

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BONITA M. WYNN)	
Claimant)	
VS.)	
)	Docket No. 1,007,338
THE BOEING COMPANY)	
Respondent)	
AND)	
)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA)	
Insurance Carrier)	

ORDER

This matter is before the Workers Compensation Board (Board) on remand from the Kansas Court of Appeals from its April 3, 2009, Memorandum Opinion in No. 100,071. The matter was originally decided by the Board in its Order of February 13, 2008.

Claimant appeared by her attorney, Joseph Seiwert of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Eric K. Kuhn of Wichita, Kansas.

The Board has considered the record and adopts the stipulations as set forth in its Order of February 13, 2008. Additionally, claimant concedes in her brief to the Board that it is the law of the case that claimant's evidence of task loss was insufficient to prove a task loss for her October 24, 2001, injury. Therefore, any permanent partial general (work) disability under K.S.A. 44-510e would be limited to a consideration of what, if any, wage loss claimant has suffered as the result of her economic layoff on June 16, 2005.

ISSUE

The Board, in its Order of February 13, 2008, found that claimant's carpal tunnel syndrome, for which she received an award in 2002, had not worsened and a review and modification of that award was not appropriate. This finding was affirmed by the Kansas Court of Appeals in its April 3, 2009, Memorandum Opinion. The Board also found that

claimant had suffered a new series of injuries to her upper extremities and shoulders, and these new injuries were not a natural progression of claimant's original 2002 carpal tunnel syndrome. This finding was also affirmed by the Court of Appeals. However, the Court of Appeals found that the Board failed to consider an increase in claimant's work disability stemming from her June 16, 2005, economic layoff from respondent. The Board found that because of the subsequent intervening injuries, it could not modify the 2002 award and the Board did not have jurisdiction to modify the 2002 award based on the new and independent injuries and restrictions. The Court of Appeals held that the Board failed to answer the question regarding the potential for a permanent partial general (work) disability stemming from the layoff. This matter was remanded to the Board from the Court of Appeals with instructions for the Board to determine claimant's claim for an increased work disability due to the economic layoff.

FINDINGS OF FACT

Claimant began working for respondent in January 1988. Claimant originally suffered accidental injuries while working for respondent, with an agreed date of accident of October 24, 2001. This matter was settled by a settlement hearing before Special Administrative Law Judge (SALJ) John C. Nodgaard on December 13, 2002. The settlement was based on the 6.2 percent body as a whole permanent impairment rating provided by J. Mark Melhorn, M.D., for an injury to claimant's upper extremities. That was the only medical opinion attached to the Work Sheet For Settlements which was provided to the SALJ at the settlement hearing. The settlement was in the form of a running award and left open claimant's right to future medical treatment and review and modification of the Award.

After the accident, claimant returned to work for respondent at an accommodated position in material processing, basically a desk job. This lasted a few months, until claimant was laid off. A short time later, in September 2002, she returned to work with respondent as a factory service attendant, where she remained until her most recent layoff on June 16, 2005. Claimant's actual last day worked was on May 16, 2005, but she was paid through June 16, 2005. The factory service attendant job also accommodated claimant's restrictions.

Because of her layoff, claimant filed an Application For Review And Modification on December 12, 2006, seeking an increase in her award from the prior functional impairment to include a permanent partial work disability.

After her layoff, claimant continued to look for work for about one year. She applied at aircraft plants, including Cessna, Learjet, and Raytheon, looking for desk jobs within her restrictions. She also applied at other companies but was offered no employment. After

a year (approximately June 2006), claimant ceased looking for a job and applied for Social Security disability. Claimant was awarded benefits and began receiving disability payments on June 1, 2007. The award of Social Security disability benefits was due to claimant's ongoing chronic illnesses, one of which was identified as Sjogren's. Claimant's other chronic illness was not identified, and this record contains no explanation as to the severity of claimant's condition or what Sjogren's entails.

Claimant was referred by her attorney to board certified physical medicine and rehabilitation specialist George G. Flutter, M.D., for an examination on December 21, 2006. Dr. Flutter diagnosed claimant with post bilateral carpal tunnel syndrome releases, right and left medial and lateral epicondylitis and pain in the right upper shoulder and shoulder girdle, a result of her many years working for respondent. He noted that after claimant's return to respondent in September 2002, her condition continued to worsen. Dr. Flutter rated claimant at 19 percent to the right upper extremity which converts to a 12 percent whole body rating, and 21 percent to the left upper extremity which converts to a 13 percent whole body rating. The whole body ratings combine for a 23 percent whole person impairment.

Dr. Flutter limited claimant's lifting, carrying, pushing and pulling to 20 pounds occasionally and 10 pounds frequently. He also recommended thermal protection for claimant's hands when working in cold environments and restricted overhead work with the right hand to occasional. Dr. Flutter acknowledged that when claimant returned to work with respondent in September 2002, she suffered additional injuries. Her condition was aggravated and made worse by her job duties. Her condition was worsened by the repetitive movements still required of her at her job. Dr. Flutter did not, however, apportion his impairment ratings or restrictions between claimant's conditions in October 2001 and her injuries suffered from September 2002 through May 2005.

Dr. Flutter was provided a task list created by vocational expert Doug Lindahl. Of the 17 tasks on the list, Dr. Flutter determined claimant was no longer able to perform 12, for a task loss of 70.6 percent. However, the Board determined in its Order of February 13, 2008, that the opinion of Dr. Flutter is based on a task list which includes task losses from both the original injuries from 2001, as well as the more recent series of injuries from September 2002 through May 2005. This being the only task loss opinion contained in this record, it is flawed and claimant, in her brief to the Board, acknowledged that the task loss opinion in this record cannot be considered. And, therefore, the only determination remaining in the work disability equation is what, if any, wage loss claimant has suffered. Mr. Lindahl, in his report of January 19, 2007, determined that claimant had the ability to earn from \$5.15 per hour to \$10.96 per hour in the Sedgwick County, Kansas labor market. Compared to claimant's average weekly wage of \$1,304.09, this would result in a wage loss of between 66 percent and 84 percent.

Claimant was referred by Administrative Law Judge John D. Clark to board certified orthopedic surgeon Pat D. Do, M.D., for an independent medical examination (IME) on March 30, 2007. Dr. Do found claimant to be post status bilateral carpal tunnel syndrome surgery, with right shoulder pain, status post right rotator cuff repair, and status post right ulnar nerve decompression, with left shoulder pain.

With respect to claimant's impairment rating, Dr. Do found claimant to have previously suffered an approximate 6 percent whole body functional impairment rating similar to that earlier determined by Dr. Melhorn for the bilateral carpal tunnel syndrome. Dr. Do also found that claimant had suffered an additional 17 percent whole body functional impairment as the result of the injuries suffered after her return to work with respondent in September 2002. He determined it was claimant's right ulnar nerve and right and left shoulder conditions which worsened with claimant's return to work. He was unable to say that claimant's worsening condition was the natural and probable consequence of her earlier injuries. He also opined that the ulnar nerve and shoulder conditions were completely separate from the bilateral carpal tunnel syndrome.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.¹

The burden of proof means the burden of a party to persuade the trier of fact 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.²

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.³

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of"

¹ K.S.A. 44-501 and K.S.A. 44-508(g).

² *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

³ K.S.A. 44-501(a).

employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."⁴

K.S.A. 44-528, the review and modification statute, allows for a modification of an award if,

. . . the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished⁵

In workers' compensation litigation, when a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.⁶

However, the Kansas Supreme Court, in *Stockman*,⁷ stated:

The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, the claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

Claimant originally suffered accidental injuries to her upper extremities in 2001, when she developed bilateral carpal tunnel syndrome from her work duties with

⁴ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

⁵ K.S.A. 44-528(a).

⁶ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

⁷ *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 505 P. 2d 697 (1973); see also *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

respondent. These injuries were settled by a running award before the SALJ based on Dr. Melhorn's 6.2 percent whole body impairment. Claimant then returned to work for respondent at accommodated positions, which caused additional injuries to her upper extremities.

The Board, in its Order of February 13, 2008, found that claimant returned to work with respondent and suffered an aggravation of her prior conditions and a series of new injuries culminating on her last day worked with respondent. However, no claim for a new series of injuries culminating on claimant's last day worked was ever filed with the Kansas Division of Workers Compensation. The Board's refusal to consider these alleged injuries absent the filing of a claim was affirmed by the Court of Appeals.

With regard to claimant's request for review and modification of this matter, the Court of Appeals determined that claimant was justified in requesting a review and modification after the economic layoff in June 2005. The matter was then remanded to the Board with instructions that claimant's work disability subsequent to the economic layoff be determined.

K.S.A. 44-510e, in defining permanent partial general disability, states that it 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.⁸

In determining what, if any, wage loss claimant has suffered, the statute must be read in light of both *Foulk*⁹ and *Copeland*.¹⁰ 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 an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993),

⁸ K.S.A. 44-510e.

⁹ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

¹⁰ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

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. . . .¹¹

As noted above, the Board found and claimant has acknowledged that the task loss opinion of Dr. Flutter, which includes tasks which claimant can no longer perform due to both the 2001 injuries and the new series of injuries suffered by claimant through her last day worked on May 16, 2005, cannot be used as the basis for a work disability in this matter. Therefore, the only determination remaining for the Board's consideration is what, if any, wage loss claimant has suffered as the result of the economic layoff from respondent.

Claimant was paid her regular wages and benefits through June 16, 2005. Claimant then tried for one year after her layoff to find a job. Claimant's job search efforts during that year constituted a good faith effort. Pursuant to *Foulk* and *Copeland*, claimant had a 100 percent wage loss during that first year. When averaged with her zero percent task loss, claimant has a 50 percent work disability. However, beginning June 15, 2006, claimant ceased trying to find a job, and concentrated on obtaining Social Security Disability compensation, which she began receiving on June 1, 2007. Claimant's complete lack of effort to obtain work after June 15, 2006, does not constitute a good faith effort pursuant to the obligations created by *Foulk* and *Copeland*. Therefore, the Board will impute a wage based on claimant's ability to earn wages beginning June 16, 2006. As noted above, Doug Lindahl determined that claimant retained the ability to earn between \$5.15 and \$10.96 per hour. This results in a wage loss of between 66 percent and 84 percent. The Board finds that claimant has suffered a wage loss of 75 percent as the result of her economic layoff from respondent. When averaged with the zero percent task loss above stipulated, claimant's work disability calculates to 37.5 percent, effective June 16, 2006.

¹¹ *Id.* at 320.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the original award of the Special Administrative Law Judge should be modified from the 6.2 percent permanent partial disability awarded for the injuries suffered on October 24, 2001. The Board finds that claimant has suffered a permanent partial general (work) disability of 50 percent from June 16, 2005, to June 15, 2006, and a permanent partial general (work) disability of 37.5 percent effective June 16, 2006.

Respondent argues that claimant is limited to a work disability only from a cumulation of all of her injuries. However, the Board finds no such limit in the Workers Compensation Act. Should claimant pursue a claim for the new series of injuries suffered through her last day worked with respondent, then an appropriate credit may be awarded pursuant to K.S.A. 44-512a.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Review and Modification Award of Administrative Law Judge John D. Clark dated September 17, 2007, should be, and is hereby, modified to award claimant a permanent partial general disability of 50 percent effective June 16, 2005, through June 15, 2006, followed by a permanent partial general disability of 37.5 percent effective June 16, 2006.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Bonita M. Wynn, and against the respondent, The Boeing Company, and its insurance carrier, Insurance Company of the State of Pennsylvania, for an accidental injury which occurred October 24, 2001, and based upon an average weekly wage of \$920.80 through June 15, 2005, and \$1,304.09 as of June 16, 2005.

Claimant is entitled to 13.00 weeks of temporary total disability compensation at the rate of \$417.00 per week or \$5,421.00, followed by 25.73 weeks of permanent partial disability compensation at the rate of \$417.00 per week or \$10,729.41 for a 6.2 percent whole body functional impairment, followed by 52.14 weeks of permanent partial disability compensation at the rate of \$417.00 per week or \$21,742.38 for a 50 percent work disability, followed by 77.76 weeks of permanent partial disability compensation at the rate of \$417.00 per week or \$32,425.92 for a 37.5 percent work disability, making a total award of \$70,318.71. As of the date of this award, this entire amount is due and owing and ordered paid in one lump sum, minus any amounts already paid.

IT IS SO ORDERED.

Dated this ____ day of August, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Eric K. Kuhn, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge