

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

JUANA V. RETANA)	
Claimant)	
)	
VS.)	Docket Nos. 1,013,806
)	1,014,218
U.S.D. 259)	1,014,294
Self-Insured Respondent)	

ORDER

Respondent requested review of the April 8, 2005 Award by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Board heard oral argument on September 20, 2005, in Wichita, Kansas.

APPEARANCES

Dennis L. Phelps, of Wichita, Kansas, appeared for the claimant. Robert G. Martin, of Wichita, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument, the parties agreed that neither party is aggrieved by the ALJ's findings in Docket Nos. 1,014,218 and 1,014,294. Thus, those Awards can be and are summarily affirmed. Similarly, both parties agreed that the ALJ's finding on the issue of claimant's receipt of short term disability payments is not at issue. The only issue on appeal is contained within Docket No. 1,013,806 and stems from the question of whether claimant's injury arose out of and in the course of her employment with respondent. And if so, the nature and extent of her resulting work disability under K.S.A. 44-510e(a).

ISSUES

The ALJ found that claimant was injured out of and in the course of her employment on October 1, 2001, October 5, 2003 and October 9, 2003,¹ and awarded compensation

¹ These injuries and dates of accidents are represented in Dockets 1,014,218 (Oct. 1, 2001), 1,014,294 (Oct. 5, 2003), and 1,013,806 (Oct. 9, 2003). Pursuant to the parties' stipulation, only Docket No. 1,013,806 is at issue.

for each. The focus of this appeal is the compensability of the event that occurred on October 9, 2003.

The respondent requests review of the ALJ's Award alleging claimant failed to establish by a preponderance of the credible evidence that she suffered an accidental injury on October 9, 2003 while serving as a security guard at a Wichita area high school. Respondent contends that "the totality of the credible evidence in this matter fails to establish that claimant sustained an injury on October 9, 2003 arising out of and in the course of her employment".² Respondent also contends that there is no proof that claimant had more than a minimal role in the altercation that took place on October 9th and that it could not have led to the injuries she is claiming.

Claimant argues the greater weight of the evidence establishes that she was, in fact, injured on October 9, 2003. Claimant also contends she demonstrated a good faith effort to find post-injury employment and as a result, the ALJ's Award should reflect a 100 percent wage loss rather than the 65 percent wage loss found by the ALJ based upon an imputed wage of \$260 per week.

The issues to be addressed in this appeal are as follows: 1) whether claimant suffered an accidental injury on October 9, 2003 arising out of and in the course of her employment with respondent; 2) and if so, the nature and extent of claimant's work disability, particularly the wage loss component.

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:

This is the second time this case has appeared before the Board. Claimant, who was employed as a security guard at a high school, alleges she sustained an injury on October 9, 2003 while breaking up an altercation between two students. Following the January 27, 2004 preliminary hearing, the ALJ found in claimant's favor and granted benefits.

Contained within that record is the testimony of the claimant and two other individuals who appeared in person at the hearing as well as that of eleven additional fact witnesses. On appeal, the Board noted that "[t]here are almost as many versions of what

² Respondent's Brief at 13 (filed Jun. 1, 2005).

took place during the altercation as there are witnesses.”³ But the Board ultimately concluded that “[a]lthough there is some dispute concerning the amount of her physical exertion, none dispute that claimant was present and most acknowledge that she was involved in restoring order.”⁴ Thus, the Board affirmed the ALJ’s preliminary hearing Order.

Since that finding, the claim proceeded to a Regular Hearing. No additional evidence has been offered on the compensability issue. The ALJ ultimately concluded that “it is clear that [c]laimant was present and had contact with one of the students involved in the fight.”⁵ She went on to find that “[c]laimant suffered a low back injury as the result of her active physical participation and involvement in the October 9, 2003 altercation.”⁶

Claimant treated with Dr. John Estivo from November 7, 2003 until May 2004. She received pain medication and was sent to physical therapy. Following a work conditioning program, Dr. Estivo diagnosed lumbar spine strain and right knee strain that has resolved. He found that claimant was at maximum medical improvement (MMI) and imposed a permanent restriction of no lifting more than 40 pounds and should not restrain anyone. Based on the Fourth edition of the *AMA Guides* he assigned a 5 percent impairment to the lumbar spine and released claimant from his care.⁷ He later testified that she had a 5 percent task loss and when combined with her 65 percent wage loss, left her with a 35 percent work disability under K.S.A. 44-510e(a). There are no other opinions as to task loss or functional impairment.

Respondent adamantly maintains claimant has failed to meet her burden of proof on the issue of whether her back injury arose out of and in the course of her employment on October 9, 2003. Respondent first contends claimant could not have been hurt as she claims as she “did not notify her supervisor or any appropriate representative of respondent of her alleged injury for almost one week.”⁸ Respondent further contends that claimant’s supporting witnesses to the accident itself are biased, due to their friendship with claimant, and/or because they did not actually see claimant’s actions during the altercation. On the other hand, respondent has offered the testimony of eight separate “neutral” witnesses,

³ Board Order (Jun. 29, 2004) at 3.

⁴ *Id.*

⁵ ALJ Award (Apr. 8, 2005) at 4.

⁶ *Id.*

⁷ Estivo Depo., Ex. 2 at 11 (May 20, 2004 office note).

⁸ Respondent’s Brief at 2 (filed Jun. 1, 2005).

including one of the combatants, who “convincingly establishes that claimant’s story is inaccurate and flawed”.⁹

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.¹⁰ “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”¹¹

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.¹²

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.¹³ Whether an accident arises out of and in the course of the worker’s employment depends upon the facts peculiar to the particular case.¹⁴

The two phrases arising “out of” and “in the course of” employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase ‘out of’ employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises ‘out of’ employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises ‘out of’ employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase ‘in the

⁹ *Id.*

¹⁰ K.S.A. 44-501(a).

¹¹ K.S.A. 2003 Supp. 44-508(g).

¹² *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

¹³ K.S.A. 44-501(a).

¹⁴ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

course of employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.¹⁵

The ALJ was not persuaded by respondent's arguments and after considering all of the evidence contained within the record, the Board agrees with and affirms the ALJ's ultimate conclusion that claimant was injured in an accident that arose out of and in the course of her employment. In instances such as this, it is difficult to ascertain how events truly occurred. And inconsistencies between those witnessing the same event are not uncommon. Nonetheless, one thing is clear. Claimant was present at the altercation and it was her job to restore order. Most of the witnesses substantiate her contention that she was actually involved in breaking up the melee. Her recitation of the history of her injury on October 9, 2003 is generally consistent throughout her treatment. Under these facts and circumstances, the Board finds no reason to disturb the ALJ's findings on that issue.

The Board also agrees with the ALJ's finding that claimant failed to demonstrate a good faith effort to find appropriate post-injury employment following respondent's decision not to accommodate her restrictions.

An injured employee is barred from a work disability under K.S.A. 44-510e(a) if he or she 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 their capabilities in order to be entitled to work disability under K.S.A. 44-510e(a).¹⁶ If an injured employee fails to make a good faith effort to find appropriate employment, a wage may be imputed based upon the employee's capacity to earn wages.¹⁷ In order to determine if the employee is still capable of earning nearly the same wage, the factfinder must first determine if the employee made a good faith effort to find appropriate employment. The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis.¹⁸

At the regular hearing claimant provided a list of 26 prospective employers with whom she sought employment. According to claimant, this list does not encompass every place she sought employment. Although claimant testified she has, on average, been applying for employment three places per week since May of 2004 and up to the time of

¹⁵ *Id.*

¹⁶ *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

¹⁷ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

¹⁸ *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, 9 P.3d 591 (2000).

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the regular hearing in January 2005. Furthermore, the list does not reflect any dates each of the contacts were made or whether or not applications were submitted. Nor is there any indication on the document about what sort of job claimant was applying for, or the person she contacted at each prospective employer. However, claimant says she does "have" the names of the people she talked to, but that information was never provided.

The Board has carefully considered claimant's attempt at a job search and believes it to be less than a good faith effort as required by *Copeland* and its progeny. And because the only evidence within the file indicates claimant had the capacity to earn \$260 per week, the ALJ's decision to impute that sum to claimant was appropriate and is affirmed. Accordingly, the 35 percent work disability finding awarded by the ALJ is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated April 8, 2005, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of September, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Dennis L. Phelps, Attorney for Claimant
- Robert G. Martin, Attorney for Self-Insured Respondent
- Nelsonna Potts Barnes, Administrative Law Judge
- Paula S. Greathouse, Workers Compensation Director