

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

**FEDERICO AGUIRRE**  
Claimant

VS.

**U.S.D. 501**

Respondent,  
Self-Insured

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Docket No. 264,161

**ORDER**

Respondent appealed the March 26, 2003 Award entered by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on September 4, 2003, in Topeka, Kansas.

**APPEARANCES**

Frederick J. Patton, II, of Topeka, Kansas, appeared for claimant. Gregory J. Bien of Topeka, Kansas, appeared for respondent.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award. In addition, at oral argument before the Board, respondent announced that it did not contest that claimant was entitled to receive the temporary total and temporary partial disability benefits that were previously paid as set forth in an exhibit introduced at Jill Lincoln's February 26, 2003 deposition. According to that document, respondent paid claimant temporary total disability benefits totaling \$2,245.04 for the period from October 16, 2000, through January 2, 2001, and temporary total disability benefits totaling \$2,381.71 for the period from August 10, 2001, through October 9, 2001. Additionally, respondent paid claimant temporary partial disability benefits totaling \$780.14 for the period from January 2, 2001,<sup>1</sup> through July 13, 2001. And claimant does not request any additional weeks of either temporary total disability or temporary partial disability benefits.

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<sup>1</sup> The document actually indicates that temporary partial disability benefits began on December 20, 2000, but the Board finds that date is probably a clerical error as claimant testified he received temporary partial upon his return to work following the back injury.

ISSUES

This is a claim for an October 2, 2000 accident and resulting back injury. After recovering from the accident, claimant returned to work for respondent from January 2, 2001, through July 13, 2001, when respondent advised that it could not or would not continue to provide him an accommodated job. Claimant did not work between July 13, 2001, and November 1, 2002, when he again returned to work for respondent at an accommodated position.

In the March 26, 2003 Award, Judge Benedict determined claimant had a 71.5 percent work disability (a permanent partial general disability greater than the functional impairment rating) for the period that claimant did not work between July 13, 2001, and November 1, 2002. The Judge derived the work disability rating by averaging a 100 percent wage loss with a 43 percent task loss. For the period commencing November 1, 2002, the Judge found that claimant had a 10 percent permanent partial general disability based upon his whole body functional impairment rating. When computing the benefits due under the Award, the Judge determined both temporary total disability benefits and permanent partial disability benefits were due and payable for some of the same weeks.

Respondent contends Judge Benedict erred. Respondent argues that claimant did not make a good faith effort to find work after July 13, 2001, and, therefore, the Judge erred by failing to impute a post-injury wage. Respondent also argues that the Judge erred by finding that claimant sustained a 43 percent task loss. Finally, respondent contends the Judge erred by ordering the payment of temporary total and temporary partial disability benefits for some of the same weeks that permanent partial disability benefits were ordered paid.

Accordingly, respondent requests the Board to modify the March 26, 2003 Award, as follows:

For that period claimant missed work from October 2, 2000, to January 2, 2001, award claimant temporary total disability benefits at \$317.22 per week.

For the period claimant worked from January 2, 2001, through July 13, 2001, award claimant permanent partial general disability benefits for a 10 percent whole body permanent functional impairment at different compensation rates as determined by the changes in both the average weekly wage computation and retirement benefits paid to claimant.

Conversely, claimant argues the March 26, 2003 Award should be affirmed.

The issues before the Board on this appeal are:

1. What is the nature and extent of claimant's injury and disability for the period from July 13, 2001, to November 1, 2002?
2. Are permanent partial general disability benefits due and payable for any of the same weeks that temporary total disability benefits are ordered paid?
3. What disability compensation benefits are presently due claimant?

**FINDINGS OF FACT**

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

1. Claimant began working for respondent in the early 1980s after moving to the United States from Mexico. Claimant's native language is Spanish. Claimant has a limited education and limited English language skills. Claimant understands English much better than he can speak it.
2. On October 2, 2000, claimant injured his back while working for respondent as a custodian at Highland Park High School in Topeka. On that date, claimant felt a sharp pain in his low back when he picked up a trash can to dump it into a large trash bin. The parties stipulated that claimant's accident arose out of and in the course of employment with respondent.
3. On January 2, 2001, after recovering from the October 2000 accident, claimant returned to work for respondent performing light duty. The evidence is uncontradicted that respondent paid claimant temporary partial disability benefits while he was performing that light duty work as he worked fewer hours than he did before his back injury.
4. On July 9, 2001, respondent's counsel wrote claimant's attorney and advised that respondent had elected to terminate claimant. The July 9, 2001 letter reads:

U.S.D. 501 is unable to identify an available job with the School District for Mr. Aguirre which is within his restrictions. Therefore, the School District has elected to terminate Mr. Aguirre as of July 13, 2001. The job which he has been doing at the Service Center was artificially created while the district was waiting to determine Mr. Aguirre's permanent restrictions.

Please have Mr. Aguirre see Jill Lincoln at 8:00 a.m., Thursday, July 12, 200 [sic], at the Administration Building so that he can officially end his employment.

As a separate matter, the District has retained Don Zumwalt [*sic*] with Terrill & Associates to provide a vocational assessment and assist with job placement for Mr. Aguirre, should he elect not to retire.

5. By letter dated August 9, 2001, claimant requested 12 weeks of paid sick leave under the Family Medical Leave Act. Respondent answered that request in an August 10, 2001 letter in which it stated that claimant had been terminated on July 13, 2001, as respondent could no longer accommodate him. The letter also stated that in addition to the money it owed for accumulated vacation leave respondent would also pay claimant for accumulated sick leave and enroll him for health insurance if he would choose to retire. Claimant elected to retire.
6. Claimant collected the money and benefits that were available to him due to his early retirement. For the period commencing July 13, 2001, claimant began receiving retirement benefits from respondent in biweekly payments of \$125. Respondent contributed all of the funds for that biweekly retirement benefit. In addition, commencing September 1, 2001, claimant began receiving \$565.36 per month in retirement benefits from the Kansas Public Employees Retirement System (KPERs). Respondent contributed approximately 43 percent of the funds for the KPERs retirement benefit.
7. The Board finds the weekly equivalent of the biweekly retirement benefit that respondent paid claimant during the period from July 13, 2001, through October 31, 2002, is \$62.50. And the Board finds that the weekly equivalent of the monthly KPERs retirement benefit is \$130.47 of which \$56.10 is attributable to respondent's contribution.
8. As the above-quoted July 9, 2001 letter indicates, respondent hired Terrill & Associates, which is located in Wichita, to assess the feasibility of providing claimant with job placement services. Dan Zumalt, the vocational counselor who worked with claimant, looked for light bench assembly, light production and inspection jobs that would allow claimant to sit and stand as needed and which would not require proficiency in the English language. The vocational assessment failed to reveal any openings of appropriate jobs in the Topeka and Lawrence areas where claimant resides. Consequently, the feasibility study which began in earnest with claimant's interview on August 22, 2001, was concluded by September 22, 2001.
9. Based upon the labor market survey, Mr. Zumalt concluded a vocational placement plan was not feasible. In the September 22, 2001 Final Vocational Report, Mr. Zumalt wrote, in part:

Research indicated that there existed no opportunities within the janitorial, custodial, or housekeeping, other than part-time opportunities that would allow accommodation based upon Mr. Aguirre's permanent restriction as issued by Sergio Delgado, M.D. related to "alternate sitting and standing every two hours."

Additional investigation related to sedentary customer contact and service positions determined a lack of potential employment based upon Mr. Aguirre's inability to communicate in spoken English or by writing.

And Mr. Zumalt testified, in part:

Based upon the survey that I conducted in the Topeka/Lawrence area, I did not feel as if there were employment opportunities based upon the number of factors we have discussed. The permanent restrictions, the ability to converse in English, his basic location, I could find nothing that I felt he would be able to successfully seek employment with.

Moving beyond that to other areas, as I indicated I had recently completed a labor market survey in the Wichita area where I did find opportunities for an individual with similar restrictions, actually more restrictive as well as non-English-speaking and so on. And I was capable of finding sufficient number of opportunities to develop what I would consider a successful labor market survey, coming up with a figure of around \$6, as I recall, \$6.50 in an unskilled bench type of position.<sup>2</sup>

Finally, Mr. Zumalt testified that claimant's language difficulties would restrict his ability to obtain employment. But Mr. Zumalt did not believe that claimant's age (early 60s) would adversely affect his chances of finding other employment in the lighter physical labor categories.

10. Claimant testified that he did not look for employment following July 13, 2001, as he was told the vocational counselors would get him another job. The vocational assessment did not result in a job placement plan or any other type of vocational rehabilitation plan. Respondent, however, in October 2002 offered claimant an accommodated job. Consequently, on November 1, 2002, claimant returned to

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<sup>2</sup> Zumalt Depo. at 39.

work for respondent on a full-time basis earning \$10.97 per hour as compared to the \$11.47 per hour he was earning on the date of accident.

11. Claimant's biweekly retirement benefit continued until November 1, 2002, when he returned to work for respondent. But, according to KPERS' general counsel Laurie McKinnon, who testified in March 2003, claimant was continuing to receive his monthly KPERS retirement benefit. Moreover, Ms. McKinnon also testified that claimant would continue to receive his KPERS retirement benefit until his death.
12. Before the October 2000 accident, claimant received health insurance that cost respondent \$27.14 per week and life insurance that cost respondent \$.95 per week. The wage statement introduced at the regular hearing also indicated that claimant earned \$441.92 in overtime during the 26-week period before the accident, plus \$475.56 that the wage statement listed as "Fringe Cash or Tips." Accordingly, excluding the insurance benefits, claimant's pre-injury average weekly wage is \$494.09. But when the insurance benefits are included in the average weekly wage computation as additional compensation items, claimant's pre-injury average weekly wage is \$522.18.
13. As of the February 6, 2003 regular hearing, claimant's post-injury average weekly wage was \$513.08, which included \$438.80 for regular earnings, \$74.05 for employer-provided life, dental and health insurance benefits and \$.23 for dependent life insurance benefits.
14. The record does not disclose the date that respondent terminated claimant's additional compensation items. Accordingly, the Board will utilize claimant's July 13, 2001 retirement date as the date that respondent terminated those benefits. Consequently, for purposes of computing claimant's workers compensation benefits, claimant's average weekly wage for the period from October 2, 2000, until July 13, 2001, which excludes additional compensation items, is \$494.09. And claimant's average weekly wage for the period beginning July 13, 2001, which includes additional compensation items, is \$522.18. But when claimant returned to work for respondent on November 1, 2002, claimant's average weekly wage reverts to \$494.09 as respondent reinstated claimant's additional compensation items.
15. At respondent's request, on March 20, 2002, claimant met with vocational counselor Karen Crist Terrill to formulate a list of work tasks that claimant performed before his October 2000 accident and resulting back injury. Ms. Terrill concluded that claimant performed 14 different work tasks in the 15-year period before the October 2000 back injury. Moreover, Ms. Terrill concluded that despite his back injury

claimant retained the ability to earn from \$6 to \$6.50 per hour when considering the following medical restrictions from Dr. Sergio Delgado:

Permanent functional restrictions should include limitation of lifting not to exceed 20-25# repetitively, 30-35# occasionally, alternate sitting and standing every 2 hours and avoid repetitive bending, twisting or stooping.<sup>3</sup>

16. On August 5, 2002, at his attorney's request claimant met with vocational counselor Michael J. Dreiling. After interviewing claimant, Mr. Dreiling concluded that claimant had performed 17 separate work tasks during the 15-year period before the October 2000 work-related back injury. Utilizing the medical restrictions from Dr. Delgado, Mr. Dreiling also concluded that despite the back injury claimant retained the ability to earn from \$6 to \$7 per hour.
17. Dr. Delgado, an orthopedic surgeon, was the only doctor to testify in this claim. On May 23, 2001, at claimant's attorney's request, Dr. Delgado examined claimant. The doctor diagnosed nerve root irritation at the first lumbar (L1) vertebra secondary to a herniated disc between the first and second lumbar vertebrae, along with left thigh atrophy, decreased sensation along the L1 dermatome with symptoms aggravated by prolonged walking, standing, bending and attempting to lift. Utilizing the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.), Dr. Delgado concluded that claimant sustained a 10 percent whole body functional impairment as a result of the October 2000 back injury. In formulating his opinions, the doctor considered both electromyographic studies and an MRI.
18. The Board is persuaded by Dr. Delgado's opinions and finds that claimant has sustained a 10 percent whole body functional impairment rating as a result of the October 2000 back injury. The Board also finds that the medical restrictions and limitations that Dr. Delgado placed on claimant are appropriate and should be utilized in determining claimant's disability.
19. At his deposition, Dr. Delgado reviewed the reports and task lists prepared by both Ms. Terrill and Mr. Dreiling. The doctor adopted the conclusions set forth in both reports. Accordingly, Dr. Delgado concluded that claimant has lost the ability to perform three of the 14 tasks, or 21 percent, identified by Ms. Terrill. Nonetheless, the doctor concluded that claimant had lost 11 of the 17 tasks, or 65 percent, identified by Mr. Dreiling due to the lifting and bending restrictions that he believed were appropriate. Moreover, when considering that claimant should alternate sitting

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<sup>3</sup> Delgado Depo., Cl. Ex. 2 at 4.

and standing at least every two hours, the doctor testified claimant had lost the ability to perform all 17 tasks. Consequently, Dr. Delgado's task loss opinion ranges from 21 percent to 100 percent. As the Board is not persuaded that either task analysis was more appropriate than the other, the Board averages the 21 percent and 100 percent losses and concludes that claimant sustained a 61 percent task loss due to his October 2000 back injury.

20. In addition to working for respondent, for approximately two years from 1997 to 1999 claimant and his wife owned and operated a Mexican restaurant in downtown Topeka. According to claimant, he worked in the restaurant in the morning before going to his job with respondent. And according to claimant's wife, claimant helped her prepare some of the food and buy groceries and supplies. But neither vocational consultant listed any tasks from that work in their task lists. Accordingly, any work tasks that claimant performed in that work have not been included in claimant's task loss analysis.
21. The Board finds and concludes that claimant failed to look for any jobs following his termination on July 13, 2001. Accordingly, the Board finds that claimant failed to make a good faith effort to find appropriate employment. Moreover, as indicated above, the three vocational consultants that testified agree that claimant retained the ability to earn around \$6 to \$7 per hour despite his back injury. Accordingly, the Board finds that during the period in question, claimant retained the ability to earn \$6.50 per hour, or \$260 per week.

#### CONCLUSIONS OF LAW

Because claimant has sustained a back injury, the permanent partial general disability benefits that he receives are governed by K.S.A. 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 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.** Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological 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 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>4</sup> and *Copeland*.<sup>5</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 to attempt to perform an accommodated job, which the employer had offered. And 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 imputed and based upon the ability to earn wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the work 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>6</sup>

The Kansas Court of Appeals in *Watson*<sup>7</sup> held that 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 failed 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 regarding the capacity to earn wages.

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

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<sup>4</sup> *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

<sup>5</sup> *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

<sup>6</sup> *Id.* at 320.

<sup>7</sup> *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

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>8</sup>

The Workers Compensation Act also provides that an employer and its insurance carrier are entitled to an offset or credit for certain retirement benefits. K.S.A. 44-501(h) provides:

If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.

When applying the facts of this claim to the appropriate law, claimant is entitled to receive the disability benefits set forth below:

For the period that claimant was off work from October 2, 2000, until January 2, 2001, claimant is entitled to receive temporary total disability benefits based upon a \$494.09 average weekly wage.

For the period that claimant returned to light duty and worked for respondent from January 2, 2001, until July 13, 2001, claimant is entitled to receive temporary partial disability benefits, which total \$780.14.

For the period from July 13, 2001, until November 1, 2002, the Board imputes a post-injury wage of \$260 per week as claimant failed to make a good faith effort to find appropriate employment. Comparing \$260 to claimant's pre-injury average weekly wage of \$522.18 (which includes additional compensation items), the Board finds a 50 percent wage loss. Averaging the 50 percent wage loss with claimant's 61 percent task loss creates a 56 percent permanent partial general disability for the period in question. And these permanent partial general disability benefits are based upon an average weekly wage of \$522.18.

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<sup>8</sup> *Id.* at Syl. ¶ 4.

For the period from July 13, 2001, until November 1, 2002, respondent, however, is entitled to a credit or offset against claimant's permanent partial general disability benefits in the sum of \$62.50 per week for the retirement benefits it paid claimant.

For the period commencing September 1, 2001, respondent is entitled to a credit or offset against claimant's permanent partial general disability benefits in the sum of \$56.10 per week for the retirement benefits paid or to be paid by KPERS.

For the period commencing November 1, 2002, claimant's permanent partial general disability is reduced from a 56 percent work disability to his 10 percent whole body functional impairment rating. On that date, claimant began earning approximately \$513.08 per week, including the value of insurance benefits. As compared to the pre-injury average weekly wage of \$522.18, as of November 1, 2002, claimant's wage loss was reduced to approximately two percent. Accordingly, under K.S.A. 44-510e, commencing November 1, 2002, claimant's permanent partial general disability is limited to his 10 percent functional impairment based upon an average weekly wage of \$494.09.

**AWARD**

**WHEREFORE**, the Board modifies the March 26, 2003 Award and computes claimant's benefits as follows:

Federico Aguirre is granted compensation from U.S.D. 501 for an October 2, 2000 accident and resulting disability.

For the period from October 2, 2000, through January 1, 2001, Mr. Aguirre is entitled to receive 13 weeks of temporary total disability benefits, which are based upon an average weekly wage of \$494.09, at \$329.41 per week, or \$4,282.33.

For the period from January 2, 2001, through July 12, 2001, Mr. Aguirre is entitled to receive a total of \$780.14 in temporary partial disability benefits.

For the period from July 13, 2001, through August 31, 2001, Mr. Aguirre is entitled to receive 7.14 weeks of permanent partial general disability benefits, which are based upon an average weekly wage of \$522.18, at \$285.64 per week (\$348.14 minus \$62.50 in retirement benefits), or \$2,039.47, for a 56 percent permanent partial general disability.

For the period from September 1, 2001, through October 31, 2002, Mr. Aguirre is entitled to receive 60.86 weeks of permanent partial general disability benefits at \$229.54 per week (\$348.14 minus \$62.50 in retirement benefits and \$56.10 in KPERS retirement benefits), or \$13,969.80, for a 56 percent permanent partial general disability.

For the period commencing November 1, 2002, Mr. Aguirre's permanent partial general disability decreases to 10 percent. But due to the accelerated payout formula in K.S.A. 44-510e, no additional permanent partial general disability benefits are payable.

The total award is \$21,071.74, which is all due and owing less any amounts previously paid.

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

**IT IS SO ORDERED.**

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

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

- c: Frederick J. Patton, II, Attorney for Claimant
- Gregory J. Bien, Attorney for Respondent
- Bryce D. Benedict, Administrative Law Judge
- Paula S. Greathouse, Workers Compensation Director