BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JIMMIE DEAN CASEY	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 262,319 &
HIX CORPORATION	)	1,006,409
Respondent	)	
AND	)	
	)	
ZURICH U. S. INSURANCE COMPANY and	)	
TRAVELERS INSURANCE COMPANY	)	
Insurance Carriers	)	

ORDER

Claimant appeals the August 18, 2004 Award of Administrative Law Judge Kenneth J. Hursh. Claimant was awarded benefits for a 5 percent permanent partial impairment to the body as a whole resulting from a June 23, 2000 accidental injury suffered while employed with respondent in Docket No. 262,319. Claimant was denied permanent benefits in Docket No. 1,006,409 after alleging an accident on August 14, 2001, which the Administrative Law Judge (ALJ) determined created no permanent impairment. The Appeals Board (Board) heard oral argument on January 6, 2005.

APPEARANCES

Claimant appeared by his attorney, William L. Phalen of Pittsburg, Kansas. Respondent and its insurance carrier, Zurich U. S. Insurance Company (Zurich), appeared by their attorney, Clinton D. Collier of Kansas City, Missouri. Respondent and its insurance carrier, Travelers Insurance Company (Travelers), appeared by their attorney, Leigh C. Hudson of Fort Scott, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

DOCKET NO. 262,319

(1) What is the nature and extent of claimant's injury and disability? More particularly, has claimant suffered a psychological impairment which, when included with his physical injury, would result in permanent total disability? Respondent contends claimant's psychological impairment results from preexisting conditions and he suffered no additional impairment as a result of the June 23, 2000 accident.

(2) Is claimant entitled to future medical treatment for the injuries suffered on June 23, 2000?

DOCKET NO. 1,006,409

(1) What is the nature and extent of claimant's injury? More particularly, did claimant suffer any permanent impairment as a result of the injury of August 14, 2001?

(2) Is claimant entitled to temporary total disability compensation from August 14, 2001, through March 10, 2003?

(3) Is claimant entitled to future medical treatment for the injuries suffered on August 14, 2001?

(4) What is the nature and extent of claimant's impairment, including any work disability?

Respondent acknowledges that claimant suffered an injury on August 14, 2001, but denies any permanent impairment resulting from that injury. Claimant contends as a result of that injury, he was incapable of returning to work for respondent and should, therefore, be entitled to a permanent partial general disability under K.S.A. 44-510e. Claimant further contends that as a result of his injuries with respondent, he is permanently and totally incapable of any type of employment and the award should be increased accordingly.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the Administrative Law Judge should be affirmed.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary that those be repeated herein. The Board adopts those findings and conclusions as its own.

Claimant suffered accidental injury on June 23, 2000, when he fell backwards over debris, striking his back, shoulder and head on a compressor. Claimant was treated initially by F. Ronald Seglie, M.D., the company doctor, and ultimately came under the care of numerous health care providers, including Kenneth W. Johnson, M.D., Brian K. Ellefson, D.O., Kevin Komes, M.D., Edward J. Prostic, M.D., and Mark Bernhardt, M.D.

Claimant returned to work for respondent on light duty, working until August 14, 2001, at which time, while helping a coworker move a two-wheel dolly, he suffered a second injury when a two-foot piece of tubing struck him, knocking him to his knees. Claimant alleges he has not been pain free since the June 23, 2000 accident and that the August 14, 2001 accident aggravated his condition, although claimant did testify that after the August 14, 2001 accident, his pain returned back to the original level he was experiencing after the June 23, 2000 accident. It was on this basis the ALJ determined claimant had suffered no permanent impairment as a result of the August 14, 2001 accident. The Board acknowledges the evidence supports that conclusion and affirms same.

Claimant was returned to work by Dr. Seglie with restrictions after the initial incident, and respondent accommodated claimant's restrictions until the August 14, 2001 accident occurred. After the August 14, 2001 accident, claimant was seen by Dr. Seglie, and Dr. Seglie released claimant again with light-duty restrictions on August 27, 2001. Claimant contacted Randy Bevins (his supervisor and respondent's assistant production manager) regarding the restrictions. Mr. Bevins testified that respondent was able to accommodate the restrictions placed upon claimant not only by Dr. Seglie, but also by Dr. Prostic. However, claimant refused to attempt the jobs, arguing that the jobs proposed by Mr. Bevins violated his work restrictions. Claimant was ultimately terminated for refusing to come to work.

Claimant, arguing that he developed psychological problems as a result of his physical injuries, was referred to Kathleen J. Keenan, Ph.D., a psychologist. Dr. Keenan subjected claimant to numerous psychological tests, ruling out any connection between his psychological condition and his work-related injuries. She did acknowledge that claimant had psychological problems which she defined as personality disorders. She determined these problems were longstanding, having their etiologies in early life experiences. She also described claimant as having a depressive personality trait, again indicating longstanding problems, as opposed to psychological problems developing only after the June 2000 accident. She found no significant medical findings related to his injury,

determining that claimant was exaggerating or magnifying his physical symptoms. She also found that there was no psychological reason claimant could not return to work.

Dr. Keenan felt claimant had no functional impairment pursuant to the AMA *Guides*, as a result of any psychological aggravation from the work-related injuries. She testified that very likely claimant had preexisting depression before the work-related injury, describing claimant as having a somatoform disorder where psychological symptoms are displayed as physical pain. Claimant's psychological problems were not, in her opinion, related to the workplace injuries suffered with respondent.

Claimant was referred by his attorney to Richard C. Sweetland, Ph.D., a clinical psychologist. Dr. Sweetland also found claimant to be psychologically impaired and so physically impaired that it interfered with his work productivity. He assessed claimant a 15 percent impairment to the body as a whole based upon the AMA *Guides*[1] for the psychological problems. Claimant advised Dr. Sweetland of only the June 23, 2000 accident, failing to mention the August 14, 2001 alleged aggravation. Dr. Sweetland did subject claimant to certain tests, although the Millon Clinical Multiaxial Inventory-III test was not performed. Dr. Sweetland acknowledged that personality disorders are longstanding and generally are often based on early life experiences, even though claimant denies any early psychological difficulties. He diagnosed claimant with a somatization disorder, where somatic complaints may interfere with claimant's ability to work. He did not determine that claimant was permanently and totally disabled, indicating from a psychological standpoint that claimant was still able to work. He diagnosed claimant as having a dysthymic disorder, which he acknowledged psychological factors played a part in. He also acknowledged that symptom magnification might be involved in this situation.

As noted above, claimant was offered a return to work within his restrictions by Mr. Bevins and refused that offer. Claimant alleges that he is currently incapable of working, testifying that he has to lie down 70 percent of the day because of pain. He testified that during the two years leading up to the regular hearing, he had made approximately fifteen job inquiries. Claimant denies that he was ever offered a return to work by respondent within his restrictions.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[2]

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[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[2] K.S.A. 1999 Supp. 44-501 and K.S.A. 1999 Supp. 44-508(g).

With regard to the accident of June 23, 2000, the ALJ determined claimant had suffered a 5 percent impairment to the body as a whole. This rating is supported by the testimony of Mark Bernhardt, M.D., a board certified orthopedic surgeon, who examined claimant at the request of the ALJ on September 11, 2001. Dr. Bernhardt found no structural abnormalities other than wear and tear in the thoracic spine. He testified that the 5 percent impairment was the result of an aggravation of claimant's back problems from his work-related injury. He testified that for a person without structural abnormalities, but with pain, he would generally place that person in a medium category of work, including no lifting greater than 50 pounds. He found no additional impairment for the August 14, 2001 incident, which opinion is supported by claimant's testimony that after the August 14, 2001 incident, his back pain returned to the post-June 23, 2000 level.

Claimant was also examined by Edward J. Prostic, M.D., a board certified orthopedic surgeon, at the request of claimant's attorney. Dr. Prostic diagnosed claimant with a strain/sprain of the spine, assessing claimant a 10 percent impairment to the body as a whole based upon the AMA *Guides*[3] for the June 23, 2000 injury. He recommended claimant return to work with restrictions of no lifting over 35 pounds occasionally and 15 pounds repetitively, and to avoid frequent bending or twisting at the waist, and forceful pushing or pulling, and more than minimal use of vibratory equipment or captive positioning. He testified that claimant had an additional 5 percent impairment for the August 14, 2001 accident, which contradicts claimant's own testimony. He did rate claimant at 15 percent impairment to the body as a whole for claimant's psychological trauma after reviewing the report of Dr. Sweetland.

Dr. Prostic was provided a task report from Karen Crist Terrill, indicating of the fifty-five tasks on the list, claimant was incapable of performing thirty-six, for a 65 percent task loss. Likewise, Dr. Bernhardt was provided that task list of fifty-five tasks, of which he felt claimant could no longer perform nineteen, for a 35 percent task loss.

K.S.A. 1999 Supp. 44-510e defines permanent partial general disability as,

> . . . 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

[3] AMA *Guides* (4th ed.).

> 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.[4]

In considering K.S.A. 1999 Supp. 44-510e, the Board must also consider the Kansas Appellate Court's determination in *Foulk*,[5] which bars a claimant from receiving work disability benefits if the claimant is capable of earning 90 percent or more of his or her pre-injury wage at a job within his or her medical restrictions, but fails to do so, or actively or constructively refuses to do so. The rationale behind that decision is that a policy should be in effect to prevent claimants from refusing work, thereby, exploiting the workers compensation system. *Foulk* and its progeny are concerned with a claimant who is able to work, but either overtly or in essence refuses to do so.[6] In this instance, claimant was offered employment by respondent, with respondent's assistant production manager, Randy Bevins, testifying that respondent could meet the restrictions placed upon claimant by his treating physicians. Claimant argues that respondent was not providing accommodation in good faith. However, as noted by the ALJ, it is difficult to believe respondent would provide claimant with a job within his restrictions for over a year and then suddenly refuse to honor new restrictions which were less restrictive than those under which claimant had earlier been working.

The Board finds claimant's refusal to even attempt the jobs offered by respondent violates the policies set forth in *Foulk*, and claimant is limited to his functional impairment.

The Board further finds that claimant has failed to prove that he suffered any type of psychological injury or impairment as a result of the injuries of June 23, 2000, or August 14, 2001. While claimant does provide the testimony of Dr. Sweetland, supporting his allegations, it is noted Dr. Sweetland did not consider all of the tests performed by Dr. Keenan, and Dr. Sweetland also agreed, contrary to claimant's testimony, that personality disorders are longstanding, generally based upon early life experiences, which claimant adamantly denies.

This opinion, however, is also shared by Dr. Keenan, who felt claimant's ongoing psychological problems were not, in any way, connected to the injuries claimant suffered while employed with respondent. Instead, she opined that claimant used those injuries as an excuse for his ongoing psychological difficulties.

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[4] K.S.A. 1999 Supp. 44-510e.

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

[6] *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

As noted in the Award, traumatic neurosis is compensable in workers compensation litigation when the psychological injury is directly traceable to a compensable physical injury.[7] A covered industrial accident, which aggravates, accelerates or intensifies a psychological disorder, will result in workers compensation benefits being allowed for the aggravated psychological problems.[8] However, in this instance, the Board finds the preponderance of the credible evidence does not support claimant's contention that his psychological problems are, in any way, related to his work-related injuries. The Board, therefore, affirms the ALJ's denial of any additional benefits based upon claimant's allegations of psychological trauma.

The Board also denies claimant's request for additional temporary total disability compensation. Claimant was examined by Dr. Prostic at his attorney's request on March 26, 2001, and again on August 27, 2001, shortly after his second alleged injury. Dr. Prostic did not place claimant on leave, but instead returned claimant to work with specific light-duty restrictions. Respondent offered claimant accommodated work within those restrictions. There is no evidence in the record to show that claimant was temporarily and totally disabled during the period August 14, 2001, through March 10, 2003. Therefore, claimant's request for temporary total during that period is denied.

Claimant alleges entitlement to future medical treatment. The ALJ found no specific evidence of claimant's need for future medical treatment, and no specific award of future medical benefits was provided. The Board affirms that finding. The ALJ determined that under K.S.A. 2002 Supp. 44-510k, the procedure is set forth for claimant to obtain post-award medical benefits should those benefits become necessary and should claimant be able to prove his need for ongoing post-award medical treatment is related to his work-related injury with respondent. Therefore, claimant's entitlement to post-award medical treatment shall be determined by the ALJ at the time the appropriate post-award medical application is filed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Kenneth J. Hursh dated August 18, 2004, should be, and is hereby, affirmed in all regards.

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[7] *Gleason v. Samaritan Home*, 260 Kan. 970, 926 P.2d 1349 (1996).

[8] *Boutwell v. Domino's Pizza*, 25 Kan. App. 110, 959 P.2d 469 (1998).

IT IS SO ORDERED.

Dated this ____ day of January 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Clinton D. Collier, Attorney for Respondent and its Insurance Carrier (Zurich)
Leigh C. Hudson, Attorney for Respondent and its Insurance Carrier (Travelers)
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director