BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SHARON S. EDWARDS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,001,558
LARRY JONES TRUCKING, INC.	)	
Respondent	)	
AND	)	
	)	
COMMERCE & INDUSTRY INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant appealed the July 25, 2003 Award entered by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on January 20, 2004, in Topeka, Kansas.

APPEARANCES

Roger D. Fincher of Topeka, Kansas, appeared for claimant. Matthew S. Crowley of Topeka, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Award identifies the transcripts and stipulations that constitute the record in this appeal. Moreover, at oral argument before the Board, the parties announced they were not contesting Judge Benedict's finding that claimant's pre-injury average weekly wage was $260.20.

ISSUES

On October 16, 2001, claimant was injured when a train struck the trailer that she was pulling with respondent's truck. The parties agree claimant's accident arose out of and in the course of employment with respondent, which operates a trucking company.

In the July 25, 2003 Award, Judge Benedict awarded claimant a 10.4 percent permanent partial general disability. The Judge determined claimant sustained a four

percent whole body functional impairment due to bilateral knee injuries she sustained in the accident. For purposes of the permanent partial general disability formula, the Judge found claimant's pre-injury average weekly wage equaled $260.20, which, when compared to an imputed post-injury wage of $206 per week, created a 20.8 percent wage loss. Additionally, the Judge determined claimant did not sustain any task loss due to the accident. Accordingly, the Judge concluded claimant sustained a 10.4 percent work disability (a permanent partial general disability greater than the functional impairment rating).

Claimant contends Judge Benedict erred. Claimant argues she has sustained a 40 percent whole body functional impairment for permanent injuries to her neck, back and both knees due to the October 2001 accident. Moreover, claimant argues she has sustained a 91 percent task loss and a 100 percent wage loss for a 96 percent work disability.

Conversely, at oral argument to the Board respondent and its insurance carrier argued claimant sustained permanent injury to her lower extremities only and, therefore, her permanent disability benefits should be based upon a four percent whole body functional impairment. They also contend claimant should not receive a work disability as respondent offered her a driving job that would have paid a comparable wage but she was unable to accept the job as her commercial drivers license had been suspended.

The only issue before the Board on this appeal is the nature and extent of claimant's injury and disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Respondent employed claimant as a truck driver. On October 16, 2001, claimant was injured when a train struck the trailer that she was pulling with respondent's truck. Immediately after the accident, an ambulance took claimant to a nearby hospital emergency room where she was treated and released.

From October 25, 2001, through January 17, 2002, claimant received medical treatment from a Topeka, Kansas, orthopedic surgeon, Dr. John Gilbert, who restricted her from working. Dr. Gilbert provided claimant with conservative medical treatment.

Respondent's insurance carrier next referred claimant to another orthopedic surgeon, Dr. Jeffrey T. MacMillan of Overland Park, Kansas. Dr. MacMillan first saw claimant on April 9, 2002, and diagnosed back pain, bilateral knee pain and a nonspecific

anxiety disorder. The doctor prescribed a work conditioning program, a TENS unit for her back pain and medications to help control depression and help her sleep.

During the course of treatment, claimant also had an MRI of her low back and her left knee. Dr. MacMillan determined the tests were normal considering claimant's age but the doctor did offer claimant an arthroscopic procedure for her knee, which she declined.

Dr. MacMillan last saw claimant on July 11, 2002, releasing her to return to work without any restrictions or limitations. The doctor determined claimant had sustained permanent functional impairment to her bilateral lower extremities only, which he rated at five percent to each lower extremity.

According to respondent and its insurance carrier, the latter paid claimant 37.14 weeks of temporary total disability benefits during the period that she was off work following the accident. Claimant testified she received those temporary total disability benefits until Dr. MacMillan determined she had reached maximum medical improvement. The record also includes a July 11, 2002 letter from Dr. MacMillan to respondent and its insurance carrier's attorney, which addresses claimant's functional impairment and also states that claimant has reached maximum medical improvement.

After Dr. MacMillan's release, claimant's attorney referred claimant to Dr. Kimball Stacey and vocational expert Bud Langston to be evaluated for purposes of this claim.

Dr. Stacey, who examined claimant on July 24, 2002, concluded claimant sustained permanent functional impairment to her neck, low back and both lower extremities, which he believed created a 40 percent whole body functional impairment. According to Dr. Stacey, claimant needed work restrictions as a result of her injuries.

Mr. Langston met with claimant in September 2002 to develop a list of work tasks that claimant had performed in the 15-year period before the accident. According to Mr. Langston, claimant was not actively seeking work at that time as she was receiving psychological treatment. Mr. Langston identified 32 former work tasks.

At respondent and its insurance carrier's attorney's suggestion, respondent wrote claimant on April 15, 2003, to offer her a job driving a dump truck. After receiving the job offer, claimant spoke with respondent's office manager, Leanna Adams, about returning to work. As respondent requested, claimant then underwent a preemployment physical and drug screening.

Respondent also ordered claimant's motor vehicle records. The record is not clear when respondent received those records but on May 22, 2003, Ms. Adams advised claimant that her license had been suspended. According to Ms. Adams, claimant

appeared surprised and stated she would look into the suspension. By that time, however, the driving job was no longer available as respondent had filled the position. The record is not clear when the position was filled but at her May 27, 2003 deposition Ms. Adams testified she had paid the new driver for at least three weeks.

At the May 1, 2003 regular hearing, claimant testified she was unemployed and that she had not worked anywhere following the October 2001 accident. The record establishes that claimant has conducted a minimal job search as she has sought work at K-Mart, Wal-Mart, several convenience stores and jobs caring for the elderly. Claimant believes she is limited in finding employment as prolonged sitting and prolonged standing causes severe pain. But claimant does believe she could perform light work such as that in a convenience store or sedentary work such as an office assistant.

1. What is the extent of claimant's permanent functional impairment?

Claimant was prescribed conservative treatment only for the injuries sustained in the October 2001 truck-train wreck. Dr. MacMillan offered claimant an arthroscopic procedure for her knee but she declined.

As indicated above, Dr. MacMillan concluded claimant sustained permanent functional impairment to her bilateral lower extremities only, under the principles of the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) (4th ed.). Accordingly, the doctor rated each lower extremity at five percent functional impairment to each lower extremity. The doctor did not rate claimant's cervical spine as, according to the doctor, claimant never complained about her neck. Moreover, the doctor determined claimant's low back condition did not warrant a rating under the AMA *Guides* as claimant had no muscle guarding or muscle spasm or any objectively identifiable source of a back injury. Consequently, Dr. MacMillan concluded claimant sustained a four percent whole body functional impairment due to the October 2001 accident and her resulting permanent bilateral knee injuries.

The only other expert medical opinion in the record comes from claimant's expert medical witness, Dr. Stacey. Dr. Stacey, who also purportedly used the AMA *Guides* (4th ed.), determined claimant sustained a 40 percent whole body functional impairment due to the October 2001 accident. The doctor rated claimant as having a 14 percent whole body functional impairment for the left knee injury, a nine percent whole body functional impairment for the right knee injury, a 10 percent whole body functional impairment for the lumbar spine and a 15 percent whole body functional impairment for the cervical spine.

The Board is not persuaded that either doctor is any more credible or more reliable than the other. And it is unfortunate the Judge did not appoint a doctor to provide an unbiased independent medical opinion. Nonetheless, after considering the expert opinions

in the record and concluding the truth lies somewhere between the doctors' diverse opinions, the Board finds claimant has failed to prove that she sustained any permanent injury or impairment to her neck or cervical spine but she has sustained permanent injury to her low back and her lower extremities.

The Board concludes claimant has sustained a permanent injury to her low back that constitutes a five percent whole body functional impairment and permanent injuries to her lower extremities that constitute a 10 percent whole body functional impairment. Consequently, the Board finds claimant has sustained a 15 percent whole body functional impairment as a direct result of the October 2001 accident.

The parties have presented no evidence that links any psychological condition to the October 2001 accident and, therefore, the Board need not address that topic.

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

Because claimant's injuries comprise more than a "scheduled" injury as listed in K.S.A. 44-510d, her entitlement to permanent disability benefits is governed by K.S.A. 44-510e, which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **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. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.** Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **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.** (Emphasis added.)

But that statute must be read in light of *Foulk*[1] and *Copeland*.[2] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual post-injury wages being earned when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* 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. . . .[3]

The Kansas Court of Appeals in *Watson*[4] more recently held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the worker's retained capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[5]

Task loss

As is often the case, the doctors' opinions regarding claimant's retained ability to work are diverse. In this instance, Dr. MacMillan believes claimant needs no restrictions on her activities despite receiving notes from claimant's work hardening program that she

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[1] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[2] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[3] *Id.* at 320.

[4] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[5] *Id.* at Syl. ¶ 4.

was only functioning at the sedentary level. On the other hand, Dr. Stacey believes claimant is capable of lifting 20 pounds occasionally and 10 pounds frequently. But Dr. Stacey would restrict claimant from prolonged standing or walking, and repetitive or extended bending, stooping, twisting and kneeling.

According to Dr. MacMillan, claimant retains the ability to perform all of her former work tasks as identified by Mr. Langston. Consequently, Dr. MacMillan gives claimant a zero percent task loss. On the other hand, Dr. Stacey indicated claimant has lost the ability to perform 29 of the 32 former work tasks, or approximately 91 percent, identified by Mr. Langston.

The Board concludes that claimant's task loss lies somewhere between the range provided by the doctors. Consequently, the Board averages zero and 91 percent and finds that claimant has sustained an approximate 46 percent task loss for purposes of the permanent partial general disability formula.

Wage loss

On April 15, 2003, which was two weeks before the scheduled regular hearing, respondent offered claimant a driving job. Although claimant may have had some reservations about her ability to perform certain parts of that job such as placing the tarp on the loads, claimant proceeded with a preemployment physical and drug screen to attempt to return to work. Unfortunately, on approximately May 22, 2003, claimant learned that her license had been suspended.

The regular hearing was held on May 1, 2003. At that time, claimant testified she had a commercial drivers license. Sometime following that hearing, the parties first learned of the suspension. Unfortunately, the record closed before the parties had an opportunity to explore the reason for the suspension and before claimant had a reasonable opportunity to resolve the problem.

The present record does not disclose the reason for the suspension as the only testimony regarding the license comes from Ms. Adams, who was unable to decipher claimant's motor vehicle report but believed the suspension was issued on May 3, 2003, and somehow related to the October 2001 accident. Moreover, according to Ms. Adams, claimant was surprised that her license was suspended and had indicated she would attempt to get the matter resolved.

Furthermore, the record is not clear when respondent filled the driving position it had offered claimant. The record does disclose, however, that the job was filled several weeks before claimant learned of the suspension and before claimant had any opportunity to address the problem.

The Board concludes claimant did not refuse to perform the driving job that was offered to her. Moreover, claimant did not act in bad faith regarding that job offer. Conversely, claimant undertook the physical and drug screening that respondent required. Accordingly, the wages from that job should not be imputed to claimant for purposes of the wage loss prong of the permanent partial general disability formula.

Nonetheless, the Board concludes claimant has failed to prove that she has made a good faith effort to find work since being released in July 2002. Claimant's job search efforts appear minimal. In fact, claimant's vocational expert testified that claimant was not actively seeking employment when he saw her in September 2002. Consequently, a post-injury wage should be imputed to claimant.

The Judge imputed a post-injury wage based upon the federal minimum wage. The Board affirms that finding. Accordingly, claimant's post-injury wage for purposes of the wage loss prong of the permanent partial general disability formula is $206 per week, which creates a wage loss of approximately 21 percent.

Permanent partial general disability

As required by K.S.A. 44-510e, claimant's 46 percent task loss is averaged with the 21 percent wage loss for a 34 percent permanent partial general disability.

AWARD

WHEREFORE, the Board modifies the July 25, 2003 Award and increases claimant's permanent partial general disability from 10.4 percent to 34 percent.

Sharon S. Edwards is granted compensation from Larry Jones Trucking, Inc., and its insurance carrier for an October 16, 2001 accident and resulting disability. Based upon an average weekly wage of $260.20, Ms. Edwards is entitled to receive 37.14 weeks of temporary total disability benefits at $173.48 per week, or $6,443.05, plus 133.57 weeks of permanent partial general disability benefits at $173.48 per week, or $23,171.72, for a 34 percent permanent partial general disability and a total award of $29,614.77.

As of January 26, 2004, Ms. Edwards is entitled to receive 37.14 weeks of temporary total disability compensation at $173.48 per week in the sum of $6,443.05, plus 81.71 weeks of permanent partial general disability compensation at $173.48 per week in the sum of $14,175.05, for a total due and owing of $20,618.10, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $8,996.67 shall be paid at $173.48 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the July 25, 2003 Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of January 2004.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Matthew S. Crowley, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Anne Haught, Acting Workers Compensation Director