BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARY VALDOIS	)	
Claimant	)	
VS.	)	
	)	Docket No. 213,733
LATOUR MANAGEMENT	)	
Respondent	)	
AND	)	
	)	
NORTHWESTERN NATIONAL CASUALTY	)	
INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the Award of Administrative Law Judge John D. Clark dated May 14, 1998. Oral argument was held on January 8, 1999, in Wichita, Kansas.

APPEARANCES

Claimant appeared by her attorney, Joseph Seiwert of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, James A. Cline of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as set forth in the Award of the Administrative Law Judge are adopted by the Appeals Board.

ISSUES

(1) What was claimant's average weekly wage on the date of accident?

(2) What is the nature and extent of claimant's injury and/or disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Appeals Board finds as follows:

Claimant was a 68-year old, semi-retired employee receiving Social Security benefits at the time of her injury on June 6, 1996. Claimant worked in food service at the Kansas Surgical and Rehabilitation Unit, and on the day of injury was earning $7.50 per hour. At the time of claimant's injury, claimant contends she was a full-time employee and thus entitled to an average weekly wage computed based upon the formula set forth in K.S.A. 44-511(b)(4)(B). Respondent contends claimant was only a part-time employee, and therefore the computation of the average weekly wage should be pursuant to K.S.A. 44-511(b)(5).

In reviewing the evidence, the Appeals Board finds that, during the 26 weeks preceding claimant's accident, she worked in excess of 40 hours on only two occasions. Claimant's average hours per week were 33.26 hours. In addition, claimant was expected to work and did in fact work less than 40 hours per week on a regular basis. Claimant admitted there were no customary numbers of hours constituting an ordinary work day in her job.

In considering whether an employee is full-time or part-time for the purpose of computing average weekly wage, the Board must first decide whether claimant is expected to work on a regular basis less than 40 hours per week, or is working in a trade or employment where there is no customary number of hours constituting an ordinary day in the character of the work performed by the employee. McMechan v. Everly Roofing, Heating & Air Conditioning, Inc., 8 Kan. App. 2d 349, 656 P.2d 797, *rev. denied* 233 Kan. 1092 (1983).

The Appeals Board finds claimant is a part-time employee for the purpose of computing claimant's average weekly wage under K.S.A. 44-511(b). In computing claimant's actual earnings from Respondent's Exhibit 1 from the regular hearing, the Appeals Board finds claimant earned a total of $6,069.98 during the 26 weeks preceding claimant's accident. During two of these weeks, claimant was on vacation, leaving a total earnings minus vacation pay of $5,606.02. The two weeks vacation will not be considered in computing claimant's wage. During the same period, claimant also worked overtime on two occasions, earning a total of $44.04. The Appeals Board computes claimant's straight

time earnings at $233.58 per week, and overtime earnings at $1.84 per week, resulting in an average weekly wage of $235.42 per week, and a weekly benefit rate of $156.95.

In considering the extent of claimant's permanent partial general disability, the Appeals Board must consider K.S.A. 44-510e(a) which states 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. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.

Claimant acknowledged there was no evidence in the record from which a task loss could be computed. Therefore, claimant is limited to the difference between the average weekly wage claimant was earning at the time of the injury and the average weekly wage claimant is earning after the injury.

However, the Appeals Board must also consider claimant's request for work disability benefits in light of the policies set forth by the Court of Appeals in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997). In Copeland, the Court of Appeals held that a fact finder must first decide whether claimant has made a good faith effort to find appropriate employment. If it is found that a good faith effort has not been made, the fact finder then must determine an appropriate post-injury wage based upon all the evidence before it, including expert testimony concerning claimant's capacity to earn wages.

In this instance, claimant acknowledges she is not employed and is not seeking employment. Her decision to terminate her employment with respondent came after a discussion with her treating physician, Dr. Richard Leu. However, the Appeals Board finds no medical evidence in the file which restricts claimant from working. In fact, the claimant's treating physician, Dr. Robert Eyster, a board certified orthopedic surgeon, found claimant capable of returning to work and limited her to no stair climbing or ladder climbing, no pushing or pulling over 10 pounds, walking over 200 yards at one time, and suggested she do intermittent standing and sitting. Dr. Eyster went on to assess claimant a 1 percent permanent partial functional impairment to the body as a whole.

Claimant was referred to Dr. Pedro A. Murati, board certified in physical medicine and rehabilitation. This referral was by claimant's attorney. Dr. Murati found claimant to

have suffered from chronic thoracic and cervical strain, right pelvic crest contusion, and chronic right shoulder strain. He recommended claimant limit her lifting to 20 pounds occasionally, 10 pounds frequently, 5 pounds constantly, with only occasional above shoulder work, no reaching more than 18 inches from the body, and that she avoid twisting her trunk and avoid working in awkward positions with her neck. He assessed claimant a 19 percent whole body permanent impairment. Dr. Murati noted claimant had a 9 percent preexisting functional impairment, and the 19 percent assessed by him excludes that preexisting condition.

It is noted neither Dr. Murati nor Dr. Eyster restricted claimant from working in the open labor market, although they both did provide specific work restrictions for claimant to follow.

During claimant's regular hearing testimony, she discussed the fact that she made a decision to terminate her employment after her discussions with Dr. Leu. She also discussed her treatment with Dr. Nathan E. Bradley and Dr. Lawrence R. Blaty. Neither Dr. Bradley nor Dr. Leu nor Dr. Blaty were deposed in this matter. It is noted that the medical records of all three are attached to the transcript of preliminary hearing held April 3, 1997. K.A.R. 51-3-5a allows medical reports, statements or records to be considered by the administrative law judge at preliminary hearing, absent the doctor's supporting testimony. However, the regulation goes on to state:

> . . . the reports shall not be considered as evidence when the administrative law judge makes a final award in the case, unless all parties stipulate to the reports, records or statements or unless the report, record or statement is later supported by the testimony of the physician, surgeon or other person making the report, record or statement.

In addition, K.S.A. 44-519 prohibits consideration of the report of any examining physician or health care provider unless supported by the testimony of such health care provider.

In this instance, it is not absolutely clear whether the medical reports attached to the preliminary hearing transcript were stipulated into evidence by the parties. At the time of regular hearing, the parties acknowledged the preliminary hearing. At that time, claimant's attorney stated "We don't object to it being included in the record." No additional comments were made by respondent's attorney.

It is noted that, in claimant's submission letter to the Administrative Law Judge, the medical records of Dr. Leu and Dr. Blaty were discussed. In respondent's brief submitted to the Appeals Board in August 1998, respondent discusses the medical records of Dr. Bradley. In the Award issued by the Administrative Law Judge, the medical records of

both Dr. Blaty and Dr. Bradley are discussed. The Appeals Board concludes the stipulation taken at regular hearing included not only the inclusion of the preliminary hearing, but also the inclusion of all medical records attached, because no objection was filed by any party to the inclusion of these records, and because both claimant's and respondent's attorneys and the Administrative Law Judge discuss these records in the briefs and in the Award without any supporting testimony from Dr. Blaty, Dr. Bradley or Dr. Leu.

In considering the medical records of the three non-testifying doctors, the Appeals Board fails to find any indication that claimant was prohibited from working. In fact the medical records indicate, in several places, that claimant could be returned to light duty with specific restrictions and limitations. At no time does any physician preclude claimant from working in the open labor market. It appears from the evidence that claimant's decision to remove herself from the open labor market was a voluntary decision on claimant's part and violates the policy set forth in Copeland.

Claimant acknowledged at the time of her termination of employment with Latour that she was not having difficulty doing the work. There was some discussion regarding harassment on the job, which claimant felt was inappropriate, but claimant acknowledged she was physically capable of performing the work she was being provided by Latour. The Appeals Board, therefore, finds claimant had the ability to continue working with the respondent and to earn a wage comparable to that she was earning at the time of the injury.

K.S.A. 44-510e(a) goes on to state:

> 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.

As the Appeals Board has found claimant capable of continuing her employment with respondent at a comparable wage, claimant would be limited under K.S.A. 44-510e to her functional impairment.

Two functional impairments were provided for consideration by the Administrative Law Judge and the Appeals Board. Dr. Eyster assessed claimant a 1 percent impairment of function to the body as a whole, and Dr. Murati assessed claimant a 19 percent functional impairment to the body as a whole. The Administrative Law Judge, in considering Dr. Eyster's conservative tendencies and Dr. Murati's liberal tendencies, found claimant's true functional impairment fell somewhere between the 1 percent and the 19 percent, and awarded claimant a 10 percent whole body functional impairment. The

Appeals Board, having had the opportunity to review the testimony of both Dr. Eyster and Dr. Murati agrees, and awards claimant a 10 percent whole body functional impairment as a result of the injuries suffered with respondent on June 6, 1996.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it is not contradicted herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated May 14, 1998, in favor of claimant, Mary Valdois, and against respondent, Latour Management, and its insurance carrier, Northwestern National Insurance Company, for an accidental injury sustained on June 6, 1996, should be, and is hereby, modified with regard to the average weekly wage, and affirmed in all other respects.

Claimant is entitled to 41.5 weeks permanent partial disability at the rate of $156.95 per week based upon an average weekly wage of $235.42, for a 10 percent permanent partial general body disability in the amount of $6,513.43, making a total award of $6,513.43. As of the date of this Award, the entire amount would be due and owing in one lump sum minus any amounts previously paid.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

Ireland Court Reporting	
Transcript of preliminary hearing	$ 59.56
Transcript of preliminary hearing	$102.52
Alexander Reporting Co.	
Deposition of Pedro A. Murati, M.D.	$170.25
Deposition Services	
Transcript of regular hearing	$161.00
Bannon & Associates	
Deposition of Robert Eyster, M.D.	$107.23

IT IS SO ORDERED.

Dated this ____ day of February 1999.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Joseph Seiwert, Wichita, KS
James A. Cline, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director