BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MIKE COBBE	)	
Claimant	)	
VS.	)	
	)	Docket No. 242,161
ATCHISON CASTING CORPORATION	)	242,162
Respondent and	)	
Self-Insured	)	
	)	
	)	

ORDER

Respondent appealed the September 7, 2000 Award entered by Administrative Law Judge (ALJ) Bryce D. Benedict. The Appeals Board heard oral argument on March 7, 2001.

Appearances

Mark S. Gunnison of Overland Park, Kansas appeared for claimant. John B. Rathmel of Overland Park, Kansas appeared for respondent.

Record and Stipulations

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

Issues

Docket Number 242,161 involves an alleged November 25, 1997 accident. The ALJ found that claimant had no temporary nor permanent disability from the accident. Accordingly, the ALJ denied claimant an award for temporary total and permanent partial disability compensation. Unauthorized medical expense was awarded, as was future medical upon proper application and approval. On appeal, respondent contends that the ALJ's award in Docket Number 242,161 should be affirmed. But claimant raised two

issues: 1) whether claimant suffered personal injury by accident arising out of and in the course of his employment; and 2) the nature and extent of disability. As the ALJ awarded compensation in the form of unauthorized medical and left open claimant's right to seek future medical benefits in Docket Number 242,161, the ALJ obviously found claimant had proven he suffered personal injury by accident arising out of and in the course of his employment with respondent. Respondent does not dispute that finding on appeal, and instead asks that the ALJ's award in Docket Number 242,161 be affirmed. Accordingly, the first issue raised by claimant is not in dispute. Therefore, the Board affirms the ALJ's finding in Docket Number 242,161 that claimant suffered personal injury by accident on November 25, 1997, and that the same accident arose out of and in the course of claimant's employment with respondent. Accordingly, the only remaining issue for the Board's review in the first docketed claim is the nature and extent of claimant's disability.

In Docket Number 242,162, claimant alleged personal injury by accident occurred on October 22, 1998. The ALJ awarded claimant 14.43 weeks of temporary total disability compensation and an 89.5 percent permanent partial general body disability based upon the average of a 79 percent task loss and a 100 percent wage loss. On appeal respondent seeks board review of the ALJ's findings that claimant suffered personal injury by accident arising out of and in the course of his employment and, if so, the nature and extent of claimant's disability.

Findings of Fact and Conclusions of Law

Having reviewed the entire record, the Board finds that the ALJ's award should be affirmed in Docket Number 242,161 but modified in Docket Number 242,162. The Board agrees with and adopts the findings of fact and conclusions of law in Docket Number 242,161 set forth by the ALJ in the award. In Docket Number 242,162, the Board makes the following findings and conclusions:

At the time of the Regular Hearing claimant was 26 years old and living in Lansing, Kansas. He has a 10th grade education and has received no vocational training since dropping out of high school. His past work experience is mostly manual type labor including farming and truck driving. Claimant began working for respondent in 1997 . On November 25, 1997, claimant was working for respondent as a plate cleaner. On that date he was pulling a plate from a rack when a co-worker struck the rack with a mule, pinning claimant between the rack and a core box. A mule is a mechanical device that hauls skids for the casting molds. Claimant described getting "smashed sideways" with immediate pain in his low and middle back, stomach, both legs and shoulder. Claimant does not know how long he was pinned or if he lost consciousness. The first thing he remembers is a co-worker holding him and trying to put him on a cart. But the pain was so bad they called for an ambulance.

Claimant was taken to the Atchison Hospital where he was admitted and released the following day. Claimant returned to work and worked light duty for a couple of weeks before returning to his regular job duties. But claimant related that following his release from the hospital he continued to have problems with pain in his back and stomach and problems with throwing up and being unable to eat. Claimant returned to the hospital about a week after the accident because of his stomach problems and vomiting. Claimant also complained to the company nurse and was instructed to take Pepto-Bismol. Claimant's stomach problems persisted and in April 1998 claimant was admitted to the hospital for testing. He was released after five days. Shortly thereafter claimant was again hospitalized for about a week and underwent abdominal surgery. Respondent admits to the November 25, 1997 accident being work related, but denies that the surgery was related to that work related accident.

Claimant eventually returned to full duty work with respondent delivering rods and chills. On October 22, 1998, claimant picked up a chill and felt an onset of pain in his back radiating down his leg to his toes. Claimant denied having radiating type pain and numbness in his leg before this accident. Claimant reported the accident that same day and was sent by respondent to Dr. Wheatley. Eventually he was referred to an orthopedic surgeon, Dr. Dalenberg. His treatment included epidural injections and physical therapy. Claimant was released to return to work with light duty restrictions in February 1999, but respondent was unable or unwilling to accommodate those restrictions. Claimant made an attempt to return to work in March 1999 but was unable to tolerate his rod and chill job. The only job claimant has held since working for respondent was driving a school bus for approximately three months. Claimant testified that he had difficulty sweeping and cleaning the bus and that driving the bus caused his back to hurt. The school bus driver job was part-time and paid $30 a day. Claimant lost that job because he did not have transportation to work. Claimant lost his car because he could not afford the payments. At the time of the May 18, 2000 Regular Hearing claimant was living with his mother and step-father and was in the process of going through a divorce. He also had custody of his eighth month old child. Also, at the time of the Regular Hearing claimant was continuing to experience low back pain with pain radiating down his left leg and tingling in his left foot. He described his pain as being about the same as when he was released by Dr. Dalenberg.

Stephen W. Wheatley, D.C., testified that he first saw claimant on October 23, 1998, on a referral from Atchison Casting. Dr. Wheatley took no x-rays before treating claimant and had none of claimant's prior treatment records. Claimant gave a history of being hit in the back approximately nine months' earlier but with a recent worsening of his symptoms. Claimant described pain in his back and a burning sensation in his right lateral thigh. On subsequent office visits claimant had additional complaints including numbness in the left leg and foot and a burning sensation on the bottom of his left foot, numbness in the left shoulder, and headaches. Because of claimant's ongoing symptoms, Dr. Wheatley

recommended he see an orthopedic physician. Dr. Wheatley last saw claimant on February 9, 1999 and continued his restriction against heavy lifting.

Board certified orthopedic surgeon Dale D. Dalenberg, M.D. first saw claimant on February 12, 1999 on a referral by Alan Hundley of Atchison Casting. Claimant had complaints of low back and left leg pain which claimant related to a November 25, 1997 injury. Dr. Dalenberg does not recall there being a mention of an October 1998 accident. Despite the fact that Mr. Hundley had sent a letter to Dr. Dalenberg which referenced claimant having been sent to a chiropractor, Dr. Dahlenberg made no attempt to obtain those records. Dr. Dalenberg took x-rays which showed narrowing at the L4-5 disc but which were otherwise normal. He also ordered an MRI which appeared normal. He ordered physical therapy through Atchison Hospital and lumbar epidural injections which were performed by Dr. Goracke. Despite claimant's continued pain complaints, he released claimant to return to regular duty without restrictions on March 26, 1999. Dr. Dalenberg noted that at the time of his March 12, 1999 examination claimant said that he was ready to return to full duty work, but when he saw him two weeks later claimant said he did not think he could return to any work, much less full duty. Because claimant had subjective symptoms without objective findings, Dr. Dalenberg did not consider claimant to have a permanent impairment of function.

Despite the letter from Mr. Hundley referencing claimant's treatment with a chiropractor, Dr. Dalenberg testified that he was not aware respondent had sent claimant to Dr. Wheatley nor did he have any information that claimant had suffered a second injury. Dr. Wheatley was not aware claimant had received any treatment immediately after his November 1997 injury. When asked whether it would have mattered to him whether he was treating a November 1997 injury versus an October 22, 1998 injury, Dr. Dalenberg said that his treatment would have been the same but that he would have pushed for a period of work hardening had he known about the October 1998 injury and the fact that the claimant had been treated by a chiropractor up until the time that he took over claimant's treatment.

At the request of his attorney, claimant was examined by board certified orthopedic surgeon Truett L. Swaim, M.D., on April 15, 1999. Dr. Swaim, now limits his practice to performing disability evaluations and is board certified as an independent medical examiner. As a part of his examination, Dr. Swaim reviewed claimant's pertinent medical history and medical records. Dr. Swaim found claimant's pancreatitis and left tenth rib fracture to have been the result of the crushing injury claimant sustained on November 25, 1997. He attributed claimant's lumbar pain with radiculopathy to the injury of October 22, 1998. He considered claimant to be at maximum medical improvement and rated his impairment at 18 percent to the body as a whole for pancreatitis and 10 percent for the lumbar spine condition with radiculopathy. He combined these ratings for a 26 percent whole body impairment. Dr. Swaim also recommended that claimant be re-evaluated by

a gastroentrologist for his abdomen and agreed that a gastroentrologist and some general surgeons would be in a better position to determine the cause of claimant's pancreatitis as Dr. Swaim was geared towards orthopedics. Nevertheless, based upon the hospital records, including the records of Dr. Marvin Patel, Dr. Swaim related claimant's pancreatitis to the initial crush type injury. He said claimant's abdominal symptoms started with that trauma, claimant was seen in followup with stomach complaints and was diagnosed with pancreatitis four months after the trauma.

Dr. Swaim also recommended restrictions because of the back injury, concurring with the restrictions given by Dr. Prostic.

Dr. Prostic, who is also a board certified orthopedic surgeon, saw claimant on May 24, 1999.[1] He rated claimant's orthopedic impairment at 15 percent to the body as a whole and recommended restrictions of no lifting greater than 40 pounds occasionally or 20 pounds frequently, avoid forceful pushing or pulling, avoid repetitious bending or twisting at the waist, avoid use of vibrating equipment and be allowed to change positions frequently. These restrictions were likewise because of claimant's back condition. With these restrictions in mind, Dr. Prostic reviewed the task list prepared by claimant's vocational expert, Michael Dreiling, and opined that claimant had lost the ability to perform 12 of the 19 tasks. Dr. Prostic was equivocal on four tasks, indicating that claimant's ability to perform those tasks would depend upon certain conditions or that he would need additional information about how they were performed before he could say whether or not claimant could perform those tasks within his restrictions. Dr. Prostic also said that in his opinion claimant retained the ability to be able to perform tasks Number 18 and 19 which involved the school bus driver job.

Dr. Prostic was equivocal about claimant's ability to perform tasks number 1, 8,12, and 16, and the record does not establish whether or not those tasks were performed in a manner inconsistent with Dr. Prostic's restrictions. Accordingly, as the burden to prove task loss is on claimant, the Board will consider those tasks to be within claimant's ability. With these adjustments, claimant established through the testimony of Dr. Prostic, that he has lost the ability to perform 12 of 19 job tasks for a loss of 63 percent. As the ALJ's work disability award was based upon his finding that claimant has lost the ability to perform 15 of 19 task, for a 79 percent task loss, the Board is modifying the ALJ's work disability finding to this extent.

The ALJ ordered an independent medical examination by Douglas Rope, M.D. Dr. Rope is board certified in internal medicine and, like Dr. Swaim, is a Fellow of the American

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[1] Although the transcript of the April 18, 2000 evidentiary deposition of Edward J. Prostic, M.D., shows that his deposition was taken on behalf of the respondent and self insured, claimant was actually sent to Dr. Prostic by his attorney and his deposition was taken by claimant's counsel as claimant's witness.

Academy of Disability Evaluating Physicians. Dr. Rope examined claimant on October 15, 1999 and found claimant to have deep tenderness and spasm in the low back predominately on the left side, abnormal restriction of flexion, extension and lateral flexion combined with abnormalities in straight leg raising. He also found claimant to have attenuation of the Achilles reflex on the left. He found pin-prick and light touch sensation were diminished over the lateral left foot. He described these findings as objective evidence of radiculopathy. Dr. Rope said he found no symptom magnification and described claimant as a credible patient. Dr. Rope believed all of his findings to be objective. He rated claimant's low back condition at 10 percent to the body as whole based upon the 4th Edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment. Dr. Rope acknowledged that claimant had chronic low back discomfort beginning with the November, 1997 injury, but because the radicular symptoms began after the lifting injury in October, 1998, he attributed all of claimant's orthopedic complaints to the work related lifting injury of October 22, 1998. As for restrictions, Dr. Rope recommended that claimant be given the opportunity to move about and change positions every 30-40 minutes, he should avoid repetitive bending and squatting, and Dr. Rope agreed with Dr. Prostic's recommended lifting restrictions of 40 pounds occasionally, 20 pounds frequently as well as push/pull limitations and avoidance of vibrating tools.

Dr. Rope would not say that to a reasonable degree of medical certainty it was more probably true than not true that claimant's pancreatitis resulted from or was aggravated by the work related accident of November 25, 1997. But he likewise could not say to a reasonable degree of medical certainty that the pancreatitis was not caused by that accident. He acknowledged that ninety percent of the cases of pancreatitis are due to gallstones or alcohol. Claimant, however, had no presence of gallstones and no history of alcohol use. On the other hand, trauma is a known cause of pancreatitis and Dr. Rope said the trauma described was a sufficient traumatic event that it could be a competent cause of pancreatitis. The third most common cause of pancreatitis is the idiopathic, meaning unknown.

> In summary, implication of the November, 1997 injury in Mr. Cobbe's complaints of chronic abdominal pain - and/or his confirmed episodes of pancreatitis - might seem attractive heuristically. To do so is, however, in the final analysis a) entirely speculative and b) totally inconsistent with the accumulated published experience of the profession. In no way could such an assertion be made to a reasonable degree of medical certainty.[2]

The Board agrees with the finding by the ALJ that Dr. Rope is the most competent and credible witness on the issue of whether claimant's pancreatitis was traceable to either

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[2] Depo. Douglas M. Rope, M.D., Ex. B report dated October 15, 1999 (June 28, 2000).

of the work related injuries. As Dr. Rope could not say claimant's pancreatitis condition was more probably than not due to his work trauma based upon a reasonable degree of medical certainty, the Board affirms the ALJ's conclusion that the pancreatic condition is not compensable.

Based upon the expert medical testimony together with the medical records in evidence and the testimony of claimant, as well as that of Alan Hundley, respondent's health and safety supervisor, the Board finds claimant suffered a low back injury at work on October 22, 1998, as described, in addition to the injury resulting from the pinning incident of November 25, 1997.

Because claimant's injuries constitute an "unscheduled" injury, claimant's permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e. That statute provides:

> 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. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But the statute must be read in light of Foulk[3] and Copeland.[4] In Foulk the Court held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In Copeland, for purposes of the wage loss prong of K.S.A. 44-510e, the Court held that workers' post-injury wages should be based upon ability rather than actual wages when they fail to make a good faith effort to find appropriate employment after recovering from their injuries.

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

[4] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[5]

Respondent contends claimant is not entitled to a work disability because he did not make a good faith attempt to perform his work for respondent after his release by Dr. Dalenberg. But claimant was not at maximum medical improvement at the time he returned to work for respondent and was not able to do his job.

The question then becomes whether claimant thereafter made a good faith effort to obtain employment. If claimant failed to make a good faith effort, or unreasonably refused to perform appropriate work as in Foulk, then claimant is precluded from using his actual earnings when calculating the wage loss prong of the two-part disability formula.[6] The ALJ found claimant did make a good faith effort to find appropriate employment, but was unsuccessful in his job efforts. The ALJ therefore found claimant's wage loss to be 100 percent. The Board, however, disagrees that claimant's testimony concerning his job search efforts was sufficient to satisfy his burden of proof. Accordingly, the Board will impute a weekly wage of $206 to claimant, based upon his ability to earn minimum wage. When compared to his average weekly wage of $710.11 this results in a wage loss of 71 percent.

The Board agrees with the ALJ's analysis of the evidence regarding claimant's functional impairment as set forth in the Award. Likewise, the Board agrees that, in this instance, greater weight should be given to the opinions of Dr. Prostic as to claimant's permanent restrictions and task loss. But, as noted above, the Board modifies the ALJ's task loss finding from 79 percent to 63 percent and the wage loss from 100 percent to 71 percent. When claimant's 63 percent task loss is averaged with the 71 percent wage loss, his work disability is 67 percent.

It should be noted that respondent stopped paying claimant's fringe benefits on July 12, 1999, when claimant was put on layoff status and, as a result, his average weekly wage changed from $516.51 to $710.11 and the weekly compensation rate increased from $344.36 to $366.00

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[5] Copeland at 320.

[6] *See* Helmstetter v. Midwest Grain Products, Inc., ___Kan. App.2d___, 18 P.3d 987 (2001); Oliver v. The Boeing Company-Wichita, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 886 (1999).

Award

WHEREFORE, the Board affirms the Award entered by Administrative Law Judge Bryce D. Benedict in Docket Number 242,161, but modifies the September 7, 2000 Award in Docket Number 242,162 and awards claimant a 67 percent permanent partial general disability.

Mike Cobbe is granted compensation from Atchison Casting Corporation for an October 22, 1998 accident and resulting disability. Mr. Cobbe is entitled to receive 14.43 weeks of temporary total disability benefits at $344.36 per week, or $4,969.11, plus 23.14 weeks of permanent partial disability benefits at $344.36 per week, or $7,968.49, plus 237.88 weeks of permanent partial disability benefits at $366.00 per week, or $87,062.40, for a 70.5 percent permanent partial general disability and a total award not to exceed $100,000.

As of March 15, 2002, there is due and owing to the claimant 14.43 weeks of temporary total disability compensation at $344.36 in the sum of $4,969.11, plus 23.14 weeks of permanent partial general disability compensation at $344.36 per week, or $7,968.49, plus 139.57 weeks of permanent partial general disability compensation at $366 per week or $51,082.62, for a total due and owing of $64,020.22, which is ordered paid in one lump sum less any amount previously paid. Thereafter, the remaining balance of $35,979.78 shall be paid at $366.00 per week until paid or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of March 2002.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Mark S. Gunnison, Attorney for Claimant
John B. Rathmel, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Workers Compensation Director