

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

LARRY A. SCANLAN)	
Claimant)	
)	
VS.)	
)	
MID-CENTRAL SYSCO)	
Respondent)	Docket No. 217,314
)	
AND)	
)	
INS. CO. STATE OF PENNSYLVANIA)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) appeal the August 14, 2003 Award entered by Administrative Law Judge (ALJ) Robert H. Foerschler. The Appeals Board (Board) heard oral argument on February 3, 2004.

APPEARANCES

Robert E. Wonder of Kansas City, Missouri, appeared for claimant. Mark E. Kolich of Lenexa, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The Board considered the record and adopts the stipulations listed in the Award.

ISSUES

The issue before the Board on this appeal is the nature and extent of claimant's injury and disability. The ALJ awarded claimant a 26.4 percent permanent partial general body disability based upon a 35.4 percent work disability less the nine percent functional impairment the ALJ determined preexisted claimant's work-related accidents. The work

disability was arrived at by averaging a 30.8 percent wage loss and a 40 percent task loss.¹ The ALJ also found claimant's functional impairment to be 18 percent based upon the testimony of Dr. Edward J. Prostic.

Respondent contends that claimant should be denied a work disability based upon his demonstrated ability to earn 90 percent or more of his average weekly wage. Respondent argues claimant terminated his employment with his subsequent employer without good cause and, therefore, the wage he was earning with Car Credit, Inc., (Car Credit) should be imputed to claimant. Respondent further argues that claimant's functional impairment is 15 percent based on the rating by Dr. David A. Tillema. At oral argument to the Board, respondent conceded that the evidence did not support a finding that claimant had a preexisting impairment that was rateable under the *Guides*.²

Conversely, claimant argues that he acted in good faith at all times and that he was unable to continue performing the job with Car Credit, as well as the other jobs he has worked, due to his work-related injury. Accordingly, claimant contends he is entitled to a work disability based upon his actual wage loss. Claimant argues his percentage of task loss is 62.5 percent as this was the testimony by Dr. Prostic. In addition, claimant asks the Board to adopt the 18 percent functional impairment rating given by Dr. Prostic.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties arguments, the Board finds and concludes:

Although this case bears only one docket number, the parties agreed that claimant suffered two separate work-related accidents. The dates of accidents were stipulated to as July 24, 1995 and August 22, 1995.³ Furthermore, although both accidents occurred in Missouri, the parties agreed that the Kansas Workers Compensation Act (Act) applied to this claim.

Claimant worked for respondent as an over-the-road truck driver. Both accidents occurred while claimant was loading or unloading his truck. Claimant's injuries were to his low back. While claimant was off work and receiving authorized medical treatment, he took a prescription pain medication that was not prescribed for him. Claimant reported this to his physician and was subsequently terminated by respondent.

¹ See K.S.A. 44-510e(a).

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

³ See ALJ Award (Aug. 14, 2003) at 2, Stipulation No.1. Nevertheless, the ALJ erroneously described the accident dates as July 25 and August 25, 1995 at page 3 of the Award.

Respondent does not argue that this termination precludes claimant from receiving a work disability. Respondent does not dispute that claimant's medical restrictions would preclude him from returning to his regular job duties. Furthermore, the record does not reflect that respondent could have or would have accommodated claimant's restrictions. What respondent does argue, however, is that claimant's voluntary termination from his subsequent jobs with Car Credit and Federal Express, both of which paid claimant at least 90 percent of his average weekly wage, was not done in good faith and, therefore, a wage should be imputed to claimant which would preclude an award of work disability.

After being terminated by respondent, claimant went to work full time for a friend of his selling used cars at Car Credit. Claimant had been working for Car Credit part time before his accidents, but the record does not reflect what he earned while working only part time. After claimant began working full time at Car Credit following his injuries and termination by respondent, claimant earned at least as much as what he had been earning with respondent.

Claimant quit his job at Car Credit to go to work for Quality Trailer driving flat-bed trucks. Claimant thought he could do this job because it involved no lifting. However, after three or four months he could no longer tolerate the prolonged sitting and driving. Claimant then returned to Car Credit and worked there for about another two years.⁴

After the December 19, 1996 preliminary hearing, the ALJ ordered respondent to provide claimant with additional medical treatment. However, at the regular hearing claimant said he never obtained that treatment because he could not get off work to go to the doctor. At regular hearing claimant also testified that he quit the Car Credit job the second time because he could not tolerate it. The work was making his back pain worse. However, at his earlier preliminary hearing testimony, claimant said he quit Car Credit the first time because he did not like working at the car lot and thought he could do the truck driving job with Quality Trailer.⁵ After determining that he could not tolerate the prolonged driving with Quality Trailer, claimant quit that job and returned to Car Credit. When he worked at Car Credit the second time claimant worked fewer hours and performed more paperwork, including handling customers' credit applications in addition to sales work. Claimant acknowledged that the paperwork was physically less demanding than the sales and repossessions work claimant had performed during his first stint at Car Credit.

Both Drs. Prostic and Tillema believed the Car Credit job was within their respective restrictions and that claimant should be able to perform that job. The Board agrees. And he did voluntarily quit that job. Accordingly, the Board finds that claimant did not make a good faith effort to retain appropriate employment when he quit the job with Car Credit the

⁴ Claimant testified at page 34 of the April 25, 2000 regular hearing that he quit the Car Credit job about a year and a half ago.

⁵ P.H. Trans. at 22.

second time. Claimant demonstrated the ability to perform that type of work and earn a wage as a car salesman equal to 90 percent or more of his average weekly wage with respondent. Furthermore, claimant did not make a good faith effort to obtain and retain employment after leaving Car Credit the second time, which appears to have been sometime in 1997 or possibly 1998. At the April 2000 regular hearing claimant testified he had not worked since leaving the car lot other than “just little things, maybe pick up a few dollars here and there.”⁶ Mostly he has been supported by his parents and his girlfriend.

A deposition of claimant was taken June 18, 2003. At that deposition claimant was asked about his work and job search activities during the three years since the regular hearing. He had worked one month at a Blockbuster video store. He also had driven a truck for a contractor with Federal Express for six or eight months. Claimant was fired from that job for failing to keep up or turn in his log sheets. That job paid him approximately \$500 for a five-day work week. Afterward claimant collected unemployment benefits for awhile. Claimant said he has tried to look for work but nobody will hire him because of his back injury and restrictions. When claimant was asked the last time he applied for a job, claimant said three or four weeks ago he had checked with a couple of car lots and a trucking place. Claimant also mentioned that he had been offered a part time job taking tickets at a movie theater, but he didn't accept that job. Claimant did not say why he did not accept the job, other than that “it didn't pay much. All you're doing is taking tickets.”⁷ Claimant did not identify any other places he had applied for work in the past three years. A good faith job search has not been established.

Because claimant failed to make a good faith effort to obtain and retain appropriate employment, a wage will be imputed to claimant based upon his ability to earn wages.⁸ Claimant demonstrated that he retains the ability to earn at least 90 percent of the average weekly wage he was earning with respondent at the time of his work-related accidents. Accordingly, claimant's permanent partial disability will be limited to his percentage of functional impairment. Based upon the expert medical testimony of Dr. Tillema, whose rating opinion the Board finds more credible than that of Dr. Prostic, claimant's impairment is 15 percent pursuant to the *Guides*. That percentage should not be reduced under K.S.A. 44-501(c). Dr. Tillema testified that “60 percent was preexisting defect in the bone and the 40 percent could be attributed to an aggravation of this problem with his back injury or injuries”⁹ This testimony fails to establish that claimant's preexisting condition constituted a separate and distinct impairment that would have been rateable under the *Guides* before the work-related accidents. Claimant testified and Dr. Tillema did not dispute that claimant's spondylolisthesis was asymptomatic before these injuries.

⁶ R.H. Trans. at 29.

⁷ Scanlan Depo. at 11.

⁸ See *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁹ Tillema Depo. at 8.

Furthermore, there is no evidence of claimant having any restrictions or limitations before the work-related accidents.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated August 14, 2003 is modified as follows:

The claimant is entitled to 62.25 weeks of permanent partial disability compensation at the rate of \$326 per week or \$20,293.50 for a 15 percent permanent partial disability, making a total award of \$20,293.50, all of which is due and owing and ordered paid in one lump sum less amounts previous paid.

The Board adopts the other orders of the ALJ not inconsistent with the above.

IT IS SO ORDERED.

Dated this _____ day of February 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Robert E. Wonder, Attorney for Claimant
- Mark E. Kolich, Attorney for Respondent and Ins. Co. State of Pennsylvania
- Robert H. Foerschler, Administrative Law Judge
- Paula Greathouse, Workers Compensation Director