BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JAMES E. RICKSON	)	
Claimant	)	
V.	)	
	)	
KERNS CONSTRUCTION, INC.	)	CS-00-0133-782
Respondent	)	AP-00-0443-097
AND	)	
	)	
AUTO OWNERS MUTUAL INS. CO.	)	
Insurance Carrier	)	

ORDER

The Kansas Court of Appeals decided *Rickson v. Kerns Construction,* No. 122,092, 2020 WL 5268162 (Kansas Court of Appeals unpublished opinion filed Sept. 4, 2020), and remanded the matter to the Board.

On February 11, 2021, Jan Fisher on behalf of the claimant, and Meredith Ashley on behalf of the respondent and its insurance carrier (respondent), presented oral argument to the Board. Because Board Member Rebecca Sanders recused herself from the case, Joseph Seiwert was appointed as a Board Member Pro Tem.

RECORD

The Board has considered the entire record, including the Board's prior Order dated October 11, 2019, and the aforementioned Memorandum Opinion of the Court of Appeals.

ISSUES

1. Did the claimant voluntarily resign?

2. What is the nature and extent of the claimant's disability?

FINDINGS OF FACT

The Board adopts the detailed factual findings and procedural overview set forth in the Board's prior Order and the Memorandum Opinion of the Court of Appeals. The following facts pertain to the claimant's separation of employment and the nature and extent of his disability.

The claimant began working for Kerns Construction in February 2005. He started as a carpenter, but advanced to being a foreman. He was in charge of jobs when the respondent's owner, Keith Kerns, was not on the job site.

The claimant injured his neck on June 18, 2014. He received medical treatment and light duty restrictions. The claimant testified Mr. Kerns did not follow the restrictions and had him do his ordinary work because of a "no excuses" work atmosphere and the expectation workers deal with pain.[1] Mr. Kerns testified he did not have light duty work available and could not afford to have a worker on light duty. However, Mr. Kerns agreed to accommodate the claimant's restriction of no overhead work "to keep him working."[2]

In September 2014, two of the claimant's coworkers told Mr. Kerns the claimant was not doing his job as reported, the claimant told them to cover for him when he did personal business on company time, he was spending a lot of work time on his cell phone, and he stole screws and fasteners from the company.

The claimant testified he told Mr. Kerns he wanted about a week off to let his neck heal on October 1, 2014, but Mr. Kerns did not have time to talk. The claimant was still on light-duty restrictions. The claimant's employment ended the next day, October 2, 2014.

At a preliminary hearing held on January 28, 2015, the claimant testified Mr. Kerns confronted him at the respondent's shop the morning of October 2, 2014, asking if he had been lying, having coworkers lie for him, spending too much time on the phone or taking unapproved time off work. The claimant viewed the complaints as false or exaggerated.

The claimant testified Mr. Kerns said, "[Y]ou know, Jim, I was going to fire you but I can't. . . . I've decided that I'm just going to work you when I can and when I can be there to keep an eye on you."[3] The claimant testified he was dumbfounded Mr. Kerns wanted to monitor his work. The claimant believed he was "basically . . . going to be let go"[4] because if Mr. Kerns wanted to keep an eye on him, his hours were going to be reduced and he would likely only be allowed to work a couple days each week. The claimant indicated Mr. Kerns disciplined employees by sending them home and not working them much, a practice dubbed "TV time" by employees. The claimant recalled several instances when Mr. Kerns cut several employees' hours to get them to quit. The claimant testified Mr. Kerns previously told him cutting employee hours and getting them to quit prevented Kerns Construction from having to pay unemployment benefits. The claimant testified he believed he was fired because he "knew what was in store"[5] in terms of reduced hours associated with "TV time."

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[1] P.H. Trans. (Jan. 28, 2015) at 22.

[2] *Id*. at 28.

[3] *Id*. at 10-11.

[4] *Id.* at 11.

[5] *Id*. at 22.

According to the claimant, he asked Mr. Kerns to give him at least two more weeks of full-time work, but Mr. Kerns interrupted him, would not let him explain his thoughts and refused to let him work any more. The claimant testified he wanted to keep working and hoped the conflict would simply dissipate. The claimant testified he told Mr. Kerns he wanted to work something out and did not want their working relationship to end this way, but Mr. Kerns sternly told him to leave the property. The claimant indicated having two weeks would give him time to find other employment. The claimant testified he would have continued working had Mr. Kerns not told him to leave. The claimant denied quitting because of Mr. Kerns' criticism or being reprimanded.

At the January 28, 2015 hearing, Mr. Kerns testified he had no problems with the claimant and characterized him as a good employee. Mr. Kerns noted he did not confront the claimant about the coworkers' complaints for a few weeks for many reasons. First, Mr. Kerns stated the claimant had been off work due to an injury he sustained on a side project. Second, the claimant had been on jury duty for one week. Third, Mr. Kerns wanted to see how things worked out. Finally, Mr. Kerns wanted to think about the situation because he did not want to "react" and "lose Jim."[6]

According to Mr. Kerns, the issues raised by the coworkers were not acceptable and he intended to speak to the claimant about these matters on October 2, 2014. Mr. Kerns testified, "I had no intentions of firing him. Never. Nothing was even mentioned about firing or anything."[7] Mr. Kerns added the concerns raised by the other workers "couldn't be accepted on the job. He needed to not do that. . . . I had no intentions to f ire him."[8]

When first addressing the allegation the claimant spent too much time on the phone, Mr. Kerns contended the claimant said he was turning in his two weeks' notice. When Mr. Kerns kept talking about the claimant having coworkers cover for him to get haircuts on company time, he stated the claimant reiterated that he was "turning in [his] two weeks."[9] At this, Mr. Kerns told the claimant he could not have two weeks of work; if the claimant was going to quit, he had to leave immediately. Mr. Kerns testified he only asked the claimant about taking screws and fasteners after the claimant gave his two weeks' notice. The claimant testified he felt entitled to take the screws and fasteners because he worked for the company for years. Mr. Kerns testified the claimant offered to work two more weeks "out of courtesy, I'm sure."[10]

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[6] *Id*. at 39.

[7] *Id.* at 35.

[8] *Id.* at 37.

[9] *Id.* at 34.

[10] *Id.* at 43.

Mr. Kerns denied firing the claimant. He simply wanted the claimant to stop doing the things the coworkers complained about. From Mr. Kerns' perspective, the claimant quit because he turned in his two weeks' notice. Mr. Kerns would not let the claimant work two more weeks because construction workers in that situation "don't put their heart in it."[11] When asked if he was going to take disciplinary action, Mr. Kerns said, "Well, he quit. There was no more action to take."[12] If the claimant had not quit, Mr. Kerns testified he would have continued working him and honoring his work restrictions.

On September 2, 2016, Douglas Burton, M.D., as authorized treatment, performed a cervical discectomy and fusion on the claimant at C5-6. As of October 18, 2016, Dr. Burton restricted the claimant to lifting 20 pounds occasionally,10 pounds frequently and negligible constant lifting. As of November 29, 2016, he restricted the claimant to lifting 40 pounds occasionally, 25 pounds frequently and 10 pounds constantly.

A preliminary hearing was held on December 20, 2016. Brent Longenecker testified he worked as an independent contractor for Kerns Construction for about two years between 2003 and 2006. Mr. Longenecker contended Mr. Kerns put him on "TV time," and cut his hours in half because he was not happy with how he did a job, which forced Mr. Longenecker to quit working for the respondent. According to Mr. Longenecker, "TV time" allowed Mr. Kerns to "babysit"[13] employees who displeased him. Mr. Kerns testified Mr. Longenecker did not quit, but was dismissed because he did not do a job properly.

Mr. Kerns reiterated it was his policy, except for one long-term worker, to not allow employees to work for two weeks after giving notice because such workers are not productive. Mr. Kerns testified he would have provided the claimant with work, absent his resignation, within Dr. Burton's temporary restrictions, such as doing estimates, running jobs, overseeing the help and attending appointments.

On January 24, 2017, Dr. Burton released the claimant at maximum medical improvement (MMI).

Karen Terrill, a vocational rehabilitation consultant, testified the claimant's restrictions precluded work as a carpenter and he could not work as a supervisor because he would be expected to be a working supervisor. Ms. Terrill testified the claimant's earning capacity was based on his surgery and resulting work restrictions. She further noted the claimant being terminated from a job is something the claimant would need to explain to potential employers. Ms. Terrill also prepared a list of the claimant's tasks.

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[11] *Id.* at 42.

[12] *Id.* at 40.

[13] P.H. Trans. (Dec. 20, 2016) at 11.

Terry Cordray, a certified vocational rehabilitation counselor, opined the claimant was capable of being a carpenter doing trim work, bidding contracts, and as a supervisor earning between $19 and $30 per hour, and earn wages comparable to what the respondent paid him. Alternatively, Mr. Cordray noted the claimant could work in a home building supply store for $13 to $15 per hour. Unlike Ms. Terrill, Mr. Cordray stated being terminated from past employment has no relevance affecting the starting pay the claimant could receive from potential employers. Mr. Cordray noted a worker with reduced physical capacity loses access to more physical jobs. Mr. Cordray based his opinion on the claimant's wage-earning capacity using physical restrictions of lifting 50 pounds, no more than 20 pounds over the shoulder and the ability to push and pull 100 pounds.

Neither Ms. Terrill nor Mr. Cordray attributed the claimant's potential wage loss to a voluntary resignation or a termination for cause.

The claimant saw Daniel Zimmerman, M.D., on August 28, 2017, and complained of neck ache and stiffness, left arm muscle cramping and weakness, some numbness and tingling affecting the third, fourth and fifth fingers of his left hand, and his fused cervical spine caused diminished neck range of motion. Dr. Zimmerman gave the claimant permanent restrictions of lifting 50 pounds occasionally and 25 pounds frequently. The claimant should avoid hyperflexion and hyperextension of the cervical spine or captive positions of the cervical spine for extended periods of time. Of 21 tasks identified by Ms. Terrill, Dr. Zimmerman opined the claimant was unable to perform 15 tasks for a 71% task loss.

The claimant saw Terrence Pratt, M.D., on December 5, 2017, for a court-ordered independent medical evaluation (IME). The claimant told Dr. Pratt about his symptoms and complaints. Dr. Pratt opined the claimant had reached MMI. Dr. Pratt assigned the claimant a 16% whole person impairment for his neck injury and permanent restrictions of no lifting over 50 pounds, no pushing or pulling over 100 pounds, no overhead lifting over 20 pounds and no odd positions of the neck. Of the 21 tasks on Ms. Terrill's task list, Dr. Pratt opined the claimant could no longer perform 10 tasks for a 48% task loss. Using Mr. Cordray's task list, the doctor found the claimant can no longer perform 7 of 11 tasks for a 64% task loss.

At the December 21, 2017 regular hearing, the claimant testified he has constant, yet variable, neck pain, headaches, left arm pain and a burning sensation down from his shoulder. The claimant reported working as a sole proprietor. He limits his lifting to 50 pounds repetitively and does very little overhead work, following Dr. Pratt's 20 pound overhead limit. He does some carpentry work, but does more painting and roofing because it is less physically demanding. Tax records show the claimant earned: (1) $29,814 from Kerns Construction in 2014 and $1,865 in miscellaneous income; (2) $16,154 in business income in 2015 (along with $9,480 in unemployment benefits); (3) $20,950 in business income in 2016; and $12,466 in business income in 2017.

On January 31, 2018, Mr. Kerns testified he never reduced an employee's hours or instructed an employee to stay home if he was upset with the employee. He denied ever having an employee quit due to lack of work. Mr. Kerns testified he did not know what "TV time" meant. When asked a second time at his deposition if he ever told an employee who made a mistake at work to stay home and not to report to work as corrective action, Mr. Kerns responded, "No, not to my knowledge."[14]

Three witnesses, Dion Martinez, Christopher Root and Randy Hildreth, testified on March 9, 2018.

Mr. Martinez worked on a part-time basis for Kerns Construction from 2012 to 2015. Mr. Martinez testified Mr. Kerns gave him "TV time" and temporarily reduced his hours a few times, but did not recall why. He described "TV time" as "a couple days timeout" and "[getting] a spanking"[15] for doing something contrary to what Mr. Kerns wanted. Mr. Martinez never testified he quit working for the respondent due to "TV time." He testified he generally worked on a full-time basis, unless he received "TV time." Mr. Martinez indicated he quit working for the respondent after he was placed on disability.

Mr. Root worked for Kerns Construction in 2013 and 2014. He testified Mr. Kerns would not fire employees, but would reduce their hours to the point where they either chose not to have money or leave the company – "TV time." Mr. Root indicated he saw other workers get "TV time." After Mr. Root was subjected to "TV time," he left Kerns Construction because he could no longer afford to work only two or three days a week. Also, Mr. Root described Mr. Kerns as a micromanager.

Mr. Hildreth has known the claimant for 25 years, but did not work for the respondent. Mr. Hildreth testified the claimant came to his house one morning kind of broken up saying Mr. Kerns "had let him go."[16] He described the claimant as worried, confused and surprised about what happened.

The ALJ denied the claimant a work disability award and based his permanent partial disability benefits on a 16% whole person functional impairment. The ALJ ruled the claimant's wage loss was due to either his employment being terminated or his quitting. The ALJ concluded the claimant quit because it would be illogical for him to ask for two weeks' notice after he had been fired, if that was the case. Further, the ALJ noted the coworker complaints and Mr. Kerns' indication he was going to monitor the claimant resulted in the claimant resigning. The decision made no comment on whether the resignation was voluntary.

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[14] Kerns Depo. at 27.

[15] Martinez Depo. at 6.

[16] Hildreth Depo. at 5.

The claimant appealed to the Board. In its October 11, 2019 Order, the Board reversed the ALJ's decision, finding the claimant did not voluntarily resign, but instead was terminated by the respondent without cause. The Board explained Mr. Kerns was less credible than the claimant for multiple reasons. The Board found not credible the claimant's assertion his two weeks' notice was an attempt to repair his working relationship with Mr. Kerns. The Board found the claimant's two weeks' notice as an indication he would stop working for the respondent two weeks later. The Board noted the contingency for the claimant's resignation – that he be allowed to work full-time for two more weeks – never occurred because Mr. Kerns immediately terminated his employment after receiving two weeks' notice. The Board awarded claimant permanent partial disability benefits based on work disability not to exceed $130,000.

The respondent appealed. The Court of Appeals affirmed the Board's finding the respondent terminated the claimant's employment without cause. However, the Court of Appeals reversed the Board and found the claimant resigned his employment. Given the lack of workers compensation cases regarding situations when an employer rejects an employee's notice of resignation and instead terminates such worker's employment, the Court agreed it was proper for the Board to look to unemployment cases for guidance. The Court held the Board erred by not applying an unemployment case, *Redline Express,* when deciding the claimant's workers compensation claim.[17] *Redline* held a worker who provided two weeks' notice of resignation, but was then immediately fired, was entitled to unemployment benefits until his intended date of separation of employment. The Court of Appeals noted the Board erred by citing unemployment cases from other jurisdictions holding a worker is entitled to unemployment benefits even after the employee's intended date of departure if the worker's employment is terminated prior to such date. The Court of Appeals stated the claimant had no intent to work after his two weeks' notice, so any wage loss thereafter was not caused by his injury, assuming his resignation was voluntary.

The Court of Appeals Memorandum states:

> *Redline* and *Palmer News*, read together, establish that when employees voluntarily give an employer notice of a date certain on which they intend to resign yet are terminated before that date, they are due unemployment benefits up to, but not after, that date. See 27 Kan. App. 2d at 1070-71.
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> Kerns argues that the same is true in workers compensation cases--because Rickson gave his two-weeks' notice which caused Keith to terminate him immediately, Rickson was entitled to work disability only for the two-week period he would have worked, absent his termination. Rickson had no intent to work after that two-week period so any wage loss after that time was not caused by his injury. See K.S.A. 2019 Supp. 44-510e(a)(2)(E)(i). Although our Kansas workers compensation cases have not addressed this issue, we agree.

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[17] *Redline Express, Inc. v. State*, 27 Kan. App. 2d 1067, 11 P.3d 85 (2000).

> Granting an injured employee an award for work disability after a date certain on which the employee has stated an intent to quit disregards the fundamental purpose of a work disability award—to compensate the employee for lost ability to earn wages caused by the injury. "[W]ork disability focuses on the reduction in a claimant's ability to earn wages, not on the actual wages lost." *Watkins v. Food Barn Stores, Inc.*, 23 Kan. App. 2d 837, 840, 936 P.2d 294 (1997).
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> When the employee fails to show this required nexus—that wage loss was caused by the injury—the employee cannot recover under this statute. Compare *Merrill*, 2016 WL 3202663, at *8 (finding that the work disability statute "specifically requires a nexus between the claimant's wage loss and his or her injury") with *Stephen v. Phillips County*, 38 Kan. App. 2d 988, Syl. ¶ 2, 174 P.3d 452 (2008) (finding, under pre-amended version of statute, that no provision required a nexus between the wage loss and the injury for recovery of permanent partial general disability awards). The causal connection required in (a)(2)(C) is underscored by the definition of "wage loss" in (a)(2)(E) which explains: "[w]age loss caused by voluntary resignation or termination for cause shall in no way be construed to be caused by the injury." K.S.A. 2019 Supp. 44-510e(a)(2)(E)(i). Here, assuming Rickson's resignation was voluntary, 100% of Rickson's "wage loss" after his stated date of resignation was caused by his resignation, not by his injury, so no work disability may be awarded after October 16, 2014. K.S.A. 2019 Supp. 44-510e(a)(2)(E)(i).
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> The Board based its finding that Rickson did not voluntarily resign on an improper legal premise—that because Keith terminated Rickson's employment before the effective date of Rickson's resignation, Rickson did not leave work voluntarily so he was not disqualified from benefits after his intended departure date.
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> We affirm the Board's finding that Rickson was terminated without cause. Yet we reverse the Board's finding that Rickson did not voluntarily resign and remand with directions for the Board to determine, from the totality of the circumstances, whether Rickson's decision to give two weeks' notice of his resignation was voluntary. If so, he can receive only two weeks' work disability.[18]

On remand, the respondent argues the claimant voluntarily gave two weeks' notice and is only entitled to work disability benefits covering those two weeks. The claimant does not argue he was constructively discharged, but argues his resignation was involuntary and maintains the Board should affirm its Award of work disability. Further, the claimant asserts the Board should examine whether his wage loss was not caused by his resignation, but rather due to his injury, impairment and permanent work restrictions. The

[18] *Rickson*, 2020 WL 5268162, at *8-10.

respondent claims the Board is limited by the Court of Appeals' mandate to only explore the voluntariness of the claimant's resignation.

PRINCIPLES OF LAW

According to K.S.A. 44-501b(c) and K.S.A. 44-508(h), the burden of proof is on the worker to establish the right to an award based on a "more true than not true" standard and the trier of fact shall consider the whole record. An employer has the burden to prove any affirmative defenses.[19]

K.S.A. 44-510e(a)(2) states:

> (C) An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:
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> (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
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> (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.
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> 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.
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> (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 thetas loss which is directly attributable to the current injury.
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> (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

[19] See *Johnson v. Stormont Vail Healthcare, Inc.*, 57 Kan. App. 2d 44, 445 P.3d 1183 (2019), *rev. denied* ___ Kan. ___, ___ P.3d ___ (Feb. 25, 2020).

> 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 postinjury average weekly wage that the employee is capable of earning. The presumption may be overcome by competent evidence.
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> (i) . . . Wage loss caused by voluntary resignation or termination for cause shall in no way be construed to be caused by the injury.
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> . . .
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> (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.

Under K.S.A. 44-510e(a)(2)(E)(i), "A wage loss that results from being terminated for cause cannot be construed as having been caused by the work-related injury."[20] The same is true for a wage loss caused by a voluntary resignation.

ANALYSIS

1. The claimant voluntarily resigned his employment with the respondent.

The Board concludes the claimant's resignation was voluntary. "'Voluntary'" is "[u]nconstrained by interference; unimpelled by another's influence; spontaneous; acting of oneself." Black's Law Dictionary 1575 (6th ed.1990)."[21] (free: "Characterized by choice, rather than by compulsion or constraint <free will>"); Black's Law Dictionary 1710 (9th ed.2009) (voluntary: "Done by design or intention <voluntary act>").[22]

The claimant is not alleging a constructive discharge and the Board is not addressing whether a constructive discharge occurred. However, the Board is free to look

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[20] See *Hernandez v. Nat'l Beef Packing Co.*, No. 117,351, 2017 WL 4081392, at *3 (Kansas Court of Appeals unpublished opinion filed Sept. 15, 2017).

[21] *State v. Freeman*, 32 Kan. App. 2d 1027, 1029, 93 P.3d 1223 (2004).

[22] *In re C.P.*, No. 109,359, 2014 WL 349616, at *5 (Kansas Court of Appeals unpublished opinion filed Jan. 31, 2014) (citing Black's Law Dictionary 1710 (9th ed. 2009)).

to cases discussing the voluntariness of a resignation. *Slobodzian*[23] is a case in which an employee, Slobodzian, worked for Pepsi for nearly 40 years. He was a manager. In the two years prior to his separation of employment, he was demoted twice for pretextual reasons, his bonus and vacation time were decreased, and his work schedule was changed unfavorably. Pepsi offered Slobodzian a severance package twice previously, which he declined. A third offer of a severance package was made by a high-level Pepsi manager, with the caveat the severance package would not be available if Slobodzian were terminated. Slobodzian believed he had to accept the severance package or be terminated. He testified he was being targeted and would not have resigned without coercion. Further, he was aware of other Pepsi managers and supervisors who involuntarily retired. The district court concluded Slobodzian's resignation was not voluntary and he was forced into constructive termination.

As summarized in a subsequent case, *Weigand*, the Court of Appeals in *Slobodzian* observed:

> a number of factors concerning whether an employee possessed good cause for his or her voluntary termination, including: whether the employee controlled or influenced the ultimate outcome; whether the event leading to termination could be construed as a warning to improve performance; the employer's intentions (if they could be ascertained); and whether the average worker would leave work when faced with those same circumstances. . . . This court also observed that its "review [did] not focus on one 'smoking gun' event, but rather on all the events in the record leading up to" termination. . . .[24]

The Court of Appeals held Slobodzian ended his employment because he would have been terminated if he did not resign.

In *Weigand*, a bank lender (Weigand) had a discussion with her supervisors at a bank regarding her job performance. Weigand was demoted to a teller position. In response, Weigand resigned and provided two weeks' notice. An unemployment examiner concluded Weigand left available work after being reprimanded by the employer for an infraction or error without good cause attributable to the work or the employer and was thus disqualified to receive unemployment benefits. An unemployment referee determined Weigand left her job voluntarily and was disqualified from benefits. The Employment Security Board of Review affirmed the referee's decision and a district court also affirmed.

Weigand states:

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[23] *Slobodzian v. Kansas Employment Sec. Bd. of Review*, No. 106,820, 2012 WL 4372982 (Kansas Court of Appeals unpublished opinion filed Sept. 21, 2012).

[24] *Weigand v. Kansas Employment Sec. Bd. of Review*, No. 109,827, 2014 WL 1302635, at *4 (Kansas Court of Appeals unpublished opinion filed Mar. 28, 2014), *rev. denied* 301 Kan. 1053 (2015)

> Applying the factors that this court found relevant in *Slobodzian* and general principles of unemployment compensation law to the instant case demonstrates that Weigand lacked good cause in leaving GSB. The record indicates that while management controlled the decision to demote Weigand to a teller position, Weigand herself controlled the ultimate outcome—that is, the decision to leave GSB altogether. Unlike the claimant in *Slobodzian*, nothing in the record demonstrates that Weigand investigated or discussed with management the reasons for her demotion beyond the initial conversation; instead, it appears that Weigand stated her intention to resign and then followed through without further discussion with management. Both Weigand and GSB indicated that the discussion surrounding her demotion focused on struggles she faced in her current position, suggesting that the demotion was meant to improve Weigand's performance. Although Weigand's testimony before the unemployment referee suggests that GSB's long-term motivations may not have been entirely innocent, nothing supports the premise that GSB's immediate intentions were to force Weigand out of her job. Finally, nothing in the record indicates that the circumstances faced by Weigand were such that the average worker would quit rather than face them. Weigand faced a pay cut due to her demotion and testified before the referee that she felt mistreated, but neither of these things appears severe enough to drive an average person from his or her job. In short, the record demonstrates that the agency correctly applied the relevant law in deciding that Weigand did not qualify for unemployment benefits.
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> . . .
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> Nothing in Weigand's testimony or the record rises to [the *Slobodzian*] level of treatment. Weigand never stated that she felt forced out or pressured to leave. In fact, while speaking to the unemployment examiner, Weigand explained that she did not feel her job was in jeopardy prior to the reprimand on August 31, 2011. In her testimony before the unemployment referee, Weigand explained that she felt that the "way [GSB was] treating me was just wrong," and that she thought "they wanted to use my experience and have me do the same job" at less pay, motivating her to leave GSB. None of this rises to the level of the claimant's experience in *Slobodzian*. None of it rises to the level of a constructive termination as in *Slobodzian.* And none of it undermines the conclusion that Weigand left her job voluntarily without good cause.[25]

Weigand also noted the current definition of "good cause" changed. K.S.A. 2013 Supp. 44-706(a) states, "[G]ood cause is cause of such gravity that would impel a reasonable, not supersensitive, individual exercising ordinary common sense to leave employment. Good cause requires a showing of good faith of the individual leaving work, including the presence of a genuine desire to work."

There is also precedent, under a prior version of the law concerning work disability, showing a worker's voluntary resignation from unaccommodated employment paying

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[25] *Id.* at *5-6.

comparable wages, precludes an award of work disability benefits. The Court of Appeals stated:

> We are persuaded to follow the holding of *Newman v. Kansas Enterprises*, 31 Kan.App.2d 929, 77 P.3d 492, Syl., 31 Kan.App.2d 929, 77 P.3d 492 (2002), where this court held that when a worker returns to work following a work-related injury to an unaccommodated position at the same wage and performing the same tasks, the worker is not entitled to work disability when later terminated for job performance issues.
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> If anything, this case presents stronger facts than *Newman*. Here, claimant returned to his old job and performed that job at the same wage without complaint and without missing any work. Claimant voluntarily terminated his employment with Transit in order to move to another city. Work disability focuses on the reductions of a claimant's ability to earn wages. See *Newman*, 31 Kan.App.2d at 933, 77 P.3d 492. Here, claimant was clearly able to earn the same wage because he did earn the same wage performing the same preinjury job. Claimant, by definition, does not qualify for work disability.[26]

In *Southeast Kansas Multi-County Health Dept. v. State of Kansas Sec. Bd. of Review*,[27] a worker, Bertone, a nurse, was found to have been constructively discharged by her employer, the Health Department. Bertone's employer's board had a private special session meeting concerning her employment. Bertone was aware her job performance was being discussed. Her employer told her she was terminated for cause, but would not provide a rationale. Bertone, out of shock and duress, asked permission to resign, which the employer granted. Very soon, Bertone had second thoughts and asked to get her job back, which her employer refused.

Bertone applied for unemployment benefits. After denials by an examiner and a referee, the Kansas Employment Security Board of Review granted benefits, finding the employer terminated her employment, but not for cause. The district court affirmed. The Employment Security Board stated:

> The Board disagrees with the referee's determination that the claimant voluntarily resigned. The claimant's testimony reveals that the resignation she submitted was offered under duress and after she had been told she had been terminated. Accordingly, instead of evaluating this case under K.S.A. 44-706(a) to determine disqualification based on whether the claimant had good cause attributable to the employer for quitting, the Board uses K.S.A. 44-706(b), and seeks to determine

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[26] *King v. Wichita Se. KS Transit*, No. 90,413, 2004 WL 719930, at *2 (Kansas Court of Appeals unpublished opinion filed Apr. 2, 2004).

[27] *Southeast Kansas Multi-County Health Dept. v. State of Kansas Sec. Bd. of Review*, No. 110,413, 2014 WL 4081990 (Kansas Court of Appeals unpublished opinion filed Aug. 15, 2014).

whether the employer discharged the claimant for misconduct connected with the work.[28]

The Court of Appeals noted the totality of the circumstances determines whether the employer's conduct effectively deprived the employee of free choice in deciding to resign:

> Factors to be considered are (1) whether the employee was given some alternative to resignation; (2) whether the employee understood the nature of the choice he was given; (3) whether the employee was given a reasonable time in which to choose; and (4) whether he was permitted to select the effective date of resignation. See *Taylor v. United States*, 591 F.2d 688, 691, 219 Ct. Cl. 86 (1979) (using factors derived from Federal Personnel Manual).[29]

The Court of Appeals stated:

> The Board's alternate determination that Bertone was constructively discharged is consistent with the *Slobodzian* analysis and the general principles of unemployment compensation discussed in *Weigand*. We agree with the *Slobodzian* analysis and the principles of unemployment compensation discussed in *Weigand* and apply them here. We find that there is substantial evidence that Bertone's resignation was not the product of her free and independent desire to end her employment. Rather, she resigned based on a reasonable apprehension that she had been or would be discharged. Bertone had no control over the ultimate outcome. Rather, she was at the mercy of the Health Department board's determination. There is absolutely no indication that the Health Department board was intending to use the circumstances to impress upon Bertone the need for improvement in her job performance. Barber admitted that the Health Department board had discussed Bertone's job performance during the executive session, and Martin admitted that she had told the other board members that she would be seeking a vote on the termination of Bertone's employment. The Health Department board's intent to terminate Bertone's employment can readily be inferred from Martin's insistence that Bertone's resignation become effective immediately, from the demand to turn over her keys immediately, and from the conduct of board members after Bertone offered her resignation. Barber and Warren refused to allow Bertone to rescind her resignation when she returned while the board meeting was still taking place. From these circumstances, which are those advanced by the Health Department, a reasonable person could reasonably believe that she was going to be fired at the July 31 meeting unless she resigned first.

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[28] *Id.* at *4.

[29] *Southeast Kansas Multi-County Health Dept.,* 2014 WL 4081990, at *7 (citing *Stone v. University of Maryland Medical System*, 855 F.2d 167, 174 (4th Cir.1988)).

> As in *Slobodzian*, Bertone "saw the handwriting on the wall" that she was being fired. Bertone demonstrated good cause, in response to her employer's actions, for her resignation. That good cause was "of such gravity that would impel a reasonable, not supersensitive, individual exercising ordinary common sense to leave employment" under K.S.A. 2013 Supp. 44-706(a).[30]

An argument can be made the respondent, through Mr. Kerns, was "baiting" the claimant into quitting. Previously, the claimant and Mr. Kerns discussed Mr. Kerns' tactic of decreasing employee hours to get workers to quit and his company would thus avoid paying unemployment benefits. The claimant knew this tactic worked, as he observed it happen to several employees on several occasions. Mr. Root and Mr. Longenecker indicated they quit working for the respondent based on "TV time." Given this information, the claimant could foresee reduced hours, not knowing if he was going to work until advised by Mr. Kerns, being micromanaged by Mr. Kerns and being unable to make a living.

The facts of this case are dissimilar to *Slobodzian*. Unlike the years of Pepsi attempting to get rid of a manager, this was a singular event. Unlike *Slobodzian*, the claimant was not told to quit or be fired and lose a retirement package. This case is not like *Southeast Kansas Multi-County Health Dept. v. State of Kansas Sec. Bd. of Review*. That case concerned either a "quit or be fired" scenario or the employee asking to resign after already being terminated. Unlike *Southeast Kansas*, in which there was no attempt by the employer to get nurse Bertone to improve her job performance, Mr. Kerns' "keeping an eye" on the claimant seems like a reasonable attempt at letting the claimant know the bad behaviors relayed by the claimant's coworkers had to stop. Had the respondent intended bad faith, the Board would have expected Mr. Kerns to terminate the claimant for pretextual reasons. Instead, upon learning of complaints raised by the claimant's coworkers, Mr. Kerns took time to address the situation. Further, the record shows Mr. Kerns was not going to terminate the claimant's employment based on the coworker's complaints, all of which would seem to be valid reasons for termination for cause.

This case is most similar to *Weigand*. Both involve a one-time meeting between an employer and an employee about job performance. Arguably, both discussions were meant to encourage the employee to exhibit better job performance. Nothing in either case suggested the employers demonstrated immediate intent to force the workers to resign. There was nothing in *Weigand* showing an average worker would quit rather than be demoted. Here, the claimant only faced the possibility of decreased hours and decreased pay. Another worker, Mr. Martinez, testified he was subjected to "TV time" a few times and his hours were reduced, but he was not compelled to quit. Instead, he stopped working for the respondent after receiving disability benefits.

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[30] *Southeast Kansas Multi-County Health Dept.,* 2014 WL 4081990, at *8.

The claimant had an alternative to resigning. Good faith would be shown had he simply continued working. The claimant could have seen if his hours would actually be reduced. Had the claimant continued working, and if his hours were reduced, his argument about "TV time" might have borne fruit. However, the claimant did not opt for such possibility. Instead, he simply resigned. The claimant had a free and independent choice to resign. If he truly intended to try to remedy his situation with Mr. Kerns, announcing a resignation was not the solution. There is no evidence the claimant did not understand the consequences of resigning. The claimant was under no timetable to announce his resignation. The claimant chose to resign two weeks after October 2, 2014, or October 16, 2014. The respondent simply did not compel the claimant to resign.

The Board views the appellate ruling as restricting our review solely to the voluntariness of the claimant's resignation. Based on the directive, the Board will not explore the claimant's argument pointing to alternative causes for his wage loss.

2. The claimant sustained a 16% whole body impairment as a result of his work injury and is entitled to two weeks of work disability benefits.

The Court of Appeals stated the claimant would be entitled to two weeks of work disability benefits if he voluntarily resigned.

Work disability benefits are based on permanent partial disability benefits in excess of a worker's functional impairment. Permanent benefits, such as work disability, are arguably not payable if the claimant's medical condition was not permanent or static.[31]

Also, permanent partial disability benefits are presumed to commence on the date of injury. The claimant's permanent partial disability benefits for functional impairment would be paid out over 66.4 weeks from the date of injury forward. As such, payments for permanent partial disability overlapped the period of time for which the Court of Appeals directed the Board to award work disability benefits. K.S.A. 44-510e(a)(3) states, in part, "In no case shall functional impairment and work disability be awarded together." The Board already determined the claimant had a 59.5% work disability in 2015. Therefore, the Board orders the claimant to receive permanent partial disability benefits for 64.4 weeks, based on a 16% whole body functional impairment, followed by two weeks of work disability based on a 59.5% work disability from October 2, 2014, until October 16, 2014.

CONCLUSIONS

WHEREFORE, the Board finds the claimant resigned voluntarily. Based on the mandate of the Court of Appeals, he is entitled to permanent partial disability benefits

[31] See *Rose v. Thornton & Florence Elec. Co.*, 4 Kan. App. 2d 669, 672, 609 P.2d 1180 (1980) ("We conclude that maximum recovery and medical stability are key factors in determining the time demarcation between temporary disability and permanent disability.").

based on a 16% whole body impairment and two weeks of permanent partial disability benefits based on a 59.5% work disability.

The claimant is entitled to 6.71 weeks of temporary total disability compensation at the rate of $560.41 per week or $3,760.35, followed by 64.4 weeks of permanent partial disability compensation at the rate of $560.41 per week or $36,090.40 for a 16% functional disability, followed by two weeks of permanent partial disability compensation at the rate of $560.41 per week or $1,120.82 for a 59.5% work disability commencing October 2, 2014, and ending October 16, 2014, making a total award of $40,971.57, all due and owing, less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of March, 2021.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

Whether a worker voluntarily resigned and such act actually caused the worker's wage loss is an affirmative defense which the respondent must prove. Without evidence the claimant's wage loss was caused by a voluntary resignation, it is mere speculation to establish a cause and effect between a resignation and wage loss. Simply put, absent the respondent proving the claimant voluntarily resigned and such voluntary separation of employment actually "caused" his wage loss, K.S.A 44-510e(a)(2)(E)(i) is not a bar to wage loss and work disability.

While the claimant attempted to resign by giving two weeks' notice, he also told Mr. Kerns he wanted to work something out and did not want their working relationship to end. The respondent thwarted this attempted reconciliation. As noted by the Court of Appeals, the claimant was not allowed to resign ("[W]hen Rickson gave his two-weeks' notice, Keith

did not accept his proposal.").[32] Instead, the respondent immediately terminated his employment, but specifically without cause. The Court of Appeals concluded the respondent simply terminated Rickson's employment two weeks early. However, the resignation was contingent on the claimant being allowed to work for two more weeks. The Court of Appeals seemingly places more emphasis on the claimant's intended and future resignation over its own finding the respondent terminated the claimant's employment without cause, as well as any consideration the claimant's wage loss was due to his injury, neck surgery and permanent work restrictions.

K.S.A. 44-510e(a)(2)(E) says wage loss is to be based on 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." Among this non-exclusive list would be wage loss caused by a voluntary resignation of employment. However, just because a worker resigned does not rule out his wage loss being "caused" by factors other than the resignation.

The claimant's argument his wage loss is based on different causes for different periods of time is meritorious. Certainly, the claimant's wage loss after he had surgery (nearly two years after his separation of employment), findings of permanent impairment and permanent restrictions (given to the claimant roughly three years after his separation of employment) which the Board already determined would not have been accommodated by the respondent, would more probably than not be "caused" by his work injury, irrespective of his prior attempt at resignation which was rejected by the employer. To only look at resignation as a causative factor ignores all other potential causes of wage loss.

No vocational expert or doctor testified the claimant's wage loss was due to his attempted resignation. The vocational experts based the claimant's wage loss on his permanent restrictions. Mr. Kerns testified but for the claimant's resignation, he could have provided the claimant with work within Dr. Burton's temporary restrictions, but the Board previously found Mr. Kerns' testimony not credible and ruled the respondent would not have accommodated the claimant's permanent restrictions. Those findings were not appealed.

The Court of Appeals seemingly treated the claimant's failed attempt at quitting as proof his wage loss was wholly unrelated to his injury. K.S.A. 44-510e(a)(2)(E)(i) does not conclusively presume an employee's attempted, yet rejected, resignation results in his or her wage loss not being caused by the worker's injury. The statute allows the finder of fact to explore the "cause" of a worker's wage loss. Here, there was no credible evidence linking the claimant's wage loss to his planning to quit two weeks later. The preponderance of the evidence establishes the claimant's wage loss was more probably than not due to his injury, his resulting permanent work restrictions and his being fired without cause.

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[32] *Rickson*, 2020 WL 5268162, at *6.

The Court of Appeals blurred the lines between workers compensation and unemployment law, which are not interchangeable. What may be true for unemployment need not apply to workers compensation. Unemployment benefits address economic insecurity caused by involuntary loss of employment. Workers compensation benefits address loss of earning power resulting from work injuries.

Unemployment cases typically do not concern injured workers with permanent impairment, permanent restrictions and wage loss stemming from the injury. The Court of Appeals states the purpose of the Kansas Workers Compensation Act is to compensate injured workers for wage loss caused by the injury. The Court further concluded all wage loss following a voluntary resignation must be caused by the resignation and not the injury. This all or nothing approach is questionable for a number of reasons.

The definition of "caused" must be explored. The Court of Appeals only looked at resignation as a potential cause for wage loss. Obviously, a voluntary resignation can result in wage loss, but a number of other factors can also cause wage loss. A work-related injury and impairment can lead to wage loss. Work restrictions and the inability to perform tasks can lead to wage loss. Here, the claimant's injury necessitated a cervical spine fusion, permanent impairment, permanent work restrictions, inability to perform work tasks and documented wage loss. There is ample evidence the claimant's wage loss was due to his injury, permanent work restrictions and being summarily fired after expressing intent to resign later.

The Court of Appeals states the claimant had no intent to work after October 16, 2014. This statement is true only as to the respondent, but is otherwise incorrect. The claimant testified the two weeks' notice would hopefully give him time to find alternate employment. He, in fact, did not just intend to work, but he did, as demonstrated by actually returning to work just after being terminated.[33]

Statutes are meant to be interpreted based on plain language.[34] Judicial blacksmithing is not permitted.[35] Words not in a statute should not be added to the law.[36] K.S.A. 44-510e(a)(2)(E)(i), states, in relevant part: "Wage loss caused by voluntary

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[33] See P.H. Trans. (Jan. 28, 2015), Ex. 1 (showing the claimant had earnings immediately after being terminated without cause); see also the parties' March 28, 2018 stipulation showing the claimant's post-termination earnings as a self-employed individual.

[34] See *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607, 214 P.3d 676 (2009).

[35] See *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 391, 224 P.3d 1197 (2010).

[36] See *State v. Pattillo*, 311 Kan. 995, 1004, 469 P.3d 1250 (2020) ("Courts apply the plain language of statutes and avoid adding, deleting, or substituting words.").

resignation . . . shall in no way be construed to be caused by the injury." The Court of Appeals reads the statute as stating:

> Wage loss caused by an *intended and future* voluntary resignation *which is not allowed to occur because the worker's employment is instead immediately terminated by the employer* . . . shall in no way be construed to be caused by the injury*, but the worker may obtain work disability benefits through the day he or she intended to resign. Further, the finder of fact shall give no consideration to any other factor relating to the cause of a worker's wage loss, contrary to the language in K.S.A. 44-510e(a)(2)(E) to assess all possible factors relating to wage loss*.

Finally, the Court of Appeals stated the Board looked to unemployment cases for guidance when an employer rejects an employee's notice of resignation. This statement is inaccurate. The Board's decision only indicated it was looking at unemployment cases to explore whether a separation of employment could be considered "voluntary."[37] How much permanent partial disability benefits would be owing is a completely different question. Also, the "cause" of the claimant's wage loss is multifactorial, is not limited to the consideration of a resignation, and instead should be tied to his permanent injury, surgery, his resulting physical limitations, and the Board's prior finding the respondent would not have accommodated the claimant's permanent work restrictions.

_____
BOARD MEMBER

_____
BOARD MEMBER

Electronic copies via OSCAR to:
John J. Bryan
Jan Fisher
Bruce Levine
Meredith Ashley
Hon. Steven Roth

[37] See Order at 16 ("The Board has looked outside of workers compensation law and cases to explore whether a separation of employment was voluntary. Unemployment law and cases provide some guidance.").