

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

<b>MARY LAWRENCE</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>CALIBRATED FORMS COMPANY, INC.</b>	)	
Respondent	)	Docket No. 265,338
	)	
AND	)	
	)	
<b>HARTFORD UNDERWRITERS INS.</b>	)	
<b>FIREMAN'S FUND INSURANCE CO.</b>	)	
Insurance Carriers	)	

**ORDER**

Respondent and its insurance carrier (respondent) request review of the November 28, 2007 Award by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on March 28, 2008.

**APPEARANCES**

William L. Phalen, of Pittsburg, Kansas, appeared for the claimant. Anemarie D. Mura, of Overland Park, Kansas appeared for respondent and Hartford Underwriters. David J. Roberts, of Kansas City, Missouri represents respondent and Fireman's Fund Insurance.<sup>1</sup>

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument the parties agreed that claimant's accident date is September 29, 2002, a date that gives rise to liability for respondent and its carrier as of that date, Hartford Underwriters. Fireman's Fund was no longer on the risk at that time and has no further

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<sup>1</sup> Counsel for respondent and its other carrier, Fireman's Fund Insurance Co. elected not to appear.

liability in this matter. As a result, any further references with regard to respondent refer to respondent and its carrier Hartford. The parties also agreed that temporary total disability benefits or medical payments are no longer at issue for purposes of this appeal.

### ISSUES

The only remaining issues to be resolved in this appeal stem from the nature and extent of claimant's impairment and the availability of a credit against claimant's Award as a result of claimant's alleged preexisting impairment. The ALJ found the claimant to be permanently and totally disabled as a result of repetitive injuries to her cervical spine and upper extremities. This Award was offset by a 15 percent preexisting impairment.

Respondent contests the ALJ's findings with respect to both the extent of the preexisting impairment as well as his conclusion that claimant is permanently and totally disabled. Respondent maintains claimant is capable of engaging in substantial gainful employment as evidenced by the testimony of Dr. Stephen Hendler, who has testified that claimant bears only a functional scheduled impairment and has sustained no task loss as a result of her accident. And respondent further contends the Award should be modified to reflect an increase in the credit for a 25 percent preexisting whole body impairment.

Claimant argues that the Award accurately reflects her permanent total disability status but that portion of the Award that grants respondent a 15 percent credit should be modified to reflect no credit whatsoever for a preexisting impairment based upon a lack of evidence.

### 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:

The ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate and supported by the record. It is not necessary to repeat those findings and conclusions herein. The Board adopts the findings and conclusions of the ALJ as its own as if specifically set forth herein except as hereinafter noted.

The primary issue to be decided in this appeal is the nature and extent of claimant's impairment as a result of her series of repetitive injuries culminating in an accident on September 29, 2002, her last date of work for respondent.

Several physicians have examined claimant and offered opinions as to her diagnoses and her causally related functional impairment(s) as well as her ability to engage in substantial gainful employment. Dr. Prostig diagnosed claimant with upper extremity nerve entrapment from the carpal tunnel, thoracic outlet and cervical spine, conditions

which he felt were related to and/or aggravated by her repetitive job duties. According to Dr. Prostic, claimant bears a 10 percent permanent impairment to her spine along with a 17 percent permanent impairment to the right upper extremity and a 5 percent permanent impairment to the left upper extremity. When converted and combined, these ratings translate to a 22 percent impairment to the body as a whole and represent new or additional impairment attributable to this accident, and beyond that which Dr. Prostic had identified and assigned to claimant's earlier workers compensation claim. And Dr. Prostic testified that claimant was unable to work and totally disabled.<sup>2</sup>

Dr. Brian Ellefson, claimant's treating physician, diagnosed her with bilateral carpal tunnel, cubital tunnel and cervical radiculopathy, all of which he attributed to her work duties. He rated her impairment at 15 impairment for her cervical complaints, and 5 percent permanent impairment to the right upper extremity and 10 percent to the left upper extremity. When converted and combined, this rating reflect a 24 percent to the body as a whole. Dr. Ellefson also testified that claimant was realistically unemployable.<sup>3</sup>

Dr. Steven Hendler, on the other hand, found only claimant's thumb complaints were attributable to her work activities, leaving her with a 4 percent permanent impairment to the left upper extremity. According to Dr. Hendler, claimant's cervical complaints are not related to her work activities and suggested that while he does not know what is causing her neck pain, it may well have preexisted this claim. He went on to testify that claimant was fully capable of working as she required only restrictions that affected her left thumb and hand.

After considering all of the evidence, the ALJ found that -

[t]he preponderance of the evidence proved that the claimant injured her cervical spine and her upper extremities from work duties performed after the previously claimed injury. The preponderance of the evidence also proved that as a result of these additional cervical spine and upper extremity injuries the claimant is permanently [and] totally disabled.<sup>4</sup>

K.S.A. 44-510c(a)(2) defines permanent total disability as follows: "[p]ermanent total disability exists 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 terms "substantial and gainful employment" are not defined in the

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<sup>2</sup> Prostic Depo. at 26.

<sup>3</sup> Ellefson Depo. at 17.

<sup>4</sup> ALJ Award (Nov. 28, 2007) at 4.

Kansas Workers Compensation Act. However, the Kansas Court of Appeals in *Wardlow*<sup>5</sup>, held that a finding that one is essentially and realistically unemployable is compatible with the legislative intent behind the statute.

Here, both Drs. Prostic and Ellefson testified that claimant was essentially unemployable. This finding is supported by the significant task loss opinions they rendered, each using Karen Terrill's task analysis. And Karen Terrill also testified that claimant's limited educational and vocational background leave her with few transferrable skills, other than the ability to work at a keyboard. But that skill has been further limited by her bilateral carpal tunnel complaints which did not lessen after surgery to her right hand. After her termination from respondent's employ claimant actively sought employment in her surrounding community by registering with the local Job Service and sought out employment on her own but had no success. Although respondent subtly suggests that it accommodates people like claimant who are on social security disability, no job has been offered to her, nor is there any indication within the record what sort of job would be made available to her, the wage for that job or whether claimant's specific limitations could be accommodated.

Terry Cordray's testimony that claimant could work as a cashier is less than persuasive as that would require repetitive hand movements which would undoubtedly cause her difficulty given her bilateral hand and arm complaints. And it is unclear how available any of the other suggested jobs are in her area. Mr. Cordray's final suggestion, that of a Certified Medication Aide requires, at a minimum, 6 months of training and there is no indication in this record as to what that job might pay assuming claimant could successfully complete that training. All told, based upon this record Mr. Cordray's testimony as to claimant's capacity lacks sufficient specificity so as to be credible.

The Board finds the ALJ's conclusion that claimant is permanently and totally disabled as provided by K.S.A. 44-510c(a)(2) should be affirmed. Like the ALJ, the Board concludes that claimant has established that it is more likely true than not that she is permanently and totally disabled as a result of her repetitive duties which caused injury to both her upper extremities and her cervical area

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the later injury is an aggravation of a preexisting condition. The Act reads, in part:

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

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<sup>5</sup> *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

disability. **Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.**<sup>6</sup> (Emphasis added).

The Board has held that the provision regarding preexisting impairment applies to a permanent total disability award.<sup>7</sup> Thus, like the ALJ, the Board must consider whether respondent has established that claimant had a preexisting *impairment* and not just a preexisting condition.

Here, the evidence confirms that claimant had a preexisting impairment to her upper extremities and her neck. Dr. Prostic was the only physician to quantify this preexisting impairment and he did so by assigning 8 percent to the right upper extremity, 20 percent to the left upper extremity and 10 percent to the spine. For whatever reason, the ALJ only adopted the 8 percent and 10 percent findings, combining (pursuant to the method prescribed in the *Guides*) and assigning a preexisting impairment of 15 percent permanent partial impairment to the whole body. Dr. Prostic thoroughly discussed his analysis on this point, explaining how he assessed claimant's preexisting impairment and compared that to her subsequent accident and resulting impairment.

Like the ALJ, the Board is persuaded that respondent has established that the claimant had a preexisting impairment to her body as a result of her earlier injury. The Board has also considered the evidence on this issue and finds the ALJ's Award should be modified to reflect the entirety of Dr. Prostic's assessment as to claimant's preexisting impairment. Thus, the Award is modified to reflect the 25 percent preexisting permanent partial impairment.

A permanent total disability pays benefits of \$125,000 at a weekly compensation rate based on the calculation set forth in K.S.A. 44-510c. As a result, one cannot deduct the percentage of impairment in exactly the same way one would with a permanent partial disability. One cannot deduct the percentage of preexisting disability from the percentage of disability found. The Board concludes, however, that the logical alternative is to deduct the number of weeks represented by the preexisting disability, in this case 103.75 weeks for a 25 percent disability, from the number of weeks of benefits to be paid for the permanent total disability. The deduction is accomplished by calculating the number of weeks of benefits to be paid for the temporary and permanent total disability and then reducing that number by the number of weeks that would be paid for the preexisting disability.

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<sup>6</sup> K.S.A. 44-501(c) (Furse 2000).

<sup>7</sup> *Horton v. Bob's Super Saver Country Mart and Cadwell's Country Mart*, Nos. 220,167 & 220,168, 1999 WL 292839 (Kan. WCAB Apr. 30, 1999).

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated November 28, 2007, is affirmed in part and modified in part, as follows:

The claimant is entitled to permanent total disability compensation at the rate of \$329.86 per week not to exceed \$125,000.00 for a permanent total general body disability, and less \$34,222.98 for her preexisting impairment.

As of April 17, 2008 there would be due and owing to the claimant 276.28 weeks of permanent total disability compensation at the rate of \$329.86 per week in the sum of \$91,133.72 for a total due and owing of \$91,133.72, which is ordered paid in one lump sum.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of April 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

- c: William L. Phalen, Attorney for Claimant
- Anemarie D. Mura, Attorney for Respondent and Hartford Underwriters
- David J. Roberts, Attorney for Respondent and Fireman's Fund Insurance
- Kenneth J. Hursh, Administrative Law Judge