



claimant's impairment as 12 percent to the body as a whole. Furthermore, Dr. Bernard T. Poole attempted to examine claimant on July 26, 2000 and again on August 15, 2000, but her bizarre behavior and histrionics made a valid rating impossible. He suggested a psychiatric evaluation be performed. Claimant contends that Dr. Poole found claimant was incapable of working.

Claimant argues she is permanently and totally disabled as a result of her work related injury. In the alternative, claimant contends that she was never offered accommodated work within her restrictions by respondent and is entitled to an award based on a work disability. Claimant also contends the ALJ erred by considering Dr. Moore's functional impairment rating. In her brief to the Board, claimant stated that her objection goes to the foundation for that opinion because Dr. Moore relied "upon hearsay evidence of a hand therapists [sic] who did not testify in this matter."

Conversely, respondent contends that the ALJ's Award should be affirmed in all respects. Respondent argues claimant was offered accommodated jobs that were within her restrictions and ability but claimant failed to make a good faith effort to perform those jobs. This is the only reason claimant is not earning at least 90 percent of her average weekly wage, not because of her work related injury and not because of any bad faith on the part of the respondent. Accordingly, respondent argues claimant is not entitled to a work disability award because she would have remained employed by respondent earning a comparable wage if she had made a good faith effort to perform the accommodated work. Respondent argues that claimant's permanent partial disability benefits are therefore limited to her permanent functional impairment and requests the Board to affirm the ALJ's Award.

The nature and extent of claimant's disability and the admissibility of Dr. Moore's rating opinion are the only issues for Board review.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the briefs and the parties' oral arguments, the Board makes the following findings and conclusions:

The ALJ's Award sets out findings of fact and conclusions of law. It is not necessary to repeat those findings and conclusions in this Order. The Board agrees with the ALJ's analysis and his conclusion that claimant's permanent partial disability award should be limited to her percentage of functional impairment. In this case, the Board agrees that the better opinion on claimant's impairment is Dr. Moore's 10 percent rating. Therefore, the Board adopts the findings and conclusions of the ALJ as its own as if specifically set forth herein.<sup>1</sup>

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<sup>1</sup> Except the Board does not adopt the ALJ's finding that claimant remains unemployed. Claimant testified at p. 19 of the transcript of the February 7, 2001 Regular Hearing that she had been working two days a week since September as a dishwasher at the Better Than Nothing restaurant in South Coffeyville.

Claimant injured her upper extremities on September 3, 1999 while working for the respondent. Respondent provided medical treatment for claimant's injuries with several physicians, including Dr. Paul Sandhu who referred her to Dr. Moore, an orthopedic surgeon. Dr. Moore first saw claimant on October 12, 1999. He diagnosed bilateral carpal tunnel syndrome. Dr. Moore performed surgery on both upper extremities and released claimant to light duty work on January 3, 2000 with a restriction of no lifting over 25 pounds. Respondent returned claimant to an accommodated job driving a fork lift which Dr. Moore believed was within that restriction but claimant made little effort to perform that job before claiming she could not do it. She returned to Dr. Moore and was given the added restriction of no repetitive or constant gripping and she was enrolled in a work hardening program. She was later given an accommodated job as a janitor but again made little effort to perform that accommodated job. Claimant worked a total of about three hours at the janitor job. Dr. Moore later opined at his deposition that both the fork lift driver and the janitor jobs were within claimant's restrictions and ability so long as she had help lifting objects over 10 pounds.

At the time of her February 7, 2001 regular hearing testimony, claimant was working at a restaurant washing dishes two days a week earning \$5.15 per hour. Vocational expert Karen Crist Terrill testified that there are 40-hour-a-week jobs available in southeast Kansas that are within claimant's restrictions. No doctor has restricted the number of hours claimant can work per week at appropriate employment. The Board finds claimant is not completely and permanently incapable of engaging in substantial and gainful employment.<sup>2</sup>

The claimant argues that the accommodated jobs were not within her restrictions, but that even if they were she remains entitled to a work disability because she was unable to perform the accommodated jobs. In support of this argument is the Guerrero<sup>3</sup> case. In that case the claimant made a good faith effort to perform an accommodated job that was within her restrictions but which caused her pain. She was terminated but was still eligible to receive a work disability award.

The test of whether a failure to perform an accommodated job disqualifies an injured worker from entitlement to a work disability is a good faith test on the part of both claimant and respondent.<sup>4</sup> Although claimant disputes the reasonableness of the accommodations, the Board finds the record fails to establish that the jobs exceeded claimant's restrictions or ability. In fact, the Board finds claimant failed to make a good faith effort to perform the accommodated jobs. Claimant's lack of credibility is a factor in this determination. Furthermore, claimant failed to make a good faith effort thereafter to find appropriate work within her restrictions and limitations. The Board concludes claimant's conduct violated the

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<sup>2</sup> K.S.A. 44-510c(a)(2) (Furse 1993).

<sup>3</sup> Guerrero v. Dold Foods, Inc., 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

<sup>4</sup> See Helmstetter v. Midwest Grain Products, Inc., \_\_\_ Kan. App. 2d \_\_\_, 18 P.3d 987 (2001) and Oliver v. Boeing Co., 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 886 (1999).

policy considerations announced in Foulk<sup>5</sup> and Copeland.<sup>6</sup> Claimant's conduct was tantamount to a refusal to perform appropriate work as in Foulk or a failure to make a good faith effort to find appropriate employment as described in Copeland. Accordingly, because claimant was offered accommodated work, the wage she was earning and would have continued to earn had she continued working for respondent should be imputed to her. As this was at least 90 percent of her average weekly wage, claimant's permanent partial general disability award is based upon her permanent functional impairment.<sup>7</sup>

Finally, the Board finds the foundation testimony for the 10 percent impairment of function rating by Dr. Moore is sufficient to ensure the reliability of the opinion. Accordingly, that opinion is admissible and is adopted by the Board as claimant's general body disability.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish dated May 21, 2001, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December 2001.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant  
Stephen J. Jones, Attorney for Respondent  
Jon L. Frobish, Administrative Law Judge

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<sup>5</sup> Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

<sup>6</sup> Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

<sup>7</sup> See Ramirez v. Excel Corp., 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* \_\_\_\_ Kan. \_\_\_\_ (1999).

**CHRISTIE D. MAYFIELD**

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**DOCKET NO. 250,719**

Philip S. Harness, Workers Compensation Director