

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

NATASHA MEZA,

Claimant,

vs.

MENARDS, INC.,

Employer,

and

PRAETORIAN INSURANCE CO.,

Insurance Carrier,
Defendants.



File No. 5057581

ARBITRATION

DECISION

Head Notes: 1802, 1803

STATEMENT OF THE CASE

Claimant, Natasha Meza, filed a petition in arbitration seeking workers' compensation benefits from Menards, Inc. (Menards), and Praetorian Insurance Company, insurer, both as defendants. This case was heard in Council Bluffs, Iowa on November 8, 2017 with a final submission date of December 4, 2017.

The record in this case consists of Joint Exhibits 1 through 8, Claimant's Exhibits A through H, Defendants' Exhibits AA through II, and the testimony of claimant, Bob Richmond, and Stacy Hanson.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

ISSUES

1. The extent of claimant's entitlement to permanent partial disability benefits.
2. The extent of claimant's entitlement to temporary benefits.

The hearing report indicated medical mileage was an issue in dispute. Claimant indicated in her post-hearing brief the issue of medical mileage was resolved after

hearing. (Claimant's post-hearing brief, page 8) As a result, medical mileage is not an issue in dispute in this case.

FINDINGS OF FACT

Claimant was 31 years old at the time of the hearing. Claimant graduated from high school. Claimant received an associate's degree as a medical assistant from Kaplan University.

Claimant worked as a bookkeeper for her parents' business. She has worked as a bartender. She has worked as a secretary and kept books for a propane company. Claimant worked for a retail store. She also worked as a warehouse picker for Oriental Trading.

Claimant began employment with Menards in November of 2014. Claimant worked at a Menards distribution center. Claimant's job was to load items on a "tug" at the distribution center and put the items on pallets for distribution to Menards stores. Claimant testified her job was physical and required her to lift up to 50 pounds.

On May 26, 2015 claimant and some coworkers were attempting to untangle heavy cages. A cage was accidentally dropped and bounced into claimant, striking her left forearm.

On May 26, 2015 claimant was evaluated by Shelia Lawton-Peters, ARNP for an injury to the left forearm. Claimant was given an Ace wrap and told to use ice and ibuprofen. (Joint Exhibit 2, pp. 3-4)

Claimant returned to Nurse Practitioner Lawton-Peters on May 29, 2015 with complaints of worsening pain and pain in the hands and fingers. Claimant was recommended to have an appointment with an orthopedist. (Jt. Ex. 2, pp. 5-6)

Claimant was evaluated by Tyrus Soares, M.D. with complaints of left shoulder pain. Claimant had decreased hand grip. Claimant was assessed as having complex regional pain syndrome (CRPS). A ganglion nerve block was recommended. (Jt. Ex. 3, pp. 7-9) On November 6, 2015 claimant underwent a ganglion block. (Jt. Ex. 3, p. 10)

Claimant returned to Dr. Soares on November 18, 2015 noting improvement with pain following the block. Claimant was again assessed as having CRPS. (Jt. Ex. 3, pp. 11-13)

Claimant returned in followup with Dr. Soares twice in January of 2016. In a January 28, 2016 exam, claimant noted increased pain in the forearm and elbow. A trial spinal cord stimulator (SCS) was discussed and chosen as a treatment option. (Jt. Ex. 3, pp. 14-19)

On March 1, 2016 claimant had a trial SCS placed. The procedure was performed by Dr. Soares. (Jt. Ex. 3, p. 20)

In a followup exam of April 13, 2016 claimant noted greater than 60 percent improvement in pain. Claimant noted improvement in her symptoms. A more permanent SCS transplant was discussed. (Jt. Ex. 3, pp. 21-23) Records indicate the SCS implant was delayed due to the insurance company requesting a second opinion. (Jt. Ex. 3, pp. 23-24)

On May 24, 2016 claimant was evaluated by Nicholas Bruggeman, M.D. for an independent medical evaluation (IME). Claimant was found to have CRPS for the left upper extremity. Dr. Bruggeman recommended continuing the course of therapy for pain. Claimant was found to not have yet reached maximum medical improvement (MMI). (Jt. Ex. 4, pp. 43-49)

On June 22, 2016 claimant had surgery consisting of implantation of a dorsal column SCS. Surgery was performed by John Hain, M.D. (Jt. Ex. 5, pp. 50-51)

Claimant testified for the first six to eight weeks the SCS helped with her symptoms. She said after eight weeks, the SCS was not controlling pain and began to shock her.

On July 12, 2016 claimant was seen by Dr. Hain. Claimant complained of shocking in the bilateral groin area. Claimant was told to monitor her symptoms. (Jt. Ex. 5, p. 52)

On August 10, 2016 claimant underwent a functional capacity evaluation (FCE) performed by Shannon Stigall, PT. Claimant was found to have given maximal effort. The FCE limited claimant to a ten-pound maximum lift on the left hand. (Jt. Ex. 6)

In an August 12, 2016 email the manager and assistant manager indicated claimant indicated problems with her left arm pain. An assistant manager questioned claimant wanting to leave work due to arm pain. (Ex. HH, p. 57)

In an August 16, 2016 note, Dr. Hain noted the SCS controlled claimant's pain when the arm was at rest. Claimant indicated when she moved her arm she had left arm pain. (Jt. Ex. 5, p. 54)

On August 26, 2016, Claimant was evaluated by Nicole Liebentritt, M.D. for left arm pain. Claimant had increasing left arm pain even with the SCS use. Pain medication used with the SCS was recommended. (Jt. Ex. 7, pp. 70-72)

Claimant testified at hearing that on October 14, 2016 she stumbled and bumped her left arm at work. She said this aggravated her symptoms and she went to the emergency room. Claimant was seen at Alegent Creighton Clinic on October 14, 2016 after hitting her left arm at work. Claimant's arm was in a sling. Claimant was given a shot of morphine for pain. Claimant was told to follow up with occupational health on Monday and to stay off work until released by occupational health. (Jt. Ex. 8)

Claimant testified she was scheduled for work the next day, October 15, 2016. She said she overslept due to the morphine injection. She said she went to Menards and gave the doctor's slip to her employer showing that she was off work for October 15, 2016 and October 17, 2016. Claimant testified that when she went to Menards late morning October 15, 2016, Menards told her they were no longer accepting her medical excuses. Claimant testified she was given disciplinary points for absences on Saturday, October 15, 2016 and disciplinary points for Monday, October 17, 2016. She said when she returned to work on Tuesday, October 18, 2016, she was terminated.

Claimant testified all the disciplinary points she accrued were related to her work injury.

Bob Richmond testified he was a general manager that worked at the Menards location where claimant was employed. He testified he participated in claimant's termination. (Tr. p. 118) Mr. Richmond testified that Exhibit G is a summary of disciplinary points claimant received from Menards. He testified claimant did receive five points for a discipline on Saturday, October 15, 2016. He said she received another five points for discipline on Monday, October 17, 2016. He said claimant was terminated on Tuesday, October 18, 2016 for having ten points in a 90-day period. (Tr. pp. 126-128; Ex. G, p. 181; Ex. H)

The fact finding worksheet for misconduct from Menards indicates claimant was terminated for acquiring ten disciplinary points within a 90-day period. (Ex. H; Tr. pp. 126-128) Claimant's statement on the discharge form indicates she was told by Menards that Menards would no longer honor absences even with a doctor's excuse. (Ex. H)

Mr. Richmond said he did not believe this was true.

Claimant testified she filed for unemployment benefits. She said those benefits were contested by Menards. Claimant said that following an administrative hearing, she was found to be qualified for unemployment insurance benefits.

Exhibit I is a copy of the administrative law decision concerning claimant's unemployment insurance benefits. The decision indicates Menards contested claimant's claim of unemployment insurance benefits. Menards claimed that claimant was terminated due to misconduct. The decision found claimant was not discharged for an act of misconduct and that she did qualify for unemployment insurance benefits. (Ex. I)

In December of 2016 claimant was evaluated by Dr. Soares. Claimant indicated she had been released from work and as a result her pain in her left upper extremity had improved. Claimant indicated the SCS was helping her with pain. (Jt. Ex. 3, pp. 31-34)

In an April 7, 2017 letter Dr. Soares assessed claimant as having CRPS caused by her May 26, 2015 work injury. He found claimant was at MMI as of February 8, 2017. He recommended claimant continue to have chronic pain management. He noted the SCS would require revision/replacement every five to seven years. (Jt. Ex. 3, pp. 37-38)

In a May 11, 2017 report Dean Wampler, M.D. gave his opinions of claimant's condition following at IME. Dr. Wampler is a little unclear if he opines claimant has CRPS. He does note in a part of the IME report that claimant's "... diagnosis of complex regional pain syndrome results in pain that limits activity." (Ex. B, p. 6) Based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition he found claimant had a 61 percent permanent impairment to the left upper extremity. (Ex. B)

According to the Guides at Table 16-3, a 61 percent permanent impairment to the upper extremity converts to a 37 percent permanent impairment to the body as a whole.

Dr. Wampler gave claimant permanent restrictions based upon the FCE.

In a September 20, 2017 report Sunil Bansal, M.D. gave his opinions of claimant's condition following an IME. He found claimant had CRPS on the left upper extremity caused by her work injury of May 26, 2015. He opined claimant had a 29 percent permanent impairment to the body as a whole. He recommended claimant's permanent restrictions based upon the August 10, 2016 FCE. In addition, he limited claimant to lifting up to five pounds occasionally. (Ex. C)

In a September 20, 2017 report Tom Karrow, M.Ed., CRC, gave his opinions of claimant's vocational opportunities. He identified 14 jobs he believed claimant could perform within her physical capabilities. He opined claimant had an approximately 22 percent wage loss. (Ex. CC, pp. 16-22)

On September 26, 2017 claimant returned in followup with Dr. Hain. Claimant had severe pain over the battery site of the implant. Surgery to move the battery to another area was discussed and chosen as a treatment option. (Jt. Ex. 5, pp. 55-57)

In an October 4, 2017 addendum, Mr. Karrow identified eight more jobs he believed claimant could work within her restrictions. (Ex. CC, p. 23)

On October 19, 2017 claimant underwent surgery to move the SCS battery. Surgery was performed by Dr. Hain. (Jt. Ex. 5, pp. 58-59)

Claimant testified at hearing that her pain had improved with the moving of the SCS battery. She said she is also on stronger pain medication.

Claimant testified that working for Menards aggravated the pain in her left upper extremity. She testified she has looked for work since leaving Menards. Claimant has applied for clerical jobs, part-time jobs at convenience stores, and security jobs. She

said she has made applications, but has received no interviews. Claimant testified she continues to look for work.

Claimant said her left hand feels frozen. She says three fingers on her left hand are numb. Claimant says she has swelling and discoloration in the left arm. Claimant said her symptoms are aggravated with activity involving the left arm. Claimant testified she is limited in her activities of daily living given limitations in her left hand and arm. These limitations include, but are not limited to, difficulty with dressing, washing her hair and putting on shoes.

Claimant has swelling and discoloration of the left hand, as shown by photos in Exhibits E and F. Claimant said these photos were taken in August of 2017 and were taken after claimant had washed dishes.

Claimant testified she could not return to work at any of her prior jobs given her limitations with the left arm. She said she could not consistently use both hands. She said she would have difficulty using a keyboard or a cash register over an eight-hour day given difficulties with her left hand.

Stacy Hanson testified she is a department manager for Menards. She said she was claimant's supervisor as of the date of injury. She said prior to the injury, claimant had no problems with her employment at Menards. She said it was only after the injury that claimant had problems with her employment at Menards.

CONCLUSIONS OF LAW

The first issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Claimant has been diagnosed as having CRPS to the left upper extremity. An injury to a scheduled member that involves a sympathetic system, such as CRPS, is assessed as an industrial disability, Collins v. Department of Human Services, 529 N.W.2d 627 (Iowa App. 1995).

Defendants contend that the court of appeals decision in Architectural Wall Systems v. Towers, No. 13-1653, filed July 16, 2014 (Iowa Ct. App.), unpublished, 854 N.W.2d 74 (Table), suggests claimant's CRPS is not to be treated as a body as a whole injury and not to be assessed as an industrial disability. (Defendants' post-hearing brief, p. 7)

This is not correct for several reasons. First, Towers dealt with the issue of a vascular injury. This case deals with an injury to the sympathetic nerve system. In Towers, the court of appeals upheld the agency's ruling that a vascular injury was an injury to the body as a whole. Finally, dicta in Towers suggest that the implantation of a permanent stimulator device, as is the case of claimant, alone, is sufficient to bring a scheduled member injury into the body as a whole. ("Permanent placement of the filter is sufficient evidence of this, as is the permanent restrictions resulting from the filter." Towers, slip op at page 4).

Based on the decisions in Collins and Towers, and other court and agency precedent, claimant's injury is to be assessed as an industrial disability.

Claimant was 31 years old at the time of hearing. Claimant graduated from high school. She has an associate's degree as a medical assistant from Kaplan University. She has worked as a bookkeeper. She has worked as a bartender. She has worked as a secretary. She has also worked in a retail store.

Two experts have opined regarding claimant's permanent impairment. Dr. Bansal saw claimant once for an IME. Dr. Bansal found claimant had a 29 percent permanent impairment to the body as a whole. (Ex. C)

Dr. Wampler saw claimant once for an IME. Dr. Wampler was retained by defendants. Dr. Wampler opined that claimant had a 61 percent permanent impairment to the upper extremity. (Ex. B, p. 6) As noted, a 61 percent permanent impairment to the upper extremity converts to a 37 percent permanent impairment to the body as a whole. (Guides, p. 437, Table 16-3)

I was able to follow and understand Dr. Bansal's analysis of how he arrived at permanent impairment for claimant. As noted, although Dr. Wampler does refer to claimant's diagnosis of CRPS, his report is a little ambiguous regarding his diagnosis. Based upon this, it is found Dr. Bansal's opinion regarding permanent impairment is

more convincing. Claimant has a 29 percent permanent impairment to the body as a whole.

Claimant is restricted to lifting up to 10 pounds on the left upper extremity.

Mr. Karrow opines claimant has a 22 percent wage loss. (Ex. CC) Mr. Karrow identified a number of jobs available that he believed claimant could perform.

However, some of the jobs identified by Mr. Karrow involve keyboarding or operating a cash register. (Ex. CC, pp. 21, 23) Claimant's un rebutted testimony is that she is limited in using a keyboard or a cash register, as she can only operate those items with her right hand. (Tr. pp. 113-115)

Mr. Karrow's opinion regarding potential jobs claimant could perform is not entirely accurate or convincing. However, I find the report has value, as it does detail the difficulties claimant will have in finding and retaining employment.

Claimant credibly testified that since leaving Menards she has applied for jobs but has not been successful in finding employment. The record indicates that while claimant is limited in using her left upper extremity, she does have varied work experience.

When all relevant factors are considered, it is found claimant has a 50 percent loss of earning capacity or industrial disability.

The final issue to be determined is the extent of claimant's entitlement to healing period benefits.

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

Claimant seeks healing period benefits from October 15, 2016 through February 7, 2017. Defendants contend claimant is not due healing period benefits for this period. Defendants allege claimant's claim for healing period benefits is suspended under Iowa Code section 85.33(3). Defendants contend that as claimant was allegedly terminated for misconduct, she is not entitled to healing period benefits from October 15, 2016

through February 7, 2017. Prior agency arbitration decisions have held that misconduct resulting in termination is essentially a refusal of suitable work under Iowa Code section 85.33(3). Linden v. Dubuque Racing Association, File No. 5012780, et. al. (Arb. January 27, 2006)

Claimant was terminated from Menards for having ten disciplinary points in a 90-day period. The record suggests that most, if not all, of the disciplinary points were the result of absences that were excused by physicians for a work-related injury. The record also suggests Menards was not accepting doctors' excuses for claimant's absences from work. (Jt. Ex. 8; Ex. G; Ex. H; Tr. pp. 47-50, 126-128)

It is true there are a few agency arbitration decisions indicating that misconduct resulting in termination qualifies as a refusal of suitable work under Iowa Code section 85.33(3). However, in this case it was found, in an administrative law decision regarding claimant's unemployment insurance benefits, that claimant's termination was not a result of misconduct. (Ex. I)

Claimant's termination was not due to misconduct. Claimant did not refuse employment. Claimant was not offered suitable work. Claimant was terminated for absenteeism related to a work-related injury. Claimant's last day of work at Menards was October 14, 2016. She was found to be at MMI as of February 7, 2017. Given this record, claimant is due healing period benefits from October 15, 2016 through February 7, 2017.

ORDER

Therefore it is ordered:

That defendants shall pay claimant healing period benefits from October 15, 2016 through February 7, 2017 at the rate of three hundred forty-nine and 85/100 dollars (\$349.85) per week.

That defendants shall pay claimant two hundred fifty (250) weeks of permanent partial disability benefits at the rate of three hundred forty-nine and 85/100 dollars (\$349.85) per week commencing on February 8, 2017.

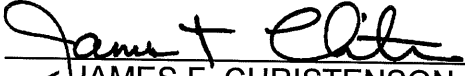
That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits as ordered above and as set forth in Iowa Code section 85.30.

That defendants shall pay costs.

That defendants shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

Signed and filed this 30th day of January, 2018.


JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.