

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

<b>MICHAEL S. JORDAN</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>PYLE, INC.</b>	)	
Respondent	)	Docket No. 253,664
	)	
AND	)	
	)	
<b>CONTINENTAL WESTERN INS. CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier appealed Administrative Law Judge Nelsonna Potts Barnes' August 22, 2002, Award. On March 11, 2003, the Board heard oral argument.

**APPEARANCES**

David H. Farris of Wichita, Kansas, appeared for the claimant. Mark A. Buck of Topeka, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The claimant alleged he suffered injury to his back as a result of a fight with a co-worker. The Administrative Law Judge (ALJ) determined respondent had reason to anticipate the fight and that the altercation arose from incidents related to the employment. Consequently, the ALJ determined claimant suffered accidental injury arising out of and in the course of employment and awarded claimant a 99 percent work disability based on a 97 percent task loss and a 100 percent wage loss.

Respondent requested review and raised the following issues: (1) whether the claimant's injury arose out of and in the course of employment; (2) average weekly wage; (3) nature and extent of claimant's disability, specifically, whether claimant is entitled to a work disability or should be limited to his functional impairment; and, (4) if claimant is entitled to a work disability should his preexisting restrictions be considered in the determination of his task loss.

Claimant argues that he is entitled to additional temporary total disability compensation from February 23, 2000, through June 30, 2000 and requests the Board to affirm the ALJ's Award in all other respects.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed as a construction worker for respondent and was working in Woodward, Oklahoma. Respondent provided claimant hotel accommodations and claimant shared that room with a co-worker, John Gagnebin. The hotel offered the option of a microwave in the room for an additional payment. Claimant and Mr. Gagnebin opted to share the expense to have a microwave in their room.

On February 23, 2000, claimant was in the break room sitting at a table. Tim Decker, a foreman on the construction project, and Terry Jarvis, a co-worker, were also in the room. Mr. Gagnebin came in the room and a verbal exchange between claimant and Mr. Gagnebin escalated into a physical altercation.

The description of the initial confrontation varied somewhat between the witnesses and claimant. Mr. Jarvis testified that Mr. Gagnebin came into the break room and told claimant the owner of the hotel had asked Mr. Gagnebin to tell claimant he needed to pay his half of the microwave rental. Mr. Decker testified that Mr. Gagnebin was harassing claimant about paying the hotel manager for the microwave. Claimant testified that Mr. Gagnebin walked into the room and began screaming that claimant owed money for a microwave at the hotel room.

Mr. Jarvis testified claimant told Mr. Gagnebin that it was between claimant and the hotel manager and that Mr. Gagnebin should stay out of his business. Mr. Decker testified that claimant told Mr. Gagnebin to mind his own business. Claimant testified that he told Mr. Gagnebin to leave him alone and that he would take care of the two dollar fee.

Mr. Jarvis described claimant as being more aggressive during the initial confrontation. Conversely, Mr. Decker thought that Mr. Gagnebin was harassing the claimant.

The parties agree that from this point the verbal exchange became more heated and Mr. Gagnebin advanced to where claimant was and asked claimant if “he wanted a piece of him.” Both Mr. Jarvis and Mr. Decker testified that claimant and Mr. Gagnebin were standing almost nose to nose and that claimant hit Mr. Gagnebin in the head. However, claimant testified that Mr. Gagnebin shoved him and he retaliated by hitting Mr. Gagnebin.

The two fell to the floor and claimant was on top when the claimant’s supervisor told claimant to let Mr. Gagnebin up. The supervisor told claimant to go to the work site. Claimant got up and started for the door when he heard a click and turned around in time to see Mr. Gagnebin lunge at him. Mr. Gagnebin had a knife and cut claimant’s head and neck causing claimant to fall back against a table.

Claimant grabbed a pipe and threatened Mr. Gagnebin. The claimant and Mr. Decker went outside the building and the police were called. Claimant was taken to the emergency room for treatment.

The police report indicated Mr. Gagnebin came into the break room and told claimant “You owe two dollars to the motel for the microwave.” Claimant said Mr. Gagnebin was yelling and using profanity. Claimant told Mr. Gagnebin it was none of his business. Mr. Gagnebin walked over to where claimant was sitting and claimant stood and told Mr. Gagnebin to quit badgering him. Mr. Gagnebin said, “You want some of me, come on punk.” Claimant told Mr. Gagnebin to shut up and leave him alone. Mr. Gagnebin shoved claimant and claimant hit Mr. Gagnebin and the two fell to the floor. The fight lasted 60 seconds.

Claimant and Mr. Gagnebin had never gotten into a fight before this incident but had previously engaged in arguments.

### **Whether Claimant Suffered a Compensable Injury**

In order for a claimant to collect workers compensation benefits he must suffer an accidental injury that arose out of and in the course of his employment. The phrase “out of” employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises “out of” employment when it is apparent to the rational mind, upon consideration of all circumstances, that there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises “out of” employment if it arises out of the nature, conditions, obligations and incidents of the employment.<sup>1</sup>

---

<sup>1</sup> *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

The threshold question is whether, under the facts and circumstances of this case, the injuries sustained by the claimant at work from an assault of a co-worker are compensable. If an employee is injured in a dispute with another employee over the conditions and incidents of the employment, then the injuries are compensable.<sup>2</sup> Although the dispute doesn't involve the employment, the employee's injuries are compensable if the injuries are exacerbated by an employment hazard.<sup>3</sup> Further, an employee's injuries are compensable, although the assault is a result of a personal matter and not associated with the employment, if the employer had reason to anticipate the assault and continued to allow the employees to work together.<sup>4</sup>

The claimant testified that he had been involved in a longstanding dispute with Mr. Gagnebin. Claimant further testified that he told his foreman, Mr. Decker, as well as David Pyle, respondent's owner, and the area foreman that he and Mr. Gagnebin were not getting along. He further told them that Mr. Gagnebin was continuously threatening to fight with claimant.

Claimant further noted that he requested and was given a separate room at one time because of his complaints but later was again assigned a room with Mr. Gagnebin. Mr. Jarvis corroborated claimant's testimony and testified that he was aware there was a dispute between claimant and Mr. Gagnebin that had been going on for two or three weeks before the fight. He further stated that David Pyle, the acting superintendent of the construction project, was aware of the dispute.

The Board concludes the preponderance of the evidence indicates that respondent had ample reason to anticipate the assault as demonstrated by the fact respondent had separated claimant and Mr. Gagnebin from rooming together on an earlier occasion. The respondent was aware of the ongoing dispute and Mr. Gagnebin's continued threatening behavior and not only allowed the two to work together but also again assigned them a room to share. The claimant has met his burden of proof to establish a compensable injury.

### **Whether Claimant should be Limited to his Functional Impairment**

Respondent argues claimant should be limited to his functional impairment because he was terminated for cause for fighting. The ALJ concluded claimant was defending himself from an attacker and was entitled to a work disability assessment. Implicit in that determination is the finding respondent did not demonstrate good faith in terminating claimant.

---

<sup>2</sup> See *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 506-507, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

<sup>3</sup> See *Baggett v. B & G Construction*, 21 Kan. App. 2d 347, Syl. ¶ 2, 900 P.2d 857 (1995).

<sup>4</sup> See *Harris v. Bethany Medical Center*, 21 Kan. App. 2d 804, Syl. ¶ 2, 909 P.2d 657 (1995).

Claimant agreed that the day after the incident he received a certified letter that he had been fired for inappropriate behavior. Tim Decker, respondent's foreman, testified that respondent had a zero tolerance policy regarding fighting on the job, which he indicated was that "if you fight, you're fired."<sup>5</sup> He further indicated that because of a previous fight within the last couple of years all the employees were aware of the policy. But Mr. Decker was unaware whether there was a written policy regarding fighting. Mr. Decker further agreed he never met with claimant to discuss the policy when claimant was hired. And he noted the previous fight had occurred before claimant was hired.

After the initial altercation between claimant and Mr. Gagnebin was broken up, Mr. Decker told claimant to leave the break room and go to the work site. This does not necessarily support his contention that there was a zero tolerance policy regarding fighting. If there was an absolute policy, the claimant would have been terminated immediately.

In the absence of evidence of a written policy regarding fighting or evidence that claimant had been advised of such policy as well as the fact the claimant was clearly defending himself in the second incident when Mr. Gagnebin attacked him with a knife, the Board concludes the claimant is entitled to a work disability analysis and is not limited to his functional impairment.

The Board is not unmindful that as a practical matter it is not unexpected that many employers will terminate employees for fighting on the job. But in this case, it is difficult to adopt respondent's argument that claimant should be limited to a functional impairment when respondent did nothing to prevent the foreseeable altercation from occurring. The evidence indicates claimant complained to respondent about problems he was having with Mr. Gagnebin and respondent initially responded by separating the two individuals from rooming together. But when the two were again placed in a motel room together and Mr. Gagnebin began making threats about fighting claimant, respondent's lack of attention to the problem reached the level of condoning the activity. The record shows respondent was aware of the problems between claimant and Mr. Gagnebin but that no preventative action was taken.

### **Work Disability Analysis**

Because claimant's injuries comprise an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 1999 Supp. 44-510e(a). That statute provides, in part:

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

---

<sup>5</sup> Decker Depo. at 13.

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 that statute must be read in light of *Foulk*<sup>6</sup> and *Copeland*.<sup>7</sup> In *Foulk*, the 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(a) (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a) (Furse 1993), that a worker's post-injury wages should be based upon ability rather than actual wages when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury.

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>8</sup>

According to the 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.

As the Kansas Court of Appeals recently held in *Watson*,<sup>9</sup> the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker fails to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based on all the evidence, including expert testimony concerning the capacity to earn wages.

---

<sup>6</sup> *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

<sup>7</sup> *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

<sup>8</sup> Id. at 320.

<sup>9</sup> *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder [sic] must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.<sup>10</sup>

The authorized treating physician, Dr. Jane K. Drazek, determined claimant had reached maximum medical improvement on July 6, 2001. Claimant then began a job search which consisted of calling businesses to see if they were hiring as well as filling out applications for employment. Claimant provided a list of the businesses he had contacted from July 6, 2001, through March 12, 2002, seeking employment.<sup>11</sup> The list contains approximately 55 contacts and indicates that several businesses were contacted multiple times. And the list contains numerous construction companies although claimant testified that he can no longer perform construction work.

A review of the list of prospective employers contacted by claimant reveals that he actually just applied at 15 different employers. As previously noted, the majority of those businesses are engaged in construction activities or heavy labor which claimant noted he can no longer perform. Applying at only 15 businesses from the time the job search commenced in July 2001 through March 2002 cannot be said to demonstrate a good faith effort to find employment. Nor can applying for jobs outside claimant's restrictions be said to demonstrate a good faith effort to find appropriate employment. The Board concludes the claimant failed to make a good faith effort to find appropriate employment. Accordingly, the Board will impute a post-injury wage based upon the evidence in the record.

Jerry Hardin testified claimant retains the ability to earn \$7 an hour or \$280 per week. Karen Terrill testified claimant retains the ability to earn between \$8 and \$9 an hour or approximately \$340 per week. The Board concludes claimant has the ability to earn \$7.75 an hour and that wage will be imputed for calculation of the wage loss component of the work disability formula. Consequently, comparing a \$310 imputed post-injury average weekly wage to the \$651.43 pre-injury average weekly wage results in a 52 percent wage loss.

Respondent argues that post-injury income claimant received selling some personal items on E-Bay should be included in the calculation of his post injury wage. The Board disagrees. Claimant testified that he sold some personal items of his own as well as listed some items on his site for sale for friends. The record does not establish how much income derived from those sales were for claimant or for his friends or that he was regularly engaged in a business venture selling products on the internet.

---

<sup>10</sup> Id. at Syl. ¶ 4.

<sup>11</sup> R.H. Trans., Cl. Ex. 5.

The Board must next consider, under K.S.A. 44-510e, what, if any, task loss claimant suffered as a result of his injuries with respondent. Drs. Philip R. Mills, Pedro A. Murati and Jane K. Drazek provided task loss opinions after reviewing task lists created by vocational experts Karen Terrill or Jerry Hardin. Dr. Mills, utilizing the task list prepared by Ms. Terrill, opined claimant could no longer perform 24 of the 53 listed tasks for a 45 percent loss. Dr. Mills also provided an opinion taking into consideration tasks claimant lost due to preexisting limitations. Under that scenario Dr. Mills concluded claimant had lost 15 of the 53 tasks for a 28 percent task loss due to the work-related incident. Dr. Murati concluded claimant had a 97 percent task loss when he compared his restrictions with the task list compiled by Mr. Hardin. Dr. Drazek also concluded claimant had a 97 percent task loss when she compared her restrictions with the task list compiled by Mr. Hardin and eliminated those tasks she felt claimant could no longer perform.

Respondent argues the preexisting tasks lost due to restrictions imposed before claimant's present injury should be eliminated from the task lists in analyzing claimant's current task loss. The Board, however, considers it inappropriate to eliminate tasks that claimant performed during the relevant 15-year period prescribed by statute. The work disability formula provided by K.S.A. 44-510e(a) requires consideration be given to all "the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident." When the disability was found to be an aggravation of a preexisting condition, a deduction for any preexisting disability is to be made pursuant to K.S.A. 44-501(c). And the evidence indicates that after his prior injury, he could, and in fact did, perform most if not all of the job tasks he had previously performed.

Consequently, the claimant's task loss lies somewhere between the 45 percent and 97 percent ratings. Averaging Dr. Mills' 45 percent with Drs. Drazek and Murati's 97 percent yields 71 percent, which the Board finds as the percentage of work tasks that claimant performed in the 15-year period before his February 23, 2000 accident that he is no longer able to perform.

Averaging claimant's 52 percent wage loss with his 71 percent task loss yields a 61.5 percent work disability for which claimant should receive permanent partial general disability benefits. Accordingly, the August 22, 2002 Award should be modified to reflect claimant has suffered a 61.5 percent work disability.

### **Average Weekly Wage**

Darlene Koehn, respondent's payroll clerk, prepared a document which showed the weekly earnings claimant received while employed.<sup>12</sup> The document prepared by Ms. Koehn included in the weekly gross earnings the claimant's regular pay at \$11.75 an hour,

---

<sup>12</sup> Koehn Depo., Ex. 1.

overtime and pay received for driving time. The respondent paid the hotel for claimant's lodging and claimant was provided a \$15 per diem for meals and miscellaneous expenses. The document indicated that claimant worked 16 weeks and had gross earnings of \$9,222.86 without including the payment for the hotel or the per diem. This would calculate to a gross average weekly wage of \$576.43.

Respondent argues that claimant worked 17 weeks because his first paycheck was for the week ending on November 5, 1999, and the last paycheck was for the week ending February 25, 2000, which is a period of 17 weeks. This argument ignores Ms. Koehn's exhibit which clearly indicates claimant only worked and was only paid for 16 weeks. The best evidence is the payroll clerk's document which establishes claimant had 16 work weeks with respondent.

The calculation of claimant's average gross weekly wage, under certain circumstances, may also include additional compensation the respondent provided claimant.<sup>13</sup> In the determination of what is included as additional compensation, K.S.A. 44-511(a)(2)(C) (Furse 1993) provides:

[B]oard and lodging when furnished by the employer as part of the wages, which shall be valued at a maximum of \$25 per week for board and lodging combined, unless the value has been fixed otherwise by the employer and employee prior to the date of the accident, or unless a higher weekly value is proved; . . .

However, not every payment made to an employee by an employer constitutes "wages" for purposes of computation of average weekly wage. The computation does include those payments for work performed to the extent it results in economic gain to the employee.<sup>14</sup> Based upon this analysis, payments to reimburse claimant for business related lodging while engaged in business travel are not included in the average gross weekly wage computation. The reimbursement for these expenses is dollar for dollar and does not result in economic gain to claimant.

The respondent directly paid the hotel for claimant's lodging and this payment was not an economic benefit to the claimant and accordingly its value would not be included as additional compensation in the determination of claimant's average gross weekly wage.

The \$15 daily cash per diem payment made to claimant is to be included as part of the average weekly wage as it does constitute economic gain to the claimant. As the records indicate, this money may be used by claimant in any manner he sees fit. As the claimant may apply this money for his meals, an expense that he would have had, unlike

---

<sup>13</sup> K.S.A. 44-511(a)(1)(2) (Furse 1993).

<sup>14</sup> *Ridgway v. Board of Ford County Comm'rs*, 12 Kan. App. 2d 441, 748 P.2d 891 (1987), *rev. denied* 242 Kan. 903 (1988).

the lodging expense, notwithstanding his employment activities, there exists economic gain. Consequently, the claimant's gross average weekly wage should include the \$75 weekly cash per diem. The ALJ's determination of claimant's average gross weekly wage is modified to reflect an average gross weekly wage of \$651.43.

### **Additional Weeks of Temporary Total Disability Compensation**

Claimant argues that he is entitled to additional weeks of temporary total disability compensation from the date of the incident through June 30, 2000. After Dr. Drazek first examined him on June 30, 2000, she opined the claimant had been temporarily, totally disabled from the date of the incident on February 23, 2000.

The ALJ denied these additional weeks of temporary total disability compensation. The ALJ noted:

Claimant is not entitled to additional dates of temporary total disability benefits. Claimant's authorized physician, Dr. Jane Drazek, opined that he was temporarily totally disabled from returning to work beginning February 23, 2000. However, Dr. Drazek first examined Claimant on June 30, 2000. Two other medical providers examined Claimant prior to June 30, 2000. On February 23, 2000, Claimant received immediate treatment at the Woodward Hospital and Health Center in Woodward, Oklahoma. Although Claimant received treatment, the medical providers made no statement nor analysis regarding Claimant's return to work. Furthermore, on April 7, 2000, Claimant was examined by Dr. David J. Starkey at the Hutchinson Clinic. Dr. Starkey examined Claimant and prescribed medication and recommended a follow-up in one week. He did not take Claimant off work.<sup>15</sup>

The claimant also received at least two weeks of unemployment compensation during this time period. The Board agrees with the ALJ's analysis that claimant has failed to meet his burden of proof to establish that he is entitled to any additional weeks of temporary total disability compensation.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated August 22, 2002, is modified to reflect claimant suffered a 61.5 percent work disability.

The claimant is entitled to 53.14 weeks temporary total disability compensation at the rate of \$383 per week or \$20,352.62, followed by permanent partial disability compensation at the rate of \$383 per week not to exceed \$100,000 for a 61.5 percent work disability.

---

<sup>15</sup> Award at 4-5.

As of October 31, 2003, there would be due and owing to the claimant 53.14 weeks of temporary total disability compensation at the rate of \$383 per week in the sum of \$20,352.62 plus 139.29 weeks of permanent partial disability compensation at \$383 per week in the sum of \$53,348.07, for a total due and owing of \$73,700.69, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$26,299.31 shall be paid at \$383 per week until fully paid or until further order of the Director.

**IT IS SO ORDERED.**

Dated this 31st day of October 2003.

---

BOARD MEMBER

---

BOARD MEMBER

---

BOARD MEMBER

c: David H. Farris, Attorney for Claimant  
Mark A. Buck, Attorney for Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director