

Claimant contends Judge Appling erred. Claimant argues she is entitled to receive benefits for a work disability (a permanent partial general disability greater than the whole person functional impairment rating). Accordingly, claimant requests the Board to find she has a 44 percent work disability, based upon a 43 percent task loss and a 45 percent wage loss.

Respondent and its insurance carrier also contend the Judge erred. They maintain Judge Appling correctly determined claimant was not entitled to an award for a work disability because claimant was terminated for unsatisfactory job performance and respondent could have accommodated claimant's restrictions. But they argue (1) claimant's functional impairment should be reduced from a 12 percent whole person impairment to a 6.36 percent whole person impairment, (2) claimant should not have received temporary total disability benefits for the period from March 15, 2005, through April 26, 2005, and (3) claimant's pre-injury average weekly wage is \$458.15 and, therefore, the compensation rate should be reduced. Accordingly, respondent and its insurance carrier request the Board to modify the June 20, 2006, Award and the June 26, 2006, Award Nunc Pro Tunc.

The issues raised to the Board on this appeal are:

1. What is claimant's average weekly wage?
2. What is the nature and extent of claimant's injury and disability?
3. Should respondent and its insurance carrier receive a credit or offset for temporary total disability benefits they paid for the period from March 15, 2005, through April 26, 2005?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Claimant began working for respondent in April 2002 as a customer service representative. Claimant's workday consisted of answering customers' telephone calls and entering information into respondent's computer system. In approximately October 2004, claimant began experiencing symptoms in both hands and arms from carpal tunnel syndrome. Claimant did not initially associate the symptoms with her work and, therefore, did not immediately report the symptoms to respondent.

After learning that her symptoms could be related to her work, which entailed working with a computer keyboard, on December 23, 2004, claimant reported the

symptoms to respondent. Respondent immediately sent claimant to see the company physician, who initially suspected bilateral carpal tunnel syndrome. The company doctor, however, also suspected the carpal tunnel syndrome was caused by claimant's uncontrolled diabetes rather than her work as claimant had advised the doctor that she had only worked about 23 days over the last three months.¹

Claimant then saw her family physician, who scheduled her for nerve conduction tests. Those tests confirmed claimant had bilateral carpal tunnel syndrome. Respondent and its insurance carrier later referred claimant to Dr. J. Mark Melhorn, who performed right and left carpal tunnel release surgeries on claimant on February 14, 2005, and February 28, 2005, respectively.

On March 15, 2005, Dr. Melhorn released claimant to return to work. And on April 26, 2005, the doctor saw claimant for the last time and released her from medical treatment. But claimant could not return to work for respondent as respondent had earlier terminated her employment on January 14, 2005. Respondent contends she was terminated because of unsatisfactory job performance as she had failed to reduce her average time for telephone calls. Conversely, claimant believes she was not given a sufficient opportunity to reduce her time per call as she missed numerous days from work due to medical reasons unrelated to her bilateral upper extremity injuries. Claimant contends she was terminated because of her many absences from work.

Claimant's health is not good. In addition to her bilateral upper extremity injuries, claimant has recently received treatment for depression, diabetes, fatigue, weight loss, and sleep apnea. Indeed, claimant attended her November 2005 regular hearing in a wheelchair as she was having problems with her knees and could hardly walk.

Claimant is a high school graduate and has a certificate in food service from a community college. Unfortunately, claimant has not been employed since being terminated by respondent in January 2005. She has filed her resume on an internet site and has applied for several jobs through that process. She has also applied with Addecco and Manpower employment services.

Claimant estimates since April 2005 she has averaged contacting three potential employers per week counting resumes, applications, and interviews. But claimant was able to provide the names of only a handful of those potential employers. Moreover, in her brief to the Board claimant concedes the Board should impute a post-injury wage of \$240 per week for purposes of the wage loss prong of the permanent partial general disability formula.

¹ Armbrister Depo., Ex. 5.

1. What is claimant's average weekly wage?

After stating respondent and its insurance carrier had refused to provide wage and fringe benefit information, the Judge found claimant's average weekly wage for purposes of computing her workers compensation benefits was sufficient for the maximum disability benefit of \$449. But respondent and its insurance carrier contend they did present that information. They argue the evidence establishes an average weekly wage of \$458.15, which is a base wage of \$435.60 per week plus \$22.55 per week in overtime and bonuses. They argue insurance benefits in the sum of \$69.36 per week should not be included in computing claimant's average weekly wage as claimant lost those only because of her termination of employment.

The Workers Compensation Act provides that additional compensation items, such as insurance benefits provided by an employer, shall be included in computing a worker's average weekly wage when those benefits are terminated.² The Act does not otherwise restrict the inclusion of those benefits when computing a worker's average weekly wage. Respondent and its insurance carrier have cited no authority to support their contention. And the Board is unaware of any statute or appellate decision that supports their contention. Consequently, the cost of claimant's insurance benefits should be included in computing her average weekly wage after those benefits were discontinued.

The parties agree respondent paid claimant \$10.89 per hour and that she worked 40 hours per week. Accordingly, claimant's pre-injury base wage equaled \$435.60 per week. The wage records entered into evidence at Ms. Armbrister's deposition indicate claimant was paid every two weeks. Those records do not break down claimant's pay into a weekly basis nor do they separate claimant's overtime pay from any bonuses she may have received. But those records do indicate claimant was paid \$586.30 more than her base wage over the last 26 weeks of her employment with respondent. Consequently, the Board finds claimant received an average of \$22.55 per week in overtime and bonuses that should be added to her base wage. Therefore, excluding insurance benefits, claimant's pre-injury average weekly wage is \$458.15.

The records introduced at Ms. Armbrister's deposition also indicate respondent provided to claimant health insurance and life insurance that cost the company \$68.93 per week and \$.43 per week, respectively. Accordingly, claimant's average weekly wage including those additional compensation items is \$527.51. Although claimant may have received additional bonuses in the 52-week period before her accident, that information is not ascertainable from the evidence presented. Accordingly, the Board finds claimant's average weekly wage for purposes of this claim is \$527.51.

² K.S.A. 2004 Supp. 44-511(a)(2).

2. What is the nature and extent of claimant's injury and disability?

Dr. Melhorn rated claimant under the *AMA Guides*³ (4th ed.) as having a 6.36 percent whole person impairment due to her bilateral arm injuries. Although the doctor released claimant to regular work, he believes she should exercise, stretch, apply heat to her upper extremities in the mornings, apply cool in the afternoons or evenings, and observe task rotation.

Dr. Melhorn reviewed a list of former work tasks that was prepared by respondent and its insurance carrier's vocational expert witness, Jon Rosell. Of the 39 different work tasks that claimant performed in the 15 years before her bilateral upper extremity injuries, Dr. Melhorn concluded claimant was definitely able to perform 37 of those tasks, or approximately 95 percent. The doctor questioned claimant's ability to perform the other two tasks – handling customer service calls for respondent, which comprised 70 percent of her day, and assembling medical supplies, which comprised 75 percent of that related job. In the end, however, Dr. Melhorn believed claimant could perform those two tasks if there was task rotation.

Claimant's attorney hired Dr. Pedro A. Murati to evaluate claimant for purposes of this claim and to rate claimant under the *AMA Guides* (4th ed.). The doctor found claimant had a 10 percent impairment to each upper extremity, which converted to a 12 percent whole person impairment. The doctor recommended the following work restrictions and limitations for her upper extremities:

no more than frequent repetitive hand controls; no more than occasional repetitive grasp/grab; no heavy grasp; no lifting/carrying/pushing/pulling over 20 pounds, 20 pounds occasionally and 10 pounds frequently; no use of hooks or knives; no more than 20 minutes on followed by 40 minutes off keyboarding; and no use of vibratory tools.

Dr. Murati reviewed the list of former work tasks prepared by claimant's expert labor market witness, Jerry D. Hardin. The doctor indicated he agreed with Mr. Hardin's analysis that claimant lost the ability to perform 49 of the 114 tasks, or 43 percent, that claimant performed in the 15-year period before her bilateral arm injuries. Excluding duplicated tasks, however, the task loss percentage increases to 60 percent.

Both Mr. Rosell and Mr. Hardin considered claimant's retained ability to earn wages. Considering Dr. Melhorn's recommendations, Mr. Rosell concluded claimant's ability to work and earn wages was not affected. But considering Dr. Murati's restrictions, Mr. Rosell

³ American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

concluded claimant retained the ability to earn between \$9 and \$10 per hour (or \$360 to \$400 per week for a 40-hour week) working as a retail salesperson or as a receptionist or information clerk. On the other hand, considering Dr. Murati's opinions, Mr. Hardin felt claimant retained the ability to earn only \$240 per week.

The Board is not persuaded that either functional impairment rating is any more accurate than the other. Accordingly, the Board averages the 6.36 percent with the 12 percent and finds claimant has sustained a 9 percent whole person functional impairment due to her bilateral upper extremity injuries. Because she sustained simultaneous bilateral upper extremity injuries, claimant's permanent disability benefits are to be determined under K.S.A. 44-510e, which provides in pertinent 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 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.)

But that statute must be read in light of *Foulk*⁴ and *Copeland*.⁵ 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 in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong

⁴ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

⁵ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the worker's ability to earn wages, rather than actual wages, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

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. . . .⁶

The record establishes claimant was struggling to perform her job within the time parameters set by respondent months before she began experiencing symptoms in her hands and arms. Claimant received coaching from her supervisor, Tamra Armbrister, and action plans to try to help her achieve the company requirement of averaging no more than 400 seconds per telephone call. Claimant's supervisor created an initial action plan on July 29, 2004, and followed up with claimant on August 27, September 3, and September 18, 2004. Respondent gave claimant a verbal warning on September 30, 2004, to reduce her average call resolution time. Claimant's supervisor again followed up with claimant on October 15, 2004, and on November 8, 2004, gave claimant a written warning. Another action plan was initiated on December 9 with a follow-up on December 24, 2004.

Claimant was terminated on January 14, 2005, for unsatisfactory job performance. According to Ms. Armbrister, the decision to terminate claimant was made in December 2004. Ms. Armbrister also testified respondent made an extensive effort to assist claimant in improving her call resolution time to avoid potential issues involving FMLA (Family Medical Leave Act), which claimant had utilized.

Respondent and its insurance carrier contend claimant's permanent disability benefits should be limited to her functional impairment rating. At oral argument before the Board, respondent and its insurance carrier made clear that they do not challenge claimant's efforts in attempting to retain her employment and, therefore, they do not contend claimant failed to make a good faith effort to keep her job. Instead, they contend claimant should not qualify for a work disability because respondent acted in good faith in terminating claimant and respondent could have accommodated claimant's injuries had she not been terminated.

The Board finds claimant was unable to perform her customer service job within the standards set by respondent before she developed her upper extremity injuries. Moreover, following her bilateral carpal tunnel release surgeries it is questionable whether she should

⁶ *Id.* at 320.

now attempt to perform such a job due to her physical limitations. Even Dr. Melhorn had some concerns regarding claimant's ability to handle the customer service calls for respondent, which comprised 70 percent of claimant's day. Moreover, the Board is not persuaded that task rotation would benefit claimant to the extent suggested by Dr. Melhorn as several of her former tasks appear to require similar physical activity.

Claimant attempted to improve her job performance and was unable to do so. And it appears the time claimant missed from work from her other health problems as well as her bilateral upper extremity injuries certainly did not help claimant lower her call resolution time averages. And, as indicated above, respondent and its insurance carrier do not challenge claimant's efforts to improve her performance to retain her employment. Accordingly, the Board concludes claimant made a good faith effort to retain her employment with respondent.

In short, claimant's ability to work has been severely affected by her bilateral upper extremity injuries. She is now unemployed competing for employment in the open labor market saddled with restrictions and limitations on the use of her hands and arms. The basic premise of the Workers Compensation Act is to place the burden of industrial injuries on industry. There is no provision in the Act to restrict an injured worker's disability benefits to the functional impairment rating upon proof that an employer has acted in good faith. Conversely, in the appellate court cases that limit a worker's benefits to the functional impairment rating the common thread appears to be the worker's lack of good faith effort to obtain or retain employment or the worker committed some wrongful act.

As claimant is unable to continue working for respondent for reasons other than lack of a good faith effort, the situation is analogous to those claims in which an injured worker is laid off following an occupational injury. And in those situations, despite the good faith of the employer, the injured worker remains entitled to receive a work disability, assuming they have sustained a wage loss greater than 10 percent.⁷

Likewise, the Kansas Court of Appeals has held that a worker was entitled to receive a work disability when the worker was later terminated for reasons that were unrelated to the work injury.⁸ Moreover, in *Cavender*⁹ the Kansas Court of Appeals allowed work disability after the worker, *who had obtained employment from another employer*, resigned her new employment for compelling reasons unrelated to her occupational injury.

⁷ *Roskilly v. Boeing Co.*, 34 Kan. App. 2d 196, 116 P.3d 38 (2005); *Gadberry v. R.L. Polk & Co.*, 25 Kan. App. 2d 800, 975 P.2d 807 (1998); *Lee v. Boeing Co.*, 21 Kan. App. 2d 365, 899 P.2d 516 (1995).

⁸ *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999).

⁹ *Cavender v. PIP Printing, Inc.*, 31 Kan. App. 2d 127, 61 P.3d 101 (2003).

The Board has been unable to find any appellate court decision that holds an employer's good faith is a defense to a claim for work disability benefits. In essence, respondent and its insurance carrier argue we should stray from the plain language of K.S.A. 44-510e. The Board disagrees.

The fundamental rule of statutory construction is that the intent of the legislature governs. When the language used is plain, unambiguous, and appropriate to an obvious purpose, the court should follow the intent as expressed by the words used. When construing a statute, a court should give words in common usage their natural and ordinary meaning.¹⁰

Although appellate courts will not speculate as to the legislative intent of a plain and unambiguous statute, where the construction of a statute on its face is uncertain, the court may examine the historical background of the enactment, the circumstances attending its passage, the purpose to be accomplished, and the effect the statute may have under various suggested interpretations.¹¹

Claimant has the burden of proof. The Board is not persuaded that claimant has made a good faith effort to find other employment. Accordingly, as requested by claimant in her brief to the Board, the Board will impute a post-injury wage based upon her ability. Considering the testimonies of Mr. Rosell and Mr. Hardin, the Board finds claimant retains the ability to earn between \$6 and \$9.50 per hour. The Board averages those hourly rates and finds that claimant retains the ability to earn \$7.75 per hour, which equals \$310 for a 40-hour week. Comparing \$310 per week to claimant's pre-injury wage of \$527.51 per week yields a 41 percent wage loss.

Considering both Dr. Murati's testimony and Dr. Melhorn's testimony regarding claimant's task loss the Board finds that claimant's task loss falls somewhere between 5 and 60 percent. Again, the Board averages those percentages and finds that claimant has sustained a 33 percent task loss.

As required by the permanent disability formula, the Board averages the 33 percent task loss with the 41 percent wage loss and finds claimant has sustained a 37 percent permanent partial general disability.

¹⁰ *Hedrick v. U.S.D. No. 259*, 23 Kan. App. 2d 783, 785, 935 P.2d 1083 (1997) (citations omitted).

¹¹ *Estate of Soupene v. Lignitz*, 265 Kan. 217, 220, 960 P.2d 205 (1998) (citations omitted).

3. Should respondent and its insurance carrier be granted credit or an offset for the temporary total disability benefits they paid for the period from March 15, 2005, through April 26, 2005?

The Workers Compensation Act provides that an employer and its insurance carrier are entitled to receive credit for the benefits paid to an injured worker before an award is issued.¹² But respondent and its insurance carrier now contend there was an overpayment of temporary total disability benefits as claimant should not have received those benefits for the period from March 15 through April 26, 2005.¹³

The issue of whether claimant should have been granted the temporary total disability benefits for the period in question was not raised to the administrative law judge for purposes of final award. Therefore, that issue shall not be addressed for the first time on this appeal. Consequently, claimant is entitled to receive 14.85 weeks of temporary total disability benefits and respondent and its insurance carrier are entitled to receive a credit for those benefits when computing the amount of compensation due and owing.

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 and conclusions set forth above reflect the majority's decision and not necessarily any individual member's analysis of the law or facts. And the signatures below confirm this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the June 20, 2006, Award and June 26, 2006, Award Nunc Pro Tunc entered by Judge Appling.

Janine L. Hurlburt is granted compensation from T-Mobile USA, Inc., and its insurance carrier for a repetitive trauma injury ending January 8, 2005, and the resulting disability. Based upon an average weekly wage of \$527.51, Ms. Hurlburt is entitled to receive 14.85 weeks of temporary total disability benefits at \$351.69 per week, or \$5,222.60, plus 153.55 weeks of permanent partial general disability benefits at \$351.69

¹² K.S.A. 44-525(b).

¹³ The June 6, 2005, Order by Judge Klein, apparently entered under a different docket number (Docket No. 1,011,122), actually granted claimant temporary total disability benefits from March 24 through April 26, 2005.

¹⁴ K.S.A. 2005 Supp. 44-555c(k).

per week, or \$54,002, for a 37 percent permanent partial general disability. The total award is \$59,224.60.

As of November 13, 2006, Ms. Hurlburt is entitled to receive 14.85 weeks of temporary total disability compensation at \$351.69 per week, or \$5,222.60, plus 81.43 weeks of permanent partial general disability compensation at \$351.69 per week, or \$28,638.12, for a total due and owing of \$33,860.72, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$25,363.88 shall be paid at \$351.69 per week until paid or until further order of the Director.

The record does not contain a written fee agreement between claimant and her 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 in this matter, counsel must submit the written agreement to the Judge for approval.

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

IT IS SO ORDERED.

Dated this ____ day of November, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: W. Walter Craig, Attorney for Claimant
- Lyndon Vix, Attorney for Respondent and its Insurance Carrier
- Thomas Klein, Administrative Law Judge
- Marvin Appling, Special Administrative Law Judge