

- (1) The nature and extent of claimant's injury and/or disability, including what, if any, work disability claimant may be entitled to.
- (2) Whether claimant suffered from preexisting conditions and restrictions and how they may or may not affect claimant's entitlement to an award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record, including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant, a sixty-two year old employee of respondent, suffered from bilateral carpal tunnel syndrome, as a result of injuries suffered during several years of employment with the respondent. Claimant's supervisor confirmed that the swelling and pain was present in claimant's hands bilaterally for several years. Dr. Young, who worked at the respondent's medical clinic, prescribed bilateral wrist splints for claimant to use both at work and away from work. The Appeals Board finds claimant's condition is bilateral and, as a result, claimant is entitled to a general body award.

Claimant had been suffering symptoms for several years. She had rejected surgery in the past for her carpal tunnel condition because her sister had undergone the surgery and had ended up with a less than satisfactory result. Ultimately the pain caused claimant to agree to the surgical intervention. Subsequent to surgery by Dr. Leonard Klafta, claimant returned to work with respondent. Dr. Klafta's records of March 11, 1993, indicate that claimant was originally returned to work light duty, with the restrictions being removed on March 11, 1993. On March 15, 1993, claimant provided respondent with her notice of termination. In a conversation between claimant and Shirley Kiser, respondent's employee health nurse, claimant advised that she was retiring and was moving to Medicine Lodge, Kansas. Ms. Kiser asked claimant whether her decision to retire was related to her workers compensation claim, which claimant denied. Ms. Kiser and two other representatives of respondent advised claimant that respondent would be willing to accommodate claimant should she desire to continue working. Upon claimant's insistence that her retirement had nothing to do with her employment injuries, respondent's offers of accommodation ceased.

Respondent did have a policy that they would accommodate workers suffering from work-related injuries and claimant was advised of this policy.

Respondent, upon being advised of claimant's work disability claim, provided a letter to claimant and her attorney on December 22, 1993. That letter, originating from respondent's employee relations coordinator, set out in detail respondent's policy regarding accommodation of workers compensation injured employees and made specific offers of employment to claimant in an attempt to accommodate claimant's physical restrictions.

Claimant contends she is unable to continue in her employment with the respondent due to her physical limitations. Respondent contends that it would be willing to accommodate claimant within whatever restrictions the doctor places upon her.

K.S.A. 1992 Supp. 44-510e(a) states in part:

“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.”

K.S.A. 1992 Supp. 44-510e(a) further states:

“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.”

In workers compensation litigation, it is the claimant's burden of proof to persuade the trier of facts by a preponderance of the credible evidence that claimant's position on an issue is more probably true than not true on the basis of the whole record. This burden must be carried by a preponderance of the credible evidence. See K.S.A. 44-501 and K.S.A. 44-508(g).

Respondent has offered, and claimant has rejected, employment on several occasions. Respondent's employees questioned claimant at the time of her retirement, advising accommodation could be made if claimant so desired. This offer of accommodation was rejected by claimant, with claimant contending she intended to retire and relocate. Respondent, again, made an offer of accommodation in the December 22, 1993 letter, an offer which was again rejected.

Although not identical, a situation similar to this arose in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995). In Foulk claimant was offered specific accommodation by respondent, which offer was rejected. The Court of Appeals, in analyzing this circumstance, found that “construing K.S.A. 1988 Supp. 44-510e(a) to allow a worker to avoid the presumption of no work disability by virtue of the worker's refusal to engage in work at a comparable wage would be unreasonable where a proffered job is within the worker's ability and the worker has refused to even attempt the job.” In Foulk, a specific job was offered to claimant. In this instance guaranteed accommodation was offered to claimant on more than one occasion. In both Foulk and this circumstance the claimants rejected the offers.

The Court of Appeals in Foulk went on to analyze this circumstance finding as follows:

“The legislature clearly intended for a worker not to receive compensation where the worker was still capable of earning nearly the same wage. Further, it would be unreasonable for this court to conclude that the legislature intended to encourage workers to merely sit at home, refuse to work, and take advantage of the workers compensation system. To construe K.S.A. 1988 Supp. 44-510e(a) as claimant suggests would be to reward workers for their refusal to accept a position within their capabilities at a comparable wage.”

K.S.A. 1992 Supp. 44-510e(a) further states:

“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.”

The offer of accommodated employment to claimant by respondent was at a comparable wage.

Under the circumstances of this case, the Appeals Board finds, based upon the Court's rationale in Fouk, that the presumption of no work disability contained in K.S.A. 1992 Supp. 44-510e has not been overcome and as a result claimant is not entitled to work disability. As set out in K.S.A. 1992 Supp. 44-510e claimant is entitled to not less than her percentage of functional impairment.

As the Appeals Board has already found claimant entitled to a bilateral carpal tunnel syndrome award, and as the only medical evidence which deals with claimant's bilateral upper extremities is that of Dr. Philip Mills, the Appeals Board finds that the fourteen percent (14%) whole body functional impairment of Dr. Mills is the appropriate functional impairment to which claimant would be entitled and awards same.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey of August 29, 1994, shall be, and is hereby, modified and that claimant, Patricia A. Price, is granted an award against the respondent, The Wichita Clinic, and its insurance carrier, The St. Paul Fire & Marine Insurance Co., for an injury suffered to her bilateral upper extremities through February 1, 1993, for a 14% permanent partial general body disability.

Claimant is entitled to .43 weeks temporary total disability compensation at the rate of \$299.00 per week in the amount of \$128.57, followed thereafter by 2 weeks temporary partial which, when converted to temporary total equals 1.43 weeks temporary total disability compensation, for a total temporary total disability compensation of 1.86 weeks in the amount of \$556.14, followed thereafter by 413.14 permanent partial general body disability at the rate of \$44.19 per week in the amount of \$18,256.66, for a total award of \$18,812.80.

As of December 18, 1995, claimant would be entitled to 1.86 weeks temporary total disability compensation at the rate of \$299.00 per week (after the conversion of temporary partial payments) in the amount of \$556.14, followed thereafter by 148.14 weeks permanent partial general body disability at the rate of \$44.19 per week, totaling \$6,546.31, for a subtotal of \$7,102.45, which is due and owing in one lump sum, minus any amounts previously paid. Thereafter, claimant is entitled to 265 weeks permanent partial general body disability at the rate of \$44.19 per week totalling \$11,710.35, until fully paid or further order of the Director.

Claimant is entitled to future medical upon proper application to and approval by the Director.

Claimant is awarded an amount not to exceed \$350.00 as unauthorized medical upon presentation of an itemized statement verifying same.

Claimant's contract of her employment with her attorney is hereby approved insofar as it is not in contravention to the provisions of K.S.A. 44-536.

Fees and expenses necessary to defray the costs of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Deposition Services	
Transcript of Regular Hearing	\$460.90
Deposition of Lloyd Hummer, M.D.	\$ 92.00
Deposition of Shirley Kiser	\$209.20
Court Reporting Service	
Deposition of Richard L. Gibson, Ph.D.	Unknown
Deposition of Philip R. Mills, M.D.	\$154.90
Barber & Associates	
Deposition of Leonard Klafta, M.D.	\$181.80

IT IS SO ORDERED.

Dated this ____ day of January 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Alan C. Goering, Medicine Lodge, Kansas
- Douglas C. Hobbs, Wichita, Kansas
- William F. Morrissey, Special Administrative Law Judge
- Philip S. Harness, Director