



The respondent requests review of the ALJ's findings with respect to the nature and extent of claimant's work disability. Respondent contends that although she is presently unemployed, claimant is capable of earning a wage that is comparable to what she was earning at the time of her injury. Thus, claimant's recovery should be limited to her 10 percent functional impairment.

In the event claimant is entitled to a work disability, respondent alternatively argues that her task and wage loss figures are far less than what was found by the ALJ. Contrary to the ALJ's finding, respondent maintains claimant has failed to demonstrate a good faith attempt to find appropriate post-injury employment and as such, a wage must be imputed to her. The respondent also urges the Board to average all of the available task loss opinions in assessing claimant's task loss, rather than utilizing only those offered by Dr. Dobyns. The resulting average of these two figures would be somewhere between 24.5 and 42.5 percent. Finally, respondent adamantly maintains claimant is capable of engaging in substantial gainful employment and is, therefore, not permanently and totally disabled.

Claimant asserts that the greater weight of the evidence establishes that she has sustained a serious injury entitling her to either a permanent total disability or in the alternative, a work disability of 85.5 percent. Claimant's contention is based upon the testimony of Dr. Pedro Murati, who relied upon medical records which include a functional capacities evaluation (FCE) ordered by Dr. Glenn Amundson, one of claimant's treating physicians. In the alternative, claimant requests that the Board affirm the ALJ's Award.

At issue in this appeal is the following:

1. Whether in light of K.S.A. 44-519, the fact-finder can consider Dr. Amundson's medical records, including his November 7, 2004 report and the results of a FCE he ordered; and
2. The nature and extent of claimant's permanent impairment beyond the agreed-upon 10 percent functional impairment.

#### **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:

Claimant began working for respondent on November 18, 2000 as a phlebotomist. On January 23, 2001, she bent over a patient to begin to draw blood when she felt a snap and heard a pop in her mid to low back. She immediately reported the incident to her supervisor and was sent to the ER for medical treatment.

Claimant was referred to Dr. Mark Dobyms for treatment. Dr. Dobyms diagnosed claimant with a low back sprain and recommended a course of conservative treatment, including physical therapy and injections. A MRI revealed a bulging disc at T11-12. When her complaints continued in spite of some time away from work or at limited duty, she was referred to a variety of doctors for further evaluation and treatment over a rather lengthy period of time.

Claimant was seen by Dr. Glenn Amundson on February 4, 2004. Dr. Amundson recommended an EMG of the bilateral lower extremities, a MRI of the thoracic and low back areas and a discogram. The discogram showed positive results at L3-4 and L4-5 and an annular tear at L3-4. Dr. Amundson performed surgery on June 4, 2004, which consisted of fluoroscopic-guided percutaneous discectomy at L3-4 and L4-5. She was released on October 13, 2004 with restrictions.

Claimant continued to follow up with Dr. Dobyms and beginning in December 2004 began learning to manage her pain medication. Dr. Dobyms also imposed the following restrictions: no lifting over 25-30 pounds, no repetitive bending, prolonged overhead work, and she must change positions frequently, not sitting or standing too long. Respondent terminated claimant's employment as of November 7, 2004 contending that she had been on medical leave in excess of 6 months. In her exit interview claimant advised respondent that she was interested in continuing her employment.

Since leaving respondent's employ, claimant testified that she applied for 20-25 different jobs from November 2004 to February 2005, but she could not remember if she ever went on any interviews and she could only identify four employers. Claimant began receiving social security disability benefits in February of 2005, and admits that since she started receiving these benefits she has not looked for work.<sup>1</sup>

According to Karen Terrill, who evaluated claimant on May 11, 2005, claimant is not only capable of substantial and gainful employment, she is capable of earning between \$9.09 and \$10.10 per hour as a receptionist or an information clerk.<sup>2</sup> She also identified a total of 41 tasks claimant performed over the last 15 years. In creating this list Ms. Terrill testified that she utilized both the employer's job descriptions as well as information provided by the claimant.

Jon Rosell also testified that claimant was capable of substantial gainful employment and could expect to earn \$7.07 - 8.06 per hour in a sedentary position as a surveillance monitor or a telemarketer. Mr. Rosell identified 23 tasks in the claimant's 15

---

<sup>1</sup> R.H. Trans. at 22-23.

<sup>2</sup> Terrill Depo. at 14,16.

year work history and he conceded that when drafting this list, he relied solely upon the information provided by claimant.

Dr. Dobyns believes claimant is capable of substantial gainful employment, working 40 hours per week. When asked to review Karen Terrill's task analysis, he testified claimant lost the ability to perform 21 of the 41 tasks (51 percent). When asked to utilize Jon Rosell's task analysis, the result is a loss of 18 of 23 tasks (78 percent).

Claimant was evaluated by Dr. Philip R. Mills on February 28, 2005 and was diagnosed with "[d]egenerative disc disease with some bulging discopathy; chronic pain syndrome status post IDET procedure without long term improvement."<sup>3</sup> Dr. Mills opined that the claimant had lost the ability to perform 13 out of 41 tasks (32 percent) based upon Karen Terrill's task analysis. He recommended claimant be restricted to lifting only with good body mechanics at the waist level or above.

Claimant was also examined by Dr. Pedro A. Murati on two separate occasions. On the first visit on July 28, 2003, he diagnosed thoracic sprain and lumbar sprain. He made some treatment recommendations and suggested some diagnostic tests. He examined her again on November 22, 2004. By this time she had undergone surgery by Dr. Amundson. Dr. Murati amended his earlier diagnosis to include bilateral SI joint dysfunction, thoracic pain secondary to radiculopathy, and status post discectomy at L3-4 and L4-5. He also recommended the following restrictions: no crawling, lifting, carrying or pushing, pulling more than 10 pounds, no bending crouching or stooping more than rarely, only occasional sitting, standing, walking, climbing stairs or ladders, squatting or driving, no lifting, carrying or pushing, pulling more than 5 pounds on a frequent basis and alternate sitting, standing and walking during an 8 hour day.<sup>4</sup> It is important to note that Dr. Murati did not limit her ability to work an 8 hour day.

Dr. Murati's restrictions were issued without the benefit of an FCE. In fact, neither Drs. Dobyns, Mills or Murati requested an FCE at any point during this litigation. Dr. Dobyns testified that he chooses not to use that tool as he believes they are somewhat vague and unpersuasive and are arguably dependent on the patient's motivations. Dr. Amundson, however, did request an FCE and it was performed on October 22, 2004. That report and its contents, coupled with Dr. Amundson's final rating report created an evidentiary issue during the trial of this matter.

Dr. Amundson was not deposed. Nonetheless, at Dr. Murati's deposition, he was presented with the FCE report along with Dr. Amundson's final report dated November 7, 2004, which contained a permanent impairment rating along with a list of restrictions. The

---

<sup>3</sup> Mills Depo. at 16.

<sup>4</sup> Murati Depo., Ex. 2 at 8 (Nov. 22, 2004 Release to Return to Work Sheet).

FCE indicated the test was “valid” and suggested that claimant had the capacity to work 2-3 hours per day in addition to restricting her weight limitations in a fashion similar to that imposed by Dr. Murati.

Although he did not have the benefit of this evaluation tool when he issued his report, Dr. Murati concluded, based upon the contents of the FCE, that his original determination that claimant was able to work a full 8 hour day was wrong. Consistent with the result of the FCE, Dr. Murati concluded claimant is capable of only working 2-3 hours per day and would then need to take a break for 30 minutes to lay down or recline for pain relief before working any more during the day. In making this point, Dr. Murati testified that this “is one of the most restrictive valid FCE’s I have ever seen”.<sup>5</sup> As a result, Dr. Murati testified that claimant had lost the ability to perform 21 of the 23 tasks contained within Mr. Rosell’s task list, for a 91 percent loss.

When an objection was lodged to Dr. Murati’s referral to and reliance upon the FCE, he was asked the following:

Q. In your normal practice, is it appropriate to if a valid FCE is available for review to consider that as part of the information you look at in reaching permanent restrictions opinions?

A. Only if it makes sense because there’s a lot of valid FCE’s that are nonsensical, but this one I would agree that it probably follows this patient’s capacities accurately.<sup>6</sup>

Dr. Murati went on to testify that he thought claimant was essentially unemployable. He explained:

. . . Now you don’t need a medical degree to say that this person is going to have a hard time finding work when she can only work from two to three hours a day and then requires frequent breaks. I mean I wouldn’t hire her. I don’t know anybody out there or any job that I’ve ever had or worked with that would be comfortable hiring a person like this. So, yes, I would say that she’s essentially and realistically unemployable.<sup>7</sup>

Although the FCE report was made available to Dr. Dobyms, he was not persuaded by the suggestion that claimant has a workday tolerance of two to three hours with frequent

---

<sup>5</sup> *Id.* at 18-19.

<sup>6</sup> *Id.* at 20.

<sup>7</sup> *Id.* at 27-28.

breaks in order to stand up and move around.<sup>8</sup> As indicated above, Dr. Dobyms testified that he does not use FCE's because he feels they're very unreliable and non-predicative and dependent on other motivations by the patient and whether they want to work and whether or not their pain will allow them to work. Put simply, he believes they are not good indicators of what a patient can and cannot do.

The ALJ did not comment on claimant's contention that she is permanently and totally disabled. K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

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.

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.<sup>9</sup>

Given his findings, it is clear the ALJ believed claimant was capable of full-time employment, and thereby had failed to establish she was permanently and totally disabled. Only Dr. Murati testified that claimant was essentially unemployable. And this finding is based upon his review of the FCE ordered by Dr. Amundson.

Respondent contends Dr. Murati inappropriately considered this FCE along with Dr. Amundson's report in coming to his conclusions. Respondent maintains that the use of and reliance upon Dr. Amundson's report and the FCE violates K.S.A. 44-519 because Dr. Amundson did not testify in this matter. And that by using those reports and offering them into evidence, claimant was circumventing the statutory requirement that no reports are to be entered into evidence absent supporting medical testimony. Respondent argues that it had no opportunity to cross examine either Dr. Amundson or the author of the FCE and as such, Dr. Murati should not be able to use those documents to revise his opinion and suggest claimant is incapable of working 40 hours per week.

---

<sup>8</sup> Dobyms Depo. at 24-25.

<sup>9</sup> *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

The Board has considered respondent's argument and finds that while the reports cannot come into evidence, it was acceptable for Dr. Murati to consider them in formulating his opinions.<sup>10</sup> Physicians routinely utilize reports prepared by others in formulating their diagnoses and opinions. As long as the physician is expressing his *own* opinion and not simply parroting the beliefs of another, it is acceptable. But respondent's criticisms nonetheless affect the weight of Dr. Murati's opinions, and Dr. Amundson's opinions are not in evidence.

While Dr. Murati seemed to believe that this particular FCE was credible, he also indicated that many times the FCE's are "nonsensical". There is no indication why, apparently without any investigation, he believed this FCE was so much more credible than others. No one asked him if he knew the person who performed the exam or precisely why he believed that this report was particularly indicative of claimant's capacity. He did not order the FCE and went ahead and issued restrictions without the benefit of such a test. Only after seeing the FCE did he conclude claimant was unable to work more than 2-3 hours per day. Although it was not improper for him to consider the FCE or Dr. Amundson's report, the ultimate opinions he offers regarding claimant's restrictions and her inability to work are not persuasive. Accordingly, the ALJ's implicit decision that claimant is not permanently and totally disabled is affirmed.

As noted in the stipulations, the parties agree claimant sustained a 10 percent permanent partial disability to the whole body. When, as here, an injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), 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**

---

<sup>10</sup> See *Roberts v. J.C. Penney Co.*, 263 Kan. 270, 949 P.3d 613 (1997).

**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.)

That statute must be read in light of *Foulk*<sup>11</sup> and *Copeland*.<sup>12</sup> 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 an accommodated job that 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) (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than 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.<sup>13</sup>

In this instance, there is no dispute that respondent terminated claimant as of November 7, 2004. Rather, respondent contends claimant is still capable of earning a comparable wage and has failed to make a good faith effort to find post-injury employment. And therefore, her award should be limited to either the 10 percent functional impairment or limited by an imputed wage if less than 90 percent of her pre-injury average weekly wage based upon the evidence contained within the record.

The ALJ concluded claimant had demonstrated a good faith effort to find appropriate post-injury employment, and therefore he declined to impute any wage to her, instead using her actual wage loss of 100 percent. The Board has considered the record and finds the ALJ's conclusion as to wage loss must be modified. Claimant testified that from the time she was released by Dr. Amundson in November 2004 up to February 2005, when she received social security benefits, she applied for 20-25 jobs. She did not, however, provide any documentation as to those efforts. She could only recall contacting 4 employers and could not remember any interviews. After she received social security benefits she stopped her efforts nearly altogether. Under these facts and circumstances, the Board finds claimant's efforts to be lacking. Accordingly, the Board finds that a wage should be imputed to her.

---

<sup>11</sup> *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

<sup>12</sup> *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

<sup>13</sup> *Id.* at 320.

The evidence bearing on claimant's capacity to earn varies from \$7.07 an hour to \$10.10 an hour. Claimant's educational background is limited and given her lack of other training, the Board finds that she is capable of earning \$7.50 per hour based upon a 40 hour work week. As explained above, the Board is not persuaded that claimant is capable of working only 2-3 hours per week and therefore, a wage of \$300 per week based upon 40 hours per week is being imputed.

For the period commencing November 8, 2004, claimant's wage loss is 17 percent. As of November 30, 2004, claimant's fringe benefits were ceased and thereafter, her pre-injury wage would increase to \$436.21, thus yielding a corresponding increase in wage loss to 31 percent.

As for the task loss, the Board finds the ALJ's conclusion of 64 percent to be reasonable and affirms the same. The ALJ averaged the task loss opinions of Dr. Dobyms, the only physician to testify who saw claimant on numerous occasions and the only physician to comment on both task loss analyses.

Claimant is entitled to a work disability commencing November 8, 2004 of 41 percent and on December 1, 2004, the work disability increased to 48 percent.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated December 5, 2005, is affirmed in part and modified as follows:

The claimant is entitled to 30.81 weeks of temporary total disability compensation at the rate of \$242.13 per week or \$7,460.03 followed by 39.92 weeks of permanent partial disability compensation at the rate of \$242.13 per week or \$9,665.83 for a 10 percent functional disability followed by 3.29 weeks of permanent partial disability compensation at the rate of \$242.13 per week or \$796.61 for a 41 percent work disability followed by 148.40 weeks of permanent partial disability compensation at the rate of \$242.13 per week or \$35,932.09 for a 48 percent work disability, making a total award of \$53,854.56.

As of April 6, 2006 there would be due and owing to the claimant 30.81 weeks of temporary total disability compensation at the rate of \$242.13 per week in the sum of \$7,460.03 plus 113.50 weeks of permanent partial disability compensation at the rate of \$242.13 per week in the sum of \$27,481.76 for a total due and owing of \$34,941.79, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$18,912.77 shall be paid at the rate of \$242.13 per week for 78.11 weeks or until further order of the Director.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of April, 2006.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

- c: Gary K. Albin, Attorney for Claimant  
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier  
John D. Clark, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director