

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

<b>ROBERT LEROY ANDERSON</b>	)	
Claimant	)	
VS.	)	
	)	
<b>USD 259</b>	)	Docket Nos. 250,870
	)	& 1,000,838
Respondent	)	
Self-Insured	)	

**ORDER**

Respondent appeals the January 14, 2003 Award of Administrative Law Judge Jon L. Frobish. Claimant was awarded benefits for an 83.5 percent permanent partial general disability after the Administrative Law Judge determined that claimant had put forth a good faith effort to obtain employment after leaving respondent. The Appeals Board (Board) heard oral argument on July 18, 2003. Gary Peterson was appointed as Board Member Pro Tem for the purposes of this appeal.<sup>1</sup>

**APPEARANCES**

Claimant appeared by his attorney, Steven R. Wilson of Wichita, Kansas. Respondent appeared by its attorney, Gary K. Albin of Wichita, Kansas.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge. It was noted at oral argument the parties had stipulated at regular hearing to an 11.5 percent functional impairment as being claimant's preexisting impairment pursuant to K.S.A. 44-501(c). The parties acknowledge respondent is entitled to a credit for this amount from the final award.

**ISSUES**

What is the nature and extent of claimant's injury and disability?

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<sup>1</sup> Board Member Gary Peterson retired in March 2003. As of the date of oral argument in this matter, no replacement for Mr. Peterson had been named.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds as follows:

Claimant, a long-term employee of respondent, suffered a series of injuries to his back in Docket No. 250,870 from January 1999 through December 1999. Claimant underwent surgery with Dr. Paul Stein and was ultimately returned to work with respondent at an accommodated position at a comparable wage. Dr. Stein opined that claimant had an 8 percent impairment to the body as a whole on a functional level, with Philip R. Mills, M.D., providing a 15 percent impairment to the body as a whole. The parties settled the matter on May 18, 2001, based upon an agreed-upon 11.5 percent impairment to the body as a whole, with the case settled on a running award.

On November 13, 2001, while moving a lunch table weighing approximately 500 pounds, claimant experienced a sudden increase in pain and reinjured his back. Claimant contacted the head custodian and advised him of the injury. Claimant filled out an accident report and was referred to Dr. Fred Smith and ultimately returned to Dr. Paul Stein on February 18, 2002. Medical tests performed on claimant revealed a new disc herniation. Claimant was again offered surgery, but declined. Dr. Stein released claimant with permanent restrictions, which respondent was unable to accommodate because of the new, more severe restrictions. Claimant left respondent's employment and began looking for alternative employment.

Claimant testified that he contacted numerous employers in the Wichita area, with claimant's list of contacts marked as Claimant's Exhibit 1 to the regular hearing. Respondent contends that the exhibit (which was created by claimant's wife) was, in some way, suspicious, as the handwriting and the pen used to create the numerous entries over several pages, which covered several months, never varied. Respondent argued that, in its opinion, the list was created at one time by claimant's wife, rather than over a period of time as claimant had testified. Respondent contends that this was evidence of claimant's lack of good faith in his post-injury job search.

Claimant was referred to physical medicine and rehabilitation specialist Philip R. Mills, M.D., at the request of his attorney, on June 6, 2002. Dr. Mills had earlier seen claimant on November 9, 2000, for the first injury. Dr. Mills diagnosed claimant with a DRE lumbosacral category III impairment including radiculopathy, an L5-S1 discopathy, status post discectomy and sacroiliitis with sclerosis. After the first injury, Dr. Mills had restricted claimant from lifting more than 35 pounds, using only good body mechanics and changing his position as needed. But after the second injury, Dr. Mills' restrictions became more severe, limiting claimant to lifting no more than 20 pounds and restricting him to only occasional twisting, bending, squatting, crawling or climbing.

Claimant was referred to vocational experts Jerry Hardin and Monty Longacre for the creation of task lists, describing claimant's 15-year history of employment prior to the date of accident. Mr. Longacre's task list contained thirty-six non-duplicate tasks. Claimant was identified as being unable to perform eleven by Dr. Mills. Mr. Hardin's task list originally contained fifty-one tasks, of which twenty-nine are non-duplicative. In reviewing Dr. Mills' testimony and the task list prepared by Mr. Hardin,<sup>2</sup> it is noted that claimant was unable to perform fourteen of the twenty-nine tasks. Dr. Mills did testify that claimant had lost the ability to perform certain of the tasks as of the first date of accident, but as claimant returned to work at an accommodated position at a comparable wage, no work disability was awarded after the first accident.

Dr. Mills opined that claimant had a 20 percent impairment to the body as a whole after the second injury, of which 15 percent preexisted. However, the parties stipulated at the time of regular hearing that claimant's preexisting functional impairment was at 11.5 percent, which is the identical impairment utilized at the time of the running award settlement on May 18, 2001. Pursuant to the stipulation of the parties, respondent will be granted an 11.5 percent preexisting functional impairment credit under K.S.A. 44-501(c).

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.<sup>3</sup>

Functional impairment means 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 fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.<sup>4</sup>

The only doctor to testify regarding claimant's functional impairment after the second injury was Dr. Mills, who opined claimant had a 20 percent impairment to the body at that time. As the parties have stipulated to an 11.5 percent impairment preexisting, the Board finds that claimant has sustained an additional 8.5 percent impairment as a result of this injury.

The extent of a permanent partial 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

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<sup>2</sup> Mills Depo., Ex. 4.

<sup>3</sup> See K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

<sup>4</sup> K.S.A. 44-510e(a).

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.<sup>5</sup>

Only Dr. Mills provided an opinion regarding the loss of tasks suffered by claimant as a result of this injury. In reviewing the list created by Monty Longacre, the Board finds based upon the opinion of Dr. Mills, that claimant lost the ability to perform eleven of the thirty-six tasks, resulting in a 31 percent task loss.

In considering the task list from Mr. Hardin, the Board finds based upon the opinion of Dr. Mills, that claimant is unable to perform fourteen of the twenty-nine non-duplicative tasks, for a 48 percent task loss. The Board finds no justification for giving greater weight to the list of Mr. Longacre over that of Mr. Hardin, or vice versa, and, therefore, will give equal weight to both of Dr. Mills' task loss opinions. In averaging the opinions of Dr. Mills, the Board finds claimant has suffered a 40 percent loss of task performing abilities.

In considering what, if any, wage loss claimant has suffered, the statute must be read in light of both *Foulk*<sup>6</sup> and *Copeland*.<sup>7</sup> In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. As respondent was unable to accommodate claimant's most recent restrictions, the policies of *Foulk* would not apply in this instance. In *Copeland*, however, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

If a finding is made that a good faith effort has not been made, the factfinder will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .<sup>8</sup>

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<sup>5</sup> K.S.A. 44-510e(a).

<sup>6</sup> *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

<sup>7</sup> *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

<sup>8</sup> *Id.* at 320.

At the regular hearing, several handwritten pages were placed into evidence describing the multitude of job contacts claimant testified he had made over a several-month period. Respondent argued that the handwriting on the pages was too similar and the fact that the same pen was used the entire time is an indication that claimant's wife had not created the list over a period of time, but had simply created the list at one time. According to respondent, this showed that claimant did not make the job contacts on the list. However, respondent provided absolutely no evidence to support this speculation. The only evidence regarding how the list was created came from the testimony of claimant. Claimant's testimony, in essence, is uncontradicted regarding this issue. Uncontradicted evidence which is not improbable or unreasonable may not be disregarded unless it is shown to be untrustworthy.<sup>9</sup> The Board finds claimant's testimony in this regard to be reasonable and trustworthy and, therefore, finds that the list showing claimant's job search efforts was evidence of actual job contacts as described by claimant. The Board finds that this job search effort on claimant's part constitutes a good faith effort by claimant, thereby satisfying the requirements of *Copeland*. As claimant was unemployed at the time of regular hearing, the Board finds that claimant's wage loss will be computed at 100 percent for the purpose of this award.

In comparing claimant's wage loss of 100 percent with claimant's task loss of 40 percent, the Board finds claimant is entitled to a 70 percent permanent partial general disability pursuant to K.S.A. 44-510e.

As noted above, pursuant to the parties' stipulations, respondent is entitled to an 11.5 percent credit under K.S.A. 44-501(c) for claimant's preexisting functional impairment. Therefore, the final award will be 58.5 percent permanent partial disability to the body as a whole.

Additionally, claimant's temporary total disability compensation will be paid at the rate of \$311.99 per week, with claimant's permanent partial disability compensation paid at the rate of \$373.75 per week based upon an average weekly wage of \$560.59 which includes the fringe benefits stipulated to by the parties.

The matters above were filed as a review and modification action in Docket No. 250,870 and, in the alternative, alleging a new date of accident in Docket No. 1,000,838. The Board finds based upon the opinion of Dr. Mills, that claimant suffered a new accidental injury on November 13, 2001. Therefore, claimant's request for a review and modification in Docket No. 250,870 is denied and claimant's request for a new award in Docket No. 1,000,838 is granted.

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<sup>9</sup> *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated January 14, 2003, should be, and is hereby, modified to grant claimant an award against the respondent for a 58.5 percent permanent partial general disability to the body as a whole based upon an average weekly wage of \$560.59 in Docket No. 1,000,838 with a date of accident of November 13, 2001.

Claimant is awarded 9.43 weeks temporary total disability compensation at the rate of \$311.99 totaling \$2,942.07, followed thereafter by 242.78 weeks permanent partial disability compensation at the rate of \$373.75 totaling \$90,739.03, for a total award of \$93,681.10.

As of July 23, 2003, claimant is entitled to 9.43 weeks temporary total disability compensation at the rate of \$311.99 per week totaling \$2,942.07, followed thereafter by 78.71 weeks permanent partial disability compensation at the rate of \$373.75 per week totaling \$29,417.86, for a total due and owing of \$32,359.93. Thereafter, claimant is entitled to 164.07 weeks permanent partial disability compensation at the rate of \$373.75 per week totaling \$61,321.17, until fully paid or until further order of the Director.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of September 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

- c: Steven R. Wilson, Attorney for Claimant
- Gary K. Albin Attorney for Respondent
- Jon L. Frobish, Administrative Law Judge

**ROBERT LEROY ANDERSON**

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**DOCKET NOS. 250,870 & 1,000,838**

Paula S. Greathouse, Director