

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

PAUL C. GOODMAN)	
Claimant)	
)	
VS.)	
)	
FOOTLOCKER)	
Respondent)	Docket No. 1,011,000
)	
AND)	
)	
AMERICAN CASUALTY COMPANY OF READING PENNSYLVANIA)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier requested review of the November 9, 2004 Award by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on May 10, 2005.

APPEARANCES

Jeff K. Cooper, of Topeka, Kansas, appeared for the claimant. Michael P. Bandré, of Overland Park, 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 respondent contends the Administrative Law Judge (ALJ) exceeded his jurisdiction and abused his discretion in awarding claimant a work disability instead of imputing the wage claimant was earning while working for respondent and thus limiting the permanent partial disability award to claimant's percentage of functional impairment in light

of claimant's retirement from respondent's employ after being advised that the results from a drug screen showed the specimen was "not consistent with normal human urine."¹

Claimant submits that the ALJ's Award should be increased because claimant is not capable of working full time, but otherwise should be affirmed in all respects.

The ALJ found that respondent provided no evidence that it could have or intended to provide accommodated employment to claimant had claimant not been terminated for cause. Therefore, the ALJ concluded that claimant was entitled to a work disability and awarded claimant a 68.5 percent permanent partial general bodily disability. He determined claimant's functional impairment to be 10 percent and found a preinjury average weekly wage of \$568.70.

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 is 61 years old and had been working for respondent for over 16 years when he began having pain in his lower back running down his right leg and ankle. In March 2003, claimant took short-term disability from the respondent to find out what was causing the problems with his back and leg. In May 2003, it was determined that claimant's problems were caused by a series of repetitive injuries relating to his work for respondent. When claimant reported the claim to respondent, he was required to take a urinalysis for drug testing.

Claimant went to the Geary Community Hospital to have the urinalysis done. He testified he took off his coat and emptied his pockets before going into the bathroom to give the sample. He testified he did not put anything in the sample. The registered nurse who collected the urine sample testified that when claimant returned the sample to her, it met the criteria for temperature and color. There was no water supply in the bathroom where the sample was collected. Nevertheless, the results of the urinalysis showed the specimen was not compatible with human urine. Dr. Stanley Kammerer, director of the laboratory where the sample was tested, stated that in his opinion, the sample was "[p]robably water."²

When respondent received the results of the urinalysis, claimant was called into a meeting with Robert Jiminez, who was claimant's supervisor, and Cezanne Korbelt,

¹Kammerer Depo., Ex. 2 at 8.

²Kammerer Depo. at 31.

respondent's director of human resources. Claimant was told that the results from his urine sample showed that it was not consistent with human urine. Claimant was told he could have the sample retested at his own cost, and claimant declined to have this done. Claimant was then given the option of taking an early retirement and keeping his benefits or being terminated. Claimant chose to take early retirement.

Vito J. Carabetta, M.D., a board certified physiatrist, examined claimant at the request of respondent on November 13, 2003. Claimant described having constant low back pain and right sciatica involving pain, tingling and numbness to the ankle level. Both sitting and standing beyond 30 minutes caused the low back symptoms to worsen. His symptoms can be improved with rest, changing positions frequently and leaning to his left side. Dr. Carabetta noted that forward bending and lifting also caused increased pain. An MRI of the lumbar spine showed degenerative changes and a significant disc herniation at the L4-5 level. This finding was subsequently confirmed by a CT myelogram. Surgical intervention had been suggested to claimant by several physicians, and Dr. Carabetta agreed with this recommendation. Although claimant could not be considered as being at maximum medical improvement because of the need for surgical intervention, Dr. Carabetta nevertheless rated claimant's impairment as 10 percent under DRE Category III of the *AMA Guides*³ because claimant did not want surgery. The doctor attributed all of this impairment to the work-related injury with respondent. Dr. Carabetta did not give an opinion concerning work restrictions or task loss. Likewise, Dr. Carabetta did not give an opinion as to claimant's ability to work but did say that "[w]ithout proper treatment, his prognosis remains rather guarded."⁴

Claimant was seen by Dr. Edward Prostic, a board certified orthopedic surgeon, on March 31, 2004. Claimant complained of pain at his right buttock with radiation down the right leg, including numbness and tingling. An x-ray showed sacralization of L5 and pseudo-spondylolisthesis at L4-5. There was no other abnormality obvious. Dr. Prostic rated claimant as having a functional impairment of 20 percent to the body as a whole based on the *AMA Guides*. Dr. Prostic testified that claimant should not lift weights greater than 20 pounds and should avoid repetitive bending, twisting at the waist, forceful pushing or pulling, use of vibrating equipment and captive positioning.⁵ Dr. Prostic testified that claimant could not return to his former job with respondent without accommodation. He said claimant is capable of performing light duty work, but probably less than full time, because the instability of claimant's back will make him fatigue easily. Nevertheless, Dr. Prostic said he would allow claimant to perform a full-time sedentary job.

³American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

⁴Stipulation (Oct. 21, 2004), Ex. A at 4.

⁵Prostic Depo. at 10; Ex. 2 at 3.

K.S.A. 44-510e 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. 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. (Emphasis added.)

But that statute must be read in light of *Foulk*⁶ and *Copeland*.⁷ In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job the claimant had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual wages being earned when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

If a finding is made that a good faith effort has not been made, the factfinder will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.⁸

⁶*Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

⁷*Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁸*Id.* at 320.

The Kansas Court of Appeals in *Watson*⁹ held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the capacity to earn wages.

In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.¹⁰

The Board finds that claimant could not return to his regular job duties due to his injury and his medical restrictions. And respondent has not proven that accommodated work was available. Nevertheless, claimant thereafter failed to make a good faith effort to find appropriate employment. Accordingly, a wage will have to be imputed based upon the evidence presented concerning claimant's capacity to earn wages.

Claimant was seen by Monty Longacre on April 27, 2004, at the request of claimant's attorney. Mr. Longacre testified that claimant would probably only be able to find employment working at minimum wage, which would be less than 90 percent of his preinjury average weekly wage. Therefore, claimant contends he is entitled to a work disability. Mr. Longacre also prepared a task list which identified 22 nonduplicative tasks claimant performed in his position at Footlocker. Dr. Prostic, in reviewing the task loss list prepared by Mr. Longacre, testified that claimant had lost the ability to perform 16 of the 22 tasks for a task loss of 73 percent. Dr. Prostic was the only physician to give an opinion as to the extent claimant has lost the ability to perform his former work tasks.

The ALJ found that although respondent argued claimant was terminated for cause, respondent provided no evidence that it could have or would have provided claimant accommodated employment. Therefore, the ALJ found the issue of whether claimant was terminated for cause irrelevant. However, the ALJ concluded that claimant was capable of earning minimum wage and had not made a good faith effort to find other employment. The ALJ imputed a hourly wage of \$5.15 per hour, or \$206 a week, to claimant. The ALJ utilized an average weekly wage of \$568.70, which was computed using the stipulated base wage of \$511.20 and splitting the difference between the alleged overtime claimed by claimant of \$68.17 per week and that of \$57.50 per week claimed by respondent. This calculated to be a 64% wage loss. The ALJ also accepted the task loss testified to by Dr.

⁹*Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

¹⁰*Id.* at Syl. ¶ 4.

Prostic, and found claimant had a task loss of 73 percent. The Board agrees with those findings and conclusions by the ALJ.

The ALJ's Award contains findings of fact and conclusions of law that are accurate and supported by the record. It is not necessary to repeat them here. The Board adopts the findings, conclusions and orders of the ALJ as its own.

AWARD

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

IT IS SO ORDERED.

Dated this _____ day of August 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Jeff K. Cooper, Attorney for Claimant
- Michael P. Bandré , Attorney for Respondent and its Insurance Carrier
- Bryce D. Benedict, Administrative Law Judge
- Paula S. Greathouse, Workers Compensation Director