

been limited to his functional impairment because after he was released from medical treatment he made no effort to return to the accommodated work offered by respondent.

The Administrative Law Judge (ALJ) determined the proposed accommodated work was not within claimant's medical restrictions. Consequently, the ALJ found the claimant was entitled to a 63.6 percent work disability based on a 77.2 percent wage loss and a 50 percent task loss.

The respondent requests review of the nature and extent of claimant's disability. Respondent argues the claimant should be limited to a 20 percent functional impairment because claimant did not attempt to return to work in the accommodated position offered by the respondent. And the accommodated work would have paid the same wage that claimant was receiving on the date of accident.

Claimant argues the ALJ's determination that his medical restrictions prevented a return to the offered accommodated work should be affirmed. Claimant further argues that the award of compensation should be increased to a 76 percent work disability based on a 77 percent wage loss and a 75 percent task loss.

The nature and extent of claimant's disability is the only issue before the Board and more specifically the issue is:

Did claimant unreasonably refuse an offer from respondent of accommodated work within claimant's medical restrictions that would have paid claimant a post-injury wage the same as his pre-injury average weekly wage?

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:

As a result of his work-related back injury the claimant suffered a herniated disk at L4-5. On January 30, 2002, Dr. John D. Miles, a board certified orthopedic surgeon, performed surgery on claimant's back which the doctor described as a bilateral foraminotomy with a discectomy on the right side at L4-5.

On May 14, 2002, Dr. Miles determined claimant had reached maximum medical improvement. The doctor had ordered a functional capacities evaluation of claimant and based upon that report the doctor imposed permanent restrictions. The doctor limited claimant to 45 pounds occasional lifting and 25 pounds frequent lifting. He further imposed restrictions limiting claimant to occasional walking, static bending at the hip, overhead reaching, crawling, squatting, kneeling and climbing ladders. Lastly, the doctor noted

claimant could frequently sit, stand and climb stairs. The doctor defined occasional as one-third of a work day and frequent as two-thirds of a work day.¹

The respondent's vice-president of field operations, Tom Ferman, testified that in June he received a copy of Dr. Miles' June 6, 2002, letter listing claimant's physical restrictions. On July 1, 2002, Mr. Ferman sent claimant a letter which noted receipt of a copy of the restrictions Dr. Miles had placed on claimant. The letter then noted that respondent had a job available which would allow claimant to stay within the restrictions. The letter concluded with the request for claimant to call when he was available for work.

Mr. Ferman testified that claimant called and was told respondent had a position for him to go work but because claimant had a doctor's appointment scheduled that week, he told Mr. Ferman he would call the following week because he wanted to make sure the doctor did not make any changes. The following week claimant called Mr. Ferman and was told there was work available at a school which was being remodeled. But Mr. Ferman recalled claimant told him that he was not returning to work for respondent. Mr. Ferman got the impression from the telephone conversation that claimant was going to retire.

Mr. Ferman testified that claimant never expressed any concern during the telephone conversation that the proposed work might not be within his restrictions. And he further testified that the jobs that would have been assigned to claimant would have varied in order to comply with the restrictions. Stated another way, the claimant would not have been required to perform one specific task the entire workday.

However, on July 23, 2002, Mr. Ferman received a letter from claimant asking Mr. Ferman to take another look at the restrictions and see if there would be a position within the guidelines. On July 24, 2002, Mr. Ferman received a letter from claimant's attorney which indicated that it was his understanding after talking to claimant that there was no work available for claimant within Dr. Miles' restrictions. The letter concluded that if that impression was incorrect to contact the attorney immediately. Mr. Ferman forwarded the letter to his insurance carrier and the claims supervisor sent claimant's attorney a letter and attached Mr. Ferman's initial letter which indicated work was available within Dr. Miles' restrictions.

Claimant agreed that he had a telephone conversation with Mr. Ferman and was offered work at the school remodeling job. Claimant concluded Mr. Ferman had only looked at the weight restrictions and had not considered the remainder of Dr. Miles' restrictions. The claimant concluded that his restrictions precluded a return to work at the school remodeling job. Claimant agreed that his attorney had sent a letter to respondent after he had sent his note to Mr. Ferman and claimant was aware the response to his

¹ Dr. Miles rated claimant's impairment at 15 percent but did not consult the AMA *Guides* and testified that he was not familiar with the DRE models. The rating was based on his experience in his practice.

attorney's letter was that respondent had work available for him. The claimant never attempted to return to work for respondent nor has he looked for any work.

The claimant has been provided medications from Dr. Forest R. Conley, an osteopathic physician. Dr. Conley indicated claimant's lifting should be restricted to 25 pounds and claimant should avoid climbing and carrying, avoid working overhead, avoid bending over, flexing his spine, and squatting. The doctor concluded that as long as claimant is taking medications he should avoid driving or operating any kind of machinery.

At his attorney's request, the claimant was examined by Dr. Truett L. Swaim on October 17, 2002. Using the range of motion model of the *AMA Guides*², the doctor opined claimant had a 29 percent whole person functional impairment. The doctor indicated claimant had the ability to exert up to 35 pounds of force occasionally, 15 pounds of force frequently and 5 pounds constantly. The doctor further indicated claimant should avoid repetitive twisting, bending, climbing and lifting below knee level as well as to avoid squatting and crawling. Lastly, the doctor agreed with Dr. Miles' restrictions that claimant limit his ladder climbing and kneeling as well as avoid overhead reaching and static bending at the hip.

The ALJ ordered Dr. Edward J. Prostic to conduct an independent medical examination of claimant and render an opinion regarding claimant's functional impairment and restrictions, if any. In a report dated March 31, 2003, Dr. Prostic determined claimant had a 20 percent whole person functional impairment. And the doctor adopted the restrictions imposed by Dr. Miles.

The primary issue raised by respondent is whether claimant made a good faith effort to retain appropriate employment. The record establishes that respondent offered to provide claimant accommodated work within the restrictions imposed by Dr. Miles.

The Kansas Appellate Courts, beginning with *Foulk*³, have barred a claimant from receiving work disability benefits if the claimant is capable of earning 90 percent or more of his pre-injury wage at a job within his medical restrictions, but fails to do so, or actually or constructively refuses to do so. In *Foulk*, the Court held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. The rationale behind the decision is that such a policy prevents claimants from refusing work and thereby exploiting the workers compensation system. *Foulk* and its progeny are concerned with a claimant who is able to work, but

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are to the fourth edition of the *Guides* unless otherwise noted.

³ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

either overtly, or in essence, refuses to do so.⁴ Before claimant can claim entitlement to work disability benefits, he must first establish that he made a good faith effort to obtain or retain appropriate employment.⁵

The Board has also held workers are required to make a good faith effort to retain their post-injury employment. Consequently, permanent partial general disability benefits are limited to the worker's functional impairment rating when, without justification, a worker voluntarily terminates or fails to make a good faith effort to retain a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage. On the other hand, employers must also demonstrate good faith. In providing accommodated employment to a worker, *Foulk* is not applicable where the accommodated job is not genuine,⁶ where the accommodated job violates the worker's medical restrictions,⁷ or where the worker is fired after making a good faith attempt to perform the work but experiences increased symptoms.⁸ The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis.

The claimant concluded that he could no longer perform his job as an electrician because of Dr. Miles' restrictions. Consequently, claimant never attempted to perform the offered accommodated work. While claimant's restrictions would have prevented claimant from performing his former job duties, the respondent offered claimant accommodated work. The difficulty with claimant's position is that he considered the offered remodeling job based upon how he had performed such unaccommodated work before his injury. This overlooks respondent's offer to only require work within the restrictions. The doctor's restrictions imposed were not absolute, instead it was suggested that certain activities could only be performed occasionally and other activities could be performed frequently. When the work is viewed in that context it cannot be said the claimant would be unable to perform any of his former job duties. And the uncontradicted testimony of Mr. Ferman was that Dr. Miles' restrictions would be followed in providing claimant accommodated job duties.

The Board finds claimant did not make a good faith effort to return to offered accommodated employment. Consequently, permanent partial general disability benefits are limited to the worker's functional impairment rating because claimant failed to make a good faith effort to retain a job that he was capable of performing that paid the same as

⁴ *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, rev. denied 267 Kan. 889 (1999).

⁵ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁶ *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

⁷ *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

⁸ *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

his pre-accident wage. Accordingly, the ALJ's Award should be modified to reflect claimant is limited to his functional impairment.

The record contains two medical opinions pursuant to the *AMA Guides* regarding claimant's functional impairment. Dr. Swaim opined that claimant had a 29 percent whole person functional impairment and Dr. Delgado opined that claimant had a 20 percent whole person functional impairment. The Board concludes that as a result of his work-related accidental injury the claimant has suffered a 24.5 percent permanent partial whole person functional impairment.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Steven J. Howard dated December 15, 2003, is modified to reflect claimant is entitled to compensation based upon a 24.5 percent permanent partial disability.

The claimant is entitled to 24 weeks of temporary total disability compensation at the rate of \$417 per week or \$10,008 followed by 99.47 weeks of permanent partial disability compensation at the rate of \$417 per week or \$41,478.99 for a 24.5 percent work disability, making a total award of \$51,486.99, which is due, owing and ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of June 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Dennis L. Horner, Attorney for Claimant
- Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
- Steven J. Howard, Administrative Law Judge
- Paula S. Greathouse, Workers Compensation Director