

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

<b>EDWIN O. HORN</b>	)	
Claimant	)	
	)	
VS.	)	Docket No. 241,878
	)	
<b>CITY OF TOPEKA</b>	)	
Self-Insured Respondent	)	

**ORDER**

Respondent requested review of the September 21, 2004 Award Upon Review and Modification by Administrative Law Judge Brad E. Avery. The Board heard oral argument on March 1, 2005.

**APPEARANCES**

John J. Bryan of Topeka, Kansas, appeared for the claimant. Matthew S. Crowley of Topeka, Kansas, appeared for the self-insured respondent.

**RECORD AND STIPULATIONS**

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

**ISSUES**

A review of the case history is necessary. The Administrative Law Judge (ALJ) awarded claimant a 16 percent whole person functional impairment on March 14, 2001. The Board affirmed that decision.

Claimant later filed an application for review and modification. The review and modification hearing was heard on March 15, 2004, and during that proceeding, the ALJ set claimant's terminal date for April 14, 2004, and the respondent's for May 14, 2004. But on May 27, 2004, the ALJ entered an order extending both parties' terminal dates and sent out letters to Dr. Bieri, the court ordered independent medical examiner, and to the parties' counsel. The letter to Dr. Bieri posed additional questions to the doctor regarding his use of the *AMA Guides* and specifically whether Dr. Bieri utilized the third edition of the *Guides*. The ALJ also posed certain written factual questions to counsel bearing on the issue of a potential retirement offset under K.S.A. 44-501(h).

Respondent requested Board review of the ALJ's Order Extending Terminal Dates and alleged a variety of errors in its application for review which, when read as a whole, takes issue with the ALJ's jurisdiction to enter such an order. Respondent asserted the ALJ had become "an advocate for a party," thus apparently exceeding his jurisdiction, and had failed to decide the case as required by the Kansas Workers Compensation Act.

The Board dismissed respondent's request for review finding the ALJ's decision to extend terminal dates and request additional information from the court ordered independent medical examiner and/or from the parties was interlocutory in nature. Accordingly, the Board concluded that it did not have jurisdiction to review the issues at that juncture of the proceedings.

After the expiration of the extended terminal dates, during which two additional depositions were taken by the parties, the ALJ entered an Award Upon Review and Modification. The ALJ found the claimant not only suffered an increase in functional impairment but also suffered an 83.5 percent work disability. The work disability was based upon a 90 percent task loss and a 77 percent wage loss. The ALJ further determined that under the facts of this claim, the K.S.A. 44-501(h) credit for retirement benefits was not applicable.

The respondent requests review of the following: (1) whether the ALJ had authority to extend terminal dates, contact the physician appointed as the independent medical examiner, and request counsel to supplement the record with additional evidence after the terminal dates had expired and submission letters had been filed; (2) whether Dr. Bieri's report dated June 3, 2004, and his deposition taken July 12, 2004, should be stricken from the record; (3) whether the claimant is entitled to an increased functional impairment as well as a work disability upon review and modification; (4) whether the respondent is entitled to a credit pursuant to K.S.A. 44-501(h); and, (5) whether claimant's revised Exhibit 9, is part of the record.

Claimant argues the ALJ's Award should be affirmed.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Initially, the Board must address the respondent's argument that the ALJ erred in reopening the record on his own motion in order for the court ordered independent medical examiner to answer additional questions and to allow the parties time to take additional evidence, if necessary.

As a consequence of the review and modification litigation, on October 3, 2003, the ALJ entered an Order Referring Claimant for Independent Medical Examination which referred claimant to Dr. Peter V. Bieri. The doctor examined claimant on December 5, 2003, and issued a report that same date which addressed whether claimant's condition had changed since he had last examined claimant on February 28, 2000. The doctor's deposition was taken by claimant on March 22, 2004.

At the conclusion of the review and modification hearing the ALJ established terminal dates of April 14, 2004 for the claimant and May 14, 2004 for the respondent. After expiration of the established terminal dates, the ALJ, on his own motion, entered an Order Extending Terminal Dates on May 27, 2004, which extended both the parties' terminal dates to August 2, 2004, for the purpose of allowing additional time for Dr. Bieri to answer additional questions addressed to the doctor in a letter from the ALJ dated May 27, 2004. Additional time was also allowed so the parties could address questions the ALJ posed to the parties' counsel on the issue of retirement benefits, the potential offset and the percentage of contributions made by claimant to the retirement plan. The terminal dates were also extended to allow the parties to submit additional evidence, if necessary, to address the questions the ALJ posed to Dr. Bieri and the parties.

Respondent requested Board review of the Order Extending Terminal Dates and alleged a variety of errors in its application for review which, when read as a whole, took issue with the ALJ's jurisdiction to enter such an order. Respondent asserted the ALJ had become "an advocate for a party," thus apparently exceeding his jurisdiction, and had failed to press forward and decide the case as required by the Kansas Workers Compensation Act, K.S.A. 44-501, et seq.

The Board determined the ALJ's decision to extend terminal dates and request additional information from the court ordered independent medical examiner and/or from the parties is interlocutory in nature, and made during the litigation of a workers compensation case that is before the ALJ. As the decision was neither a final order that can be reviewed pursuant to K.S.A. 44-551, nor an order entered pursuant to the preliminary hearing statute, K.S.A. 44-534a, as preliminary hearing orders are limited to issues of furnishing of medical treatment and payment of temporary total disability compensation, the Board dismissed the respondent's application for review.

Respondent again argues the ALJ exceeded his jurisdiction by extending terminal dates and that his questions posed to Dr. Bieri indicate that he had become an advocate for claimant. Specifically, respondent notes that in his first deposition on March 22, 2004, the doctor indicated that the impairment rating in his December 5, 2003 report was based upon the *AMA Guides*, Fourth Edition. In his May 27, 2004 letter to Dr. Bieri, the ALJ noted:

Your letter does not state what edition of the *AMA Guides* you used to determine your rating. Since this was a May 1995 injury, I am requesting you specify how, if

at all, your rating may differ if you were to use the 3<sup>rd</sup> edition of the AMA Guides to make a determination.

Respondent concludes that this inquiry indicates the ALJ knew the doctor had used the wrong edition of the Guides to formulate his rating and that unless the doctor clarified his opinion the claimant would have failed to meet his burden of proof that his functional impairment had changed.<sup>1</sup> Consequently, the respondent argues it was prejudiced by the extension of terminal dates as well as the leading questions the ALJ directed to Dr. Bieri.

On June 22, 2004, a motion hearing was held on respondent's motion for the ALJ to recuse himself as well as respondent's request that the ALJ vacate the Order Extending Terminal Dates. During colloquy at that hearing the ALJ indicated that he did not think that he had received a copy of Dr. Bieri's deposition. And he further indicated which depositions he had in the file but noted that sometimes depositions do get scattered. Respondent countered that his submission letter was part of the file and it contained reference to the page of Dr. Bieri's deposition where the doctor had indicated which edition of the Guides he had utilized in preparing his December 5, 2003 report. Thus, the ALJ's question to Dr. Bieri had already been answered and respondent argues the only reason the ALJ would have made further inquiry was to elicit evidence favorable to the claimant. It should be noted the administrative file indicates that Dr. Bieri's March 22, 2004 deposition was file stamped as received in the Division of Workers Compensation on April 1, 2004.

In an Order dated June 24, 2004, the ALJ denied respondent's motion for recusal as well as respondent's motion to rescind the order extending terminal dates. The ALJ noted:

The court's inquiry of Dr. Bieri was based upon the doctor's failure to specify the edition of the AMA Guides under which he assessed his rating of impairment in his response to the court. Though the doctor indicated later in his deposition that his rating was issued under the fourth edition in his deposition, Dr. Bieri was the court appointed independent medical examiner. (See K.S.A. 44-528). The court appointed the doctor to inquire as to the claimant's current state of functional impairment, and in regard to the request for review and modification, Dr. Bieri was the sole doctor to issue an opinion as to functional impairment. During the original terminal dates, neither side sought additional medical evidence to question the substance of Dr. Bieri's opinion. Respondent complains of the court's questioning

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<sup>1</sup> Functional impairment is 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 *AMA Guides to the Evaluation of Permanent Impairment*, if the impairment is contained therein. K.S.A. 44-510e. In workers compensation cases, the law in effect at the time of the injury governs the rights and obligations of the parties. *Osborn v. Electric Corp. of Kansas City*, 23 Kan. App.2d 868, 936 P.2d 297 (1997). For injuries occurring before April 4, 1996, the Third Edition (Revised) of the *AMA Guides* is the version to be utilized. For injuries occurring on or after April 4, 1996, the Fourth Edition of the *AMA Guides* will be utilized.

of the doctor because the date of injury would require the opinion of impairment be issued under the Third edition of the AMA Guides rather than the Fourth edition, when in fact the rating of impairment provided by Dr. Bieri would be the same under both editions.<sup>2</sup>

The court has the right and obligation to make inquiries of its independent medical examiner when the record of his examination is not clear or the doctor has mistakenly issued a rating under the wrong edition of the AMA Guides. The court fails to understand how this line of questioning from the court would in any shape or form unfairly prejudice either party since both sides had and have the opportunity to depose the doctor and/or seek their own rating of functional impairment, if deemed necessary.

For the record, the court did receive the deposition of Dr. Bieri on April 1, 2004.<sup>3</sup>

Respondent contends the ALJ erred by writing Dr. Bieri for additional information and extending the parties' terminal dates to permit the parties to submit additional evidence into the record after the case had been submitted for decision. The Board disagrees.

This issue has been before this Board on at least two prior occasions. The Board has held that the ALJ has the authority to reopen a claim to take additional evidence upon his or her own motion. Furthermore, the Board has held that reopening a claim does not deny the parties due process as long as the ALJ sets new terminal dates for the parties to allow them an opportunity to introduce whatever additional evidence that may be desired due to the change of events, if any.

The Kansas Supreme Court has held that the general public is an interested party in a workers compensation proceeding and that public policy requires careful scrutiny of workers compensation settlements.<sup>4</sup> The same public policy rationale equally applies to litigated proceedings under the Workers Compensation Act. Accordingly, ALJs upon their own initiative can determine that good cause exists to reopen the record to receive additional evidence. Parties may seek reopening of the record for good cause under K.S.A. 44-523(b)(4) (Furse 1993). Public policy dictates that ALJs have the same ability.

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<sup>2</sup> It should be noted that the appropriate edition of the Guides would have been the Third Edition, Revised rather than the Third Edition.

<sup>3</sup> ALJ Order (June 24, 2004) at 2.

<sup>4</sup> *Cramer v. Railways Co.*, 112 Kan. 298, 211 Pac. 118 (1922); *Miles v. Wyatt*, 138 Kan. 863, 865, 28 P.2d 748 (1934).

Moreover, the Workers Compensation Act specifically empowers judges to “conduct an investigation, inquiry or hearing on all matters”<sup>5</sup> before them.

In the claim of *Hicks*,<sup>6</sup> the Board held:

It has long been the law in workers compensation that the administrative law judge is not bound by the technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, insure the employee and the employer an expeditious hearing and act reasonably without partiality. Bahr v. Iowa Beef Processors, Inc., 8 Kan. App. 2d 627, 663 P.2d 1144, *rev. denied* 233 Kan. 1091 (1983); K.S.A. 1999 Supp. 44-523. In fact, any procedure which is appropriate and not prohibited by the Workers Compensation Act may be employed by the administrative law judge. Bushey v. Plastic Fabricating Co., 213 Kan. 121, 515 P.2d 735 (1973).

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A fact situation similar to this was presented to the Board in Sapata v. Southwestern Bell Telephone Company, WCAB Docket No. 133,971 (Jan. 1997). In Sapata, the assistant director selected Peter V. Bieri, M.D., to evaluate claimant for the purposes of a review and modification proceeding. This request was made approximately nine months after the record was closed and the parties had submitted their case for decision. Before either party had the opportunity to respond to Dr. Bieri's findings, the assistant director issued an award, in part, utilizing Dr. Bieri's opinion. In that instance, the Board found that the assistant director, in effect, reopened the record upon his own initiative to receive additional evidence without extending the parties' terminal dates or otherwise giving the parties and [*sic*] opportunity to respond to the new evidence.

K.S.A. 44-516 allows the director, in the director's own discretion, to refer claimant for an independent medical examination. The Board found in Sapata that this procedure was appropriate. However, the Board went on to hold that once the record is reopened, K.S.A. 44-523 dictates that the parties shall be given a reasonable opportunity to respond to the new evidence.

... The Appeals Board finds that, while the Administrative Law Judge had the right to reopen the record, the Administrative Law Judge should have given the parties the opportunity to respond to and, if necessary, rebut the evidence.

The reliance by the Administrative Law Judge on ex parte investigations or examinations violates their due process by not giving the parties an opportunity to respond.

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<sup>5</sup> K.S.A. 44-551(b)(1) (Furse 1993).

<sup>6</sup> *Hicks v. Labor Ready*, No. 228,851, 2000 WL 1134435 (Kan. WCAB July 31, 2000).

The basic right to confront, cross-examine, and refute must be respected. . . . Under the increasingly common practice of referral of the claimant to an official medical examiner or an independent physician chosen by the Commission, it is particularly important that commissions not lose sight of the elementary requirement that the parties be given an opportunity to see such doctor's report, cross-examine the doctor, and if necessary provide rebuttal testimony. <sup>7</sup> Larson's Workers' Compensation Law, § 127.05[4] (2000).

The Appeals Board is mindful of the Kansas Supreme Court decisions in both Baker v. St. Louis Smelting & Refining Co., 145 Kan. 273, 65 P.2d 284 (1937), and Burns v. Topeka Fence Erectors, 174 Kan. 136, 254 P.2d 285 (1953). However, in both Baker and Burns, the parties were given the opportunity to cross-examine the independent medical examination doctor prior [to] the issuance of the decision by the then Workers Compensation Commissioner, thus protecting their due process rights. In this instance, the opportunity to cross-examine the independent medical examination doctor was never afforded the parties prior to the issuance of the decision.

The Appeals Board finds that the Administrative Law Judge's decision to reopen the record was proper and well within her jurisdiction. However, her consideration of the report without providing the parties an opportunity to cross-examine and refute the evidence was a denial of due process. . . .

In this instance, the parties were afforded additional time to depose Dr. Bieri or to take additional evidence on the issues. The ALJ was simply searching for the truth by requesting his court appointed independent medical examiner to determine what impact, if any, using the correct edition of the *AMA Guides* would have on the doctor's rating. Accordingly, respondent's request to exclude Dr. Bieri's December 5, 2003 report from the record is denied as is the respondent's request to vacate the ALJ's extension of terminal dates.

The respondent next argues that a revised exhibit should not be considered as part of the record. At the review and modification hearing held on March 15, 2004, the claimant offered a document, Exhibit 9, which was identified as a copy of pay stubs from the State of Kansas as well as the City of Topeka for claimant's part-time employment earnings from April 23, 2002, through May 23, 2003. The exhibit was offered and admitted without objection.<sup>7</sup>

At the conclusion of the hearing the following colloquy occurred:

JUDGE AVERY: I don't have anything else. Anything else?

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<sup>7</sup> R.M.H. Trans. at 11.

MR. CROWLEY: I have one thing, Your Honor, you brought it up, I didn't notice this, if you look at Exhibit 9 and Exhibit 7 they don't appear to coincide.

MR. BRYAN: Exhibit 9 doesn't have all Exhibit 7 on it, you're right.

MR. CROWLEY: So the totals -- subtotals are only from the pay stubs provided to you.

JUDGE AVERY: Okay.

MR. BRYAN: Right. Yeah. Well, I think we had all the pay stubs and I think when we put the exhibit together we screwed up and didn't have them all on there is what happened. We didn't get it on there.

JUDGE AVERY: If you want to submit a corrected exhibit that would reflect the calculation.

MR. BRYAN: Okay.

MR. CROWLEY: Okay. Couple other things.<sup>8</sup>

As a result of the foregoing discussion the claimant's attorney, in a letter to the ALJ dated March 15, 2004, provided a revised exhibit to replace Exhibit 9. The letter requested that respondent's counsel respond promptly if he was not in agreement that the exhibit be made part of the record.

Respondent's counsel replied, by letter dated March 25, 2004, and objected to the revised exhibit on the grounds it was irrelevant, vague, ambiguous, is without foundation and is argumentative. Respondent argued the revised exhibit required foundation testimony.

In the Award Upon Review and Modification the listing of the record includes: "Revised exhibit #9, per letter of claimant's counsel dated March 15, 2004, is admitted to the record."<sup>9</sup>

Initially, it should be noted that the review and modification hearing Exhibit 9, contains all the figures utilized by the ALJ in his calculation of the claimant's post-injury wage. That exhibit was admitted without objection. It should also be noted that despite the respondent attorney's concern, it appears that, when totaled, the figures on Exhibit 7 correspond with the numbers reflected on Exhibit 9 for the time period that is relevant to determine claimant's post-injury wage, if necessary.

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<sup>8</sup> *Id* at 57-58.

<sup>9</sup> ALJ's Award (Sep. 21, 2004) at 1.

Because respondent did not object to either Exhibit 7 or Exhibit 9 and the Revised Exhibit 9 contains the same totals for the relevant time periods the respondent's objections are overruled and Revised Exhibit 9 is admitted as part of the record.

The next issue for Board determination is the nature and extent of disability. This is a review and modification proceeding. An award may be modified when changed circumstances either increase or decrease the permanent partial general disability. The Workers Compensation Act provides, in part:

Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.<sup>10</sup>

K.S.A. 44-528 permits modification of an award in order to conform to changed conditions.<sup>11</sup> If there is a change in the claimant's work disability, then the award is subject to review and modification.<sup>12</sup>

In a review and modification proceeding, the burden of establishing the changed conditions is on the party asserting them.<sup>13</sup> Our appellate courts have consistently held that there must be a change of circumstances, either in claimant's physical or employment status, to justify modification of an award.<sup>14</sup>

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<sup>10</sup> K.S.A. 44-528(a).

<sup>11</sup> See *Nance v. Harvey County*, 263 Kan. 542, Syl. ¶ 1, 952 P.2d 411 (1997).

<sup>12</sup> See *Garrison v. Beech Aircraft Corp.*, 23 Kan App. 2d 221, 225, 929 P.2d 788 (1996).

<sup>13</sup> *Morris v. Kansas City Bd. of Public Util.*, 3 Kan App. 2d 527, 531, 598 P.2d 544 (1979).

<sup>14</sup> See, e.g., *Gile v. Associated Co.*, 223 Kan. 739, 576 P.2d 663 (1978); *Coffee v. Fleming Company, Inc.*, 199 Kan. 453, 430 P.2d 259 (1967).

The review and modification statute effective on claimant's May 5, 1995, accident date provided that an award may be modified if the functional impairment or work disability of the injured worker has increased or diminished.<sup>15</sup> Review and modification of an award is appropriate where there has been a change in the claimant's condition.<sup>16</sup> The change does not have to be a change in claimant's physical condition. It could be an economic change, such as a claimant returning to work at a comparable wage,<sup>17</sup> or losing a job because of a layoff.<sup>18</sup> The burden of establishing the changed conditions is on the party asserting them.<sup>19</sup>

After claimant received surgery for his back, he returned to his job with respondent as a supervisor in the water division. Claimant continued working for respondent until June 25, 2001. Claimant testified that during this time period his back condition worsened which required that he increase the over-the-counter medications. Although claimant took retirement at that time he explained that his reason for quitting work for respondent was because his back pain had worsened.

Mr. Ed Winton, claimant's supervisor, testified that claimant did not initially provide a reason why he was retiring but indicated that a factor was his pay would have been reduced because of the elimination of "standby pay". Mr. Winton testified:

Q. Did he [claimant] present the resignation to you?

A. I believe he did.

Q. Okay. At the time he presented this, did he give you a reason why he elected to retire?

A. Not at that time he didn't.

Q. At some later time did he give you a reason?

A. Prior to that time in, in conversation we had talked about things that had transpired at the division, you know, basically relating to some decisions in -- organizational decisions made about standby and reduction in pay and things of that sort, but --

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<sup>15</sup> See K.S.A. 44-528(a) (1993 Furse).

<sup>16</sup> See *Gile v. Associated Co.*, 223 Kan. 739, 740, 576 P.2d 663 (1978).

<sup>17</sup> See *Ruddick v. Boeing Co.*, 263 Kan. 494, 949 P.2d 1132 (1997).

<sup>18</sup> See *Lee v. Boeing Co.*, 21 Kan. App. 2d 365, 372, 899 P.2d 516 (1995).

<sup>19</sup> See *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 531, 598 P.2d 544 (1979).

Q. And --

A. -- that --

Q. Was the standby some type of system where Mr. Horn would receive additional compensation for the standby status?

A. Right. They would be paid a certain amount of dollars -- or I believe it was one hour for every eight hours they were on, on standby they were getting paid. And decisions were made prior to my arrival that that was going to be eliminated for certain supervision positions.

Q. And would that affect Mr. Horn?

A. Yes.<sup>20</sup>

Mr. Winton further testified that claimant never requested accommodation in performing his job as a supervisor in the respondent's water division. And but for his retirement claimant would have continued to work as a supervisor for respondent.

After claimant took retirement, he returned to work for respondent on a temporary basis driving a front end loader starting December 2001 through February 10, 2003.<sup>21</sup> The claimant then went to work part-time for the State in January 2003 and worked through May 2003. At the time of the review and modification hearing, claimant had started working for Bartlett and West on August 16, 2003, as a temporary inspector of water pipe insulation. Claimant testified that all of his jobs after retirement were easier than his job working for respondent.

As previously noted the ALJ had ordered an independent medical evaluation of claimant to be performed by Dr. Peter V. Bieri. The doctor examined the claimant on December 5, 2003, and issued a report which indicated claimant's condition had somewhat deteriorated since the doctor had last evaluated claimant on February 28, 2000. The doctor noted:

I believe the claimant's condition has somewhat deteriorated since the previous evaluation, with findings primarily involving the right lower extremity. This appears to be secondary to radiculopathy, which was previously judged to be ten percent (10%) right lower extremity impairment. Based on the current findings of absent reflex at the level of the ankle, along with increased pain and weakness, I would judged [sic] the current right lower extremity impairment to be fifteen percent (15%).

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<sup>20</sup> Winton Depo. at 12-13.

<sup>21</sup> R.M.H. Trans., Cl. Ex. 7.

This represents a five percent (5%) lower extremity impairment increase from the previous evaluation.<sup>22</sup>

The claimant took the doctor's deposition on March 22, 2004. The doctor indicated that the impairment rating in the December 5, 2003 report was based upon the *AMA Guides*, Fourth Edition. The doctor later indicated that his rating would be identical whether utilizing the *AMA Guides*, Third Edition Revised or the Fourth Edition. And the claimant's increased 5 percent impairment to the lower extremity would result in a 2 percent additional permanent partial whole person impairment.

Dr. Bieri concluded that claimant's worsening was a natural progression of the original injury. But the doctor agreed that he would not have restricted claimant from the work he was performing in the interval between his two examinations of the claimant. Stated another way, the doctor determined claimant's continued employment did not cause the increased impairment. And the doctor agreed that claimant had not had additional medical treatment for his back since February 2000.

Dr. Bieri's testimony establishes that claimant's functional impairment increased 2 percent to the whole body which was a natural and probable consequence of the claimant's work-related accident. Accordingly, claimant has met his burden of proof that he is entitled to modification of the award for this increased functional disability.

Claimant argues he is also entitled to an award of work disability as a result of his being forced to retire due to his ongoing back problems. Conversely, respondent argues claimant voluntarily retired from his job which was within his restrictions and had he not retired he would have suffered no wage loss.

The Kansas Appellate Courts, beginning with *Foulk*,<sup>23</sup> have barred a claimant from receiving work disability benefits if the claimant is capable of earning 90 percent or more of his pre-injury wage at a job within his medical restrictions, but fails to do so, or actually or constructively refuses to do so. The rationale behind the decision is that such a policy prevents claimants from refusing work and thereby exploiting the workers compensation system. *Foulk* and its progeny are concerned with a claimant who is able to work, but either overtly, or in essence, refuses to do so.<sup>24</sup> Before claimant can claim entitlement to

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<sup>22</sup> Bieri Depo. (Mar. 22, 2004), Ex. 2.

<sup>23</sup> *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

<sup>24</sup> *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

work disability benefits, he must first establish that he made a good faith effort to obtain or retain appropriate employment.<sup>25</sup>

The Board has also held workers are required to make a good faith effort to retain their post-injury employment. Consequently, permanent partial general disability benefits are limited to the worker's functional impairment rating when, without justification, a worker voluntarily terminates or fails to make a good faith effort to retain a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage. On the other hand, employers must also demonstrate good faith. In providing accommodated employment to a worker, *Foulk* is not applicable where the accommodated job is not genuine,<sup>26</sup> where the accommodated job violates the worker's medical restrictions,<sup>27</sup> or where the worker is fired after making a good faith attempt to perform the work but experiences increased symptoms.<sup>28</sup>

The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis. The Board concludes claimant has failed to prove that he made a good faith effort to retain his employment with respondent.

Claimant testified he was forced to leave his job because it had simply become too painful to continue working. However, the record indicates that except for one mentioned visit to his personal physician the claimant never sought additional medical treatment after he returned to work. The claimant's job required that he drive around town and inspect the work of the various crews. Dr. Bieri noted that he would not have restricted claimant from performing his job with respondent and the doctor did not change claimant's restrictions as a result of his most recent examination of claimant. Nor did the doctor restrict claimant from driving. Moreover, after the claimant retired he sought temporary work, which he performed for many 40 hour work weeks, running a front end loader for respondent. This activity seems as physically demanding, if not more so, than claimant's driving activities in his work as a supervisor.

The Board concludes the claimant's decision to retire was more probably than not based upon factors other than his work-related injury. The claimant never sought additional medical treatment for his alleged worsening back condition nor requested accommodation at work. The sole medical evidence proffered at the review and modification hearing indicated claimant was not restricted from performing his supervisory position with respondent nor were his restrictions changed. Claimant also expressed

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<sup>25</sup> *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

<sup>26</sup> *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

<sup>27</sup> *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

<sup>28</sup> *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

displeasure with the fact his "standby pay" was being reduced. After retirement the claimant returned to work that, if not more physically demanding, was as strenuous as the physical activities required in his supervisory position. Upon review of the entire evidentiary record the Board concludes claimant failed to meet his burden of proof that he made a good faith effort to retain appropriate employment.

Claimant's loss of a job paying 90 percent or more of his pre-injury average gross weekly wage resulted from claimant's voluntary retirement. Had he not done so, claimant would have continued to be provided work within his restrictions and would be earning a comparable wage. Accordingly, claimant's conduct is tantamount to refusing to work and, therefore, the salary that he was receiving from respondent should be imputed for the post-injury wage in the wage loss prong of the permanent partial general disability formula. As this would have been at least 90 percent of claimant's average weekly wage on the date of accident, claimant is limited to compensation calculated by using his percentage of functional impairment.

Accordingly, the ALJ's Award is modified to reflect claimant is entitled to a 2 percent permanent partial functional impairment.

Respondent argued that if claimant was awarded additional compensation benefits that it was entitled to a credit pursuant to K.S.A. 44-501(h).

The Workers Compensation Act provides that compensation benefits should be reduced by retirement benefits. The Act reads:

If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, **but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.**<sup>29</sup> (Emphasis added).

The Board's determination that claimant is limited to his increased functional impairment renders respondent's arguments moot. As noted, the reduction in benefits due to retirement benefits does not apply to the percentage of functional impairment.

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<sup>29</sup> K.S.A. 44-501(h)(Furse 1993).

**AWARD**

**WHEREFORE**, it is the finding of the Board that the Award of Administrative Law Judge Brad E. Avery dated September 21, 2004, is modified to reflect claimant is entitled to a 2 percent whole body functional permanent partial impairment.

The claimant is entitled to 8.3 weeks of permanent partial disability compensation at the rate of \$319 per week or \$2,647.70 for a 2 percent increase in his functional impairment which is due, owing and ordered paid in one lump sum.

**IT IS SO ORDERED.**

Dated this 31st day of May 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John J. Bryan, Attorney for Claimant  
Matthew S. Crowley, Attorney for Respondent  
Brad E. Avery, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director