

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

CORY WILLINGHAM)	
Claimant)	
)	
VS.)	Docket No. 1,048,327
)	
CITY OF TOPEKA)	
Self-Insured Respondent)	

ORDER

STATEMENT OF THE CASE

Respondent requested review of the May 3, 2011, Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on August 2, 2011. The Director appointed Gary Terrill to serve as Appeals Board Member Pro Tem in place of former Board Member Julie A.N. Sample. George H. Pearson, of Topeka, Kansas, appeared for claimant. Matthew S. Crowley, of Topeka, Kansas, appeared for self-insured respondent.

The Administrative Law Judge (ALJ) found that claimant was a full-time employee with a 40-hour work week and a wage of \$9.50 per hour. Accordingly, he found claimant's preinjury average weekly wage was \$380. The ALJ found the rating opinion of Dr. Peter Bieri to be more credible than the rating opinions of Dr. Phillip Baker and Dr. Edward Prostic and that claimant had a 7 percent whole body functional impairment. The ALJ also found that claimant was entitled to a work disability of 71.34 percent based on a 100 percent wage loss and a 42.67 percent task loss. The ALJ computed claimant's task loss by averaging the task loss opinions of Drs. Bieri, Baker and Prostic.

The Board has considered the record and adopted the stipulations listed in the Award.¹ In addition to the record listed by the ALJ, the record also contains the parties' Stipulation filed March 14, 2011 and the Stipulation filed April 25, 2011.

¹ For the reasons explained below, however, the Board has not determined whether all of Dr. Bieri's opinions are a part of the record.

ISSUES

Respondent requests review of the ALJ's findings concerning claimant's average weekly wage and whether claimant received an overpayment of temporary total disability benefits. Further, respondent asks the Board to review the nature and extent of claimant's disability. Respondent objects to the task loss opinion of the court-ordered independent medical examiner, Dr. Bieri, being considered as part of the record. Respondent further asks the Board to review whether claimant had preexisting disability as contemplated under K.S.A. 2010 Supp. 44-501 and if so, what was the amount of claimant's preexisting disability.

Claimant argues that he was a full-time employee who was expected to be available to work 40 hours a week. Claimant also asserts that the ALJ properly found a work-related injury to his lumbar spine and that he was entitled to a work disability based on a 100 percent work loss and a task loss of either the 42.67 percent as determined by the ALJ or the 47 percent task loss opined by Dr. Bieri. Accordingly, claimant requests that the Award of the ALJ be increased to a 73.5 percent work disability or affirmed in its entirety.

The issues for the Board's review are:

- (1) What was claimant's preinjury average weekly wage?
- (2) Was there an overpayment of temporary total disability benefits?
- (3) What is the nature and extent of claimant's disability?
- (4) Should the task loss opinion given by Dr. Bieri be excluded from the record?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board must first address issue number 4 as to what is in the record the Board is to consider in its review of the ALJ's Award. Respondent argues that the task loss opinion given by Dr. Bieri during his deposition should be excluded from the record because it was given in violation of the ALJ's neutrality order. Claimant disagrees and asserts that because claimant only contacted Dr. Bieri after the court appointed expert had rendered his IME report, the neutrality of that expert was not interfered with and the ALJ's no-contact order was not violated.

On August 4, 2010, the ALJ entered an Order Referring Claimant for Independent Medical Evaluation which provided:

Now on this 4th day of August, 2010, the above-captioned matter comes on for hearing on the motion of the Administrative Law Judge for the Division of Workers Compensation of the State of Kansas. After due consideration of the

evidence, the Court determined to refer claimant for an independent medical evaluation and disability rating.

That the claimant is referred for an independent medical examination and recommendations per K.S.A. 44-510e(a) and/or K.S.A. 44-516, to be paid as assessed costs to the parties, with costs being paid initially by respondent and insurance carrier, to Dr. Peter Bieri, 3110 Mesa Way, Suite C, Lawrence, KS 66049, (785) 841-5217, for evaluation and disability rating regarding an alleged work-related injury sustained by claimant allegedly with respondent, and recommendations regarding what future medical treatment is appropriate, if any. Restrictions are to be imposed and opinions concerning apportionment of any pre-existing impairment of the affected body parts, together with opinions concerning loss of task-performing ability, if any, are to be given as appropriate.

The parties are hereby instructed to furnish Dr. Bieri with all medical records and pertinent medical materials, including x-rays, which they presently have in their possession. A copy of such medical report is to be forwarded by Dr. Bieri to the Administrative Law Judge and also to counsel for the parties involved.

Counsel for claimant, Mr. George Pearson, is to make the appointment for such evaluation at the physician's earliest convenience. Additionally, Mr. Pearson, is to prepare on non-letterhead stationery, a letter of confirmation of the appointment made, and an itemization of the relevant medical reports and records to be reviewed by Dr. Bieri. Such letter is to be forwarded to Dr. Bieri, after counsel for both the claimant and counsel for respondent-insurance carrier have affixed their signatures. Any direction concerning further contacts, tests, or referrals, need to be approved by the undersigned. The attorneys are to refrain from further contact with the independent medical evaluator without court approval, except to respond to additional information that the evaluator might request. The claimant will cooperate by keeping the scheduled appointment. The parties shall notify the doctor's office if the appointment needs to be cancelled, in order to avoid cancellations charges.

Failure to comply with this directive may result in the appropriate sanction, including, but not limited to the striking of any subsequent reports authored by the neutral physician. Independent medical evaluation fees are to be paid within 30 days of the appointment.

The doctor is directed to provide copies of the report of independent medical examination to the Court and all counsel of record after completion of the examination. Counsel for the respective parties may depose the examining physician after completion of the examination. If this order has been issued after the expiration of the respondent's terminal date, and the Court has reset or suspended terminal dates, Counsel wishing to depose the doctor shall notify the Court in writing within 10 days of the date of this order of the intent to take the doctor's deposition. If the intent to take a deposition is provided to the Court and counsel subsequently elects not to schedule the depositions, counsel shall notify the

Court in writing that the deposition was not scheduled. Once a deposition is scheduled, counsel shall also provide a written notice of deposition to the Court.

K.S.A. 44-510e(a) states in part:

(a) If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of disagreement, except that in case of temporary or permanent partial general disability not covered by such schedule, the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks. Weekly compensation for temporary partial general disability shall be 66 2/3% of the difference between the average gross weekly wage that the employee was earning prior to such injury as provided in the workers compensation act and the amount the employee is actually earning after such injury in any type of employment, except that in no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c and amendments thereto. 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. If the employer and the employee are unable to agree upon the employee's functional impairment and if at least two medical opinions based on competent medical evidence disagree as to the percentage of functional impairment, such matter may be referred by the administrative law judge to an independent health care provider who shall be selected by the administrative law judge from a list of health care providers maintained by the director. The health care provider selected by the director pursuant to this section shall issue an opinion regarding the employee's functional impairment which shall be considered by the administrative law judge in making the final determination.

K.S.A. 44-516 states:

In case of a dispute as to the injury, the director, in the director's discretion, or upon request of either party, may employ one or more neutral health care providers, not exceeding three in number, who shall be of good standing and ability. The health care providers shall make such examinations of the injured employee as the director may direct. The report of any such health care provider shall be considered by the administrative law judge in making the final determination.

K.A.R. 51-7-6 states:

If a neutral physician is appointed, the written report of that neutral physician shall be made a part of the record of hearing. Either party may cross examine each neutral physician so employed. The fee of the neutral physician giving such testimony shall be assessed as costs to a party at the administrative law judge's discretion.

A copy of the Order Referring Claimant for Independent Medical Evaluation (IME Order) was sent to counsel for claimant, counsel for respondent and to Dr. Bieri. Although the IME Order included a request for "opinions concerning loss of task-performing ability" the parties acknowledged during oral argument to the Board that a task list was not included with the records sent to Dr. Bieri with their joint letter. The joint confirmation letter, with the list of medical records and any other materials sent to Dr. Bieri was not made a part of the record.

Dr. Bieri issued a court-ordered IME report dated October 12, 2010 which is stamped "Received" by the Division of Workers Compensation on November 12, 2010. That report includes Dr. Bieri's recommendations concerning physical restrictions for claimant but it does not contain a task loss opinion. Thereafter, on February 8, 2011, claimant's counsel wrote a letter to Dr. Bieri inclosing a copy of the task list prepared by claimant's vocational expert, Dick Santner, and asking the doctor to "review this task list and give us your opinion on what Cory [claimant] is capable of performing in light of his permanent work restrictions."² Neither the ALJ nor respondent's counsel was copied on the letter. Dr. Bieri responded to that letter as requested and, according to claimant's counsel, a copy of that response was provided to respondent's counsel. The deposition of Dr. Bieri was taken on April 5, 2011 by respondent, pursuant to notice served by respondent on February 22, 2011. During that deposition, counsel for claimant asked Dr. Bieri for his opinions concerning claimants ability to perform his former job tasks whereupon counsel for respondent objected.

Q. (By Mr. Pearson) Let's talk about did I send you a task list -- looks like February 8, 2011?

² Bieri Depo., Resp. Ex. 4.

A. Yes, sir.

Q. And that was after you had already authored the report of October 12, 2010?

MR. CROWLEY: I'm going to object to the line of questioning on any task list is a violation of the Judge's order.

MR. PEARSON: No, I didn't think it is since the Doctor had already written his report, and I think the Judge's order is up through the time the doctor authored the report.

MR. CROWLEY: With the objection, I'm going to state that the record does reflect that the order was issued and that no contact was to be made without leave of Court, and that you did not get such leave.

MR. PEARSON: Well, I have had this come up before, and the order applies until the doctor writes the report. And so your objection, you can have a running objection if that will save some time here.

MR. CROWLEY: That will.

MR. PEARSON: Okay.

Q. (By Mr. Pearson): Doctor, I sent you a letter dated February 8, 2011, containing Mr. Santner task list consisting of 30 job tasks that we have had marked Claimant's Exhibit 1, did I not?

A. Yes, sir.

Q. And you had already authored your report in conjunction with the Judges' order and completed that report, had you not?

A. Yes.

Q. And did I ask you to render your opinion on what tasks out of the 30 tasks that Mr. Santner had identified?

A. Yes.

MR. PEARSON: I may have -- bear with me one second, Doctor.

Q. (By Mr. Pearson): Doctor, Mr. Santner did an addendum and testified to an addendum for the task list. And so I am going to ask our court reporter if she would --

(Thereupon, Claimant's Exhibit 2 was marked for identification.)

Q. There has been an addendum, Doctor, to the task list that I had sent you and we have had this marked Claimant's Exhibit 2. It consists of Tasks 31 through 36. And before I ask you about the, the original task list, I would ask you to take a look at the addendum and go ahead if you would write down which of those you would preclude Mr. Willingham from performing as beyond his capacity?

MR. CROWLEY: Just so the record is clear, this whole line of questioning falls under the objection I previously made.

A. I've completed that. [sic]

Q. (By Mr. Pearson) And with Mr. Crowley's running objection, of course, still in force and effect, I am going to ask you to [take] a look at Claimant's Exhibit 1. Is that responses to the left of those tasks from you, Doctor?

A. Yes.³

The ALJ never expressly ruled on respondent's objections, either in the Award or before. The ALJ did, however, consider Dr. Bieri's task loss opinions in his determination of claimant's permanent partial disability. That may constitute a ruling by implication denying respondent's objection. But because it is not clear that the ALJ actually considered the respondent's objection, the Board does not have the benefit of a determination, much less an explanation, of whether the ALJ considered the ex parte contact by claimant's counsel with Dr. Bieri constituted a violation of his IME Order where the contact occurred after the IME report had already been issued.⁴ Claimant's counsel argues that this is a common and accepted practice whereas respondent's counsel contends that it is not. Under these circumstances, the Board considers it prudent to give the ALJ another opportunity to rule on respondent's objection to determine whether claimant's counsel's contact with Dr. Bieri violated the ALJ's IME Order and what, if any, sanctions are appropriate.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated May 3, 2011, is hereby remanded to the ALJ for a determination on respondent's objection to the admission of Dr. Bieri's opinions concerning claimant's loss of task performing ability. The Board does not retain jurisdiction of this appeal.

³ Bieri Depo. at 44-46.

⁴ To be fair, the ALJ may not have considered this to be a serious objection as neither party filed a motion to obtain a ruling on respondent's objection before the expiration of terminal dates and respondent did not renew it's objection in a submission letter to the ALJ.

IT IS SO ORDERED.

Dated this _____ day of August, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
Matthew S. Crowley, Attorney for Self-Insured Respondent
Brad E. Avery, Administrative Law Judge