

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

BONITA J. ZOGLMAN)	
Claimant)	
VS.)	
)	Docket Nos. 214,021 & 225,754
LAKESWOOD HEIGHTS CARE CENTER)	
Respondent)	
AND)	
)	
OAK RIVER INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Both claimant and the respondent and its insurance carrier appealed the August 2, 1999 Award entered by Administrative Law Judge John D. Clark. The Appeals Board heard oral argument on January 26, 2000.

APPEARANCES

James B. Zongker of Wichita, Kansas, appeared for the claimant. Ronald J. Laskowski of Topeka, 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

Docket #214,021 was filed as a claim for an April 9, 1996 back injury and any additional back injury that claimant may have sustained while working for the respondent after that date. Docket #225,754 was filed as a claim for a June 26, 1997 accident and resulting injury. Despite filing those two claims, claimant proceeded to regular hearing alleging that she sustained only one accident, which is the April 9, 1996 incident.¹

¹ Regular Hearing transcript, p. 3.

Averaging a 54 percent task loss with a 20 percent wage loss, the Judge found that claimant sustained a 37 percent permanent partial general disability. Additionally, the Judge reduced the permanent partial general disability by five percent for preexisting functional impairment.

Claimant contends Judge Clark erred and argues that she has an 84 percent task loss and a 100 percent wage loss that yield a 92 percent work disability.

Conversely, the respondent and its insurance carrier contend Judge Clark erred by failing to limit claimant's permanent partial general disability to the functional impairment rating. They argue that claimant failed to make a good faith effort to find appropriate employment and refused to attempt at least two jobs that were offered her. The respondent and its insurance carrier argue that a comparable post-injury wage should be imputed to claimant.

The nature and extent of claimant's injury and disability is the only issue before the Appeals Board on this appeal.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. On April 9, 1996, Ms. Bonita J. Zoglman injured her low back while lifting a patient at the Lakewood Heights Care Center (Lakewood). The parties stipulated that the accidental injury arose out of and in the course of her employment with Lakewood.
2. Ms. Zoglman began treating with orthopedic surgeon Dr. Bernard Poole, who diagnosed a herniated disk between the fifth lumbar and first sacral vertebrae. After a period of conservative treatment failed to resolve her symptoms, Dr. Poole operated on Ms. Zoglman's back on August 19, 1996. After recuperating from that surgery, the doctor released Ms. Zoglman to return to modified work. Although limited to light duty, Ms. Zoglman's back worsened causing Dr. Poole to perform a second back surgery in August 1997. During the second surgery, the doctor noted that the L5 nerve root was incased in hard scar tissue. Despite the two surgeries, Ms. Zoglman continues to complain of pain in her low back and down into the left leg.
3. Dr. Poole last saw Ms. Zoglman in October 1998. At that time, the doctor's final diagnosis was status post L5-S1 diskectomy times two, mild chronic L5 radiculopathy, and significant perineural scarring at the operated site without evidence of instability. Dr. Poole believes that Ms. Zoglman had a 15 percent whole body functional impairment according to the fourth edition of the *AMA Guides to the Evaluation of Permanent Impairment (Guides)*. Further, the doctor believes that Ms. Zoglman should be restricted from heavy lifting, restricted in her bending, and generally perform light sedentary work only. Although

he recognizes that Ms. Zoglman has significant work restrictions, Dr. Poole believes that Ms. Zoglman retains the ability to work.

4. At her attorney's request, Ms. Zoglman saw Dr. Pedro Murati, who is board certified in physical medicine and rehabilitation. Dr. Murati saw Ms. Zoglman on two occasions – in February and in July 1998. He diagnosed failed back surgery syndrome, left SI joint dysfunction, and left trochanteric bursitis. Dr. Murati rates Ms. Zoglman as having an 18 percent whole body functional impairment according to the *AMA Guides*. The difference between Dr. Poole's rating and Dr. Murati's is that the latter rated the trochanteric bursitis. Because of the failed back syndrome, Dr. Murati believes Ms. Zoglman should be restricted to sedentary work and permitted to change positions and lie down as needed. Dr. Murati does not believe that Ms. Zoglman could work as a telemarketer or that she is employable at any work for eight hours per day, five days a week.

5. At the request of Lakewood and its insurance carrier, board certified physical medicine and rehabilitation specialist Dr. Frederick Ray Smith examined Ms. Zoglman in May 1999. When Dr. Smith saw Ms. Zoglman, she had difficulty walking, had an antalgic gait, an absent ankle reflex, and had difficulty sitting without having to extend her leg. The doctor referred Ms. Zoglman for a functional capacity assessment at Wesley Medical Center in Wichita to more objectively define her work restrictions. According to Dr. Smith, Ms. Zoglman has the ability to sit for three hours at 35 minutes at a time; stand for three hours for 30 minutes at a time; walk two to four hours with occasional to moderate distances; minimally and occasionally squat, crawl, climb stairs, kneel, and balance; very minimally bend and stoop; and occasionally carry and lift approximately 10 pounds. Based upon his assessment, the doctor believes Ms. Zoglman is physically capable of working in the open labor market and physically capable of performing clerical work if she were permitted to change positions as needed.

6. The parties stipulated that Dr. Anthony G. A. Pollock's March 15, 1989 letter would be part of the evidentiary record. That letter, which pre-dates Ms. Zoglman's April 1996 accident, indicates that Ms. Zoglman had a five percent whole body functional impairment. Based upon that letter, Judge Clark found that Ms. Zoglman had a preexisting five percent whole body functional impairment and deducted that amount in computing Ms. Zoglman's award of permanent partial general disability benefits. As the parties did not contest that finding in either their brief or during oral argument, the Appeals Board affirms that finding.

7. Persuaded by Dr. Poole's opinion as he was the treating physician, Judge Clark found that Ms. Zoglman sustained a 15 percent whole body functional impairment as a result of her work-related back injury. The Appeals Board affirms that finding.

8. According to the medical release slips, Dr. Poole released Ms. Zoglman to return to light office work on October 29, 1997. And on December 30, 1997, the doctor released Ms. Zoglman to light sedentary work. But Lakewood did not accept her back into its employment. Ms. Zoglman did not look for work until January 1999 when Lakewood and

its insurance carrier hired vocational rehabilitation counselor Monty Longacre to assist her in finding a job. Mr. Longacre suggested an eight-week job search. After a conflict developed between Ms. Zoglman and Mr. Longacre, vocational rehabilitation counselor Dan R. Zumalt replaced Mr. Longacre commencing March 1999. Mr. Zumalt requested that the job search be extended an additional six weeks as Ms. Zoglman lacked basic job seeking skills.

9. At the conclusion of the job search program, Ms. Zoglman remained unemployed although she had received at least two job offers – one as a telemarketer and one working for Olsten's. Both Mr. Longacre and Mr. Zumalt believed that Ms. Zoglman failed to make a genuine good faith effort in the job search. Although it is true that Ms. Zoglman did complete numerous applications, according to both Mr. Longacre and Mr. Zumalt she generally conducted herself in a manner that was detrimental to being hired. Among other things, (1) Ms. Zoglman refused to consider any jobs that were not on first shift; (2) she unnecessarily volunteered information about her injuries that adversely affected her chances of being hired; (3) she only applied at a small percentage of the company referrals that the counselors provided; (4) she walked out of a job interview on at least one occasion; (5) on at least two occasions she failed to call to cancel or reschedule appointments with Mr. Zumalt; (6) she failed to inquire into what would be required to obtain her GED; and (7) she failed to follow up on her job applications. Considering the greater weight of the evidence, the Appeals Board finds that Ms. Zoglman did not put forth a genuine effort to find appropriate employment.

10. The parties stipulated that Ms. Zoglman's average weekly wage at the time of the accident was \$257.60. The Appeals Board finds that, despite her accident and medical restrictions, Ms. Zoglman retains the ability to earn \$6 per hour or \$240 per week. That conclusion is based upon the testimonies of Mr. Longacre, Mr. Zumalt, and labor market expert Jerry Hardin. Mr. Longacre indicated that he was looking to place Ms. Zoglman in a job paying from \$5.15 through the low \$6 per hour range. Based upon the then-existing labor market, Mr. Longacre did not feel that it would be difficult to find Ms. Zoglman a job that paid a comparable wage. Mr. Zumalt indicated that he felt Ms. Zoglman's post-injury earning capacity fell in the \$5.75 to \$6.25 per hour range. And Mr. Hardin testified that there was a large demand for unskilled workers in Wichita for jobs that paid up to \$6 per hour and that telemarketers earned from minimum wage up to approximately \$7 per hour.

11. Comparing \$257.60 to \$240, the Appeals Board finds that Ms. Zoglman retains the ability to earn at least 90 percent of her pre-injury wage.

CONCLUSIONS OF LAW

1. Because the Appeals Board finds that Ms. Zoglman should be imputed a post-injury wage that is at least 90 percent of her pre-injury average weekly wage, the Award should be modified to reduce the permanent partial general disability to one based upon the functional impairment rating.

2. Because Ms. Zoglman's back injury comprises an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 1996 Supp. 44-510e. That statute 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. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . 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.

But that statute must be read in light of Foulk² and Copeland.³ In Foulk, the Court of Appeals held that a worker could not avoid the presumption of having no work disability as contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In Copeland, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that workers' post-injury wages should be based upon their ability rather than their actual wages when they fail to make a good faith effort to find appropriate employment after recovering from their injury.

If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .⁴

3. As indicated in the findings above, Ms. Zoglman did not put forth a genuine good faith effort to find appropriate employment after she was released to work following her second back surgery. Therefore, a post-injury wage should be imputed for purposes of the wage loss prong of the permanent partial general disability formula. And in this case the post-injury wage to be imputed is \$240, which is at least 90 percent of the stipulated pre-

² Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

³ Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁴ Copeland, p. 320.

injury wage of \$257.60. Therefore, Ms. Zoglman’s permanent partial general disability cannot exceed the 15 percent whole body functional impairment rating.

4. The Workers Compensation Act provides that compensation awards must be reduced by the preexisting functional impairment. Therefore, deducting the five percent preexisting functional impairment from 15 percent yields 10 percent upon which Ms. Zoglman’s award should be based.

AWARD

WHEREFORE, the Appeals Board modifies the August 2, 1999 Award and reduces the permanent partial general disability award from 32 percent to 10 percent.

Bonita J. Zoglman is granted compensation from Lakewood Heights Care Center and its insurance carrier for an April 9, 1996 accident and resulting disability. Based upon an average weekly wage of \$257.60, Ms. Zoglman is entitled to receive 89.16 weeks of temporary total disability benefits at \$171.74 per week, or \$15,312.34, followed by 34.08 weeks of benefits at \$171.74 per week, or \$5,852.90, for a 10 percent permanent partial general disability, making a total award of \$21,165.24, which is all due and owing less any amounts previously paid.

The Appeals Board adopts the orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of February 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: James B. Zongker, Wichita, KS
- Ronald J. Laskowski, Topeka, KS
- John D. Clark, Administrative Law Judge
- Philip S. Harness, Director