BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BETTINA MOFFITH	)	
Claimant	)	
VS.	)	
	)	Docket No. 251,241
RUSSELL STOVER CANDIES	)	
Respondent	)	
AND	)	
	)	
HARTFORD ACCIDENT & INDEMNITY	)	
Insurance Carrier	)	

ORDER

Claimant appealed the April 1, 2004 Award entered by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on October 5, 2004, in Topeka, Kansas.

APPEARANCES

Jeff K. Cooper of Topeka, Kansas, appeared for claimant. Brenden W. Webb of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. In addition, the parties filed a written stipulation on October 16, 2002, agreeing that the June 14, 2002 report of Monty Longacre and the June 25, 2002 report of Dick Santner could be considered as evidence in this claim without requiring Mr. Longacre and Mr. Santner to testify.

ISSUES

The parties stipulated claimant injured both upper extremities working for respondent through December 8, 1999, and that she sustained an additional 22 percent whole body functional impairment due to those injuries. The Judge denied claimant's request for a work disability (a permanent partial general disability greater than the functional impairment rating) and limited claimant's permanent disability benefits to her

additional 22 percent functional impairment. The Judge also denied claimant's request for additional temporary total disability benefits.

Claimant contends Judge Benedict erred. Claimant argues she has a 100 percent wage loss and a 63 percent task loss for an 81.5 percent work disability. Accordingly, claimant contends she should be awarded a 69.5 percent permanent partial general disability, which has been reduced by her preexisting whole body functional impairment of 12 percent. Claimant also contends she should receive one week of temporary total disability benefits that respondent failed to pay in February 2000 when she was off work for left elbow surgery. Moreover, claimant argues she is entitled to receive temporary total disability benefits for the period from April 12, 2000, through February 18, 2002, during which claimant underwent three of the four surgeries she had for the injuries she sustained working for respondent. Accordingly, claimant requests the Board to modify the April 1, 2004 Award.

Conversely, respondent contends claimant was terminated in April 2000 for failing to report to work and abandoning her job. Therefore, respondent argues claimant's permanent partial general disability should be limited to her whole body functional impairment rating. Consequently, respondent requests the Board to affirm the April 1, 2004 Award.

The issues before the Board on this appeal are:

1. What is the extent of claimant's permanent partial general disability?

2. Is claimant entitled to receive additional temporary total disability benefits?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Respondent makes candy. Claimant began working for respondent in 1995. Claimant initially worked as a nut inspector but later became a candy maker. While performing that work, claimant injured her hands. Claimant underwent right carpal tunnel surgery and returned to work for respondent without restrictions in July 1998. The parties agree claimant has a preexisting 12 percent whole body functional impairment due to her earlier bilateral upper extremity injuries.

Despite her bilateral upper extremity injuries, claimant returned to her regular job duties as a candy maker. Unfortunately, as she continued to work, claimant experienced symptoms in her hands, left elbow and both shoulders. In approximately December 1999,

claimant requested medical treatment from respondent. When respondent did not authorize claimant to see a physician, claimant sought treatment on her own.

Respondent eventually authorized claimant to see a doctor, who in late January 2000 recommended surgery. Consequently, on February 7, 2000, claimant underwent left elbow surgery. It is claimant's uncontradicted testimony that she was taken off work for three weeks to recover from that surgery but was not paid for the first week. In respondent's submission letter to the Judge, respondent notes it began paying temporary total disability benefits to claimant in February 2000 commencing February 18, 2000.

Following the left elbow surgery, in March 2000 claimant was initially released to return to work for four hours per day and approximately two weeks later was released to work six hours per day. Claimant worked the four-hour shifts for several weeks following the February 2000 left elbow surgery. Respondent, however, terminated claimant when she failed to come to work after the company moved the starting time of her shift from 2:30 a.m. to 6:30 a.m. Claimant last worked for respondent on approximately April 12, 2000.

Claimant did not work anywhere after leaving respondent's employ. Claimant's symptoms, however, did not resolve and on October 25, 2000, Dr. J. Douglas Cusick performed a repeat right carpal tunnel release and on December 5, 2000, the doctor performed a left carpal tunnel release and synovectomy of the palm and wrist.

But claimant's surgeries were not complete. Because of persistent right shoulder and arm complaints and a diagnosis of right thoracic outlet syndrome, on September 17, 2001, Dr. Michael Borkon performed a right rib resection.

The record is not clear when claimant was eventually released to return to work but claimant argues it was February 18, 2002.

On March 20, 2002, at claimant's attorney's request orthopedic surgeon Dr. Sergio Delgado evaluated claimant for purposes of this claim. The doctor noted in his March 20, 2002 report that claimant was neither working nor seeking work as she felt she could not return to any work activities requiring repetitive use of both upper extremities, particularly for pushing, pulling, overhead work, repetitive gripping and pinching. The doctor also noted claimant was unable to stand for prolonged periods due to low back pain.

As a result of his evaluation, Dr. Delgado concluded claimant (1) had residuals of right thoracic outlet syndrome despite the cervical rib resection, (2) had undergone a left ulnar nerve transposition, (3) had undergone a repeat carpal tunnel release on the right and a release on the left, and (4) had low back pain, myofascial in nature, with no history of injury. Moreover, the doctor determined claimant should observe permanent work restrictions, as follows:

> Functionally, she should avoid activities requiring repetitive use of both upper extremities, particularly overhead, avoid lifting repetitively using both upper extremities not to exceed 25# occasionally or 15# repetitively using single extremity, with occasional lifting to 35# using both upper extremities, or 20# using single extremity. She should avoid pushing and pulling not to exceed 50# repetitively, 75# occasionally. She should avoid using vibratory tools and avoid working in cold environments. She should also avoid repetitive gripping and pinching not to exceed continuous such activities over 2 hours without 1 hour of rest.[1]

Dr. Delgado reviewed two lists of the work tasks that claimant performed in the 15-year period before developing the bilateral upper extremity injuries that are the subject of this claim. Considering the task list prepared by vocational expert Monty Longacre, the doctor indicated claimant should not perform 25 of the 40 tasks, or approximately 63 percent. On the other hand, considering the list prepared by vocational expert Dick Santner, the doctor concluded claimant should not perform 10 of the 33 tasks, or approximately 30 percent.

The parties stipulated in writing that both Mr. Longacre's and Mr. Santner's evaluation reports would be part of the evidentiary record without requiring them to testify. Mr. Longacre's June 14, 2002 report indicates he met with claimant in late April 2002 at her attorney's request. Mr. Longacre noted claimant was neither working nor looking for work. Moreover, Mr. Longacre concluded claimant retained the ability to earn $6.50 per hour as a night auditor, surveillance worker, security guard, or perhaps, with some accommodation, work in a bar.[2]

On the other hand, Mr. Santner, who was hired by respondent to evaluate claimant for this claim, indicated in his June 25, 2002 report that he interviewed claimant on June 12, 2002, and that she had contacted some potential employers. Mr. Santner wrote, in part:

> Ms. Moffith was unemployed at the time of my interview with her. She indicated she had applied with State Vocational Rehabilitation approximately a month prior, and had also placed applications with USD 475 as a hall monitor; Wal-Mart doing customer service; Sheriff's Department as a jailer; and, had registered with the Job Service. She acknowledged that her application with the Sheriff's Department as a jailer was probably inappropriate, considering her medical restrictions.[3]

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[1] Delgado Depo., Ex. 5 at 5-6.

[2] See Stipulation with attachments (filed Oct. 16, 2002).

[3] *Id.*

According to Mr. Santner, claimant retains the ability following her bilateral upper extremity injuries to earn $6 to $7, or more, per hour working as a restaurant hostess, at a customer service desk, as an independent living advisor, or a dental office receptionist.

1. What is the extent of claimant's permanent disability?

As indicated above, the parties agree claimant sustained an additional 22 percent whole body functional impairment as a result of the bilateral upper extremity injuries that are the subject of this claim. The parties also agree claimant had a 12 percent whole body functional impairment due to preexisting bilateral upper extremity injuries.

Claimant has sustained simultaneous injuries to two parallel limbs. Consequently, claimant's injuries are not compensated as scheduled injuries under K.S.A. 1999 Supp. 44-510d.[4] Instead, claimant's permanent disability is governed by K.S.A. 1999 Supp. 44-510e, which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **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. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **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.** (Emphasis added.)

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[4] *Pruter v. Larned State Hospital*, 271 Kan. 865, 26 P.3d 666 (2001); *Depew v. NCR Engineering & Manufacturing*, 263 Kan. 15, 947 P.2d 1 (1997); *Murphy v. IBP, Inc.*, 240 Kan. 141, 727 P.2d 468 (1986); *Downes v. IBP, Inc.*, 10 Kan. App. 2d 39, 691 P.2d 42 (1984), *rev. denied* 236 Kan. 875 (1985).

But that statute must be read in light of *Foulk*[5] and *Copeland*.[6] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as embodied in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to work. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the work 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. . . .[7]

The Kansas Court of Appeals in *Watson*[8] held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based on all the evidence, including expert testimony concerning the capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[9]

Claimant argues that she was ultimately released to return to work in approximately February 2002. As indicated above, claimant was not looking for work in March 2002 according to Dr. Delgado's records. Likewise, claimant was not looking for work in April 2002 according to Mr. Longacre's report. And when claimant appeared at her January 2004 regular hearing, she remained unemployed despite her alleged good faith effort to find work. Claimant, who is from Germany, testified at the regular hearing that she had

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

[6] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[7] *Id.* at 320.

[8] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[9] *Id.* at Syl. ¶ 4.

recently applied for United States citizenship because she believed that would improve her chances for employment and that she had performed volunteer work to gain experience.

At the regular hearing, claimant introduced a list of approximately 70 job contacts she made, other than mere telephone calls, and job fairs that she had attended from May 2002 through late January 2004. Many of the named employers, however, were listed multiple times. For example, Food for Less was listed approximately five times, Aafes was listed approximately four times, and the Wal-Mart stores in Junction City and Manhattan were listed for a combined seven times.

Claimant testified at her regular hearing that she was in Germany during December 2002 and January and February 2003 due to her father's death. During those three months claimant suspended her job search. Claimant's efforts to find work only slightly improved in March 2003, however, as she only lists three job contacts for that month.

The Board is not persuaded claimant has made a good faith effort to find appropriate employment following her latest release to return to work in approximately February 2002. The Board concludes claimant has failed to satisfy her burden of proof. Accordingly, the Board must impute a post-injury wage for claimant for purposes of the permanent partial general disability formula contained in K.S.A. 1999 Supp. 44-510e.

Considering the opinions of Mr. Longacre and Mr. Santner, the Board finds claimant retains the ability to earn approximately $6.50 per hour, or $260 per week, despite her work injuries. Comparing a post-injury weekly wage of $260 to claimant's pre-injury average weekly wage of $404 yields a wage loss of approximately 36 percent.

According to Dr. Delgado's testimony, claimant should no longer perform 30 percent of the former work tasks identified by Mr. Santner and 63 percent of those former tasks identified by Mr. Longacre. The Board averages those two percentages and finds claimant has lost the ability to perform approximately 47 percent of her former work tasks.

As required by the permanent partial general disability formula, the Board averages the 36 percent wage loss with the 47 percent task loss and finds claimant has a 42 percent permanent partial general disability. Claimant's award, however, is reduced by the agreed 12 percent preexisting whole body functional impairment as required by K.S.A. 1999 Supp. 44-501(c). Accordingly, claimant is entitled to receive benefits for a 30 percent permanent partial general disability.

The Board is cognizant respondent argues claimant's permanent partial general disability should be limited to claimant's additional 22 percent whole body functional impairment because she was terminated for violating respondent's company rules. The Board, however, disagrees with respondent's analysis.

First, the record does not establish respondent had work available to claimant within her permanent work restrictions that would have paid her 90 percent of her pre-injury wages had she not been terminated. Second, the Board finds claimant did not demonstrate a lack of good faith when she was terminated as she had genuine transportation problems, which prevented her from coming to work at 6:30 a.m. In short, claimant attempted to work with respondent to resolve the transportation problem but respondent would not cooperate. And third, had the evidence established claimant's termination was due to her lack of a good faith effort to retain employment, such finding would have justified imputing the wages that claimant was earning at the time of her termination as her post-injury wage for the permanent partial general disability formula. That part-time wage, however, was less than the $260 per week that the Board imputed, as explained above.

2. Is claimant entitled to additional temporary total disability benefits for the period following her termination through the date that she was released to return to work in approximately February 2002?

There is little evidence regarding claimant's work status following her termination in April 2000 through her ultimate release to return to work following her thoracic outlet surgery. Claimant now argues that she was ultimately released to return to work in February 2002 but at the regular hearing claimant initially represented it was April 2002.

Although the Judge requested the parties to submit a joint letter regarding the payment of temporary total and temporary partial disability benefits,[10] the parties did not comply. Respondent, however, provided that information in its submission letter to the Judge.[11] According to respondent, it paid claimant 39 weeks and two days of temporary total disability benefits totaling $10,188.52 and temporary partial disability benefits totaling $10,605.76.

The doctors who treated claimant following her termination did not testify and, therefore, their testimonies are not available to the Board for consideration. Claimant, however, testified she was paid temporary total disability benefits for those periods when she was taken completely off work.

> Q. (Mr. Cooper) Now, since you were terminated by Russell Stovers you've had the carpel *[sic]* tunnel and the shoulder surgeries? During --
>
> A. (Claimant) Correct.

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[10] R.H. Trans. at 12.

[11] Respondent's Brief at 11-12 (filed Mar. 2, 2004).

Q. -- the large part of that time did a doctor have you off work completely?

A. Yes, for almost -- I believe it's close to two years.

Q. Okay. And for the time that you were off completely did Russell Stovers pay you temporary total disability benefits, the weekly checks, you got?

A. Yes, I believe so.[12]

The Board concludes claimant has failed to satisfy her burden of proof that respondent failed to pay her the appropriate temporary total disability benefits for that period following her termination from respondent's employment. Conversely, claimant's testimony is uncontradicted that respondent failed to pay her an additional week of temporary total disability benefits in February 2000 when she was taken off work for left elbow surgery. Consequently, the Board concludes claimant is entitled to receive an additional week of temporary total disability benefits.

AWARD

WHEREFORE, the Board modifies the April 1, 2004 Award entered by Judge Benedict and increases claimant's permanent partial general disability award from 22 percent to 30 percent. The Board also awards claimant one additional week of temporary total disability benefits and utilizes the payment information set forth in respondent's submission letter in computing the award.

Bettina Moffith is granted compensation from Russell Stover Candies and its insurance carrier for a December 8, 1999 accident and resulting disability. Based upon an average weekly wage of $404, Ms. Moffith is entitled to receive 79.67 weeks of temporary total disability benefits at $269.35 per week, or $21,459.11, plus 105.10 weeks of permanent partial general disability benefits at $269.35 per week, or $28,308.69, for a 30 percent permanent partial general disability, making a total award of $49,767.80, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

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[12] R.H. Trans. at 32-33.

Dated this ____ day of November 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Brenden W. Webb, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director