

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

MAXINE McGHEE)	
Claimant)	
VS.)	
)	Docket No. 210,059
PAYLESS SHOESOURCE)	
Respondent)	
Self-Insured)	

ORDER

Claimant appeals the January 25, 2000, Award on respondent's Application for Review and Modification of Administrative Law Judge Bryce D. Benedict. Claimant's award was reduced to the 4 percent functional impairment which had been earlier stipulated to by the parties. The Administrative Law Judge found that claimant failed to put forth a good faith effort, post award, to locate appropriate employment. Respondent's vocational counselor had provided claimant with six job leads which would have allowed claimant to earn a wage comparable to what she was earning at the time of her injury. Claimant's failure to properly follow up on those leads resulted in that wage being imputed to claimant and, therefore, claimant being limited to a functional impairment pursuant to K.S.A. 44-510e. Oral argument before the Board was held on July 6, 2000.

APPEARANCES

Claimant appeared by her attorney, Judy A. Pope of Topeka, Kansas. Respondent appeared by its attorney, John A. Bausch of Topeka, Kansas.

RECORD AND STIPULATIONS

The record and stipulations set forth in the Award of the Administrative Law Judge dated March 18, 1997, and in the Award on respondent's Application for Review and Modification dated January 25, 2000, are adopted by the Appeals Board for the purposes of this decision.

ISSUES

- (1) Is respondent entitled to a review and modification of the March 18, 1997, Award issued by Administrative Law Judge

Benedict? If so, what is the nature and extent of claimant's disability?

- (2) Is claimant's attorney entitled to post-award attorney fees pursuant to K.S.A. 44-536?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file herein, the Appeals Board finds as follows:

Claimant initially suffered accidental injury on November 4, 1994, while working for respondent. The matter went to litigation and, in an Award dated March 18, 1997, the Administrative Law Judge awarded claimant a 69 percent permanent partial work disability based upon a 38 percent loss of work tasks and a 100 percent loss of wages.

Shortly thereafter, respondent contacted Dick Santner, a vocational rehabilitation counselor in Kansas, requesting he provide job placement assistance to claimant. Mr. Santner first contacted claimant and her attorney in May 1997 and was advised that claimant was preparing to relocate to Mississippi.

In a July 3, 1997, letter from claimant's attorney, Mr. Santner was advised that claimant had relocated to New Albany, Mississippi. Mr. Santner then contacted David E. Stewart, a vocational rehabilitation counselor in Mississippi. Mr. Stewart was requested to provide job placement services for claimant in the New Albany, Mississippi, area. A job search plan was formulated by Mr. Stewart and presented to claimant's attorney. While the plan was verbally accepted by claimant and claimant's attorney, the plan was never actually signed by claimant or returned to either Mr. Santner or Mr. Stewart. In November 1997, both Mr. Santner and Mr. Stewart recommended that the file be closed due to claimant's lack of participation in the plan.

Evidence in the record indicates that, around that time, claimant underwent surgery not related to her work-related injury. Claimant argues that surgery prohibited her from participating in the plan.

In June 1999, Mr. Stewart was contacted by respondent and instructed to reestablish contact with the claimant. Mr. Stewart contacted claimant through her attorney. Mr. Stewart had a telephone conference with claimant on August 3, 1999, and an in-person meeting with claimant on August 16, 1999. As a result of that meeting, Mr. Stewart prepared a market survey for the New Albany, Mississippi, area, locating six jobs which he recommended claimant pursue. This information was provided to claimant by certified letter on August 31, 1999. While the letter reached claimant's address, it was not actually signed for by claimant. Mr. Stewart followed with a second letter on September 1, 1999.

He requested that claimant contact him after she had the opportunity to talk to the six employers. Claimant later contacted Mr. Stewart, advising that she had contacted two of the employers--Wal-Mart and Hallmark Inn--on September 9, 1999. Claimant also advised she contacted the remaining four potential employers on September 22, 1999. These included Claybrook Furniture, Comfort Inn, Western Sizzlin and New Mart convenience store.

During a follow-up investigation, Mr. Stewart discovered that only Claybrook Furniture, of the six, had an application on file by claimant. That application indicated claimant had requested a starting wage of \$8.50 per hour, which is \$3.43 per hour higher than claimant was earning for respondent. Mr. Stewart testified that the jobs presented to claimant all paid \$5.15 an hour for a 38- to 40-hour-per-week work week. None of the jobs would have paid \$8.50 per hour as requested by claimant.

During their August 16, 1999, meeting, Mr. Stewart asked claimant whether she had been pursuing any job opportunities. Claimant advised him that she had not been looking for work, but had instead been pursuing a personal interest, that of writing children's books. There is no information in the record to indicate that claimant's writing activities produced any type of income or generated any type of job opportunity. There is also no evidence in the record as to the extent of claimant's writing efforts.

When claimant contacted the six employers, several indicated that there were no jobs available. Mr. Stewart explained that claimant waited three weeks before she contacted several of the employers. While the jobs were available when he provided claimant the list, they would not necessarily be available three weeks later, as those types of job openings do not stay open long.

Mr. Stewart admitted, on cross-examination, that he had no information regarding claimant's job search efforts from 1997 until his meeting with her in August 1999.

Claimant argued to the Board that she had transportation problems which Mr. Stewart did nothing to alleviate. However, claimant also admitted that she failed to request any assistance from Mr. Stewart regarding those transportation problems. In addition, whatever problems claimant had, she apparently overcame as she did ultimately manage to contact the six employers in question.

The Administrative Law Judge in the Award on review and modification of January 25, 2000, reduced claimant's award to a functional impairment. He found that claimant had not put forth a good faith effort, post award, to obtain employment. He also found that the jobs recommended by Mr. Stewart would have paid claimant a wage comparable to what she was earning at the time of her injury. Therefore, claimant would have been limited under K.S.A. 44-510e to her earlier stipulated-to functional impairment of 4 percent to the body as a whole. The Administrative Law Judge made this modification

effective March 10, 1998, six months before the respondent filed the application for review and modification.

K.S.A. 44-528 states:

(a) Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.

(b) If the administrative law judge finds that the employee has returned to work for the same employer in whose employee the employee was injured for another employer and is earning or is capable of earning the same or higher wages than the employee did at the time of the accident, or is capable of gaining an income from any trade or employment which is equal to or greater than the wages the employee was earning at the time of the accident, or finds that the employee has absented and continues to be absent so that a reasonable examination cannot be made of the employee by a health care provider selected by the employer, or has departed beyond the boundaries of the United States, the administrative law judge may modify the award and reduce compensation or may cancel the award and end the compensation.

(c) The number of reviews under this section shall be limited pursuant to rules and regulations adopted by the director to avoid abuse.

(d) Any modification of an award under this section on the basis that the functional impairment or work disability of the employee has increased or diminished shall be effective as of the date that the increase or diminishment actually occurred, except that in no event shall the effective date of any such modification be more than six months prior to the date the application was made for review and modification under this section.

Claimant argues review and modification is not proper in this instance as there has been no showing of a change in claimant's physical condition, restrictions or ability to work which would justify a modification under K.S.A. 44-528. However, the review and modification statute is not so limited. In this case, the original award used a 100 percent wage loss to calculate work disability because claimant was then making a good faith effort to find employment. Respondent now argues the circumstances have changed, that claimant is not now making a good faith effort. The Board agrees that, if shown to be true, this change would be a type of change that warrants a modification in the percentage of work disability awarded. The administrative law judge may modify the award upon a finding that the injured employee is capable of earning wages and that the employee, post award, has not exercised a good faith effort to obtain employment. Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

In this instance, respondent provided vocational assistance to help claimant locate a job in the New Albany, Mississippi, area. This vocational assistance provided claimant access to jobs which would have paid claimant a wage comparable to that which she was earning at the time of her accident. The Administrative Law Judge found claimant did not put forth a good faith effort in pursuing these jobs, and the Appeals Board agrees.

Claimant admitted to Mr. Stewart that she had pursued no job leads on her own with the exception of her attempts at writing children's books. The six job leads provided to claimant were pursued in what appeared to be only a halfhearted effort. Claimant contacted two employers over a week after being advised of the openings. In one instance, the information provided by claimant to one of the prospective employers requested a salary nearly \$3.50 per hour higher than that which was being offered. The vocational expert was unable to verify that claimant contacted the remaining employers. However, accepting claimant's comments as accurate, it still appears claimant waited nearly three weeks before contacting four of the six prospective employers. By that time, the jobs, which had been originally available, were filled. The evidence in the record indicates claimant made no additional efforts to obtain employment.

The respondent argues that claimant's efforts at obtaining employment in New Albany, Mississippi, did not constitute good faith on claimant's part. However, the record is extremely limited as to the extent of claimant's efforts prior to her meeting with Mr. Stewart on August 16, 1999.

When the respondent seeks a modification in the award, respondent has the burden of proving the circumstance that warrants a change. In this case, where claimant is not working, respondent has the burden of proving claimant is not making a good faith effort to find work. The Board finds that respondent has met that burden only for the period from and after August 16, 1999. The evidence indicates that, as of that date, claimant was not looking for work. The evidence does not show when claimant stopped looking. The evidence does show that, after that date, claimant's efforts to cooperate with respondent's

placement assistance were inadequate. Therefore, the Appeals Board affirms the Administrative Law Judge's decision to modify the award, but finds the modification should be effective only as of August 16, 1999.

The evidence prior to that time constitutes speculation regarding claimant's ongoing job search activities and does not justify a modification of the award.

The Appeals Board affirms the Administrative Law Judge's finding that claimant's award should be reduced to the 4 percent functional impairment stipulated by the parties. The jobs found by Mr. Stewart would have paid claimant a comparable wage, and that wage is imputed to claimant pursuant to K.S.A. 44-510e and Copeland, *supra*. Under K.S.A. 44-510e, this would limit claimant to her functional impairment.

Claimant requests attorney fees for the post-award time spent litigating respondent's application for review and modification. However, this issue was not submitted to the Administrative Law Judge and no evidence was presented to the Board regarding how much time claimant's attorney spent in defense of this post-award proceeding. Therefore, pursuant to K.S.A. 44-536 and K.S.A. 44-551, the matter of claimant's attorney fees is remanded to the Administrative Law Judge for further proceedings.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award on Application for Review and Modification of Administrative Law Judge Bryce D. Benedict dated January 25, 2000, should be, and is hereby, modified, and respondent is granted a review and modification of the award, reducing claimant's award to the stipulated 4 percent whole body functional impairment, with the modification becoming effective August 16, 1999.

As respondent has paid well in excess of what would be required of a 4 percent functional award, respondent's obligation to provide payments to claimant under the original award ceased as of August 16, 1999.

The fees and expenses associated with the administration of the Kansas Workers Compensation Act are hereby assessed against the respondent as follows:

Rhonda Luker

Unknown

(Telephone Deposition of David E. Stewart, October 28, 1999)

Curtis, Schloetzer, Hedberg, Foster & Associates

\$196.40

Appino & Biggs Reporting Service

\$261.00

IT IS SO ORDERED.

Dated this ____ day of August 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Judy A. Pope, Topeka, KS
John A. Bausch, Topeka, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director