

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

<b>JESUS CHAVEZ</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 204,408
<b>IBP, INC.</b>	)	
Respondent	)	
Self-Insured	)	
	)	

**ORDER**

Respondent appealed the Award dated February 27, 1998, entered by Administrative Law Judge Floyd V. Palmer. Jeff K. Cooper was appointed Board Member Pro Tem to serve in place of Gary Korte who recused himself from this proceeding. The Appeals Board heard oral argument on December 2, 1998.

**APPEARANCES**

Diane F. Barger of Wichita, Kansas, appeared for the claimant. Gregory D. Worth of Lenexa, Kansas, appeared for respondent.

**RECORD AND STIPULATIONS**

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

**ISSUES**

This is a claim for a May 2, 1995 accident. The Judge found that claimant unreasonably refused medical treatment and, therefore, limited claimant's permanent partial general disability to his 32 percent functional impairment rating. Also, the Judge used a six day work week to compute claimant's average weekly wage at \$365.58.

Respondent requested the Appeals Board to review nature and extent of disability and average weekly wage. First, respondent argues that claimant's functional impairment is less than that found by the Judge. Second, respondent asserts that claimant's average weekly wage should be based upon a five day work week rather than six. Third, respondent contends that claimant should be limited to medical benefits only under the

Boucher<sup>1</sup> rationale because claimant's injury allegedly did not disable him from earning full wages for at least one week.

Claimant, on the other hand, contends that the Judge erred by failing to award a work disability. Claimant requests the Board to affirm the Judge's finding of average weekly wage.

The only issues before the Appeals Board on this review are:

- (1) What is the nature and extent of claimant's injury and disability?
- (2) What is claimant's average weekly wage?

#### FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds as follows:

- (1) Jesus Chavez injured both shoulders and arms while working for IBP, Inc. The accident date for purposes of computing this award for repetitive trauma injuries is May 2, 1995.
- (2) As a result of his work activities, Mr. Chavez has a confirmed rotator cuff tear in the left shoulder, a probable tear in the right shoulder, bilateral shoulder tendinitis, and bilateral carpal tunnel syndrome.
- (3) IBP provided Mr. Chavez with medical treatment from board certified orthopedic surgeon Michael Montgomery, M.D. The doctor offered Mr. Chavez surgery to repair the torn left rotator cuff. But Mr. Chavez declined.
- (4) In June 1995, when Dr. Montgomery began treating Mr. Chavez, IBP modified his job duties and placed him in a job where he took out the trash and stacked empty boxes. When the doctor modified the temporary work restrictions, IBP then placed Mr. Chavez in an easier job where he picked meat and bones from a conveyer belt on the hamburger line.
- (5) In September 1995, Dr. Montgomery gave Mr. Chavez his permanent work restrictions - no lifting over 20 pounds and no extending the elbows away from the body.
- (6) Mr. Chavez performed the picking job until he terminated his employment with IBP on November 29, 1996, and moved to Mexico, his native country.

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<sup>1</sup>Boucher v. Peerless Products, Inc., 21 Kan. App. 2d 977, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996).

(7) Although Mr. Chavez contends that he quit because he was hurting and unable to perform his job, he neither sought additional medical treatment at that time nor did he ask for an easier job.

(8) At some unidentified point in time, Mr. Chavez did advise the supervisor that the picking job violated his 20 pound lifting restriction. The supervisor then demonstrated how Mr. Chavez could limit the pans and buckets of meat that he was handling to the 20 pound limit. The record fails to establish that Mr. Chavez later advised IBP that he was unable to perform the picking job for any other reason or that additional accommodations were needed.

(9) In December 1995, at his attorney's request, Mr. Chavez saw Pedro A. Murati, M.D. Although Dr. Murati examined and evaluated Mr. Chavez, he did not restrict him from performing the picking job that Mr. Chavez held at that time.

(10) In July 1996, Dr. Artz found that Mr. Chavez was "doing quite well" performing the picking job. At that time, Mr. Chavez was adamant that he did not want any additional medical treatment or evaluation as he only desired an impairment rating to settle his workers compensation claim.

(11) Mr. Chavez appeared and testified at the November 7, 1996 regular hearing. When he next testified at his deposition on January 13, 1997, he had quit his job at IBP and had moved to Mexico. At the deposition, Mr. Chavez testified that he would not accept employment at IBP because he felt that he could not work anywhere at that time.

(12) Because of his bilateral arm and shoulder injuries, Mr. Chavez has lost the ability to perform 100 percent of his former work tasks that he performed within the 15-year period before his work related accident. That conclusion is based upon the testimony of orthopedic surgeon Tyrone D. Artz, M.D. who examined Mr. Chavez at the Division's request.

(13) While working for IBP, Mr. Chavez was sometimes expected to work on Saturdays. But when he did work on Saturday, he was given another day off in exchange.

(14) Because the record does not otherwise establish Mr. Chavez's post-injury ability to earn wages, the Appeals Board finds that he retains the ability to earn the U.S. Federal minimum wage of \$5.15 per hour, or \$206 per week.

#### **CONCLUSIONS OF LAW**

(1) Because Mr. Chavez has sustained an "unscheduled" injury, his entitlement to permanent partial general 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 at any substantial gainful employment during the 15-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of 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. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of the 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.

But that statute must be read in light of Foulk<sup>2</sup> and Copeland<sup>3</sup>. In Foulk, the Court held that a worker could not avoid the presumption of no work disability contained K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that paid a comparable wage that the employer had offered. In Copeland, the Court held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wage should be based upon ability rather than actual wages when the worker fails to put forth a good faith effort to find appropriate employment after recuperating from the injury.

(2) The Appeals Board finds that the Foulk rationale applies to these circumstances. First, IBP demonstrated its willingness to accommodate Mr. Chavez. When Dr. Montgomery changed the temporary medical restrictions, IBP gave Mr. Chavez an easier job picking meat and bones from the hamburger line. Second, Mr. Chavez performed that job over one year with minimal complaints. When he advised the supervisor of a problem with lifting over 20 pounds, the supervisor demonstrated how the job could be accomplished within the 20 pound weight limit. Third, the record fails to establish that Mr. Chavez made any additional complaints to IBP about the requirements of the picking job or that it was causing him any physical problems. In fact, when he quit Mr. Chavez was not seeking additional medical treatment.

(3) Considering the lack of complaints regarding the picking job, the failure to request additional medical treatment, the failure to request different job duties, immediately moving to Mexico and, thus, removing himself from the U.S. labor market, Dr. Artz's conclusion in July 1996 that Mr. Chavez was doing quite well performing the picking job, the failure to

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<sup>2</sup>Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140, *rev. denied* 257 Kan. 1091 (1995).

<sup>3</sup>Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

meet with IBP to discuss the need for additional accommodations, the lack of desire to seek medical treatment that might benefit him, the Appeals Board is not convinced that Mr. Chavez quit his job due to an inability to perform it.

(4) The Appeals Board acknowledges that Dr. Artz testified that the picking job was beyond Mr. Chavez's restrictions as it might violate the restriction against lifting overhead or reaching and working too far out in front of him. But the record contains no explanation why Mr. Chavez would be required to lift pans of meat overhead instead of holding and carrying the pan close to his body, or how the picking duties violate the reaching restrictions when, according to Dr. Murati, Mr. Chavez can reach and work one and half feet in front of him. Further, Dr. Artz's opinion is weakened as he did not restrict Mr. Chavez from performing the picking job when the doctor evaluated him in July 1996 and found that he was doing quite well.

(5) The Appeals Board also finds that the Copeland rationale applies to these facts. Mr. Chavez performed the picking job for over a year. And during that time he did not complain about that job to either Dr. Montgomery, Dr. Murati, or Dr. Artz when he saw them before quitting in November 1996. The Appeals Board is not convinced that Mr. Chavez made a good faith effort to retain his employment with IBP and, thus, retain a comparable wage job.

The record is relatively silent concerning the details surrounding Mr. Chavez's termination. The record does not convince the Appeals Board that IBP was aware that further adjustments or accommodations were necessary. The Appeals Board concludes that the Workers Compensation Act requires both the employer and employee to exercise good faith in returning the employee to work. In an earlier case, the Board stated:

The Appeals Board also agrees, on the other hand, that a claimant who is performing accommodated work should advise the employer of problems working within the restrictions and afford the employer the opportunity to adjust or at least decide whether it wants to adjust the accommodation. The failure on the part of the employee to do so would in many cases be strong evidence that claimant is not making a good faith effort.<sup>4</sup>

Here, the record establishes that IBP made a good faith effort to accommodate Mr. Chavez's medical restrictions. But the record fails to establish that Mr. Chavez exercised good faith in retaining his employment with the company.

Further, the Appeals Board concludes that Mr. Chavez was not looking for employment when he last testified as he did not believe that he was healthy enough to

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<sup>4</sup>Hunsecker v. Enterprise Estate Nursing Center, Docket No. 186,229 (December 1996).

work anywhere. That alone violates the Copeland rationale, as Mr. Chavez has failed to make a good faith effort to find appropriate employment.

(6) The Appeals Board concludes that under these facts, Mr. Chavez's termination is tantamount to refusing to attempt to perform an accommodated job that paid a comparable wage. Therefore, pursuant to Foulk, Mr. Chavez's benefits are limited to the 32 percent functional impairment rating as determined by the Judge.

(7) Because Mr. Chavez declined shoulder surgery, the Judge limited the permanent partial general disability to the functional impairment rating. The Appeals Board finds that the parties did not raise the reasonableness of the refusal as an issue to be decided by the Judge. Therefore, Mr. Chavez was not afforded an opportunity to address that issue or given a hearing as contemplated by K.A.R. 51-9-5. The Appeals Board concludes that the Judge's finding that Mr. Chavez refused reasonable medical treatment should be set aside.

(8) For different reasons than those of the Judge, the Appeals Board affirms the finding and conclusion that Mr. Chavez's permanent partial general disability benefits are limited to his 32 percent functional impairment rating.

(9) Because Mr. Chavez's injuries eliminated his ability to perform the type of work that he was performing when the injuries occurred, the Boucher rationale does not apply. The Appeals Board finds that Mr. Chavez's accidental injuries have disabled him "for a period of at least one week from earning full wages at the work at which the employee is employed."<sup>5</sup>

(10) Mr. Chavez argues that his average weekly wage should be computed using a six day work week. The Appeals Board disagrees. Because he was given another day off for working Saturday, Mr. Chavez was not expected to work six days per week. Therefore, his average weekly wage is \$325.86 which is comprised of \$280 per week straight time, \$24.94 per week overtime, and \$20.92 per week for other wages, all as indicated in the exhibit introduced at Mr. Chavez's deposition.

### **AWARD**

**WHEREFORE**, the Appeals Board modifies the Award to reduce the average weekly wage from \$365.58 to \$325.86, but otherwise affirms the conclusion that the claimant has a 32 percent permanent partial general body disability.

Jesus Chavez is granted compensation from IBP for a May 2, 1995, accident and a 32% permanent partial general disability. Based upon a \$325.86 average weekly wage,

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<sup>5</sup>K.S.A. 44-501(c).

Mr. Chavez is entitled to 132.8 weeks of permanent partial disability benefits at \$217.25 per week, or \$28,850.80.

As of January 31, 1999, the entire award is due and owing, less any amounts previously paid.

The Appeals Board adopts the remaining orders contained in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January 1999.

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BOARD MEMBER PRO TEM

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BOARD MEMBER

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BOARD MEMBER

c: Diane Barger, Wichita, KS  
Gregory D. Worth, Lenexa, KS  
Philip S. Harness, Director