BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JESUS CORRAL	)	
Claimant	)	
V.	)	
	)	
FACILITY DYNAMICS	)	AP-00-0463-514
Respondent	)	CS-00-0289-447
AND	)	
	)	
KANSAS BUILDERS INS GROUP	)	
Insurance Carrier	)	

ORDER

The claimant, through Jeff Cooper, requested review of Administrative Law Judge (ALJ) Gary Jones' Review and Modification Award dated February 3, 2022. Edward Heath, Jr., appeared for the respondent and its insurance carrier (respondent). The Board heard oral argument on June 9, 2022.

RECORD AND STIPULATIONS

The Board considered the same record as the ALJ, consisting of the: (1) evidentiary deposition of Pedro Murati, M.D., taken August 18, 2021; (2) review and modification haring, held August 24, 2021; (3) evidentiary deposition of the claimant, taken September 20, 2021; (4) evidentiary deposition of Steve Benjamin, taken September 22, 2021; (5) evidentiary deposition of John Estivo, D.O., taken November 12, 2021; (6) evidentiary deposition of Roger Roper, taken December 8, 2021; (7) evidentiary deposition of the claimant, taken January 11, 2022; (8) evidentiary deposition of Martha Corral, taken January 11, 2022; and (9) all associated exhibits, pleadings and correspondence contained in the administrative file.

ISSUE

Is the claimant entitled to a work disability award? Within this question is:

(1) whether the claimant's wage loss is directly attributable to his work injury and no other causes or factors;

(2) what is the claimant's post-injury wage earning capability, including whether the claimant is capable of earning comparable wages based on his post-injury earnings; and

(3) did the claimant refuse accommodated employment within his medical restrictions established by the authorized treating physician at a wage equal to 90% or more of the pre-injury average weekly wage, which would result in a rebuttable presumption of no wage loss?

FINDINGS OF FACT

The claimant, a Spanish-speaking man, currently 49 years old, with a sixth grade education, worked for the respondent as a painter. On September 25, 2017, he injured his low back in an accident arising out of and in the course of his employment. He had lumbar spine surgery and received temporary total disability benefits for approximately one year. On September 24, 2018, the authorized treating physician, John Estivo, D.O., released the claimant at maximum medical improvement (MMI) and provided permanent restrictions (lifting up to 40 pounds and no constant bending or twisting). The claimant's prior work with the respondent required lifting 50 pounds.

Initially, the claimant was not returned to work with the respondent. Instead, he obtained accommodated work at Forshee Painting in October 2018, working 12 to 32 hours per week at $11 per hour. He worked at Forshee for four months. During that time, the claimant was interviewed by Steve Benjamin, a vocational rehabilitation consultant, in November 2018.

The claimant returned to accommodated work for the respondent around February 2019. The accommodated work was within Dr. Estivo's restrictions. The claimant was paid comparable earnings to his pre-injury average weekly wage.

On April 18, 2019, the parties entered into an Agreed Award stating the claimant sustained an 18.5% permanent partial impairment to the body as a whole, leaving all rights open, including review and modification and future medical treatment. The Agreed Award stated the claimant had a stipulated pre-injury average weekly wage of $834.12.

The claimant continued to work in an accommodated fashion for the respondent. On February 23, 2021, the claimant returned to Dr. Estivo for continued low back pain with bilateral leg pain and left leg weakness. There is no evidence the claimant previously returned to Dr. Estivo after September 24, 2018. The doctor ordered an MRI, which showed post-surgical changes, including multi-level degenerative changes at L3-L4 and L4-L5 and a protruding disc at L3-L4 making contact with the L4 nerve root.

On March 22, 2021, the claimant again saw Dr. Estivo. The doctor recommended an epidural steroid injection, physical therapy and restrictions.

The respondent terminated the claimant's employment on March 22, 2021. The claimant testified he was let go because he went to get an injection recommended by Dr. Estivo and because he had restrictions. The claimant testified a supervisor named Gary or Jerry fired him because of the restrictions, and advised him to speak to the respondent’s owner, Roger Roper, who was not present for this conversation. The claimant testified:

A I called [Mr. Roper], like, three times right there and he didn't pick up. [Mr. Roper] didn't pick up. So I had to leave. I believe he returned my phone call around 10 or 11 a.m. that day and he was very upset.

Q Did he say what he was upset about?

A Yes. He told me, but I didn't quite understand the conversation so I hand the phone to my wife. But I believe it was something in regards that me going to see the doctor without telling them, but, I mean, I will get the injections twice a year.

Q Did anyone, either Roger or Gary, around that March 22, 21 time you were terminated, did either one of them tell you you were being terminated because there wasn't enough work?

A No. It was because I went to see the doctor, not because there was loss of work.[1]

The claimant and his wife, Martha, testified Mr. Roper called the claimant on March 22, 2021, after the conversation with Gary or Jerry. They both described Mr. Roper as very upset. The claimant, who speaks Spanish, handed the phone to Martha. The claimant understood from his wife Mr. Roper was upset the claimant saw Dr. Estivo without telling the respondent in advance. Ms. Corral testified Mr. Roper questioned why the claimant had to go see the doctor without prior notification.

Ms. Corral stated Mr. Roper was upset because her husband had seen the doctor and testified:

Q Did [Mr. Roper] tell you that's why Jesus had got terminated? Because he went to see a doctor?

A First of all, yes. That's when he say that he don't have anymore job for Jesus and he did not even tell the company that he was going to see the doctor. And I told Mr. [Roper], yes, he was. He notified Mr. Gary. And he say that Gary was nobody [at] the company. He was just another simple worker, and that's the only conversation that we had at the moment.[2]

Mr. Roper testified the claimant was laid off on March 22, 2021, due to a slow down in painting work. Painting is a small part of the respondent's activities. Mr. Roper denied the claimant's restrictions had anything to do with his being laid off. Mr. Roper testified the claimant worked continuously from the time of his 2019 settlement until March 22, 2021. According to the respondent's calculations, the claimant earned between $1,296.40 and

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[1] Claimant Depo. (Jan. 11, 2022) at 6-7.

[2] Martha Corral Depo. at 5.

$1,759.40 in the six weeks prior to his employment ending and he earned a weekly average of $912.69 in the 26 weeks prior to the end of his employment with the respondent.

Mr. Roper testified two other painters were laid off prior to the claimant – Jesus Rios, who is the claimant's son, in December 2020, and Monico Cisneros in mid-March 2021. Mr. Roper testified the layoffs were based on seniority. The claimant testified he did not know if his son was laid off because of lack of work or because he was lazy "because there was plenty of jobs."[3] The claimant did not know if Mr. Cisneros quit or was fired.

Three weeks after being fired by the respondent, the claimant obtained accommodated work for Guzman Construction, 32 hours per week at $10 per hour. He testified the work at Guzman Construction was within his restrictions. The claimant testified no other employer offered work and he did not turn down any offers of work.

At some time on or after March 22, 2021, the claimant had an epidural steroid injection at L3-L4. He had a second epidural steroid injection at L3-L4 some time on or after May 3, 2021.

Mr. Roper testified he called the claimant's wife in April or May 2021 about the possibility of the claimant returning to work, and he again had a similar conversation with her a week later in which to discuss this "possibility." While Mr. Roper asked Ms. Corral to have the claimant return his calls, the claimant never responded.

Ms. Corral testified Mr. Roper called in May 2021, and told her it was possible the respondent had a job available and asked her to have her husband call him. She told Mr. Roper her husband was already working, but she would let him know. Ms. Corral denied Mr. Roper offered the claimant a job. She testified, "He just say possible, but he never say tell [Jesus] to come back to work for me, I already have a job, no, never." She stated Mr. Roper never mentioned anything about hours, pay or how long the job would last.[4]

The claimant acknowledged the respondent left a message with his wife for him to call about a possible job opportunity, but he was working elsewhere at the time and needed the income. Ms. Corral testified her husband did not want to go back to work for the respondent because she was undergoing cancer treatment and he did not want to risk being laid off again or not having a job.

The claimant continues to have back pain and problems. He feels his symptoms are worse than immediately after the work accident.

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[3] Claimant's Depo. (Jan. 11, 2022) at 10.

[4] *Id*. at 7.

Dr. Estivo last saw the claimant on June 14, 2021, at which time the claimant declined a third injection, noting his symptoms were “tolerable.”[5]

In June 2021, Mr. Roper encountered the claimant at a quinceañera and spoke with him about potentially coming back to work for the respondent. Mr. Roper testified the claimant indicated he would have to think about it and then walked away. The claimant never called him. Ms. Corral testified she was aware her husband saw Mr. Roper at the quinceañera, but it was her understanding he asked her husband about whether he got the message to call him back and that it was too loud to discuss anything at that time. Ms. Corral denied any job offer was made, only the possibility of work.

The claimant denied the respondent ever offered him a job after March 22, 2021. The claimant understood Mr. Roper told his wife there "might" be available work. The claimant did not return Mr. Roper's call because he was already working for Guzman, he did not want to leave a job he just started, he needed to pay bills and his wife had throat cancer. Ms. Corral testified the claimant did not want to take a chance of returning to work for the respondent and getting laid off or not having a job.

Mr. Roper saw the claimant again in November and December 2021, on a job site. The claimant was working for Guzman Construction. They exchanged pleasantries, but there was no discussion about the claimant returning to work for the respondent.

Mr. Roper has nothing in writing to confirm the conversations he had with the claimant. Mr. Roper had no written letter of termination or job offer regarding the claimant.

At the claimant’s attorney’s request, Mr. Benjamin reinterviewed the claimant on September 9, 2021. Mr. Benjamin, the only vocational expert to testify, opined the claimant had suffered a 61.6% wage loss as a result of his termination. He calculated this based on the claimant earning $834.12 per week for the respondent and $320 (32 hours at $10/hour) for Guzman Construction. However, Mr. Benjamin believed the claimant is capable of working 40 hours per week. Mr. Benjamin later stated the claimant's $10 hourly wage was appropriate, testifying: "Well, I believe the hourly wage is right around where he should be able to earn based on his vocational profile."[6] Mr. Benjamin saw no reason the claimant should work less than 40 hours per week.

At his attorney’s request, the claimant saw Pedro Murati, M.D., twice in 2018. Dr. Murati imposed permanent restrictions of no bending, stooping or crawling; no lifting/carrying or pushing/pulling over 20 pounds; rarely stairs, ladders and squatting; occasional sit, stand and drive; frequent walking; and alternate sit, stand and walk. Dr. Murati testified the claimant’s restrictions still apply. Dr. Murati testified the claimant lost

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[5] Estivo Depo. at 10.

[6] Benjamin Depo. at 9.

the ability to perform 22 of 25 tasks identified by Mr. Benjamin for an 88% task loss. Using Mr. Benjamin's task list, Dr. Estivo testified the claimant lost the ability to perform 17 of 25 tasks for a 68% task loss.

Following the Review and Modification Hearing, the ALJ ruled:

> There was a change in the Claimant's economic status on March 22, 2021, when his employment with the Respondent was terminated. The Court concludes that the Claimant is entitled to work disability beginning March 23, 2021, for two reasons.
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> First, there is disputed testimony about the reason for the termination or lay off. The Court finds it is more likely than not that the reason the Claimant was sent home from work was related to his renewed treatment with Dr. Estivo rather than an economic reduction in force. The [Claimant] and Mrs. Corral both said that Mr. Roper talked about the Dr. Estivo treatment and not about an economic layoff. If the Respondent intended to lay the Claimant off for economic reasons, it does not appear that intention was adequately conveyed to the Claimant.
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> Second, the Court is not persuaded by the Respondent's argument that the Claimant has no wage loss because he earned a high wage working for the Respondent after the injury. According to Mr. Benjamin's expert opinion, the Claimant is capable of earning $400.00 per week. Although the Claimant earned higher than that while working for the Respondent, that does not mean he can still earn that amount after the job with the Respondent ended.
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> The Court is also not persuaded by the Respondent's argument that the Claimant is not entitled to work disability because of his termination of his job with the Respondent was not the result of the work injury. K.S.A. 44-510e(a)(2)(C)(ii) requires that the wage loss be directly attributable to the work injury. K.S.A. 44-510e(a)(2)(C)(ii) does not require that the Claimant's job loss be attributable to the work injury. The wage loss is the difference between the Claimant's average weekly wages and what he is capable of earning, and that is caused by the Claimant's permanent restrictions. K.S.A. 44-510e(a)(2)(E)(is) says that wage loss caused by voluntary resignation or termination for cause is not wage loss caused by the injury, but it does not preclude job termination caused by an economic layoff from being a wage loss caused by the injury.
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> So the Claimant is entitled to work disability beginning March 23, 2021. But the case does not end there. In May 2021, Mr. Roper attempted to contact the Claimant and discuss the Claimant's return to work. The Claimant did not return Mr. Roper's telephone calls and declined to discuss the matter in person. The Claimant has to date not been willing to talk to the Respondent about returning to work. It appears likely that the Claimant would be able to return to work for the Respondent at a wage comparable to his pre-injury wage if the Claimant would discuss the situation with the Respondent.

> K.S.A. 44-510e(a)(2)(E)(iii) says that a worker's refusal of accommodated work results in a presumption of no wage loss. The Court finds this presumption applies based on the Claimant's refusal to talk to Mr. Roper. The Court, therefore, finds that the Claimant's wage loss and eligibility for work disability ended on May 31, 2021, in accordance with K.S.A. 44-510e(a)(2)(E)(iii). March [sic] 31, 2021, is used since the Respondent did not establish an exact date in May when the Respondent attempted to contact the Claimant.
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> For the period March 23, 2021, through May 31, 2021, the Court finds that the Claimant is entitled to wage loss of 52% based on the Claimant's pre-injury average weekly wages of [$834.12] and his ability to earn $400.00 per week post injury per Mr. Benjamin's testimony.
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> The Court further finds that the Claimant has a task loss of 68%. The Court finds Dr. Estivo's testimony about task loss more persuasive than that of Dr. Murati. Dr. Estivo is more familiar with the Claimant's current condition as the treating physician and having seen the Claimant more recently. Dr. Murati was not aware of the construction jobs that the Claimant has worked since the accident. Dr. Murati's task loss appears high in light of the type of work that the Claimant has been able to do since the accident.
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> Averaging the task and wage loss, the Court concludes that the Claimant is entitled to a 60% work disability for the period March 23, 2021, through May 31, 2021, a period of 10 weeks.

The claimant argues he is entitled to a work disability award exceeding the 10 weeks found by the ALJ. The claimant asserts he did not refuse accommodated work and had no duty to respond to any inquiry about a possible job. The respondent argues the claimant failed to prove he is entitled to a work disability award and is capable of earning his pre-injury wage based on his accommodated earnings between 2019 and 2021. The respondent also argues the claimant's wage loss could have been avoided if he returned Mr. Roper's calls, and not doing so is akin to refusing to attempt accommodated work.

PRINCIPLES OF LAW

K.S.A. 44-501b(b) and (c) state an employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment, and the burden of proof is on the worker to establish the right to an award based on the whole record. An employer must prove any affirmative defenses.[7]

[7] See *Smalley v. Skyy Drilling*, No. 111,988, 2015 WL 4366531 (Kansas Court of Appeals unpublished opinion filed June 26, 2015).

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. 44-510e(a)(2) states, in 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.

. . .

(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.

K.S.A. 44-528 states:

(a) Except lump-sum settlements approved by the director or administrative law judge, any award or modification thereof may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. . . . The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, pursuant to the provisions set forth in K.S.A. 44-510b, 44-510c, 44-510d or 44-510e, and amendments thereto, as may be applicable.

. . .

(d) Any modification of an award under this section on the basis that the functional impairment or work disability of the employee has increased or diminished shall be effective as of the date that the increase or diminishment actually occurred, except that in no event shall the effective date of any such modification be more than six months prior to the date the application was made for review and modification under this section.

The Board's review of an order is de novo based on the record.[8]

ANALYSIS

1. The claimant's wage loss is directly attributable to his work injury.

The claimant maintains he lost his job because he went to see Dr. Estivo and this upset the respondent's owner, Mr. Roper. Conversely, Mr. Roper testified the claimant was released from his employment due to an economic slowdown and lack of painting work.

[8] See K.S.A. 44-555c; *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

Timing shows the claimant's employment was terminated because of his work injury. The claimant saw Dr. Estivo on March 22, 2021, and the respondent fired the claimant on March 22, 2021. The claimant testified his supervisor fired him for going to the doctor. The supervisor did not testify. Mr. Roper was not present for the discussion between the claimant and the supervisor. Later, Mr. Roper called the claimant, and spoke to the claimant and his wife, the day of the termination. Mr. Roper was upset and questioned why the claimant saw Dr. Estivo without previously notifying the respondent. Essentially, the claimant's employment was terminated based on his seeking medical treatment on account of his work injury. The claimant's wage loss was not due to any other reason, including any purported economic lay off. The Board concludes the claimant's corresponding wage loss was directly attributable to his work injury.

As discussed further, the claimant is eligible for a work disability award because his work-related wage loss was at least 10%. The claimant earned $834.12 before his accident. Mr. Benjamin testified the claimant had the ability to earn $400 per week after his termination of employment. The claimant's wage loss is 52%.

2. The claimant's current post-injury earning capacity is $400 per week. The wages he earned from the respondent between February 2019 and March 2021 do not represent his current earning capacity in the open labor market.

Mr. Benjamin was the only witness testifying to the claimant's current earning capability. His testimony was not refuted by the respondent. While there is a statutory presumption within K.S.A. 44-510e(a)(2)(E) the claimant's actual earnings of $320 per week represent his earning ability, the ALJ ruled consistent with the evidence the claimant could earn $400 a week based on working 40 hours per week at $10 per hour.

The claimant twice found accommodated work, within one month of being at MMI in September 2018, and within one month of being fired by the respondent in March 2021. This shows good faith on his part.[9] These jobs paid $10 to $11 an hour, which is representative of the available work within the claimant's physical capabilities.

The respondent argues the claimant made significantly higher wages in the approximate two years he was brought back to work between February 2019 and March 2021, those wages show he is capable of earning more than his pre-injury average weekly wage, and he is ineligible for a work disability award.

Historically, Kansas case law held employers may avoid work disability by accommodating injured workers at comparable wages, but when the accommodation ends,

[9] See *Shouse v. Goodyear Tire & Rubber Co.*, No. 89,806, 2003 WL 21981956 (Kansas Court of Appeals unpublished opinion filed. Aug. 15, 2003).

the question of work disability arises.[10] When accommodated work ends, the employee still has work restrictions and the possibility the injury and work restrictions will make it more difficult to find work in the open labor market.[11]

Older Kansas case law looked at an employee's good faith effort in obtaining or retaining appropriate employment to mitigate against wage loss.[12] However, *Bergstrom* abolished the good faith requirement, and held wage loss must be based on actual post-injury earnings. *Merrill* recognized the Kansas Legislature, in an apparent response to *Bergstrom*, amended K.S.A. 44-510e to require a nexus between a claimant's wage loss and his or her injury.[13] Currently, wage loss must be directly attributable to or caused by the injury, as opposed to other causes or factors. Additionally wage loss is assessed based on 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."[14] The Board's decision is based on the current statutory scheme. The Board must look at all factors.

Based on all factors, including the specific factors listed in K.S.A. 44-510e(a)(2)(E), the claimant performed accommodated work for the respondent for two years. This fact does not negate the claimant had back surgery, permanent impairment and permanent work restrictions, or that these factors impact his ability to earn wages in the open labor market. The uncontradicted evidence from Mr. Benjamin, the only vocational expert to testify, is the claimant is capable of earning $400 per week in the open labor market.

The Board understands the respondent's argument the claimant's nearly two years of accommodated work represents his earning capability. The Board's concern is what the claimant is currently capable of earning, not what he used to be able to earn while employed by the respondent in an accommodated position in the past. Historically, in review and modification hearings, the Board has rejected the notion wages earned during accommodated work represent a worker's capability. The Board found a worker who returned to accommodated work and earned the same or higher wages are nevertheless

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[10] See *Copeland v. Johnson Group, Inc.*, 26 Kan. App. 2d 803, 806, 995 P.2d 369 (1999), *rev. denied* 269 Kan. 931 (2000). Another version of *Copeland*, 24 Kan.App.2d 306, 944 P.2d 179 (1997), was disapproved of by *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

[11] See *Niesz v. Bill's Dollar Stores*, 26 Kan.App.2d 737, 740, 993 P.2d 1246 (1999).

[12] See *Merrill v. Georgia Pacific*, No. 113,996, 2016 WL 3202663, at *7 (Kansas Court of Appeals unpublished opinion filed June 10, 2016).

[13] See *id.*, at *8.

[14] K.S.A. 44-510e(a)(2)(E).

entitled to a work disability award when his or her employment is subsequently terminated.[15]

Under the facts, the claimant's accommodated earnings do not represent his current earning capability. If true, no injured worker who is terminated from accommodated employment after being paid comparable wages would ever receive a work disability award through a review and modification proceeding. The Board rejects the respondent's argument the claimant is currently capable of earning what he earned between February 2019 and March 22, 2021.

The claimant is entitled to review and modification. The claimant is entitled to a work disability award in excess of the 10 weeks awarded by the ALJ. The work disability is based on a 52% wage loss and a 68% task loss, as found by the ALJ. These figures result in a 60% work disability.

3. The claimant did not refuse accommodated employment within his medical restrictions established by the authorized treating physician at a wage equal to 90% or more of the pre-injury average weekly wage. The claimant is not barred from receiving work disability benefits.

After the respondent terminated the claimant's employment, Mr. Roper called the claimant's wife one or two times and briefly spoke to the claimant at a quinceañera. These discussions involved the possibility of the claimant returning to work for the respondent. However, a mere possibility of work is not a legitimate job offer, let alone an offer of accommodated employment within the claimant's medical restrictions established by the authorized treating physician at a wage equal to 90% or more of the pre-injury average weekly wage.

The Board concludes the respondent never made an actual bona fide offer for the claimant to return to work. Even Mr. Roper defined the discussions as involving the possibility the claimant might return to work. There was no testimony Mr. Roper actually made an offer of work to the claimant after the claimant's employment was terminated on March 22, 2021. There is no evidence as to the type of work the claimant might possibly perform for the respondent or his hours or rate of pay. In short, there was no job offer. With no job offer, there was no refusal of accommodated work.

Unlike the determination reached by the ALJ, the Board does not conclude the claimant would have returned to work for the respondent in accommodated employment within the claimant's medical restrictions established by the authorized treating physician at a wage equal to 90% or more of the pre-injury average weekly wage had the claimant

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[15] *Sayre v. Steven Motor Group*, No. 1,044,568, 2011 WL 2185259, at *7 (Kan. WCAB, May 6, 2011); see also *Ridgeway v. Exide Technologies*, No. 1,033,067, 2010 WL 5579592, at *5 (Kan. WCAB, Dec. 30, 2010).

simply discussed the possibility of returning to work with Mr. Roper. While it may have been polite for the claimant to engage in conversation, it is speculative to conclude dialogue about a possibility of returning to work would have resulted in the claimant actually returning to work with the respondent in an accommodated job within Dr. Estivo's restrictions paying at least 90% of his pre-injury average weekly wage. The respondent did not make an offer, so there was nothing for the claimant to refuse. The bar to work disability benefits under K.S.A. 44-510e(a)(2)(E) is inapplicable.

AWARD

WHEREFORE, the Board modifies the Review and Modification Award dated February 3, 2022. The claimant is entitled to permanent partial disability benefits based on a 60% work disability.

The claimant is entitled to 52 weeks of temporary total disability compensation at the rate of $556.11 per week in the amount of $28,917.72, followed by 69.93 weeks of permanent partial disability benefits at the rate of $556.11 per week in the amount of $38,888.77. All of these benefits were previously awarded under the terms of the Agreed Award dated April 18, 2019. Thereafter, starting March 22, 2021, the claimant is entitled to 156.87 weeks of permanent partial disability compensation at the rate of $556.11 per week, not to exceed $130,000, for a 60% work disability.

As of June 23, 2022, the claimant is entitled to 65.43 weeks of permanent partial disability compensation at the rate of $556.11 per week in the amount of $36,386.28 which is ordered paid in one lump sum. The remaining balance in the amount of $25,807.23 shall be paid at the rate of $556.11 per week until fully paid or until further order.

IT IS SO ORDERED.

Dated this _____ day of July, 2022.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: (via OSCAR)
Jeff Cooper
Edward Heath
Hon. Gary Jones