BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROBERTA MARRS, Claimant, vs. REGIONAL CARE HOSPITAL PARTNERS, INC., Employer, and AMERICAN ZURICH INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5052161 A P P E A L D E C I S I O N Head Notes: 1402.40; 1803; 1804; 2501; 2602; 2907; 4100

Claimant Roberta Marrs appeals from a review-reopening decision filed on June 11, 2021. Defendants Regional Care Hospital Partners, Inc., employer, and its insurer, American Zurich Insurance Company, respond to the appeal. The case was heard on November 18, 2020, and it was considered fully submitted in front of the deputy workers' compensation commissioner on December 18, 2020.

In the review-reopening decision, the deputy commissioner found claimant failed to prove she is permanently and totally disabled as a result of the stipulated July 28, 2014, work injury under either the traditional industrial disability analysis or under the odd-lot doctrine. Instead, the deputy commissioner found claimant sustained 80 percent industrial disability as a result of the work injury. The deputy commissioner found claimant's permanent partial disability benefits should commence on February 28, 2018.

Claimant asserts on appeal that the deputy commissioner erred in finding claimant is not permanently and totally disabled.

Defendants assert on appeal that the arbitration decision should be affirmed in its entirety.

Those portions of the proposed arbitration decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 86.24 and 17A.15, the

review-reopening decision filed on June 11, 2021, is modified to reflect my finding that claimant is permanently and totally disabled.

I adopt the deputy commissioner's findings of fact from pages 2 through 8 of the review-reopening decision as they pertain to claimant's medical treatment and ongoing symptoms following the April 4, 2017, arbitration hearing. I likewise agree with the deputy commissioner that claimant, as a result of her work injury, now has permanent restrictions as set forth in the functional capacity evaluation (FCE). These restrictions are unrebutted and were adopted by claimant's treating physicians and the competing experts in this case. (See Review-Reopening Decision, p. 9)

Where my findings diverge from the deputy commissioner's findings, however, is with respect to how those restrictions limit claimant's ability to return to work. While claimant's functional ability places her within the "light" work category, claimant's sitting tolerance and her standing tolerance are in the "rare" category, meaning she is limited to sitting and standing from one to five percent of an eight-hour day. (Claimant's Exhibit 2, p. 32) Claimant's sitting tolerance is further limited by the "need to frequently change positions at 15-20 min due to reports of increased pain." (Cl. Ex. 2, p. 32) In effect, this means claimant spends the vast majority of her day laying down. As claimant explained at hearing, she spends 90 percent of her days laying down in her recliner or in her bed. (Hearing Transcript, pp. 38-39) Claimant also uses a traction machine several times a day for up to 30 minutes each time. (Tr., pp. 30-31, 37-38)

I acknowledge claimant has failed to make any attempt to secure employment following her injury. However, as claimant aptly noted at hearing, she is not aware of any jobs that would allow her to lay down for 90 percent of her day. (Tr., p. 52) When asked whether she inquired about any work-from-home opportunities that would presumably allow her to work while laying down, she stated that any such position would also require an accommodation for her time in the traction machine. (Tr., p. 52 ("I would have to be in my traction machine three to four times a day for thirty minutes and then sit for five minutes and take a two-hour break. But I have not seen any jobs that would meet with that criteria."); Tr., pp. 54-55)

While defendants produced a vocational report with jobs that technically fall within the light work category, it is unclear how claimant could perform any of those jobs (or any other job, for that matter) while having to lay down for the vast majority of her day.

The deputy commissioner found the report to be unrebutted. While it is true the report is unrebutted by another vocational report, the report is rebutted by other facts, such as the specific limitations contained in the FCE report, by claimant's testimony (which the deputy commissioner found to be credible) regarding how often claimant is forced to lay down, by her physical capabilities and by her inability to return to work. Considering both claimant's testimony and her specific limitations, I find claimant is unable to return to her past jobs, her job with defendant-employer, and the jobs contained in defendants' vocational report.

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work

that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

With limitations that allow only rare sitting and standing, and which force claimant to lay down for the vast majority of her workday, I find claimant is wholly disabled from performing work that her experience, training, education, intelligence and physical capabilities would otherwise allow her to perform. Thus, I respectfully reverse the deputy commissioner's finding, and instead I find claimant carried her burden of proof to establish she is permanently and totally disabled under the traditional industrial disability analysis.

Notably, I give considerable deference to findings of fact which are impacted by the credibility findings, expressly or impliedly made, by the deputy commissioner who presided at the arbitration hearing. The deputy commissioner found claimant to be a credible witness. I find the deputy commissioner correctly assessed claimant's credibility in this matter. I find nothing in the record in this matter which would cause me to reverse the deputy commissioner's credibility findings.

Having found claimant is permanently and totally disabled under the traditional industrial disability analysis, I need not consider whether claimant is entitled to permanent total disability benefits under the odd-lot doctrine.

With respect to the commencement date for claimant's permanent total disability benefits, prior appellate case law indicates that "the date of the commencement of additional weekly benefits in a review-reopening case is the date the review-reopening petition was filed." Searle Petroleum, Inc. v. Mlady, 842 N.W.2d 679 (Iowa App. 2013) (table); see also Verizon Bus. Network Servs., Inc. v. McKenzie, 823 N.W.2d 418 (Iowa App. 2012) (table). The review-reopening petition in this case was filed on October 22, 2018. Therefore, pursuant to prior case law, claimant's permanent total disability benefits shall commence on October 22, 2018. Defendants shall receive credit for all weekly benefits previously paid starting on October 22, 2018, paid pursuant to the running award.

Thus, the deputy commissioner's date of February 28, 2018, for the commencement of permanency benefits is modified to reflect the commencement date of October 22, 2018, for permanent total disability benefits.

ORDER

IT IS THEREFORE ORDERED that the review-reopening decision filed on June 11, 2021, is reversed in part and is modified in part.

Defendants shall pay claimant permanent total disability benefits commencing on October 22, 2018, continuing to the present and into the future so long as claimant remains totally disabled and qualifies for benefits under Iowa Code section 85.34(3).

All weekly benefits shall be paid at the stipulated weekly rate of five hundred fifty-nine and 49/100 dollars ($559.49).

Defendants shall receive credit for all weekly benefits paid to date.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding as set forth in the ruling on motion for rehearing, and defendants shall pay the costs of the appeal, including the cost of the hearing transcript.

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

Signed and filed on this 4th day of October, 2021.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

John Dougherty (via WCES)

Charles Blades (via WCES)