

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

LARRY R. CEASE)	
Claimant)	
)	
VS.)	
)	
R.M. BARIL GEN. CONTRACTOR INC.)	
Respondent)	Docket No. 1,009,320
)	
AND)	
)	
CONTINENTAL WESTERN INS. CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier request review of the March 9, 2004 Award by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on September 14, 2004.

APPEARANCES

George H. Pearson of Topeka, Kansas, appeared for the claimant. Nathan Burghart of Topeka, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) determined claimant suffered a work-related accident arising out of and in the course of his employment on October 1, 2001. The ALJ awarded claimant a 62.7 percent work disability based upon a 47.2 percent wage loss and a 78.2 percent task loss.

The respondent requests review of whether the claimant's accidental injury arose out of and in the course of employment; and, if so, the nature and extent of claimant's disability. Initially, respondent argues claimant's condition is the result of the natural aging process and is not compensable. In the alternative, if the claim is determined to be compensable, the respondent argues claimant should be limited to his 5 percent functional impairment. This argument is based upon the testimony of respondent's vocational expert who opined claimant retains the ability to earn more than 90 percent of his pre-injury wage.

Claimant argues he aggravated an asymptomatic preexisting condition and accordingly suffered a compensable work-related accident. Claimant concedes he failed to make a good faith effort to find employment but that the ALJ appropriately adopted the testimony of claimant's vocational expert who based his opinion on the testifying physicians' restrictions. In his brief to the Board, claimant additionally raises a foundation objection to respondent's vocational expert's testimony. Consequently, the claimant requests the Board to affirm the ALJ's Award.

The issues for Board determination are:

1. Whether claimant suffered accidental injury arising out of and in the course of employment.
2. If claimant suffered a compensable injury, the nature and extent of disability. Specifically, whether claimant should be imputed a wage that would be within 90 percent of his pre-injury wage and limited to his functional impairment or whether the imputed wage would be less than 90 percent of his pre-injury wage and entitle claimant to a work disability.
3. Whether respondent's vocational expert's testimony should be considered.

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:

Claimant was employed as a carpenter for respondent. On October 1, 2001, claimant had twisted, turned and bent over to help tie a piece of rebar. As he stood up he experienced a sharp pain in his lower back.

On October 26, 2001, an MRI noted degenerative disks at L1-2, L4-5 and L5-S1 but no evidence of herniated nucleus pulposus. Claimant was provided an extended course of conservative treatment which included several occasions of physical therapy and four epidural steroid injections.

Claimant received conservative treatment through December 3, 2002, and following a functional capacities evaluation in January 2003, claimant was released to return to work with restrictions. Claimant talked to respondent about returning to work but was told respondent could not accommodate his restrictions.

Claimant has not returned to work and concedes that he failed to make a good faith effort to find appropriate employment.

At his attorney's request the claimant was examined by Dr. Glenn M. Amundson on April 4, 2003. As a result of that examination, the doctor diagnosed claimant with degenerative disk disease at L4-5 and L5-S1 with a small left lateral disk protrusion at L4-5 with some nerve root impingement at that level. Claimant also has a small bulge at the L5-S1 level. The doctor imposed restrictions limiting claimant to occasional lifting to 70 pounds. In addition, claimant should avoid sustained or awkward posture of the lumbar spine as well as any repetitive bending, pushing, pulling, twisting or lifting activities. Finally, the doctor opined that as a result of the October 1, 2001 accident the claimant suffered a DRE Lumbosacral Category III impairment of the *AMA Guides*¹ and assigned a 10 percent permanent partial functional impairment.

At respondent's attorney's request, the claimant was examined by Dr. Chris D. Fevurly on September 12, 2003. Dr. Fevurly noted claimant's low back pain was the probable result of the degenerative changes in his low back in combination with work activities suffered in 2001 and 2002. Dr. Fevurly imposed work restrictions of occasional lifting up to 50 pounds with frequent lifting up to 40 pounds and repetitive lifting from the floor to the waist up to 20 pounds. In addition, the doctor opined claimant needs to be in a position where he does not perform prolonged or nonstop bending and stooping. And claimant should be allowed to alternate between sitting and standing as needed for pain control. Finally, the doctor opined based upon the *AMA Guides* the claimant suffers a DRE Lumbosacral Category II impairment and assigned a 5 percent permanent partial functional impairment.

Initially, respondent argues claimant had preexisting degenerative disk disease and his condition was simply caused by every day activity, standing up after bending over, and such activity is not compensable. The Board concludes the facts do not support the respondent's contention and affirms the ALJ's determination claimant suffered accidental injury arising out of and in the course of his employment.

The claimant was bent over and twisted around to hold a piece of rebar while a co-worker wired it in place. When claimant attempted to stand up he felt a stabbing pain in his low back. Dr. Fevurly examined claimant at respondent's request and concluded

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

claimant's low back pain was the result of claimant's work activities superimposed upon the degenerative changes in his back. Dr. Amundson attributed claimant's condition to his work-related injury on October 1, 2001.

K.S.A. 2002 Supp. 44-508(d) defines "accident":

'Accident' means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

K.S.A. 2002 Supp. 44-508(e) defines "personal injury" and "injury":

'Personal injury' and 'injury' mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

The foregoing statute, which defines "injury" excludes "normal activities of day-to-day living" from being found to have been caused by the employment.

The Board has concluded that the exclusion of normal activities of day-to-day living from the definition of injury was an intent by the Legislature to codify and strengthen the holdings in *Martin*² and *Boeckmann*.³ But claimant's injury in this case is distinguishable from both *Martin* and *Boeckmann*. While standing up after being bent over is an activity which admittedly can occur whether at the workplace or not, being in a captive position while bending over and twisting to hold rebar is not. Moreover, the Court in *Boeckmann* distinguished cases in which "the injury was shown to be sufficiently related to a particular strain or episode of physical exertion" to support a finding of compensability.⁴ The Board concludes that the Legislature did not intend for the "normal activities of day-to-day living" to be so broadly defined as to include injuries caused or aggravated by the strain or physical exertion of work.

² *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

³ *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

⁴ *Id.* at 737.

It is clear from the record that claimant aggravated and worsened his previously asymptomatic degenerative disk disease when awkwardly bent over holding rebar and then standing up. Both Drs. Fevurly and Amundson concluded such activity resulted in his current disability.

From the record provided, the Board concludes claimant has met his burden of proving that the work activities he performed for respondent aggravated, intensified or accelerated his preexisting degenerative disk disease to a degree greater than the natural aging process and the normal activities of daily living. Accordingly, the aggravation from work was a new and distinct injury, which arose out of and was directly caused by claimant's employment.

Moreover, it is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.⁵ While the doctors noted claimant had preexisting degenerative disk disease, both doctors concluded the work activity aggravated that condition and caused the resultant disability. And the claimant's preexisting condition was asymptomatic before the incident at work.

Respondent next argues claimant should be limited to his functional impairment because claimant conceded he failed to make a good faith effort to find appropriate post-injury employment and its vocational expert, Dan Zumalt, opined claimant retained the ability to earn a comparable wage.

An injured employee is barred from a work disability under K.S.A. 44-510e(a) if he is earning 90 percent or more of the employee's pre-injury wage. It is well settled that an injured employee must make a good faith effort to return to work within his capabilities in order to be entitled to work disability under K.S.A. 44-510e(a).⁶ If it is determined that a good faith effort has not been made, then an appropriate post-injury wage will be imputed based on all the evidence, including expert testimony concerning the capacity to earn wages.⁷ If the imputed wage equals at least 90 percent of his gross average weekly wage, his permanent partial general disability award is limited to his permanent functional impairment.

⁵ *Harris v. Cessna Aircraft Co.*, 9 Kan. App.2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

⁶ *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

⁷ *Copeland v. Johnson Group, Inc.*, 26 Kan. App. 2d 803, 995 P.2d 369 (1999), *rev. denied* 269 Kan. 931 (2000).

Respondent's vocational expert opined claimant retained the ability to earn \$13.42 an hour based upon for a forklift operator's wage. But Mr. Zumalt agreed that he could not identify an employer who had such a job available nor did he consider Dr. Amundson's restrictions in his determination of claimant's ability to earn wages. Moreover, claimant's vocational expert, Dick Santner, noted that forklift operators are typically filled internally by employers and he could not identify an employer that would require an employee to just operate a forklift. Instead, such a job normally requires loading, unloading and physically working with skids such that claimant's restrictions might very well exclude him from such a job.

Mr. Santner, claimant's vocational expert, opined claimant retained the ability to earn between \$7-8 an hour based upon his age, the medical restrictions provided by Drs. Fevurly and Amundson and his limited education. The ALJ concluded this testimony was more persuasive and imputed a wage of \$7.50 an hour or \$300 a week. The Board agrees and affirms.

Dr. Amundson utilized the task list developed by Mr. Santner and concluded claimant had lost the ability to perform 7 of 8 tasks. Dr. Fevurly utilized the task list developed by Mr. Zumalt and determined claimant had lost the ability to perform 9 of 13 tasks. The ALJ averaged the resulting task loss percentages to arrive at claimant's 78.2 percent task loss. The Board agrees and affirms.

In his brief to the Board, the claimant argues that respondent's vocational expert's opinion regarding claimant's post-injury wage earning ability should be stricken because the expert relied upon non-testifying physicians' records to formulate his opinion.

The claimant never made a timely objection at Mr. Zumalt's deposition to either the wage earning ability testimony or introduction of Mr. Zumalt's report containing that opinion. Nor did claimant raise this objection in his submission letter to the ALJ.

The Board agrees that K.S.A. 44-519 requires testimony of the physician before the physician's medical reports or records are admitted as evidence in the record of a workers compensation proceeding. However, the Board concludes claimant was required to make a timely objection during the deposition testimony of respondent's vocational expert, Mr. Zumalt, in order to exclude his opinion on claimant's wage earning ability based on the non-testifying physicians' permanent restrictions. The Board finds the claimant cannot wait until the claim is appealed to the Board to then object to the admission of evidence.

Although the rules of evidence are not strictly applied in workers compensation cases, the Board finds that the longstanding "contemporaneous objection rule" applies to a workers compensation case. Accordingly, a party waives the right to complain that evidence was erroneously introduced unless a timely objection is made in the record making

clear the grounds of the objection.⁸ The Board, therefore, denies claimant's request to exclude the report and opinion of Mr. Zumalt regarding claimant's ability to earn post-injury wages.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated March 9, 2004, is affirmed.

IT IS SO ORDERED.

Dated this 30th day of September 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
Nathan Burghart, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁸ See *Anderson v. Scheffler*, 248 Kan. 736, Syl. ¶ 5, 811 P.2d 1125 (1991) and *State v. Carter*, 220 Kan. 16, Syl. ¶ 2, 551 P.2d 821 (1976).