



The parties requested the Appeals Board to review the issue of nature and extent of disability. That is the only issue 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:

The Award should be modified to award claimant permanent partial general disability benefits for a 5 percent whole body functional impairment only.

Respondent employed claimant as a cook at its Pratt, Kansas, pizza restaurant. Claimant's duties included making pizza dough, setting up the salad bar, opening the restaurant in the mornings, operating the cash register, and cleaning. On or about April 13, 1994, claimant injured her low back when she bent down to lift pizza dough from a bowl.

Claimant initially sought medical treatment from the Pratt Rural Health Clinic. Claimant was ultimately referred to Wichita to see an orthopedic surgeon and ultimately saw Stephen Ozanne, M.D., who became the authorized, treating physician. Claimant first saw Dr. Ozanne in August 1994 and was taken off work. After a period of conservative treatment, at claimant's request, the doctor released claimant to return to work on November 30, 1994, with medical restrictions of occasional lifting limited to 25 pounds, frequent lifting limited to 15 pounds, and squatting limited to an occasional basis.

In November 1994 claimant's fiancé was offered a promotion which would require a move to Salina.

Upon learning of claimant's release to return to work, claimant's attorney advised her to return to work for respondent. On or about December 5 or 7, 1994, claimant spoke with respondent's then manager, Carl Black, about returning to work and left him Dr. Ozanne's restrictions and her telephone number and address where she could be reached. During that conversation, Mr. Black told claimant he might have an opening in the near future and he would get back to her. Claimant testified Mr. Black stated he might have an opening for her the next day. However, Mr. Black testified he told claimant he would contact her within a week and that he twice subsequently tried without success to telephone and offer claimant a job.

Without hearing from respondent regarding her return to work, on December 16, 1994, claimant and her fiancé moved to Salina. On December 21, 1994, Mr. Black telephoned claimant's mother attempting to contact claimant. On January 6, 1995, claimant received a certified letter from respondent which offered her a job in Pratt.

Claimant testified she and her fiancé would not have moved to Salina if respondent had returned her to work. No reasonable explanation is offered why claimant did not return to respondent's restaurant to check her employment status before moving to Salina despite her expressed desire to remain in Pratt.

At the time of regular hearing in October 1995 claimant was not working although she had applied for employment in Salina.

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

"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. . . . 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."

The Appeals Board believes Mr. Black's testimony that he attempted to contact claimant to offer her an accommodated job on two occasions within a week following their early December conversation. The Appeals Board finds Mr. Black is a credible witness as he is disinterested in the outcome of the litigation as he no longer works for respondent but is now attending college. His testimony is also very believable.

The Appeals Board does not believe claimant intended to return to work for respondent in any event. That conclusion is based upon the conversation claimant had with Dr. Ozanne at her last appointment with the doctor on November 30, 1994. At that time claimant told the doctor she was going to marry, move to Salina, and she did not intend to return to work for respondent. Also, the Appeals Board is skeptical to believe claimant desired to remain in Pratt to work for respondent when she moved without recontacting Mr. Black about her employment status.

Based upon the above the Appeals Board finds the facts in this proceeding are conceptually equivalent to those in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140, *rev. denied* 257 Kan. 1091 (1995). In Foulk, claimant was offered a job within her work restrictions but she did not attempt to perform it. In the proceeding before us, claimant actively avoided respondent as she did not return messages from Mr. Black and did not make any effort to recontact Mr. Black between her early December 1994

conversation and her move to Salina later that same month. Therefore, claimant prevented respondent from offering her an accommodated job before she moved away. The Appeals Board finds a lack of good faith on claimant's part. The Appeals Board also finds the job of cashier and salad bar person, which Mr. Black had intended to offer claimant, would not have violated claimant's permanent work restrictions and limitations. Also, the accommodated job would have paid claimant a wage comparable to what she was earning on the date of accident.

Because the public policy principles set forth in Foulk are also applicable to injuries occurring after July 1, 1993, the Appeals Board finds the wages claimant would have earned if she had returned to work for respondent should be imputed for purposes of applying K.S.A. 44-510e. Avoiding an offer of accommodated work is conceptually equivalent to refusing to attempt to perform an accommodated job.

Imputing a post-injury wage which is comparable to the average weekly wage claimant was earning on the date of accident, the Appeals Board finds there is no difference in claimant's pre- and post-injury wages and, therefore, claimant's benefits are limited to those for her 5 percent whole body functional impairment rating.

For the reasons above, claimant's request for permanent partial disability benefits based upon work disability is denied.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bruce E. Moore, dated February 29, 1996, should be, and hereby is, modified.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Pamela Ward-Wallace, and against the respondent, L. C. Enterprises d/b/a Big Cheese Pizza, and its insurance carrier, CIGNA, for an accidental injury which occurred April 13, 1994, and based upon an average weekly wage of \$106.45 for 34 weeks of temporary total disability compensation at the rate of \$70.97 per week or \$2,412.98, followed by 19.8 weeks at the rate of \$70.97 per week or \$1,405.21, for a 5% permanent partial general body impairment of function, making a total award of \$3,818.19, which is due and owing less any amounts previously paid.

Claimant is entitled to request additional medical treatment upon proper application and approval by the Director of the Division of Workers Compensation.

Claimant is also entitled to unauthorized medical expense up to the statutory maximum upon presentation of proof of payment.

The remaining orders set forth in the Award are hereby adopted by the Appeals Board as its own to the extent that they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July 1997.

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BOARD MEMBER

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BOARD MEMBER

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- c: David H. Farris, Wichita, KS
- Michael D. Streit, Wichita, KS
- Bruce E. Moore, Administrative Law Judge
- Philip S. Harness, Director