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

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| **JENNIFER S. LOWMASTER**<br>Claimant<br>VS.<br><br>**MODINE MANUFACTURING COMPANY**<br>Respondent<br>AND<br><br>**SENTRY CLAIMS SERVICE**<br>Insurance Carrier | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Docket No. 190,020 |

## ORDER

Claimant appeals from an Award entered by Special Administrative Law Judge Douglas F. Martin dated February 9, 1996. The Appeals Board heard oral arguments June 11, 1996.

### APPEARANCES

Claimant appeared by her attorney Timothy J. King of Wichita, Kansas. Respondent and its insurance company appeared by their attorney Kirby A. Vernon of Wichita, Kansas.

### RECORD AND STIPULATIONS

The Appeals Board has adopted the stipulations stated in the Award. The Appeals Board has reviewed and considered the record listed in the Award.

### ISSUES

The sole issue to be considered on appeal is the nature and extent of claimant's disability.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Appeals Board concludes that the Award should be modified and that claimant should be awarded benefits based upon a work disability of 67 percent.

Claimant, who worked for respondent as a press operator from May 1990 to May 1994, seeks workers compensation benefits for bilateral upper extremity injuries which she alleges were caused by repetitive work activities. The Special Administrative Law Judge

awarded benefits for an 8 percent permanent partial general disability based upon functional impairment ratings by Dr. Ernest R. Schlachter of 9 percent and by Dr. Tyrone Artz of 6 percent. The issue on appeal is whether the award should be based upon work disability rather than functional impairment. The Administrative Law Judge found the date of accident to be May 11, 1994 and the parties have not challenged that finding on appeal.

Respondent argues that the award was appropriately limited to functional impairment on the basis of a rationale analogous to that applied in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995). Claimant worked her regular duties until the last date of her employment and no restrictions had been recommended prior to that time. Respondent also introduced testimony of claimant's supervisor, Dennis Meyer, tending to indicate that respondent could and would have accommodated the restrictions which were ultimately recommended. Respondent asserts that the claimant did not give respondent an opportunity to accommodate those restrictions and that claimant, therefore, should be limited to the functional impairment awarded.

The statutory provision at issue is found in K.S.A. 44-510e:

> "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.)

In Foulk, the Court of Appeals addressed a factual situation involving a claimant who refused to attempt to perform a job offered which the evidence indicated claimant could have performed within the recommended restrictions. In spite of the fact that the literal language of the statute only refers to circumstances where claimant is, in fact, engaged in work, the Court of Appeals concluded that the legislature did not intend to allow a claimant to refuse offered employment which was within his or her capabilities.

The present case involves a circumstance which, in the opinion of the Appeals Board, is materially different from those presented in court in the Foulk case. Here the evidence tends to indicate that the respondent could and would have offered accommodated work. The record does not, however, indicate that such an offer was made or that the claimant declined such an offer. The question then becomes whether the respondent is entitled to have the claimant treated as though she were engaging in work at 90 percent or higher. The Appeals Board does not believe the Foulk decision reaches this far. While we recognize that the respondent may have, under the circumstances, done as much as it could do, one cannot say that the claimant deliberately declined work which was offered. The Appeals Board, therefore, concludes claimant is not limited to functional impairment.

K.S.A. 44-510e establishes the criteria for determining the nature and extent of work disability as follows:

> "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."

The above-quoted statutory language requires that we determine both wage loss and task loss factors. In this case the evidence shows claimant was not earning a wage and the wage loss factor would be 100 percent.

Claimant offered the testimony of Dr. Schlachter in support of the task loss factor. Dr. Schlachter reviewed and agreed with the opinion expressed in the report of Mr. Jerry D. Hardin indicating that claimant had an 88 percent loss of ability to perform tasks which the claimant had performed in the previous 15-year work history. Respondent objected to that opinion at the time of the deposition and does so now on the grounds that there was no proper foundation for the opinions expressed by Mr. Hardin. Respondent points out that Mr. Hardin did not testify.

The Appeals Board finds, however, that there was adequate foundation in the form of testimony from the claimant and Mr. Dennis Meyer, claimant's supervisor. Both testified to claimant's job duties. The list of tasks shown in Mr. Hardin's report reasonably describes the tasks in claimant's work over the 15-year work history. The physician's opinion applies the work restrictions to those job tasks.

The record also contains the opinion of Ms. Karen Crist Terrill regarding loss of ability to perform tasks. Ms. Terrill did testify, and while there was not an objection to her opinions, there was disagreement about the import of those opinions. Ms. Terrill initially stated in her report and in her testimony that claimant has a 67 percent loss of ability to perform tasks. Ms. Terrill later modified her opinion to one that claimant had a 33 percent loss of ability to perform tasks. The Appeals Board notes that Dr. Artz agreed with, although quite reluctantly, the opinion of Ms. Terrill, thus satisfying the statutory requirement that the task loss be based upon the opinion of a physician. K.S.A. 44-510e.

The Appeals Board considers it appropriate in this case to give equal weight to Dr. Artz' opinion that claimant has a 33 percent loss and Dr. Schlachter's opinion that claimant has an 88 percent loss. By doing so, the Appeals Board concludes that claimant has a 60 percent loss of ability to perform tasks. The task loss averaged together with the 100 percent wage loss yields an 80 percent work disability.

The Appeals Board finds, therefore, that the Award of Special Administrative Law Judge Douglas F. Martin should be modified to 80 percent work disability.

## AWARD

**AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Jennifer S. Lowmaster, and against the respondent, Modine Manufacturing Company, and its insurance carrier, Sentry Claims Service, for an accidental injury which occurred over a period from May 1990 to May 1994 and based upon an average weekly wage of $540.48, for 332 weeks of permanent partial disability at the rate of $313.00 per week for an 80 percent work disability for a total maximum award of $100,000.00.

As of August 30, 1996, there is due and owing claimant 120.29 weeks at the rate of $313.00 per week or $37,650.77 which is due and owing in one lump sum less amounts previously paid. Thereafter, the remaining balance of $62,349.23 will be paid at the rate of $313.00 per week until the maximum award of $100,000.00 has been paid or further order of the Director.

Pursuant to K.S.A. 44-536, the claimant's contract of employment with her counsel is hereby approved.

The claimant is entitled to future medical treatment on proper application to the Director of Workers Compensation.

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

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| Nora Lyon & Associates<br>Transcript of Proceedings on May 22, 1995 | $176.30 |
| Satterfield Reporting Services<br>Transcript of Karen Crist Terrill | Unknown |
| Johanna L. Wilkinson, CSR/RPR<br>Transcript of Tyrone D. Artz, M.D. | $132.00 |
| Barbara J. Terrell & Associates<br>Transcript of Ernest R. Schlachter, M.D. | $ 83.50 |
| Owens, Brake, Cowan & Associates<br>Transcript of Dennis Meyer | $180.60 |
| Special Administrative Law Judge Fee | $150.00 |

**IT IS SO ORDERED.**

Dated this ____ day of August 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Timothy J. King, Wichita, KS
Kirby A. Vernon, Wichita, KS
Douglas F. Martin, Special, Administrative Law Judge
Philip S. Harness, Director