

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

SARA PLISEK)	
Claimant)	
VS.)	
)	Docket No. 264,831
DANA CORPORATION)	
Respondent)	
AND)	
)	
HARTFORD ACCIDENT & INDEMNITY)	
Insurance Carrier)	

ORDER

Respondent appeals the May 23, 2003 Award of Administrative Law Judge Jon L. Frobish. Claimant alleges a series of accidental injuries through November 9, 2000, her last day worked with respondent, with the injuries involving her right shoulder and neck. The Administrative Law Judge awarded claimant at 62.5 percent permanent partial disability to the body finding claimant had injured both her right shoulder and neck. Respondent contends that claimant's injury is limited to a scheduled injury to the right shoulder. The Workers Compensation Board (Board) heard oral argument on November 21, 2003.

APPEARANCES

Claimant appeared by her attorney, Joseph Seiwert of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Garry W. Lassman of Pittsburg, Kansas.

RECORD AND STIPULATIONS

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge. At oral argument, however, the parties acknowledged that it was stipulated at regular hearing that claimant was paid 19 weeks of temporary total disability compensation totaling \$5,142.73. The Award showed claimant had been paid 22.14 weeks of temporary total disability compensation at the weekly rate of \$270.67. The award of the Board will be modified to show the correct

number of weeks of temporary total disability compensation. No additional weeks are claimed. However, claimant does allege an underpayment of temporary total disability compensation based upon the appropriate average weekly wage.

The parties have agreed that the average weekly wage of \$447.11, utilized by the Administrative Law Judge in the Award, is correct for the purposes of this litigation. This results in a temporary total disability compensation rate of \$298.09, which is higher than the rate paid at \$270.67. There is, therefore, an underpayment of \$27.42 per week for 19 weeks for a total underpayment to claimant of \$520.98. It is noted in the Award that the Administrative Law Judge used the appropriate weekly rate for temporary total disability compensation. However, the 22.14 weeks listed in the Award will be modified to reflect the actual stipulation of 19 weeks temporary total disability compensation that claimant is due.

Additionally, the parties acknowledge that the 25 percent loss of tasks opinion of Pedro A. Murati, M.D., is appropriate for the purposes of this award.

ISSUES

What is the nature and extent of claimant's injury and disability? More particularly, did claimant suffer a scheduled injury to her right shoulder or did her injuries include the cervical spine? Additionally, if claimant did suffer a whole body disability, did claimant put forth a good faith effort to obtain employment after leaving respondent's employment on November 9, 2000?

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 functional impairment of 15 percent to the body as a whole including both the neck and right shoulder and a permanent partial general disability of 35.5 percent.

Claimant began working for respondent in September of 1989 as a line worker. Her job duties with respondent involved substantial upper extremity activities including repetitive pushing and pulling. Claimant began noticing upper extremity pain in her shoulders and neck area beginning in February of 2000. Claimant reported her problems to her foreman and was sent to the company nurse. She was referred for an MRI and ultimately referred to Laurie Behm, M.D., a physical medicine specialist. Claimant was treated by Dr. Behm over a several-month period. Dr. Behm did not testify in this matter, but her medical records were stipulated into evidence by the parties.

During treatment, claimant underwent EMGs and an MRI. The MRI was basically negative, although there was some indication of disc disease at C5-6. The EMGs displayed a possible nerve irritation at C7. Additionally, claimant had decreased sensation in the right upper extremity ulnar distribution with a positive Tinel's. She also had a

reduced grip strength on the right side. Dr. Behm opined that claimant had a 7 percent whole body functional impairment as a result of the injuries to her shoulder and neck. Dr. Behm's report of November 6, 2000, indicates the rating is pursuant to the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, but the utilized version of the Guides is not noted in Dr. Behm's records.

Dr. Behm placed limitations on claimant of no lifting greater than 5 pounds frequently and 10 pounds occasionally, with no repetitive lifting greater than once per minute. Respondent advised claimant on November 9, 2000, that they were unable to accommodate the restrictions placed upon her by Dr. Behm.

Claimant applied for and received 26 weeks of unemployment through approximately May 10, 2001. For the period May 11, 2001, through July 11, 2001, there is no indication as to claimant's job search activities. On July 12, 2001, claimant began receiving temporary total disability compensation and was paid 19 weeks temporary total disability through November 22, 2001. This covered the period of time claimant was being treated by Paul S. Stein, M.D., and John Gorecki, M.D. While surgery was discussed during this time, no surgery was performed.

Claimant was referred to Dr. Paul Stein for an examination on June 12, 2001, at the Administrative Law Judge's request. Dr. Stein initially diagnosed overuse syndrome to the right shoulder girdle, predominantly in the muscles around the scapula. He also indicated, however, that claimant may have an impingement or entrapment of the suprascapular nerve. He testified that the suprascapular nerve comes out of the neck and goes down behind the muscles through the suprascapular notch at the top of the shoulder blade and into the actual shoulder blade area. He recommended injections into the suprascapular notch. Surgery was also discussed, but not performed. Dr. Stein testified that in his 28 years of medical practice, he had only performed one such surgery. The MRI scan, done earlier with Dr. Behm, was read as indicating a diffuse posterior bulge at C5-C6. Also, Dr. Behm had earlier diagnosed degenerative disc disease, which Dr. Stein testified would most likely have been accurate based upon Dr. Behm's observations at the time of the examination.

Dr. Stein rated claimant at 10 percent to the right upper extremity for the condition in her shoulder and shoulder musculature. He testified that claimant's condition was primarily located in the shoulder musculature, although he did acknowledge claimant had nerve entrapment and that the nerve itself was not part of the shoulder musculature.

Dr. Stein last saw claimant on November 12, 2001, at which time he opined that she had reached maximum medical improvement. As noted above, claimant's temporary total disability compensation ceased on November 22, 2001.

Claimant was referred to Pedro A. Murati, M.D., at her attorney's request, for an examination on April 25, 2001, and a second examination on June 5, 2002. Dr. Murati

found decreased sensation along the C5 dermatome, with neck pain secondary to right C5 radiculopathy. He limited claimant from climbing ladders, from crawling and from working above shoulder level. He also restricted her lift, push, pull and carry weights to 20 pounds, with those weights being limited to no more than 18 inches from the body. Claimant was to avoid awkward positions of the neck. Claimant was allowed to occasionally lift, push, pull and carry up to 20 pounds and frequently lift, push, pull and carry up to 10 pounds. Dr. Murati assessed claimant a 15 percent impairment to the body as a whole based upon the *AMA Guides* (4th ed.) for both the neck and right shoulder conditions. When he first examined claimant, she had complaints in both her shoulders. However, when he saw her in June of 2002, claimant's complaints were limited to the neck and right shoulder. The left shoulder complaints had resolved.

At the regular hearing, claimant was questioned regarding her job search activities after November 22, 2001. Between November 23, 2001, and October 23, 2002 (the date of regular hearing), claimant was only able to identify eight companies where she applied for employment. It is noted that all eight contacts were done within approximately two months immediately prior to the regular hearing. There is no information in the record to indicate what claimant did by way of job search after November 22, 2001, through roughly the end of August 2002.

In workers' compensation litigation, it is claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.¹

K.S.A. 44-510e defines "functional impairment" as:

. . . 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.²

The Board finds based upon this record, that claimant suffered a 15 percent impairment to the body as a whole, involving both her right shoulder and neck. While Dr. Stein limits claimant's impairment to the right shoulder, he also acknowledged that claimant's underlying problem involved nerve entrapment and the nerve involved is not part of the shoulder musculature. He also agreed during his testimony that there was possible diffuse posterior bulging at C5-C6 and that the EMGs performed on claimant by Dr. Behm indicated positive cervical root irritation at the 7th level. Dr. Murati also found claimant to have right C5 radiculopathy, basing his 15 percent whole person impairment on both the cervical and shoulder limitations. The Board finds the opinion of Dr. Murati that claimant

¹ K.S.A. 44-501 and K.S.A. 44-508(g).

² K.S.A. 44-510e(a).

suffered an injury both to her right shoulder and cervical spine is the most credible in the record and adopts Dr. Murati's 15 percent whole person impairment for the purposes of this award.

K.S.A. 44-510e defines "permanent partial general 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.³

As noted above, the parties stipulated that the 25 percent task loss opinion of Dr. Murati was appropriate for the purposes of this award. The Board must, therefore, look at claimant's wages after the accident. Additionally, K.S.A. 44-510e must be read in the light of *Copeland*.⁴ In *Copeland*, the Kansas Court of Appeals held, for the 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 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

The Kansas Court of Appeals, in *Watson*,⁶ reiterated that the absence of a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Rather, in such circumstances, the imputed post-injury wage for permanent partial general disability should be based upon all the evidence, including expert testimony concerning the worker's ability to earn wages.

Claimant's job search activities after leaving respondent on November 9, 2000, are varied. She received unemployment for approximately 26 weeks, through approximately May 10, 2001. Claimant testified she did what was necessary to obtain her unemployment

³ K.S.A. 44-510e(a).

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

⁵ *Id.* at 320.

⁶ *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

benefits, although there is no indication in the record that claimant put forth any additional effort. For the period from May 11, 2001, through July 11, 2001, there is no indication as to claimant's job search activities. She was then paid 19 weeks of temporary total disability compensation through November 22, 2001. Thereafter, claimant contacted approximately eight companies over an 11-month period leading up to the regular hearing. Most of these contacts occurred shortly before the October 23, 2002 regular hearing. Based upon the evidence in the record, the Board finds that claimant's job search activities after leaving respondent did not constitute a good faith effort to obtain employment. Therefore, pursuant to *Copeland*, a wage will be imputed.

James Molski, vocational expert, estimated claimant capable of earning between \$5.50 and \$6.50 per hour in the open labor market. Using a \$6-per-hour wage and based upon a 40-hour week, the Board finds claimant has the ability to earn \$240 per week, which results in a wage loss of 46 percent when compared to the agreed \$447.11 average weekly wage. K.S.A. 44-510e obligates that the wage and task losses be averaged. Averaging the 46 percent wage loss and the 25 percent task loss, the Board finds claimant has suffered a permanent partial general disability of 35.5 percent to the body as a whole for the injuries suffered through November 9, 2000. It is noted that the period of temporary total disability compensation from July 12, 2001, through November 22, 2001 (a total of 19 weeks) is sandwiched between periods of permanent partial general disability.

K.S.A. 44-510e states that either functional impairment or permanent partial general disability will be paid, whichever is greater. The Board finds that in addition to the temporary total disability compensation, claimant is entitled to a 35.5 percent permanent partial general disability for the work disability suffered.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated May 23, 2003, should be, and is hereby, modified, and claimant is awarded a 35.5 percent permanent partial general disability against respondent and its insurance carrier for the injuries suffered through November 9, 2000.

Claimant is entitled to 19 weeks of temporary total disability compensation to be paid at the rate of \$298.09 per week totaling \$5,663.71, and an additional 145.91 weeks of permanent partial general disability compensation at the rate of \$298.09 per week totaling \$43,494.31, for a total award of \$49,158.02.

As of December 7, 2003, claimant is entitled to 19 weeks of temporary total disability compensation at the rate of \$298.09 per week totaling \$5,663.71, and 141.43 weeks of permanent partial general disability compensation at the rate of \$298.09 per week totaling

\$42,158.87, for a total due and owing of \$47,822.58. Thereafter, claimant is entitled to 4.48 weeks of permanent partial general disability compensation at the rate of \$298.09 per week totaling \$1,335.44, until fully paid or until further order of the Director.

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

IT IS SO ORDERED.

Dated this ____ day of December 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Joseph Seiwert, Attorney for Claimant
- Garry W. Lassman, Attorney for Respondent
- Jon L. Frobish, Administrative Law Judge
- Anne Hought, Acting Workers Compensation Director