 37 percent. Claimant seeks a work disability but otherwise asks the Board to affirm the ALJ.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Award should be modified. Claimant is awarded benefits for a 22 percent permanent partial disability.

#### **Findings of Fact**

1. Claimant injured his back on April 3, 1995, while dragging brush as part of his duties for respondent. Claimant went immediately to the emergency room where he was taken off work. Claimant subsequently treated with a number of physicians including, beginning in March 1996, Dr. Deborah Mowery. Dr. Mowery released claimant to return to work on September 3, 1996. In November 1996, Dr. Mowery also performed a job site evaluation. Respondent offered claimant an accommodated job that Dr. Mowery believed claimant could perform. Claimant refused to attempt that job. Claimant was last employed January 2, 1996.

2. Dr. Mowery diagnosed degenerative disk disease of L4-5, L5-S1, spondylolisthesis with mild stenosis, a history of L5 radiculopathy, chronic pain syndrome, general deconditioning, and a sleep-wake cycle dysfunction contributing to the chronic pain syndrome. Dr. Mowery did not believe claimant had cauda equina syndrome because she found no indication of bladder incontinence.

3. Dr. Koprivica examined claimant and evaluated his injury on June 19, 1997. Dr. Koprivica performed the evaluation at the request of claimant's counsel. Dr. Koprivica acknowledged that there was a problem with using the range of motion testing because claimant was protecting against pain on the testing. Dr. Koprivica did not believe claimant was intentionally exaggerating the loss of range of motion, only that he was protecting himself from the pain and mechanically claimant retained a greater range than shown.

Because of the difficulty with the range of motion testing, Dr. Koprivica referred to the Fourth Edition of the *Guides*. According to Dr. Koprivica, the Fourth Edition would warrant a 40 percent rating. In the rating under the Fourth Edition, Dr. Koprivica treated claimant's condition as a cauda equina-like syndrome. Based on review of Dr. Koprivica's testimony, the Board does not believe Dr. Koprivica was diagnosing cauda equina, only that he was saying the condition was entitled to be rated the same under the Fourth Edition.

Using the Third Edition (Revised), Dr. Koprivica testified the total rating would be 37 percent based on 19 percent for loss of range of motion, 12 percent for neurological

findings, and 11 percent based on diagnosis. He combined these percentages using the combined values chart to 37 percent.

Because he did not consider the range of motion testing to be valid, Dr. Koprivica made reference to the Fourth Edition. But Dr. Koprivica considered the 40 percent to be too high and arrived at an overall rating of 35 percent, considering the Third Edition (Revised) with reference to the Fourth Edition for assistance because of difficulty with the range of motion testing.

4. Dr. Glenn M. Amundson examined claimant on August 13, 1998. Dr. Amundson did so at the direction of the ALJ. He diagnosed multilevel degenerative condition, spondylosis, lower extremity radiculopathy, and chronic pain syndrome. Dr. Amundson rated the impairment as 10 percent of the whole person using the Fourth Edition of the *AMA Guides*. (Table 72, p. 110, Category III.) Dr. Amundson testified he could not give a rating based on the Third Edition because it considered factors such as range of motion and he stated he was not prepared to give a rating under the Third Edition (Revised). In addition, Dr. Amundson noted the FCE showed self-limiting behavior and this would make it difficult to use range of motion. Dr. Amundson reviewed the accommodated job description and agrees claimant could do that job but states that if he could not do this, he probably could not do any job. Dr. Amundson testified claimant does not have cauda equina syndrome.

### Conclusions of Law

1. Claimant has the burden of proving his right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 44-501(a).

2. The Board agrees with the ALJ's finding that claimant failed to attempt appropriate accommodated employment offered by respondent. The job was approved by Dr. Mowery and Dr. Amundson. But claimant did not attempt the job. The wage for the accommodated job should be imputed to claimant and claimant is limited to functional impairment. K.S.A. 44-510e. *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997); *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

3. K.S.A. 1994 Supp. 44-510e provides that the *AMA Guides* are to be used "*if the impairment is contained therein.*" Respondent argues that the Third Edition (Revised) should not be used here because both Dr. Koprivica and Dr. Amundson mention difficulty using range of motion testing. But the language from K.S.A. 44-510e excludes only cases where the impairment is not contained in the *Guides*, not instances where the impairment is covered by the *Guides* but difficult to measure. The Board concludes the impairment should be based on the Third Edition (Revised).

4. Dr. Koprivica is the only physician in this case to give a rating based on the Third Edition (Revised) of the *AMA Guides*. But the portion of Dr. Koprivica's rating based on

loss of range of motion is not, according to Dr. Koprivica, reliable. Claimant has the burden of proving the impairment and that portion of Dr. Koprivica's rating based on range of motion, the 19 percent, is not proven. This leaves the 12 percent based on neurological findings and 11 percent based on diagnosis. These combine, using the combined values chart, to a rating of 22 percent. The Board finds the 22 percent is the extent of impairment claimant has proven based on the Third Edition (Revised) of the *AMA Guides*.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Brad E. Avery on October 21, 1999, should be, and the same is hereby, modified.

**WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Bruce Terry, and against the respondent, City of Topeka, a qualified self-insured, for an accidental injury which occurred April 3, 1995, and based upon an average weekly wage of \$510.41, for 31.14 weeks of temporary total disability compensation at the rate of \$319 per week or \$9,933.66, followed by 87.75 weeks at the rate of \$319 per week or \$27,992.25, for a 22% permanent partial disability, making a total award of \$37,925.91, all of which is currently due and owing in one lump sum less amounts previously paid.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April 2000.

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

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

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

- c: Roger D. Fincher, Topeka, KS
- Larry G. Karns, Topeka, KS
- Brad E. Avery, Administrative Law Judge
- Philip S. Harness, Director