

work disability.¹ In determining the extent of claimant's wage loss, the Judge found claimant had demonstrated a good faith effort to find post-injury employment (the Judge found claimant had attended school to improve her position in the open labor market but unfortunately the current economic conditions had prevented her from finding employment). The Judge also found claimant's average weekly wage on the date of accident was \$340 (\$8.50 per hour x 40 hours) as claimant was expected to work 40 hours per week.

In its brief to the Board, respondent requested the Board to reverse and/or remand the May 11, 2009, Award. Respondent maintained: (1) the Judge erred in finding claimant made a good faith effort to find employment, (2) the Judge erred in failing to account for claimant's post-injury earnings in awarding work disability, (3) the Judge erred by failing to impute a post-injury wage, and (4) claimant's average weekly wage on the date of accident was \$318.75 as she worked part-time rather than full-time.

In her brief to the Board, claimant asserted she made a good faith effort in pursuing employment after recovering from her accident and, therefore, her work disability should be calculated using her actual wages.

Moreover, at oral argument before the Board the parties agreed the remarks in their briefs concerning whether claimant made a good faith effort to find other employment and about imputing a post-injury wage must now be considered in light of the recent Kansas Supreme Court *Bergstrom*² decision, which addressed good faith and the wage loss prong of the permanent partial general disability formula in K.S.A. 44-510e.

The issues before the Board on this appeal are:

1. What is claimant's average weekly wage?
2. What is the extent of claimant's permanent partial general disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

¹ A permanent partial disability under K.S.A. 44-510e that is greater than the whole person functional impairment rating.

² *Bergstrom v. Spears Manufacturing Company*, ___ Kan. ___, 214 P.3d 676 (2009).

Claimant injured her right shoulder and neck on August 13, 2004, while working for respondent. The neck injury resulted in a cervical fusion. The parties stipulated claimant's accident arose out of and in the course of her employment with respondent. The parties do not dispute that claimant sustained a 20 percent whole person functional impairment as a result of her work-related accident. Likewise, the parties do not challenge the Judge's finding that claimant sustained a 42.75 percent task loss for purposes of the permanent partial general disability formula. Accordingly, the Board makes those findings.

Pre-injury average weekly wage

On the date of claimant's accident, respondent was paying claimant \$8.50 per hour. Claimant testified she was expected to work five days per week, 40 hours per week.³ During the 26 weeks before her August 2004 accident, claimant did not work 40 hours per week as she was sent home early on some days due either to the heat (the warehouse where claimant worked did not have air conditioning) or a lack of work.

The Judge determined claimant's average weekly wage on the date of accident was \$340 because claimant testified she was expected to work 40 hours per week. The Board agrees.

The issue is whether claimant is considered a part-time or full-time worker for purposes of computing her average weekly wage. K.S.A. 2004 Supp. 44-511(a)(4) and (5) provide in pertinent part:

(4) The term "part-time hourly employee" shall mean and include any employee paid on an hourly basis: (A) Who by custom and practice or under the verbal or written employment contract in force at the time of the accident is employed to work, agrees to work, **or is expected to work on a regular basis less than 40 hours per week**; and (B) who at the time of the accident is working in any type of trade or employment where there is no customary number of hours constituting an ordinary day in the character of the work involved or performed by the employee. (Emphasis added.)

(5) **The term "full-time hourly employee" shall mean and include only those employees paid on an hourly basis who are not part-time hourly employees, as defined in this section, and who are employed in any trade or employment where the customary number of hours constituting an ordinary working week is 40 or more hours per week**, or those employees who are employed in any trade or employment where such employees are considered to be full-time employees by

³ R.H. Trans. at 20.

the industrial customs of such trade or employment, regardless of the number of hours worked per day or per week. (Emphasis added.)

K.S.A. 2004 Supp. 44-511(b)(4)(B) provides:

(B) if the employee is a full-time hourly employee, as defined in this section, the average gross weekly wage shall be determined as follows: (i) A daily money rate shall first be found by multiplying the straight-time hourly rate applicable at the time of the accident, by the customary number of working hours constituting an ordinary day in the character of work involved; (ii) the straight-time weekly rate shall be found by **multiplying the daily money rate by the number of days and half days that the employee usually and regularly worked, or was expected to work**, but 40 hours shall constitute the minimum hours for computing the wage of a full-time hourly employee, unless the employer's regular and customary workweek is less than 40 hours, in which case, the number of hours in such employer's regular and customary workweek shall govern; (iii) the average weekly overtime of the employee shall be the total amount earned by the employee in excess of the amount of straight-time money earned by the employee during the 26 calendar weeks immediately preceding the date of the accident, or during the actual number of such weeks the employee was employed if less than 26 weeks, divided by the number of such weeks; and (iv) the average gross weekly wage of a full-time hourly employee shall be the total of the straight-time weekly rate, the average weekly overtime and the weekly average of any additional compensation. (Emphasis added.)

And the Kansas Court of Appeals in *Tovar*⁴ held:

A worker's compensation is to be determined by multiplying his or her daily money rate by the number of days and half days he or she usually and regularly works or is expected to work.

The greater weight of the evidence establishes that claimant was hired to work and expected to work at least 40 hours per week. The reason she did not work 40 hours per week was due to either the onerous heat in the warehouse or the lack of work. The Board affirms the Judge's finding that claimant expected to work 40 hours per week and, therefore, she was a full-time worker. Consequently, her average weekly wage on the date of the accident was \$340 per week, which was derived by multiplying claimant's \$8.50 hourly wage by 40 hours.

⁴ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, Syl. ¶ 2, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

Post-injury wage

After being terminated by respondent in February 2005 for allegedly speaking to a co-worker about their wages, claimant pursued additional education at a community college. She graduated in May 2008 with an Associate's degree. While attending college, claimant underwent neck surgery and received temporary total disability benefits from September 15, 2005, through May 18, 2006, a period of 35.14 weeks.⁵

In 2006, claimant began tutoring other students. In addition, during 2007 claimant worked in a work study program.⁶ Claimant testified she earned \$6.60 an hour tutoring and from \$6.25 to \$7 per hour in the work study program. During 2007 claimant worked approximately 35 hours per week as she tutored other students approximately 20 hours per week and worked approximately 15 hours per week in work study. Claimant testified, in part:

Q. (Mr. Graham) Did you actually work -- strike that. Did you work 40 hours a week while you were going to school full time?

A. (Claimant) No. I got close. I did 20 hours a week average for tutoring and 15 hours a week for the school for that one year, so I did 35 hours.

Q. So while you were in school working as a math tutor you were working 20 hours a week at six sixty an hour?

A. Well, it wasn't the same time because I started the math tutoring in 2006 and I started the office work in 2007, so there was like a year in between, so I don't know.

....

Q. So in 2007 you were going to school full time and working 35 hours a week?

A. Yes.

Q. So when you were working 35 hours a week you would have been earning six sixty an hour for 20 hours as a math tutor and approximately \$7 an hour for 15 hours working in the office?

⁵ R.H. Trans. at 5.

⁶ *Id.*, at 18.

A. Yes.⁷

And after graduating from community college in May 2008, claimant tutored a 7th grade student for a week during December 2008 earning \$150. Claimant also tutored a college student during 2008 for three days and earned \$10 per hour.⁸

The record is not entirely clear as to claimant's post-injury earnings. But, as indicated above, the parties agreed at oral argument before the Board that claimant earned the following approximate wages following her termination from respondent's employment: \$132 per week (\$6.60 per hour x 20 hours) tutoring other students in 2006; \$237 per week (\$105 per week (\$7 per hour x 15 hours) from work study plus \$132 per week (\$6.60 per hour x 20 hours) for tutoring) during 2007; a total of \$180 during 2008; and zero wages as of January 1, 2009.

After the parties filed their briefs with the Board, the Kansas Supreme Court issued its decision in *Bergstrom*.⁹ In that proceeding the Kansas Supreme Court interpreted K.S.A. 44-510e, which governs the computation of claimant's permanent partial general disability, and ruled that it is not proper to impute a post-injury wage when computing the wage loss in the permanent partial general disability formula. The Kansas Supreme Court stated, in pertinent part:

When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.¹⁰

K.S.A. 44-510e(a) contains no requirement that an injured worker make a good-faith effort to seek postinjury employment to mitigate the employer's liability. *Fouk 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, 320, 944 P.2d 179 (1997), and all subsequent cases that have imposed a good-faith effort requirement on injured workers are disapproved.¹¹

⁷ *Id.*, at 36, 37.

⁸ *Id.*, at 32.

⁹ *Bergstrom v. Spears Manufacturing Company*, ___ Kan. ___, 214 P.3d 676 (2009).

¹⁰ *Id.*, Syl. ¶ 1.

¹¹ *Id.*, Syl. ¶ 3.

We can find nothing in the language of K.S.A. 44-510e(a) that requires an injured worker to make a good-faith effort to seek out and accept alternate employment. The legislature expressly directed a physician to look to the tasks that the employee performed during the 15-year period preceding the accident and reach an opinion of the percentage that can still be performed. That percentage is averaged together with the difference between the wages the worker was earning at the time of the injury and the wages the worker was earning after the injury. The legislature then placed a limitation on permanent partial general disability compensation when 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.) K.S.A. 44-510e(a). The legislature did not state that the employee is required to *attempt to work* or that the employee *is capable of engaging in work* for wages equal to 90% or more of the preinjury average gross weekly wage.¹²

In the absence of *Bergstrom*, claimant’s termination and efforts to obtain other employment would have been an issue for the Judge and Board to consider in determining whether claimant’s actual post-injury wages or her wage-earning ability should be used in computing her permanent partial general disability under K.S.A. 44-510e. But *Bergstrom* makes clear that good faith is not an element of the permanent partial general disability formula and those earlier Kansas Court of Appeals cases that treated good faith as an element of the formula are no longer valid. Consequently, claimant’s actual post-injury earnings must be used in computing her permanent partial general disability. The Board finds claimant has the following wage losses for the permanent partial general disability formula for the following periods:

From August 13, 2004 (date of accident), through February 2, 2005 (date of termination), claimant has no wage loss as she continued to work for respondent;

From February 3, 2005, to September 15, 2005 (date that temporary total began), claimant had a 100 percent wage loss because she was not working;

(From September 15, 2005, through May 18, 2006, claimant received temporary total disability benefits;)

From May 19, 2006, through December 31, 2006, claimant had a 61 percent wage loss as she was earning approximately \$132 per week;

¹² *Id.*, slip op. at 4.

From January 1, 2007, through December 31, 2007, claimant had a 30 percent wage loss as she was earning approximately \$237 per week; and

From January 1, 2008, through December 31, 2008, claimant had a 99 percent wage loss as she earned \$180 during the year and, thus, averaged \$3.44 per week; and

Commencing January 1, 2009, claimant has a 100 percent wage loss as she was not working when she testified on January 27, 2009, and, thus, not earning any wages.

The permanent partial general disability formula of K.S.A. 44-510e requires the percentage of wage loss to be averaged with the percentage of task loss. Averaging the above wage loss percentages with claimant's 42.75 percent task loss yields the following:

(20 percent permanent partial disability from August 13, 2004, through February 2, 2005, while claimant continued to work for respondent;)

71 percent permanent partial disability from February 3, 2005, to September 15, 2005;

52 percent permanent partial disability from May 19, 2006, through December 31, 2006;

36 percent permanent partial disability from January 1, 2007, through December 31, 2007; and

71 percent permanent partial disability commencing January 1, 2008.¹³

In conclusion, the May 11, 2009, Award should be modified to utilize claimant's actual post-injury wages for the permanent partial general disability formula of K.S.A. 44-510e.

The Board adopts the findings of the Judge that are not inconsistent with the above.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹⁴ Accordingly, the findings

¹³ The permanent partial disability is the same, which is 71 percent, for the period from January 1, 2008, through December 31, 2008, and the period commencing January 1, 2009.

¹⁴ K.S.A. 2008 Supp. 44-555c(k).

and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the May 11, 2009, Award entered by Judge Yates Roberts to compute claimant's permanent partial general disability using her actual post-injury earnings.

Shawna L. Lauber is granted compensation from Smith Steel & Supply and its insurance carrier for an August 13, 2004, accident and the resulting disability. Based upon an average weekly wage of \$340, Ms. Lauber is entitled to receive the following disability benefits:

For the period from August 13, 2004, through February 2, 2005, Ms. Lauber is entitled to receive 24.86 weeks of permanent partial disability benefits at \$226.68 per week, or \$5,635.26, for a 20 percent permanent partial disability.

For the period from February 3, 2005, through September 14, 2005, Ms. Lauber is entitled to receive 32 weeks of permanent partial disability benefits at \$226.68 per week, or \$7,253.76, for a 71 percent permanent partial disability.

For the period from September 15, 2005, through May 18, 2006, Ms. Lauber is entitled to receive 35.14 weeks of temporary total disability benefits at \$226.68 per week, or \$7,965.54.

For the period from May 19, 2006, through December 31, 2006, Ms. Lauber is entitled to receive 32.43 weeks of permanent partial disability benefits at \$226.68 per week, or \$7,351.23, for a 52 percent permanent partial disability.

For the period from January 1, 2007, through December 31, 2007, Ms. Lauber is entitled to receive 52.14 weeks of permanent partial disability benefits at \$226.68 per week, or \$11,819.10, for a 36 percent permanent partial disability.

For the period commencing January 1, 2008, Ms. Lauber is entitled to receive 138.92 weeks of permanent partial disability benefits at \$226.68 per week, or \$31,490.39, for a 71 percent permanent partial disability and a total award of \$71,515.28.

As of November 10, 2009, Ms. Lauber is entitled to receive 35.14 weeks of temporary total disability benefits at \$226.68 per week, or \$7,965.54, plus 238.58 weeks of permanent partial disability compensation at \$226.68 per week in the sum of \$54,081.31 for a total due and owing of \$62,046.85, which is ordered paid in one lump sum less any

amounts previously paid. Thereafter, the remaining balance of \$9,468.43 shall be paid at \$226.68 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of November, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: James R. Shetlar, Attorney for Claimant
- Jason M. Lloyd, Attorney for Respondent and its Insurance Carrier
- Marcia L. Yates Roberts, Administrative Law Judge