

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

ROBERT J. STACK)	
Claimant)	
VS.)	
)	Docket No. 265,082
IBP, INC.)	
Self-Insured Respondent)	

ORDER

Claimant appealed the January 13, 2004 Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on June 29, 2004.

APPEARANCES

Michael C. Helbert of Emporia, Kansas, appeared for claimant. Gregory D. Worth of Roeland Park, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. In addition, the September 9, 2003 deposition transcript of Dan Zumalt is also part of the record.

ISSUES

Claimant injured both knees while working for respondent. The parties stipulated August 17, 1999, was the appropriate date of accident for computing claimant's disability benefits for these repetitive trauma injuries. In the January 13, 2004 Award, the Judge determined respondent terminated claimant "for cause." Therefore, the Judge imputed the wages that claimant was earning while working for respondent for purposes of claimant's post-injury wage. Consequently, the Judge awarded claimant permanent partial general disability benefits based upon his five percent whole body functional impairment.

Claimant contends Judge Avery erred. Claimant argues he was terminated for seeking medical treatment. Accordingly, claimant argues he should be awarded a 55-56 percent permanent partial general disability for a 71 percent wage loss and a 38-40 percent task loss.

Conversely, respondent contends the January 13, 2004 Award should be affirmed.

The only issue before the Board on this appeal is the nature and extent of claimant's injury and disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant worked for respondent's meat-packing plant for a number of years as an industrial electrician, which required him to often work on his knees. The parties stipulated claimant injured both knees while working for respondent and that August 17, 1999, was the appropriate date of accident for computing claimant's disability benefits for these repetitive trauma injuries.

After claimant reported his knee symptoms to respondent, the company gave him light duty work and referred him for medical treatment. Eventually, in January 2000, claimant had arthroscopic surgery on his left knee.

In approximately November or December 2001, respondent transferred claimant to the processing side of its plant to operate a machine that vacuum sealed the cuts of meat. According to claimant, that job paid him one dollar per hour less than his job as an electrician. In approximately May 2002, when claimant's fingers began going numb, respondent transferred claimant to the job of skinner helper. According to claimant, he then developed carpal tunnel syndrome and also injured his back. The parties represented that those alleged accidents are the subject of a different workers compensation claim.

On September 11, 2002, respondent terminated claimant for points he had accumulated for both his excused and unexcused absences from work.

In November 2003, when claimant last testified in this claim, he was working between 20 and 25 hours per week for a lawn care business and earning from \$125 to \$135 per week. According to claimant, he was not personally looking for other employment at that time because he was too busy. But a counselor with a state agency was allegedly looking for work on claimant's behalf.

Because claimant has sustained an injury that is not listed in the “scheduled injury” statute,¹ claimant’s permanent partial general disability is determined by the formula set forth in K.S.A. 1999 Supp. 44-510e. 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 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*² and *Copeland*.³ 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 which 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 worker’s ability to earn wages rather than the actual wages being received 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. . . .⁴

The Kansas Court of Appeals in *Watson*⁵ held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial

¹ K.S.A. 1999 Supp. 44-510d.

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

³ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁴ *Id.* at 320.

⁵ *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

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 upon all the evidence, including expert testimony concerning the worker's retained 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 determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.⁶

The record establishes that claimant's bilateral knee injuries comprise a five percent whole body functional impairment as rated by the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).⁷ Accordingly, claimant's permanent partial general disability before his September 11, 2002 termination is limited to his five percent whole body functional impairment rating, as he continued to work for respondent and from all appearances earned at least 90 percent of his pre-injury wage.⁸

After returning to work following an injury, a worker must also make a good faith effort to retain that employment or a wage will be imputed for purposes of the wage loss prong of the permanent partial general disability formula. Accordingly, respondent argues claimant was terminated for violating company policy and, therefore, claimant is precluded from receiving an award for a work disability (a permanent partial general disability greater than the whole body functional impairment rating).

Respondent desires the Board to limit its inquiry into whether or not respondent terminated claimant for violating company policy. The Board, however, believes the test is broader. The appropriate test is whether claimant made a good faith effort to retain his employment with respondent and, therefore, company policy is only one factor to be considered in that analysis. And whether an injured worker has made a good faith effort to retain post-injury employment is decided on a case-by-case basis as it is a question of fact to be determined after carefully examining all the facts and circumstances.

⁶ *Id.* at Syl. ¶ 4.

⁷ Bieri Depo. at 14.

⁸ At oral argument before the Board, the parties acknowledged that claimant's permanent partial general disability before September 11, 2002, would be based upon claimant's functional impairment rating.

In short, injured workers who are terminated for reasons other than their injuries are not necessarily precluded from receiving an award of permanent disability benefits for a work disability.⁹

Respondent has an absentee policy in which employees are terminated when they accumulate 14 points in a 12-month period for either missing work or being tardy to work. Different points are assigned depending upon, among other factors, whether the absence was excused or unexcused.

Claimant accumulated 14 points in a 12-month period for an excused absence on September 6, 2002, for being ill and being unable to work; an excused absence on August 8, 2002, for missing a partial day of work to attend a medical appointment, which he testified was related to his work-related back injury; an excused absence on June 26, 2002, due to being hospitalized for a kidney stone; an excused absence on May 10, 2002, due to illness; an unexcused absence on April 12, 2002, for which claimant testified he worked and was allegedly told that his supervisor would correct his timecard; an excused absence on March 27, 2002, due to illness; an excused absence on March 2, 2002, due to his back; an unexcused absence on January 31, 2002, which claimant testified was due to a terrible ice storm that knocked out his electricity and telephone service and felled a large tree that blocked his driveway; an excused absence on October 26, 2001, due to a car accident that claimant attributed to the medication he was taking for his work-related injuries; and finally, an excused absence on October 22, 2001, due to illness.

The Board finds claimant's absences from work were reasonable. The record does not indicate claimant has refused to work or that he has attempted to manipulate his workers compensation claim. Considering all the facts and circumstances, the Board finds claimant made a good faith effort to retain his employment with respondent. Consequently, the wages that claimant was earning while working for respondent after the August 17, 1999 computation date should not be imputed for purposes of the wage loss prong of the permanent partial general disability formula.

The next question is whether claimant has proven he has made a good faith effort to find appropriate employment following his September 11, 2002 termination. As indicated above, as of November 2003 claimant was not personally looking for work as he was too busy working part-time for a lawn care business where he commenced working in approximately late May 2003. Claimant's wife also testified claimant had applied at nine or 10 potential employers, which were specifically named or otherwise identified. In addition, claimant testified he had contacted 20 to 25 potential employers over the Internet.

⁹ *Beck v. MCI Business Services, Inc.*, 32 Kan. App. 2d 201, 83 P.3d 800, rev. denied ___ Kan. ___ (2003); *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999).

As claimant was terminated in September 2002 and last testified in November 2003, claimant's contacts of potential employers have averaged less than one per week during that period of time. Moreover, claimant has ceased exerting any personal effort to find appropriate work. The Board finds and concludes that claimant has failed to satisfy his burden of proof that he has made a good faith effort to find appropriate work following his September 2002 termination. Accordingly, a post-injury wage should be imputed based upon claimant's retained ability to earn wages for purposes of determining claimant's permanent partial general disability.

Two vocational experts testified. Claimant presented testimony from Michael Dreiling and respondent presented testimony from Dan Zumalt. According to Mr. Dreiling, claimant retains the ability to earn between \$7 and \$8 per hour. But according to Mr. Zumalt, claimant retains the ability to earn between \$11 and \$13.83 per hour. Averaging the high and low of those ranges, the Board finds claimant retains the ability to earn \$10.42 per hour, or \$416.80 per week. Comparing \$416.80 to the stipulated pre-injury average weekly wage of \$473.42 yields a 12 percent wage loss.

As a result of the bilateral knee injuries, claimant has sustained a 39 percent task loss considering the work tasks claimant performed in the 15-year period before developing those injuries. That conclusion is based upon the opinions of Dr. Peter Bieri, whose testimony established that claimant had lost the ability to perform nine of the 24 former tasks, or approximately 38 percent, identified by Mr. Dreiling and 14 of the 35 former tasks, or 40 percent, identified by Mr. Zumalt. According to Dr. Bieri, claimant should neither squat nor kneel and should not lift greater than 50 pounds.

Averaging claimant's 12 percent wage loss with his 39 percent task loss produces a 26 percent permanent partial general disability. Consequently, the January 13, 2004 Award should be modified.

AWARD

WHEREFORE, the Board modifies the January 13, 2004 Award and grants claimant a five percent permanent partial general disability through September 11, 2002, followed by a 26 percent work disability.

Robert J. Stack is granted compensation from IBP, Inc., for an August 17, 1999 accident and resulting disability. Based upon an average weekly wage of \$473.42, Mr. Stack is entitled to receive the following disability benefits:

Mr. Stack is entitled to receive 3.57 weeks of temporary total disability benefits at \$315.63 per week, or \$1,126.80.

For the period ending September 11, 2002, Mr. Stack is entitled to receive 20.75 weeks of permanent partial general disability benefits at \$315.63 per week, or \$6,549.32, for a five percent permanent partial general disability.

Commencing September 12, 2002, Mr. Stack is entitled to receive 87.15 weeks of permanent partial general disability benefits at \$315.63 per week, or \$27,507.15, for a 26 percent permanent partial general disability.

The total award is \$35,183.27, 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 July 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Michael C. Helbert, Attorney for Claimant
- Gregory D. Worth, Attorney for Respondent
- Brad E. Avery, Administrative Law Judge
- Paula S. Greathouse, Workers Compensation Director