

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

RANDY L. MAAG)	
Claimant)	
)	
VS.)	
)	
SARA LEE BAKERY GROUP)	
Respondent)	Docket No. 1,025,059
)	
AND)	
)	
INDEMNITY INS. CO. OF NORTH AMERICA)	
Insurance Carrier)	

ORDER

Respondent requested review of the January 25, 2007 Award by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on April 25, 2007.

APPEARANCES

John M. Ostrowski, of Topeka, Kansas, appeared for the claimant. Ryan Weltz, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, the parties agreed that in the event the ALJ's finding with respect to claimant's good faith is resolved in claimant's favor, the balance of the Award can be affirmed.

ISSUES

The ALJ found that the claimant had a 12 percent functional impairment and a 42.9 percent work disability as a result of his work-related injury. The ALJ considered but rejected the respondent's argument that claimant failed to put forth a good faith effort to

retain his job when he resigned on July 29, 2005. Thus, claimant's actual wage loss was used in computing his work disability impairment.

The respondent requests review of the ALJ's factual conclusion with respect to claimant's good faith. Respondent argues that the claimant demonstrated a lack of good faith in retaining his employment when he voluntarily resigned, thereby preventing respondent an opportunity to provide him with accommodated (and presumably comparable) employment. And due to this lack of good faith, respondent argues that claimant is entitled to only the 12 percent functional impairment found by the ALJ.

Claimant argues the Award should be affirmed in all respects. Claimant maintains that the ALJ clearly recognized that the respondent failed to accommodate claimant's restrictions and his decision to resign was reasonable under these circumstances.

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:

The ALJ's Award sets for the facts and circumstances surrounding this claim and the Board adopts that statement as its own. Accordingly, only those facts pertinent to the issues will be discussed.

Claimant worked for the respondent as a route driver. On June 4, 2004, while pushing a large rack of bakery items in a customer's store, the claimant felt a twinge in his low back. He continued to work thinking he had just pulled a muscle, but his low back complaints continued, along with radiating pain into his right leg and so he notified his employer and sought treatment. At this point in time, claimant's regular route took less than 10 hours per day.

Claimant underwent surgery for a three level laminectomy and micro-diskectomy at L5-S1 on June 15, 2004, and returned to light duty on July 13, 2004. After a period of performing light office work, claimant was returned to his a position as a route driver, loading his trucks and delivering product to his route customers. As noted by the ALJ:

[t]his decision was based upon a review of the route driving position by [c]laimant's physical therapist, Les Durst, and after completion of a functional capacities evaluation. Mr. Durst interpreted the functional capacities evaluation and his observation of [c]laimant's job duties to permit [c]laimant to perform those job duties

over an *eight hour workday*. In actuality, [c]laimant's workday could extend from eight to 12 or 13 hours, depending on the route he had to serve.¹

Claimant was found to be at maximum medical improvement on November 22, 2004 and released to work with no restrictions. Over time, the routes were reconfigured and claimant's assigned route was changed to include some larger, and more time consuming, accounts. As a result, his work day was extended to 12 or 13 hours. On July 6, 2005 claimant advised Dr. Manguoglu he was having difficulty during his long shifts, so Dr. Manguoglu issued restrictions directing claimant not to work more than 8 to 10 hours with no lifting over 50 pounds.

Claimant tendered the restrictions to his supervisor, Dennis Hall, by placing them on his desk. Mr. Hall was aware that claimant had another job with Lowe's and in response to the restrictions, he asked the claimant whether the hourly restriction included other part-time employment. Claimant returned to Dr. Manguoglu and on July 20, 2005 the restrictions were reissued to make it clear it was the employment activities with respondent that were to be limited. Again, this was given to Mr. Hall.

Over the next 9 days, no effort was made to contact claimant about changing his route. On July 29, 2005, claimant delivered a resignation letter to Mr. Hall indicating that because his restrictions were not being accommodated and because his excessive hours were causing him "significant/severe discomfort/pain", he would be terminating his employment. A copy of that letter was faxed to Mark White, Mr. Hall's supervisor, in Wichita, Kansas. Claimant's resignation was accepted and at no time was accommodated work offered to claimant. Claimant's last day of work for respondent was August 9, 2005. Claimant found alternative employment within a week of leaving respondent's employment, which yields an actual wage loss of 65 percent.

The Kansas Appellate Courts have interpreted K.S.A. 44-510e(a) to require workers to make a good faith effort to continue their employment post injury. The Court has held a worker who is capable of performing accommodated work should advise the employer of his or her medical restrictions and should afford the employer a reasonable opportunity to adjust the job duties to accommodate those restrictions. Failure to do so is evidence of a lack of good faith.² Additionally, permanent partial general disability benefits are limited to the functional impairment rating when the worker refuses to attempt or voluntarily

¹ ALJ Award (Jan. 25, 2007) at 4.

² See, e.g., *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999), and *Lowmaster v. Modine Mfg. Co.*, 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* 265 Kan. 885 (1998).

terminates a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage.³

The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis.⁴ An employee is not required to seek post-injury accommodated employment with the employer in every case.⁵ An employee may be entitled to a work disability after seeking other employment when the injury prevents him or her from continuing to perform his or her job duties for the employer.⁶

Likewise, employers are encouraged to accommodate an injured worker's medical restrictions. In so doing, employers must also act in good faith.⁷ In providing accommodated employment to a worker, *Foulk* is not applicable where the accommodated job is not genuine⁸ or not within the worker's medical restrictions,⁹ or where the worker is fired after attempting to work within the medical restrictions and experiences increased symptoms.¹⁰ Even returning to one's regular job will not preclude a work disability where the job is only temporary and not offered in good faith.¹¹

The Act neither imposes an affirmative duty upon the employer to offer accommodated work, nor does it impose an affirmative duty upon the employee to request accommodated work. Whether claimant requested accommodated work from an employer is just one factor in determining whether the claimant made a good faith attempt to obtain appropriate work.¹²

³ *Cooper v. Mid-America Dairymen*, 25 Kan. App. 2d 78, 957 P.2d 1120, rev. denied 265 Kan. 884 (1998).

⁴ *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, 9 P.3d 591 (2000).

⁵ *Helmstetter v. Midwest Grain Products, Inc.*, 29 Kan. App. 2d 278, 28 P.3d 398 (2001).

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

⁷ *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999).

⁸ *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

⁹ *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

¹⁰ *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

¹¹ *Edwards v. Klein Tools Inc.*, 25 Kan. App. 2d 879, 974 P.2d 609 (1999), and *Gadberry v. R.L. Polk & Co.*, 25 Kan. App. 2d 800, 975 P.2d 807 (1998).

¹² *Oliver v. Boeing Company*, 26 Kan. App. 2d 74, 977 P.2d 288, rev. denied 267 Kan. 889 (1999).

In contesting claimant's good faith, respondent essentially contends that claimant gave respondent no opportunity to modify routes such that it could accommodate the claimant, thereby avoiding the resulting work disability. But just like the ALJ, the Board finds this argument to be less than persuasive. The ALJ concluded "[r]espondent's position is without merit, as there is no evidence before the court that [r]espondent, once aware of the revised restrictions imposed by Dr. Manguoglu, made any effort to accommodate [c]laimant's restrictions or even communicate with [c]laimant regarding potential accommodation. Respondent had a "history" of not accommodating permanent work restrictions." Thus, "[u]nder these circumstances, [c]laimant has satisfied his obligation of good faith in his efforts to maintain his employment."¹³ The Board agrees.

As of July 6, 2005, respondent knew claimant was having difficulty performing his work duties over the longer work day. He gave Mr. Hall the written restrictions in the hopes of obtaining some sort of accommodation so he could continue working. Even when Mr. Hall questioned whether the limitation in work days applied to just respondent, this was clarified and still, nothing was done to minimize claimant's route and the attendant work hours. Mr. Hall's protestations that he knew nothing of these limitations or claimant's physical difficulties does not ring true, particularly when so many documents were contained within the file he maintained within the office. And even he concedes that respondent does not accommodate permanent work restrictions. This history is corroborated by the case manager's letter to Dr. Manguoglu when she states that "this employer has not previously provided permanent accommodation".

In sum, the Board believes the ALJ's evaluation of claimant's good faith in this matter is accurate and should be affirmed. Accordingly, the Award is affirmed in all respects.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated January 25, 2007, is affirmed in all respects.

¹³ ALJ Award (Jan. 25, 2007) at 8.

IT IS SO ORDERED.

Dated this _____ day of May, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John M. Ostrowski, Attorney for Claimant
Ryan Wertz, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge