

The respondent requested review and argues that a wage should be imputed to claimant because she failed to make a good faith job search. Respondent further argues that a wage of \$240 per week should be imputed based upon the vocational experts' opinions. Because such wage is more than 90 percent of claimant's pre-injury average gross weekly wage respondent concludes claimant's compensation should be limited to her 10 percent functional impairment. In the alternative, respondent argues the ALJ erred in disregarding its vocational expert's task loss opinion.

Conversely, claimant argues she made a good faith job search as evidenced by the fact that she contacted one prospective employer a day and the fact that her vocational expert noted her job search effort was exceptional. Claimant further argues that because respondent's vocational expert's task loss opinion contained duplicative tasks it was properly disregarded by the ALJ. Consequently, claimant requests the Board to affirm the ALJ's Award.

The sole issue for Board review is the nature and extent of claimant's disability, both functional impairment and work disability, if any. In particular, the Board must consider whether the claimant made a good faith effort to find appropriate employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant was injured when she slipped on ice and fell while she was gathering shopping carts in respondent's parking lot. Claimant fell onto her hands and knees which resulted in complaints of pain in both wrists, both knees, her back and her left heel. Claimant received treatment from Dr. Mark S. Dobyns. Claimant received medication and was referred for physical therapy.

Because claimant did not show improvement, an MRI of the lumbar spine was performed on February 4, 2003. The MRI revealed claimant had degenerative disk disease at L4-5 and L5-S1 with small central disk protrusions at both levels. There were also tiny posterior annulus tears but no lateralization. There was no nerve root impingement nor spinal stenosis at any level. Dr. Dobyns then referred claimant for lumbar epidural steroid injections. The injections did not provide claimant any relief. Dr. Dobyns then referred claimant to Dr. Paul Stein who concluded claimant was not a surgical candidate.

On August 6, 2003, Dr. Dobyns released claimant from further treatment. He restricted claimant from working more than eight hours with no lifting over 25 pounds. But

the doctor agreed that his previous restrictions of no overhead lifting with limited repetitive bending were still appropriate. On September 19, 2003, claimant was terminated from her employment with respondent because it would no longer accommodate her restrictions.

At her attorney's request, the claimant was examined by Dr. Pedro A. Murati on September 22, 2003. The doctor diagnosed claimant with low back pain with radiculopathy and left SI joint dysfunction. Dr. Murati concluded claimant fit DRE Lumbosacral Category III of the *AMA Guides*¹ which represented a 10 percent whole person functional impairment. The doctor imposed permanent restrictions against crawling with no lifting, carrying, pushing or pulling greater than 10 pounds. Claimant should alternate sitting, standing and walking. Rarely bend, crouch or stoop and only occasionally sit, stand, walk, climb stairs, climb ladders, squat, crawl or drive.

Functional impairment is 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 *AMA Guides to the Evaluation of Permanent Impairment*, if the impairment is contained therein.² The uncontradicted evidence regarding claimant's functional impairment was provided by Dr. Murati. The Board finds the claimant has met her burden of proof to establish a 10 percent whole person functional impairment.

The ALJ determined claimant was entitled to a work disability. The permanent partial general bodily disability, or what is also known as "work disability" is defined at K.S.A. 44-510e(a) and 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

¹ 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.

² K.S.A. 44-510e(a).

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*³ and *Copeland*.⁴ 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(a) (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a), that a worker's post-injury wage should be based upon the worker's ability to earn wages rather than the actual wages being received 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.⁵

The Kansas Court of Appeals in *Watson*⁶ 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

³ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

⁴ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁵ *Id.* at 320.

⁶ *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.⁷

The claimant began her job search within a few days after her employment was terminated. Both at the time of the regular hearing and later when claimant's evidentiary deposition was taken on May 28, 2004, the claimant had not found employment.

Claimant described her job search as checking the newspaper, applying in person and calling prospective employers. At regular hearing as well as at her later evidentiary hearing, the claimant provided a list of the prospective employers she had contacted regarding employment. The lists indicated claimant would contact only one employer each day, during the week, after she began her job search.

The claimant did not register with the Kansas Job Service. When asked why she had not registered the claimant responded that she really did not have an answer why she had not. Nor did she contact any employment agencies for assistance in finding a job. The vast majority of the businesses claimant contacted indicated that they did not have job openings. Such cold calls were made by phone or by simply leaving an application for employment.

When claimant met with respondent's vocational expert, Monty Longacre, on April 27, 2004, she was offered advice on agencies to contact, including Kansas Job Service, for assistance in finding employment. But as previously noted, claimant did not register with Job Service nor did she appear to follow his advice that it would be better to focus her efforts on prospective employers that were hiring.

The number of job applications, while impressive in volume, strikes the Board as an effort on the part of the claimant to enhance her work disability claim rather than actually find a job. The claimant would make only one contact a day which often simply consisted of a phone call to see if a business was hiring or claimant would stop by a business and make the same inquiry. If claimant was genuinely seeking employment, it does not appear appropriate to limit the search to one daily contact. One call or contact would only take a few minutes and actually demonstrated very little effort. Moreover, the claimant did not focus on businesses that were in fact hiring.

Mr. Longacre was asked to review the claimant's job search as well as the regular hearing exhibit listing the prospective employers claimant had contacted. Mr. Longacre noted that most of the jobs were beyond Dr. Murati's restrictions. It was further noted that 90 percent of the businesses were not hiring. Although Mr. Longacre agreed that a job

⁷ *Id.* at Syl. ¶ 4.

search would include a small percentage of cold calls, nonetheless, he opined it was not a good job search to effectively base the job search on contacting businesses that were not hiring.

When considering the entire record, the Board is not convinced that claimant's efforts in her job search were entirely genuine. The record establishes claimant failed to follow the advice from vocational rehabilitation counselor, Monty Longacre, to register with Job Service, which is a state agency that collects and compiles job listings. Although the total number of job contacts that claimant has made is impressive, the Board is not persuaded claimant has made a genuine effort to find appropriate employment in light of the fact the overwhelming majority of contacts were made at businesses that were not hiring and many of those contacts were for jobs not within claimant's restrictions. Moreover, limiting a job search to one contact a day also raises doubts whether a meaningful effort was being made. The Board concludes that the mere act of making one contact a day does not, in and of itself under these facts and circumstances, constitute a good faith effort to find appropriate employment.

The Board is mindful that claimant's vocational expert opined claimant's job search was exceptional. This opinion seemed based on the fact claimant made daily contacts which produced an impressive total number. As previously noted, the total number of contacts is not controlling.

Accordingly, the Board must impute a post-injury wage for purposes of the wage loss prong of the permanent partial general disability formula. The two vocational experts who testified in this matter, Mr. Jerry Hardin and Mr. Monty Longacre, offered opinions regarding the claimant's capacity to earn wages. Mr. Hardin opined claimant retained the ability to earn \$240 per week. Mr. Longacre noted that he did not disagree with Mr. Hardin's opinion that claimant retained the ability to earn \$240 per week but that there were also jobs available to claimant that would pay up to \$280 per week. The Board concludes claimant retains the ability to earn \$240 per week. As this wage is more than 90 percent of claimant's pre-injury average gross weekly wage the claimant is not entitled to a work disability and is instead limited to her functional impairment.⁸

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated July 30, 2004, is modified to reflect claimant is entitled to an award of compensation for a 10 percent permanent partial functional impairment.

⁸ See K.S.A. 44-510e(a).

The claimant is entitled to 10.69 weeks of temporary total disability compensation at the rate of \$176.95 per week or \$1,891.60 followed by 41.5 weeks of permanent partial disability compensation at the rate of \$176.95 per week or \$7,343.42 for a 10 percent functional disability, making a total award of \$9,235.02, which is due and ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of February 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Dale V. Slape, Attorney for Claimant
- John A. Pazell, Attorney for Respondent and its Insurance Carrier
- Nelsonna Potts Barnes, Administrative Law Judge
- Paula S. Greathouse, Workers Compensation Director