

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

<b>AUDREY L. CHUBB</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 165,020
<b>BAXTER MEMORIAL HOSPITAL</b>	)	
Respondent	)	
AND	)	
	)	
<b>PHICO INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier requested review of the Award dated December 18, 1996, entered by Administrative Law Judge Steven J. Howard.

**APPEARANCES**

Carlton W. Kennard of Pittsburg, Kansas, appeared for the claimant. M. Doug Bell of Coffeyville, Kansas, appeared for the respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

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

**ISSUES**

The Administrative Law Judge awarded claimant benefits based upon a 41½ percent permanent partial general disability. In their brief, respondent and its insurance carrier requested review of the following issues:

- (1) Whether claimant met with personal injury by accident while in the course of employment with respondent.

- (2) Whether claimant made timely written claim.
- (3) The nature and extent of claimant's disability, if any.

Those are the only issues before the Appeals Board on this review.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Appeals Board finds as follows:

(1) The Appeals Board finds that claimant sustained personal injury by accident on April 24, 1991, when she was helping an intoxicated patient out of the back seat of a car. At the time of the incident, claimant experienced pain in the right shoulder, upper back, and around her neck. Claimant immediately reported the incident to her supervisor and prepared an incident report.

(2) Claimant provided the respondent with timely written claim for compensation. Respondent filed its report of accident with the Division of Workers Compensation on May 6, 1991. Therefore, claimant had 200 days from the date of accident or date of last payment of compensation to serve written claim for compensation upon the respondent.

The Appeals Board agrees with the Administrative Law Judge that the incident report claimant prepared and signed immediately after the accident constituted written claim for workers compensation benefits. Claimant testified that when the document was prepared her supervisors were aware she was seeking workers compensation benefits for the injury. That testimony is uncontroverted. Later, after the incident report had been prepared, claimant was advised by respondent's workers compensation director no additional paperwork was needed.

Under the facts presented, the Appeals Board finds that the parties intended the incident report to serve as written claim and, therefore, the requirements of K.S.A. 44-520a regarding written claim were satisfied.

(3) Claimant worked for the respondent as a part-time charge nurse on the evening shift. The parties stipulated claimant's average weekly wage on the date of accident was \$500.

The Appeals Board finds claimant sustained permanent injury as a result of the April 1991 accident. That conclusion is supported by the medical experts' testimony, including that of respondent's expert witness, Robert A. Rawcliffe, Jr., M.D., who testified claimant sustained a 3 percent whole body functional impairment for aggravation to a preexisting degenerative cervical disc disease and a 7 percent whole body functional impairment for injury to the right upper extremity, all as a result of the April 1991 accident.

The Appeals Board finds the opinions regarding work restrictions and limitations and functional impairment of John A. Pazell, M.D., are the most persuasive. As the physician selected by the Administrative Law Judge to provide an independent medical evaluation, Dr. Pazell was seemingly unbiased and disinterested in the outcome of this litigation. He found claimant sustained a 37 percent whole body functional impairment as a result of the work-related accident and that claimant could work at the sedentary level. He believed claimant could stand and walk up to two hours; sit up to two hours; drive 30 to 60 minutes at a time; and perform simple grasping, pushing, pulling, and fine manipulations. Also, Dr. Pazell believed claimant could frequently bend, squat, kneel, and occasionally reach. Most importantly, however, the doctor felt claimant can work on a full-time basis within those restrictions.

Because hers is an "unscheduled" injury, claimant's entitlement to permanent partial disability benefits is governed by K.S.A. 1990 Supp. 44-510e, which provides in pertinent part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . **There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury.**" (Emphasis added.)

The Appeals Board agrees with the Administrative Law Judge's conclusion that claimant has a 41½ percent permanent partial general disability when considering both loss of ability to perform work in the open labor market and loss of ability to earn a comparable wage. That conclusion is based upon the finding that claimant retains the ability to earn \$450 to \$500 per week. According to her own testimony, after the accident claimant earned \$15 per hour working as a medical case manager for another employer working up to 32 hours per week. Respondent's vocational rehabilitation expert, Karen Terrill, indicated in her report that claimant retains the ability to perform the job of a medical case manager and, therefore, retains the ability to earn \$15 per hour. Also, the record indicates that claimant has now completed a bachelor's degree in social sciences at Pittsburg State University.

The Appeals Board finds no persuasive reason to disturb the Administrative Law Judge's finding that claimant retains the ability to earn a comparable wage. Likewise, there appears to be no persuasive reason to disturb the Administrative Law Judge's finding that claimant has an 83 percent loss of ability to work in the open labor market as indicated by vocational and rehabilitation counselor, Karen Terrill, when she utilized Dr. Pazell's work restrictions. The Appeals Board finds the Administrative Law Judge's conclusions regarding claimant's permanent partial general disability are accurate and, therefore, those conclusions are adopted by the Appeals Board as its own.

Claimant has not worked for any employer since May 1992. Instead of seeking employment, claimant opted to complete an undergraduate degree. The record supports the conclusion that claimant is presently not seeking employment and, in effect, has voluntarily removed herself from the open labor market. The act of removing oneself from the open labor market is conceptually equivalent to refusing to work at accommodated employment as denounced in Fouk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). Therefore, considering the fact that claimant retains the ability to work as a medical case manager on a full-time basis and earn \$450 to \$500 per week, the Appeals Board finds the presumption of no work disability as set forth in K.S.A. 1990 Supp 44-510e, above, is applicable.

However, the Appeals Board also finds the presumption of no work disability has been overcome due to the severity of claimant's injury and to the significant loss of the open labor market which claimant has sustained. Therefore, the Appeals Board finds the 41½ percent permanent partial general disability, determined above by averaging the 83 percent loss of ability to perform work in the open labor market with a zero percent loss of ability to earn a comparable wage, is appropriate upon which to award claimant benefits for that period following May 22, 1992, when claimant discontinued working as a medical manager. Before May 22, 1992, claimant is entitled to permanent partial general disability benefits based upon her functional impairment rating of 37 percent because the evidence supports the conclusion claimant was either working for the respondent or another employer for a comparable wage.

#### AWARD

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award dated December 18, 1996, entered by Administrative Law Judge Steven J. Howard should be, and hereby is, modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Audrey Chubb, and against the respondent, Baxter Memorial Hospital, and its insurance carrier, Phico Insurance Company, for an accidental injury which occurred April 24, 1991, and based upon an average weekly wage of \$500 for 43 weeks of temporary total disability compensation at the rate of \$278 per week or \$11,954; followed by 13.14 weeks at the rate of \$123.34 per week, or \$1,620.69, for a 37% permanent partial general disability through May 22, 1992; followed by 358.86 weeks at the rate of \$138.34 per week, or \$49,644.69, for a 41½% work disability, making a total award of \$63,219.38.

As of April 30, 1997, there is due and owing claimant 43 weeks of temporary total disability compensation at the rate of \$278 per week or \$11,954; followed by 13.14 weeks of permanent partial disability compensation at the rate of \$123.34, or \$1,620.69, and 257.86 weeks of permanent partial disability compensation at the rate of \$138.34 per week, or \$35,672.35, for a total of \$49,247.04, which is ordered paid in one lump sum less any

amounts previously paid. The remaining balance of \$13,972.34 is to be paid for 101 weeks at the rate of \$138.34 per week, until fully paid or further order of the Director.

The Appeals Board hereby 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 May 1997.

\_\_\_\_\_  
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

**CONCURRING OPINION**

I concur with the majority's ultimate conclusion regarding the nature and extent of claimant's disability. However, I do not believe the presumption of no work disability is applicable, nor do I believe the principles of Fouk should be applied to this factual situation. Claimant has neither refused an offer of accommodated employment, nor has she refused any offers of vocational rehabilitation services deigned to return her to work. Because claimant's treating physician, as late as August 1995, prepared documents indicating claimant was unable to work, when considering the entire record it is inconsistent to now conclude that claimant was wrongfully attempting to manipulate her claim by failing to look for work. The treating physician's opinion regarding claimant's ability to work should be considered and bear considerable weight when one considers claimant's motives.

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BOARD MEMBER

- c: Carlton W. Kennard, Pittsburg, KS
- M. Doug Bell, Coffeyville, KS
- Steven J. Howard, Administrative Law Judge
- Philip S. Harness, Director