

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Award should be modified. Claimant is awarded benefits for an 85 percent work disability.

Findings of Fact

1. The Board finds claimant injured his back while lifting a vanity top at work on September 25, 1997, and aggravated that injury on September 26, 1997, while carrying a snake weighing 60 to 70 pounds used to unclog drains. Respondent challenges this claim through evidence that claimant had seen Dr. Stan J. Farr, a chiropractor, for back problems on September 23, 1997, two days before the accident at work. Respondent points out that claimant initially denied seeing Dr. Farr before this injury at work. Respondent also offers testimony of Ronald Godfrey, one of the supervisors, that claimant said he hurt his back lifting a china cabinet while helping his father with carpeting. Ronald Godfrey also denies that claimant told him he was injured at work.

In spite of respondent's challenge, the ALJ accepted claimant's testimony. Claimant testified that on October 6, 1997, he told Gyla Godfrey he was interested in pursuing workers compensation benefits. This testimony is confirmed by testimony of Gyla Godfrey, although she told him she did not believe it was a workers compensation injury. At his deposition and again at the regular hearing, claimant acknowledged he had seen Dr. Farr before this injury. He testified he had seen Dr. Farr occasionally for years and had some discomfort from lifting a china cabinet at work, not at home. He further testified the symptoms following the incidents on September 25 and September 26 were substantially worse. On the 26th he began having pain down his right leg. Dr. Farr was not deposed and the Board has concluded below that Dr. Farr's records are not in evidence.

Claimant's father testified to conflict between his family and the Godfrey's. He also testified that claimant had not assisted with the carpet laying and the carpet laying was done September 15.

After the injury, claimant was eventually referred to Dr. Kenneth Gimple. Claimant gave Dr. Gimple a history of pain since lifting a vanity top. Based on MRI results, Dr. Gimple diagnosed herniated disc and performed surgery November 12, 1997.

As indicated, the record contains reason to doubt claimant's version of the events. But the ALJ had an opportunity to observe the claimant, claimant's father, and the Godfrey's testify. The ALJ believed claimant's testimony and awarded benefits. The Board generally gives some deference to the ALJ's assessment of credibility for witnesses who have testified before the ALJ. It appears reasonable to do so in this case. Based on its own

examination of the evidence, and giving some deference to the ALJ's evaluation of credibility, the Board finds claimant injured his back at work as he testified.

2. The Board finds claimant gave notice of the accident to his employer not later than October 6, 1997. Claimant testified and respondent's witnesses acknowledge that claimant informed respondent he had injured his back within a few days after September 26, 1997. Ronald Godfrey denies that claimant ever said he was injured at work. Gyla Godfrey testified that in a phone conversation on October 6, 1997, claimant asked her about workers compensation benefits for the injury. The Board finds claimant gave notice of injury not later than October 6, 1997.

3. The parties have agreed claimant has a 15 percent permanent partial functional impairment. Dr. Gimple's restrictions are described in Mr. Longacre's report as follows:

Lifting from floor or table 20 pounds frequently, 30 pounds occasionally, lift from overhead 20 pounds occasionally, carry 10 pounds frequently for 30 minutes, 30 pounds occasionally. Carry more than 30 minutes 20 pounds occasionally, occasionally bend, crawl, never climb heights, (at one time) sit for 6 hours, stand for 4 hours, walk for 4 hours. During an 8 hour work day, sit, stand, walk for 8 hours. Mild restrictions to working around moving machinery, sustained positions, side to side bending. No working at unprotected heights.

4. After leaving work for respondent, claimant made a good faith effort to find other work. He found only one temporary position, lasting one week, and has since been unable to find employment. Claimant has had some difficulty applying for work because he does not have transportation, but he has registered with Job Service and applied through an employment agency. He also applied at Packer Plastics, Jefferson County for two position openings, Westlake Hardware, Petro Pantry, and a telemarketing position. Claimant has also looked for openings through other sources such as friends, newspaper, and cold calls to potential employers. Claimant is studying to take a GED examination.

5. The Board finds claimant has lost the ability to perform 70 percent of the tasks he performed in work he did during the 15 years before this injury. This conclusion gives weight to the task lists prepared by Mr. Gary Weimholt and Mr. Marty D. Longacre and the opinions of Dr. Gimple based on those two lists. Dr. Gimple opined that claimant cannot do 18, or 90 percent, of the 20 tasks in Mr. Longacre's list. Dr. Gimple reviewed the list prepared by Mr. Weimholt. Dr. Gimple identified 20 of the total 54 tasks that, in his opinion, claimant cannot do. But as to several other tasks, Dr. Gimple either was not asked about the task or did not give a clear opinion. The Board has, for this reason, not given as much weight to Dr. Gimple's opinion based on Mr. Weimholt's task list. The ALJ concluded Mr. Weimholt's list contains, for some jobs, several tasks that could properly be joined as one task, but the Board also believes Mr. Longacre's list contains, for some jobs, too few tasks. The Board has not, therefore, fully adopted either and has given each some weight.

Conclusions of Law

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

2. The Board concludes claimant has met his burden of proving both accidental injury arising out of and in the course of his employment and of proving that he gave notice within ten days as required by K.S.A. 44-520. The ten days allowed for notice is calculated by excluding weekend days. *Bain v. Cormack Enterprises, Inc.*, 267 Kan. 754, 986 P.2d 373 (1999).

3. K.S.A. 1999 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.

4. K.S.A. 1999 Supp. 44-510e also specifies that a claimant is not entitled to disability compensation in excess of the functional impairment so long as the claimant earns a wage which is equal to 90 percent or more of the preinjury average weekly wage.

5. The wage prong of the work disability calculation is based on the actual wage loss only if claimant has shown good faith in efforts at obtaining or retaining 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. *Foulk 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).

6. The Board has found claimant made a good faith effort to find employment and is, nevertheless, now unemployed. Claimant's wage loss for purposes of calculating work disability is, therefore, 100 percent.

7. Claimant's task loss is 70 percent. K.S.A. 44-510e.

8. Claimant's work disability is 85 percent. 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 Bryce D. Benedict on June 14, 1999, amended by Nunc Pro Tunc on June 25, 1999, 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, James Montgomery, and against the respondent, Fountainbleau Apartments, and its insurance carrier, Liberty Mutual Insurance Company, for an accidental injury which occurred September 26, 1997, and based upon an average weekly wage of \$340, for 54 weeks of temporary total disability compensation at the rate of \$226.68 per week or \$12,240.72, followed by 319.60 weeks at the rate of \$226.68 per week or \$72,446.93, for an 85% permanent partial disability, making a total award of \$84,687.65.

As of April 28, 2000, there is due and owing claimant 54 weeks of temporary total disability compensation at the rate of \$226.68 per week or \$12,240.72, followed by 81 weeks of permanent partial disability compensation at the rate of \$226.68 per week in the sum of \$18,361.08, for a total of \$30,601.80 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$54,085.85 is to be paid for 238.60 weeks at the rate of \$226.68 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 April 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Ami S. Hyten, Topeka, KS

James K. Blickhan, Overland Park, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director