

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

TERESA BYRD)	
Claimant)	
VS.)	
)	Docket No. 259,838
CAPITOL PLAZA)	
Respondent)	
AND)	
)	
UNITED STATES FIRE INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appeals the December 12, 2002 Award of Administrative Law Judge Bryce D. Benedict. Claimant alleges she is entitled to both a functional impairment and a permanent partial general disability resulting from the injuries suffered with respondent on September 17, 2000. Respondent contends that claimant's injury on that date was temporary at best, with no functional impairment or permanent partial disability resulting. Respondent requests that the Award of the Administrative Law Judge granting claimant only temporary total disability and medical treatment be affirmed. The Workers Compensation Board (Board) heard oral argument on June 3, 2003. Gary M. Peterson appeared as Appeals Board Member Pro Tem for the purposes of this appeal.¹

APPEARANCES

Claimant appeared by her attorney, Roger D. Fincher of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Christopher J. McCurdy of Overland Park, Kansas.

¹ Board Member Gary Peterson retired from the Board in March 2003. As of the date of oral argument, no replacement had been named.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

What is the nature and extent of claimant's injury and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the Administrative Law Judge should be modified to award claimant a 2.5 percent permanent partial impairment to the body as a whole based upon the opinion of Vito J. Carabetta, M.D.

Claimant was injured in a slip and fall on September 17, 2000. After a short course of treatment, she was returned to work with respondent with little or no restriction. Respondent accommodated claimant, allowing her at her request to use a stool to sit on, even though the stool was never recommended nor requested by any of her health care providers. Claimant last worked for respondent on February 2, 2001, terminating her employment on February 3, 2001, alleging that the work had become too painful. Claimant was not restricted from performing her job duties at the time of her voluntary termination.

The medical records conflict regarding what, if any, impairment claimant suffered from the injuries.

Claimant came under the care and treatment of Dick Geis, M.D., from Midwest Occupational Health Services. Dr. Geis treated claimant conservatively, ultimately returning her to regular duty on January 5, 2001, with no permanent impairment and no restrictions.

Claimant was referred to physical medicine and rehabilitation specialist Lynn A. Curtis, M.D., at her attorney's request. At the time of the January 30, 2001 examination, Dr. Curtis was unable to assess claimant a functional impairment, opining that she had not reached maximum medical improvement. He temporarily restricted her from using her left arm above her head until her diagnostic studies and rehabilitation were complete. At his deposition, Dr. Curtis rated claimant at a Category II, 5 percent impairment to the lumbar spine, and a Category II, 5 percent impairment to the cervical spine, both pursuant to the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Dr. Curtis based his cervical impairment on an abnormal range of motion which he found at the time of his examination. However, as noted above, in Dr. Curtis's opinion, claimant was not at maximum medical improvement at the time of his examination and any permanent range of motion impairment would be speculation on Dr. Curtis's part.

Claimant was examined on July 9, 2001, at the request of the Administrative Law Judge by physical medicine and rehabilitation specialist Vito J. Carabetta, M.D. This examination resulted in an opinion by Dr. Carabetta that claimant had no lumbar impairment, but there was some concern on his part regarding the cervical complaints expressed by claimant. Dr. Carabetta found claimant's impairment to be somewhere between the AMA *Guides* DRE Category I, which would be a zero percent impairment, and DRE Category II, which would be a 5 percent impairment. Dr. Carabetta split the difference and assigned claimant a 2.5 percent impairment to the body as a whole for her cervical injuries. The Board finds the opinion of Dr. Carabetta to be the most credible in this instance and assesses claimant a 2.5 percent impairment to the body as a whole for the injuries to her cervical spine.

Claimant further alleges that she is entitled to a work disability under K.S.A. 44-510e. K.S.A. 44-510e defines permanent partial disability as:

. . . 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. . . . 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.²

However, this statute must be read in the light of *Foulk*³ and *Copeland*.⁴ In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of

² K.S.A. 44-510e(a).

³ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

⁴ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the worker's ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

If a finding is made that a good faith effort has not been made, the factfinder 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. . . .⁵

. . . a claimant is barred from wage loss compensation if he or she is capable of earning 90% or more of the employee's preinjury wage level within restrictions but fails to do so.⁶

In this instance, claimant was returned to work at an accommodated job, working within her restrictions and earning a comparable wage. Her decision to terminate her employment was hers alone and not the result of any restrictions placed upon her by the health care providers. The conflict between claimant and respondent regarding the stool apparently played some part in claimant's determination, but is not related to her injury as she was not restricted or required to use the stool by any of her health care providers. Claimant's medical restrictions did not limit her ability to perform her regular job duties and her decision to terminate was not made in good faith. Therefore, she is not entitled to a work disability based upon *Foulk, Copeland* and *Oliver*. The Board, therefore, finds claimant is limited to her functional impairment of 2.5 percent to the body as a whole based upon the opinion of Dr. Carabetta.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bryce D. Benedict dated December 12, 2002, should be, and is hereby, modified to award claimant a 2.5 percent functional impairment to the body as a whole based upon an average weekly wage of \$330.80 and a date of accident of September 17, 2000.

Claimant is entitled to 1.14 weeks temporary total disability compensation at the rate of \$220.54 per week totaling \$251.42, followed thereafter by 10.38 weeks permanent partial disability compensation at the rate of \$220.54 per week totaling \$2,289.21, for a

⁵ *Copeland* at 320.

⁶ *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, rev. denied 267 Kan. 886 (1999).

total award of \$2,540.63, all of which is due and owing as of the date of this award minus any amounts previously paid.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not conflict with the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of October 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Roger D. Fincher, Attorney for Claimant
- Christopher J. McCurdy, Attorney for Respondent
- Bryce D. Benedict, Administrative Law Judge
- Paula S. Greathouse, Director