NOT DESIGNATED FOR PUBLICATION

No. 118,946

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

WALTER LONG,
Appellant/Cross-appellee,

v.

ICL PERFORMANCE PRODUCTS
and
NEW HAMPSHIRE INSURANCE COMPANY,
Appellees/Cross-appellants.

MEMORANDUM OPINION

Appeal from Workers Compensation Board. Opinion filed January 4, 2019. Affirmed.

Judy A. Pope, of Dickson & Pope, P.A., of Overland Park, for appellant/cross-appellee.

Christopher J. McCurdy and *Ryan D. Weltz*, of Wallace, Saunders, Austin, Brown & Enochs, Chartered, of Overland Park, for appellees/cross-appellants.

Before MALONE, P.J., PIERRON, J., and BURGESS, S.J.

PER CURIAM: Walter Long appeals the Kansas Workers Compensation Board's (Board) decision to uphold the administrative law judge's (ALJ) decision denying his claim for work disability benefits under the Workers Compensation Act (Act). Long asserts that the Board erred when finding that his functional impairment and wage loss percentages were below the threshold levels required for work disability benefits under K.S.A. 2017 Supp. 44-510e(a)(2)(C)(i)-(ii). Because the record establishes that Long's post-injury wage loss was not high enough for work disability benefits, we affirm the Board.

ICL Performance Products and New Hampshire Insurance Company (hereafter ICL) cross-appeal, asserting that the Board erred by adopting the ALJ's future medical award. Nevertheless, substantial competent evidence supports the ALJ's award, and this court would have to reweigh evidence to accept ICL's argument. As a result, ICL's cross-appeal is denied.

FACTUAL AND PROCEDURAL BACKGROUND

On November 6, 2000, Long hurt himself while carrying a 130 pound object upstairs at work for Astaris, ICL's predecessor company. Long felt pain in his back. He filed a workers compensation claim, and Dr. Chris Fevurly treated him. Dr. Fevurly diagnosed Long with sciatica and radiculopathy, and acute herniated disk at L4-5. Dr. Fevurly also provided Long with permanent restrictions: (1) no lifting over 50 pounds; (2) no repetitive non-stop bending and stooping; (3) only occasional lifting of 50 pounds; and (4) only limited repetitive lifting of up to 30 to 35 pounds. Long ultimately settled his workers compensation claim with Astaris for $16,641.50. Under the settlement agreement, the parties agreed that Long had a 10 percent whole body permanent partial impairment.

On March 11, 2013, Long hurt himself while helping pull an 800 pound mill rotor at work for ICL. Long felt pain in his low back and left leg. Long immediately reported his injury to his supervisor. ICL allowed Long to obtain medical treatment from Dr. Elo and Dr. Michael Geist. It is undisputed that Dr. Elo and Dr. Geist placed Long on a 50 pound lifting restriction and 30 to 35 pound repetitive lifting restriction. Other than these restrictions, Long could return to work as normal.

Although Long returned to work, he continued to seek medical treatment for his back injury. Long saw Dr. John Ciccarelli, who was an independent medical examiner, on May 28, 2013. Dr. Ciccarelli knew about Long's prior back injury. He believed that

Long's current injury involved low back pain with "left-sided radicular pain or burning in [the] L5 nerve distribution." Dr. Ciccarelli treated Long with an epidural steroid injection, which resulted in a 70 percent improvement. Dr. Ciccarelli first released Long on July 25, 2013, but Long returned to him on January 2, 2014, complaining of back and leg pain. An MRI revealed that Long "still had a disc bulge" with "some stenosis" and normal aging.

Following the MRI, Dr. Ciccarelli recommended another epidural steroid injection. Long did another injection, and received "at least 50 percent improvement." Long stopped seeing Dr. Ciccarelli after his February 21, 2014 appointment. Dr. Ciccarelli placed no work restrictions on Long.

On February 25, 2014, Long applied for a job change. His current position had included both mechanical and electrical work. The position he applied for included only electrical work. On the application, Long stated that he wanted the electrical position because his "skills [were] more ap[p]lied [to] this field." The electrical only position paid less than the mechanical and electrical position. When ICL approved Long's application on February 26, 2014, Long's salary decreased from $32.91 per hour to $29.38 per hour.

Nearly a year later, on February 12, 2015, Long applied for benefits under the Act.

On May, 14, 2015, New Hampshire Insurance Company contacted Dr. Ciccarelli and requested that he give Long an impairment rating. Dr. Ciccarelli gave Long a 5 percent whole body permanent partial impairment with no work restrictions. During Dr. Ciccarelli's deposition, he testified that he never told Long to find a physically less demanding job. The doctor had notes of an appointment with Long, where Long brought up that he had applied for a job change, and he had told him "great, if that was an option . . ." Dr. Ciccarelli believed that Long was at maximum medical improvement. Dr. Ciccarelli, admitted, however, that he did not reexamine Long when making his

impairment rating. Instead, he reviewed his medical records, calculating the impairment rating from his final appointment with Long on February 21, 2014.

Next, Long met with Dr. Peter Bieri, seeking an alternative opinion on his work injury. After meeting with Dr. Bieri twice, Dr. Bieri determined that Long had "chronic lumbar strain and degenerative joint disease, with clinical left lower extremity radiculopathy." Dr. Bieri gave Long a 10 percent "whole person impairment." Dr. Bieri suggested that Long follow permanent work restrictions of: (1) occasional lifting up to 20 pounds, with frequent lifting up to 10 pounds; (2) no "[s]houlder-level and overhead use on the right"; and (3) no "[s]quatting, kneeling, crouching, [or] crawling." Dr. Bieri cited the March 11, 2013, work accident being the prevailing factor for Long's current injuries.

During his deposition, however, Dr. Bieri admitted that he had not known about Long's 2000 work accident when he made his report. Last, Dr. Bieri testified that Long could benefit from future pain management, including more epidural steroid injections and physical therapy.

ICL also deposed two of its employees: Michael Worley and Theresa Terry. Worley was Long's supervisor. Worley testified that when Long applied to change from the mechanical and electrical job to the electrical only job, Long never mentioned that he was changing jobs for medical purposes. Long had told Worley "he'd rather do electrical work." Worley testified that Long should have known that the electrical only job paid less because (1) the wages were in the union handbook, and (2) the wages were in the contract book. Additionally, Worley testified that Long had no work restrictions when he applied for the job change. Terry, who was an ICL human resources analyst, testified about Long's salary. According to Terry, including fringe benefits Long was earning 93.2 percent of his preinjury earnings under his electrical only salary.

Finally, both Robert Barnett, Ph.D., a clinical psychologist and vocational specialist hired by Long, and Michelle Sprecker, a rehabilitation counselor hired by ICL, provided their opinions on Long's task and wage loss. Dr. Barnett concluded that Long suffered a task loss of 82 percent and a wage loss of 20 percent. (Sprecker considered the examinations of Dr. Fevurly, Dr. Ciccarelli, and Dr. Bieri. Sprecker provided different task loss assessments for each doctor.

On March 3, 2017, the ALJ held the regular hearing. At the outset of the hearing, the parties stipulated that Long's injury arose out of the course of his employment with ICL. Furthermore, the parties agreed that the primary disputed issues were (1) whether Dr. Ciccarelli's or Dr. Bieri's functional disability ratings were more accurate, (2) whether Long was entitled to work disability, and (3) whether Long was entitled to future medical benefits. Long was the only person who testified at the regular hearing. Long testified that he applied for the electrician only position at the instruction of Dr. Ciccarelli and Dr. Elo, and had now suffered a significant decrease in wages.

Following the hearing, Long submitted a brief in which he argued: (1) that the ALJ should find that he had a 10 percent whole body impairment rating based on Dr. Bieri's report; (2) that the ALJ should not consider fringe benefits when determining his wage losses; (3) that he receive 51 percent work disability based on Dr. Barnett's report; and (4) that he receive future medical based on Dr. Bieri's recommendations. ICL responded that the ALJ should accept the 5 percent whole body impairment rating from Dr. Ciccarelli, ignoring Dr. Bieri's impairment rating. ICL argued that Long could not receive work disability because he failed to establish "wage loss in excess of 10% which [was] directly attributable to the work injury and [was] unable to prove any new task loss." ICL stressed that Long's wage loss occurred because of his voluntary change in job positions. ICL further argued that the ALJ should deny future medical because Dr. Bieri's opinions were unreliable.

The ALJ found that Long's average weekly wage for the 26 weeks before his accident was $1,465.75. The ALJ found that overall, both Dr. Ciccarelli's and Dr. Bieri's opinions were credible. Accordingly, the ALJ averaged Dr. Ciccarelli's 5 percent and Dr. Bieri's 10 percent whole body permanent impairment ratings, for a 7.5 percent whole body permanent impairment rating. Next, the ALJ found that Long was not entitled to work disability because he had not suffered at least a 10 percent wage loss as required by K.S.A. 44-510e(a)(2)(C)(ii). The ALJ then found that Long was entitled to future medical, finding Dr. Bieri's testimony more credible than Dr. Ciccarelli's given that Dr. Bieri had examined Long more recently.

Long appealed the ALJ's decision to the Board. ICL challenged the ALJ's future medical award. The Board affirmed the ALJ's and the ALJ's findings on Long's average weekly wage. The Board also found that Long was not entitled to disability because "his functional impairment [did] not exceed 7.5 percent" as required under K.S.A. 44-510e(a)(2)(C)(i). Last, the Board adopted the ALJ's findings on future medical.

Long timely filed a petition for judicial review. ICL timely cross-appealed.

DID THE BOARD ERR IN MAKING ITS AWARD?

On appeal, Long argues that the Board erred when it denied his request for work disability benefits under K.S.A. 2017 Supp. 44-510e(a)(2)(C)(i)-(ii) because given his previous work injury at Astaris, he had an overall functional impairment that exceeded 10 percent. Long then complains that the Board ignored evidence establishing that his wage loss exceeded 10 percent following his work injury. Long's argument hinges on the ALJ errantly including fringe benefits in his wage loss calculation, as well as miscalculating the wage loss.

ICL responds that this court should affirm the ALJ's wage loss findings because fringe benefits can be considered in calculating wage loss. ICL also responds that under K.S.A. 2017 Supp. 44-510e, Long's voluntary decision to change positions within the company to a lower paying job cannot result in it having to pay Long work disability.

Standard of Review

K.S.A. 2017 Supp. 44-556(a) provides that this court reviews the Board's decision in accordance with the Kansas Judicial Review Act, K.S.A. 77-601 et seq. *Atkins v. Webcon*, 308 Kan. 92, 95, 419 P.3d 1 (2018).

K.S.A. 2017 Supp. 77-621(c)(4) states that the court shall grant relief if the agency has erroneously interpreted the law. And K.S.A. 2017 Supp. 77-621(c)(7) states:

> "The court shall grant relief only if it determines . . . :
>
> "(7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act."

Whether the Board erred in applying the law constitutes a question of law over which this court has de novo review. *Nuessen v. Sutherlands*, 51 Kan. App. 2d 616, 618, 352 P.3d 587 (2015). Whether the Board's factual findings were supported by substantial competent evidence constitutes a question of law. *Atkins*, 308 Kan. at 95. "'Substantial competent evidence possesses both relevance and substance and provides a substantial basis of fact from which the issues can be reasonably determined.' [Citation omitted.]" *In re Equalization Appeal of Wagner*, 304 Kan. 587, 599, 372 P.3d 1226 (2016).

The term "in light of the record as a whole" is also statutorily defined. Under K.S.A. 2017 Supp. 77-621(d), when reviewing evidence "in light of the record as a whole," courts (1) must review evidence both supporting and contradicting the Board's findings, (2) must examine credibility determinations, if any, and (3) must review the agency's explanation for its findings. *Atkins*, 308 Kan. at 97. While considering the evidence in light of the record as a whole, this court does not reweigh the evidence or engage in de novo review. *Williams v. Petromark Drilling*, 299 Kan. 792, 795, 326 P.3d 1057 (2014).

Applicable Statutes

Claimants have the burden of proof to establish their right to an award under the Act. K.S.A. 2017 Supp. 44-501b(c). This case turns on the Board's application of the work disability provisions of K.S.A. 2017 Supp. 44-510e.

K.S.A. 2017 Supp. 44-510e allows workers with certain nonscheduled injuries to get work disability benefits after complying with subsections (a)(2)(C)(i) and (ii):

> "(a) In case of whole body injury resulting in temporary or permanent partial general disability not covered by the schedule in K.S.A. 44-510d, and amendments thereto, the employee shall receive weekly compensation as determined in this subsection during the period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks.
>
> . . . .
>
> (2)(C) An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ('work disability') if:
>
> (i) The percentage of functional impairment determined to be caused solely by the injury exceeds 7 1/2% 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-injury wage loss, as defined in subsection (a)(2)(E) of K.S.A. 44-510e, and amendments thereto, of at least 10% which is directly attributable to the work injury and not to other causes or factors."

Accordingly, to obtain work disability, the worker must have sustained a whole body injury resulting in permanent or partial impairment. Specifically, the worker must first establish a functional impairment rating from the current injury of more than 7.5 percent *or* an overall functional impairment rating of at least 10 percent. Second, the worker must establish wage loss of at least 10 percent.

K.S.A. 2017 Supp. 44-510e(a)(2)(E) defines "wage loss" and provides guidance on how to calculate wage loss:

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

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

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

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

If the worker meets K.S.A. 2017 Supp. 44-510e(a)(2)(C)(i) and (ii), then the worker's "task loss" is considered. "[T]he 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. 2017 Supp. 44-510e(a)(2)(C)(ii).

Disability Properly Denied

To review, although the ALJ found that Long had met his burden under K.S.A. 2017 Supp. 44-510e(a)(2)(C)(i), the Board disagreed. The Board reached this conclusion by finding that Long's functional impairment for his current work injury did not exceed 7.5 percent. While this is technically correct, Long argues that he met K.S.A. 2017 Supp. 44-510e(a)(2)(C)(i) because his overall functional impairment rating, which included his pretexting functional impairment, was at least 10 percent.

Long's argument is persuasive. Under K.S.A. 2017 Supp. 44-510e(a)(2)(C)(i), workers meet the work disability functional impairment requirement by either (1) having "[t]he percentage of functional impairment determined to be caused solely by the injury exceed[] 7 1/2% to the body as a whole," or (2) having "the overall functional impairment . . . equal to or exceed[] 10% to the body as a whole in cases where there is preexisting functional impairment." Here, it is undisputed that in his 2000 work injury, Long had a 10 percent whole body permanent partial impairment. In its brief, ICL concedes that there was substantial competent evidence supporting the Board's finding that Long had a functional impairment rating of 7.5 percent for his current work injury.

As a result, Long had an overall functional impairment rating of 17.5 percent. This exceeds the 10 percent threshold. In consequence, the Board erred when it found that Long failed to meet his burden under K.S.A. 2017 Supp. 44-510e(a)(2)(C)(i). See *Stark v. Atwood Good Samaritan Ctr.*, No. 113,075, 2016 WL 4076203, at *12 (Kan. App. 2016) (unpublished opinion) (explaining that the calculation of the overall functional impairment rating involves adding the functional impairment ratings from the current work injury to preexisting work injury).

Thus, this court must next consider whether Long met his burden under K.S.A. 2017 Supp. 44-510e(a)(2)(C)(ii). Below, the Board simply adopted the ALJ's findings, which was that Long had not suffered a 10 percent wage loss. The ALJ specifically found (1) that Long's average weekly wage before the accident was $1,465.75, and (2) that Terry's testimony on Long's wages was credible. The ALJ explained that "[w]hile [Long] has a reduced average weekly wage, with the inclusion of fringe benefits, [Long was] presently earning 93.2% of his pre-injury average weekly wage[,] reflecting only a 6.8% wage loss."

At her deposition, Terry testified about Long's wages before and after his work injury and job change, and with and without fringe benefits. Terry testified that before Long's work injury and without fringe, he made $1,465.74 per week on average. When his employer paid employee health insurance were considered as fringe benefits, Long made $1,691.43 per week on average. After Long's job change and without fringe benefits, he made $1,276.01 on average per week. When fringe benefits were considered, though, Long made $1,576.01 per week.

Long makes two arguments about the ALJ's wage loss calculations on appeal. First, Long asserts that the ALJ compared his "pre-accident wage without benefits to a post-accident wage with benefits, even though [he had] been getting the same benefits all along." This is not correct. Although the Board found that Long's average weekly wage

was $1,465.74 per week before his work injury, to find that Long was earning 93 percent of his pre-injury wages, it is readily apparent that the ALJ considered both Long's pre-injury and post-injury average weekly wage including fringe benefits—$1,576.01 divided by $1,691.43 is 93.2 percent.

Concerning fringe benefits, in his second argument, Long asserts that the ALJ could not consider his fringe benefits in the wage loss calculation based on language in K.S.A. 2017 Supp. 44-511, which states that "additional compensation," including health insurance, "shall not be included in the calculation of the average wage until and unless such additional compensation is discontinued." K.S.A. 2017 Supp. 44-511(a)(2)(A), (C). Nevertheless, it is a well-established rule that a "specific statute controls over a general one." *Neighbor v. Westar Energy, Inc.*, 301 Kan. 916, 922, 349 P.3d 469 (2015). K.S.A. 2017 Supp. 44-510e(a)(2)(E)(ii)—a subparagraph under the actual provision on wage loss calculation—provides that "[t]he actual or projected weekly value of any employer-paid fringe benefits are to be included as part of the worker's post-injury average weekly wage and shall be added to the wage imputed by the [ALJ] . . ." The Act does not define fringe benefits, but this court has held that fringe benefits included insurance in the context of a worker's compensation case. *Slack v. Thies Dev. Corp.*, 11 Kan. App. 2d 204, Syl. ¶ 2, 718 P.2d 310 (1986). Thus, it is readily apparent that the ALJ could consider Long's fringe benefits in calculating his wage loss.

The ALJ correctly found that Long's post-injury wage losses were not at least 10 percent as required for Long to receive work disability. As a result, the Board correctly adopted the ALJ's findings about wage loss. The Board's decision to deny Long work disability was correct. Because Long has failed to establish he is entitled to work disability, this court need not consider either Long's or ICL's arguments on task loss.

Last, in its brief, ICL asserts that Long could not have suffered wage losses because any wage loss he suffered was based on his own voluntary decision to accept the

lower paying electrical only job. Once more, K.S.A. 2017 Supp. 44-510e(a)(2)(E)(i) states: "Wage loss caused by voluntary resignation or termination for cause shall in no way be construed to be caused by the injury." The facts suggest that Long voluntarily demoted himself nearly a year after his injury without direction from a doctor or ICL to a lower paygrade. Additionally, based on a comparison of Dr. Elo's, Dr. Geist's, and Dr. Fevurly's work restrictions, it seems that Long was under the same work restrictions he had been under since 2000 when he applied for the job change. Even so, the ALJ did not rely on this provision to deny Long's work disability claim and this issue need not be addressed.

Cross-Appeal

On cross-appeal, ICL challenges the Board's decision to affirm the ALJ's finding that Long receive future medical treatment. ICL asserts that the ALJ should have followed Dr. Ciccarelli's opinion that Long was at maximum medical improvement instead of Dr. Bieri's opinion that Long could benefit from more epidural steroid injections and physical therapy. The ALJ accepted Dr. Bieri's opinion because he had "provided the most through, recent examination." Although this court's standard of review requires consideration of the ALJ's credibility determination, it does not allow reweighing of the ALJ's credibility determination if that determination was supported by substantial evidence. *Williams, LLC*, 299 Kan. at 795.

Here, the ALJ's reasoning for accepting Dr. Bieri's opinion was sound and supported by substantial evidence. As a result, the Board's award of future medical benefits is affirmed.

Affirmed.