

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

**MICHAEL L. JORDAN**

Claimant

VS.

**MERCY HOSPITAL**

Respondent

Self Insured

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Docket No. 220,307

**ORDER**

Claimant appealed the December 16, 1999, Award entered by Administrative Law Judge Jon L. Frobish. The Appeals Board heard oral argument on July 19, 2000.

**APPEARANCES**

Carlton W. Kennard of Pittsburg, Kansas, appeared for claimant. Leigh C. Hudson of Fort Scott, Kansas, appeared for respondent.

**RECORD AND STIPULATIONS**

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

**ISSUES**

The compensability of this claim is not at issue. The sole issue raised for Appeals Board review is the extent of claimant's resulting disability. The parties agree claimant suffered a work related injury. Claimant had also alleged a psychological injury and disability resulting from his work related injury, but during oral argument to the Appeals Board claimant stated that this was no longer a part of this claim.

The ALJ awarded claimant permanent partial disability compensation based upon his functional impairment of 20 percent to the body as a whole. Claimant contends he is unemployable and therefore is entitled to a permanent total disability award. Claimant argues in the alternative for a work disability in excess of the functional impairment ratings based upon either his actual 100 percent wage loss or, if an ability test is appropriate, then based upon his post-accident ability to earn wages.

Respondent requests that the Appeals Board affirm the ALJ's Award.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the parties' arguments, the Appeals Board concludes for the reasons stated below that the Award should be affirmed.

**Findings of Fact**

- (1) Claimant is a registered nurse. On September 21, 1996, claimant was working in the intensive care unit at Mercy Hospital. While assisting a patient claimant injured his neck, upper back and right shoulder. He has also had pain going down his back into his right leg and abdominal pain.
- (2) Claimant received extensive treatment from several doctors. He also returned to work at a temporary, accommodated job with respondent for a short period of time. However, because he developed other health problems unrelated to his work injury, claimant was never able to return to regular, full time employment.
- (3) Dr. Vito J. Carabetta examined claimant on August 3, 1999. He gave restrictions to avoid abrupt head and neck movements, avoid awkward or prolonged posturing of the neck, occasional overhead reaching and limit overhead lifting to 25 to 30 pounds.
- (4) Dr. Christopher G. Covington treated claimant and gave restrictions to limit lifting to 15 pounds occasionally, no repetitive bending, stooping or lifting and no prolonged sitting or standing.
- (5) Dr. Edward J. Prostic examined claimant twice. He recommended claimant continue under the restrictions given by Dr. C. Scott Anthony, which were: no lifting greater than 15 pounds; no repetitive lifting greater than 10 pounds; no climbing, excessive bending or stooping; no repetitive motion of his upper extremities; limit sitting to three to four hours at a stretch and standing to two to three hours at a stretch; and frequent rest breaks. In addition, Dr. Prostic said claimant was unable to perform significant activities with his right elbow away from his side.
- (6) The parties agree that claimant would not be able to return to his regular job duties under the restrictions recommended by any of the examining or treating physicians.
- (7) Claimant is not working and therefore his actual wage loss is 100 percent.
- (8) Because of his non-work related health problems, claimant is now essentially unemployable. The Appeals Board finds, therefore, that claimant is incapable of engaging in substantial, gainful employment.<sup>1</sup>

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<sup>1</sup> Wardlow v. ANR Freight Systems, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

(9) Claimant was terminated by respondent on May 8, 1998 due to his injury, his overall health condition and the restrictions recommended by Dr. Anthony. Based upon the testimony of Roberta Dotterer the Appeals Board finds that if claimant had not suffered the subsequent non-work related health problems, respondent could have and would have accommodated claimant's restrictions for his work related injury by placing him in a job as a home health nurse. That home health nurse job, with overtime, would have paid claimant a wage comparable to the wage claimant was earning at the time of his work related injury, but according to Michael Dreiling, similar home health nurse jobs with other employers in the area would not have paid claimant 90 percent of the average weekly wage he was earning at the time of his injury.

#### Conclusions of Law

The ALJ found that because respondent would have accommodated claimant's restrictions by placing him in the home health nurse job at a comparable wage, then no work disability can be awarded. The Appeals Board agrees a work disability is inappropriate under these facts, but the Board does not reach this conclusion by imputing the wage of the home health nurse job.

Claimant was never offered the home health care job or any other permanent, full time accommodated position. Therefore, the rationale of Foulk<sup>2</sup> does not apply. When attempting to reconcile the language of K.S.A. 44-510e with the logic of Foulk, the Court of Appeals has held that before the actual wage loss contemplated by K.S.A. 44-510e can be used, the finder of fact must first determine that the claimant made a good faith effort to obtain appropriate employment.<sup>3</sup> Claimant made no such effort, but, as stated above, claimant is essentially unemployable. Accordingly, there has been no lack of good faith and certainly no bad faith exhibited on the part of claimant. The Appeals Board finds that the requirement to make a good faith effort to find work does not apply to a case where claimant is realistically unemployable. The issue then is this: When there is no failure by claimant to make a good faith job search post-award, should a wage based upon ability be imputed?

The Appeals Board finds that claimant is not entitled to his actual 100 percent wage loss because the reason he is unemployed is not due to the restrictions from the work related injury.

Furthermore, claimant is not entitled to a work disability based upon his loss of ability to earn wages. In 1993 the legislature eliminated ability to access the open labor

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<sup>2</sup> Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

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

market from the work disability formula in K.S.A. 44-510e replacing that prong of the two part test with the actual wage loss. Although, under certain circumstances, the courts have put an ability test back into the statute, those circumstances are not present in this case. There has been no refusal to attempt an offer of accommodated work and there has been no lack of good faith by either party. Nevertheless, claimant is not entitled to a work disability award, but is instead, limited to an award based upon his impairment of function from the work related injury. Work disability, unlike functional impairment, is in essence wage replacement.<sup>4</sup> Because claimant is unemployable and incapable of engaging in substantial gainful employment for reasons primarily unrelated to his restrictions from the work related injury, requiring respondent to provide wage replacement is inappropriate. It is for this reason that the Appeals Board finds claimant's award should be limited to his percentage of functional impairment.

The record contains functional impairment ratings from three physicians -- Dr. Carabetta's 20 percent, Dr. Covington's 17 percent, and Dr. Prostic's 30 percent. The ALJ concluded that Dr. Carabetta's rating was the most credible in this instance and the Appeals Board agrees with that conclusion.

**AWARD**

**WHEREFORE**, the Appeals Board affirms the December 16, 1999, Award entered by Administrative Law Judge Jon L. Frobish.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July 2000.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

- c: Carlton W. Kennard, Pittsburg, KS
- Leigh C. Hudson, Fort Scott, KS
- Jon L. Frobish, Administrative Law Judge

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<sup>4</sup> See, Treaster v. Dillon Companies, Inc., 267 Kan. 610, 987 P.2d 325 (1999).

**MICHAEL L. JORDAN**

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Philip S. Harness, Director