

## BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JODY WILSON,

Claimant,

vs.

J &amp; L INVESTMENTS, INC.,

Employer,

and

AMERICAN FAMILY INSURANCE CO.,

Insurance Carrier,  
Defendants.

File No. 5060690.02

A P P E A L

D E C I S I O N

Headnotes: 1402.40; 1801; 1803; 1804;  
1808; 2501; 2905; 2907; 4000.2

Claimant Jody Wilson appeals from a review-reopening decision filed on January 26, 2022, and from a ruling on application for rehearing filed on February 10, 2022. Defendants J & L Investments, Inc., employer, and its insurer, American Family Insurance Company, respond to the appeal. The case was heard on September 1, 2021, and it was considered fully submitted in front of the deputy workers' compensation commissioner on October 22, 2021.

In the review-reopening decision, and in the ruling on application for rehearing, the deputy commissioner found claimant established a change of physical condition and had sustained 30 percent permanent impairment to her body as a whole, entitling claimant to receive 150 weeks of permanent partial disability benefits at the stipulated weekly rate of \$252.55, commencing on October 7, 2020. The deputy commissioner found claimant is entitled to healing period benefits from July 1, 2020, through November 25, 2020, at the stipulated weekly rate of \$252.55. The deputy commissioner ordered defendants to pay the medical expenses itemized in Exhibits E and 8. The deputy commissioner assessed defendants a \$2,651.78 penalty for delayed temporary benefits and a \$1,894.13 penalty for delayed permanent partial disability benefits.

On appeal, claimant asserts the deputy commissioner erred in failing to find claimant is permanently and totally disabled under the statute or under the common law odd-lot doctrine, and, alternatively, claimant asserts the deputy commissioner erred in

failing to find claimant's loss of use exceeds the impairment rating if she is not permanently and totally disabled.

Defendants assert on appeal that the review-reopening decision and the ruling on application for rehearing should be affirmed in their entirety.

Those portions of the proposed review-reopening decision pertaining to issues not raised on appeal are adopted as part of this appeal decision.

I have performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.5 and 86.24, the review-reopening decision filed on January 26, 2022, and the ruling on application for rehearing filed on February 10, 2022, are affirmed with the following additional and substituted analysis.

Without further analysis, I affirm the deputy commissioner's findings that (1) defendants shall pay claimant healing period benefits from July 1, 2020, through November 25, 2020, at the stipulated weekly rate of \$252.55, (2) defendants are responsible for the medical expenses itemized in Exhibits E and 8, and (3) defendants are assessed a \$2,651.78 penalty for delayed temporary benefits and a \$1,894.13 penalty for delayed permanent partial disability benefits.

With the following additional and substituted analysis, I affirm the deputy commissioner's finding that claimant proved she sustained a change of physical condition, and I affirm the deputy commissioner's finding that claimant has sustained a 30 percent functional loss entitling claimant to 150 weeks of permanent partial disability benefits at the stipulated weekly rate of \$252.55, commencing on October 7, 2020.

Iowa Code section 86.14 governs review-reopening proceedings. When considering a review-reopening petition, the inquiry "shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded." Iowa Code § 86.14(2). The deputy workers' compensation commissioner does not re-determine the condition of the employee adjudicated by the former award. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391 (Iowa 2009). The deputy workers' compensation commissioner must determine "the condition of the employee, which is found to exist subsequent to the date of the award being reviewed." Id. (quoting Stice v. Consol. Ind. Coal Co., 228 Iowa 1031, 1038, 291 N.W. 452, 456 (1940)). In a review-reopening proceeding, the deputy workers' compensation commissioner should not reevaluate the claimant's level of physical impairment or earning capacity "if all of the facts and circumstances were known or knowable at the time of the original action." Id. at 393.

The claimant bears the burden of proving, by a preponderance of the evidence that, "subsequent to the date of the award under review, he or she has suffered an *impairment or lessening of earning capacity proximately caused by the original injury.*"

Simonson v. Snap-On Tools Corp., 588 N.W.2d 430, 434 (Iowa 1999) (emphasis in original).

Iowa Code section 85.34(2) governs compensation for permanent partial disabilities. The law distinguishes between scheduled and unscheduled disabilities. The Division of Workers' Compensation evaluates disability using two methods, functional and industrial. Simbro v. Delong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983). The Division applies the functional method for scheduled injuries to body parts listed in the statute and the industrial method for unscheduled body parts that are not listed in the statute. The statute provides a maximum number of weeks of compensation for the complete loss of a scheduled member. Unscheduled injuries are compensated in relation to 500 weeks, examining loss of earning capacity.

This case involves an injury to claimant's bilateral legs arising out of the June 13, 2015, work injury. Pursuant to Iowa Code section 85.34(2)(t):

[t]he loss of both arms, or both hands, or both feet, or both legs, or both eyes, or any two thereof, caused by a single accident, shall equal five hundred weeks and shall be compensated as such; however, if said employee is permanently and totally disabled the employee may be entitled to benefits under [the subsection governing permanent total disability, Iowa Code section 85.34(3)].

Claimant asserts the deputy commissioner erred in failing to find she is permanently and totally disabled under the statute or under the odd-lot doctrine. Alternatively, claimant asserts she is entitled to additional benefits exceeding the 30 percent functional rating from Jason Stanford, D.O., the treating orthopedic surgeon.

In Iowa, a claimant may establish permanent total disability under the statute, or through the common law odd-lot doctrine. Michael Eberhart Constr. v. Curtin, 674 N.W.2d 123, 126 (Iowa 2004) (discussing both theories of permanent total disability under Idaho law and concluding the deputy's ruling was not based on both theories, rather, it was only based on the odd-lot doctrine). Under the statute, the claimant may establish the claimant is totally and permanently disabled if the claimant's medical impairment together with nonmedical factors totals 100 percent. Id. The odd-lot doctrine applies when the claimant has established the claimant has sustained something less than 100 percent disability but is so injured that the claimant is "unable to perform services other than 'those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.'" Id. (quoting Boley v. Indus. Special Indem. Fund, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997)).

"Total disability does not mean a state of absolute helplessness." Wal-Mart Stores, Inc. v. Caselman, 657 N.W.2d 493, 501 (Iowa 2003) (quoting IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 633 (Iowa 2000)). Total disability "occurs when the injury wholly disables the employee from performing work that the employee's experience,

training, intelligence, and physical capacity would otherwise permit the employee to perform.” IBP, Inc., 604 N.W.2d at 633.

The parties entered into an agreement for settlement on December 12, 2017, agreeing claimant had sustained a work-related injury to her bilateral knees occurring on July 13, 2015, agreeing claimant had sustained a two percent rating to the body as a whole, and agreeing claimant was entitled to 10 weeks of permanent partial disability benefits commencing on December 29, 2015. (Exhibit 1)

After entering the agreement for settlement claimant's bilateral knee conditions worsened. Claimant underwent visco supplement injections and ultimately, she underwent bilateral total knee replacements performed by Dr. Stanford on August 11, 2020, and August 12, 2020. (JE 4, pp. 20-21; JE 5, pp. 25-59; JE 6, pp. 31-35; JE 7) Claimant continued to experience knee pain and symptoms following surgery.

On November 25, 2020, Dr. Stanford opined claimant reached maximum medical improvement and released her to regular activity without restrictions. (JE 6, p. 46) On May 17, 2021, Dr. Stanford opined claimant had sustained 37 percent permanent impairment to each knee, which converts to 15 percent permanent impairment to the body as a whole for each knee, and opined claimant sustained 30 percent total impairment to the body as a whole, or 74 percent combined impairment to her bilateral lower extremities. (JE 6, p. 47) I agree with the deputy commissioner's finding that claimant sustained a worsening of her physical condition following the agreement for settlement based on Dr. Stanford's opinion.

On de novo review, I agree with the deputy commissioner's finding that claimant sustained 30 percent loss to her bilateral legs since the parties entered into the agreement for settlement. I do not find claimant established she is permanently or totally disabled under the statute or under the common law odd-lot doctrine. I do not find claimant's functional loss exceeds Dr. Stanford's rating.

At the time of the review-reopening hearing claimant was 65 years old. She dropped out of school in the tenth grade and never obtained a GED or other formal education. (Tr., p. 10). Claimant's academic performance was poor, she is unable to type, and she is not familiar with computers. (Tr., p. 11)

Claimant sustained an injury to her bilateral knees in June 2015, when she fell at work. Claimant underwent surgery, but her bilateral knee conditions worsened, and in 2020, she had to undergo bilateral total knee replacements. Following her knee replacement surgeries, claimant did not return to work at McDonalds.

At the time she filed the review-reopening petition, claimant lived in Waterloo, Iowa. Claimant started working for McDonalds in the Waterloo area in 1972. (Tr., p. 13) Apart from a brief move to Arizona for three months, claimant worked for McDonalds at stores in Waterloo, Cedar Falls, and Evansdale from 1986 until the time of her total knee replacement surgeries in August 2020. (Tr., pp. 13-15)

In 2020, the Evansdale store where claimant worked was sold. Claimant testified she knew of the sale of the store and that she needed to reapply for her old job if she wanted to continue working for the new owner. (Tr., pp. 26-27) Claimant did not submit a new application. (Tr., p. 47)

At the time of the review-reopening hearing, claimant had not looked for work. (Tr., p. 49) Claimant testified that even if the new owner offered her the job, she would not take the position, and she does not believe she would be physically able to do the job. (Tr., pp. 46-50) No physician in this case has opined claimant's bilateral knee conditions preclude her from returning to work at McDonalds, or for any other employer.

At the time of the review-reopening hearing, claimant had not sought vocational assistance through Iowa Vocational Rehabilitation Services, a free service, or consulted with a private vocational rehabilitation counselor to determine what work she is capable of engaging in, if any, or to find work. I find claimant is not motivated to return to work.

Claimant has worked in the Waterloo area for many years. Claimant presented no vocational evidence supporting the services she is able to perform in the Waterloo area are so limited in "quality, dependability or quantity that a reasonably stable market for them does not exist." For those reasons, I find claimant has not met her burden of proof to establish she is permanently and totally disabled under the statute or under the odd-lot doctrine. Considering both the medical and lay evidence regarding claimant's extent of functional loss, I find claimant's functional loss of her bilateral legs does not exceed the functional rating. Based on the foregoing, with my additional and substituted analysis, I affirm the deputy commissioner's finding that claimant has sustained 30 percent functional loss to her bilateral knees,

#### ORDER

IT IS THEREFORE ORDERED that the review-reopening decision filed on January 26, 2022, and the ruling on application for rehearing filed on February 10, 2022, are affirmed with my additional and substituted analysis.

Defendants shall pay claimant healing period benefits from July 1, 2020, through November 25, 2020, at the stipulated weekly rate of two hundred fifty-two and 55/100 dollars (\$252.55).

Defendants shall pay claimant 150 weeks of permanent partial disability benefits at the stipulated weekly rate of two hundred fifty-two and 55/100 dollars (\$252.55), commencing on October 7, 2020.

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.

Defendants shall pay the medical expenses itemized in Exhibits E and 8.

Defendants shall pay claimant two thousand six hundred fifty-one and 78/100 dollars (\$2,651.78) in penalty benefits for the delayed temporary benefits, and defendants shall pay claimant one thousand eight hundred ninety-four and 13/100 dollars (\$1,894.13) in penalty benefits for delayed permanent partial disability benefits.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding, and claimant 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 22<sup>nd</sup> day of July, 2022.



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JOSEPH S. CORTESE II  
WORKERS' COMPENSATION  
COMMISSIONER

The parties have been served as follows:

Benjamin Roth (via WCES)

Charles Showalter (via WCES)

Kelsey Paumer (via WCES)