BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KAREN L. FOWLER	)	
Claimant	)	
	)	
VS	)	Docket Nos. 1,012,268 & 1,012,269
	)	1,012,271 & 1,012,272
CESSNA AIRCRAFT COMPANY	)	
Self-Insured Respondent	)	

ORDER

Both parties requested review of the January 24, 2005 Award by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on July 12, 2005.

APPEARANCES

James S. Oswalt, of Hutchinson, Kansas, appeared for the claimant. P. Kelly Donley, of Wichita, Kansas, appeared for self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, the parties agreed that the record listed in the Award failed to include the stipulations filed with the Court on the issues of wage (filed on November 4, 2004) and the medical records of Dr. Barcelo (filed on September 27, 2004). The parties further agreed that although claimant has alleged and filed 4 separate claims, they are all consolidated into one accident date and the Board need only issue one award.

ISSUES

The ALJ awarded claimant a 17 percent functional impairment to the whole body as a result of injuries she suffered while working for respondent based upon the opinions expressed by Dr. John P. Estivo. The ALJ also found that claimant made a good faith effort to find post-injury employment which entitled her to a 100 percent wage loss along

with a 7 percent task loss which when combined, yields a 53.5 percent permanent partial general (work) disability.[1]

Both parties appealed the ALJ's Award but neither party seriously contested the ALJ's finding of 17 percent functional impairment. Rather, both claimant and respondent take issue with the ALJ's findings with respect to work disability under K.S.A. 44-510e(a).

Claimant contends that the ALJ erred in relying upon the 7 percent task loss[2] opinion of Dr. Estivo as claimant asserts that Dr. Estivo's restrictions and resulting task loss are not credible. Claimant suggests the Board adopt the task loss opinions issued by Dr. Murati, or in the alternative, average the opinions of both Drs. Murati and Estivo which would yield a 35 percent task loss. Claimant's resulting work disability would then be 67.5 percent.

On the other hand, respondent takes issue with the ALJ's finding that claimant sustained a 100 percent wage loss as a result of her injury. Respondent does not believe claimant has made a good faith effort to find employment since she was laid off from respondent's plant in April 2004. Thus, respondent urges the Board to impute a wage to claimant which would then lessen her ultimate work disability award to somewhere between 29.95 and 34.35 percent.

The only issue to be addressed in this appeal is the nature and extent of claimant's work disability as a result of her compensable injury.

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 finds the ALJ's Award should be modified.

The ALJ succinctly and accurately set forth the pertinent facts of this claim and they will not be unnecessarily repeated. The Board adopts that statement as its own.

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[1] Both parties appealed this matter and among other things, both take issue with the ALJ's calculation of permanent partial disability benefits due at the time of the Award. It appears from counsels' statements at oral argument that the ALJ's calculations were erroneous, likely a mere clerical error. And as such, the Board will correct this error in its final computation.

[2] The Award indicates Dr. Estivo's task loss opinion was 7 percent. All parties agree this was a typographical error and that a loss of 1 task out of 25 translates to a 4 percent task loss.

Suffice it to say claimant sustained a series of compensable injuries to her upper and lower back and bilateral upper extremities which necessitated medical treatment from a variety of providers, including the company physician, Dr. Jeanne Barcelo, and Dr. Estivo, another physician designated by respondent to provide treatment. While she was able to return to work from some of those injuries, on April 19, 2004, claimant was informed that respondent could not longer accommodate her in the job she was then performing based upon a company ordered functional capacity evalutation (FCE). Claimant was placed on a 24 month leave of absence and her fringe benefits have been continued since that date. There is no dispute that claimant is entitled to permanent partial general (work) disability benefits under K.S.A. 44-510e(a). The only dispute is the extent of those benefits.

Permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> . . .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. . . 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.

This statute must be read in light of *Foulk* and *Copeland*.[3] 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 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, that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages being received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury. If a finding is made that a claimant has not made a good

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[3] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995); *Copeland v. Johnson Group, Inc.,* 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

faith effort to find post-injury employment, then the factfinder must determine an appropriate post-injury wage based on all the evidence before it.

In this instance, the Board agrees with the ALJ's finding that claimant exhibited a good faith effort to find post-injury employment after being laid off from respondent's plant. Claimant testified that she applied for unemployment following her layoff on April 19, 2004, an action that required her to actively search for employment each week. In addition to that effort, claimant posted her resume on 3 websites, an act that arguably could generate significant employment contacts. She also testified to making over 100 inquiries or applications from April 19th to the date of the regular hearing, August 16, 2004, a period of 4 months. She further testified that she was not only looking in her hometown of Marion, but in Wichita as well and had even expanded her search to out of state. She had one conditional offer of employment from Raytheon but has not heard back from that employer and has not otherwise had any offers.

Respondent's counsel emphasizes the fact that claimant testified at the regular hearing that she kept a list of her employment contacts and while she did not have them with her at the regular hearing, she agreed to produce them but never did. Thus, respondent feels disadvantaged by claimant's failure to produce the list and suggests the logical conclusion, based on this failure to produce, is that claimant falsified her efforts. For that reason, respondent maintains that the Board should find claimant failed to exhibit a good faith effort to locate appropriate employment as required by *Foulk,* and then impute a wage to claimant for purposes of the work disability computation. The Board rejects this suggestion.

The Board concludes the existence of a list is not necessarily determinative of the good faith issue, although it is certainly helpful. If respondent believed the list to be less than genuine, counsel could have asked the ALJ to issue an Order directing claimant to produce the document. Failing that, respondent could have written a follow-up letter making a written request of claimant's counsel. Respondent could have then summoned her for a deposition during its terminal period and inquired as to the contents of the list or establish that the list did not, in fact, exist. It is simply not enough, based upon this record, to dismiss the list as non-existent just because claimant did not produce it as she said she would during the course of the regular hearing.

The Board affirms the ALJ's conclusion that claimant demonstrated good faith in searching for post-injury employment and that she is entitled to a 100 percent wage loss as a result of her work-related injury.

As for the task loss component of the formula, the Board finds the ALJ's conclusion must be modified.

Claimant was treated by Dr. John P. Estivo from April 30, 2003 to November 7, 2003. At that point in time he concluded she was at maximum medical improvement, with a final diagnosis of post bilateral carpal tunnel release, cervical and thoracic spine strains and mild lumbar strain. He imposed restrictions of no lifting more than 40 pounds, and assigned a total of 5 percent for cervical, thoracic, and lumbar spine strains, and 10 percent to each of the upper extremities.[4] When combined, this yields a 17 percent functional impairment to the body as a whole pursuant to the AMA *Guides*.[5] Curiously, Dr. Estivo issued no restrictions to claimant's upper extremities as a result of her bilateral carpal tunnel condition and subsequent surgery. He maintains she is fully capable of returning to repetitive duty as long as it does not violate her 40 pound lifting restriction, which was solely imposed due to the strains to her spine. As a result, his task loss opinion was comparatively low. When deposed, Dr. Estivo testified that claimant sustained a 4 percent task loss, losing the ability to perform only 1 of the 25 listed tasks.

Dr. Pedro Murati saw claimant on January 20, 2004, at claimant's lawyer's request. Claimant complained of neck pain that occasionally produces headaches, mid-low back pain, and pain in both hands. Dr. Murati diagnosed bilateral hand pain, status post carpal tunnel releases, myofascial pain syndrome at the level of the bilateral shoulder girdles, cervical paraspinals, thoracic paraspinals and lumbar paraspinals. Claimant was placed on permanent restrictions based on an 8 hour day of no crawling or heavy grasping with the right or left side, no above shoulder work with the right or left side, no lifting, carrying, pushing, or pulling over 20 pounds. Claimant can occasionally climb stairs and ladders, squat, repetitive grasp/grab with both the right and left. Claimant is not to work more than 18 inches from her body with the right or left and is to avoid awkward positions of the neck and is to alternate her sitting, standing, and walking. She is not to use hooks, knives or vibratory tools with either the right or the left. She is allowed to use a keyboard for 20 minutes of the day and then must break and do something else for 40 minutes.[6]

Dr. Murati rated claimant with a 10 percent (6 percent whole body) impairment to the right upper extremity, and a 10 percent (6 percent whole body) for the left upper extremity, 5 percent myofascial pain syndrome at the level of the paraspinals, and 5 percent at the level of the lumbar paraspinals. These ratings combine for a 24 percent

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[4] Estivo Depo., Ex. 2 at 1.

[5] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

[6] Murati Depo., Ex. 2 at 6.

whole body impairment.[7] He also opined that claimant sustained a 66 percent task loss as a result of her work-related injuries. This opinion not only took into consideration her weight lifting restrictions but her limits in performing repetitive upper extremity movements.

In between these two physicians' treatment and evaluations, claimant was seen by Dr. Jeanne Barcelo, the in house physician for respondent. Dr. Barcelo examined claimant, ordered a FCE and imposed restrictions similar to those that would ultimately be imposed by Dr. Murati. She concluded respondent was no longer able to accommodate claimant and that triggered a layoff as of April 19, 2004.

Claimant maintains it is wholly unfair and inconsistent for respondent to conclude, based upon Dr. Barcelo's FCE and resulting restrictions, that it cannot accommodate her, and yet rely on the restrictions and resulting task loss opinions of Dr. Estivo, who opined claimant bears only a 4 percent task loss. Both Drs. Estivo and Dr. Barcelo apparently relied upon the same FCE so it is somewhat curious that the two would have such widely diverse opinions as to claimant's ability to perform her job for respondent. However, Dr. Barcelo did not testify and while it is known that she triggered claimant's lay off status, her opinions on claimant's ultimate task loss are not within this record. Thus, the Board is left with the opinions of Dr. Estivo (4 percent) and Dr. Murati (66 percent). Dr. Murati's opinions are not impervious to criticism as he included within this rating fibromyalgia to various parts of claimant's body, a finding that was not made by Dr. Estivo or Dr. Barcelo.

The Board has considered this evidence and concludes that neither task loss opinion is more persuasive than the other and as such, it will average the two and find claimant bears a 35 percent task loss. When that figure is averaged with the 100 percent wage loss, the result is 67.5 percent and the Board so finds

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 January 24, 2005, is modified as follows:

The claimant is entitled to 2.57 weeks of temporary total disability compensation at the rate of $440 per week or $1,130.80 followed by permanent partial disability

[7] Murati Depo., Ex. 2 at 4-5.

compensation at the rate of $440 per week not to exceed $100,000 for a 67.5% work disability.

As of July 29, 2005 there would be due and owing to the claimant 2.57 weeks of temporary total disability compensation at the rate of $440 per week in the sum of $1,130.80 plus 64 weeks of permanent partial disability compensation at the rate of $440 per week in the sum of $28,160 for a total due and owing of $29,290.80, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $70,709.20 shall be paid at the rate of $440 per week until fully paid or until further order from the Director.

IT IS SO ORDERED.

Dated this _____ day of July, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James S. Oswalt, Attorney for Claimant
P. Kelly Donley, Attorney for Self-Insured Respondent
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director