

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

PAUL DUKE)	
Claimant)	
VS.)	
)	Docket No. 233,942
CORNEJO & SONS, INC.)	
Respondent)	
AND)	
)	
WAUSAU UNDERWRITERS INSURANCE CO.)	
Insurance Carrier)	

ORDER

Respondent appeals from an Award entered by Administrative Law Judge Jon L. Frobish on July 20, 1999. The Appeals Board heard oral argument December 10, 1999.

APPEARANCES

Joni J. Franklin of Wichita, Kansas, appeared on behalf of claimant. Douglas C. Hobbs of Wichita, 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 Administrative Law Judge awarded benefits for a 10 percent disability based on functional impairment from November 27, 1996, through April 9, 1998, while claimant was earning a comparable wage working for respondent. Respondent terminated claimant's employment April 10, 1998, and from April 10, 1998, through January 24, 1999, the award is for a work disability of 63.5 percent based, in part, on a 100 percent wage loss. As of January 25, 1999, claimant found other employment and the wage loss drops to 49 percent and the work disability drops correspondingly to 38 percent.

On appeal, respondent argues the award should be governed by provisions of K.S.A. 44-510e which limit the award to functional impairment in cases where, after the injury, claimant earns a wage which is 90 percent or more of the preinjury wage. Respondent argues

that claimant was terminated from a comparable wage position for reasons unrelated to the injury. According to respondent, this fact operates to limit the award to one based on the wage claimant was earning at the time he was terminated. In this case, the wage claimant was earning at the time he was terminated was more than 90 percent of the preinjury wage, and the award should, respondent argues, be limited to functional impairment pursuant to K.S.A. 44-510e.

Claimant argues that the award should be affirmed. Claimant contends claimant was terminated because of his injury. In the alternative, claimant contends that even if the termination was for reasons other than the injury, respondent has not proven there was cause for the termination. Claimant argues he acted in good faith at all times and should be entitled to a work disability.

Respondent contested other issues before the ALJ, but nature and extent of disability is the only issue on appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board agrees with and affirms the decision to award a work disability but has modified the amount of the disability to correct a calculation error.

Findings of Fact

1. Claimant injured his right leg and left arm on November 27, 1996, when a scissor lift ran over the back of claimant's leg, pulling him down to the ground.
2. Immediately after the injury, claimant was taken by ambulance to the Occupational Health Clinic where his leg was x-rayed and he was sent home to elevate and put ice on the leg. On December 4, 1996, claimant saw Dr. Robert L. Eyster. Dr. Eyster diagnosed a pulled or torn Achilles tendon and a fracture of the left elbow. Dr. Eyster continued to treat and monitor claimant's injury but claimant returned to work approximately five weeks after the injury.
3. Dr. Eyster rated claimant's impairment as 4 percent of the arm and 10 percent of the lower extremity which he combined to a 6 percent whole body impairment. Dr. Eyster advised claimant would need to be careful and indicated claimant should not do ladders or stairs repetitively, should not repetitively squat, and should stand and walk intermittently. Dr. Eyster reviewed a list of tasks claimant had done in his work during the previous fifteen years, a list prepared by Mr. Jerry D. Hardin. Although Mr. Hardin had identified some tasks he felt claimant could not do, Dr. Eyster felt claimant should be able to do all of the tasks. He acknowledged claimant might have some difficulty but still felt the tasks did not absolutely violate his restrictions. But Dr. Eyster also predicted claimant may need surgery in the future for the injury to his ankle.

4. The work to which claimant returned was initially an accommodated job. The accommodation included a golf cart claimant was allowed to ride. After about six months respondent took the cart away, advising claimant that the walking would do him good. Claimant testified he could do his regular job without the golf cart. He hobbled and limped some but he could do the job. Claimant worked for the last three months without using the golf cart.

5. Respondent terminated claimant after claimant reported that a coworker was drunk on the job. Claimant's last day of employment for respondent was April 10, 1998.

6. Claimant's injury and workers compensation claim was one of the reasons respondent terminated claimant's employment. Claimant had no problems with his supervisors prior to the injury. After the injury Mr. Cornejo became upset every time claimant tried to talk to him about the claim. Claimant was harassed about the injury. When respondent took away the golf cart, respondent simply advised claimant that walking would do him good.

The circumstances of claimant's termination suggest there was some reason for the termination other than the immediate events. On the day he was terminated, claimant asked Angelo Cornejo, brother of one of the owners, to remove from the job another employee, an employee who had been drinking but was about to operate a backhoe. Angelo Cornejo became upset and struck claimant. At the time claimant was terminated, claimant asked why he was being terminated and Richard Cornejo, one of the owners, told him he could not say because claimant would use it against them.

These factors convince the Board that the injury and workers compensation claim were factors in the decision to terminate claimant.

7. The Board also finds that claimant acted in good faith to retain and perform his job with respondent. Even if the injury and/or workers compensation claim were not a factor, the Board concludes claimant was not terminated for misconduct by claimant.

8. After leaving the employment with respondent, claimant was unemployed until January 25, 1999. At that time claimant began working at \$6.25 per hour. The ALJ found claimant made a good faith effort to work and used a 100 percent wage loss for the period from April 10, 1998, through January 24, 1999. After January 24, 1999, the ALJ used a wage loss of 49 percent. Neither party disputes those findings in this appeal. The Board agrees with and adopts those findings.

Conclusions of Law

1. Respondent does not, on appeal, argue with the findings of the ALJ on task or wage loss in the event work disability is awarded. Respondent rather argues that no work disability should be awarded. The Board agrees with and affirms the findings by the ALJ that claimant

made a good faith effort to find employment after he left work for respondent in April 1998 and he began working at \$6.25 per hour January 25, 1999.

2. The Board finds claimant has a 22 percent task loss as a result of this injury¹. This finding is based on the opinion of Dr. Philip R. Mills who concluded claimant could not do 6 of 27 tasks. The Board acknowledges other opinions in the record but finds the opinion of Dr. Mills to be the most credible.

3. The Board finds claimant is entitled to a work disability award. K.S.A. 1996 Supp. 44-510e provides 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. In this case claimant earned the same wage during the period he remained employed for respondent, the period from November 27, 1996, through April 10, 1998. For that period, claimant's award is limited to the functional impairment of 10 percent based on the testimony of Dr. Mills.

4. For the period April 10, 1998, through January 24, 1999, claimant had a 100 percent wage loss and the Board finds claimant is entitled to use this wage loss to calculate the work disability. The Court of Appeals has limited the claimant to functional impairment in some cases where the claimant has been terminated for cause. *Ramirez v. Excel Corporation*, 26 Kan. App. 2d 139, 979 P.2d 1262, rev. denied ____ Kan. ____ (1999). But in this case the Board has found that the injury and workers compensation claim were factors in the decision to terminate claimant. This fact, the Board believes, materially distinguishes this case from others where the Court of Appeals has limited the claimant to functional impairment after termination.

In addition, the evidence indicates claimant acted in good faith to continue working for respondent. The termination was not based on any misconduct by claimant. This factor also distinguishes this case from others where the Court of Appeals has limited the award to functional impairment. *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

5. On January 25, 1999, claimant began working at \$6.25 per hour and the wage loss became 49 percent.

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

¹ The ALJ used 6 of 27 but described this, apparently due to a calculation error, as a 27 percent loss.

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. Claimant’s disability is 10 percent based on functional impairment from November 27, 1996, through April 9, 1998; 61 percent work disability based on 100 percent wage loss and a 22 percent task loss from April 10, 1998, to January 24, 1999; and a 35.5 percent work disability after January 24, 1999, based on a 49 percent wage loss and a 22 percent task loss.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish on July 20, 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, Paul Duke, and against the respondent, Cornejo & Sons, Inc., and its insurance carrier, Wausau Underwriters Insurance Co., for an accidental injury which occurred November 27, 1996, and based upon an average weekly wage of \$506.02, for 3.84 weeks of temporary total disability compensation at the rate of \$337.36 per week or \$1,295.46, followed by 147.33 weeks at the rate of \$337.36 per week or \$49,703.25, for a final work disability of 35.5 percent, making a total award of \$50,998.71, all due and owing less amounts previously paid.

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 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Joni J. Franklin, Wichita, KS
- Douglas C. Hobbs, Wichita, KS
- Jon L. Frobish, Administrative Law Judge
- Philip S. Harness, Director