

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

FRED E. JONES)	
Claimant)	
VS.)	
)	Docket No. 1,037,902
SECURITAS SECURITY SERVICES)	
Respondent)	
AND)	
)	
INDEMNITY INSURANCE COMPANY OF NORTH AMERICA)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appealed the May 11, 2010, Award and June 1, 2010, Award Nunc Pro Tunc¹ entered by Administrative Law Judge (ALJ) Thomas Klein. The Workers Compensation Board heard oral argument on September 8, 2010.²

APPEARANCES

Fred Spigarelli of Pittsburg, Kansas, appeared for claimant. Dallas L. Rakestraw of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

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

¹ The Award was issued but inadvertently not mailed to the parties. Accordingly, the Award Nunc Pro Tunc was issued on June 1, 2010, but it is also dated May 11, 2010, on page five of the document. The parties do not contest the timeliness of the appeal in this matter.

² E. L. Lee Kinch of Wichita, Kansas, was appointed to serve as a pro tem in this matter in place of former Board Member Carol Foreman.

ISSUES

This is a claim for a January 17, 2007, accident. The ALJ awarded claimant a 70.5 percent permanent partial general disability, which represented a 41 percent task loss and a 100 percent wage loss. The ALJ rejected Dr. Edward J. Prostic's opinion that claimant was permanently and totally disabled as claimant returned to work for respondent following his accident before ultimately being terminated. The ALJ also denied respondent's request to offset or reduce claimant's disability compensation due to the Social Security retirement benefits he was receiving.

Respondent maintains claimant's permanent partial general disability should be limited to his functional impairment rating as claimant was terminated for violating company rules. In the alternative, respondent argues that a post-injury wage of \$300 should be imputed, which would limit claimant's wage loss to 29 percent. Respondent also challenges the ALJ's findings regarding claimant's functional impairment rating, which respondent believes should be reduced. Finally, respondent contends claimant's compensation should be reduced under K.S.A. 2006 Supp. 44-501(h) as he is receiving Social Security retirement benefits. In short, respondent contends claimant's Award and Award Nunc Pro Tunc should be modified and his compensation benefits reduced.

Claimant contends the Award and the Award Nunc Pro Tunc should be modified as he is essentially permanently and totally disabled from engaging in substantial and gainful employment. In the alternative, claimant argues the Award and the Award Nunc Pro Tunc should be affirmed. Regarding the request to offset or reduce claimant's compensation, claimant cites the *Dickens*³ case and argues that an offset is not applicable as he was receiving Social Security retirement benefits before his injury.

The issues before the Board on this appeal are:

1. What is the nature and extent of claimant's injury and disability?
2. Should claimant's permanent partial general disability benefits be reduced under K.S.A. 2006 Supp. 44-501(h) because he is receiving Social Security retirement benefits?

³ *Dickens v. Pizza Co.*, 266 Kan. 1066, 974 P.2d 601 (1999).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Board finds and concludes the Award and the Award Nunc Pro Tunc should be modified to set aside the approval of attorney fees but otherwise affirmed.

Claimant worked for respondent as a security guard. On January 17, 2007, claimant broke his left hip when he slipped on ice and fell. There is no dispute that claimant's accident arose out of and in the course of his employment. The parties stipulated claimant was earning \$424.80 per week when he was injured.

As a result of the accident, claimant underwent left hip surgery. Claimant received slightly more than 38 weeks of temporary total disability benefits as he received those benefits into mid-October 2007. Following the September 2008 regular hearing, respondent contacted claimant and asked him to return to work. In January 2009 claimant returned to work for respondent as a security guard in an accommodated position. But claimant was later terminated in May 2009 for allegedly failing to call in early enough before missing work.

Before commencing work for respondent claimant had withdrawn completely from the workforce due to heart problems. But finding his Social Security benefits inadequate and needing extra income, claimant reentered the workforce in 2005. Upon reentering the labor market, claimant initially took a job at a roadside park and later began working for respondent. Claimant believed he worked for respondent for approximately a year before his accident. When terminated, claimant was receiving approximately \$1,100 per month in Social Security retirement benefits. Claimant explained that he first received Social Security disability benefits at around age 50, but the disability benefits converted to retirement benefits when he reached age 65.

Claimant is 72 years old, has a 12th grade education, and lives in Cherryvale, Kansas. He has not worked since being terminated by respondent and he does not believe he is capable of working. Claimant testified he continued to take pain medication, hydrocodone,⁴ and he felt he was substantially impaired in his ability to bend, sit, and walk. Although he feels he can drive relatively short distances, he has others drive him on longer trips. In August 2009, when he last testified, claimant was not looking for employment as he believed a job would have to be specially created for him before he would be able to return to the workforce.

⁴ Jones Depo. at 26.

What is claimant's functional impairment rating?

At his attorney's request claimant was evaluated by board-certified orthopedic surgeon Dr. Edward J. Prostic. The doctor examined claimant in late April 2008 and concluded claimant had sustained a 25 percent whole person impairment under the AMA *Guides*⁵ due to his left hip injury. The doctor also concluded that claimant's ongoing left hip pain complaints were at least partially due to a protruding hip screw that was used to repair the hip.

The only other functional impairment opinion in the record was from board-certified orthopedic surgeon Dr. John P. Estivo. Dr. Estivo saw claimant on two occasions and prescribed physical therapy. At their third and last meeting, which occurred in October 2007, the doctor determined claimant had reached maximum medical improvement and rated him as having a 22 percent whole person impairment under the AMA *Guides*.

The ALJ gave equal weight to the doctors' functional impairment ratings and concluded that claimant had sustained a 23.5 percent whole person impairment. The Board agrees and adopts that finding as its own. In short, neither doctor's opinion of claimant's functional impairment rating is more persuasive than the other.

Is claimant entitled to receive permanent total disability benefits?

When claimant returned to work for respondent in January 2009 he returned to the Coffeyville refinery where he was initially injured. Respondent created a special job for claimant as respondent had him sit in a building, answering the telephone, and checking people in and out of the refinery. According to claimant other security guards worked from that location and could have easily performed the tasks assigned to him. Claimant testified that as the days progressed he began having trouble completing his eight-hour workday due to the worsening pain and symptoms in his hip. His special job ended, however, when he was fired. Claimant questions the propriety of his termination.

Dr. Prostic concluded that claimant should be restricted to sedentary activities as he has a significant mobility problem. In short, Dr. Prostic believed that considering claimant's age and vocational history, claimant was essentially permanently disabled from performing gainful employment. The doctor, however, acknowledged that claimant was capable of engaging in substantial and gainful employment as long as he could sit the majority of the workday. Moreover, the doctor testified that "with stretch breaks and

⁵ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

whatever he [claimant] can sit for eight hours.”⁶ Stated another way, Dr. Prostic believed there were some jobs that claimant would be able to perform if he had the proper education or opportunity. For example, the doctor believed claimant could perform sedentary work such as working on small electronics, repairing watches, or sitting and watching a bank of security monitors.

Claimant’s labor market expert, Jerry D. Hardin, held a similar view. Although there may be some work that claimant would be able to perform, Mr. Hardin felt, as a practical matter, that there was little possibility claimant would be hired. Mr. Hardin testified, in part:

The report that I have shows what he has the ability to do. I do not personally believe that he will be hired, or that he will find a position at his age, with the restrictions and limitations that he has, but he still has the ability to perform that work, but to answer your question, no, I don’t believe he’ll be hired.⁷

After reviewing and considering the list of claimant’s former work tasks that Mr. Hardin prepared, Dr. Prostic indicated claimant had lost the ability to perform 10 of the 16 tasks (or 63 percent) claimant performed in the 15-year period leading up to his accident.

Dr. Estivo recommended that claimant observe the following restrictions – no kneeling, no squatting, no running, limited stair climbing, and using a cane at all times while at work. Considering those restrictions, Mr. Hardin believed claimant retained the ability to earn \$300 per week. Dr. Estivo also reviewed Mr. Hardin’s task list and determined claimant had lost the ability to perform nine of claimant’s 16 former work tasks (or 56 percent), excluding consideration of duplicate tasks.

Respondent hired vocational rehabilitation counselor Steve L. Benjamin, who owns a vocational rehabilitation consulting company, to devise a list of claimant’s former work tasks and to provide a wage loss opinion. After reviewing and considering Mr. Benjamin’s task list, Dr. Estivo excluded the duplicate tasks and concluded claimant had lost the ability to perform nine of the 22 tasks (or 41 percent) claimant performed in the 15 years preceding his accident.

Mr. Benjamin interviewed claimant in October 2009 and concluded claimant would be able to return to the labor force under Dr. Estivo’s restrictions. Mr. Benjamin also concluded that claimant should be able to perform the following jobs and earn on average

⁶ Prostic Depo. at 15.

⁷ Hardin Depo. at 29.

\$299.20 without violating Dr. Estivo's recommended restrictions: bench assembler, desk security guard, hand packager, greeter/host, and manufacturing helper.

The ALJ concluded claimant was not entitled to permanent total disability benefits. The Board agrees as the record establishes that claimant retains the ability to perform sedentary work.

Claimant maintains that he is permanently, totally disabled. In the alternative, claimant requests the Board to affirm the ALJ's findings regarding task loss and wage loss. Accordingly, the Board finds that claimant has sustained a 41 percent task loss as opined by Dr. Estivo.

What is claimant's permanent partial general disability?

Claimant has a hip injury, which does not fall within the schedule of K.S.A. 44-510d. Consequently, the calculation of claimant's permanent partial disability benefits is governed by K.S.A. 44-510e, which provides, in part:

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.)

While this claim was pending the Kansas Supreme Court decided *Bergstrom*,⁸ which held the language of K.S.A. 44-510e is clear and unambiguous that determining permanent partial general disability is accomplished by merely performing the mathematical task of averaging a worker's actual wage loss with the worker's task loss. More importantly, the

⁸ *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

Kansas Supreme Court ruled that the Board should not delve into a worker's efforts to find appropriate post-injury employment nor question the reasons for a worker's unemployment following an accident. In short, the Kansas Supreme Court held the formula for permanent partial general disability in K.S.A. 44-510e should be followed explicitly and the Board should not attempt to determine what the law should or should not be. Consequently, *Bergstrom* overruled a host of appellate decisions that held a worker's post-injury wage should be based upon the worker's ability to earn wages rather than the worker's actual wages when the worker had failed to make a good faith effort to obtain or retain employment following an injury. The Kansas Supreme Court stated, in pertinent part:

When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.⁹

K.S.A. 44-510e(a) contains no requirement that an injured worker make a good-faith effort to seek postinjury employment to mitigate the employer's liability. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 320, 944 P.2d 179 (1997), and all subsequent cases that have imposed a good-faith effort requirement on injured workers are disapproved.¹⁰

We can find nothing in the language of K.S.A. 44-510e(a) that requires an injured worker to make a good-faith effort to seek out and accept alternate employment. The legislature expressly directed a physician to look to the tasks that the employee performed during the 15-year period preceding the accident and reach an opinion of the percentage that can [*sic*] still be performed. That percentage is averaged together with the difference between the wages the worker was earning at the time of the injury and the wages the worker was earning after the injury. The legislature then placed a limitation on permanent partial general disability compensation when 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.) K.S.A. 44-510e(a). The legislature did not state that the employee is required to *attempt to work* or that the employee *is capable of engaging in work* for wages equal to 90% or more of the preinjury average gross weekly wage.¹¹

⁹ *Id.*, Syl. ¶ 1.

¹⁰ *Id.*, Syl. ¶ 3.

¹¹ *Id.*, at 609-610.

In the absence of *Bergstrom*, the circumstances surrounding claimant's termination from respondent's employment may have been considered in determining claimant's permanent partial general disability benefits. But *Bergstrom* makes those circumstances irrelevant as good faith in obtaining or retaining employment is not an element of the permanent partial general disability formula. The ALJ and Board must follow the explicit language of the disability formula rather than carving out exceptions to that formula based on equitable precept or putative public policy. In short, claimant's actual post-injury earnings must be used in computing his permanent partial general disability.

As indicated above, the permanent partial general disability formula under K.S.A. 44-510e is an average of the worker's actual wage loss and the worker's task loss. Claimant is unemployed and, therefore, the difference in his pre-injury and post-injury wages is 100 percent. Averaging that 100 percent wage loss with his 41 percent task loss creates a 70.5 percent permanent partial general disability.

Should claimant's permanent partial general disability benefits be reduced because claimant is receiving Social Security retirement benefits?

The Workers Compensation Act provides that a worker's disability compensation may be reduced or offset by Social Security retirement benefits. K.S.A. 2006 Supp. 44-501(h) provides:

If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.

The Kansas Supreme Court, however, has considered that statute and has held that workers compensation benefits are not offset when the injured worker was receiving Social Security retirement benefits before the accident at work. The Kansas Supreme Court reasoned the offset was intended to prevent the duplication of wage loss replacement benefits, but there is no such duplication when the worker was injured after commencing receipt of the Social Security benefits. The Court noted, in part:

When a retired person who works to supplement social security income suffers a second wage loss when injured in the course of employment, K.S.A. 1998 Supp. 44-501(h) does not apply.¹²

... “[T]he social security offset in K.S.A. [1998 Supp.] 44-501(h) is rationally related to the valid state interest of preventing the duplication of wage loss replacement benefits.” *Franklin*, 262 Kan. at 870.¹³

Boyd, the case relied on by the ALJ, held that K.S.A 1976 Supp. 44-510f(c) did not apply to a worker who had already retired, but was working to supplement his social security income. 2 Kan. App. 2d at 429. *Boyd* concluded “that the legislature did not intend K.S.A. 1976 Supp. 44-510f(c) to apply to plaintiff and those similarly situated, even though the literal wording of that provision might seem to include them.” 2 Kan. App. 2d at 429. The *Boyd* court reasoned that a retired person who works to supplement social security income suffers a second wage loss when injured in the course of supplemental employment. 2 Kan. App. 2d at 428. Preventing compensation for a second wage loss was inconsistent with the intent of K.S.A. 1976 Supp. 44-510f(c) to avoid wage-loss duplication. There is no wage-loss duplication in the scenario of a worker injured after receiving social security benefits.¹⁴

Applying K.S.A. 1998 Supp. 44-501(h) to a retired worker receiving social security benefits would preclude replacement of wages which the legislature intended to provide under the Workers Compensation Act, K.S.A. 44-501 *et seq.*¹⁵

There is no dispute that claimant was receiving Social Security retirement benefits before his January 2007 accident. There is no wage loss duplication by compensating claimant for that accident under the Workers Compensation Act. Consequently K.S.A. 2006 Supp. 44-501(h) does not apply and claimant’s permanent partial general disability benefits are not offset or reduced.

In summary, the Award and the Award Nunc Pro Tunc should be modified to set aside the approval of attorney fees. The ALJ approved claimant’s attorney fee contract. But the record does not contain a written attorney fee contract between the claimant and his attorney.

¹² *Dickens v. Pizza Co.*, 266 Kan. 1066, Syl. ¶ 2, 974 P.2d 601 (1999).

¹³ *Id.*, at 1069.

¹⁴ *Id.*

¹⁵ *Id.*, Syl. ¶ 3.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹⁶ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the May 11, 2010, Award and June 1, 2010, Award Nunc Pro Tunc entered by ALJ Thomas Klein and sets aside the approval of claimant's attorney fees. In all other respects, the Award and the Award Nunc Pro Tunc are affirmed.

A reasonable fee shall be awarded in accordance with K.S.A. 44-536 upon presentation of the written attorney fee contract and subject to the Director's approval. The provision in the Award and the Award Nunc Pro Tunc approving claimant's attorney fee arrangement is set aside.

IT IS SO ORDERED.

Dated this ____ day of November, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Fred Spigarelli, Attorney for Claimant
- Dallas L. Rakestraw, Attorney for Respondent and its Insurance Carrier
- Thomas Klein, Administrative Law Judge

¹⁶ K.S.A. 2009 Supp. 44-555c(k).