

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

PAMELA CHURCHILL)	
Claimant)	
VS.)	
)	Docket No. 216,070
VALLEY FLORAL COMPANY)	
Respondent)	
AND)	
)	
CONTINENTAL WESTERN INSURANCE CO.)	
Insurance Carrier)	

ORDER

The claimant and the respondent and its insurance carrier appealed the November 24, 1998 Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Appeals Board heard oral argument in Wichita, Kansas, on September 10, 1999.

APPEARANCES

Lawrence M. Gurney of Wichita, Kansas, appeared for the claimant. Mark A. Buck 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

This is a claim for an April 12, 1996 accident and alleged injuries to the left ankle and low back. After finding that (1) the claimant returned to her regular job as a floral designer and worked for the respondent until she was laid off, (2) claimant then obtained other employment for approximately two months earning comparable wages, and (3) claimant failed to make a good faith effort to find work, the Judge held that claimant's permanent partial general disability was limited to her 13 percent functional impairment rating.

Claimant contends that Judge Barnes erred by finding that she failed to make a good faith effort in seeking appropriate employment after respondent laid her off. Claimant argues that she did exercise good faith as she sought work at all times when she was physically able. Claimant also argues that the Judge erred by finding that she was automatically denied a work disability under the principles of Copeland,¹ if that case even applies. Should Copeland apply, claimant argues that the Judge should have used an imputed wage to determine whether or not a work disability was appropriate.

Although the respondent and its insurance carrier also filed an application for Appeals Board review, at the oral argument before the Appeals Board they requested that the Award be affirmed.

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

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. On April 12, 1996, Ms. Churchill broke her left ankle while working for Valley Floral Company. After her left ankle was casted, Ms. Churchill began experiencing both pain in her back and tarsal tunnel symptoms in her left foot. The parties stipulated that the accident arose out of and in the course of employment. The parties also stipulated that Ms. Churchill's average weekly wage on the date of accident was \$308.96.
2. Ms. Churchill initially obtained medical treatment from Dr. James Joseph Jr., an orthopedic surgeon. But in September 1996, at her attorney's request Ms. Churchill saw physical medicine specialist Dr. Pedro A. Murati who later became the court-authorized treating physician.
3. After the accident, Ms. Churchill was off work and received temporary total disability benefits for approximately 34 weeks.
4. Before initially seeing Dr. Murati in September 1996 and while still wearing the cast on her left leg, Ms. Churchill returned to work for Valley Floral Company for a short period until the company closed her division. The company then offered Ms. Churchill a position as a flower puller, which would have required her to be on her feet all day. When she declined the flower puller job, the company did not offer Ms. Churchill any accommodated positions but placed her on layoff. The record discloses neither the date that Ms. Churchill returned to Valley Floral Company nor the date of her layoff nor the specific job duties that she performed.

¹ Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

5. After being laid off at Valley Floral Company, Ms. Churchill then found full-time work at a talent agency, River City Performing Arts Network, where she worked from approximately August 1997 through October 1997, until she was again laid off. Ms. Churchill then looked for work until sometime in November 1997 when her personal physician restricted her from working as she was experiencing a high risk pregnancy. At the talent agency, Ms. Churchill earned \$6.50 per hour but did not receive medical benefits. Based upon that evidence, the Appeals Board finds that Ms. Churchill's post-injury wage while at the talent agency was \$260 per week.

6. Ms. Churchill gave birth on April 17, 1998. At the regular hearing held in July 1998, Ms. Churchill had been working weekends as a musician for 30 days playing her acoustical guitar at a total of three engagements. That weekend work earned her approximately \$50 per week. Ms. Churchill was not seeking other employment as she had encountered problems with obtaining a baby-sitter and did not anticipate getting a sitter until August 28, 1998, at which time she intended to resume looking for full-time work.

7. Valley Floral Company and its insurance carrier hired Dr. Bernard T. Poole to evaluate Ms. Churchill's functional impairment. Dr. Poole found that Ms. Churchill had a 1-2 percent whole body functional impairment because of a back strain and the left ankle fracture. Conversely, Dr. Murati found that Ms. Churchill had a 13 percent whole body functional impairment for the back strain and left tarsal tunnel syndrome. It is unclear whether Dr. Poole used the AMA Guides to the Evaluation of Permanent Impairment in formulating his impairment rating. But it is clear that Dr. Murati did. Persuaded by Dr. Murati, who treated Ms. Churchill for a number of months, the Judge found that Ms. Churchill sustained a 13 percent whole body functional impairment as a result of the April 1996 accident. The Appeals Board agrees.

8. Through Dr. Murati's testimony, Ms. Churchill has proven that she lost the ability to perform 7 of 19 work tasks that she had performed in the 15 years before the April 1996 accident. But Ms. Churchill did not prove through a doctor's testimony that she was unable to perform the three work tasks that she performed for Lawrence Photo, where she also had worked in that 15-year period. Therefore, Ms. Churchill has established that as a result of the April 1996 accident she lost the ability to perform 7 of 22 former work tasks, or 32 percent.

CONCLUSIONS OF LAW

1. Because the ankle and low back injuries constitute an "unscheduled" injury, the formula for determining permanent partial general disability is contained in K.S.A. 1996 Supp. 44-510e. That statute provides:

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

2. Ms. Churchill is entitled to receive 34.14 weeks of temporary total disability benefits. For that period between the date of accident and August 1, 1997, when Ms. Churchill did not qualify for temporary total disability benefits, Ms. Churchill has a 100 percent difference in pre- and post-injury wages and a 32 percent task loss. Therefore, for the period before August 1, 1997, Ms. Churchill has a 66 percent permanent partial general disability. The Appeals Board finds that Ms. Churchill made a good faith effort to find employment during that period as she returned to work for Valley Floral Company for a very short period before she was laid off due to the company's inability to provide her with accommodated work. The Appeals Board also finds that the floral designer job that she performed for Valley Floral Company before her accident violated her permanent work restrictions and limitations.

3. For the period from August 1, 1997, through October 31, 1997, Ms. Churchill worked at the talent agency earning approximately \$260 per week. Comparing \$260 to the stipulated average weekly wage of \$308.96 yields a 16 percent difference. Averaging the 16 percent wage loss with the 32 percent task loss yields a 24 percent permanent partial general disability for that period.

4. For the period commencing November 1, 1997, a post-injury wage should be imputed because Ms. Churchill was not looking for employment for reasons unrelated to her work-related injuries. Imputing the \$260 per week that she demonstrated that she was capable of earning, the Appeals Board concludes that Ms. Churchill has a 16 percent wage loss and

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).

32 percent task loss, or a 24 percent permanent partial general disability, for that period commencing November 1, 1997.

5. The Appeals Board adopts the findings and conclusions set forth in the Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, the Appeals Board modifies the November 24, 1998 Award, as follows:

Pamela Churchill is granted compensation from Valley Floral Company and its insurance carrier for an April 12, 1996 accident and resulting disability. Based upon an average weekly wage of \$308.96, Ms. Churchill is entitled to receive 34.14 weeks of temporary total disability benefits at \$205.98 per week, or \$7,032.16. For the period from December 8, 1996, through July 31, 1997, 33.71 weeks of benefits are due at \$205.98 per week, or \$6,943.59, for a 66 percent permanent partial general disability. For the period commencing August 1, 1997, 61.30 weeks of benefits are due at \$205.98 per week, or \$12,626.57, for a 24 percent permanent partial general disability. The total award due and owing is \$26,602.32, which is ordered paid in one lump sum less any amounts previously paid.

IT IS SO ORDERED.

Dated this ____ day of December 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Lawrence M. Gurney, Wichita, KS
- Mark A. Buck, Topeka, KS
- Nelsonna Potts Barnes, Administrative Law Judge
- Philip S. Harness, Director