

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

KATHLEEN PEREZ)	
Claimant)	
VS.)	
)	Docket No. 217,650
TONY'S PIZZA SERVICE)	
Respondent)	
AND)	
)	
LIBERTY MUTUAL INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent appeals from an Award entered by Administrative Law Judge Bruce E. Moore dated September 22, 1997. The Appeals Board heard oral argument April 1, 1998.

APPEARANCES

Claimant appeared by her attorney, John M. Ostrowski of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, John W. Mize of Salina, Kansas.

RECORD AND STIPULATIONS

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

ISSUES

The claimant met with personal injuries by accident in a series through October 30, 1996. The Administrative Law Judge found claimant suffered a 62.5 percent work disability as a result of her work-related injuries. On appeal respondent contends claimant's permanent disability award should be limited to her percentage of functional impairment because she was offered accommodated work at a comparable wage and did not make a good faith effort to perform that work. The nature and extent of claimant's disability is the only issue on appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

As more fully explained in the findings of fact and conclusions of law by the Administrative Law Judge, the Appeals Board finds and concludes that claimant is entitled to

a work disability award. But the Appeals Board finds the award should be modified to award a 53 percent work disability based, in part, on a 50 percent wage loss. The Appeals Board agrees with the Administrative Law Judge that claimant has suffered a 56 percent task loss. The Appeals Board further agrees that a wage should be imputed for claimant based upon the \$6 per hour she was earning while working for Carpet Pro because claimant left that job for reasons unrelated to her injuries. The Administrative Law Judge, however, found claimant sustained a 69 percent wage loss based upon the five hours per week for five days a week that claimant actually worked at Carpet Pro. The Appeals Board finds claimant is not restricted to working less than eight hours per day and that claimant has the ability to perform that job, and others, working a full 40-hour work week. Accordingly, comparing a post-accident wage-earning ability of \$240 per week to the stipulated average weekly wage of \$480.12 results in a 50 percent wage loss. When this is averaged with the 56 percent task loss the result is a 53 percent work disability.

K.S.A. 1996 Supp. 44-510e(a) sets out the statutory definition of permanent partial general disability and an injured employee's entitlement to the same:

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.

K.S.A. 1996 Supp. 44-510e(a) also specifies that a claimant is not entitled to disability compensation in excess of the functional impairment so long as the claimant earns a wage which is equal to 90 percent or more of the pre-injury average weekly wage. Following claimant's injury, she was eventually released to return to work with certain permanent restrictions. Respondent attempted to accommodate those restrictions. Respondent offered, and claimant accepted, three positions which appeared to fit within claimant's restrictions. Claimant attempted those jobs but was physically unable to perform them. Respondent then terminated claimant. Respondent argues claimant failed to make a good faith effort to perform the jobs and should, therefore, be precluded from receiving a work disability, citing the doctrine announced in Fouk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). As did the Administrative Law Judge, the Appeals Board finds the facts in this case are more analogous to Guerrero v. Dold Foods, Inc., 22 Kan. App. 2d 53, 913 P.2d 612 (1995). In that case, the claimant was awarded a work disability where it was found claimant made a good faith attempt to perform the accommodated work but was physically unable to do so.

The Kansas Court of Appeals has also held that the actual wage loss will not be used unless it is first shown that the claimant has made a good faith effort to obtain employment after her injury. A claimant who is not earning a wage and might otherwise be considered to have a 100 percent wage loss will not be considered to have a 100 percent wage loss if the claimant has not made a good faith effort to find work. Under those circumstances, a wage will

be imputed based on relevant factors, including evidence of the claimant's wage earning capacity. Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997). Because claimant left her job with Carpet Pro for reasons unrelated to her injury, the Board finds a wage should be imputed to claimant on the basis of the rationale given in the Copeland decision. As stated above, the Appeals Board will impute a post-injury wage of \$240 per week.

AWARD

WHEREFORE, the Appeals Board finds that the Award entered by Administrative Law Judge Bruce E. Moore dated September 22, 1997, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Kathleen Perez, and against the respondent, Tony's Pizza Service, and its insurance carrier, Liberty Mutual Insurance Company, for an accidental injury which occurred in a series through October 30, 1996, and based upon an average weekly wage of \$480.12 for 219.95 weeks at the rate of \$320.10 per week or \$70,406.00, for a 53% permanent partial work disability.

As of April 10, 1998, there is due and owing claimant 75.14 weeks of permanent partial compensation at the rate of \$320.10 per week in the sum of \$24,052.31, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$46,353.69 is to be paid for 144.81 weeks at the rate of \$320.10 per week, until fully paid or further order of the Director.

The Appeals Board adopts and approves all other others contained in the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of April 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: John M. Ostrowski, Topeka, KS
- John W. Mize, Salina, KS
- Bruce E. Moore, Administrative Law Judge
- Philip S. Harness, Director