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CASE NUMBER: 117336

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

No. 15-117336 A

AYAAN M. KULMIYE
Claimant/Appellant
v.
TYSON FRESH MEATS, INC.
Respondent and Self-Insured/Appellee

Brief of Appellee

Appeal From the
Kansas Workers' Compensation Appeals Board
Docket No. 1,068,606

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ISSUES TO BE DECIDED ON APPEAL

I. Is the Kansas Workers' Compensation Appeals Board's finding that Respondent successfully proved that the Claimant was terminated for cause supported by substantial and competent evidence?

STATEMENT OF FACTS

The Claimant, Ayaan Kulmiye, sustained an injury to her low back in the course of her employment on August 23, 2013. Respondent admits the Claimant's personal injury arose out of and in the course of employment. At the Prehearing Settlement Conference, the parties stipulated to 9% whole body impairment of function. (Record on Appeal, Vol. 4, p. 6). The Respondent denies, however, that the Claimant is entitled to work disability as a result of this injury.

The Claimant was then seen by Pedro A. Murati, M.D., at the request of Claimant's attorney. On March 28, 2016, Dr. Murati testified that he placed the Claimant in Lumbosacral DRE III for 10% whole person impairment. (Record on Appeal, Vol. 3, p. 13). Dr. Murati evaluated the Claimant on one occasion at the request of Claimant's counsel and did not provide the Claimant with any treatment. (Id. at 19). He imposed extreme work restrictions, essentially preventing the Claimant from performing any task included in her position, despite the fact that Claimant was able to continue working after her accident.

The Claimant was seen by Terry R. Hunsberger, M.D. several times following her injury for complaints of pain in her back, hips and legs. On June 6, 2016, Dr. Hunsberger testified that the Claimant demonstrated normal results for evaluation of her low back and deep tendon reflexes in both lower extremities. (Appeal on Record, Vol. 5, p. 12). There were absolutely no positive findings on the examination, with only subjective pain complaints. (Id. at 9–11). His examination suggested an absence of true radiculopathy. (Id). Dr. Hunsberger opined that the

injuries to the Claimant's low back region did not result in permanent impairment of function and, most importantly, did not necessitate the imposition of permanent work restrictions. (Id. at 13).

Similar to the findings of Dr. Hunsberger, John P. Estivo, M.D. opined that the Claimant did not require any permanent restrictions in relation to this claim during his evaluation on July 21, 2015. (Estivo Deposition, Ex. 2). Dr. Estivo reviewed Claimant's MRI film from November 1, 2013 and found no ruptured discs, some mild bulging discs but no acute abnormalities. (Estivo Deposition, p. 8). He placed the Claimant at 8% functional impairment as a result of her lumbar spine strain and a left hip greater trochanteric bursitis. (Id. at 20–22). He believed Claimant to be at maximum medical improvement and that the Claimant did not require any future medical treatment for this injury. (Id. at 22). Dr. Estivo opined that no work restrictions were necessary. (Id.).

Following her injury, the Claimant continued to perform the same job duties she had prior to her injury for more than a year. (Record on Appeal, Vol. 4, p. 26). The Claimant testified to standing for most of her shift each day except for an occasional period where she would walk around. (Id. at 27).

Vocational Expert Opinions

The Claimant was interviewed by vocational expert, Doug Lindahl, at the request of Claimant's attorney on June 5, 2015. Mr. Lindahl reduced Claimant's pre-injury work to three tasks. (Record on Appeal, Vol. 2, Ex. 2). On March 14, 2016, Mr. Lindahl testified that the only restriction statement he had at the time of his report was from Dr. Murati. (Id. at p. 7). Mr. Lindahl felt that there was no work available to the Claimant within the restrictions recommended by Dr. Murati. (Id. at 10).

Mr. Lindahl further testified that if the opinion of Dr. Estivo regarding the Claimant's need for permanent restrictions was relied upon, that the Claimant would not have sustained any loss in her ability to earn a wage. (Id. at 14). If Dr. Estivo's report were relied upon, the Claimant would be able to return to her former job, if it were still available to her, in addition to other jobs in the open labor market. (Id).

The Claimant was additionally interviewed by vocational expert, Steve Benjamin, on October 27, 2015. Mr. Benjamin reduced Claimant's pre-injury work to six tasks. (Record on Appeal, Vol. 5, Ex. 2). When relying upon the work restrictions imposed by Dr. Murati, coupled with the Claimant's vocational profile, Mr. Benjamin felt that the Claimant would not be able to re-enter the open labor market or earn a wage.

In contrast, Mr. Benjamin testified that an absence of permanent work restrictions, per the opinions of both Dr. Hunsberger and Dr. Estivo, would result in no wage loss and a full ability to enter the open labor market. (Id. at p. 12). Mr. Benjamin noted at least 13 job positions available which Claimant would have the qualifications and ability to perform. (Id. at 14).

Claimant's Termination from Tyson

The Claimant was ultimately terminated for cause from her employment with Tyson on November 25, 2014. The Claimant was terminated due to fighting with a co-worker in violation of Tyson's policy. (Record on Appeal, Vol. 4, Ex. 1 and 2). She admitted she was advised of the rules and regulations at Tyson, including that fighting with another team member would be grounds for termination of employment. (Id at p. 19). The Claimant admitted to pushing the team member in a written statement that was taken after the incident and during her testimony (Id. at p. 14, Ex. 2).

Additionally, Claimant's testimony at the Regular Hearing confirmed that the Claimant was involved in fight on November 11, 2014. Claimant testified the other worker, whose employment was also terminated, was in Claimant's path and kicked her on the foot when she was trying to go to the office. Claimant testified:

> A: Yes, she was standing right on – on my way and I tried – and I **tried to push her out of the way**. I was pissed. She called me names. I was hit by – on the face. Like I say, I was trying to leave but she was in my way and still kicking me and I was trying to tell her, I'm going to go – I was – (Indicating) – I push her out of the was as I was going like this before I even – even though I never meant to hit her or anything like that. I was – I was telling her, Go – go – go out of the way that's when she strike me and she slapped me.
>
> Q: Did she move out of the way for you?
>
> A: She – she slapped me. There was – she was – there was a supervisor right there that actually stopped her but she strike me on the face and that's when both of us were taken to the office, but before we go to the office she slapped me on the face and had actually scratched my face due to the slap that she hit me with that came from her nails.
>
> Q: Did you ever hit her?
>
> A: I – I did – I did try to stop her from hitting me. She – like I say, she strike me once and slap me with a scratch on my face that left a mark on my face. So second time before she slapped – that was I was trying to make her stop hitting me again there was a supervisor right there that actually grabbed her and stopped her from striking me again and that was it.
>
> Q: …[A] supervisor restrained her from striking you?
>
> A: Yes, there was a supervisor that stopped her from striking me. Yes, she strike me once left a mark or a scratch on my face but other than that the second time the supervisor stopped her form scratching me.
>
> Q: And for the record you never struck her?
>
> A: I did stop her from hitting me but I never struck her.
>
> Q: All right.

> THE COURT: Okay. But she did testify she did push her out of the way or tried to push her out of the way.
>
> ...
>
> THE WITNESS: **Yes, I did try to push her out of the way so I could leave**.

(Record on Appeal, Vol. 4, pp. 14-16, Emphasis Added).

Witness statements taken from first-hand witnesses confirm that the Claimant engaged in fighting with a co-worker (Record on Appeal, Vol. 8, Ex. 2). The witness statements suggest that the Claimant was more aggressive in the fight than portrayed in Claimant's testimony (Id.).

Barbara Larsen, the human resources manager at Tyson Fresh Meats in Holcomb, Kansas, testified that the records taken after the fight between the Claimant and her co-worker were those kept in the ordinary business practice at Tyson Foods. (Record on Appeal, Vol. 8, p. 6). Ms. Larsen testified that Tyson's Rules of Conduct outlining various offenses which could lead to immediate termination of employment, including fighting with a coworker, would have been explained to the Claimant at the time of hire. (Id. at 10). Since being terminated from Tyson, the Claimant has yet to fill out an application for employment. (Regular Hearing, pg. 29).

Award

On October 14, 2016, Administrative Law Judge Fuller entered an Award finding that Claimant was not entitled to work disability because her wage loss is not attributable to her work injury. (Record on Appeal, Vol. 1, p. 41). Furthermore, Judge Fuller found that Claimant is entitled to unauthorized medical treatment not to exceed $500.00 and the Claimant is entitled to future medical treatment in the form of pain management upon proper application to and approval by the Director of Workers Compensation. (Id.).

On February 23, 2017, the Kansas Workers' Compensation Appeals Board (hereinafter, the Board) affirmed that the Claimant was terminated for cause, thus, she was not entitled to work disability and was limited to an award based on her functional impairment. The Board also affirmed Judge Fuller's Award of future medical treatment. Claimant appealed the Board's decision.

ARGUMENTS AND AUTHORITIES

Under K.S.A. 44-556(a), decisions of the Workers Compensation Appeals Board are reviewed under the Kansas Judicial Review Act. *Mitchell v. Petsmart, Inc.*, 203 P.3d 76, 81 (Kan. App. 2009). When reviewing the Board's factual findings, the question for the court is whether the determination of fact is supported by substantial evidence when viewed in light of the record as a whole. K.S.A. 77-621(c)(7); *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 514, 154 P.3d 494 (2007).

The Kansas legislature amended section 77-621. *See* L. 2009, ch. 109, sec. 28; *Herrera-Gallegos v. H&H Delivery Serv., Inc.*, No. 100,741, slip. op. (Kan. App. July 24, 2009). Effective July 1, 2009, amended section 77-621(d) defines "in light of the record as a whole" to include evidence both supporting and detracting from an agency's finding, any determinations of veracity by the presiding officer who personally observed the demeanor of the witness, and the agency's explanation of why the relevant evidence in the record supports its material findings of fact. *Herrera-Gallegos*, No. 100,741, slip. op. (Kan. App. July 24, 2009).

In *Herrera-Gallegos*, the Court of Appeals recently recognized that the amended statute expressly prohibits the court from reweighing the evidence or engaging in de novo review. *Id.* The court explained that the amendment simply requires the court to look at the record more completely than previously indicated by judicial precedent in determining whether substantial

evidence supports the agency decision. *Id.* The court reiterated that substantial evidence is such evidence as a reasonable person might accept as being sufficient to support a conclusion. *Id.* (citing *Blue Cross and Blue Shield of Kansas, Inc. v. Praeger*, 276 Kan. 232, 263 (2003)). The ultimate question under the amended statute, the court concluded, is whether the evidence supporting the agency's decision has been so undermined by cross-examination or other evidence that it is insufficient to support the agency's conclusion. *Id.*

I. The Kansas Workers' Compensation Appeals Board finding that the Claimant was terminated for justifiable reasons unrelated to the workplace injury, thus, the wage loss was not caused by the injury pursuant to K.S.A. 44-510e(a)(2)(E)(i), is supported by substantial and competent evidence.

Under K.S.A. 44-510e(a)(2)(C), an injured worker is entitled to "work disability" if she has a percentage of functional impairment determined to be caused solely by the injury exceeding 7½ percent and at least 10% wage loss as a direct result of the work accident and not to other causes or factors. Wage loss is determined by calculating 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. K.S.A. 44-510e(2)(E). However, wage loss caused by voluntary resignation or termination for cause shall in no way be construed to be caused by the injury. K.S.A. 44-510e(a)(2)(E)(i).

While the Kansas Workers Compensation Act (the Act) does not define the term "for cause," *Morales-Chavarin* provides the appropriate standard for determining if an employee was discharged for cause. *Morales-Chavarin v. National Beef Packing Co.* No. 95,261, 2006 WL 2265205 (unpublished Kansas Court of Appeals opinion filed Aug 4, 2006), *rev. denied* 282 Kan. 790 (2006). In *Morales-Chavarin*, the Court held:

> The 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 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.

What constitutes a termination "for cause" is subject to interpretation. As noted by the Kansas Workers' Compensation Appeals Board (the Board), the United States Supreme Court noted the term "cause" is a broad and general standard and that a more specific definition would be impracticable given the "infinite variety of factual situations [that] might reasonably justify dismissal for cause…" *Arnett v. Kennedy,* 416 U.S. 134, 160–161 (1974).

The *Morales-Chavarin* case quoted the definition of "cause" in *Weir*, which states:

> [Cause for discharge] is a shortcoming in performance which is detrimental to the discipline or efficiency of the employer. Incompetency or inefficiency or some other cause within the control of the employee which prohibits him from properly completing his task is also included within the definition. A discharge for cause is one which is not arbitrary or capricious, nor is it unjustified or discriminatory. *Weir v. Anaconda Co.*, 773 F.2d 1073 (10th Cir. 1985).

Additionally, Kansas case law suggests that violation of a written policy regarding fighting or when a claimant has been advised of such policy is enough to determine that the claimant was terminated for cause. *Jordan v. Pyle, Inc.*, 33 Kan. App. 2d 258.

There is undoubtedly substantial and competent evidence to support the Board's finding that the Claimant was terminated for cause. The Claimant in this case was aware of and understood Tyson's policy regarding team members fighting at work. (Record on Appeal, Vol. 4, p. 19). Tyson listed "employee's voluntary participation in fighting or horseplay with a co-employee for any reason, work related or otherwise" as a reason for termination. (Id. at Ex. 1). Claimant's written statement given to Tyson following the fight confirms that she was an active participant in the fight on November 11, 2014. (Id. at Ex. 2). In addition, the Claimant's testimony alone illustrates that she pushed another team member. (Record on Appeal, Vol. 4, pp.

14-16). Regardless of the other team member's involvement, the Claimant actively engaged in prohibited behaviors that are appropriate ground for termination.

It should also be noted that the witness statements surrounding the fight, suggest that the Claimant was more aggressive in the fight than she recalled in her testimony. (Record on Appeal, Vol. 8, Ex. 2). While her self-serving testimony confirmed that she was involved in a fight, the statements provided by first-hand witnesses' show that the Claimant was more at fault in her involvement than she originally expressed. Respondent conducted a full investigation by obtaining written statements from witnesses to the accident. Ultimately, both the Claimant and the team member involved in the altercation were terminated for their violation of workplace policy.

In addition, the timing of Claimant's termination further supports that the Claimant was justifiably terminated. The Claimant continued to work for the Respondent following her injury in accommodating positions. Only until 15 months after the Claimant's injury was she terminated for her violation of the workplace policy. This supports the fact that the Claimant was not terminated based on Claimant's workers compensation claim or in attempt to avoid paying workers compensation benefits.

The Board's finding that Claimant was terminated "for cause" is supported by substantial and competent evidence and should be affirmed.

II. The Board appropriately considered all evidence when determining that the Claimant was terminated for cause.

A. Parties are not bound by technical rules of procedure in workers' compensation proceedings.

The Board appropriately considered all evidence submitted in this case in determining whether the Claimant was appropriate terminated. K.S.A. 44-523(a) states:

> The director, administrative law judge or board shall not be bound by the technical rules of procedure, but shall give the parties reasonable opportunity to be heard and present evidence, insure the employee and the employer an expeditious hearing and act reasonably without partiality.

While Administrative Law Judge Fuller did not refuse to admit the witness statements upon Claimant's objection that the statements were hearsay, she also did not comment on the impact, if any, of such witness statements. The Judge did not include any discussion of the content of the witness statements when she concluded that the Claimant was justifiably terminated for fighting. As noted by the Board, there have been several cases where the Board has relied on testimony from employer witnesses to establish (or not establish) whether an employee's termination was for cause. *Dirshe v. Cargill Meat Sols. Corp.*, No. 1,062,817, 2015 WL 6776994 (Kan. WCAB Oct. 20, 2015); *Merrill v. Georgia Pacific*, No. 1,064,126, 2015 WL 3642455 (Kan. WCAB May 28, 2015).

Claimant's testimony alone supports Respondent's position that the Claimant was terminated for fighting, but should the Court not consider this substantial evidence, the Board appropriately considered the statements of the employee witnesses.

B. Should the Court determine that parties are bound by technical rules of procedure; the employee witness statements were properly considered.

The Board determined that hearsay statements resulting from an investigation may properly form the basis for an employer to terminate an employee's job. (Record on Appeal, Vol. 1, p. 92-93). In *Zamora v. Board of Education for Las Cruces Public Schools*, evidence was submitted to support nondiscriminatory reasons for Zamora's termination. On appeal, Zamora argued that the report should not have been considered as it was hearsay within hearsay. 553 Fed. Appx. 786 (10th Cir. 2014). The 10th Circuit determined the report was not hearsay because the Board offered it to establish the effect it had on Superintendent Rounds' state of mind when he

made the decision to terminate Zamora. In other words, the report was not offered to prove the truth of the matter asserted but rather was offered to demonstrate that Superintendent Rounds believed there were legitimate reasons for his decision to terminate Zamora's contract.

Much like the case at hand, the witness statements weren't offered to prove the truth of the matter asserted, but rather were presented to demonstrate that a reasonable investigation was conducted. Thus, it is not hearsay.

C. Should the Court determine that the witness statements are considered hearsay; the evidence is admissible as it falls under the Business Record exception to hearsay.

At the very least, the employee witness statements are admissible based on the business record exception to hearsay. Any compilation of any data made at or near the time of the event, by or from a person of knowledge, in the ordinary course of business, in regular practice and is trustworthy is admissible as a business record. K.S.A. 60-460(m).

Ms. Barbara Larsen testified that taking employee witness statements to an incident in the workplace are kept in the ordinary business practice of Tyson Fresh Meats. (Record on Appeal, Vol. 8, p. 6). Such records were offered to prove that a good faith investigation was conducted when determining to terminate Claimant's employment.

III. Even if the Court does not believe that substantial and competent evidence was presented to demonstrate that the Claimant was terminated for cause, the Claimant is still not entitled to work disability due to a lack of work restrictions.

Although Administrative Law Judge Fuller and the Board found the Claimant to have been terminated for cause, thus, not entitled to work disability, it is the Respondent's position that the Claimant is also not entitled to work disability benefits due to a lack of work restrictions.

In this case, three different licensed physicians have opined regarding the necessary work restrictions placed on Claimant and her subsequent task loss. However, Dr. Estivo and Dr.

Hunsberger's opinions are the most accurate reflection of Claimant's actual ability to perform tasks and thus should be relied upon in determining Claimant's task loss.

According to K.S.A. § 44-510e(a)(2)(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.

Dr. Estivo is a board certified orthopedic surgeon who performed a thorough in person examination of the Claimant and a review of her medical records. Dr. Estivo opined that the Claimant had reached maximum medical improvement and that she did not require any permanent work restrictions in this claim. Based on vocational expert, Steve Benjamin's task list, the Claimant sustained a 0% task loss.

Similar to Dr. Estivo's opinion, Dr. Hunsberger testified that Claimant's injury did not result in permanent impairment of function and did not necessitate the imposition of work restrictions. Thus, Dr. Hunsberger's opinion further solidified that the Claimant sustained a 0% task loss.

Dr. Murati's opinion regarding the Claimant's extensive work restrictions is unreasonable and unsupported. Dr. Murati provided no objective measurement for why the Claimant should be so severely restricted. The fact that Claimant was able to continue working at Tyson for over a year after her injury, and two other doctors opined that no permanent restrictions were necessary, suggests that it is more probable than not that the Claimant does not require the serious work restrictions imposed by Dr. Murati.

Both Dr. Estivo and Dr. Hunsberger's opinions regarding Claimant's need for permanent work restrictions are the most accurate portrayal of Claimant's actual loss of ability to perform work tasks due to her injury. Both Dr. Estivo and Dr. Hunsberger concluded that the Claimant is able to work without restrictions, a conclusion that would not have logically been reached had the Claimant demonstrated a need for such extensive restrictions as imposed by Dr. Murati. Based on these reports, it should be found that Claimant suffers from a 0% wage and task loss.

CONCLUSION

In light of the arguments and authorities addressed above, this Court should find that the Board's determination that Respondent successfully proved that the Claimant was terminated for cause is supported by substantial and competent evidence.

For these reasons, the Respondent respectfully requests that the Court affirm the Board's decision.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

On this 14th day of June, 2017 the undersigned hereby certifies that the original of the above and foregoing Brief of Appellee was e-filed with:

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/s Gregory D. Worth

42 Kan.App.2d 360
Court of Appeals of **Kansas**.

Tracy **HERRERA–GALLEGOS**, Appellee,
v.
H & H DELIVERY SERVICE, INC., and
Commerce & Industry Insurance Company
c/o AIG Claims Services, Appellants.

No.
100,741
.
|
July 24, 2009.

Synopsis

Background: Employer appealed from decision of the Workers' Compensation Board concluding that claimant was permanently and totally disabled.

Holdings: The Court of Appeals, Leben, J., held that:

[1] substantial evidence supported Board's finding that claimant was permanently and totally disabled; and

[2] claimant was not required to show any effort to obtain employment in order to receive the statutory compensation called for in a total-disability case.

Affirmed.

West Headnotes (12)

[1] **Administrative Law and Procedure**
⇐ Conflicting evidence
Administrative Law and Procedure
⇐ Substantial evidence

Under the **Kansas** Judicial Review Act, an appellate court reviews an agency's factual findings to see whether substantial evidence supports them in light of the whole record, considering evidence both supporting and detracting from the agency's findings, and this substantial-evidence standard evaluates the reasonableness of an agency's conclusion in terms of the evidence. West's K.S.A. 77–601 et seq.

69 Cases that cite this headnote

[2] **Administrative Law and Procedure**
⇐ Credibility

If a hearing officer has made credibility determinations regarding a witness who appeared in person before that hearing officer, the appellate court must consider any credibility determinations made by the hearing officer, and if an agency head disagrees with those credibility determinations, that agency head should give reasons for disagreeing, and the appellate court needs to consider those reasons on appeal as well. West's K.S.A. 77–621(d).

9 Cases that cite this headnote

[3] **Administrative Law and Procedure**
⇐ Substantial evidence

Substantial evidence to support agency decision is such evidence as a reasonable person would accept as sufficient to support a conclusion.

73 Cases that cite this headnote

[4] **Administrative Law and Procedure**
⇐ Conflicting evidence
Administrative Law and Procedure
⇐ Substantial evidence
Administrative Law and Procedure
⇐ Weight of evidence

Appellate courts do not reweigh the evidence or engage in de novo review of an agency's factual findings, and instead, the appellate court must consider all of the evidence, including evidence that detracts from an agency's factual findings, when assessing whether the evidence is substantial enough

to support those findings, and the appellate court must determine whether the evidence supporting the agency's decision has been so undermined by cross-examination or other evidence that it is insufficient to support the agency's conclusion. West's K.S.A. 77–621.

52 Cases that cite this headnote

[5] **Workers' Compensation**
Reasonable or gainful employment

Workers' compensation statute, governing compensation for permanent total and temporary total disabilities, provides several examples that are presumed to result in permanent and total disability, and in cases not specifically listed, the Workers' Compensation Board must determine, based on all the facts, whether the employee, due to injury, has been left completely and permanently unable to engage in any substantial and gainful employment. West's K.S.A. 44–510c(a)(2).

3 Cases that cite this headnote

[6] **Workers' Compensation**
Back injuries

Substantial evidence supported Workers' Compensation Board's finding that claimant was permanently and totally disabled; claimant had two disc-fusion surgeries, but experienced no relief to her pain, doctor opined that claimant should rest for 30 minutes every 2 hours, and vocational experts stated that claimant would not be employable under that restriction. West's K.S.A. 44–510c(a)(2).

1 Cases that cite this headnote

[7] **Workers' Compensation**
Sufficiency to sustain finding in general

Workers' Compensation
Certainty

There is no statutory requirement that a doctor testify definitely that workers' compensation claimant is physically unable to perform job tasks to be considered disabled, and Workers' Compensation Board is free to consider all of the evidence presented on this issue. West's K.S.A. 44–510c(a)(2).

Cases that cite this headnote

[8] **Workers' Compensation**
Efforts to Obtain Employment;Work Search

When claimant is permanently and totally disabled, there is no requirement under workers' compensation law that the claimant continue to look for work.

Cases that cite this headnote

[9] **Workers' Compensation**
Earnings or wages in general

The statutory formula for determining the workers' compensation benefit in cases of permanent total disability has no reference to future earnings, which differs from the statutory benefit applicable in permanent partial-disability cases. West's K.S.A. 44–510c(a)(1).

Cases that cite this headnote

[10] **Workers' Compensation**
Efforts to Obtain Employment;Work Search

Under workers' compensation law, there is no good-faith requirement to find employment in total-disability cases. West's K.S.A. 44–510c.

Cases that cite this headnote

[11] **Workers' Compensation**
Efforts to Obtain Employment;Work Search

Since Workers' Compensation Board's award to claimant for permanent total disability was supported by substantial evidence, claimant was not required to show any effort to obtain employment in order to receive the statutory compensation called for in a total-disability case. West's K.S.A. 44–510c.

Cases that cite this headnote

[12] **Workers' Compensation**
Extent of right;amount

Substantial evidence supported Workers' Compensation Board's conclusion that claimant needed ongoing medical treatment; there was considerable evidence that claimant was suffering from chronic pain and that her current treatment was not helping, and doctor testified that claimant needed chronic pain management, such as a spinal cord stimulator and slow-release pain medications.

1 Cases that cite this headnote

****240 *360** *Syllabus by the Court*

1. Under the **Kansas** Judicial Review Act, K.S.A. 77–601 *et seq.*, an appellate court reviews an agency's factual findings to see whether substantial evidence supports them in light of the whole record, considering evidence both supporting and detracting from the agency's findings. This substantial-evidence standard evaluates the reasonableness of an agency's conclusion in terms of the evidence. Substantial evidence is such evidence as a reasonable person would accept as sufficient to support a conclusion.

2. If a hearing officer has made credibility determinations regarding a witness who appeared in person before that hearing officer, the appellate court must consider any credibility determinations made by the hearing ****241** officer. If an agency head disagrees with those credibility determinations, that agency head should give reasons for disagreeing, and the appellate court would need to consider those reasons on appeal as well.

3. The appellate courts do not reweigh the evidence or engage in de novo review of an agency's factual findings. But the appellate court must consider all of the evidence—including evidence that detracts from an agency's factual findings—when assessing whether the evidence is substantial enough to support those findings. So the appellate court must determine whether the evidence supporting the agency's decision has been so undermined by cross-examination or other evidence that it is insufficient to support the agency's conclusion.

4. K.S.A. 44–510c(a)(2) provides several examples that are presumed to result in permanent and total disability. In cases not specifically listed, the Workers Compensation Board must determine based on all the facts whether the employee, due to injury, has been left completely and permanently unable to engage in any substantial and gainful employment.

5. On the facts of this case, substantial ***361** evidence supports the agency's conclusion that the claimant is permanently and totally disabled and needs ongoing medical treatment.

6. When a person is permanently and totally disabled, there is no requirement under **Kansas** workers'-compensation law that the person continue to look for work.

Attorneys and Law Firms

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Randy S. Stalcup, of Affiliated Attorneys of Pistotnik Law Offices, PA, of Wichita, for appellee.

Before STANDRIDGE, P.J., BUSER and LEBEN, JJ.

Opinion

LEBEN, J.

Tracy **Herrera–Gallegos** hurt her back badly while moving a heavy box for **H & H Delivery**. Both the administrative law judge and the Workers Compensation Board concluded that she was permanently and totally disabled, meaning that she was unable to engage in any substantial or gainful employment.

Her employer argues that the Board's decision was based on flawed evidence, that her failure to seek out other employment opportunities negates her right to an award, and that she shouldn't have been given an award for future medical expenses where no evidence demonstrated a need for ongoing medical treatment. But we review

the Board's factual findings to see whether substantial evidence supports them, and sufficient evidence showed that Herrera–Gallegos was unemployable due to her chronic pain and that she needed additional pain-management treatment. Further, nothing in our workers'-compensation law requires a person who is permanently and totally disabled to try to find a job or lose workers'-compensation benefits. We therefore affirm the Board's award to Herrera–Gallegos.

Standard of Review

[1] We begin our analysis by noting a change in the standard of review for workers'-compensation cases that took effect on July 1. Under K.S.A. 44–556(a), decisions of the Workers Compensation Board are reviewed under the Kansas Judicial Review Act, *362 K.S.A. 77–601 *et seq.*, which applies generally to appeals from administrative agencies. The statute was amended July 1, 2009, and that change alters our standard of review. See L.2009, ch. 109, sec. 28 (amending K.S.A. 77–621).

K.S.A. 77–621 has always provided that we review an agency's factual findings to be sure substantial evidence supports them "in light of the record as a whole." But our cases had limited that review by directing that we take the evidence in the light most favorable to the Board's ruling. If we found substantial evidence that would support the Board's decision, we were not concerned about other evidence that might have led to a different conclusion. See **242 *Graham v. Dokter Trucking Group*, 284 Kan. 547, Syl. ¶ 1, 161 P.3d 695 (2007); *Gutierrez v. Dold Foods, Inc.*, 40 Kan.App.2d 1135, Syl. ¶ 4, 199 P.3d 798 (2009). In addition, if the Board ruled against a party who had the burden of proof on a factual issue, we reviewed the matter under a negative-findings test—we would then uphold the Board's ruling unless it arbitrarily ignored disputed evidence or the Board acted on bias, passion, or prejudice. *Gutierrez*, 40 Kan.App.2d 1135, Syl. ¶ 4, 199 P.3d 798.

[2] As amended, K.S.A. 77–621 now defines "in light of the record as a whole" to include the evidence both supporting *and detracting from* an agency's finding. Thus, we must now determine whether the evidence supporting the Board's factual findings is substantial when considered in light of *all* the evidence. In addition, the amended statute, K.S.A. 77–621(d), now requires that we consider both the credibility determinations that the hearing officer "who personally observed the demeanor of the witness" made, and if the agency head, here the Board, does not agree with those credibility determinations, the agency should give its reasons for disagreeing. We must consider "the agency's explanation of why the relevant evidence in the record supports its material findings of fact." For us to fairly consider an agency's position should it disagree with a hearing officer's credibility determination, an explanation of the agency's differing opinion would generally be needed. See also L.2009, ch. 109, sec. 13 (amending K.S.A. 77–527[d] and providing that agency head give "due regard" to hearing officer's ability to observe witnesses and determine credibility).

[3] *363 The statute doesn't define the term substantial evidence, but caselaw has long held that it is such evidence as a reasonable person might accept as being sufficient to support a conclusion. *Blue Cross & Blue Shield of Kansas, Inc. v. Praeger*, 276 Kan. 232, 263, 75 P.3d 226 (2003). With the statutory amendments, we have simply been told to look more completely at the record in determining whether substantial evidence supports the agency decision.

[4] The amended statute finally reminds us that we do not reweigh the evidence or engage in de novo review, in which we would give no deference to the administrative agency's factual findings. Indeed, the administrative process is set up to allow an agency and its officials to gain expertise in a particular field, thus allowing the application of that expertise in the fact-finding process. But we must now consider all of the evidence—including evidence that detracts from an agency's factual findings—when we assess whether the evidence is substantial enough to support those findings. Thus, the appellate court now must determine whether the evidence supporting the agency's decision has been so undermined by cross-examination or other evidence that it is insufficient to support the agency's conclusion.

An Overview of the Evidence and the Board's Ruling

Herrera–Gallegos hurt her back while trying to move a 70– to 80–pound box out of the way. There's no dispute that this injury occurred during the course of her employment with H & H Delivery.

Doctors performed disc-fusion surgery of the L4/L5 discs in November 2004, and a second fusion of the L5/S1 discs in January 2006. **Herrera–Gallegos** said the doctor who performed the surgery told her she'd never work again.

Dr. Pedro Murati testified regarding his examination of **Herrera–Gallegos**. He diagnosed her with failed-back-surgery syndrome, and he said that individuals with it experience pain and difficulty in all activities. Based on his examination and a review of her medical records, he said she should rest for 30 minutes every 2 hours. He concluded that she was unable to engage in any substantial or gainful employment due to the level of pain she experienced. He conceded that she could physically do certain work-related tasks, ***364** but he recommended that she not do them because it would cause her too much pain. In addition, he said that if she tried to work, it would cause her so much pain that she'd often have to stay at home to rest her back. He concluded that she was unemployable because "she has lost the ability to [work] to the satisfaction of any reasonable employer."

****243** H & H **Delivery** presented a different view from Dr. Paul Stein. He reviewed a functional-capacity evaluation and concluded that **Herrera–Gallegos** could function under light physical-demand restrictions, including that she not lift more than 20 pounds on an occasional basis and no more than 10 pounds on a frequent basis. He concluded that "within the framework of the restrictions that I have provided, she should be able to function." He reviewed lists of tasks she had done in past jobs, noting some (like vacuuming) that she could no longer do but many others (like standing to operate a cash register) that she could do. Even for tasks that she could do, however, the functional-capacity evaluation approved by Dr. Stein recommended that she frequently alternate between sitting and standing.

Two vocational experts, Jerry Hardin and Karen Crist Terrill, testified. Based on Dr. Murati's restrictions, Hardin concluded that **Herrera–Gallegos** was "essentially and realistically unemployable." Based on Dr. Stein's restrictions, Terrill testified that **Herrera–Gallegos** had "the ability to earn wages in the open labor market" as a customer-service representative or as a bill collector. But when asked to consider Dr. Murati's restrictions, she conceded that **Herrera–Gallegos** wouldn't be employable under them:

> "Dr. Murati has indicated she needs to rest every two hours for at least 30 minutes and that she is essentially and realistically unemployable. I would then defer to those statements. If Dr. Murati is of the opinion she's essentially and realistically unemployable from a medical standpoint, I would defer to that opinion."

Terrill also testified that **Herrera–Gallegos** said she hadn't looked for any jobs since her injury because she hadn't been released to go back to work and because the pain made it hard for her to leave her home.

An administrative law judge found that **Herrera–Gallegos** was permanently and totally disabled. **H & H Delivery** sought review ***365** by the Workers Compensation Appeals Board, but the Board agreed that she was permanently and totally disabled. Both the judge and the Board relied heavily on Dr. Murati's testimony.

I. Substantial Evidence Supports the Board's Finding that **Herrera–Gallegos** Is Permanently and Totally Disabled.

[5] [6] We begin our review of **H & H Delivery's** appeal by determining whether, with consideration of the entire record, substantial evidence supports the Board's conclusion that **Herrera–Gallegos** is permanently and totally disabled. Our statute provides several examples that are presumed to result in total disability, but it otherwise provides that the Board determine whether the person's disabilities have altogether shut them out of the labor market based on the facts of that individual case:

> "Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be

determined in accordance with the facts." K.S.A. 44–510c(a)(2).

None of the special situations, like losing both hands, applied to **Herrera–Gallegos**' case, so the Board had to determine from all the facts whether she was "completely and permanently incapable of engaging in any type of substantial and gainful employment."

The evidence supporting the Board's permanent- and total-disability finding hinges on Dr. Murati's opinion that **Herrera–Gallegos** should rest for 30 minutes every 2 hours. Both of the vocational experts who testified, Hardin and Terrill, agreed that **Herrera–Gallegos** would not be employable under that restriction. Accordingly, whether substantial evidence supports the Board's finding depends upon Dr. Murati's opinion. Unless his opinion is greatly undermined by other evidence, the Board's decision would have substantial evidence to support it.

****244** **H & H Delivery** made several arguments designed to undercut Dr. Murati's testimony. **H & H Delivery** noted that Dr. Murati ***366** couldn't independently recall **Herrera–Gallegos** when he testified, that he provided general testimony about people with her condition, that he admitted she hadn't claimed to him that she had difficulty standing or sitting for a specific time length, that he put too much emphasis on the burns **Herrera–Gallegos** experienced from overusing her heating pad (which **H & H Delivery** contends has no medical significance), and that he relied upon the functional-capacity evaluation while also criticizing it. But **H & H Delivery's** attempts to undercut Dr. Murati's testimony did not so undermine it that it may no longer be relied upon by the Board. Dr. Murati is board certified in physical medicine and rehabilitation, and both the administrative law judge and the Board found his testimony credible and persuasive.

The Board noted that Dr. Murati's opinion was more recent than Dr. Stein's and that no doctor had found **Herrera–Gallegos** to be magnifying her symptoms. The Board also noted that even the functional-capacity restrictions relied upon by Dr. Stein recommended at least frequent alternating between sitting and standing. **Herrera–Gallegos** had two disc-fusion surgeries but experienced no relief to her pain. The Board also appears to have accepted **Herrera–Gallegos**' testimony on these points—that her pain continued after the surgeries and that the pain was constant. The Board also made specific note of her testimony that she suffered burns to her back from a heating pad while trying to alleviate the back pain. Taken in combination, the testimony of Dr. Murati, along with that of **Herrera–Gallegos**, Hardin, and Terrill, provides substantial evidence in support of the Board's factual finding that her injuries prevent her from being gainfully employed.

[7] **H & H Delivery** also challenges the Board's finding on the ground that Dr. Murati based his recommendations on what **Herrera–Gallegos** *should* not do rather than what she *could* not do. But even though **Herrera–Gallegos** could physically perform, at least for some time period, many of the tasks that might be required in a job, Dr. Murati said that in his opinion her pain would interfere with working unless she followed his recommendation to rest for 30 minutes every 2 hours. There's no requirement in K.S.A. 44–510c(a)(2) that a doctor testify definitely that a worker is physically ***367** unable to perform job tasks to be considered disabled. See *Adams v. Ball's Food Stores*, 41 Kan.App.2d 799, 207 P.3d 261, 264 (2008). The Board is free to consider all of the evidence presented on this issue, and substantial evidence provides support for its conclusion.

II. A Person Who Is Permanently and Totally Disabled Is Not Required to Seek Work to Preserve His or Her Rights to a Workers'-Compensation Award.

[8] **H & H Delivery** separately argues that **Herrera–Gallegos** should not be able to receive a permanent and total disability award "where she has not made any effort, much less a good faith effort, to find post-injury employment." We are at a loss to understand the logic of this argument. It's obviously contradictory to require someone who is, in the words of our statute, "completely and permanently incapable of engaging in any type of substantial and gainful employment" to put forth a good-faith effort to find and maintain gainful employment. See K.S.A. 44–510c(a)(2). A job search in that circumstance would be the very definition of a fool's errand.

Nor is **H & H Delivery's** argument based on some language in the workers'-compensation statute. K.S.A. 44–510c(a)(2) simply tells the Board to determine whether a permanent and total disability exists "in accordance with the facts" in cases like **Herrera–Gallegos**', which is not covered with a special rule. **H & H Delivery** does not cite any statutory language in support of this argument.

We acknowledge—and **H & H Delivery** cites to—one unpublished decision of our court in which a panel provided some language supportive of **H & H Delivery's** position. In *Studyvin v. Wal–Mart*, 2007 WL 2241694 (Kan.App.) (unpublished opinion), *rev. denied* 285 **Kan.** 1177 (2007), the worker was denied permanent total-disability benefits ****245** apparently because she had twice turned down accommodated employment *within* the restrictions set for her by the treating physician. On appeal, she argued that her lack of good faith in finding work wasn't an appropriate consideration in determining whether she had a permanent total disability. A panel of our court disagreed: "If good faith is a requirement for work disability or for a continuation of permanent partial disability benefits, ***368** it is most assuredly a requirement for an award of permanent total disability." 2007 WL 2241694, at *4.

The *Studyvin* panel relied on some past cases in which our court has held that an employee must show good-faith efforts to obtain new employment before obtaining an award for wage losses (referred to as a work-disability award) in excess of functional impairment in cases of permanent partial disabilities. *E.g., Copeland v. Johnson Group, Inc.*, **24** Kan.App.2d 306, Syl. ¶ 6, 944 P.2d 179 (1997); *Foulk v. Colonial Terrace*, 20 Kan.App.2d 277, 284, 887 P.2d 140 (1994), *rev. denied* 257 **Kan.** 1091 (1995). But since the development of that doctrine more than a decade ago, our Supreme Court has emphasized that the workers'-compensation statute should be applied as written without the addition of rules not included in the statute. See *Graham v. Dokter Trucking Group*, 284 **Kan.** 547, 556–57, 161 P.3d 695 (2007); *Casco v. Armour Swift–Eckrich*, 283 **Kan.** 508, 524–25, 154 P.3d 494 (2007). Based on these Supreme Court cases and the lack of any statutory language supporting the rule announced in *Copeland* and *Foulk*, several recent rulings have questioned whether the good-faith rule has retained any validity after *Casco* and *Graham*. See *Gutierrez v. Dold Foods, Inc.*, 40 Kan.App.2d 1135, 1143, 199 P.3d 798 (**2009**); *Stephen v. Phillips County*, 38 Kan.App.2d 988, 995, 174 P.3d 452, *rev. denied* 286 **Kan.** 1186 (2008); *Kiser v. Tractor Supply Co.*, **2009** WL 1766556, at *1 (Kan.App.**2009**) (unpublished opinion); but see *Minden v. Paola Housing Authority*, **2009** WL 596559, at *5 (Kan.App.**2009**) (unpublished opinion) (approving Board's use of good-faith test to deny work-disability award); *Purinton v. George J. Shaw Const. Co.*, 2008 WL 5135153, at *3 (Kan.App.2008) (unpublished opinion) (same).

Two other points should be made with regard to the *Studyvin* ruling and its impact, if any, on **Herrera–Gallegos'** case. First, the *Studyvin* opinion does not tell us how the worker's alleged lack of good faith affected a determination of whether she could engage in gainful employment. There was other evidence that the worker *was* able to hold a job, including a doctor's conclusion that she was able to work notwithstanding some medical limitations. That fact alone would have supported the Board's denial of a permanent ***369** total-disability award without regard to whether she had rejected any offers of work that would accommodate her medical restrictions. Thus, it's not clear how important the good-faith rule was either to the Board's decision or this court's decision. Second, the cases relied upon in *Studyvin* for a good-faith requirement arose under awards for permanent *partial* disability, not permanent *total* disability. Benefits are figured in a different way for partial-disability awards than for permanent-disability awards. For partial disabilities, a worker can receive an award beyond functional impairment to compensate in part for future lost wages, called a work-disability award. But that award isn't available if the worker is engaging in work for 90% or more of the wages earned at the time of injury. K.S.A. 44–510e(a). Thus, even if not found in the statute, the good-faith rule would **serve** a logical purpose because the wage earned *after* the injury matters in the statutory calculation of benefits. But in cases of permanent total disability, the statute provides a benefit "equal to 66 2/3% of the average gross weekly wage of the injured employee" for a specified time period. K.S.A. 44–510c(a)(1). The benefits are not dependent upon any postinjury wage—presumably because a worker with a permanent total disability can't earn a postinjury wage. Thus, imposing some good-faith requirement at the threat of imputing a postinjury wage **serves** no purpose in a permanent total-disability case.

[9] **[10]** **[11]** In sum, when a worker has suffered a permanent and total disability as defined under the workers'-compensation statute, there's no reason for that person to seek further employment. In addition, the ****246** statutory formula for determining the benefit in cases of permanent total disability has no reference to future earnings, which differs from the statutory benefit applicable in permanent partial-disability cases.

Thus, however the dispute may ultimately be resolved regarding whether a good-faith requirement should be grafted onto the statute in partial-disability cases, we find no such requirement should apply in total-disability cases. The Board made an award to **Herrera–Gallegos** for a permanent total disability. Since that award was supported by substantial evidence, she was not required to show any effort to obtain employment in order to ***370** receive the statutory compensation called for in a total-disability case.

III. The Board Did Not Err in Awarding Future Medical Expenses.

[12] **H & H Delivery** makes one final argument—that the Board wrongly awarded future medical treatment to **Herrera–Gallegos**. **H & H Delivery** argues that **Herrera–Gallegos** "provided no evidence that she would *require* any future medical treatment," so none should have been awarded. But there was considerable evidence that she was suffering from chronic pain and that her current treatment was not helping. Dr. Murati testified that she needed chronic pain management, such as a spinal cord stimulator and slow-release pain medications. This meets the substantial-evidence test in support of the Board's conclusion that **Herrera–Gallegos** needed ongoing medical treatment.

The Board's award to **Herrera–Gallegos** is therefore affirmed.

All Citations

42 Kan.App.2d 360, 212 P.3d 239

End of Document

139 P.3d 153 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

Raul MORALES-CHAVARIN, Appellee,
v.
NATIONAL BEEF PACKING COMPANY, and Fidelity & Guaranty Insurance Company, Appellants.

No. 95,261
.
|
Aug. 4, 2006.

Synopsis

Background: Employer sought review of decision from the Workers' Compensation Board awarding workers' compensation claimant work disability payments after claimant was fired due to a failure to return from leave of absence caused by his work-related injury.

Holdings: The Court of Appeals held that:

[1] evidence supported Board's finding that claimant acted in good faith, and

[2] employer's termination was not in good faith, entitling claimant to work disability benefits.

Affirmed.

West Headnotes (2)

[1] **Workers' Compensation**
⇐ Efforts to obtain work;acceptance of employment

Evidence of workers' compensation claimant's efforts to retain his employment and to regain it after being terminated was sufficient to support Workers' Compensation Board finding that claimant made a good faith effort to find employment after his injury-related termination, as would provide support for a conclusion that claimant was entitled to work disability payments following an unreasonable termination. K.S.A. 44-510e(a).

2 Cases that cite this headnote

[2] **Labor and Employment**
⇐ Exercise of rights or duties;retaliation
Workers' Compensation
⇐ Departure from Position;Withdrawal from Workforce
Workers' Compensation
⇐ Departure from position;withdrawal from workforce

Evidence, including testimony that workers' compensation claimant's employer terminated claimant while claimant was on leave for injury without contacting claimant, was sufficient to support a conclusion that employer acted in bad faith in terminating claimant, and therefore, claimant was entitled to work disability benefits following his termination. K.S.A. 44-510e(a).

2 Cases that cite this headnote

Appeal from the Workers Compensation Board. Opinion filed August 4, 2006. Affirmed.

Attorneys and Law Firms

Shirla R. McQueen, of Sharp, McQueen, McKinley, McQueen & Dodge, P.A., of Liberal, for appellants.

Steve Brooks, of Brooks, Olson & Peterson, of Liberal, for appellee.

Before MCANANY, P.J., GREENE and HILL, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** In this case, we must review the award of work disability payments made by the Kansas Workers Compensation Board. The Board ruled that a claimant who was fired because of failure to return from a leave of absence caused by his injury was entitled to work disability payments under the circumstances presented. Because the award is supported by substantial competent evidence, we affirm.

Prior Proceedings

Raul Morales-Chavarin claimed that he suffered a repetitive use injury while working at National Beef Packing Company in September 2003. After being notified of claimant's injury, National Beef provided medical treatment to the claimant, including treatment by Dr. Pedro Murati. As a result of an examination in January 2004, Murati recommended temporary work restrictions. The claimant was transferred to a light duty job. Murati also recommended the claimant for surgical consultation. The surgical consultation was approved by National Beef, but was not conducted due to the claimant's decision that he did not want surgery. The claimant and National Beef then agreed that the claimant would submit to an independent medical examination to be performed by Dr. C. Reiff Brown.

On March 11, 2004, National Beef placed the claimant on a workers compensation leave of absence after National Beef found that there were no jobs available that fit the claimant's restrictions. National Beef also noted that the leave fell under the Family Medical Leave Act (FMLA). The form provided to the claimant set forth that the leave ended on April 6, 2004, and that the claimant was required to contact the company prior to the expiration of the leave. The form also provided that failure to comply with the leave requirements "may result in discharge." The claimant was also provided a FMLA form that was in Spanish which explained the leave and set forth the date the leave expired. The claimant refused to sign the forms.

George Hall, the personnel director for National Beef, testified that he met with the claimant when he was placed on leave on March 11, 2004. Hall admitted that the claimant never asked to be placed on leave. Hall stated that he told the claimant that he was required to report back to National Beef after his doctor's appointment on April 6, 2004. Hall further testified that under National Beef's collective bargaining agreement, an employee can be discharged for overstaying a leave of absence. The collective bargaining agreement stated in relevant part: "An employee's seniority and employment shall be forfeited for the following: ... 6. Over staying a leave of absence or breaching terms thereof."

The claimant testified that Hall and an interpreter told him "more or less" what the forms stated. The claimant also testified that he was told on March 11, 2004, that the leave expired on April 6, 2004, and that he was required to contact National Beef prior to the expiration of the leave. However, the claimant's later testimony indicated that the claimant may have believed that he was only required to contact National Beef to inform them of Brown's restrictions. The claimant further stated that he did not sign the forms because he did not request the leave and that he did not understand the fact that he was supposed to return to National Beef on April 6, 2004, because he was told that National Beef no longer had a job available to him due to his restrictions. The claimant further alleged that he told National Beef's personnel office to contact his attorney if they needed to notify him of anything. The claimant also admitted that he did not contact National Beef immediately after his doctor's appointment on April 6, 2004. However, the claimant did give Brown's initial report, which did not contain Brown's restrictions, to his attorney.

***2** On April 6, 2004, Brown examined the claimant and found that the claimant suffered from "very mild carpal tunnel syndrome with very weakly positive Tinel signs bilaterally but no other findings." Brown found that the claimant's carpal tunnel injury resulted in a 6% permanent partial impairment of function to the body as a whole. The sheet the claimant received when leaving Brown's examination did not provide any restrictions. Instead, the sheet only stated that permanent restrictions would be provided by a report.

Selena Sena, the workers compensation coordinator at National Beef, testified that on April 15, 2004, she received

the sheet indicating Brown's diagnosis of the claimant's injuries that indicated that restrictions would follow in a report. Sena further testified that since the initial report did not contain any restrictions, the claimant's leave would have been extended had he brought Brown's initial report to National Beef on April 6, 2004. Sena indicated that they could not have done anything else until National Beef received Brown's report that contained permanent restrictions. Sena further testified that she received Brown's final report on either April 19 or 20, 2004. Sena also testified that National Beef could have accommodated Brown's permanent restrictions had claimant not been terminated.

On April 21, 2004, National Beef terminated the claimant's employment for not reporting back to National Beef as of April 21, 2004, and therefore overstaying his leave of absence. Hall testified that April 21, 2004, was an arbitrary date and that the termination date had nothing to do with when National Beef received Brown's report. Sena testified that it was not National Beef's policy to attempt to contact employees who have overstayed their leave prior to terminating their employment.

After being terminated, the claimant sought to be rehired on three different occasions at National Beef, all of which were refused. At the regular hearing on this matter, the claimant introduced a list of 116 employment contacts he had from March 24, 2004, to September 14, 2004, when he finally obtained part-time employment delivering pizzas.

The administrative law judge found that the claimant was terminated for cause and denied the claimant's claim for work disability and limited the award to the claimant's 6% functional impairment. The claimant appealed to the Board.

The Board disagreed with the work disability denial. Accordingly, the Board modified the award to include work disability payments. National Beef argues that the Board erred in finding that the claimant was entitled to work disability benefits.

Scope of Review

An appellate court's review of questions of fact in a workers compensation case is limited to whether the Board's findings of fact are supported by substantial competent evidence, which is a question of law. *Titterington v. Brooke Insurance*, 277 Kan. 888, 894, 89 P.3d 643 (2004). Substantial evidence in workers compensation cases is evidence that possesses something of substance and relevant consequence and carries with it fitness to induce the conclusion that the award is proper, or furnishes a substantial basis of fact from which the issue raised can be reasonably resolved. An appellate court reviews the evidence in the light most favorable to the prevailing party and does not reweigh the evidence or assess the credibility of the witnesses. *Neal v. Hy-Vee, Inc.*, 277 Kan. 1, 16-17, 81 P.3d 425 (2003). An appellate court will uphold findings supported by substantial evidence even though evidence in the record would have supported contrary findings. *Webber v. Automotive Controls Corp.*, 272 Kan. 700, 705, 35 P.3d 788 (2001).

***3** This case also involves the interpretation of K.S.A. 44-510e(a). Obviously, the interpretation of statutory provisions in the Workers Compensation Act is a question of law. Under the doctrine of operative construction, the Board's interpretation of the law is entitled to judicial deference. That is to say, if there is a rational basis for the Board's interpretation, it should be upheld upon judicial review. However, the Board's determination on questions of law is not conclusive and, though persuasive, is not binding on a court. The party challenging the Board's interpretation bears the burden of proving its invalidity. *Foos v. Terminix*, 277 Kan. 687, 692-93, 89 P.3d 546 (2004).

Analysis

We must begin with the understanding that there is no dispute that at the time of hearing, the claimant was not making wages equal to 90% or more of his average weekly wage that he was earning at the time of his injury. But National Beef asserts that the claimant is not entitled to work disability because he was fired for cause. They rely on two cases, *Ramirez v. Excel Corp.*, 26 Kan.App.2d 139, 979 P.2d 1261, *rev. denied* 267 Kan. 889 (1999), and *Perez v. IBP, Inc.*, 16 Kan.App.2d 277, 826 P.2d 520 (1991).

Both cases are distinguishable from this case. In *Ramirez*, the claimant suffered an injury and was assigned light duty work. After the claimant filed a workers compensation claim, the employer discovered that the claimant had failed to disclose a previous workers compensation

claim on his employment application. The claimant was subsequently terminated. In *Perez,* the claimant was injured but returned to work the next day and worked 33 out of a possible 57 work days before he was terminated for poor attendance. In *Ramirez* and *Perez,* the claimants returned to work in some capacity after their injuries and were then fired for reasons totally unrelated to their injuries. In the present case, the claimant never returned to work before being fired.

Furthermore, it can be validly said that the reason for termination was not totally unrelated to the claimant's injury in the present case in that the claimant was forced to take leave as a result of his injury. It was the failure to report back in a timely manner from this injury-induced leave that led to the claimant's termination. Thus, the claimant's termination was at least connected to his injury.

The Board did not frame the issue here as whether National Beef had good cause to terminate the claimant. Instead, the Board broadened the inquiry into a good faith effort to retain employment:

> "Respondent [National Beef] desires the Board to limit its inquiry into whether or not respondent terminated claimant for violating company rules. The Board, however, concludes the inquiry is more broad. The appropriate test is whether claimant made a good faith effort to retain his employment with respondent and, therefore, company policy is only one factor to be considered in that analysis. And whether an injured worker has made a good faith effort to retain post-injury employment is determined on a case-by-case basis. In short, good faith is a question of fact to be determined after carefully examining all the facts and circumstances."

***4** The Board did not cite any authority for the standard it applied. The test set forth by the Board contradicts this court's decision in *Ramirez.* As stated earlier, in *Ramirez,* the claimant was terminated after returning to an accommodated position when the employer discovered that the claimant did not disclose a prior workers compensation claim on his employment application. This court reversed the Board's award of work disability without making a finding or setting out any facts indicating that the claimant did not make a good faith effort to maintain his employment. 26 Kan.App.2d at 143, 979 P.2d 1261. Clearly, the fact that the claimant falsified his employment application was sufficient to deny his claim of work disability.

Instead, it appears the Board relied on *Foulk v. Colonial Terrace,* 20 Kan.App.2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). In *Foulk,* the claimant was injured and was offered an accommodated job within her restrictions but refused. She therefore could not avoid the presumption of no work disability.

Going further, the Board uses language from *Copeland v. Johnson Group, Inc.,* 24 Kan.App.2d 306, 320, 944 P.2d 179 (1997), where the court interpreted *Foulk* in harmony with K.S.A. 44-510e(a) and stated:

> "In attempting to harmonize the language of K.S.A. 44-510e(a) with the principles of *Foulk,* we find the factfinder must first make a finding of whether a claimant has made a good faith effort to find appropriate employment. If such a finding is made, the difference in pre- and post-injury wages based on the actual wages can be made. This may lead to a finding of lesser wages, perhaps even zero wages, notwithstanding expert opinion to the contrary.
>
> "If a finding is made that a good faith effort has not been made, the factfinder will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages."

While *Foulk* and *Copeland* set forth general standards to be used in workers compensation claims, they do not address what effect a termination for cause has on an employee's ability to obtain work disability in excess of the their functional impairment rating.

After a review of relevant case law, it appears that the Board's statement that the proper test is whether the claimant made a good faith effort to maintain his employment was incorrect. While the Board's interpretation of the Workers Compensation Act is entitled to deference, the Board's interpretation in the

present case violates prior case law on the subject. Accordingly, the Board's decision cannot be considered proper.

Instead, the proper question is whether National Beef had good cause to terminate the claimant. The question of what constitutes good cause to terminate an employee so as to prohibit an employee from receiving work disability benefits in a workers compensation case has not been addressed in Kansas.

***5** But the effects of termination for cause has been demonstrated. In *Niesz v. Bill's Dollar Stores,* 26 Kan.App.2d 737, 740-41, 993 P.2d 1246 (1999), the court concluded that a termination for cause can cut off a claimant's right to work disability regardless of whether he or she made a good faith effort to maintain or find employment.

> "The Board correctly interpreted K.S.A.1998 Supp. 44-510e(a). The presumption of no work disability is subject to reevaluation if a worker in an accommodated position subsequently becomes unemployed. The Board noted that Niesz did not display any bad faith, but instead demonstrated a strong work ethic. The Board correctly interpreted the law, and its decision will not be overturned on appeal." 26 Kan.App.2d at 741, 993 P.2d 1246.

Then, in *Decatur County Feed Yard, Inc. v. Fahey,* 266 Kan. 999, 974 P.2d 569 (1999), the court discussed the terms "cause" and "good cause" within an employment contract situation. In discussing the term "cause," the court referred to *Weir v. Anaconda Co.,* 773 F.2d 1073, 1080 (10th Cir.1985), which applied Kansas law and stated:

> " '[Cause for discharge] is a shortcoming in performance which is detrimental to the discipline or efficiency of the employer. Incompetency or inefficiency or some other cause within the control of the employee which prohibits him from properly completing his task is also included within the definition. A discharge for cause is one which is not arbitrary or capricious, nor is it unjustified or discriminatory.' " 266 Kan. at 1007, 974 P.2d 569.

It appears from examining the decisions previously discussed, *Ramirez, Foulk,* and *Niesz,* and *Decatur County Feed Yark, Inc.* above, that the 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 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.

[1] First, we examine the claimant's good faith. The Board found that the claimant made a good faith effort to maintain his employment with National Beef. The Board's factual findings were primarily set forth as follows:

> "When claimant was terminated, he was not working as respondent could not accommodate his work restrictions. And respondent would not accept claimant back to work without knowing his final medical restrictions. Respondent had knowledge of the April 6, 2004, appointment with Dr. Brown and also knew that Dr. Brown was to set claimant's work restrictions. Respondent also knew claimant was represented by an attorney in this claim. Moreover, claimant's testimony is uncontradicted that he requested the company to contact his attorney about returning to work.
>
> ***6** "Notwithstanding the parties' intentions, claimant's permanent work restrictions remained in question despite his April 6, 2004, meeting with Dr. Brown. Consequently, claimant's employment status also remained in limbo.
>
> "The record does not indicate claimant has refused to work or that he has attempted to manipulate his workers compensation claim. Conversely, following his being terminated, claimant has attempted to return to work for respondent on three different occasions. Moreover, although claimant's testimony is inconsistent, it does establish that claimant was confused as to whether he was to report to respondent's plant immediately following Dr. Brown's appointment when he did not have Dr. Brown's work restrictions. And, as indicated above, extending the leave of absence was the only thing that respondent would have done had claimant returned to the plant immediately following his appointment with Dr. Brown.

> "It is disconcerting that a simple telephone call to the parties' attorneys may have prevented a worker from losing his employment and prevented an employer from losing an experienced employee. The Workers Compensation Act requires good faith from both employees and employers."

No one disputes that the claimant contradicted himself during his testimony at the hearing. But the Board found that this showed that the claimant was confused as to whether he was required to report to National Beef after he was examined by Brown but did not receive Brown's restrictions. The conclusion that the claimant made a good faith effort to retain his employment is also supported by the facts showing that the claimant was diligent in attempting to regain his employment with National Beef after being terminated. While the evidence presented could have supported a different finding, the evidence was sufficient to support the Board's finding. Finally, National Beef has not contested the Board's finding that the claimant made a good faith effort to find employment after being terminated from National Beef.

[2] Next, we examine the good faith of the employer. The Board inferred that National Beef did not act in good faith in terminating the claimant without attempting to contact him prior to termination. The claimant testified that when he was placed on leave, he told National Beef's personnel office to contact his attorney if National Beef needed to notify him of anything. It is undisputed that National Beef did not attempt to contact the claimant at any time between April 6, 2004, and the date the claimant was terminated. While such an attempt is not always required, National Beef's failure to make an attempt to contact the claimant under the facts of the present case is evidence showing a lack of good faith by National Beef.

The timing of the events in the present case also supports a finding that National Beef did not act in good faith. The claimant's leave ended on April 6, 2004. Sena testified that had the claimant reported to National Beef on April 6, 2004, his leave would have been extended until Brown's restrictions were received. Sena stated that she received Brown's final report containing the restrictions he recommended for the claimant on April 19 or 20, 2004. The claimant was terminated on April 21, 2004. Nothing in the record indicates that the claimant was even aware at the time he was terminated that Brown had issued his restrictions. Under these facts, the Board did not err in finding that National Beef did not act in good faith in terminating the claimant.

*7 Another way to determine the good faith of the employer and employee is based on when the policy and the occurrence that violated the policy happened. Under this test, where the employer claims the employee was fired for cause unrelated to the work-related injury, a critical point is whether the employer can show the employee had notice of that particular reason prior to the occurrence of the work-related injury. In instances where the employer can show a written policy existed prior the occurrence of the injury, the employer's reason for terminating the employment does not arouse suspicion. However, where the employer relies upon a policy or reason that was made after the occurrence of the employee's injury, the employer's alleged reason for termination weighs more heavily against a good faith finding on the part of the employer.

Here, there is no dispute that the collective bargaining agreement provision that allowed National Beef to terminate an employee for overstaying a leave was in existence prior to the claimant's injury. *But the claimant's action of overstaying his leave occurred after his injury.* Under the test set forth above, National Beef would have a greater burden of establishing that its termination of the claimant was made in good faith. After analyzing the factors set forth earlier, it is clear that National Beef did not show that it acted in good faith.

Despite the fact the Board erred in its application of the law by finding that the only test to consider in determining whether the presumption against work disability applies was whether the claimant made a good faith effort to maintain his or her employment, when the Board's findings of fact are applied to the correct legal standard, the Board's conclusion was proper. "A trial court decision which reaches the right result will be upheld, even though the trial court may have relied upon the wrong ground or assigned erroneous reasons for its decision. [Citation omitted.]" *Hall v. Kansas Farm Bureau,* 274 Kan. 263, 273, 50 P.3d 495 (2002).

Affirmed.

All Citations

139 P.3d 153 (Table), 2006 WL 2265205

End of Document

2015 WL 6776994 (Kan.Work.Comp.App.Bd.)

The Appeals Board for the Division of Workers Compensation

State of Kansas

DAHIR DIRSHE
CLAIMANT
v.
CARGILL MEAT SOLUTIONS CORP.
RESPONDENT
AND
CHARTIS CASUALTY COMPANY
INSURANCE CARRIER

Docket No.
1,062,817
October 20, 2015

ORDER

STATEMENT OF THE CASE

***1** Claimant requested review of the March 31, 2015, Award entered by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on September 9, 2015. Stanley R. Ausemus of Emporia, Kansas, appeared for claimant. D. Shane Bangerter of Dodge City, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ found claimant sustained an 18 percent permanent partial impairment to the body as a whole. Additionally, the ALJ found claimant was terminated for cause and is not entitled to an award for a work disability.

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

ISSUES

Claimant argues he was not terminated for cause and is entitled work disability based upon a wage loss of 100 percent. Additionally, claimant contends he sustained an impairment of 19 percent to the body as a whole.

Respondent maintains claimant is not entitled to an award for a work disability because he was earning a wage in excess of 90 percent of his pre-injury earnings in an accommodated position before he was terminated for cause. Respondent argues claimant sustained a 17 percent impairment to the body as a whole.

The issue for the Board's review is: what is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant is Somalian and does not speak, read, or write English. Claimant's education consists of two years of schooling in Somalia. [1] Claimant testified he performs manual labor jobs and can only understand Somalian. Claimant was employed by respondent as a tail cutter, using pneumatic scissors to cut the tails from cow carcasses. Claimant testified

he sustained a series of injuries to his neck, chest, left arm and both shoulders on September 5, 2012, while performing repetitive work at respondent. Claimant was treated with physical therapy, medication, ice and heat, but stated the treatment was not helpful.

Dr. C. Reiff Brown examined claimant on January 10, 2013, at claimant's counsel's request. Claimant provided a history to Dr. Brown:

> In the course of [claimant's] work activity he has had gradual increasing pain involving both the shoulders. He describes this as starting out as a dull aching and gradually increasing until now it is sharp and stabbing. Any use of his hands above his chest level increases severity of the pain. [2]

Claimant indicated he had pain in his low neck and upper shoulders extending into his shoulder blades and chest. Dr. Brown reviewed claimant's medical records and performed a physical examination, finding tenderness, myofascial pain syndrome trigger points, and decreased range of motion in claimant's shoulders. Dr. Brown concluded:

***2** In my opinion, this man has severe rotator cuff tendonitis bilaterally. The severity of his limitation causes me to suspect that he has rotator cuff tears. He definitely has acromial impingement bilaterally. He also has developed myofascial pain syndrome involving the scapular and interscapular musculature. The distribution of trigger points in those muscular areas is typical of that diagnosis. He also appears to have some myositis involving the pectoral musculature and to a lesser degree the upper arm musculature.

In my opinion, the repetitive nature of this injury was demonstrated by his history, my physical examination, and review of the records. In my opinion, the work activity that he was performing subjected him to an increased risk which he would not have been exposed to in normal non-employment life. The increased risk or hazard that he was exposed to is the prevailing factor in causing this repetitive trauma situation. The repetitive trauma is the prevailing factor in causing his present condition and his need for additional treatment. [3]

Dr. Brown recommended conservative treatment and a referral to an orthopedic surgeon. Dr. Brown imposed permanent restrictions of: avoid frequent reaching of more than 18 inches from the body, avoid frequent reaching at arm's length above the head, no lifting above shoulder-level with either hand, and lifting between waist and chest level limited to 20 pounds occasionally and 10 pounds frequently. [4]

Dr. Alexander Neel first examined claimant on January 28, 2013, for complaints of bilateral shoulder pain. Dr. Neel performed a physical examination, noting claimant had hyper-exaggerated responses and was unable to cooperate in demonstrating range of motion. After a review of diagnostic studies, Dr. Neel concluded claimant has degenerative joint disease of both AC joints and a small tear of the right infraspinatus. Dr. Neel imposed work restrictions: "[n] o lift, push, pull, carry greater than [three pounds]. Work at table height. No hook or knife." [5]

Respondent accommodated claimant's work restrictions until he was terminated April 9, 2013. Respondent's records indicate claimant was terminated for workmanship and instruction: "[Claimant] was intentionally not cutting the tails. This caused unnecessary work on other workers and became a food safety risk." [6] Claimant testified he had problems working the scissors when he had shoulder pain, though he later testified the scissors operated by pushing a button, a job within the restrictions imposed by Dr. Neel. Claimant stated he was terminated because his equipment would not work. He said he could not cut tails when the scissors were jammed, and although he reported such to his supervisor for repair, it was only a matter of time before the scissors jammed again.

Daniel Medrano, kill floor supervisor, testified the pneumatic scissors are changed often, at least once per eight-hour shift. Mr. Medrano stated the scissors will be changed for an employee when requested, and he had them changed for

claimant even when he felt it was not necessary. Mr. Medrano approached claimant more than once regarding his job performance. He testified:

***3** A. [Claimant] was just letting [the tails] all go by.

Q. Letting them all or just letting one or two go by?

A. There was [*sic*] several times he was letting them all go by. That's definitely a violation of the company.

Q. And he told you during those periods of time that he couldn't cut them because the scissors were dull; isn't that right?

A. One time he stated the scissors were dull, which I got [them] changed out; and I think it was an hour later he continued letting them go by and I didn't understand why. Myself, I went up there; lead man went up to try [[them]. Everything was working fine. He just continued just to let [them] go by. [7]

Human Resources manager Scott Reid testified claimant had been written up on more than one occasion prior to his termination for safety and job performance issues. In November 2011, claimant was not turning cattle for inspection and was written up. Claimant was again written up on January 5, 2012, for work performance issues. Claimant left his equipment and exited the office. Later, he chose to stay so respondent would not process a termination for job abandonment. Claimant was written up for job abandonment. Claimant was next counseled on July 17, 2012, because he was missing work on the first and last days of each work week. Mr. Reid agreed claimant's termination was justified and for cause.

Mr. Reid noted claimant was paid more than 90 percent of his average weekly wage while working his accommodated position. Debbie Henning, respondent's workers compensation coordinator, agreed with Mr. Reid and stated claimant would have continued to earn within 90 percent of his pre-injury wage but for being terminated for cause.

Employees may file a grievance with respondent's union, though it is not mandatory. Claimant did not file a grievance with the union related to his termination because he had problems with the union previously. Ms. Henning testified the plant has continued to run since April 9, 2013, the date of claimant's termination, and she is not aware of any issues with the scissor operation.

Claimant followed up with Dr. Neel and was released to regular work duties on May 6, 2013. Claimant continued to complain of bilateral shoulder pain and was provided medication. Dr. Neel noted claimant was "very difficult to treat in terms of his exaggerated responses on exam and his unwillingness to proceed with any type of treatment other than oral pills." [8] Claimant was released from Dr. Neel's care on June 3, 2013.

Using the AMA *Guides*, [9] Dr. Neel determined claimant sustained a functional impairment of 13 percent to the right upper extremity and a functional impairment of 16 percent to the left upper extremity based on range of motion related to the shoulders. The parties stipulated these convert to an 8 percent and 10 percent impairment to the body as a whole, respectively, for a combined 17 percent functional impairment to the body as a whole.

***4** Dr. Neel opined claimant may benefit from occasional over-the-counter medication and a home physical therapy program. He also wrote, "Regarding work restrictions, [claimant] has in place permanent work restrictions and these will stand as on record at the meat packing plant." [10]

Dr. Brown again examined claimant on October 8, 2013, at claimant's counsel's request. Dr. Brown found claimant had little change since his previous examination, though he noted a slight decrease in his range of motion. Dr. Brown

determined claimant had reached maximum medical improvement and provided a rating opinion using the AMA *Guides*. Dr. Brown opined:

[T]here is a 12% permanent partial impairment of function of the right upper extremity and a 15% permanent partial impairment of function of the left upper extremity on the basis of loss of range of motion of the shoulders. There is, in my opinion, an additional 5% whole body impairment based on the DRE Cervicothoracic Category II, the result of his myofascial pain syndrome. These values convert and combine to total 19% permanent partial impairment of function of the body as a whole. [11]

Doug Lindahl, vocational rehabilitation counselor, interviewed claimant on June 11, 2014. In a report dated June 16, 2014, Mr. Lindahl listed all tasks claimant performed in the five-year period prior to the date of accident. Dr. Brown reviewed the task list prepared by Mr. Lindahl. Of the three unduplicated tasks on the list, Dr. Brown opined claimant could not safely perform any, for a 100 percent task loss.

Mr. Lindahl testified the combination of claimant's lack of English and work restrictions would preclude him from employment in most locations. He opined claimant has no earning capacity in the Dodge City area, and thus has a 100 percent loss of earnings capacity. Mr. Lindahl was not provided medical records from claimant's treating physician, nor was he provided the records of Dr. Neel releasing claimant to regular duties. Mr. Lindahl agreed his opinion regarding claimant's ability to find work would be affected if claimant was able to perform his regular work duties.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b(c) states:

> 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. 2012 Supp. 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. 2012 Supp. 44-510e(a)(2)(C) states:

***5** 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 71/2 % 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-injurywageloss, as defined in subsection (a) (2) (E) of K.S.A. 44-510 e, and amendments there to, of atleast 10 % which is directly attributeable 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.

K.S.A. 2012 Supp. 44-510e(a)(2)(E)(i) states:

> 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.

ANALYSIS

The ALJ found claimant was terminated for cause and limited the award of compensation to the extent of claimant's functional impairment. The Board agrees.

Respondent carries the burden to prove it discharged claimant for cause. [12] A Board majority has adopted the standard set forth in *Morales-Chavarin v. Nat'l Beef Packing Co.* [13] as the appropriate standard for determining if an employee was discharged for cause. [14] *Morales-Chavarin* set forth what constitutes "good cause to terminate" an employee. The Court of Appeals in *Morales-Chavarin* 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 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. [15]

Before his injury, claimant was written up or counseled three times. On November 29, 2011, claimant was written up for not turning cattle so they could be inspected by the USDA. [16] On January 5, 2012, claimant was written up for work performance. [17] At that meeting, claimant left his equipment and left the room. He was then given a final written warning for job abandonment. Mr. Reid testified that these three infractions alone justified termination. On July 17, 2012, claimant was counseled for missing work on the first and last days of the work week.

***6** After his injury and after claimant was placed on the job cutting tails, Mr. Medrano testified there were several instances where claimant let all the carcasses go by without cutting the tail off in violation of company policy. Claimant was taken to the office a "couple times" for counseling. [18] Claimant alleges he let the cattle go by because his scissors were dull. Mr. Medrano recalled one instance where he changed the blades in claimant's scissors and within an hour claimant was letting cattle go by without doing his job. Mr. Medrano testified he and his lead man checked the scissors and found they were not dull and functioned properly. The problem continued, and claimant was written up and terminated on April 9, 2013, for not cutting tails.

Based upon the facts presented, the Board finds respondent met its burden of proving claimant was terminated for cause.

The parties stipulated that Dr. Neel's functional impairment rating of 17 percent could be considered by the Board without supporting testimony from Dr. Neel. Dr. Brown found claimant suffers a 19 percent whole body impairment. The ALJ found the opinions of both physicians to be equally credible. The Board Agrees and find claimant suffers an 18 percent whole body functional impairment as the result of his injury by repetitive trauma.

CONCLUSION

Claimant was terminated for cause. Claimant suffers an 18 percent whole body functional impairment as the result of his injury by repetitive trauma while working for respondent.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated March 31, 2015, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October, 2015.

Valerius
Board Member
Carpinelli
Board Member
Korte
Board Member

Footnotes

1 Claimant testified at regular hearing he had two years of education in Somalia, though he informed vocational expert Doug Lindahl he had four years of Somalian education. (R.H. Trans. at 11; Lindahl Depo. at 7.)
2 Brown Depo. at 6; Ex. 2 at 4.
3 *Id.* at 10-11.
4 See *id.*, Ex. 2 at 5.
5 Stip. (filed Mar. 2, 2015) at 5.
6 Reid Depo., Ex. B at 2.
7 Medrano Depo. at 12-13.
8 Stip. (filed Mar. 2, 2015) at 10.
9 American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.
10 Stip. (filed Mar. 2, 2015) at 12.
11 Brown Depo., Ex. 2 at 2.
12 See *Gutierrez v. Dold Foods, Inc.*, 40 Kan. App. 2d 1135, 199 P.3d 798 (2009).
13 *Morales-Chavarin v. Nat'l Beef Packing Co.*, No. 95,261, 2006 WL 2265205 (unpublished Kansas Court of Appeals opinion filed Aug. 4, 2006), *rev. denied* 282 Kan. 790 (2006).
14 See *Merrill v. Georgia Pacific*, No. 1,064,126, 2015 WL 3642455 (Kan. WCAB May 28, 2015).
15 *Morales-Chavarin, supra*, at 5.
16 See Ried Depo. at 7.
17 See *id.*
18 Medrano Depo. at 12.

2015 WL 6776994 (Kan.Work.Comp.App.Bd.)

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372 P.3d 446 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

De Anna **MERRILL**, Appellee,
v.
GEORGIA PACIFIC and Indemnity Insurance Co. of N.A., Appellants.

No. 113,996.
|
June 10, 2016.

Appeal from Workers Compensation Board.

Attorneys and Law Firms

Nathan D. Burghart and Carissa A. Heim, of Burghart Law, LLC, of Lawrence, for appellants.

John J. Bryan, of Bryan, Lykins, Hejtmanek, P.A., of Topeka, for appellee.

Before GREEN, P.J., BUSER, J., and HEBERT, S.J.

MEMORANDUM OPINION

PER CURIAM.

***1** In this workers compensation appeal, **Georgia Pacific** contends the Workers Compensation Board (Board) erred when it determined that its former employee, De Anna **Merrill**, was entitled to permanent partial disability benefits in excess of her functional impairment. After carefully reviewing the parties' briefs and the record on appeal, we find that substantial competent evidence supports the Board's finding that **Merrill** was eligible to receive a work disability award.

FACTUAL AND PROCEDURAL BACKGROUND

On October 17, 2011, **Merrill** began working for **Georgia Pacific** as a sacker in a gypsum mine in Blue Rapids, **Kansas**. At the mine, the company converted gypsum ore into products ranging from dental plaster to subflooring. Later, **Merrill's** duties included mixing and cooking "dirty rock" (gypsum that had other components in it) in large autoclaves. Lastly, **Merrill** worked as an Ultra operator.

As an Ultra operator, **Merrill** cooked "clean rock" (very white gypsum) in autoclaves and, once cooked, she used an overhead hoist to move the gypsum into baskets that were placed in a dryer. After drying, **Merrill** guided the gypsum through "a series of tubes, screws and air tubes" into a hammer mill or screw mill where the gypsum was pulverized into a dust. The product then went into a hopper where it was sifted by screens.

Merrill was injured on December 18, 2012. On that date, a 40–pound bolus of gypsum struck her "full force in the face." Because of the incident, **Merrill** inhaled some gypsum. Employees used an air hose to blow the gypsum dust off of **Merrill**, and she washed her face and hands. **Merrill** informed the plant foreman and safety manager that her "lungs were burning really bad," but they declined her request for medical assistance and told her to finish her shift. A couple of days later, **Merrill** was still having difficulty breathing and her lips were turning blue, so she went to the emergency room, where she was given IV medications and breathing treatments.

On January 15, 2013, **Merrill** was evaluated by Dr. Gerald R. Kerby. Dr. Kerby diagnosed **Merrill** with irritant-induced asthma from exposure to gypsum dust. Dr. Kerby also opined that **Merrill** had "an element of bronchitis ... which [was] probably related to her untreated asthma." As a result, Dr. Kerby prescribed several medications and recommended that **Merrill** either refrain from work or remain in a nondusty area for 4 days "to give the medication a chance to improve her current asthma and bronchitis symptoms."

Upon **Merrill's** return to **Georgia Pacific**, she performed her regular jobs duties with the use of a dust mask. According to **Merrill**, however, completing her assigned tasks was "difficult [and] very painful" and she had to move "real slow" and stop multiple times when climbing stairs because she "couldn't breathe."

Merrill filed an application for workers compensation on February 4, 2014. **Georgia Pacific** appointed Dr. William M. Leeds—a board certified specialist in internal

medicine, diseases of the chest, and intensive care medicine—as the authorized treating physician. Dr. Leeds diagnosed Merrill with irritant-induced asthma, or reactive airway dysfunction syndrome (RADS), and opined that she would need "chronic treatment most likely [for] the rest of her life." Dr. Leeds imposed the following work restrictions: "[S]tay away from dust, fumes, chemicals, animal dander, [and] avoid extremes of temperature and humidity." Dr. Leeds assessed Merrill with a whole person impairment of 25%.

***2** On February 12, 2014, Dr. Thomas Beller, a board-certified specialist in internal medicine with a subspecialty in pulmonary medicine, completed an independent medical examination of Merrill at the request of Georgia Pacific. Similar to Dr. Leeds, Dr. Beller diagnosed Merrill with RADS caused by a work-related exposure to gypsum, and he recommended work restrictions which included avoiding "exposure to fumes, dust, smoke and respiratory irritants as much as possible." Dr. Beller assessed Merrill with a 10% whole person impairment.

Georgia Pacific terminated Merrill on February 5, 2013, the day after she filed her workers compensation claim. She was terminated for leaving a shift early, failing to properly shut down equipment, dishonesty, and poor job performance. The primary reasons for Merrill's termination derived from a workplace incident.

Merrill testified that about 2 a.m. on February 3, 2013, some of the equipment she had been using began to malfunction. Merrill contacted Tobby Oatney, whom she described as the "on-call foreman/manager," at home and advised him of the situation. Oatney dispatched a mechanic who resolved the problems, whereupon Merrill called Oatney to let him know that the equipment was functioning. During this conversation Oatney asked Merrill when she would be going on "all pause"; and after Merrill told him about 4 a.m., Oatney stated that "if anything breaks down after 2AM don't call [me], just shut it down."

At about 3:40 a.m., an alarm on one of the autoclaves sounded indicating there was high pressure, but Merrill noted there was no high pressure in the machine. Merrill's attempts to disable the alarm were unsuccessful, and when she tried to reclose the lid on the autoclave, "material started coming out of the overflow for the [r]eheater." Merrill "shut the appropriate machinery down" and contacted Oatney, who instructed her to " '[s]hut it down and go home.' " Merrill informed Oatney that the alarm was sounding and would not shut off. In response, Oatney stated, " '[T]hat's fine. Leave it alone and just shut everything down." Merrill testified, "[Oatney] specifically told me to shut the equipment down and go home. He told me that several times. He told me that two or three times each time I called him."

In keeping with Oatney's instructions, Merrill attempted to shut down the equipment but because it was broken she was unable to properly turn off some of the equipment. While some autoclaves, dryers, and oil burners were left operating to some degree, Merrill took precautions to ensure this equipment would not be further damaged.

Merrill advised Oatney of the manner in which she shut down the equipment, and according to her, Oatney replied, " 'That's fine, just go home and we will be in in the morning and get it fixed.' " Merrill advised Oatney that she would leave him a note explaining "what [she] had done and what the issues were" and then go home. Merrill left Oatney a note, and before leaving, she told the Densite operator "what was going on and that [Oatney] had told [her] to go ahead and shut it down, that [she] had shut it down to the best of [her] ability, and that [she] was going home."

***3** In the workers compensation proceedings, Merrill testified that Georgia Pacific never provided her a hearing or an opportunity to present her side of the story prior to her termination. In fact, according to Merrill, on the day she was terminated, James Mullins, the human resources manager, called her to his office and stated, " '[W]e[']re not going to spend much time on this. You are being terminated for 'poor workmanship and improperly shutting equipment down.' "

On the other hand, Mullins testified that Merrill's position as an Ultra operator was under the authority of the production department, overseen by the production supervisor. Mullins maintained that when a production employee encounters malfunctioning equipment, the proper procedure would be to contact the production supervisor to seek further guidance. If the employee believes it is not safe to leave the equipment in operation, he or she may follow the posted shutdown procedure and remain with the equipment until relieved or given other instructions by the supervisor. Moreover, employees are

not allowed to leave the plant without permission because (1) "the employee could get hurt and [Georgia Pacific] might have some liability" and (2) Georgia Pacific does not want to leave equipment running and unattended because this could cause damage to the product and facility.

When Mullins learned of the February 3, 2013, incident, he conducted an investigation which involved interviewing Merrill, Oatney, and Merrill's production supervisor, John Nordquist. According to Mullins, after hearing Merrill's version of the events he asked Oatney whether he ever gave Merrill permission to leave and Oatney denied giving such an instruction.

Mullins also confirmed with Nordquist that while an employee was authorized to contact Oatney, the maintenance supervisor, for assistance with malfunctioning equipment, any decision to cease operations or leave early should come from the employee's direct supervisor, who, in this case, was Nordquist. Mullins explained that although there was no damage to the equipment, Merrill's actions resulted in a substantial production and material loss because the machines did not operate for several hours although the mechanical problem was an "extremely simple fix." Based on his investigation, Mullins determined it was appropriate to terminate Merrill because she never contacted Nordquist and she did not use the "proper shut down procedure."

Mullins stated that on the day of Merrill's termination he provided her with a disciplinary form entitled Employee Counseling Documentation, in the presence of her union representative, which listed the causes for her discharge. In particular, the Employee Counseling Documentation read as follows:

> "You were previously given a disciplinary lay-off for your continued inefficient operations on the mixer floor. You were disqualified from that position and ultimately moved to the Ultra Operator position effective 9/7/2012. You have continued to display poor quality workmanship and an inability to efficiently perform your duties though provided more than adequate training and opportunity.
>
> ***4** "In the instant case on Saturday, February 2, 2013 into the morning of Sunday, February 3, 2013 you left the plant without authorization of any member of management and additionally, left the equipment running, which was not in accordance with normal shut-down procedures.
>
> "For the stated behaviors you are now being **'terminated'** according to **Article X(1) Causes for Discharge:** 'Inefficiency continuing after repeated counseling from Foreman, Human Resource Manager or Plant Manager;' **Article X(3),** 'Insubordination, neglect of duty or disorderly conduct' (leaving the plant without authorization) and **Article X(5),** 'Dishonesty' (misrepresentation of conversation and instructions from supervisor Tobby Oatney to supervisor Nicole Wassenberg)."

Nordquist also provided testimony during this litigation. Although he could not recall whether he was the on-call production supervisor at the time of the incident, Nordquist indicated that Merrill was working alone on the production floor during that shift. As a general matter, Nordquist advised that equipment breaks down at least once a week; and in the event of a breakdown during a graveyard shift, the typical procedure would be for a production employee to contact the production supervisor and, if necessary, that supervisor would contact the maintenance supervisor, who would then decide whether a crew would need to be dispatched. When asked if a production employee is supposed to call the maintenance supervisor directly, Nordquist replied, "Not supposed to, no. But I will say if it's an emergency and you can't get ahold of your production supervisor, then [it] would be proper to get ahold of somebody." Nordquist also testified there is a specific shutdown procedure for the machinery in the Ultra department and the equipment should not be left unattended.

According to Nordquist, Merrill should have contacted the production supervisor, rather than Oatney, when the equipment began to malfunction. When asked, however, if he had ever told Merrill that she needed to call the production supervisor for maintenance issues, he replied, "I don't know that I can say that for a fact." Nordquist acknowledged that Oatney should have known that Merrill was not supposed to call him directly; and when asked if Oatney should have advised Merrill of her error, Nordquist replied, "I would have thought so." Nordquist, however, refused to answer whether Merrill should have followed Oatney's directions, other than to indicate that Merrill should have questioned any directions from Oatney that went beyond contacting her production supervisor.

Merrill's discharge was not Georgia Pacific's first attempt to terminate her. Prior to her work injury, on July 3, 2012, Georgia Pacific terminated Merrill for "poor quality workmanship" after she was warned about producing contaminated mixes on the mixing floor. Merrill acknowledged the warning and Georgia Pacific's attempt to terminate her, but she testified that the company reinstated her following a successful union grievance. Upon her reinstatement, Merrill was assigned to "yard help" and later to work in the Densite department. Shortly thereafter, Merrill bid to a position in the Ultra department. According to Merrill, after her disciplinary layoff, she never received any criticism of her job performance nor was she given any poor performance warnings.

*5 Mullins confirmed that in the summer of 2012 he attempted to terminate Merrill because she had "a number of performance issues" on the mixing floor, including "poor quality workmanship and [an] inability to ... produce at expected rates." After the union filed a grievance on Merrill's behalf, however, Mullins determined it was appropriate to reinstate Merrill and modify her termination to a "disciplinary layoff."

The Division of Workers Compensation held a regular hearing on July 17, 2014. Merrill testified in person to supplement her previous testimony. The administrative law judge (ALJ) also reviewed the deposition transcripts which memorialized the testimony of numerous witnesses. On December 15, 2014, the ALJ awarded Merrill work disability benefits. After determining that Merrill had a functional impairment of at least 10% and a wage loss of 71%, the ALJ addressed Georgia Pacific's contention that Merrill's termination, which Georgia Pacific contended was for cause, disqualified her from receiving a work disability award. In particular, Georgia Pacific argued that under K.S.A.2012 Supp. 44–510e(a)(2)(E)(i), claimants are ineligible to receive permanent partial disability benefits in excess of their functional impairment if their wage loss was caused by a voluntary resignation or a termination for cause.

The ALJ began her analysis by noting that the Workers Compensation Act (Act), K.S.A. 44–501 *et seq.*, does not define the phrase "termination for cause," nor does the Act provide any standards for determining whether the circumstances surrounding a claimant's firing constitute a termination for cause. The ALJ found, however, that it was "reasonable and logical to use the standards defining discharged for misconduct by the unemployment laws to define termination for a cause." Specifically, the ALJ adopted the definition set forth in K.S.A.2012 Supp. 44–706(b)(4)(B), which provides that an individual shall not be disqualified from receiving unemployment insurance benefits if his or her discharge occurred under the following circumstances:

> "[T]he individual was making a good-faith effort to do the assigned work but was discharged due to: (i) Inefficiency, (ii) unsatisfactory performance due to inability, incapacity or lack of training or experience, (iii) isolated instances of ordinary negligence or inadvertence, (iv) good-faith errors in judgment or discretion, or (v) unsatisfactory work or conduct due to circumstances beyond the individual's control." K.S.A.2012 Supp. 44–706(b)(4)(B).

Applying this standard, the ALJ concluded that Merrill was not terminated for cause because she had made a good-faith effort to maintain her employment and properly perform her assigned work duties.

Georgia Pacific appealed this adverse ruling to the Board. The company argued that the ALJ applied an incorrect definition of the phrase " 'termination for cause.' " Relying on our court's decision in *Morales–Chavarin v. National Beef Packing Co.*, No. 95,261, 2006 WL 2265205 (Kan.App.) (unpublished opinion), *rev. denied* 282 Kan. 790 (2006), Georgia Pacific contended that the proper standard for such a determination involves deciding " 'whether the termination was reasonable, given all of the circumstances.' " Georgia Pacific claimed that under this rubric, Merrill was clearly terminated for cause and "[e]ven if [Merrill] believed she was acting in good faith in doing what she did, that [did] not negate the fact that her actions in leaving the machinery running and unattended created—in the ALJ's words—'an inherently dangerous situation.' " In response, Merrill agreed that *Morales–Chavarin* set forth the appropriate standard of review, but she insisted that the evidence supported the ALJ's ultimate decision.

*6 On May 28, 2015, the Board issued an order on Georgia Pacific's application for review. A majority of three members of the Board affirmed the ALJ's finding that Merrill was fully entitled to a work disability award. Although the majority disagreed with

the ALJ's determination that the "employment security law definition of being discharged for misconduct can or should be used to determine termination for cause in workers compensation cases" and agreed with the parties' assertion that *Morales–Chavarin* set forth the appropriate standard for determining whether an employee was discharged for cause, the majority found that **Georgia Pacific** failed to carry its burden to prove that the company discharged **Merrill** for cause because its claimed reasons were suspect.

The two remaining Board members dissented. After noting that the ALJ's award "seem[ed] to go so far as to require that a claimant act in bad faith in order to justify the denial of work disability benefits due to a termination for cause," the minority determined that the Act contained no good-faith/bad-faith requirement. According to the minority, **Georgia Pacific** was not obligated to prove that **Merrill** acted in bad faith while performing the actions that led to her termination; instead, the Act simply required that "the termination be 'for cause.' " The minority then found that the evidence established that **Merrill's** termination qualified as a discharge for cause because, as the ALJ acknowledged, **Merrill** created an " 'inherently dangerous situation' " when she left a running piece of equipment unattended and this was not her first disciplinary problem.

Georgia Pacific filed a timely petition for judicial review.

DID THE WORKERS COMPENSATION BOARD ERR WHEN IT FOUND THAT GEORGIA PACIFIC DID NOT TERMINATE MERRILL FOR CAUSE?

Georgia Pacific contends the Board erred when it awarded **Merrill** permanent partial disability benefits in excess of her functional impairment because the evidence demonstrates that **Merrill's** wage loss was entirely attributable to her termination for cause rather than her work-related injury. The company asserts that under K.S.A.2012 Supp. 44–510e(a)(2)(E)(i), claimants must establish a nexus between their work disability (task loss and wage loss) and injury.

In order to resolve this issue, we must interpret and apply K.S.A.2012 Supp. 44–510e. We exercise unlimited review over questions involving the interpretation of a statute, owing " '[n]o significant deference' " to the agency's or the Board's interpretation or construction. *Ft. Hays St. Univ. v. University Ch., Am. Ass'n of Univ. Profs.*, 290 **Kan.** 446, 457, 228 P.3d 403 (2010).

Under the **Kansas** Judicial Review Act (KJRA), K.S.A. 77–601 *et seq.*, which governs our standard of review for workers compensation cases, we review a challenge to the Board's factual findings in light of the record as a whole to determine whether the findings are supported to the appropriate standard of proof by substantial competent evidence. See K.S.A.**2015** Supp. 44–556(a); K.S.A.**2015** Supp. 77–618(a); K.S.A.**2015** Supp. 77–621(c)(7), (d); "[S]ubstantial evidence" refers to evidence possessing something of substance and relevant consequence to induce the conclusion that the award was proper, furnishing a basis of fact from which the issue raised could be easily resolved. *Ward v. Allen County Hospital*, 50 Kan.App.2d 280, 285, 324 P.3d 1122 (2014). In considering the record as a whole, the court must (1) review evidence both supporting and contradicting the agency's findings; (2) examine the presiding officer's credibility determination, if any; and (3) review the agency's explanation as to why the evidence supports its findings. K.S.A.**2015** Supp. 77–621(d); *Williams v. Petromark Drilling*, 299 **Kan.** 792, 795, 326 P.3d 1057 (2014). Our court must not, however, reweigh the evidence or make its own independent review of the facts. K.S.A.**2015** Supp. 77–621(d); *Williams*, 299 **Kan.** at 795.

***7** Under the Act, the amount of compensation a claimant is entitled to receive depends upon the nature of the claimant's disability. *Casco v. Armour Swift–Eckrich*, 283 **Kan.** 508, 522, 154 P.3d 494 (2007). When, as in this case (December 2012 injury), the claimant sustains a permanent partial disability, the claimant is entitled to compensation under K.S.A.2012 Supp. 44–510d for a scheduled injury or K.S.A.2012 Supp. 44–510e for a nonscheduled injury. *Casco*, 283 **Kan.** at 522. Claimants, like **Merrill**, who sustain an injury that is not included in the schedule of disabilities, are entitled to a "permanent partial general disability" award. See 283 **Kan.** at 522. If certain conditions are satisfied, K.S.A.2012 Supp. 44–510e(a), authorizes claimants to receive permanent partial general disability compensation in excess of their functional impairment, *i.e.*, a work disability award. Work disability awards are calculated in accordance with the formula set forth in K.S.A.2012 Supp. 44–510e, which, in short, averages the claimant's postinjury wage loss percentage with his or her task loss percentage.

The manner in which Kansas courts have treated a claimant's eligibility for a work disability award in situations involving a wage loss caused by a termination for cause has been in flux over the years. Before addressing the merits of Georgia Pacific's arguments, it is helpful to begin with a brief discussion of this legal history.

Prior to May 15, 2011, K.S.A. 44–510e(a) provided, in pertinent part:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.... An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury."

In the 1990s, our court concluded that K.S.A. 44–510e(a) implicitly contained a requirement that a claimant make a good-faith effort to obtain or retain appropriate employment to mitigate the claimant's wage loss before the claimant could claim entitlement to work disability benefits, as it would be "unreasonable for the courts to conclude the legislature intended to encourage workers to merely sit at home, refuse to work, and take advantage of the workers compensation system." *Copeland v. Johnson Group, Inc.*, 24 Kan.App.2d 306, 319, 944 P.2d 179 (1997). Our court also determined that claimants who were terminated for cause were precluded from receiving a work disability award. See, *e.g., Ramirez v. Excel Corp.*, 26 Kan.App.2d 139, 140–43, 979 P.2d 1261, *rev. denied* 267 Kan. 889 (1999) (claimant was not eligible for a work disability award because the Excel Corporation terminated him for cause, *i.e.,* claimant failed to disclose a prior injury on his employment application); *Minden v. Paola Housing Authority*, No. 100,172, 2009 WL 596559, at *2–6 (Kan.App.2009) (unpublished opinion) (substantial competent evidence supported the Board's determination that claimant was terminated in good faith, rendering her ineligible for a work disability award).

***8** In 2009, however, our Supreme Court abolished the good-faith requirement in the landmark decision of *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, Syl. ¶ 3, 214 P.3d 676 (2009). Moreover, the court specifically disapproved of all prior cases that imposed such a requirement, including those that involved situations in which the injured employee was terminated for cause. 289 Kan. 605, Syl. ¶ 3.

Subsequently, in *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan.App.2d 386, 391, 224 P.3d 1197 (2010), this court eliminated another judicially created requirement when it concluded that K.S.A. 44–510e does not mandate that an injured worker prove a causal connection between his or her wage loss and injury and stated: "Absent a specific statutory provision requiring a nexus between the wage loss and the injury, this court is not to read into the statute such a requirement." See *Killough v. Goodyear Tire & Rubber Co.*, No. 103,321, 2011 WL 2175950, at *4 (Kan.App.2011) (unpublished opinion). In other words, under K.S.A. 44–510e(a), "[t]he reason for the employee's postinjury wage loss [was] irrelevant." *Criswell v. U.S.D. No. 497*, No. 104,517, 2011 WL 5526549, at *3 (Kan.App.2011) (unpublished opinion), *rev. denied* 296 Kan. 1129 (2013).

Based upon *Bergstrom* and *Tyler,* our court began upholding a claimant's right to a work disability award in situations where the claimant's wage loss was due to a termination for cause rather than the claimant's injury. See, *e.g., Butler v. Cessna Aircraft Co.*, No. 103,965, 2011 WL 2205238, at *3 (Kan.App.2011) (unpublished opinion) (claimant eligible for work disability award even where claimant's wage loss was due to termination for cause); *Criswell,* 2011 WL 5526549, at *2 ("Although

Criswell makes a compelling argument that allowing claimants who have been terminated for postinjury misconduct to have their awards increased from a functional disability ... to a work disability places an employer in an untenable situation, our Supreme Court has made it perfectly clear in *Bergstrom* that we are not to read language into a statute that is plain and unambiguous.").

In an apparent response to *Bergstrom,* the legislature amended K.S.A. 44–510e, and among other changes, the amended version of the statute now specifically requires a nexus between the claimant's wage loss and his or her injury. L.2011, ch. 55, sec. 9. K.S.A.2012 Supp. 44–510e(a)(2)(C), provides that a claimant may be eligible to receive permanent partial general disability compensation in excess of his or her percentage of functional impairment if the claimant's percentage of functional impairment, determined to be caused solely by the injury, exceeds 7.5% to the body as a whole and the "employee sustained a post-injury wage loss ... of at least 10% which is *directly attributable to the work injury and not to other causes or factors.*" (Emphasis added.) "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.*" (Emphasis added.) K.S.A.2012 Supp. 44–510e(a)(2)(C). " 'Wage loss' " is defined as "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." K.S.A.2012 Supp. 44–510e(a)(2)(E). Importantly, the legislature also included this language: any "[w]age loss caused by voluntary resignation or *termination for cause shall in no way be construed to be caused by the injury.*" (Emphasis added.) K.S.A.2012 Supp. 44–510e(a)(2)(E)(i).

***9** In amending K.S.A. 44–510e, our legislature did not provide a standard for determining whether a claimant was terminated for cause. But in *Morales–Chavarin v. National Beef Packing Co.*, No. 95,261, 2006 WL 2265205, at *4 (Kan.App.) (unpublished opinion), *rev. denied* 282 Kan. 790 (2006), our court addressed as an issue of first impression, "what constitutes good cause to terminate an employee so as to prohibit an employee from receiving work disability benefits."

In *Morales–Chavarin,* the claimant suffered a repetitive use injury while working for the National Beef Packing Company (National Beef), and the company placed him on a leave of absence because there were no jobs available that accommodated his restrictions. National Beef provided Morales–Chavarin with a form which informed him that his leave ended on April 6, 2004, that prior to that date he must contact National Beef, and that his failure to do so " 'may result in discharge.' " 2006 WL 2265205, at *1. National Beef also provided Morales–Chavarin with a Family Medical Leave Act form that explained the leave and gave the expiration date. Morales–Chavarin refused to sign the forms because he did not request the leave and he understood that National Beef no longer had a job available to him.

George Hall, the personnel director for National Beef, testified that he met with Morales–Chavarin when he was placed on leave and informed him that he was required to report to the employer after his doctor's appointment on April 6, 2014. Morales–Chavarin, on the other hand, claimed that he understood he should report any restrictions to National Beef and that he told the personnel office to contact his attorney if they needed to notify him of anything. While Morales–Chavarin admitted that he did not contact National Beef after his doctor's appointment, he provided his attorney with a copy of the doctor's initial report.

National Beef's collective bargaining agreement authorized the discharge of an employee for "overstaying a leave of absence," and on April 21, 2004, National Beef terminated Morales–Chavarin for not reporting back to work. Subsequently, Morales–Chavarin made three attempts to regain his employment, but National Beef refused to rehire him. Notably, Selena Sena, National Beef's workers compensation coordinator, testified that on April 15, 2004, she received the report from Morales–Chavarin's doctor, which stated that he would define the claimant's permanent work restrictions in a later report, which Sena received 4 or 5 days later. Sena conceded that had Morales–Chavarin brought the initial report to National Beef on April 6 his leave would have been extended because the company "could not have done anything else until [it] received [the] ... permanent restrictions." 2006 WL 2265205, at *2.

When the Board determined that Morales–Chavarin was entitled to a work disability award, National Beef

appealed, alleging that Morales–Chavarin's termination for cause disqualified him from receiving the benefits. After reviewing relevant caselaw, our court concluded that the Board's determination that the "proper test [was] whether the claimant made a good faith effort to maintain his employment was incorrect" because "the proper question [was] whether National Beef had good cause to terminate [Morales–Chavarin]." 2006 WL 2265205, at *4.

***10** Our court in *Morales–Chavarin* then undertook the task of defining the proper standard of review. In doing so, the court noted that while discussing the terms " 'cause' and 'good cause,' " 2006 WL 2265205, at *5, within an employment contract in *Decatur County Feed Yard, Inc. v. Fahey*, 266 Kan. 999, 974 P.2d 569 (1999), our Supreme Court referred to *Weir v. Anaconda Co.*, 773 F.2d 1073, 1080 (10th Cir.1985), which applied Kansas law:

> " " '[Cause for discharge] is a shortcoming in performance which is detrimental to the discipline or efficiency of the employer. Incompetency or inefficiency or some other cause within the control of the employee which prohibits him from properly completing his task is also included within the definition. A discharge for cause is one which is not arbitrary or capricious, nor is it unjustified or discriminatory.' " [Citation omitted.]" *Morales–Chavarin*, 2006 WL 2265205, at *5.

Based upon our examination of caselaw, our court concluded in *Morales–Chavarin*, 2006 WL 2265205, at *5. that the "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," and the panel explained:

> "Included within these circumstances to consider would be whether the claimant made a good faith effort to maintain his or 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." 2006 WL 2265205, at *5.

Our court utilized this standard to examine whether Morales–Chavarin's discharge qualified as a termination for cause. First, the court found the record supported the Board's conclusion that Morales–Chavarin acted in good faith because the evidence indicated that he was "confused as to whether he was required to report to National Beef after he was examined by [his doctor] but did not receive [his] restrictions" and he made a diligent attempt to regain his employment. 2006 WL 2265205, at *5–6. Second, the court agreed with the Board's determination that National Beef's failure to contact Morales–Chavarin prior to terminating him qualified as a failure to act in good faith. The panel also found that based upon Sena's testimony the timing of the events further supported this finding. Finally, the panel analyzed the timing of Morales–Chavarin's termination, and the panel concluded that National Beef's reason for termination appeared to be a subterfuge to avoid work disability payments. 2006 WL 2265205, at *6–7.

Returning to the case on appeal, we agree with the parties that the Board did not err when it utilized the standard set forth in *Morales–Chavarin* to determine whether Merrill was terminated for cause. Georgia Pacific, however, claims that the Board erred, as a matter of law, because the majority improperly applied the *Morales–Chavarin* test. That is the next question for our consideration in this appeal.

***11** According to Georgia Pacific, the Board placed too much emphasis upon the good faith of the parties and neglected its obligation to consider the totality of the circumstances. As Merrill counters, however, the majority's discussion of the factual circumstances surrounding her termination are consistent with the *Morales–Chavarin* standard.

In applying the *Morales–Chavarin* standard to the facts of this case, the Board discussed the evidence relevant to its decision:

> "[J]ust four days prior to the incident that gave rise to [Merrill]'s discharge, an internal email focused on [her] breathing being a safety issue. This fact gives some credence to [her] argument that she was terminated due to her job-induced asthma and not for cause.
>
> ....

"Of note, Mr. Mullins agreed that if [Merrill]'s version of events were correct, he would not have terminated her employment, but he opted to believe Mr. Oatney's statement that he did not tell [Merrill] to go home.

"It cannot be stressed enough that the judge believed [Merrill]'s description of events, which was largely uncontroverted. Mr. Oatney did not testify. Written statements attributed to Mr. Oatney, including a write-up and an email, were made part of the record. Such documents do not indicate if he did or did not give [Merrill] permission to go home on February 3, 2013. Mr. Nordquist testified Mr. Oatney should have told [Merrill] to call a production supervisor instead of him. There is no evidence from these documents generated by Mr. Oatney that he told [Merrill] she should not be calling him and instead should have called her production supervisor. From Mr. Oatney's brief statements, these Board Members cannot conclude [Merrill] was dishonest. It is difficult to place much credence in statements Mr. Mullins attributes to Mr. Oatney to the effect that Mr. Oatney never told [Merrill] to go home. No witness even knows the whereabouts of Mr. Oatney.

"While the Board conducts de novo review, the Board nonetheless often opts to give some deference —although not statutorily mandated—to a judge's findings and conclusions concerning credibility where the judge was able to observe the testimony in person. The judge had the first-hand opportunity to assess [Merrill]'s testimony.... [T]he judge made a credibility ruling in [Merrill]'s favor. The judge did not adopt [Georgia Pacific]'s asserted version [of] what transpired as true....

"Other evidence of what [Merrill] did prior to her work accident does not sufficiently justify [Merrill]'s termination. In [July] 2012, prior to her accident, [Merrill] was terminated based on inefficiency. After a union grievance, her termination was rescinded ... after [Mullins] determined she may not have had the appropriate training. It seems unfair to use [Merrill]'s prior termination to justify her subsequent termination when it turned out [Georgia Pacific] agreed such prior termination was unwarranted.

....

***12** "[Georgia Pacific] asserts [Merrill] had been previously written up numerous times for inadequately performing her job as a mixer.... [Mullins] did not counsel her after she was reinstated and given the job in the Ultra department. Mr. Nordquist testified he had issues with [Merrill] when she did the mixer job, but nothing else until the event leading to [Merrill]'s termination. Mr. Nordquist did not know if he ever gave [Merrill] any sort of warning or disciplinary action, but if he had, [Georgia Pacific] should have had a copy of any verbal or written reprimand. No such documentation was in the evidentiary record. From late June 2012 until she was discharged, [Merrill] received no write-ups. From August 2012 until her February 5, 2013, termination, [Merrill] was not cited for inefficiency, insubordination, neglect of duty or dishonesty. [Merrill] testified that prior to February 5, 2013, when she was discharged, she had not received any criticism of her job performance in the Ultra department."

As summarized above, in applying the *Morales–Chavarin* standard, the Board thoroughly considered Merrill's work and disciplinary history, her work injury of December 18, 2012, the work incident of February 3, 2013, and Georgia Pacific's handling of both Merrill's injury and her termination following the work incident. As detailed in the Board's opinion, it is apparent the majority considered the totality of circumstances as required in utilizing the *Morales–Chavarin* standard.

We are persuaded that the Board properly applied the correct standard of review and there was sufficient substantial competent evidence to support its determination that Merrill was not terminated for cause. In addition, similar to *Morales–Chavarin,* we find support for the Board's belief that the reasons Georgia Pacific provided for Merrill's termination were pretextual in order to avoid providing Merrill work disability payments. In particular, there are three reasons, supported by evidence, which justify the propriety of the Board's conclusion.

First, Mullins claimed that Merrill was terminated for inefficiency following repeated counseling. Yet, he also testified that while she received counseling during her stint as a mixer, she received no further counseling following her disciplinary layoff. Similarly, when asked if Merrill was a "satisfactory employee" as far as he was concerned,

Nordquist replied, "We had had some issues when she was in [U]ltra and that process of trying to figure out whether we had an issue with the equipment or whether it was an issue with the employee making a mistake. I don't know that it was ever completely determined." Moreover, Nordquist could not recall whether he ever gave Merrill "any kind of a warning or disciplinary action." In sum, Georgia Pacific's claim that Merrill was terminated for inefficiency lacked a sufficient factual basis.

Second, Georgia Pacific's claims that Merrill was terminated because she was insubordinate and neglected her job duties focused on the company's version of Merrill's conduct during the February 3, 2013, equipment malfunction. Yet, Georgia Pacific's version was highly controverted by Merrill's testimony. And based on the following discussion between Mullins and Merrill's attorney, it is apparent that Merrill's termination was predicated on Oatney's assertion that he did not tell Merrill that she could leave her shift early.

> ***13** "[MERRILL'S ATTORNEY:] If the instruction she was given [was] to contact ... Oatney, and she was given his home phone number to do so, and she did contact him four times, and he did give her instructions each time, and he never told her, 'no, you're calling the wrong person. You need to call John Nordquist or somebody else.' Should she have disregarded what he told her to do?
>
> "[MULLINS:] Well, I would say if he had actually told her to go home, she probably would have been on firm ground. I wouldn't have terminated her. But the reality is [Oatney] clearly stated to me that he did not give her that instruction. So—since he didn't give her those instructions, she had no business leaving.
>
> "[MERRILL'S ATTORNEY:] I understand what you're saying. That the boss said I didn't say that, she says he did, but you are saying that had the boss told her to go home, shut it down and go home, then she should have done what he told her?
>
> "[MULLINS:] If the boss had given her those instructions, absolutely, she should follow the instructions she was given."

While Mullins indicated that Merrill's termination was essentially premised upon Oatney's claim that he never told Merrill she could abandon her shift, Oatney did not testify at the regular hearing, nor was he deposed. Mullins conceded that Oatney was terminated for "excess absenteeism," and neither Mullins nor Nordquist had any idea of Oatney's whereabouts. In fact, Nordquist testified that he did not know why Oatney left, and while he believed Oatney left "[n]ot too long after [Merrill]," he did not "know [that] for a fact." Moreover, Mullins indicated that a copy of Oatney's written statement concerning Merrill's termination confirmed his assertion that he did not advise Merrill to leave her shift early. But as the Board found, Oatney's written statement does not address whether he told Merrill to leave. Likewise, another witness spoke with Merrill and Oatney after Merrill's graveyard shift, and the written statement she prepared is also silent on this important issue.

As the Board properly found: "The judge had the first-hand opportunity to assess [Merrill]'s testimony.... [T]he judge made a credibility ruling in [Merrill]'s favor." Merrill's testimony directly controverted the testimony of company employees who spoke with Oatney. We may not challenge the ALJ's credibility finding which is supported by the evidence. Given that the ALJ found Merrill's version of the February 3, 2013, equipment malfunction was true, there is substantial competent evidence to discount Georgia Pacific's account based on hearsay from employees who spoke with Oatney.

Finally, as the Board aptly pointed out, an internal email sent a few days prior to Merrill's termination "gives some credence to [Merrill]'s argument that she was terminated due to her job-induced asthma and not for cause." On January 30, 2013, Donnie Stein sent Mullins an email which stated, "Still piling up. See below." The "[s]ee below" reference pertained to an email Stein received from Michael J. Lyhane, which read:

> ***14** "Deanna called over a little while ago stating material was coming out of a tube it wasn't supposed to. I went over and it was just an overflow tube after the Sweco screen. I remained calm, didn't even increase my walk to anything to be considered 'brisk.' I told her I wasn't too worried about it at this time. She then tried to fire up the reheater and couldn't get any material to flow. She started to 'hyperventilate' (I am not a doctor, and that is not a diagnosis) and used her Inhaler. We went to the control room and reviewed the screen and everything seemed to be set right. I went and got [illegible] to come over. By the time he got over there, DeAnna had called Denny and he came over

and got Ultra running, there was a switch after the Air Separator [*sic*] that was in the opposite direction it was supposed to be.

"# 1—I believe this is another example of DeAnna not being able to trouble shoot her machinery. I believe this is the third consecutive time that she has been unable to make the change to from white to dirt or vice versa on her own. Thus furthering the question of whether she should be qualified to operate the Ultra department.

"# 2—*Her sudden onset of breathing issues when there is a disruption of any sort to the normal process leads me to believe that her presence is a safety issue. If there were to be an issue while an autoclave is open or basket raised and her condition gets agitated we could be looking at disastrous results. I do not believe that for her own safety and the safety of others on the property that could be affected, that she be allowed to work in any form of solitary condition without anyone that can make sure she does not have an attack that her Inhaler doesn't get under control.*" (Emphasis added.)

The Board was persuaded that the timing of this email referencing **Merrill's** health problems and resultant safety concerns shortly before her termination strongly suggested that these were the actual reasons for **Merrill's** termination—not inefficiency, insubordination, and dishonesty.

In conclusion, when viewed in light of the record as a whole and applying the *Morales–Chavarin* standard in evaluating whether **Merrill** was terminated for good cause, we hold that substantial competent evidence supports the Board's finding that **Georgia Pacific** did not terminate **Merrill** for cause.

Affirmed.

All Citations

372 P.3d 446 (Table), 2016 WL 3202663

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