

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

ERIK B. EDENS)	
Claimant)	
VS.)	
)	Docket No. 1,018,158
RELIABLE REPORTS OF TEXAS)	
Respondent)	
AND)	
)	
LIBERTY MUTUAL INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appealed the April 6, 2005, Award entered by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on July 27, 2005.

APPEARANCES

James E. Martin of Overland Park, Kansas, appeared for claimant. Andrew D. Wimmer of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant alleges he injured his left ankle, right knee and low back in a work-related automobile accident on December 1, 2003. In the April 6, 2005, Award, Judge Benedict found claimant injured his left ankle in the automobile accident and subsequently injured his right knee and low back due to an altered gait. Finding the injuries occurred as a result of separate accidents, the Judge gave claimant three separate awards for three separate permanent disabilities. Accordingly, the Judge awarded claimant (1) permanent partial disability benefits under K.S.A. 44-510d for a 15 percent functional impairment for his left ankle injury, (2) permanent partial disability benefits under K.S.A. 44-510d for an eight percent functional impairment for his right knee injury, and (3) permanent partial general

disability benefits under K.S.A. 44-510e for a four percent whole person functional impairment for his low back injury.

Claimant contends Judge Benedict erred. Claimant argues he sustained multiple injuries from one accident, which resulted in a 14 percent whole person functional impairment, and that he is entitled to a work disability (a permanent partial general disability greater than the functional impairment rating). Accordingly, claimant requests the Board to modify the April 6, 2005, Award and grant him a 47.125 percent work disability for a 38 percent wage loss and a 56.25 percent task loss.

Conversely, respondent and its insurance carrier contend claimant only injured his left ankle in the December 1, 2003, accident and, accordingly, he is not entitled to a work disability as that injury is compensated under the schedule set forth in K.S.A. 44-510d. Respondent and its insurance carrier maintain that if the alleged low back and right knee injuries are compensable, those injuries are the result of a separate accident. In the alternative, if claimant sustained injury to his low back and right knee in the December 1, 2003, accident, respondent and its insurance carrier argue that any wage loss and task loss claimant has are due to the left ankle injury only and, therefore, a work disability is precluded. Consequently, respondent and its insurance carrier request the Board either to award claimant permanent disability benefits for a left ankle injury only or to affirm the Award.

The only issue before the Board on this appeal is the nature and extent of claimant's injuries and disability.

FINDINGS OF FACT

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

1. On December 1, 2003, claimant was injured when the truck he was driving was struck by a car spinning out of control. At the time of the accident, claimant worked for respondent as a residential inspector and was driving to a house to inspect a roof. The parties agreed claimant's accident arose out of and in the course of his employment with respondent.
2. The accident pinned claimant's left ankle between the side of the truck and the emergency brake, caused a large contusion on his right knee from striking either the steering wheel or dashboard, fractured several ribs, and tore some cartilage between his ribs. In short, claimant hurt all over.

3. An ambulance took claimant to a nearby Atchison, Kansas, hospital emergency room. But that hospital sent claimant on to a hospital in Lawrence, Kansas, where claimant came under the treatment of Dr. Richard G. Wendt, the orthopedic surgeon on call.
4. Dr. Wendt diagnosed a grade two to three left ankle sprain. And a February 2004 MRI helped confirm that diagnosis as the MRI showed claimant had an anterior talofibular ligament tear in his left ankle. The doctor's notes from the initial examination do not indicate that claimant complained about either his right knee or his back.
5. As claimant recovered from his initial soreness, he noticed pain in his lower back and hip. On January 6, 2004, which was only a month after his accident, claimant sought low back treatment from his chiropractor, Dr. Dennis L. Anthony. Claimant attributed his low back complaints to the accident and to the manner in which he was walking.
6. On January 7, 2004, according to Dr. Wendt's notes, claimant told Dr. Wendt he was having problems with his right knee. Consequently, the doctor prescribed physical therapy for the knee, which claimant received concurrently with the therapy that was prescribed for his left ankle. X-rays of the right knee were normal. And an MRI of the right knee was nonspecific, although it indicated the possibility of some small nondisplaced tears in both the medial and lateral menisci.
7. While recovering from his injuries, claimant returned to work for respondent. But claimant could not climb ladders or walk on roofs, which were activities he regularly performed as a residential inspector. Consequently, respondent assigned claimant commercial inspections.
8. But claimant made less money doing commercial inspections and, consequently, he began working in October 2004 for another company, Advanced Field Services. In his new position, claimant reviews reports created by the company's residential inspectors. Claimant left respondent, where he had worked for approximately seven years, because he believed he could eventually earn more money with Advanced Field Services and he believed the work would be easier on his body.
9. The parties stipulated, for purposes of any award in this claim, the difference between claimant's pre-injury and post-injury earnings is 38 percent.
10. Dr. Wendt treated claimant through May 12, 2004, but has not seen him since. The doctor concluded claimant sustained a seven percent functional impairment to the

leg due to the left ankle injury.¹ Dr. Wendt did not feel claimant should have any type of ongoing problem or any permanent impairment due to the right knee because the doctor thought claimant only sustained a contusion to that knee as there was no reason to believe he had a cartilage or meniscal tear. When he last saw claimant in May 2004, Dr. Wendt felt the right knee was improving and, therefore, the doctor assumed it would continue to improve.

11. According to Dr. Wendt, claimant did not mention his alleged back pain until their last visit on May 12, 2004. At that time, claimant told the doctor he was having low back problems and seeing a chiropractor. Dr. Wendt was not asked and, therefore, did not otherwise comment about claimant's back.
12. At Dr. Wendt's deposition, the doctor reviewed the list of claimant's former work tasks that was prepared by respondent's vocational expert, Terry L. Cordray. The doctor concluded claimant was no longer able to perform seven of the 20 former work tasks, or 35 percent, due to the left ankle injury.
13. On the other hand, claimant introduced the testimony of orthopedic surgeon Dr. Edward J. Prostic, whom claimant's attorney hired for this claim. Dr. Prostic examined claimant in September 2004 and diagnosed claimant as having chronic low back sprain and strain, patellar tendinitis and abnormal patellar tracking in the right knee, and tendinitis in the left ankle, all of which the doctor attributed to the December 1, 2003, accident. Using the *AMA Guides* (4th ed.), the doctor concluded claimant had a four percent whole person functional impairment due to his low back injury, an eight percent functional impairment to the right leg due to the right knee injury, and a 15 percent impairment to the left leg due to the left ankle injury, all of which combined for a 14 percent whole person impairment.
14. Dr. Prostic also concluded claimant should have the following medical restrictions:

He should limit activities on uneven surfaces, limit climbing, squatting and kneeling, and avoid lifting or carrying weights greater than 50 pounds.²

According to the doctor, the restriction against lifting and carrying weights more than 50 pounds pertained to claimant's back.

¹ The record is not clear whether that rating was pursuant to the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA Guides) (4th ed.) although Dr. Wendt testified he was familiar with the book.

² Prostic Depo. at 15.

15. Dr. Prostic reviewed the list of former work tasks that was prepared by claimant's vocational expert Michael J. Dreiling and the doctor concluded claimant should no longer perform nine of the 16 tasks, or approximately 56 percent.
16. Claimant's chiropractor, Dr. Dennis L. Anthony, also testified. Dr. Anthony treated claimant's low back on a regular basis until October 15, 2004, when the doctor determined claimant's back had reached maximum improvement.
17. Dr. Anthony first treated claimant in June 2000, and saw claimant approximately 14 times before the December 2003 accident for miscellaneous aches and pains in his neck, low back, and thoracic spine. Claimant's most recent visit with Dr. Anthony before the December 2003 automobile accident occurred on June 24, 2003, or more than five months before the automobile accident. In short, the doctor believed claimant's problems before the December 2003 accident were only temporary in nature. Conversely, Dr. Anthony believes claimant's present low back complaints will continue as long as his ankle affects his gait. Dr. Anthony was not asked to estimate claimant's permanent functional impairment.
18. Considering the entire record, the Board concludes claimant sustained permanent injuries to his left ankle, right knee, and low back as a direct result of the December 2003 automobile accident. The Board is also persuaded by Dr. Prostic's opinions that claimant has sustained a 14 percent whole person functional impairment due to that accident.

CONCLUSIONS OF LAW

According to *Jackson*,³ every natural consequence that flows from an injury, including a new and distinct injury, is also compensable under the Workers Compensation Act if it is a direct and natural result of the initial injury. But that general rule was qualified in *Stockman*,⁴ which held that the *Jackson* rule did not apply when a worker sustained a new and separate accident:

The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a

³ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

⁴ *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 505 P.2d 697 (1973).

claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.⁵

And whether a new and distinct injury was a natural and direct consequence of an initial injury or whether the new and distinct injury resulted from a new and separate accident is a question of fact to be decided on a case-by-case basis.

The Board finds the evidence establishes that claimant's right knee and low back injuries are either the direct result of the December 2003 accident or the direct and natural consequence of the left ankle injury and resulting altered gait. Accordingly, claimant is entitled to receive only one award of permanent disability benefits based upon the combined effects of the left ankle, right knee, and low back injuries. The Judge's reliance upon the *Casco*⁶ decision is misplaced as the facts in that claim are readily distinguishable.

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.)

⁵ *Id.* at 263.

⁶ *Casco v. Armour Swift Eckrich*, No. 262,768, 2005 WL 280926 (Kan. WCAB Jan. 25, 2005) (appealed to the Kansas Court of Appeals).

But that statute must be read in light of *Foulk*⁷ and *Copeland*.⁸ 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, which the employer 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 *[sic]* 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. . . .⁹

The Kansas Court of Appeals in *Watson*¹⁰ 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 *[sic]* 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.¹¹

Respondent and its insurance carrier have not argued to the Board that claimant failed to make a good faith effort to find appropriate employment. Instead, the parties acknowledged claimant sustained a wage loss due to the December 2003 accident and, consequently, the parties stipulated claimant sustained a 38 percent wage loss for purposes of determining any work disability.

⁷ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

⁸ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁹ *Id.* at 320.

¹⁰ *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

¹¹ *Id.* at Syl. ¶ 4.

The Board finds Dr. Prostic's 56 percent task loss more persuasive as he considered claimant's left ankle, right knee, and low back in his task loss analysis. Averaging that 56 percent task loss with the 38 percent wage loss creates a 47 percent permanent partial general disability, which claimant should receive in this claim.

The evidence fails to establish that claimant had a preexisting functional impairment in his low back that could be rated under the *AMA Guides* (4th ed.). Accordingly, the award of permanent partial general disability benefits should not be reduced.¹²

AWARD

WHEREFORE, the Board modifies the April 6, 2005, Award entered by Judge Benedict.

Erik B. Edens is granted compensation from Reliable Reports of Texas and its insurance carrier for a December 1, 2003, accident and resulting disability. Based upon an average weekly wage of \$1,082.75, Mr. Edens is entitled to receive 15.43 weeks of temporary total disability benefits at \$440 per week, or \$6,789.20.

For the period from March 19, 2004, through July 1, 2004, Mr. Edens is entitled to receive a total of \$3,614.55 in temporary partial disability benefits.

Commencing July 2, 2004, Mr. Edens is entitled to receive 190.99 weeks of permanent partial general disability benefits at \$440 per week, or \$84,035.60, for a 47 percent permanent partial general disability.

The total award is \$94,439.35.

As of August 5, 2005, Mr. Edens is entitled to receive 15.43 weeks of temporary total disability compensation at \$440 per week in the sum of \$6,789.20, plus \$3,614.55 in temporary partial disability compensation, plus 57.14 weeks of permanent partial general disability compensation at \$440 per week in the sum of \$25,141.60, for a total due and owing of \$35,545.35, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$58,894 shall be paid at \$440 per week until paid or until further order of the Director.

Claimant is entitled to unauthorized medical benefits up to the statutory maximum upon presentation of proof of utilization.

¹² See K.S.A. 44-501(c).

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of August, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: James E. Martin, Attorney for Claimant
- Andrew D. Wimmer, Attorney for Respondent and its Insurance Carrier
- Bryce D. Benedict, Administrative Law Judge
- Paula S. Greathouse, Workers Compensation Director