

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

BRANDON SCHMUCKER)	
Claimant)	
)	
V.)	
)	
ELECTREX, INC.)	CS-00-0197-169
Respondent)	AP-00-0448-340
)	
AND)	
)	
EMPLOYERS MUTUAL CASUALTY CO.)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the December 12, 2019, Award Nunc Pro Tunc entered by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on April 9, 2020. Matthew L. Bretz of Hutchinson, Kansas, appeared for claimant. Kirby A. Vernon of Wichita, Kansas, appeared for respondent.

The ALJ found claimant sustained a 9 percent functional impairment to the body as a whole as a result of his injury. The ALJ determined claimant has a 45 percent task loss and 38 percent wage loss, for a 42 percent work disability. Further, the ALJ concluded claimant is not disqualified from work disability compensation because “neither party attempted to communicate with the other from the time claimant was released at [maximum medical improvement] in August, to when the claimant requested accommodated work through his counsel in October.”¹

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

¹ ALJ Award (Dec. 12, 2019) at 4.

ISSUES

Respondent argues claimant is entitled to a 9 percent functional permanent partial impairment to the whole person because he waived his entitlement to work disability compensation when he neglected to ask for accommodated work in a timely manner. Claimant contends the ALJ's Award should be affirmed.

The sole issue for the Board's review is: did claimant voluntarily resign from his position and/or was he terminated for cause?

FINDINGS OF FACT

Claimant sustained a compensable work injury on August 31, 2018, while moving spools of industrial wire. Claimant eventually underwent two back surgeries, returning to work at respondent when allowed by his physician. Claimant's first surgery occurred on November 27, 2017, and he was released to return to work by Dr. Henry on January 9, 2018. Respondent accommodated the restrictions. Claimant's second surgery, a spinal fusion, was performed on April 5, 2018. Claimant was later released with temporary restrictions at maximum medical improvement (MMI) on August 22, 2017.

Claimant testified he provided every doctor's note to respondent as he received them. Claimant stated it was his understanding he was not to contact respondent after he retained counsel, though he continued to provide doctor's notes when available.

Anita Stringos, respondent's culture coordinator, testified claimant was provided accommodated employment following his injury until February 20, 2018, his last day worked. Ms. Stringos indicated claimant was not terminated until September 11, 2018, after a six-month period of no communication with claimant. Ms. Stringos acknowledged she was aware claimant was not released to return to work, with restrictions, until August 2018. She did not know if claimant's restrictions could be accommodated at the time he was released.

Ms. Stringos agreed she knew claimant underwent two surgeries. She agreed she expected claimant to be off work after the surgeries. Ms. Stringos agreed claimant provided respondent with work releases. She testified respondent made no attempt to contact claimant about returning to work.

Claimant's counsel inquired about claimant's job status in October 2018, at which time he was informed:

You inquired whether [claimant] should report to work at [respondent] since he is at MMI. [Claimant] abandoned his employment months ago. After not hearing from

[claimant] for more than six months despite sending him letters, the employer terminated [claimant] effective 9/11/18 for job abandonment.²

Claimant testified he was unaware he was terminated until he spoke with his counsel, and he denied abandoning his job. Claimant stated the only correspondence he received from respondent after his last day worked was a letter related to insurance coverage.

Dr. George Fluter examined claimant at his counsel's request on November 14, 2018. Dr. Fluter reviewed claimant's medical records, history, and performed a physical examination. Dr. Fluter reported the following assessment:

1. Status post work-related injury; 08/31/17.
2. Low back/left lower extremity pain/dysesthesia.
3. Lumbosacral strain/sprain.
4. Probable left lower extremity radiculitis.
5. Status post lumbar spine surgery (posterior approach); 11/27/17.
6. Status post lumbar spine fusion surgery (posterior approach); 04/05/18.
7. Probable sacroiliac joint dysfunction.³

Dr. Fluter recommended restrictions:

[B]ased on sort of my clinical judgment, I felt that lifting, carrying, pushing, and pulling should be restricted to 50 pounds occasionally and 20 pounds frequently, which is basically the medium level of physical demand. I thought that bending, stooping, crouching, and trunk twisting should be restricted to an occasional basis, and I also felt that squatting, kneeling, crawling, and climbing should be restricted to an occasional basis.⁴

Using the *AMA Guides*,⁵ Dr. Fluter determined claimant sustained a 9 percent permanent partial impairment to the whole person related to his lumbar spine. Dr. Fluter opined claimant requires future medical treatment in the form of prescription medications and the use of a soft brace during activity.

Dr. David Hufford examined claimant at respondent's request on January 31, 2019. Dr. Hufford also reviewed claimant's medical records, history, and performed a physical

² R.H. Trans., Cl. Ex. A.1 at 1.

³ Fluter Depo., Ex. 2 at 7.

⁴ Fluter Depo. at 31.

⁵ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (6th ed.). All references are based upon the Sixth Edition of the *Guides* unless otherwise noted.

examination, finding claimant suffered an occupational lifting injury, disc herniation, resolved symptoms of radiculopathy, and two surgical interventions. Dr. Hufford found claimant would benefit from ongoing doses of nonsteroidal medication. Dr. Hufford opined claimant did not require permanent physical restrictions. He testified:

In this case, I felt that [claimant] should not have permanent restrictions assigned only because of his tolerance levels, simply because he would not cause further harm or damage. It was my intention to imply that he would hopefully have some ability to select and choose further occupational activities without the overriding issue of physical limitations, even though I did acknowledge and attempted to acknowledge by my statement that he was not asymptomatic and that he did have continued and ongoing pain which he found limiting.⁶

Dr. Hufford found claimant sustained a 9 percent whole person impairment based on the *AMA Guides*. He testified claimant's risk for adjacent level disc disease is 25 percent.

Vocational experts Dr. Robert Barnett and Steve Benjamin interviewed claimant to assess his job tasks, education, training, and experience. Dr. Barnett concluded claimant retains the ability to earn \$290.00 per week, resulting in a wage loss of 49 percent. Dr. Barnett testified he considered Dr. Fluter's report when making his determination. Dr. Barnett did not contact respondent to see whether claimant could be accommodated under Dr. Fluter's restrictions.

Mr. Benjamin, in addition to the information obtained from claimant, had reports from both Drs. Hufford and Fluter. Mr. Benjamin stated he contacted respondent and was informed the restrictions of Dr. Fluter could be accommodated. Dr. Benjamin testified claimant retains the ability to earn \$429.20 under Dr. Fluter's restrictions if unable to return to accommodated work at respondent, resulting in a 27.8 percent wage loss.

Dr. Fluter reviewed the task list generated by Dr. Barnett. Of the 9 unduplicated tasks on the list, Dr. Fluter opined claimant could no longer perform 8, for an 89 percent task loss.

PRINCIPLES OF LAW

K.S.A. 44-501b(c) states:

⁶ Hufford Depo. at 14.

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 44-508(f)(2) provides, in relevant part:

(B) An injury by accident shall be deemed to arise out of employment only if:

- (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
- (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 44-510e(a)(2) provides, in relevant part:

(C) An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:

- (i) The percentage of functional impairment determined to be caused solely by the injury exceeds 7½% to the body as a whole or the overall functional impairment is equal to or exceeds 10% to the body as a whole in cases where there is preexisting functional impairment; and
- (ii) the employee sustained a post-injury wage loss, as defined in subsection (a)(2)(E) of K.S.A. 44-510e, and amendments thereto, of at least 10% which is directly attributable to the work injury and not to other causes or factors.

In such cases, the extent of work disability is determined by averaging together the percentage of post-injury task loss demonstrated by the employee to be caused by the injury and the percentage of post-injury wage loss demonstrated by the employee to be caused by the injury.

(D) "Task loss" shall mean the percentage to which the employee, in the opinion of a licensed physician, has lost the ability to perform the work tasks that the employee

performed in any substantial gainful employment during the five-year period preceding the injury. The permanent restrictions imposed by a licensed physician as a result of the work injury shall be used to determine those work tasks which the employee has lost the ability to perform. If the employee has preexisting permanent restrictions, any work tasks which the employee would have been deemed to have lost the ability to perform, had a task loss analysis been completed prior to the injury at issue, shall be excluded for the purposes of calculating the task loss which is directly attributable to the current injury.

(E) "Wage loss" shall mean the difference between the average weekly wage the employee was earning at the time of the injury and the average weekly wage the employee is capable of earning after the injury. The capability of a worker to earn post-injury wages shall be established based upon a consideration of all factors, including, but not limited to, the injured worker's age, physical capabilities, education and training, prior experience, and availability of jobs in the open labor market. The administrative law judge shall impute an appropriate post-injury average weekly wage based on such factors. Where the employee is engaged in post-injury employment for wages, there shall be a rebuttable presumption that the average weekly wage an injured worker is actually earning constitutes the post-injury average weekly wage that the employee is capable of earning. The presumption may be overcome by competent evidence.

(i) To establish post-injury wage loss, the employee must have the legal capacity to enter into a valid contract of employment. Wage loss caused by voluntary resignation or termination for cause shall in no way be construed to be caused by the injury.

(ii) The actual or projected weekly value of any employer-paid fringe benefits are to be included as part of the worker's post-injury average weekly wage and shall be added to the wage imputed by the administrative law judge pursuant to K.S.A. 44-510e(a)(2)(E), and amendments thereto.

(iii) The injured worker's refusal of accommodated employment within the worker's medical restrictions as established by the authorized treating physician and at a wage equal to 90% or more of the pre-injury average weekly wage shall result in a rebuttable presumption of no wage loss.

ANALYSIS

The nature and extent of claimant's disability issue hinges solely upon whether claimant was terminated for cause or voluntarily resigned from his position with respondent. Respondent contends claimant is barred from receiving work disability by K.S.A. 44-510e(a)(2)(E)(i), which creates a presumption of no wage loss if a claimant voluntarily resigns or is terminated for cause. Respondent argues claimant voluntarily

resigned or was properly terminated for cause because he made no effort attempt to return to work after he reached MMI.

Claimant's first surgery occurred on November 27, 2017. Claimant was released to return to work by Dr. Henry on January 9, 2018. Respondent accommodated the restrictions. Claimant had a second surgery on April 5, 2018. Respondent knew claimant had the second surgery and Ms. Stringos agreed she expected claimant to be off work after the surgery. Claimant was released with restrictions on August 22, 2018. Twenty days later, on September 11, 2018, claimant's employment was terminated.

Respondent relies on *Lowmaster v. Modine Mfg. Co.*⁷ to create a good faith effort by claimant to continue working. In *Lowmaster*, the injured worker: (1) was able to work and earn 90 percent of her pre-injury wage until the day she quit and (2) her employer would have accommodated her restrictions had she not quit. While the employer never actually offered her accommodated employment, *Lowmaster* never requested such an offer. As a matter of public policy, the Kansas Court of Appeals indicated an employer should not have to offer accommodated employment to an employee who voluntarily terminated his or her employment with the employer. *Lowmaster* did not exercise good faith in terminating her job. As a result, she was denied a work disability award.

In cases following *Lowmaster*, the Kansas Court of Appeals shifted and found the determination of whether an individual was terminated for cause includes consideration of the reasonableness and good faith of both parties. In *Oliver v. Boeing Company-Wichita*, the Court of Appeals wrote:

Just as the Act does not impose an affirmative duty upon the employer to offer accommodated work, *Griffin v. Dodge City Cooperative Exchange*, 23 Kan.App.2d 139, 147-48, 927 P.2d 958 (1996), *rev. denied* 261 Kan. 1082, 941 P.2d 1388 (1997), it also does not establish an affirmative duty upon the employee to request accommodated work. Whether a claimant requested accommodated work from an employer is just one factor, viewed along with the rest of the record, in determining whether the claimant in good faith attempted to obtain appropriate work.⁸

In *Morales-Chavarin v. National Beef Packing Co.*, the Court of Appeals wrote:

[T]he proper inquiry to make when examining whether good cause existed for a termination in a workers compensation case is whether the termination was reasonable, given all of the circumstances. Included within these circumstances to consider would be whether the claimant made a good faith effort to maintain his or

⁷ *Lowmaster v. Modine Mfg. Co.*, 25 Kan. App. 2d 215, 218-19, 962 P.2d 1100 (1998).

⁸ *Oliver v. Boeing Company-Wichita*, 26 Kan. App. 2d 74, 77, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

her employment. Whether the employer exercised good faith would also be a consideration. In that regard, the primary focus should be to determine whether the employer's reason for termination is actually a subterfuge to avoid work disability payments.⁹

Respondent asserts claimant abandoned his job in February 2018 and was terminated for cause on September 11, 2018, six months later, even though it knew claimant was unavailable for four of those months due to surgery in April 2018. Ms. Stringo testified respondent made no effort to contact claimant relating to accommodated employment after claimant's release. Respondent waited only twenty days to terminate claimant. Given all the circumstances, the Board finds respondent did not exercise good faith in maintaining claimant's employment as required by *Morales-Chavarin*.

CONCLUSION

The Board finds claimant did not abandon his employment with respondent and that he was not terminated for cause.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of Administrative Law Judge Thomas Klein dated December 12, 2020, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2020.

BOARD MEMBER

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⁹ *Morales-Chavarin v. National Beef Packing Co.*, No. 95,261, 2006 WL 2265205 (Kansas Court of Appeals unpublished opinion filed Aug. 4, 2006).

BOARD MEMBER

copies via OSCAR to:

Matthew L. Bretz, Attorney for Claimant

Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier

Hon. Thomas Klein, Administrative Law Judge