BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMIE L. SPUNAUGLE Claimant	)	
VS.	)	
SPANGLES, INC. Respondent	)	Docket No. 1,014,210 & 1,016,337
AND	)	
KS. RESTAURANT & HOSPITALITY ASSN. SELF-INSURERS FUND Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the May 11, 2006 Award by Administrative Law Judge John D. Clark. The Board heard oral argument on August 18, 2006.

APPEARANCES

Dale V. Slape of Wichita, Kansas, appeared for the claimant. Jeffery R. Brewer of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed the claimant's compensation rate before November 30, 2005, should be based upon the stipulated average weekly wage of $538.46 and starting on that date the compensation rate should be based upon an average weekly wage of $615.42. The Award will be modified to reflect the change in the compensation rate.

The parties further agreed the claimant suffers a 15 percent whole person functional impairment and a 25 percent task loss.

ISSUES

The Administrative Law Judge (ALJ) found the claimant sustained a 47 percent work disability based upon a 25 percent task and 69 percent wage loss.

The respondent requests review of nature and extent of disability, specifically, claimant's wage loss percentage. Respondent argues the claimant has self limited the number of hours she is working and therefore has not made a good faith effort to find appropriate employment. Consequently, respondent further argues a wage should be imputed to her which would reduce her wage loss percentage to 41 percent before November 30, 2005, and 48 percent after that date.

The claimant argues that respondent has limited the hours she can work and her actual wage should be utilized which would result in an increased percentage of wage loss. Consequently, claimant further argues her actual wage should be adopted which would increase her wage loss percentage to at least 74 percent before November 30, 2005, and at least 78 percent after that date.

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 facts of this case were succinctly presented in the Award and they will not be repeated except as necessary. The issue to be addressed on appeal is the percentage of claimant's wage loss as the parties stipulated at oral argument before the Board that claimant suffered a 25 percent task loss. And the parties' disagreement regarding claimant's wage loss is limited to the determination of claimant's post-injury wage.

In *Copeland*[1], 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 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. Conversely, if a good faith effort to find appropriate employment is made then the post-injury wage is based upon the actual earnings.

At the time of her injury claimant was a manager at one of respondent's restaurants. Upon her release from medical treatment, she was returned to work within her restrictions as a crew member at the restaurant and paid at the hourly rate of $6.50. As she continued

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

working she also engaged in a job search which evidenced a good faith effort to find appropriate employment. However, upon her return to work for respondent the claimant self-limited the hours she worked and agreed she could work more.

The claimant was offered accommodated work for 30 hours a week at $6.50 an hour but limited her schedule to fewer hours for a variety of reasons including taking some evening classes which reduced her availability to work. Nonetheless, 30 hours were offered and remained available to her, consequently, the ALJ imputed claimant's post-injury earning ability as $195. The Board agrees and affirms.

The claimant's stipulated wage before November 30, 2005, was $538.46. Consequently, the post-injury wage of $195 results in a 64 percent wage loss. Averaging the 25 percent task loss component of the work disability formula with the 64 percent wage loss results in a 44.5 percent work disability.

On November 30, 2005, the claimant's stipulated average weekly wage increased to $615.42. Consequently, the $195 post-injury wage results in a 68 percent wage loss. Averaging the 25 percent task loss component of the work disability formula with the 68 percent wage loss results in a 46.5 percent work disability.

The Board affirms the ALJ's determination that claimant's post-injury wage was $195 and modifies the calculation of the award to reflect the stipulated changes in claimant's average weekly wage and corresponding different work disability percentages before and after November 30, 2005.

The Board notes that the ALJ did not award claimant's counsel a fee for his services. The record does not contain a fee agreement between claimant and his attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge John D. Clark dated May 11, 2006, is modified to reflect claimant suffered a 44.5 percent work disability before November 30, 2005, and a 46.5 percent work disability thereafter.

The claimant is entitled to 58.80 weeks of temporary total disability compensation at the rate of $358.99 per week or $21,108.61 followed by 49.34 weeks of permanent partial disability compensation at the rate of $358.99 per week or $17,712.57 followed by

123.27 weeks of permanent partial disability compensation at the rate of $410.30 per week or $50,577.68 for a 46.50% work disability, making a total award of $89,398.86.

As of September 15, 2006 there would be due and owing to the claimant 58.80 weeks of temporary total disability compensation at the rate of $358.99 per week in the sum of $21,108.61 plus 49.34 weeks of permanent partial disability compensation at the rate of $358.99 per week in the sum of $17,712.57 plus 41.43 weeks of permanent partial disability compensation at the rate of $410.30 per week in the sum of $16,998.73 for a total due and owing of $55,819.91, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $33,578.95 shall be paid at the rate of $410.30 per week for 81.84 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of September 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant
Jeffery R. Brewer, Attorney for Respondent and its Insurance Carrier