



In the April 21, 2005, Award, Judge Barnes determined claimant's low back injury arose out of and in the course of his employment with respondent. After finding claimant sustained a 62 percent task loss and a 58 percent wage loss, the Judge awarded claimant benefits under K.S.A. 44-510e for a 60 percent permanent partial general disability.

Respondent contends Judge Barnes erred. The company argues the claim should be dismissed because claimant did not attend a functional capacity evaluation. In the alternative, respondent argues the claim should be remanded to the Judge with an order that claimant submit to a functional capacity evaluation and that respondent be permitted to present additional evidence pertaining to claimant's disability. Respondent also contends claimant should not receive any benefits for the alleged back injury because claimant did not list that body part as being injured in his Application for Hearing that was filed with the Division of Workers Compensation. Finally, respondent argues claimant failed to prove his back was either injured in the August 4, 2003, accident or that the alleged back injury resulted from the right foot injury. Accordingly, respondent requests the Board to dismiss this claim, to remand the claim, or to award claimant permanent disability benefits under K.S.A. 44-510d for the foot only.

Conversely, claimant contends the April 21, 2005, Award should be affirmed.

The issues before the Board on this appeal are:

1. Should this claim be dismissed because claimant did not attend a second functional capacity evaluation? In the alternative, should the claim be remanded to the Judge to have claimant undergo a second functional capacity evaluation and to provide respondent an opportunity to present additional evidence regarding claimant's task loss and wage loss?
2. If the claim is neither dismissed nor remanded, what is the nature and extent of claimant's injury and disability?

#### **FINDINGS OF FACT**

After reviewing the entire record and considering the parties' arguments, the Board finds:

1. On August 4, 2003, claimant fell approximately five feet from the back of a truck to the ground. A compressor, which weighed from 60 to 100 pounds, followed claimant's descent and landed on his right foot and ankle. Co-workers promptly took claimant to a hospital emergency room in a nearby town.

2. The initial medical treatment provided to claimant concentrated on his foot injury. The record is not entirely clear, but it appears claimant underwent foot surgery approximately four days after the accident and later had his right shoulder and upper back evaluated for injuries.
3. On November 17, 2003, Dr. Anthony G. A. Pollock, who is an orthopedic surgeon, began treating claimant. Claimant told Dr. Pollock that he began having leg and low back pain when he was in a cast following the right foot surgery. Dr. Pollock's initial impression was that claimant probably strained his lumbar spine or possibly sustained a spinal disc injury.
4. On March 29, 2004, claimant underwent a functional capacity evaluation at Dr. Pollock's request. And on April 5, 2004, claimant saw Dr. Pollock for the last time. The doctor concluded claimant sustained a six percent whole person functional impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment (AMA Guides)* (4th ed.) for the foot and back injuries that resulted from the August 2003 accident.<sup>1</sup> Moreover, the doctor adopted the restrictions that were suggested by the functional capacity evaluation. Dr. Pollock also concluded claimant should not perform 20 of 29 former work tasks as identified by claimant's vocational expert.
5. Respondent's medical expert witness, Dr. Paul S. Stein, examined claimant in January 2005 and concluded claimant sustained a five percent whole person functional impairment under the *AMA Guides* (4th ed.) due to his low back injury. The doctor did not attempt to rate the impairment to claimant's right foot. After reviewing the list of former work tasks prepared by respondent's vocational expert, Dr. Stein concluded claimant should not perform 22 of 40 former work tasks.
6. The Board finds claimant has sustained permanent injury to both his right foot and low back as a direct result of his August 4, 2003, accident. The Board further finds those injuries comprise a six percent whole person functional impairment as measured by the *AMA Guides* (4th ed.).

#### **CONCLUSIONS OF LAW**

Respondent argues this claim should either be dismissed because claimant did not attend a second functional capacity evaluation or that the Board should remand the claim for claimant to undergo another and to provide respondent an opportunity to present additional evidence regarding claimant's task loss and wage loss.

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<sup>1</sup> Pollock Depo. at 14-16.

At the regular hearing, claimant testified his symptoms were better as he had lost 33 pounds and he was trying to walk four miles a day.

Okay, well, first off I would like to say my symptoms have been a little better because I have lost 33 pounds. I have been trying to walk four miles a day. I work out a little bit, of course within the limitations [of] the five pound weights, I am trying to make myself better. But I still have the problems with the foot.

. . . .

Cold weather really bothers it [claimant's foot]. Walking a whole bunch, but mainly kneeling, squatting probably the biggest one I have with it and my lower back is squatting down. If you do it 20 or 30 times I am not talking about a partial squat I am talking all the way down. . . .

. . . .

And there's days on my lower back if it's really cold or if I worked myself real good you can't walk upright without it pinching or hurting you. Other days I feel great. And then there's those days where you will go out and work or do work in the yard for two days and do this and do that and then for two days you can't hardly move.

. . . .

And the girl who did the FCE [functional capacity evaluation] is really the one who got me doing exercise she said with my back the way you hunch over if you keep walking like that you will be that way for the rest of your life. So the 33 pounds that I lost helped me tremendously, tremendously, and the exercise has been helping.

. . . .

When I did the FCE, whatever, the little gal they always do the one to ten thing. I said every day when I get up it's a five or six and by the end of the day it's a seven or eight. And now it's about a three or four. And if I work hard or get to where it started bothering me it's a five or six, but there are some days that it doesn't go up to the five or six.

So I feel as far as the steps I have taken as far as the weight and the exercise on my own because the insurance company wouldn't do anything to help me, I feel I have helped myself tremendously, but there are some things I still can't do.<sup>2</sup>

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<sup>2</sup> R.H. Trans. at 26-28.

Following claimant's testimony at the December 6, 2004, regular hearing, respondent promptly requested claimant undergo another functional capacity evaluation. Although respondent made its request before the parties' terminal dates had expired, claimant's counsel objected unless the evaluation was approved by the Judge. Consequently, claimant did not attend the functional capacity evaluation that was scheduled for December 14, 2004.

While awaiting a February 2005 hearing on respondent's request for another functional capacity evaluation, claimant took Dr. Pollock's deposition. The doctor initially testified at his December 15, 2004, deposition that another functional capacity evaluation would not be "very valuable."<sup>3</sup> But the doctor later testified another functional capacity evaluation might be helpful and, depending upon its results, it might influence the permanent work restrictions he placed upon claimant.<sup>4</sup>

Thinking the parties wanted another evaluation, following his December 15, 2004, deposition, Dr. Pollock scheduled a functional capacity evaluation for January 18, 2005. Again, claimant did not attend.

Likewise, Dr. Stein testified at his February 2005 deposition that another functional capacity evaluation would be reasonable. In the medical report following his January 13, 2005, examination of claimant, Dr. Stein indicated he had considered claimant's testimony at the regular hearing and Dr. Pollock's December 15, 2004, deposition. Dr. Stein wrote that he found no definitive evidence of a "tremendous improvement" over the last nine or ten months. Moreover, Dr. Stein questioned that claimant's statements at the regular hearing of "helped tremendously" could be translated into a "tremendous improvement" in his condition. But, nonetheless, the doctor concluded another functional capacity evaluation was reasonable. Dr. Stein wrote, in part:

My review of the transcripts, and particularly of the exact wording used by the patient, in conjunction with his history given today, do not reflect an absolute need for another functional capacity evaluation. That said, I do not think it would be unreasonable to request another FCE. These studies by their very nature are of relatively short duration and a second evaluation with the passage of nine months might be helpful, particularly with the patient's efforts to improve his situation as well as the fact that today's examination does not reflect the presence of a severe back disorder. If another FCE is to be done, consideration should be given to using the CRT equipment as well.

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

<sup>4</sup> *Id.* at 25-28.

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I am not certain that we can translate “helped tremendously” from the hearing into a “tremendous improvement” in his condition. However, the radiology report on the lumbar MRI scan does not show a great deal of pathology nor does today’s examination reflect the presence of a severe back injury. Dr. Pollock’s examination and opinion did not seem to reflect a substantial amount of back pathology either and he provided impairment under DRE lumbosacral category II of the AMA Guides, which is labeled “Minor Impairment” on page 102 of the fourth edition. I agree with this.

....

In summary, I do not believe that the patient’s statements in his hearing are necessarily distinctly opposed to his statements in [his] history today and there is no definitive evidence of a tremendous improvement over the last nine or ten months. However, I do not find evidence on examination or MRI scan and x-ray reports (although I have not seen the films themselves) of severe lower back injury such that it should limit this individual[’]s lifting to 20 pounds maximum. I do not know if another functional capacity evaluation will provide any different findings but it would be reasonable to do one.<sup>5</sup>

The Judge denied respondent’s request to require claimant to undergo another functional capacity evaluation. But the Board concludes respondent’s request to undergo a second functional capacity evaluation was reasonable and should have been granted. Accordingly, this claim should be remanded to the Judge for claimant to undergo a functional capacity evaluation and to provide the parties an opportunity to provide additional evidence regarding claimant’s permanent disability. The Board finds good cause existed to extend the parties’ terminal dates as permitted by K.S.A. 2004 Supp. 44-523 to permit the second functional capacity evaluation to be performed in conjunction with a medical evaluation conducted under K.S.A. 44-515.

Respondent’s argument that this claim should be dismissed pursuant to K.S.A. 44-518 because claimant failed to attend a second functional capacity evaluation is without merit. Respondent presented its request to Judge Barnes, who ruled that claimant was not required to undergo a second evaluation. Accordingly, claimant did not refuse to undergo a medical examination as contemplated by K.S.A. 44-518.

Likewise, the Board rejects respondent’s argument that claimant should be precluded from receiving disability benefits for his back because he failed to list that body part in the Application for Hearing filed with the Division of Workers Compensation to

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<sup>5</sup> Stein Depo., Ex. 2 at 5-6.

initiate the litigation of this claim. First, respondent did not raise to the administrative law judge the issue of a defective application as a defense to the compensability of this claim. And the Board's review is limited to those issues of law and fact presented at the administrative law judge level.<sup>6</sup> Second, respondent cites no provision in the Workers Compensation Act, and the Board is unaware of any such provision, that requires an injured worker to itemize each and every body part that might be injured in an accident.

**AWARD**

**WHEREFORE**, the Board sets aside the April 21, 2005, Award and remands this claim to Judge Barnes for further proceedings consistent with the findings and conclusions above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of September, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

**DISSENT**

We respectfully disagree with the majority. The Workers Compensation Act provides that the parties are to be given a reasonable opportunity to be heard and to present their evidence.<sup>7</sup> Likewise, an employer may require an injured worker to submit

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<sup>6</sup> K.S.A. 2004 Supp. 44-555c(a).

<sup>7</sup> K.S.A. 2004 Supp. 44-523(a).

to an examination at any reasonable time and place.<sup>8</sup> But the Judge appropriately exercised her discretion in denying respondent's December 2004 request that claimant undergo an additional functional capacity evaluation. First, as indicated by respondent's own medical expert, Dr. Stein, the evaluation was not necessary. Second, the Judge was aware that Dr. Stein had found no evidence of any tremendous improvement when he evaluated claimant in early January 2005 and that claimant's statements at the regular hearing did not translate into meaning that claimant's condition had tremendously improved. Third, the Judge would have necessarily realized the claim would be delayed by an evaluation at that late date and that claimant would have potentially been exposed to increased litigation expenses due to another functional capacity evaluation. Accordingly, the Judge weighed those various factors, probably among others, and determined that it was not appropriate to require claimant to undergo additional testing. We would not disturb that decision.

This Board, on numerous occasions, has held that it will rarely interfere with a Judge's decision regarding terminal dates. We do not find that these facts warrant the Board in overriding the Judge's discretion in controlling her docket and the orderly presentation of evidence. As Dr. Stein concluded, another functional capacity evaluation was not necessary and although it might be more recent it may not be any more accurate.

In short, we would deny respondent's requests to either dismiss or remand this claim. By remanding this claim, the majority has created unnecessary delay.

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BOARD MEMBER

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BOARD MEMBER

c: Dennis L. Phelps, Attorney for Claimant  
Terry J. Torline, Attorney for Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director

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<sup>8</sup> K.S.A. 44-515(a).