

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

<b>JAMES C. NELSON, JR.</b>	)	
Claimant	)	
VS.	)	
	)	
<b>CAPITAL CITY MOVING AND STORAGE</b>	)	
Respondent	)	Docket No. 264,542
	)	
and	)	
	)	
<b>CLAIM INDEMNITY SERVICES</b>	)	
Insurance Carrier	)	

**ORDER**

All parties appealed the September 18, 2002 Award entered by Administrative Law Judge (ALJ) Brad E. Avery. The Appeals Board (Board) heard oral argument on March 11, 2003.

**APPEARANCES**

Mark W. Works of Topeka, Kansas, appeared on behalf of claimant. James L. Wisler of Lawrence, Kansas, appeared on behalf of respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Board considered the record and adopts the stipulations listed in the Award. Furthermore, the parties agreed during oral argument to the Board that the court ordered independent medical report by Dr. Daniel M. Downs dated July 5, 2002, is a part of the record. Also, the school records and reports, including the reports of the school's staff

psychologists and of consulting psychologist Melvin Berg, Ph.D., were admitted at the regular hearing without objection.<sup>1</sup>

### ISSUES

In the Award entered September 18, 2002, Judge Avery awarded claimant compensation based upon a permanent total disability. Respondent argues claimant is capable of working and, therefore, is not entitled to an award based upon a permanent total disability. Respondent further contends that claimant is not entitled to an award based upon a work disability, because claimant has not made a good faith effort to find employment. The nature and extent of claimant's disability, including, whether claimant is permanently and totally disabled, is respondent's only issue for determination by the Board. Claimant contends the ALJ's Award should be affirmed but requests approval of his attorney's fees.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Board finds that the permanent total disability award entered by the ALJ should be affirmed.

Permanent total disability exists when an employee, on account of his or her work related injury, has been rendered completely and permanently incapable of engaging in any type of substantial, gainful employment. K.S.A. 44-510c(a)(2).

An injured worker is permanently and totally disabled when he is "essentially and realistically unemployable."<sup>2</sup> The injuries claimant suffered do not raise a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2); therefore, it is the responsibility of the trier of fact to determine the existence, extent and duration of an injured worker's incapacity.<sup>3</sup>

The "existence, extent and duration of an injured workman's incapacity is a question of fact for the trial court to determine."<sup>4</sup> It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability.

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<sup>1</sup> R. H. Trans. at 6, Cl. Ex. 5.

<sup>2</sup> *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

<sup>3</sup> *Id.* at 112.

<sup>4</sup> *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 803, 522 P.2d 395 (1974).

The trial court must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.<sup>5</sup>

Claimant started working for respondent while he was still in high school. Claimant's 20 year work history since then has been almost exclusively with respondent. His job duties included packing and carrying freight, driving, loading and unloading trucks. In the course of his employment with respondent claimant has suffered several injuries to his neck, shoulders, upper and lower back. In this case claimant alleged a series of injuries, including both repetitive use and specific traumas. The parties agreed to an accident date of December 4, 2001.

Claimant described a specific incident in March 2001 when he injured his back carrying a dresser. He eventually was sent to Dr. Fevurly for treatment. Dr. Fevurly gave claimant a restriction against lifting over 30 pounds. He was taken off work for a two week period in June and July 2001 and thereafter returned to light duty work with respondent primarily doing packing jobs and driving a truck. Nevertheless, claimant's condition did not improve. According to claimant, the boxes exceeded his weight lifting restrictions when packed. In addition, driving a truck aggravated his symptoms. Nevertheless, claimant continued working part time for respondent when work was made available to him. Eventually, however, a dispute arose between claimant and respondent concerning the amount of work that was available and claimant's alleged failure to call in as instructed. On December 4, 2001, claimant received a letter of termination from respondent. Claimant has not worked and has made only very limited job search efforts since his termination.

Claimant did speak to a counselor with Job Service but was told he did not qualify for any jobs. It was suggested that he needed vocational rehabilitation or retraining. Although claimant possesses a high school diploma, he attended special education classes and has difficulty reading and writing. Claimant's work history is almost exclusively heavy manual labor and driving trucks.

Vocational expert Bud Langston, who interviewed claimant at his attorney's request, opined that from a vocational standpoint claimant was unlikely to be able to return to substantial and gainful employment. Mr. Langston did take into account claimant's mental functioning as a part of his overall vocational profile, because claimant's medical restrictions, in and of themselves, would not keep him from working. In addition to his medical restrictions, he noted claimant's mental retardation, and his lack of education and transferable job skills as impediments to claimant becoming employed. In his opinion, claimant would require direct and extensive supervision. Even so, claimant would most likely not be successful in the competitive labor market given his level of anxiety, low stress

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<sup>5</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 785, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

tolerance and tendency to become easily frustrated. Mr. Langston recommend claimant seek part time piece work through a sheltered work shop environment such as the Topeka Association for Retarded Citizens (TARC) or Sheltered Living.

Dr. Chris Fevurly, who is board certified in internal and occupational medicine, and as an independent medical examiner, was claimant's primary treating physician. He diagnosed claimant with a left shoulder rotator cuff tear and degenerative changes that were either caused or aggravated by claimant's work-related injury. Dr. Fevurly rated the left upper extremity at 11 percent which he then converted to a seven percent whole person impairment. He gave an additional five percent impairment for cervicothoracic pain and five percent for lumbosacral pain. These combined for an overall 16 percent whole person impairment. Although claimant also had complaints fitting bilateral median nerve entrapment, no rating was given for this. An MRI of the lumbar spine showed diffuse degenerative disc disease and disc space narrowing with small protrusions at L4-5 and L5-S1. The MRI he recommended for the left shoulder was apparently never performed. He placed claimant in the light to medium work level, with occasional lifting of up to 30 to 40 pounds and frequent lifting limited to the 20 to 30 pound range with no prolonged overhead reaching or forward reaching with the left arm. Claimant would also need to alternate between sitting and standing. Dr. Fevurly did not attempt to rate claimant's preexisting cognitive problems or intellectual ability.

Q. (Mr. Works) And Doctor, has anybody ever done a psychological profile or a - - let me put it this way: Has anybody ever done a rating for Mr. Nelson for either his mental impairment or psychological condition?

A. (Dr. Fevurly) That would not be something that I would do. I think a specialist in that field would have to do that. To my knowledge, that has not been done.

Q. Of course, the AMA Guides 4<sup>th</sup> Edition provide for ratings in mental impairments?

A. They do. In this case, I don't believe that there would be a work-related causal relationship to that. That's a preexisting condition.

Q. Let me ask you this: If he had a preexisting condition of a mental impairment say being below 70 I.Q., coupled with a work injury, would that make him less employable in the workplace?

A. I think experience and educational status and intellectual capacity are obvious limiting and restricting factors in regard to future employment.<sup>6</sup>

Likewise, claimant's medical expert Dr. Peter Bieri did not rate claimant's cognitive problems or intellectual capacity. But he said he could have given a mental impairment rating if asked. He rated claimant's functional impairment at 22 percent for the whole body which consisted of five percent whole person impairment for cervicothoracic strain, five percent for lumbosacral strain, three percent for left shoulder impingement syndrome, and six percent for residuals of bilateral entrapment neuropathy. He assigned restrictions of light work, which limit occasional lifting to up to ten pounds, frequent lifting not to exceed ten pounds and negligible constant lifting. He further recommended claimant avoid frequent bending, stooping, reaching and handling.

In this case, the ALJ appointed orthopedic surgeon Daniel M. Downs, M.D., to perform an independent medical examination of claimant. Dr. Downs examined claimant on only one occasion, May 17, 2002. His July 5, 2002 report is in evidence, but his deposition was not taken. Dr. Downs reviewed various medical records that he lists in his report. He diagnosed cervical myofascial strain which he rated as five percent to the body as a whole. But Dr. Downs disagreed with the diagnosis of carpal tunnel syndrome and a left rotator tear. He said he would, however, be willing to amend his report, if necessary, upon his personal review of the purported MRI studies that were interpreted as showing a rotator cuff tear. He recommended restrictions of occasional lifting up to chest level up to 40 pounds, and frequent lifting of up to 15 to 20 pounds.

Placing greater weight on the opinions given by the treating physician, Dr. Fevurly, and by claimant's vocational expert, Mr. Langston, the Board finds claimant to be permanently and totally disabled due to the combination of his work-related injuries and his preexisting mental condition. Once claimant's work-related injuries resulted in his being given permanent restrictions, his available labor market dwindled to almost nothing. Taking into consideration his education, experience and capacity for retraining, claimant is realistically unemployable.

#### AWARD

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Brad E. Avery dated September 18, 2002 should be, and is hereby, affirmed.

Claimant's contract with his attorney is approved as provided by K.S.A. 44-536.

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<sup>6</sup> Fevurly Depo at 30-31.

The Board adopts the remaining orders set forth in the Award.

**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

**Dissent**

The undersign respectively dissents from the opinion of the majority that claimant is permanently and totally disabled from any type of employment. The medical evidence and the expert testimony in this case does not support the majority's finding.

Here, claimant was examined and treated by several health care providers. Dr. Downs, the court appointed independent medical examiner, found claimant to have multiple subjective complaints with few objective findings supporting claimant's complaints. He assessed claimant a five percent impairment to the body as a whole, restricting claimant to occasional lifting of up to 40 pounds with frequent lifting of 15 to 20 pounds. In viewing the task list provided by Bud Langston, Dr. Downs found claimant incapable of performing one of nine former tasks for an 11 percent task loss.

Dr. Bieri, who examined claimant at his attorney's request, also limited claimant, finding him incapable of performing four of nine former tasks for a 44 percent task loss. He limited claimant to occasional lifting of 20 pounds, frequent lifting of ten pounds and recommended claimant work in the light category. Dr. Bieri did not find claimant to be permanently incapable of performing any type of substantial gainful employment.

Claimant was also examined and treated by Chris Fevurly, M.D. Dr. Fevurly found claimant to have lost the ability to perform one of nine tasks for an 11 percent task loss. He limited claimant to the light to medium work category restricting claimant to lifting up to 40 pounds occasional. He specifically disagreed with the opinion of the school psychologist, Jeane Berg, which inferred that claimant was realistically unemployable. Dr. Fevurly stated that claimant would not require constant supervision. He recommended contact with Topeka Association for Retarded Citizens, which he opined would be very good for claimant. Dr. Fevurly was, in fact, concerned about the claimant not working as that situation he opined generally worked to the detriment of a patient. He agreed that claimant would need direction in learning new tasks, but did not feel claimant needed constant supervision.

The majority in its opinion cites *Wardlow v. ANR Freight Systems*<sup>7</sup>. In *Wardlow* the claimant, a truck driver, was knocked off a dock by a hi-low (forklift). The forks hit claimant across the back and right leg fracturing his pelvis, his lower back, his right hip, and his right femur, with a possible fracture of his right ankle. Claimant underwent three surgeries, had an external frame temporarily attached to his pelvis, a ten-inch plate and screws permanently affixed to his right femur, was fitted with a bolted plastic brace to support his right foot which was weakened by sciatic nerve injury and spent several months at the Demar Gardens Nursing Home after his release from the K.U. Medical Center. Claimant sought no work after the May 3, 1989 injury. The Kansas Court of Appeals in *Wardlow* found that claimant was permanently and totally disabled because, “He is essentially and realistically unemployable. . . .”

To compare claimant’s condition in *Wardlow* to the case at hand is an insult to *Wardlow*. While it is acknowledged that this claimant has limitations, this claimant in no way compares to the claimant in *Wardlow*. Here the claimant has been diagnosed with carpal tunnel syndrome. However, in this instance not all doctors agree with that diagnosis, as the claimant’s EMGs were normal. In addition, Dr. Downs, the IME doctor appointed by the Administrative Law Judge, questioned the rotator cuff tear findings. Additionally, he found most of claimant’s complaints to be subjective.

The only person to testify that the claimant was permanently and totally disabled was the vocational expert, Bud Langston. However, Mr. Langston also testified that he had offered to go further with placement efforts in this instance as he felt that claimant would be “. . . a good person to work with as far as placing him or at least having his cooperation in seeking employment.”<sup>8</sup>

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<sup>7</sup> *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

<sup>8</sup> Langston Depo at 28-29.

K.S.A. 44-510c defines permanent total disability as being “. . . when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment.”

The liberal finding by the majority in this opinion is contradicted by the evidence. It does not fit the statutory definition of K.S.A. 44-510c and comes no where near the permanent total standard set in *Wardlow*.

This Board member would find that the claimant is entitled to a work disability based upon the task loss opinions of Drs. Downs, Bieri and Fevurly and would impute a wage to claimant based upon the policy set forth in *Copeland v. Johnson Inc.*,<sup>9</sup> as claimant has made practically no effort to seek or obtain employment, which in this Board member’s opinion constitutes a lack of good faith on claimant’s part.

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BOARD MEMBER

c: Mark W. Works, Attorney for Claimant  
James L. Wisler, Attorney for Respondent  
Brad E. Avery, Administrative Law Judge  
Director, Division of Workers Compensation

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<sup>9</sup> *Copeland v. Johnson Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).