

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

<b>DAVID WEICKERT</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 261,097
<b>LANDOLL CORPORATION</b>	)	
Respondent	)	
AND	)	
	)	
<b>RISK ENTERPRISE MANAGEMENT</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent appeals the September 27, 2002 Award of Administrative Law Judge Bryce D. Benedict. Claimant was awarded benefits for a 5 percent permanent partial general disability based on a functional impairment, followed by a 29.2 percent permanent partial general disability for injuries suffered on September 15, 2000. The Appeals Board (Board) heard oral argument on April 2, 2003. Gary M. Peterson was appointed as pro tem for the purpose of determining this matter.

**APPEARANCES**

Claimant appeared by his attorney, Roger D. Fincher of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Gregory D. Worth of Roeland Park, Kansas.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

**ISSUES**

- (1) What is the nature and extent of claimant's injury and disability?
- (2) Is claimant entitled to a work disability after his post-economic layoff?
- (3) Is respondent entitled to a credit for claimant's preexisting functional impairment pursuant to K.S.A. 44-501(c)?

Respondent originally included in its appeal the Administrative Law Judge's determination that claimant had a \$382 average weekly wage, which increased to \$402, with fringe benefits, on or after January 1, 2001. But at oral argument, respondent advised that claimant's average weekly wage was no longer an issue before the Board. Therefore, the Board affirms the Administrative Law Judge's determination of the above average weekly wage.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the Administrative Law Judge should be affirmed.

The Award of the Administrative Law Judge sets out findings of fact and conclusions of law in some detail, and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

Claimant, an assembly worker, had worked for respondent for several years. He suffered accidental injury on September 15, 2000, when, while lifting a hydraulic cylinder, he felt pain in his low back on the left side. He was referred for treatment and was examined and treated by several health care providers. Claimant was off work for a period of time before returning to respondent's employment at light duty. The light-duty job he returned to, running a shear and a press, only lasted approximately three weeks. At the end of the three-week period, claimant was notified of an interdepartmental layoff and was given two weeks' severance pay. The layoff was permanent, with claimant not subject to recall.

Claimant was paid unemployment compensation for a period of time, receiving three unemployment checks. He immediately began a job search, applying for approximately 30 jobs in the year 2001. He received job offers from the Beatrice State Developmental Center, the Community Memorial Hospital and NEAPCO. He ultimately accepted employment at the Community Memorial Hospital of Marysville, Kansas, as a nurse's aide,

earning \$6.55 an hour with fringe benefits, including medical insurance, life insurance and a pension program.

Claimant was offered a job with NEAPCO, which would have paid \$9 an hour. He rejected that job, however, due to the fact that it would have required approximately a one-hour drive from his home. He accepted the nursing job, even though it was lower pay, because he wanted to remain closer to his home and family.

Claimant was examined by board certified physical medicine and rehabilitation specialist Lynn A. Curtis, M.D., on July 6, 2001. Dr. Curtis diagnosed a cervical thoracic spine injury with restrictions of the proximal thoracic spine, and thoracolumbar musculo ligamentous injury with an L5-S1 disc herniation, left S1 dermatome with mild plantar flexion weakness reflecting left lumbar radiculopathy. He did not place additional restrictions on claimant, as claimant had restrictions placed on him at the time he was returned to light duty and those did not change. He opined claimant had a 10 percent impairment as a result of the lumbar radiculopathy and an additional 3 percent impairment for the thoracic injury, which combined for a 13 percent impairment to the body as a whole. He next saw claimant on May 10, 2002, at which time he stated in his report that claimant's impairment rating had not changed. He then went on to rate claimant at 21 percent to the body as a whole based upon the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). There was no explanation provided for his conflicting testimony that claimant's impairment had not changed, after which he increased the impairment rating from 13 percent to 21 percent.

Dr. Curtis reviewed a list of tasks completed by Bud Langston, the vocational expert utilized by claimant in this matter. Of the seventeen tasks on the list, Dr. Curtis felt claimant incapable of performing three or four of the tasks, for an 18 to 24 percent loss of task performing ability. The confusion is created because Dr. Curtis testified that claimant was unable to perform three of the seventeen tasks on the list. His report of May 13, 2002, lists four of seventeen that claimant cannot do.

Claimant was examined by board certified orthopedic surgeon Allan D. Holiday, Jr., M.D., on May 8, 2001. This was a second opinion performed by Dr. Holiday at the request of his partner, Richard B. Baker, Jr., M.D. Dr. Holiday diagnosed degenerative disc disease of the lumbar spine, assessing claimant a 5 percent impairment to the whole person based upon the *AMA Guides* (4th ed.), utilizing DRE Category II from the *Guides*. He felt claimant had a significant preexisting impairment to the low back. Claimant had a congenital short leg his entire life, which caused him to limp. Dr. Holiday testified that the stress caused by this limp significantly aggravated claimant's low back. He felt that 75 percent of claimant's condition was preexisting, with 25 percent work related from this

recent injury. However, there is no indication that his preexisting impairment rating opinion was provided pursuant to the *AMA Guides* (4th ed.).

In reviewing the task list created by Mr. Langston, Dr. Holiday testified claimant was incapable of performing five of seventeen tasks, for a 29 percent task loss.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.<sup>1</sup> With regard to claimant's functional impairment, the Board finds the 5 percent opinion of Dr. Holiday to be the most credible. While Dr. Curtis testified to a significantly higher functional impairment, there is no explanation as to how Dr. Curtis could assess claimant a 13 percent impairment, followed by a 21 percent impairment, while, at the same time, testifying that claimant's functional impairment had not changed.

Therefore, the finding by the Administrative Law Judge that claimant has a 5 percent impairment to the body as a whole on a functional basis is affirmed.

Claimant's entitlement to a permanent partial general disability is governed by K.S.A. 44-510e, which states:

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.

When harmonizing the language of K.S.A. 44-510e with the principles set forth in *Copeland*,<sup>2</sup> it must be determined by the finder of fact whether claimant made a good faith effort to find appropriate employment after the injury.

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>3</sup>

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<sup>1</sup> K.S.A. 44-501 and K.S.A. 44-508(g).

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

<sup>3</sup> *Copeland*, at 320.

Where a claimant has the ability to earn wages but is not doing so, an inquiry must be made into the good faith efforts of the claimant in seeking employment. "An effort that amounts to nothing more than a sham or token effort will not suffice."<sup>4</sup>

Respondent argues that claimant violated the principles of *Copeland* by refusing the NEAPCO job. However, the Board has held that a claimant will not be obligated to travel long distances from home in order to obtain a job which might pay a higher wage. In this instance, claimant would have been required to drive an hour each way in order to obtain the NEAPCO job. He did not want to be away from his family that much and, therefore, accepted a job as a CNA at a reduced wage. The Board does not consider claimant's actions in this matter to constitute a lack of good faith. Claimant's efforts at finding a job were reasonable under the circumstances. His determination to accept a job close at home, while paying less money, was justified for the reasons expressed. The Board finds claimant did not violate the policies set forth in *Copeland*. Therefore, the actual wage claimant is earning at the CNA job will be utilized pursuant to K.S.A. 44-510e to determine the wage loss suffered by claimant as a result of these injuries.

The Administrative Law Judge, in his computations, determined, based upon claimant's \$6.55 an hour job, that claimant was making \$262 a week which, when compared to his \$402 average weekly wage with respondent, constituted a 34.8 percent wage loss as of January 1, 2002.

Claimant, in his brief, argues the task loss is between 18 percent and 29 percent. There is some confusion as to whether Dr. Curtis assessed claimant an 18 percent task loss or a 24 percent task loss, depending upon whether he eliminated three or four tasks. Respondent, at oral argument, conceded that the 23.5 percent task loss opinion determined by the Administrative Law Judge was appropriate. In considering both claimant's and respondent's arguments, the Board affirms the 23.5 percent task loss opinion of the Administrative Law Judge.

Respondent further argued that claimant should be denied any wage loss, as the job offer by NEAPCO would have paid claimant a wage comparable to that which he was earning with respondent. As noted above, while the NEAPCO job would have paid claimant higher wages than the job he accepted, the Board found claimant's actions to be in good faith and, in utilizing claimant's actual wage, calculated a 34.8 percent loss of wages.

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<sup>4</sup> *Cooper v. Mid-America Dairymen*, 25 Kan. App. 2d 78, 957 P.2d 1120, rev. denied 265 Kan. 884 (1998).

K.S.A. 44-510e requires that the wage loss and task loss be averaged when determining an employee's work disability. In averaging the wage and task loss above computed, the Board finds that claimant has suffered a 29.2 percent permanent partial general disability to the body as a whole. Therefore, the Award of the Administrative Law Judge in that regard should also be affirmed.

Respondent further contends, under K.S.A. 44-501(c), that it is entitled to a credit for any preexisting impairment claimant may have suffered to his low back. K.S.A. 44-501(c) 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.

K.S.A. 44-510e requires that functional impairment be determined based upon the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment. The Board has held that any preexisting functional impairment must also be determined utilizing the same criteria. As Dr. Holiday did not specify, when providing his opinion regarding claimant's preexisting condition, as to whether he utilized the *AMA Guides* (4th ed.) when determining that preexisting condition, the Board finds that respondent has failed in its burden of proving what, if any, preexisting functional impairment claimant may have suffered. Therefore, an offset under K.S.A. 44-501(c) is denied.<sup>5</sup>

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bryce D. Benedict dated September 27, 2002, awarding claimant a 5 percent permanent partial general disability, followed by a 29.2 percent permanent partial general body work disability should be, and is hereby, affirmed.

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<sup>5</sup> *Leroy v. Ash Grove Cement Company*, No. 88,748 (Kansas Court of Appeals unpublished opinion filed April 4, 2003) (copy attached pursuant to Sup. Ct. Rule 7.04).

**IT IS SO ORDERED.**

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

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

- c: Roger D. Fincher, Attorney for Claimant  
Gregory D. Worth, Attorney for Respondent  
Bryce D. Benedict, Administrative Law Judge  
Director, Division of Workers Compensation