

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

WILLETTA R. GUNN)	
Claimant)	
VS.)	
)	Docket No. 1,029,428
ROLLING HILLS HEALTH CENTER)	
Respondent)	
AND)	
)	
KANSAS HEALTHCARE ASSOCIATION)	
WORKERS COMPENSATION INSURANCE TRUST)	
Insurance Trust)	

ORDER

Respondent and its insurance trust appealed the January 25, 2008, Award entered by Administrative Law Judge Bryce D. Benedict. The Workers Compensation Board heard oral argument on May 6, 2008.

APPEARANCES

Roger D. Fincher of Topeka, Kansas, appeared for claimant. Kip A. Kubin of Kansas City, Missouri, appeared for respondent and its insurance trust (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a May 8, 2006, accident and alleged back and lower extremity injuries. In the January 25, 2008, Award, Judge Benedict found the following:

1. Claimant worked for respondent as a part-time employee with an average weekly wage of \$350.
2. Claimant was entitled to receive temporary partial disability benefits for the period from June 20 through October 4, 2006.
3. Claimant sustained a five percent whole person functional impairment as a result of her May 8, 2006, accident and resulting low back injury.
4. Claimant has a 56 percent task loss.
5. Claimant has a 20 percent wage loss, which is based upon an imputed weekly wage of \$280 as claimant failed to make a good faith effort to find full-time employment.

Judge Benedict awarded claimant temporary disability benefits and a 38 percent permanent partial disability under K.S.A. 44-510e after averaging claimant's 56 percent task loss and her 20 percent wage loss.

Respondent contends Judge Benedict erred. Respondent argues claimant failed to prove her earnings for the period that she was requesting temporary partial disability benefits and, therefore, the Board should deny those benefits. Respondent also argues the Board should impute a post-injury wage of at least \$340, which is within 10 percent of her pre-injury wage of \$350 per week. Accordingly, respondent contends claimant's permanent disability benefits should be based upon her whole person functional impairment rating, which respondent argues is five percent. Finally, respondent contends the Board should give substantial weight to the opinion of the court-appointed physician, Dr. Terrence Pratt, who did not believe claimant needed any work restrictions (so there would be no task loss).

Claimant also contends Judge Benedict erred. She argues that she was a full-time employee with an average weekly wage of \$406, not a part-time employee with an average weekly wage of \$350 as found by the Judge. In addition, she asserts her task loss is between 44 percent and 56 percent and her wage loss should be determined using her actual post-injury earnings of \$180 per week as she believes she made a good faith effort to find appropriate employment after being fired by respondent. Accordingly, claimant contends she has a 56 percent wage loss for purposes of the permanent partial disability formula of K.S.A. 44-510e. Claimant also argues she sustained a 14 percent whole person

functional impairment¹ rather than the five percent impairment as found by the Judge. In summary, claimant requests the Board to find she was a full-time employee with an average weekly wage of \$406, increase her whole person functional impairment to 14 percent, increase her permanent partial disability to between 50 percent and 56 percent (after averaging her task loss and wage loss), and affirm the Judge's finding with regard to the temporary partial disability benefits.

The issues before the Board on this appeal are:

1. What is the nature and extent of claimant's injury and disability?
2. What is claimant's average weekly wage?
3. Is claimant entitled to receive temporary partial disability benefits?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Claimant commenced working for respondent in April 2006 as a certified nurses' aide (CNA). At the same time she also worked 38 to 40 hours per week as a housekeeper for another employer. On May 8, 2006, within weeks of joining respondent, claimant injured her low back and leg² when she caught a resident who fell out of a lift and onto claimant's lap.

Following the accident, claimant was off work from May 9 through May 12, 2006. Claimant returned to work for respondent on May 13, 2006, and in early June 2006 she requested reduced work hours. Approximately 10 or 11 days later, claimant requested to return to regular hours but respondent did not accommodate that request. Claimant's testimony is uncontradicted that Tammy Williams, respondent's then director of nursing, indicated that respondent would not increase claimant's hours because of her injury. According to claimant, she performed light duty work the remainder of her employment with respondent.

¹ Dr. Lynn A. Curtis found claimant had a 10 percent whole person impairment for her low back and an eight percent left lower extremity impairment, which combined for a 14 percent whole person impairment.

² Claimant is a poor historian. Part of the record indicates she initially experienced pain in her left leg and part of the record indicates she initially experienced pain in her right leg. Claimant testified, however, she experienced some symptoms in both legs.

The doctors who examined and evaluated claimant appear to agree that claimant sustained a lumbar strain. But claimant's medical expert witness, Dr. Lynn A. Curtis, also believes claimant experiences radiculopathy into her lower extremities. In any event, claimant did not undergo surgery as a bone scan, MRI, EMG, physical therapy, and medications comprised her medical treatment. In addition, claimant underwent a functional capacity evaluation.

Claimant left respondent's employ on October 14, 2006, when she was terminated. Between the date of accident and her termination, claimant was suspended for three days on two separate occasions for insubordination. During that same period, she also missed several days of work allegedly due to pain and at least one family emergency. Meanwhile, in either late June or late July 2006, claimant terminated her housekeeping job with her other employer.

Within approximately two weeks of being terminated by respondent, claimant began part-time work for Westport Cleaners in Kansas City, Missouri. Claimant indicated she quit that job after approximately two months because of the problems she was having from the constant standing. Claimant then began working part time for Troust Cleaners, where she worked for approximately 7½ months. That job ended in the latter part of July 2007 when the employer closed its plant. In late July 2007, claimant began working part time for Select Cleaners, earning approximately \$180 per week.³

At the time of her October 2007 regular hearing, claimant remained employed part time by Select Cleaners. Claimant testified she has looked for full-time employment since being terminated by respondent but she has only been able to find part-time work.

1. What is claimant's average weekly wage?

The parties did not enter a wage statement into the record.⁴ Consequently, the evidence on claimant's wages and the hours she worked is limited to claimant's testimony, respondent's representations, and the limited time records introduced at the preliminary hearing. Claimant initially testified at her preliminary hearing she was hired to work at \$10.15 per hour and that in August 2006 her hourly rate was increased to \$10.40 per hour. But at her later regular hearing, claimant testified she earned \$10.65 per hour working for respondent. Respondent's attorney, however, represented at the September 2006 preliminary hearing that claimant received a raise on July 23, 2006, which increased her

³ Claimant requests this \$180 per week post-injury wage be used for the permanent partial disability formula in K.S.A. 44-510e.

⁴ Kansas Administrative Regulation (K.A.R.) 51-3-8(c) provides that a respondent shall have payroll information available at the first hearing.

hourly rate to \$10.40. The Board finds claimant was earning \$10.15 per hour on the date of her accident.

The question of whether claimant was a part-time or full-time worker under the Workers Compensation Act is not so easily disposed. Claimant testified respondent hired her to work full time as a CNA and that if she were scheduled to work 40 hours per week she was expected to work those hours.⁵ She later testified her work hours were from 2:45 p.m. to 11:15 p.m., or 8½ hours, five days per week.⁶

But the time records introduced at the preliminary hearing tell another story. Those records encompass the 10 two-week pay periods from April 16, 2006, through September 2, 2006. Claimant began working for respondent on April 18, 2006. During her first two-week pay period, which began before claimant commenced working for respondent and ended on April 29, 2006, claimant worked nine days for a total of 68.01 hours. But rather than the 8½ hours that claimant testified she worked, the time records indicate claimant worked between 5.67 and 8.17 hours per day. During the second two-week pay period, which ran from April 30 through May 13, 2006, claimant worked six days for a total of 43.5 hours and logged from 6.33 to 7.83 hours per day. Claimant did not work from May 9 through May 12, 2006. When she returned to work on May 13, 2006, claimant worked 6.67 hours. Not including the day of the accident, it appears claimant actually worked only 13 days before the May 8, 2006, incident.

The Workers Compensation Act provides different formulas for determining a worker's average weekly wage based upon whether the worker is considered full time as opposed to part time. The Act provides, in 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.

(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

⁵ P.H. Trans. at 8.

⁶ R.H. Trans. at 11.

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 the industrial customs of such trade or employment, regardless of the number of hours worked per day or per week.⁷

Reviewing the time records that pertained to the period before her accident, the Board finds claimant did not regularly work eight hours or more per day. Indeed, those same time records indicate during that period claimant worked eight hours or more only three times. Consequently, the Board finds that before her accident claimant was expected to work on a regular basis less than 40 hours per week. And there is no evidence in this record regarding the customary number of hours constituting a workday. Accordingly, the Board finds claimant is considered to be a part-time worker for purposes of determining her average weekly wage under the Workers Compensation Act.

The Act provides the following formula for determining a part-time worker's average weekly wage:

(4) If at the time of the accident the employee's money rate was fixed by the hour, the employee's average gross weekly wage shall be determined as follows: (A) If the employee was a part-time hourly employee, as defined in this section, the average gross weekly wage shall be determined in the same manner as provided in paragraph (5) of this subsection⁸

And that subsection provides:

(5) If at the time of the accident the money rate is fixed by the output of the employee, on a commission or percentage basis, on a flat-rate basis for performance of a specified job, or on any other basis where the money rate is not fixed by the week, month, year or hour, and if the employee has been employed by the employer at least one calendar week immediately preceding the date of the accident, the average gross weekly wage shall be the gross amount of money earned during the number of calendar weeks so employed, up to a maximum of 26 calendar weeks immediately preceding the date of the accident, divided by the number of weeks employed, or by 26 as the case may be, plus the average weekly value of any additional compensation and the value of the employee's average weekly overtime computed as provided in paragraph (4) of this subsection. If the employee had been in the employment of the employer less than one calendar week immediately preceding the accident, the average gross weekly wage shall be determined by the administrative law judge based upon all of the evidence and

⁷ K.S.A. 2005 Supp. 44-511(a).

⁸ K.S.A. 2005 Supp. 44-511(b).

circumstances, including the usual wage for similar services paid by the same employer, or if the employer has no employees performing similar services, the usual wage paid for similar services by other employers. The average gross weekly wage so determined shall not exceed the actual average gross weekly wage the employee was reasonably expected to earn in the employee's specific employment, including the average weekly value of any additional compensation and the value of the employee's average weekly overtime computed as provided in paragraph (4) of this subsection. In making any computations under this paragraph (5), workweeks during which the employee was on vacation, leave of absence, sick leave or was absent the entire workweek because of illness or injury shall not be considered.⁹

Claimant was employed by respondent more than one calendar week before the accident. Consequently, the above-quoted statute requires that claimant's average weekly wage be determined by averaging her actual earnings for the period she worked before her May 8, 2006, accident. Returning to the time records introduced at the preliminary hearing, the Board finds claimant worked nine days, or 68.01 hours, from April 18 through April 29, 2006, and five days, or 36.83 hours, from April 30 through May 8, 2006.

Accordingly, claimant worked three calendar weeks from April 18 through May 8, 2006, for a total of 104.84 hours. Multiplying those hours by claimant's hourly rate of \$10.15 per hour yields gross wages of \$1,064.13, or an average of \$354.71 per week. Therefore, the Board finds claimant's average weekly wage is \$354.71.

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

Three doctors provided their opinions regarding the extent of claimant's injuries. Dr. Joseph F. Galate, who is a physical medicine and pain management specialist, treated claimant from early August through early October 2006. The doctor released claimant in October 2006 with restrictions of no lifting more than 25 pounds and no repetitive twisting or bending. The doctor rated claimant as having a four percent whole person impairment under the *AMA Guides*¹⁰ for lumbar strain and facet changes after apportioning claimant's impairment for preexisting degenerative changes. Dr. Galate did not dispute that claimant experienced pain down into her legs as he felt that it may be referred pain from the spasms in claimant's back or the piriformis or short abductor muscles.

⁹ *Id.*

¹⁰ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Dr. Lynn A. Curtis, who was claimant's expert medical witness, determined claimant had lumbar radiculopathy based on his August and October 2006 evaluations. The doctor felt claimant had positive compression tests, positive straight leg raising and Lesague tests, weakness in her left lower extremity with hip abduction, and a loss of sensation in the left foot. The doctor recommended claimant be limited to sedentary activities with the option to sit and stand as needed and change position every 20 minutes. He also believed claimant should not bend, stoop, crawl, kneel, climb ladders or be at unprotected heights. Finally, the doctor felt claimant should not lift more than 10 pounds from her waist to her chest. The doctor recommends claimant refrain from lifting any items from the floor. After reviewing a list of former work tasks prepared by vocational rehabilitation consultant Dick Santner, the doctor indicated claimant lost the ability to perform 11 of the 25, or 44 percent. That is the only task loss opinion in the record.

Dr. Curtis also rated claimant under the *AMA Guides* and determined she had a four percent whole person impairment for the left leg and a 10 percent whole person impairment for the lumbar spine injury, which combined for a 14 percent whole person impairment. The doctor rated claimant's motor loss in the left lower extremity at five percent and sensory loss at three percent to the lower extremity.

The Judge appointed Dr. Terrence Pratt, who specializes in physical medicine and rehabilitation, to evaluate claimant for purposes of this claim. The doctor examined claimant in April 2007 and found claimant displayed inappropriate responses during her examination. For example, claimant complained of pain upon light touch, began holding onto objects in the room when asked to bend or change positions, demonstrated giveaway weakness in her left lower extremity, displayed diminished sensation in her lower extremities with areas of hypersensitivity, and gave inconsistent results with straight leg raising tests. In short, claimant's examination revealed claimant was giving inconsistent and inappropriate responses.

According to Dr. Pratt, claimant had low back pain with unverifiable radicular symptoms and inappropriate responses on examination. The doctor rated claimant under the *AMA Guides* and found claimant sustained a five percent whole person impairment due to her May 2006 accident. Moreover, the doctor was unable to identify any permanent restrictions claimant needed due to her accident.

The Board notes both Dr. Galate and Dr. Pratt found claimant provided inconsistent responses. Dr. Galate testified some of claimant's pain complaints were in a non-dermatomal pattern. Dr. Pratt viewed claimant's inappropriate responses as symptom magnification. Weighing the various medical opinions, the Board finds claimant has proven she sustained a five percent whole person functional impairment due to her May 8, 2006, accident and resulting back injury.

Dr. Pratt was selected by the Judge to evaluate claimant as a neutral, unbiased physician. In this instance, the Board is persuaded by Dr. Pratt's opinion that claimant does not require any permanent restrictions. Consequently, claimant has failed to prove she has sustained any task loss due to her May 2006 accident.

Because claimant's back injury is not included in the schedule of K.S.A. 44-510d, claimant's permanent disability benefits are governed by K.S.A. 44-510e, which provides that a worker's permanent disability is limited to the functional impairment rating if the worker returns to work earning 90 percent or more of the pre-accident average weekly wage. If not, the permanent disability is an average of the worker's wage loss and task loss. In addition, *Foulk*¹¹ and *Copeland*¹² require a worker to make a good faith effort to find an appropriate job and, if not, a post-injury wage is imputed for the permanent disability formula.

The Board concludes claimant has failed to prove she has suffered any task loss as a result of her May 2006 accident. Moreover, the Board finds claimant has failed to make a good faith effort to find full-time work and, therefore, a post-injury wage must be imputed. According to claimant the only jobs she has been able to find, and the only jobs that she has been able to interview for, have been part time. In addition to the part-time jobs claimant has obtained, claimant has contacted only a handful of other potential employers. In short, claimant has failed to prove that she has made a genuine effort to find full-time employment. Whether the Board imputes claimant's pre-injury wage of \$10.15 per hour or the \$9 per hour she currently earns, the result is the same as both yield a post-injury wage of more than 90 percent of her pre-injury wage when considering a 40-hour workweek.

The Board rejects Mr. Santner's opinion that claimant could probably earn only \$7 per hour as she has shown she can earn at least \$9 per hour in her present job. In addition, the medical evidence fails to establish that claimant is limited to working only part time.

In summary, claimant's permanent disability under K.S.A. 44-510e is limited to her five percent functional impairment.

¹¹ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

¹² *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

3. Is claimant entitled to temporary partial disability benefits?

At the September 2006 preliminary hearing claimant requested temporary partial disability benefits for the month of August 2006. Now, claimant requests temporary partial disability benefits for the period from June 20, 2006, the approximate date claimant requested more hours through October 4, 2006, when Dr. Galate released claimant.

As indicated above, the record contains no evidence regarding the actual wages claimant received during the period in question. Moreover, the time records introduced at the preliminary hearing do not extend beyond September 2, 2006.

Respondent contends the Board should deny claimant's request for temporary partial disability benefits because claimant has failed to introduce evidence regarding her earnings during the period in question. Respondent also argues claimant should not receive temporary partial disability benefits because she requested to work fewer hours after returning to work following her injury when no doctor had made such a recommendation.

The Board agrees that claimant should not receive temporary partial disability benefits. First, claimant failed to prove the amounts she earned during the period in question. That information is necessary as temporary partial disability benefits are based upon two-thirds of the difference between the pre-injury average weekly wage and actual post-injury earnings. Second, the evidence indicates claimant missed work during the period in question due to insubordination and missed other work due to at least one family emergency. There is no way to determine from the evidence presented when those absences occurred. Without that information, the Board would be speculating as to the amount of temporary partial disability that claimant should receive.

If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of disagreement, except that in case of temporary or permanent partial general disability not covered by such schedule, the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks. Weekly compensation for temporary partial general disability shall be 66 $\frac{2}{3}$ % of the difference between the average gross weekly wage that the employee was earning prior to such injury as provided in the workers compensation act and the amount the employee is actually earning after such injury in any type of employment, except that in no case shall such

weekly compensation exceed the maximum as provided for in K.S.A. 44-510c and amendments thereto.¹³

In conclusion, the Board finds claimant (1) was a part-time worker on the date of her accident, (2) had a pre-injury average weekly wage of \$354.71, (3) has sustained a five percent permanent partial disability under K.S.A. 44-510e, and (4) has failed to prove her entitlement to temporary partial disability benefits.

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 the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the January 25, 2008, Award entered by Judge Benedict.

Willetta R. Gunn is granted compensation from Rolling Hills Health Center and its insurance trust for a May 8, 2006, accident and resulting disability. Based upon an average weekly wage of \$354.71, Ms. Gunn is entitled to receive 20.75 weeks of permanent partial general disability benefits at \$236.49 per week, or \$4,907.17, for a five percent permanent partial general disability, making a total award of \$4,907.17, which is all due and owing less any amounts previously paid.

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.

¹³ K.S.A. 44-510e(a).

¹⁴ K.S.A. 2007 Supp. 44-555c(k).

Dated this ____ day of June, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent and its Insurance Trust
Bryce D. Benedict, Administrative Law Judge