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

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| **DEBRA J. FRAZEE**<br>Claimant | ) | |
| VS. | ) | |
| **VIA CHRISTI RIVERSIDE**<br>Respondent | ) | Docket Nos. 1,017,012;<br>1,017,013 |
| AND | ) | |
| **LIBERTY MUTUAL FIRE INS. CO.**<br>Insurance Carrier | ) | |

## ORDER

Respondent requested review of the June 15, 2007 Review and Modification Award by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on September 21, 2007.

### APPEARANCES

Joseph Seiwert, of Wichita, Kansas, appeared for the claimant. Edward D. Heath, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

### RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument, respondent conceded the 23 percent functional impairment and the 50 percent task loss assigned by the ALJ is not in dispute and can be summarily affirmed.

## ISSUES

In this post-award proceeding, the Administrative Law Judge (ALJ) concluded the claimant made a good faith effort to find a job following her lay off from respondent's employ. Accordingly, he modified the claimant's Award granting her a 75 percent work disability based upon a 100 percent wage loss and a 50 percent task loss.

The respondent did not file a brief with either the ALJ or the Board but during oral argument argued claimant's work disability should be something less than that awarded by the ALJ, based upon an alleged lack of good faith effort to obtain appropriate post-injury employment. Respondent contends claimant's job search was less than genuine and lacked true effort, in that she spent approximately 10-15 minutes per week completing and filing 5-6 online computer applications for employment. Because she failed to put forth a good faith effort, and according to Karen Terrill was capable of earning comparable wages, respondent maintains claimant is entitled to no work disability under K.S.A. 44-510e(a). Alternatively, respondent suggests that if there is a wage loss, it is no more than 24 percent and when averaged with a 50 percent task loss, yields a 37 percent work disability.

Claimant maintains the ALJ's [Review and Modification] Award should be affirmed in all respects, with one caveat. Claimant acknowledges the Award should be modified to give credit for respondent's earlier payment of $13,599.55 for her 10 percent functional impairment under the original Award.

## 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's work-related injuries were the subject of an Agreed Award entered into by the parties and approved on October 4, 2005. Thereafter, on July 31, 2006, claimant was laid off from her accommodated position with respondent. Claimant was told of the impending layoff and as a result, she filed her application for Review and Modification on July 20, 2006, just before her employment was terminated. Fringe benefits were paid through August 31, 2006 and as of that time, her average weekly wage increased to $553.81. Claimant also took a typing test that was arranged for by respondent. According to claimant, she was able to type between 19-20 words per minute, a rate that disqualified her for certain jobs with respondent.

Since her lay off and up to the time of the Review and Modification hearing claimant has looked for work within her restrictions, utilizing the internet to search for open jobs and list her resume on several websites, including "Kansasjoblink" and "Nationsjob". Claimant has also gone in person to apply for 4 positions, keeping an ongoing list of all her efforts.

Her list itemizes a search that encompasses approximately 5-6 employment inquiries per week. To date, she has not received any job offers and admittedly, most of her job applications are completed online. And she testified that each week her online inquiries and applications take her approximately 10-15 minutes.

Two vocational specialists testified as to claimant's capacity to earn wages and the prevalence of jobs available to someone with claimant's educational history. Doug Lindahl testified on behalf of the claimant that there were 666 jobs available to a high school graduate (such as claimant) in the Wichita area. And based upon that and claimant's employment background, he believed claimant had the capacity to earn from $5.15 an hour to $8.21 an hour in a clerical position. Upon further questioning, he testified that it was most likely that claimant could secure employment as a dietary aid earning $7.50 an hour.

In contrast, Karen Terrill testified on behalf of the respondent that claimant could work as a unit clerk or a staffing coordinator, given her background in the medical field, earning a range of $10.34 to $13.80 an hour. However, it is unclear from Ms. Terrill's testimony how many of either of these jobs are available in the Wichita market or what effect claimant's lack of typing skills might have on her success in such jobs.

The Workers Compensation Act provides, in part:

> Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and 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 diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, be increasing or diminishing the compensation subject to the limitation provided in the workers compensation act.[1]

K.S.A. 44-528 permits modification of an award in order to conform to changed conditions.[2] If there is a change in the claimant's work disability, then the award is subject

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[1] K.S.A. 44-528.

[2] *Nance v. Harvey County*, 263 Kan. 542, Syl. ¶ 1, 952 P.2d 411 (1997).

to review and modification.[3] In a review and modification proceeding, the burden of establishing the changed conditions is on the party asserting them.[4] Our appellate courts have consistently held that there must be a change of circumstances, either in claimant's physical or employment status, to justify modification of an award.[5]

Here, there is a change in circumstances, in that claimant is no longer employed by respondent and has suffered a 100 percent actual corresponding wage loss. However, case law requires the factfinder to consider whether claimant has engaged in a good faith effort to find appropriate post-injury employment before utilizing the claimant's actual wage loss when computing the permanent partial general disability under K.S.A. 44-510e(a).[6] Absent a finding of good faith, the factfinder must then consider the claimant's capacity to earn wages in determining the amount of wage loss.

Claimant maintains that her documented job search satisfies the good faith criteria, in that 5-6 times per week she submitted a resume, filled out an application or sometimes sought employment in person. In the past, just such an effort has been found to constitute "good faith" but in no instance have such efforts been solely or primarily online contacts. But respondent is asserting that claimant's job search efforts, while numerically sufficient when compared to earlier cases, is truly a less than sincere effort. More to the point, claimant's efforts to file 5-6 applications online, an act that *according to claimant* takes up to 15 minutes during the week is, according to respondent, tantamount to no search at all and is intended only to serve as a less than genuine attempt to find employment. Respondent asserts that quality is required by the *Foulk* and *Copeland* rationales, not quantity.

Karen Terrill concedes that many employers actually *require* applications to be filed online and do not encourage or permit in person applications. That said, it is somewhat difficult to understand why claimant did not spend more time attempting to find appropriate employment, particularly given the diversity of employment opportunities in the Wichita area. At a minimum, claimant could register with a day labor company thereby increasing

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[3] *Garrison v. Beech Aircraft Corp.*, 23 Kan. App. 2d 221, 225, 929 P.2d 788 (1996).

[4] *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 531, 598 P.2d 544 (1979).

[5] *See*, e.g., *Gile v. Associated Co.*, 223 Kan. 739, 576 P.2d 663 (1978); *Coffee v. Fleming Company, Inc.*, 199 Kan. 453, 430 P.2d 259 (1967).

[6] *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). But this analysis may no longer be applicable as our Supreme Court has recently said that statutes must be interpreted strictly and nothing should be read into the language of a statute as was done in *Foulk* and *Copeland*. See *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh. denied* (May 8, 2007).; and *Graham v. Dokter,* ___Kan. ____, 161 P.3d 695 (No. 95,650 filed July 13, 2007).

her skills while expanding her employment opportunities. And the more time spent looking for work, the more likely that a job will result.

Based upon the evidence contained within the record, the Board concludes that claimant did not make a good faith job search in the period following her layoff and up to the review and modification hearing. Accordingly, the decision to utilize her actual wage loss of 100 percent is hereby reversed. The Board further finds that given her lack of good faith, a wage of $7.50 per hour should be imputed, thus translating to a 46 percent wage loss and a 48 percent work disability.

## AWARD

**WHEREFORE**, it is the finding, decision and order of the Board that the Review and Modification Award of Administrative Law Judge Thomas Klein dated June 15, 2007, is modified as follows:

The claimant is entitled to 199.20 weeks of permanent partial disability compensation at the rate of $369.23 per week or $73,550.62 for a 48 percent work disability, making a total award of $73,550.62.

As of November 6, 2007 there would be due and owing to the claimant 77.43 weeks of permanent partial disability compensation at the rate of $369.23 per week in the sum of $28,589.48 for a total due and owing of $28,589.48, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $44,961.14 shall be paid at the rate of $369.23 per week for 121.77 weeks or until further order of the Director.

**IT IS SO ORDERED.**

Dated this _____ day of November, 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

## DISSENT

I would find claimant made a good faith effort to find appropriate employment. As such, her percentage of permanent partial disability compensation should be calculated based upon her percentage of actual wage loss.

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BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Edward D. Heath, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge