

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

<b>DALLAS C. KILPATRIC</b>	)	
Claimant	)	
VS.	)	
	)	
<b>BONANZA, INC.</b>	)	
Respondent	)	Docket No. 253,097
	)	
AND	)	
	)	
<b>CONTINENTAL WESTERN INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent appealed the January 10, 2002 Award entered by Administrative Law Judge (ALJ) John D. Clark. The Appeals Board (Board) heard oral argument on July 16, 2002. Gary Peterson was appointed and participated as Appeals Board Member Pro Tem.

**APPEARANCES**

Stephen J. Jones of Wichita, Kansas, appeared for claimant. Nathan D. Burghart of Topeka, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

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

ISSUES

Claimant injured his low back on January 11, 2000 while lifting cement blocks. Respondent admits claimant suffered a work-related injury as alleged, but disputes his entitlement to a work disability.

In the January 10, 2002 Award, Judge Clark determined claimant sustained a five percent whole person functional impairment. But because claimant was not accommodated by respondent and did not find other employment that paid at least 90 percent of his average weekly wage, the ALJ found claimant was entitled to a work disability (a permanent partial general disability greater than the percentage of functional impairment).

Based upon the average of a 22 percent wage loss and a 41 percent task loss the ALJ found claimant's permanent partial general disability to be 31.5 percent. The ALJ denied respondent's request for a credit against the permanent partial disability award for the alleged overpayment of temporary total disability compensation.

Respondent and its insurance carrier contend the ALJ erred. They argue, among other things, claimant should be compensated for only a five percent functional impairment; claimant is not entitled to receive a work disability because after respondent was unable to provide accommodated work, claimant did not make a good faith effort to find appropriate employment and he retains the ability to earn at least 90 percent of his pre-injury wages; claimant quit a job which was paying at least 90 percent of claimant's pre-injury wage and therefore, the Board should impute a post-injury wage; even if a work disability is awarded, the ALJ erred in the award calculation by not accounting for the period claimant was actually earning 90 percent or more of his average weekly wage; claimant's task loss should be no greater than the 26 percent opined by Dr. Brown, but if Dr. Mills' opinion is included it was actually 49 percent not 56 percent; claimant's post-injury average weekly wage at PSI Security was actually \$314.96, not \$300, when the average overtime earnings of \$14.96 are included which would result in a wage loss of 18.45 percent rather than the 22 percent found by the ALJ; when the 18.45 percent wage loss is averaged with the 37.5 percent task loss (26 percent and 49 percent divided by two equals 37.5 percent) the resulting work disability is 28 percent.

The respondent and its insurance carrier described the issues before the Board on this appeal as follows:

1. The Administrative Law Judge erred in finding that the claimant is entitled to a work disability.
2. The Administrative Law Judge erred in computing the claimant's work disability.

3. The Administrative Law Judge erred as a matter of law when he failed to make a finding that Claimant made a good faith effort to find employment, as required by *Copeland*<sup>1</sup> before awarding permanent partial disability under K.S.A. 44-510e(a). Further, the Administrative Law Judge erred in not imputing a wage of \$376.00 per week to the claimant.
4. The Administrative Law Judge erred when he failed to give Respondent a credit for overpayment of temporary total disability benefits which were paid pursuant to a preliminary award that was later reversed by the Board of Appeals.<sup>2</sup>

#### FINDINGS OF FACTS AND CONCLUSIONS OF LAW

After reviewing the entire record, the Board finds and concludes, as follows:

When an injury does not fit within the schedules of K.S.A. 1999 Supp. 44-510d; permanent partial general disability is determined by the formula set forth in K.S.A. 1999 Supp. 44-510e, which provides in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the hysician, 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. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total hysiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional**

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<sup>1</sup> *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1977).

<sup>2</sup> Brief of Appellants Bonanza, Inc. and Continental Western Ins. Co. (Filed Feb 22, 2002).

**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.** (Emphasis added.)

But that statute must be read in light of *Foulk*<sup>3</sup> and *Copeland*.<sup>4</sup> In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

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 . . . .<sup>5</sup>

The Kansas Court of Appeals in *Watson*<sup>6</sup> reiterated that the absence of a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Rather, in such circumstances the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the worker's ability to earn wages.

The ALJ determined claimant's permanent partial general disability should not be limited to his functional impairment rating. Instead, the ALJ awarded a work disability. The ALJ determined claimant's injury was the reason for him losing his job with respondent and thereafter being unable to perform a new job with Keystone Construction. Eventually, claimant did find a job that was within his restrictions and that he could perform. Although not specifically stated, the obvious implication was that claimant had made a good faith effort to obtain and retain employment post-injury. The Board agrees.

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

<sup>4</sup> *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

<sup>5</sup> *Id.* at 320.

<sup>6</sup> *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

The Kansas appellate courts have consistently held that workers who return to work following a work injury are not deprived of a work disability if they later lose their job due to their injury.<sup>7</sup> In *Lee*,<sup>8</sup> the Kansas Court of Appeals first held that a worker who returned to work following an injury earning a wage comparable to his pre-injury wage was entitled to receive a work disability after losing his job in a layoff. The Court of Appeals, after reviewing the history of the permanent partial general disability formula, stated in *Lee* that it was clear under the present version of the formula that the worker would not be entitled to a work disability as long as he worked for the employer, but once he stopped earning a comparable wage he could receive a work disability, subject to his ability to prove it. In its syllabus, the Court stated:

1. The 1993 amendments to K.S.A. 1992 Supp. 44-510e(a) are merely the latest in a series of attempts by the legislature to ensure that a worker does not earn substantial post-injury wages while collecting work disability benefits. Thus, the 1992 version of the statute may be interpreted in light of the 1993 amendments.
2. The 1993 version of K.S.A. 44-510e(a) eliminates the presumption of no work disability set out in K.S.A. 1992 Supp. 44-510e(a). Instead, it prevents permanent partial disability compensation in excess of functional impairment as long as the employee earns 90 percent of his or her pre-injury wage.
3. It is not the intent of the legislature to deprive an employee of work disability benefits after a high-paying employer discharges him or her as part of an economic layoff where the employer was accommodating the injured employee at a higher wage than the employee could earn elsewhere.

In January 1998, the Kansas Court of Appeals decided *Gadberry*.<sup>9</sup> In that decision, the Court held that a worker who returned to work at her pre-injury wage but within a few weeks was terminated in a layoff was not precluded from receiving a work disability award. Moreover, the Court noted that there was no evidence that the employer was accommodating the worker with a light-duty job.<sup>10</sup> The Court stated, in part:

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<sup>7</sup> *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997); *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

<sup>8</sup> *Lee v. Boeing Co.*, 21 Kan. App. 2d 365, 899 P.2d 516 (1995).

<sup>9</sup> *Gadberry v. R.L. Polk & Co.*, 25 Kan. App. 2d 800, 975 P.2d 807 (1998).

<sup>10</sup> *Id.* at 804.

Gadberry's return to work at the same wage that she had been receiving prior to her [January 21, 1994] injury does not preclude a finding of wage loss since she was given notice of her termination just a few weeks later, and the termination was based on an economic layoff. Pursuant to *Lee*, Gadberry became eligible for compensation on a work disability upon her termination, one component of which is wage loss.<sup>11</sup>

In addressing whether the principles in *Foulk* should preclude claimant from receiving a work disability, the Court stated:

Gadberry would have continued to work at Polk if she had not been terminated. The Record reflects that Gadberry applied for retirement benefits subsequent to her termination because she needed health insurance. Even after she had applied for retirement benefits, Gadberry sought employment with numerous employers within the community. Gadberry did not refuse employment; it was never offered to her.<sup>12</sup>

Consequently, in *Gadberry* the Court of Appeals held that the worker was entitled to receive a work disability after she was terminated in an economic layoff despite returning to her regular work without accommodations.

In the 1999 *Niesz*<sup>13</sup> case, the Kansas Court of Appeals held that a worker was entitled to receive a work disability when the worker was later terminated for reasons unrelated to the work-related injury. In that decision, the Court held that an accommodated job artificially circumvents a work disability but once that accommodated job ends, the presumption of no work disability may be rebutted.

Placing an injured worker in an accommodated job artificially avoids work disability by allowing the employee to retain the ability to perform work for a comparable wage. Once an accommodated job ends, the presumption of no work disability may be rebutted.<sup>14</sup>

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<sup>11</sup> *Id.* at 805.

<sup>12</sup> *Id.* at 806.

<sup>13</sup> *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999).

<sup>14</sup> *Id.* at Syl. ¶ 2.

The presumption of no work disability is subject to reevaluation if a worker in an accommodated position subsequently becomes unemployed.<sup>15</sup>

The Court of Appeals held that Ms. Niesz was entitled to receive a work disability after losing her comparable wage job.

Niesz performed accommodated work until she lost her job, as did the claimant in *Lee*. The fact that Niesz' accommodated position ended does not mean that Niesz ceased having work restrictions. Niesz' work disability made it difficult for her to find work in the open market. The presumption of no work disability does not apply because Niesz is no longer earning 90 percent of her preinjury wages. See K.S.A. 1998 Supp. 44-510e(a) . . . .<sup>16</sup>

Finally, in January 2003 the Kansas Court of Appeals in *Cavender*<sup>17</sup> held that a worker who had obtained employment following a work injury was entitled to receive work disability benefits despite the fact that she resigned her employment for reasons unrelated to the injury. The Court reasoned that the proper test to apply in these cases is whether the worker has made a good faith effort to find appropriate employment. The Court wrote, in part:

K.S.A. 44-510e(a) allows work disability in excess of functional impairment only if the claimant is making less than 90% of his or her preinjury gross weekly wage. If this percentage is met, K.S.A. 44-510e(a) provides the equation for computing work disability[.]

. . . .

The cases interpreting K.S.A. 44-510e have added the requirement that an employee must set forth a good faith effort to secure appropriate employment before work disability will be awarded.

The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis. . . .<sup>18</sup>

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<sup>15</sup> *Id.* at Syl. ¶ 3.

<sup>16</sup> *Id.* at 740.

<sup>17</sup> *Cavender v. PIP Printing, Inc.*, \_\_\_ Kan. App. 2d \_\_\_, 61 P.3d 101 (2003); See also *Palmer v. Lindberg Heat Treating*, \_\_\_ Kan. App. 2d \_\_\_, 59 P.3d 352 (2002).

<sup>18</sup> *Id.* at 103-104 (citations omitted).

. . . .

The purpose of the good faith test, at its very core, is to prevent employees from taking advantage of the workers compensation system. In situations where post injury workers leave future employment, the good faith test is extended to determine whether leaving was reasonable. Clearly, in the cases cited by PIP, leaving employment was reasonable when the employment became outside physical restrictions or the changed circumstances justified a refusal of accommodated employment. However, the reasonableness of leaving employment is not limited to a decision based on work restrictions or injuries.

The present case is closest in nature, while still not on point, to those cases where an injured employee is terminated due to economic downturn and layoff and the employee is found to still be entitled to work disability. Those cases present a situation where termination or leaving employment is unrelated to the workers compensation injury or restrictions. . . .<sup>19</sup>

According to the above appellate court decisions, in determining permanent partial general disability, the question is whether the worker has made a good faith effort to find and retain appropriate employment. If the worker has made a good faith effort, then the actual difference in pre- and post-injury earnings is used in the permanent partial general disability formula. If the worker has not made a good faith effort, then a post-injury wage should be imputed. Consequently, workers who are earning less than 90 percent of their pre-injury wage and have acted in good faith are entitled to receive an award for work disability.

Moreover, like the ALJ, the Board finds that claimant's back injury and restrictions not only contributed to his unemployment but that injury has permanently limited his employment opportunities. Furthermore, the injury was the reason claimant was unable to perform the job with Keystone Construction. Because claimant has established a good faith effort to find appropriate employment, his actual wage loss should be used for the disability formula. When the \$14.90 average weekly overtime is added to claimant's \$300 per week base wage at PSI Security, his actual wage loss is 18.44 percent.

The Board concludes claimant has lost the ability to perform 41 percent of the work tasks that he performed in the 15-year period before his January 11, 2000 injury. That is a split of the 26.5 percent task loss opinion provided by Dr. Brown, who saw claimant in August 2001 and determined that claimant had lost the ability to perform approximately 9 of 34 former work tasks, contained in the list by Karen Terrill, and the 56 percent task loss

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<sup>19</sup> *Id.* at 105 (citation omitted).

opinion provided by Dr. Mills, who saw claimant in both April 2000 and January 2001 and determined claimant had lost the ability to perform approximately 32 of his 57 former work tasks, based on the list by Jerry Hardin.

Averaging claimant's 18.44 percent wage loss with the 41 percent task loss yields a permanent partial general disability of 30 percent. Accordingly, the January 10, 2002 Award should be modified to decrease claimant's permanent partial general disability from 31.5 percent to 30 percent.

The Board further finds that there was no overpayment of temporary total disability compensation. The ALJ's July 18, 2000 preliminary hearing Order was set aside because of a procedural defect, not because of any finding that claimant was not temporarily and totally disabled. Claimant was, in fact, temporarily and totally disabled. The benefits paid are found to have been due.

The Board otherwise adopts the findings and conclusions set forth in the Award by the ALJ that are not inconsistent with the above.

#### Award

**WHEREFORE**, the Board modifies the January 10, 2002 Award as follows:

Dallas C. Kilpatric is granted compensation from Bonanza, Inc., and its insurance carrier for a January 11, 2000 accident and resulting disability. Mr. Kilpatric is entitled to receive 22 weeks of temporary total disability benefits at \$257.46 per week, or \$5,664.12 plus 122.40 weeks of permanent partial general disability benefits at \$257.46 per week, or \$31,513.10, for a 30 percent permanent partial general disability, making a total award of \$37,177.22.

As of May 26, 2003, there is due and owing to Mr. Kilpatric 22 weeks of temporary total disability compensation at \$257.46 per week in the sum of \$5,664.12, plus 122.40 weeks of permanent partial general disability compensation at \$257.46 per week in the sum of \$31,513.10, for a total due and owing of \$37,177.22, which is ordered paid in one lump sum less any amounts previously paid.<sup>20</sup>

Claimant's contract with his attorney is approved as provided by K.S.A. 44-536.

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<sup>20</sup> Claimant's permanent partial disability award would be limited to his percentage of functional impairment while he was working and earning at least 90 percent of his average weekly wage. But due to the accelerated pay out formula and because the compensation rate does not change, it makes no difference in the calculation of this award or in the amount due. Therefore, this award simply uses the final percentage of work disability to compute the total number of weeks of permanent partial disability compensation.

The Board adopts the remaining orders in the Award that are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May 2003.

\_\_\_\_\_  
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

- c: Stephen J. Jones, Attorney for Claimant  
Nathan D. Burghart, Attorney for Respondent  
John D. Clark, Administrative Law Judge  
Director, Division of Workers Compensation Director