

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

JASON WILSON)	
Claimant)	
VS.)	
)	Docket No. 222,461
AUGUSTINE AUCTION SERVICE)	
Respondent)	
AND)	
)	
AETNA CASUALTY & SURETY COMPANY)	
Insurance Carrier)	

ORDER

Respondent appeals from an Award entered by Administrative Law Judge Bruce E. Moore on April 24, 1998. The Appeals Board heard oral argument December 21, 1998.

APPEARANCES

Jan L. Fisher of Topeka, Kansas, appeared on behalf of claimant. C. Stanley Nelson of Salina, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ awarded a 43 percent work disability based on a 45 percent task loss and a 41 percent wage loss. On appeal, respondent raises two issues:

1. Did claimant sustain accidental injury which arose out of and in the course of his employment on March 5, 1997? Respondent agrees that claimant had an accident on the date alleged but denies claimant suffered an injury from that accident.

2. What is the nature and extent of claimant's disability? Respondent argues that, at most, claimant should be awarded benefits for a functional impairment. If work disability is awarded, respondent contends it should be less than the percentage awarded. Specifically, respondent disputes the task loss finding by the ALJ.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board generally agrees with and affirms the Award. The single exception is the calculation of task loss, based on Karen C. Terrill's list of tasks, by the ALJ. Consequently, while the Board approves all other findings in the Award, the Board concludes the work disability should be decreased to a 41.5 percent work disability.

Findings of Fact

1. Claimant injured his low back on March 5, 1997, when a sofa slipped from an overhead rack and struck claimant while he was working for respondent.
2. The accident was on a Wednesday and claimant was unable to work Thursday (March 6). He contacted his supervisor to report the accident and advised that he would not be able to work. Claimant returned to work Friday (March 7), but did not work Saturday (March 8) or Monday and Tuesday (March 10 and 11). When he returned on March 12, claimant was advised his things had been collected and was handed his last paycheck. Claimant testified that the reason he did not work March 8, 10, and 11, was because of his back injury, but he did not testify that he had ever told respondent this was the reason.
3. When claimant told his supervisor that his back was hurting, his supervisor ignored him and simply walked away. Although it is not absolutely clear when this incident occurred, it appears it occurred March 7, two days after the accident. Claimant, therefore, went to his family physician, Dr. Williams. Claimant was ultimately referred to Dr. Alan Kruckemyer, an orthopedic surgeon. Neither physician testified and their records were not introduced into evidence.
4. Claimant did not have significant low back symptoms before the accident of March 5, 1997.
5. On October 25, 1997, Dr. Edward J. Prostic examined and evaluated claimant's injury. Dr. Prostic diagnosed preexisting spondylolisthesis at L5-S1 aggravated by the accident of March 5, 1997. He testified that by aggravation he meant that claimant now has a symptomatic area that previously was not. He also diagnosed tarsal tunnel syndrome and testified he believed this was attributable to the March 5, 1997, accident. He recommended claimant not lift weights greater than 50 pounds occasionally or 25

pounds repetitiously. The restrictions were for the low back injury only. Dr. Prostic also testified he would have recommended the same restrictions before the current accident. He rated the resulting impairment as 14 percent of the body with 11 or 12 percent attributable to the symptomatic spondylolisthesis and an additional 2 or 3 percent attributable to the bilateral tarsal syndrome. Even though the spondylolisthesis existed before this accident, Dr. Prostic testified claimant would not have had any functional impairment before this accident.

6. Dr. Prostic reviewed two lists of the tasks claimant performed in the work he did before this accident, one prepared by James T. Molski and the other prepared by Karen C. Terrill. At the time of the accident, claimant was working as a warehouse manager for respondent. Before this accident claimant had worked for respondent as a delivery driver and as a delivery person. He had also worked for another furniture company doing warehouse and delivery work. He also worked briefly as a disc jockey. Using the list from Mr. Molski, Dr. Prostic testified claimant can not now do 8 of the total of 15 tasks, including the disc jockey job, or 53 percent. If the disc jockey job is not included, Dr. Prostic identified 7 of the remaining 13 tasks, or 54 percent, as tasks claimant can not now do.

Using Ms. Terrill's list, Dr. Prostic said claimant can not now do 9 of the total of 30 tasks, including the tasks as a disc jockey, or 30 percent. If the disc jockey job is not included, Dr. Prostic said claimant can not now do 8 of 28 tasks which, when rounded to the next number, is also 30 percent.¹

7. Mr. Molski testified by deposition and described the process by which he prepared the task list. Ms. Terrill did not testify, but claimant was cross-examined about the list and, with limited exceptions stated in his testimony, generally agreed that the list reflected what he told Ms. Terrill.

8. In October 1997, claimant began working at Copy Company for \$5.15 per hour, working 30 to 35 hours per week. Claimant identified 36 employers he had applied with in between the time he left employment with respondent in August 1997 and the time he found employment in October 1997. Claimant testified he had not made any effort or inquiry regarding working a full 40-hour week for Copy Company.

Conclusions of Law

1. Claimant has the burden of proving his right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 44-501(a).

¹ It is not clear from the Award how the ALJ found this to be 37 percent. Also, respondent's brief describes this as 6 of 24 tasks, for a 25 percent loss, but it appears this calculation used only the tasks performed while working for respondent, not the entire fifteen-year period.

2. The Board finds claimant suffered a compensable permanent injury as a result of the work related accident of March 5, 1997. That injury included the aggravation to the preexisting spondylolisthesis. An injury is compensable if it aggravates, accelerates, or intensifies an existing affliction. *McIver v. State Highway Commission*, 198 Kan. 678, 426 P.2d 118 (1967).

3. The record does not establish that claimant has a preexisting functional impairment.

4. Although claimant was terminated from his employment with respondent for other reasons, the Board concludes that the injury would, based on recommended restrictions, prevent claimant from continuing to perform the job he was performing for respondent.

5. Claimant did not, after the injury, earn a wage that was 90 percent or more of his preinjury wage. He is, therefore, entitled to work disability benefits. K.S.A. 1996 Supp. 44-510e.

6. K.S.A. 1996 Supp. 44-510e(a) defines work disability as the average of the wage loss and task loss:

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.

7. The wage prong of the work disability calculation is based on the actual wage loss only if claimant has shown good faith in efforts to find and retain employment after the injury. Claimant may not, for example, refuse to accept a reasonable offer for accommodated work. If the claimant refuses to even attempt such work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation. *Foullk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). Even if no work is offered, claimant must show that he/she made a good faith effort to find employment. If the claimant does not do so, a wage will be imputed to claimant based on what claimant should be able to earn. *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

8. The Board agrees with the conclusions by the ALJ that claimant's post-injury wage should be calculated on the basis of a 40-hour week. Although the Board finds claimant did make a good faith effort to find other employment, it does not appear he has made any effort to work a full work week. Accordingly, the wage in his employment with Copy Company, \$5.15 per hour for a 40-hour week, or \$206 per week, should be used to determine the wage factor in claimant's work disability.

9. The Board finds claimant has a wage loss of 41 percent based on a comparison of the pre-injury wage of \$349.04 and the post-injury wage of \$206.

10. The Board finds claimant has a task loss of 42 percent. This conclusion gives equal weight to the opinions of Dr. Prostic based on both Ms. Terrill and Mr. Molski. The parties disagree about whether the disc jockey position should be used, but it does not appear to make a significant difference in this case. The percentage loss based on Ms. Terrill's task list is the same 30 percent if the results are rounded to an even percentage. The loss based on Mr. Molski's list varies by 1 percent depending on whether the disc jockey position is used. Based on the opinions by Dr. Prostic, the Board finds the task loss to be 42 percent.

The Board has used the opinion of Dr. Prostic based on Ms. Terrill's task list because, even though Ms. Terrill did not testify, claimant was cross-examined about the information and, with limited exceptions, agreed with the information.

The Board has not adjusted the list prepared by Mr. Molski as suggested in respondent's brief. Respondent there argued that certain of the tasks should be separated into two tasks. Mr. Molski testified that he had divided the work into tasks using recognized definitions of tasks. The Board finds no reason in this case not to give equal weight to the opinion based on his task list using his division of the work into tasks.

11. The Board finds claimant has a 41.5 percent work disability based on a 42 percent task loss and a 41 percent wage loss. K.S.A. 44-510e.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bruce E. Moore on April 24, 1998, should be, and the same is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Jason Wilson, and against the respondent, Augustine Auction Service, and its insurance carrier, Aetna Casualty & Surety Company, for an accidental injury which occurred March 5, 1997, and based upon an average weekly wage of \$349.04, for 10 weeks of temporary total disability compensation at the rate of \$232.70 per week or \$2,327, followed by 172.23 weeks at the rate of \$232.70 per week or \$40,077.92, for a 41.5% permanent partial disability, making a total award of \$42,404.92.

As of January 29, 1999, there is due and owing claimant 10 weeks of temporary total disability compensation at the rate of \$232.70 per week or \$2,327, followed by 89.29 weeks of permanent partial disability compensation at the rate of \$232.70 per week in the

sum of \$20,777.78, for a total of \$23,104.78, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$19,300.14 is to be paid for 82.94 weeks at the rate of \$232.70 per week, until fully paid or further order of the Director.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of January 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Jan L. Fisher, Topeka, KS
- C. Stanley Nelson, Salina, KS
- Bruce E. Moore, Administrative Law Judge
- Philip S. Harness, Director