

employment. Thus, claimant asserts he is entitled to a work disability award of 90 percent based on an 80 percent work task loss and a 100 percent wage loss.

Conversely, respondent requests the Appeals Board to affirm the Administrative Law Judge's award. Respondent admits claimant suffered a work-related injury to his neck. But respondent argues claimant failed to prove he suffered permanent work-related injuries to his back and shoulders. Furthermore, respondent argues that claimant is not entitled to a work disability award as he voluntarily forfeited his employment with respondent because his Immigration and Naturalization Service (INS) employment authorization expired. Also, respondent asserts that at a later date respondent offered claimant a job within his permanent work restrictions and claimant indicated to respondent he was incapable or unwilling to even attempt to perform such job. Thus, respondent argues claimant is not entitled to a higher work disability award because he was terminated for cause not associated with his work injuries and he indicated to respondent he was either incapable or unwilling to even attempt to perform a job within his work restrictions at a comparable wage.

The Administrative Law Judge in her award denied claimant workers compensation benefits for his alleged back and shoulder injuries because he failed to provide timely notice to respondent of the injuries. At oral argument before the Appeals Board, respondent withdrew the timely notice issue.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs and hearing the parties' arguments, the Appeals Board finds the Decision should be modified to award claimant a work disability.

FINDINGS OF FACT

1. Claimant, a citizen of Guatemala, started working for respondent at its Liberal, Kansas, plant on November 4, 1996.
2. Because claimant is a citizen of Guatemala and not a United States citizen, claimant was working in the United States under an employment authorization issued by the INS.
3. Claimant worked for the respondent as a ribeye boner. This job required claimant to cut meat from the bone in pieces weighing from 30 to 50 pounds every 15 seconds.
4. Claimant cut the meat from the bone using a knife and a hook. He was required to wear protective metal gloves, sleeves, and apron.

5. As claimant performed these repetitive job duties, wearing the heavy protective metal equipment, he began to have pain and discomfort in his neck, shoulders, and upper back.

6. Claimant first reported his symptoms to the company nurse through an interpreter as claimant is limited in education and also is limited in understanding and speaking English. The nursing station notes indicate that on March 31, 1998, claimant reported neck pain that had occurred since March 24, 1998.

7. Respondent first sent claimant for examination and treatment to a local physician, Dr. David Edwards, who provided claimant with pain medication and physical therapy.

8. Claimant was then sent to Dr. Christopher Wilson in Garden City, Kansas, who provided claimant with trigger point injections and additional medications.

9. During Dr. Wilson's treatment, claimant was placed on a leave of absence for his injuries from May 1, 1998 through May 14, 1998. On May 14, 1998, claimant returned to his regular boning job.

10. Because claimant remained symptomatic, the respondent placed him in an accommodated job on the paint and cleaning crew as of May 29, 1998.

11. On June 23, 1998, respondent placed claimant in a lighter accommodated job of carrying bills of lading from the front office to the security guard station.

12. Respondent also referred claimant for further examination and treatment to orthopedic surgeon C. Reiff Brown, M.D., of Great Bend, Kansas. Dr. Brown saw claimant for the first time on June 23, 1998. He took a history from claimant and conducted a physical examination. Dr. Brown found claimant with tenderness in the back of his neck with no extension into the upper trapezius or scapular muscles. Claimant had a 50 percent loss of range of motion of the neck in flexion, extension and rotation. The range of motion of claimant's shoulders was normal and there was no evidence of a radicular component.

13. Dr. Brown's diagnostic impression was chronic cervical strain. The doctor placed claimant in a work hardening program, continued claimant on home exercises and prescribed anti-inflammatory medication. Claimant was continued on light work restrictions of lifting and carrying of 1-10 pounds occasionally and no work using a knife or hook.

Dr. Brown saw claimant again on July 21, 1998. At that time, the doctor prescribed a different pain medication and continued claimant in a physical therapy program. Claimant was also continued on light work with the same restrictions.

14. The last time Dr. Brown saw claimant was on August 18, 1998. Claimant continued to have pain in his neck area with no radicular complaints. The doctor found claimant with

mild restriction of range of motion of the neck and no muscle spasm. At that time, claimant was no longer working for the respondent but remained symptomatic with only slight improvement. Dr. Brown gave claimant some additional home exercises, changed his medication and believed claimant was approaching maximum medical improvement. He continued claimant on the same work restrictions.

15. While claimant was under Dr. Brown's care and treatment, the respondent terminated claimant on July 24, 1998. George Hall, respondent's personnel manager, testified that claimant was considered a voluntary termination on July 24, 1998. The reason for the voluntary termination was that claimant's INS employment authorization had expired before claimant received the renewal of the authorization. Mr. Hall testified that respondent could be subject to both civil and criminal penalties if the respondent worked an employee after the employment authorization had expired.

16. Mr. Hall testified that claimant was notified his employment authorization was going to expire and claimant made a timely application for an extension of the employment authorization. But through no fault of the respondent or the claimant, the INS failed to issue the employment authorization until after the expiration date. Claimant finally received the employment authorization on July 27, 1998, only three days after respondent terminated claimant.

17. After claimant received his INS employment authorization, he reapplied for employment with respondent. The first time he reapplied was on August 12, 1998. Mr. Hall testified that claimant was not considered for reemployment at that time because he only had temporary work restrictions and respondent had a policy not to consider a person for employment with temporary work restrictions.

18. After claimant's termination, respondent's attorney requested through an August 25, 1998, letter to Dr. Brown, his opinion on permanent functional impairment and permanent work restrictions, if claimant had met maximum medical improvement. Dr. Brown, on August 31, 1998, without examining claimant, wrote a letter to respondent's attorney indicating that claimant was at maximum medical improvement. The doctor in accordance with the AMA Guides the Evaluation of Permanent Impairment, Fourth Edition, DRE Cervicothoracic Category II, imposed a 5 percent whole body permanent functional impairment for the March 24, 1998, neck injury. Dr. Brown restricted claimant to permanently avoid work requiring frequent neck rotation greater than 30 degrees in either direction and frequent neck extension greater than 30 degrees.

19. Finally, as a result of claimant filing a discrimination complaint against respondent, claimant was allowed to reapply for employment with respondent. Claimant's application for reemployment was approved by respondent's Rehire Review Committee. At that time, Mr. Hall had Debra Martinez, the Workers Compensation Coordinator, make a videotape of workers performing six different jobs in the plant that were thought to be within Dr. Brown's permanent work restrictions as imposed on August 31, 1998. Ms. Martinez

sent that videotape to Dr. Brown and requested Dr. Brown to give his opinion whether those jobs were within claimant's permanent work restrictions. Dr. Brown reviewed the tapes and, in a letter to respondent dated April 15, 1999, he indicated all the jobs were within claimant's permanent work restrictions.

20. On April 20, 1999, claimant was interviewed by Barbara Warner, respondent's Employment Director. Ms. Warner was instructed by the personnel department to offer claimant a job in the fabrication department of boxing cap meat. Ms. Warner described the job as working in a cold environment and requiring repetitive hand work.

21. Ms. Warner testified she did not know claimant's permanent work restrictions. In conjunction with the interview, claimant was also requested to fill out an employment questionnaire which asked claimant questions on whether he was willing or capable of performing certain job requirements. In answering those questions, claimant indicated he was incapable or unwilling to: (1) work up to 10 hours in temperatures near or below freezing; (2) work with sharp knives; (3) perform work requiring repeated motion of arms and wrists for a full day; (4) perform work pushing and pulling heavy objects on a regular basis for a full work day; and (5) perform work lifting over 25 pounds.

But claimant testified, and Ms. Warner verified, that claimant told Ms. Warner he would attempt to perform any job that was within the doctor's permanent work restrictions. Claimant testified he understood his work restrictions at the time respondent had terminated him were (1) lifting limited to 10-15 pounds, (2) not move his neck or back, (3) not lifting arms over shoulder level, and (4) no working with knives and hooks. Because claimant answered the employment questionnaire that he was not capable of performing a job requiring repetitive hand activities and he was unwilling or incapable of working in a cold environment, respondent withdrew the job offer.

22. Dr. Brown's opinions concerning claimant's ability to perform the videotaped jobs were based on the permanent work restrictions contained in his August 31, 1998, letter to respondent's attorney. There is no evidence in the record that claimant was aware of those permanent work restrictions before the boxing cap meat job was offered to him.

23. The August 31, 1998, letter is contained in Dr. Brown's records and is addressed to respondent's attorney and is not copied to anyone else. Dr. Brown did not examine claimant again before writing the August 31, 1998, letter to respondent's attorney.

24. At his attorney's request, claimant was examined and evaluated by Paul Rodriguez, M.D., on February 25, 1999, before the April 20, 1999, interview and job offer. As a result of that examination, Dr. Rodriguez restricted claimant's work activities to light work consisting of lifting occasionally from 11-20 pounds, frequently from 1-10 pounds, negligible force constantly, minimal cervical rotation and flexion, and no reaching above shoulders.

25. Dr. Rodriguez' diagnostic impression was chronic myofascial pain with limitation of motion in the cervical spine and shoulders. In accordance with the AMA Guides, Fourth Edition, Dr. Rodriguez assessed claimant with an 18 percent whole body functional impairment for injuries to claimant's cervical spine and shoulders.

26. Claimant's attorney also had claimant evaluated and examined by physical medicine and rehabilitation physician Frances Madden, M.D. Dr. Madden saw claimant on one occasion, November 16, 1998. Her impression was chronic cervical spine strain. Dr. Madden found claimant at maximum medical improvement. She agreed with Dr. Brown's permanent functional impairment rating of 5 percent pursuant to the AMA Guides, Fourth Edition, DRE Cervicothoracic Category II. Dr. Madden did not place any restrictions on claimant's work activities. But if more accurate restrictions were needed, she then proposed claimant undergo a physical capacity evaluation to give a guideline for the restrictions.

27. On the date of the regular hearing, January 25, 2000, claimant remained unemployed. He testified he had sought other employment following receipt of his INS employment authorization on July 27, 1998. In addition to applying for employment with respondent on three occasions, claimant testified he had looked for employment with other packing plants, grocery stores, pig farms, cattle feedlots, and had contacted the unemployment office every week. Claimant testified he was unable to find employment mainly because of his permanent work restrictions and his limited education and understanding of the English language.

28. At the regular hearing, claimant testified his neck, back and shoulders remained symptomatic. He further testified that he could not move his neck, bend his back, pick up more than 10 pounds or use a knife or hook.

29. Throughout the litigation of this case, claimant has claimed, in addition to injuring his neck while employed by the respondent, that he also permanently injured his back and shoulders. He claims he made back and shoulder complaints to all the physicians who either treated or performed independent examinations. But respondent's nursing station's notes do not show that he made any complaint other than complaints of pain and discomfort in his neck. Also, none of the examining or treating doctors, other than Dr. Rodriguez, indicate claimant made any complaints about his back or shoulders. In fact, the first time claimant was seen by Dr. Brown, he made a specific finding that claimant's shoulders range of motion was normal. Dr. Rodriguez was the only physician to diagnose claimant with a permanent injury other than to his neck. Dr. Rodriguez diagnosed claimant had permanently injured his shoulders while working for the respondent and also assessed claimant with a permanent functional impairment based on a range of motion deficit to the shoulders.

30. In regard to a work tasks loss, both Dr. Brown and Dr. Rodriguez reviewed a list of work tasks that claimant had performed in the 15 year period next preceding the

March 24, 1998, work-related accident. This list was compiled by vocational expert James T. Molski and verified by the claimant.

31. Based on the permanent restrictions he assigned, Dr. Rodriguez found claimant could not perform 8 of the 10 work tasks for an 80 percent task loss. On the other hand, Dr. Brown also reviewed the 10 work tasks compiled by Mr. Molski and found, based on the permanent restrictions he imposed, that claimant could not perform 2 of the 10 work tasks. Task number 1 of the meat trimmer job and task number 1 of the air knife operator's job were work tasks claimant was required to either move his head or twist his neck. Dr. Brown questioned whether claimant was able to perform those particular tasks because the task description did not give him enough information on what degree claimant would have to move his head or twist his neck. Thus, the Appeals Board finds that Dr. Brown was unable to give a definitive opinion as to whether claimant could perform those two work tasks with the permanent work injury he had experienced.

CONCLUSIONS OF LAW

1. In proceedings under the Workers Compensation Act, claimant has the burden to prove by a preponderance of the credible evidence his or her entitlement to an award of compensation and prove the various conditions on which that right depends.¹

2. K.S.A. 1997 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.

3. K.S.A. 1997 Supp. 44-510e also specifies that a claimant is not entitled to permanent partial general 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 pre-injury average weekly wage.

4. The wage component of the work disability test is based on the actual wage loss only if claimant has shown good faith in efforts to obtain or retain employment after the injury. Claimant may not, for example, refuse to accept a reasonable offer for

¹ See K.S.A. 1997 Supp. 44-501(a) and K.S.A. 1997 Supp. 44-508(g).

accommodated work. If claimant refuses to even attempt such work, the wage of the accommodated job may be imputed to the claimant in a work disability calculation.²

5. Even if no work is offered, claimant must show that he or she made a good faith effort to find appropriate employment. If claimant does not do so, a wage will be imputed to claimant based on what claimant should be able to earn.³

6. Under certain circumstances, an injured worker who respondent returns to work in an accommodated position at a comparable wage and then is terminated for reasons unrelated to his work injury, is limited to an award based on his functional impairment rating.⁴

7. The Appeals Board concludes, under the circumstances in this case, claimant's termination was not a result of bad faith or any wrong doing on the part of the claimant. After claimant's March 24, 1998, work-related injury, respondent returned claimant to accommodated work within his temporary work restrictions as specified by claimant's treating physician, Dr. Brown. This case is distinguishable from Ramirez because in Ramirez the claimant was denied a work disability because he was terminated after his work-related injury for not disclosing an earlier workers compensation claim. Here, claimant was not terminated for acting in bad faith or for any wrong doing on his part. The termination was a result of the INS failing to timely process claimant's application for an extension of his employment authorization. George Hall, respondent's personnel director, admitted claimant's termination was of no fault of claimant or respondent. Thus, the Appeals Board finds that neither Foulk nor Ramirez applies.⁵

8. After claimant received his INS employment authorization on July 27, 1998, the Appeals Board finds the record contains uncontradicted evidence he made a good faith effort to find appropriate employment. Claimant established through his testimony he reapplied for employment with respondent on three separate occasions. The last time was April 21, 1999, when respondent withdrew the job offer. Claimant also testified, at the regular hearing, that he continued to contact the unemployment office every week for jobs and on a regular basis applied for jobs in his working area.

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

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

⁴ See Ramirez v. Excel Corporation, 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* ___ Kan. ___ (1999).

⁵ See Niesz v. Bill's Dollar Stores, 26 Kan. App.2d 737, 741, 993 P.2d 1246 (1999).

9. The respondent also argues claimant is not entitled to a work disability because he was offered on April 20, 1999, the job of boxing cap meat in the fabrication department that was within Dr. Brown's permanent restrictions and claimant indicated to the respondent he was unwilling or incapable of performing that job.

10. The Appeals Board, however, concludes, at the time respondent offered claimant the boxing cap meat job, claimant had not been informed by either the respondent or Dr. Brown of the permanent restrictions Dr. Brown imposed on claimant in the letter to respondent's attorney dated August 31, 1998. The only evidence that shows these restrictions is Dr. Brown's August 31, 1998, letter to respondent's attorney. George Hall testified respondent had not communicated these work restrictions to claimant during his reemployment application process.

11. The Appeals Board finds it is also significant that before respondent offered claimant the boxing cap meat job, claimant had been examined and evaluated by Dr. Rodriguez who also imposed permanent work restrictions on claimant. The questions claimant answered in the negative on the employment questionnaire he filled out during the reemployment application process on April 20, 1999, are generally a combination of the work restrictions claimant knew as the temporary restrictions imposed by Dr. Brown and permanent restrictions imposed by Dr. Rodriguez.

12. During the reemployment application process, claimant asked Ms. Warner, respondent's employment director, if the boxing cap meat job was within the doctor's restrictions because he would attempt any job approved by the doctor. Ms. Warner testified she did not answer that question because she did not know claimant's work restrictions when she offered him the job.

13. The Appeals Board concludes claimant made a good faith effort to find appropriate employment including reemployment with respondent. Claimant was ready and willing to return to work for the respondent but did not accept the offered job because he did not know Dr. Brown had approved the job and he did not know the permanent work restrictions Dr. Brown had imposed on his work activities.

14. In regard to claimant's permanent functional impairment rating, the Appeals Board finds claimant failed to prove he sustained permanent injury to his back and shoulders. Therefore, the Appeals Board affirms the Administrative Law Judge's finding based on the opinions of both Dr. Brown and Dr. Madden that claimant has a 5 percent permanent functional whole body impairment rating for a cervical spine injury.

15. As found above, claimant made a good faith effort to find appropriate employment after respondent terminated him on July 24, 1998, and has failed to do so. Therefore, the Appeals Board finds claimant has a 100 percent wage loss from July 27, 1998, the date his employment authorization was renewed by the INS.

16. The only physician to express an opinion on claimant's work task loss for permanent work restrictions relating only to a permanent neck injury was Dr. Brown. Dr. Rodriguez also testified as to claimant's work task loss but used work restrictions that included claimant's shoulders. The Appeals Board concludes Dr. Brown's opinion on work task loss should be interpreted to reflect a loss of 2 out of 10 work tasks or 20 percent. The Appeals Board acknowledges the 2 tasks that we are indicating claimant can no longer perform were only questioned by Dr. Brown and he indicated claimant could have performed those tasks with accommodation. The Appeals Board has interpreted the work task to be considered for purposes of task loss opinion under the statute should be as the task was actually performed by claimant before the injury. The test is not whether the claimant could still perform the task if accommodations or changes are made. The Appeals Board finds the two tasks involved either the movement of the head or neck which, depending on the degree and frequency of the movement, violated Dr. Brown's permanent work restrictions. Under these circumstances, the Appeals Board finds those two tasks should be interpreted as lost as the result of claimant's permanent neck injury.

17. Averaging the 100 percent wage loss with the 20 percent work task loss, the Appeals Board finds claimant is entitled to a 60 percent work disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Pamela J. Fuller's May 10, 2000, Decision should be modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Rigoberto Mejia De Paz, and against the respondent, National Beef Packing Company, L.P., and its insurance carrier, Wausau Insurance Companies, for an accidental injury which occurred March 24, 1998, and based upon an average weekly wage of \$564.94.

Claimant is entitled to .86 weeks of temporary total disability compensation at the rate of \$351.00 per week or \$301.86, followed by 249 weeks⁶ of permanent partial disability compensation at the rate of \$351.00 per week or \$87,399.00, for a 60% permanent partial general disability, making a total award of \$87,700.86.

As of April 30, 2001, there is due and owing claimant .86 weeks of temporary total disability compensation at the rate of \$351.00 per week or \$301.86, followed by 160.85

⁶ Included in the 249 weeks is the 3-day period after respondent terminated claimant and before he received the INS renewal of his employment authorization. Claimant, although not entitled to a work disability for this 3-day period, would be entitled to permanent partial disability based on functional impairment and at the same weekly compensation rate.

weeks of permanent partial compensation at the rate of \$351.00 per week in the sum of \$56,458.35 for a total of \$56,760.21, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$30,940.65 is to be paid for 88.15 weeks at the rate of \$351.00 per week, until fully paid or further order of the Director.

Claimant is entitled to the unauthorized medical expenses up to the statutory maximum of \$500.00.

All authorized medical expenses are ordered paid by respondent.

All remaining orders contained in the Decision are adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of April 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Ausemus, Emporia, KS
Shirla R. McQueen, Liberal, KS
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Director