BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARTHA A. COURVILLE	)	
Claimant	)	
	)	
VS.	)	Dockets Nos. 248,664
	)	1,000,592 & 1,006,509
DILLON COMPANIES, INC.	)	
Self-Insured Respondent	)	

ORDER

Respondent requested review of the October 1, 2009 Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on January 20, 2010.

APPEARANCES

John J. Bryan, of Topeka, Kansas, appeared for the claimant. Scott J. Mann, of Hutchinson, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, the parties confirmed that neither had any objection to the ALJ's decision to consolidate the claims referenced above into a single Award. Moreover, they both agreed that there was no dispute as to the ALJ's decision to award 10 percent permanent partial disability (ppd) in Docket No. 248,664 as a result of all of claimant's accidents.

Respondent also conceded that in light of the Supreme Court's recent ruling in *Bergstrom*[1], its "good faith" defense was no longer viable.[2] As a result, once claimant

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[1] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

[2] Although the parties litigated this claim under the theory that claimant's "good faith" attempt to retain or pursue appropriate post-injury employment was a relevant issue, after this case was submitted, the Kansas Supreme Court issued its ruling in *Bergstrom.* The parties acknowledge that *Bergstrom* eliminated the "good faith" considerations in determining a claimant's work disability under K.S.A. 44-510e(a). Now, a claimant's actual post-injuries wages are to be used in calculating the work disability.

resigned her position with respondent on July 21, 2004, her wage loss was 100 percent and would continue until such time as she reached a statutorily comparable post-injury wage as provided in K.S.A. 44-510e(a).

ISSUES

The ALJ found claimant to have a 10 percent whole body functional impairment[3]. Because claimant had experienced a decrease in wages following her injury, he also awarded her 41.5 percent permanent partial general (work) disability[4] until claimant earned a comparable wage in 2003. Claimant resigned her position on July 21, 2004 and as a result her work disability increased to a 69 percent permanent partial disability.[5]

The ALJ also authorized future medical treatment upon proper application. And although requested at the Regular Hearing, he did not comment on claimant's request for interest under K.S.A. 44-512(b).

Respondent appealed the ALJ's decision and asks the Board to modify the Award. Respondent contends that while claimant has a wage loss beginning July 21, 2004[6] and continuing until February 13, 2007[7], she was nonetheless being accommodated at her job and earning a comparable wage. In fact, the parties entered into a stipulation as to claimant's wage earning this period of time. Thus, respondent contends claimant is not entitled to a work disability until July 21, 2004. Respondent also contends that at all times during claimant's employment, she was able to perform her job tasks and that in reality, she sustained no task loss as a result of her accidental injury.

As for claimant's request for interest, respondent indicates that this claim has involved multiple dates of accidents, a varying number of functional impairments and restrictions and to date, no precise demand for payment. Thus, respondent maintains that there was just cause for its failure to pay claimant any permanency benefits.

Claimant contends the Board should affirm the ALJ's permanency findings (which results in a $100,000 award), but should recalculate the Award as specified in claimant's brief. Claimant also requests the Board to order respondent to pay interest on the 10

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[3] As noted above, there is no dispute as to the ALJ's decision to award 10 percent who body ppd.

[4] This is based upon a 45 percent wage loss and a 38 percent task loss.

[5] The 69 percent work disability is based upon a 100 percent wage loss and a 38 percent task loss.

[6] July 21, 2004 is the date claimant resigned her employment.

[7] This is the date the 415 weeks expired on the claimant's March 2, 1999 claim.

percent functional impairment commencing September 27, 2005, the date of Dr. Sandow's report. Finally, claimant asks the Board to designate Dr. Wertin as the treating physician as she contends the respondent has failed to provide her with ongoing medical treatment.

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 Board finds the ALJ's findings and conclusions are accurate and supported by the law and the facts contained in the record. It is not necessary to repeat those findings and conclusions in this Order. The Board approves those findings and conclusions and adopts them as its own.

Highly summarized, claimant was employed by respondent in a variety of positions within its retail grocery store. She was injured March 2, 1999 when she tripped over a baker's rack. During the course of her treatment she was injured in a motor vehicle accident. She returned to work and continued to experience an aggravation of her condition over a period of time. The ALJ consolidated each of the three claims and awarded claimant benefits under the first docketed claim, Docket No. 248,664, a finding that neither party takes issue with. The primary issue in this appeal is her claim for permanent partial general (work) disability.

When an injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **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.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. 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. (Emphasis added.)

This statute makes it clear that permanent partial general disability under K.S.A. 44-510e(a) has two components: task loss and wage loss.[8] Moreover, our Supreme Court has recently indicated that statutory provisions are to be strictly construed.

> When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.[9]

As claimant notes, there is nothing within the Workers Compensation Act that expressly predicates a work disability award upon a claimant's "good faith" efforts to retain or obtain post-injury employment. To the contrary, the statute provides:

> An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.[10]

Accordingly, when determining the wage loss component of K.S.A. 44-510e(a), the Board need only consider claimant's actual post-injury wages she earned. If claimant engaged in *any work* for wages equal to 90 percent, then no work disability is owed. But if claimant is *not* so engaged, then work disability is to be considered based upon the formula set forth in the statute. The entitlement to work disability is conditioned upon the wage loss and the statute makes no reference to the reasons for that wage loss. Additionally, the calculation of post-injury wage is not guided by the principles set forth in K.S.A. 44-511.[11]

Here, there is little dispute as to claimant's task loss. Only one physician testified to claimant's task loss and opined that claimant sustained a 38 percent task loss.[12] Although

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[8] *Nistler v. Footlocker*, 40 Kan. App. 2d 831, 196 P.3d 395 (2008).

[9] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676, Syl. ¶ 1 (2009).

[10] K.S.A. 44-510e(a).

[11] *Nistler v. Footlocker*, 40 Kan. App. 2d 831, 196 P.3d 395 (2008).

[12] Dr. Sandow testified that claimant had lost the ability to perform 38 percent of the tasks identified in Dick Santner's task list.

Dr. Bieri testified that he believed claimant was able to do her last job with respondent as the video department manager (based upon a review of the job description) without violating her restrictions, the Board is more persuaded by Dr. Sandow's opinions on this issue as well as the fact that claimant has testified about her difficulties performing that job and the toll it took on her physically. Accordingly, the Board finds the ALJ's conclusion that claimant sustained a 38 percent task loss should be and is hereby affirmed.

As for the wage loss component of the statute, claimant's pre-injury wage in 1999 is not in dispute. The parties agreed claimant's average weekly wage was $492.29 and became $682.95 on July 21, 2004 (when her benefits ceased). But *after* her injury, there were extended periods of times she did not earn as much, although she may have been earning the same hourly rate and receiving fringe benefits.

For example, there were times she was working part-time as directed by Dr. Downs.[13] At other times claimant had to leave work due to the pain she was experiencing.[14] She would inform her supervisor and at one point she asked that her hours be reduced. But when she was advised that her hourly rate of pay would be reduced by $3.00 per hour, she elected not to follow up on that request and instead continued to work as much as she could in spite of her physical complaints.[15]

Respondent maintains that claimant conceded she was making a comparable wage. But again, this fails to take into account claimant's actual wage loss as demonstrated by her W-2's which were entered into evidence at the Regular Hearing. The ALJ correctly noted that in 2001 and 2002 claimant's yearly income was down from earlier years while in respondent's employ. Over these two years, her average wage loss was 45 percent. In 2003 her wages rebounded (because claimant was advised that she would be transferred to the "California" location and needed to work full-time or would be terminated.[16] Finally, on July 21, 2004, claimant decided to terminate her employment with respondent, at which time her wage loss became 100 percent. Her wage loss continued until January 2007 when she was reemployed at a comparable wage. The 415 weeks available on this award expired as of February 13, 2007.[17]

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[13] R.H. Trans. at 100-101.

[14] *Id.* at 33.

[15] *Id.* at 64.

[16] *Id.* at 68 and 102.

[17] K.S.A. 44-510e(a)(3)(a).

The Board has carefully considered the ALJ's analysis of claimant's actual wages as well as the appellate court's findings in *Nistler* and *Bergstrom* and finds the ALJ's conclusions as to the claimant's wage loss should be affirmed. Moreover, there is nothing within this record that suggests that this claimant is trying to manipulate the workers compensation system in any way. She sustained an accident from which she has suffered ongoing complaints of pain. Her regular job duties have caused her significant complaints and in spite of her efforts to retain her employment and continue working at a job that is somewhat physically demanding, she was unable to continue.

The ALJ awarded claimant a 41.5 percent work disability for the period 2001-2002[18], but because claimant earned comparable post-injury wages in 2003 (based on her tax returns) she was awarded no benefits. Then, once she terminated her employment the work disability was again available to her. He awarded her a 69 percent work disability commencing July 21, 2004[19] Those findings are affirmed.

As for claimant's request for Dr. Wertin to be designated as the treating physician, the Board finds no justification for amplifying the ALJ's original Award on this issue. The ALJ granted claimant future medical treatment upon proper application. If claimant requires additional treatment, claimant can merely avail herself of the appropriate statutory procedure.

Finally, claimant's request for interest under K.S.A. 44-512b is denied. K.S.A. 44-512b(a) provides that

> [w]henever the administrative law judge or board finds, upon a hearing conducted pursuant to K.S.A. 44-523 and amendments thereto or upon review or appeal of an award entered in such a hearing, that there was not just cause or excuse for the failure of the employer or insurance carrier to pay, prior to an award, the compensation claimed to the person entitled thereto, the employee shall be entitled to interest on the amount of the disability compensation found to be due and unpaid . . .

This issue was addressed at the Regular Hearing and respondent's counsel responded as follows:

> JUDGE AVERY: And also the claimant is raising issues of penalties in Docket No. 248,664.
>
> MR. MANN: And in response to that the --

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[18] This reflects an average of a 45 percent wage loss and a 38 percent task loss.

[19] This reflects an average of a 100 percent wage loss and a 38 percent task loss.

> JUDGE AVERY: You don't have to respond to that now.
>
> MR. MANN: Well, I'm going to on the record, Your Honor. With three separate docket numbers and now five impairment ratings and three different wages we've never been provided a demand as to what to pay in any of the three docket numbers.
>
> JUDGE AVERY: Okay.
>
> MR. MANN: So that's our response to not paying prior to Award.[20]

In spite of this recitation at the Regular Hearing, the ALJ did not list this as an issue in his Award nor did he make any finding with respect to this matter.

The Board has considered this issue and concludes the sole issue of claimant's entitlement to interest under K.S.A. 44-512b should be remanded to the ALJ for a decision or, at the ALJ's discretion, further hearing.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated October 1, 2009, is affirmed in all respects except for the claimant's request for interest under K.S.A. 44-512b. That issue has yet to be determined and this matter is remanded to the ALJ for further proceedings on that single issue consistent with the statute.

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[20] R.H. Trans. at 6.

IT IS SO ORDERED.

Dated this _____ day of February 2010.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Scott J. Mann, Attorney for Self-Insured Respondent
Brad E. Avery, Administrative Law Judge

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ORDER NUNC PRO TUNC

It has come to the attention of the Board that a clerical error was made in the Board's Order in the above-captioned matter issued on February 23, 2010. It was the clear intent of the Board's Order to remand the issue of interest under K.S.A. 44-512b to the ALJ but the sentence, as originally worded and if taken out of context, could be construed otherwise. This correction is to make clear that the Board is remanding that issue to the ALJ for a determination. Specifically, beginning with the final full paragraph on page 6, continuing on to page 7 of the Order should read as follows:

> Finally, claimant's request for interest under K.S.A. 44-512b is denied as the ALJ has yet to rule on that request. K.S.A. 44-512b(a) provides that
>
> > [w]henever the administrative law judge or board finds, upon a hearing conducted pursuant to K.S.A. 44-523 and amendments thereto or upon review or appeal of an award entered in such a hearing, that there was not just cause or excuse for the failure of the employer or insurance carrier to pay, prior to an award, the compensation claimed to the person entitled thereto, the employee shall be entitled to interest on the amount of the disability compensation found to be due and unpaid
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[21] R.H. Trans. at 6.

IT IS SO ORDERED.

Dated this _____ day of February 2010.

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c: John J. Bryan, Attorney for Claimant
Scott J. Mann, Attorney for Self-Insured Respondent
Brad E. Avery, Administrative Law Judge