BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SEMRA DEVIC, Claimant, vs. TYSON FRESH MEATS, INC., Employer, Self-Insured, Defendant.	File No. 5047228 APPEAL DECISION Head Note Nos: 1800; 1803; 1700; 2502	FILED FEB 24 2017 WORKERS' COMPENSATION

Defendant Tyson Fresh Meats, Inc., appeals from an arbitration decision filed on September 15, 2015. Claimant Semra Devic responds to the appeal. The case was heard on April 6, 2015, and it was considered fully submitted in front of the deputy workers' compensation commissioner on May 9, 2015.

In the arbitration decision, the deputy commissioner found claimant is entitled to 75 percent industrial disability for the stipulated work-related injury which arose out of and in the course of claimant's employment with defendant on March 6, 2013. The award entitles claimant to 375 weeks of permanent partial disability (PPD) benefits commencing on September 27, 2014. The deputy commissioner found defendant is entitled to a credit for all benefits paid prior to the filing of the arbitration decision, including the net amount of any long-term disability benefits. The deputy commissioner ordered defendants to pay medical expenses itemized in Exhibit 15 for all medical providers authorized to treat claimant's spine and left leg. The deputy commissioner found defendant is not liable for any medical expenses for treatment of claimant's psychological or psychiatric conditions. Pursuant to Iowa Code section 85.39, the deputy commissioner ordered defendant to pay the cost of the independent medical evaluation (IME) performed by Marc Hines, M.D., on January 23, 2015. The deputy commissioner also taxed defendant with costs totaling $188.90 requested by claimant in the arbitration proceeding.

Defendant asserts on appeal the deputy commissioner erred as follows:

1) In failing to separately state findings of fact and conclusions of law in accordance with Iowa Code section 17A.16(1).

2) In finding claimant sustained 75 percent industrial disability.

3) In finding claimant carried her burden of proof that defendants are liable for payment of medical expenses itemized in Exhibit 15.

4) In failing to find defendant is entitled to a credit for prior payment of long-term and short-term disability benefits.

Claimant asserts on appeal that the arbitration decision should be affirmed in its entirety.

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

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner.

Pursuant to Iowa Code sections 17A.5 and 86.24, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on September 15, 2015, which relate to the issues properly raised on intra-agency appeal.

I find the deputy commissioner provided sufficient analysis of the issues raised in the arbitration proceeding. I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to those issues and I provide the following additional analysis for the issues raised on appeal:

1) Did the deputy commissioner err in failing to separately state findings of fact and conclusions of law in accordance with Iowa Code section 17A.16(1)?

Defendant argues that the deputy failed to comply with Iowa Code section 17A.16(1), which requires that, "[a] proposed or final decision shall include findings of fact and conclusions of law, separately stated." Defendant argues the deputy commissioner combined her findings of fact and her conclusions of law. They point out the arbitration decision has a single heading which states "Findings of Fact and Conclusions of Law," rather than separating them into distinct sections within the decision. Defendant does acknowledge that the arbitration decision includes quotes from medical records, summaries of testimony, citations to law and discussions of expert medical opinions. (Defendants Brief, p. 7)

Claimant argues the deputy commissioner satisfied the requirements of the statute and did, in fact, separately state findings of fact and conclusions of law. Claimant further argues the deputy's "'analytical process' can be followed." (Claimant Brief, p. 4)

The Supreme Court has stated concerning the decisions of the commissioner, that "[h]is decision must be sufficiently detailed to show the path he has taken through conflicting evidence." Catalfo v. Firestone Tire & Rubber Co., 213 N.W.2d 506, at 510 (Iowa 1973) The Court also concluded that "the law does not require the commissioner to discuss each and every fact in the record and explain why or why not he has rejected

it." Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, at 274 (Iowa 1995) Rather, the Court emphasized that the commissioner provide explanation for his opinion such that the appellate court can "follow his process of analysis." Terwilliger, 529 N.W.2d at 274.

In reviewing the arbitration decision, I note the hearing report indicates the parties stipulated to, among other things, the existence of an employer-employee relationship; the date of the injury; that the injury was the cause of both temporary and permanent disability; that permanent disability involved an industrial disability, not a scheduled member; and the applicable weekly benefit rate. (Hearing Report p. 1) Further, the affirmative defenses were waived. (Hearing Report, p. 2) From the undersigned's review, it would appear that the greater task for the deputy in this case was a determination of the facts as opposed to sorting through competing legal arguments.

I note that although the findings of fact and conclusions of law are contained under a single heading in the arbitration decision, the deputy commissioner does make separate findings of fact and conclusions of law. The deputy commissioner's separate findings of fact include, among other things: claimant's age; marital status; number of children; the amount of social security and long-term disability benefits claimant receives; claimant's country of origin, Bosnia; her work history; her substantial difficulty with the English language; and many aspects of her medical history. The deputy commissioner also makes separate conclusions of law, including but not limited to: assigning the burden of proof by a preponderance of the evidence to the party who would suffer loss if the issue was not established; noting and applying the parties stipulations as to legal conclusions; identifying the legal factors the Supreme Court has held are appropriate for consideration in the assessment of industrial disability and applying those legal factors to the facts; and identifying the appropriate timing of the commencement of interest accrual on unpaid permanency benefits.

After a review of the arbitration decision, I find the deputy's "process of analysis" is sufficiently stated in a clear manner that allows the reader to discern and distinguish the separately stated findings of fact and conclusions of law, such that the deputy has met her obligation under Iowa Code section 17A.16(1). Terwilliger, 529 N.W.2d at 274.

2) Did the deputy commissioner err in finding claimant sustained 75 percent industrial disability?

As stated above, this matter involves a stipulated work injury which the parties agree was the cause of permanent disability to the body as a whole. (Hearing Report, p. 1)

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, 593; 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. However, consideration must also be given to the injured worker's medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured workers' qualifications intellectually, emotionally and physically; the worker's earning before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted. Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616 (Iowa 1995); 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).

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

Assessments of industrial disability involve a viewing of loss of earning capacity in terms of the injured workers' present ability to earn in the competitive labor market without regard to any accommodation furnished by one's present employer. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996); Thilges v. Snap-On Tools Corp., 528 N.W.2d 614 (Iowa 1995).

In this case, the stipulated work injury caused pain in claimant's low back with radicular symptoms into claimant's left leg. (Ex. 5, p. 18) About six weeks following the injury and initial treatment, on April 24, 2013, claimant was referred to Chad Abernathy, M.D., neurosurgeon, who noted continuing low back pain and "pain, numbness, and tingling extending into the left anterior thigh and knee with weakness on extension of the knee and dorsiflexion of the ankle." (Ex. 7, p. 28) Dr. Abernathy performed surgery on May 14, 2013, which is described as a "left L3-4 partial hemilaminectomy, discectomy, microscope." (Ex. 8, p. 33)

Following surgery, claimant's pain did not subside and she continued to have pain in her back and leg, (Tr. pp. 22-23) although on May 22, 2013, Dr. Abernathy noted "[s]he continues to demonstrate excellent relief of her pre-operative pain syndrome and

is quite pleased with her surgical result." (Ex. 7. p. 29) However, claimant contacted Dr. Abernathy's office on multiple occasions following surgery complaining of continued low back and leg pain. (Id.) When claimant began physical therapy on May 29, 2013, it was noted the "[p]atient reports pain severity is severe" and her pain was noted to be 7/10 at best and 10/10 at worst. (Ex. 13, p. 70)

On July 29, 2013, claimant was released by Dr. Abernathy to return to work without restrictions on August 5, 2013. (Ex. 7, p. 30) However, on August 1, 2013, a request was made for claimant to continue physical therapy, which Dr. Abernathy agreed was appropriate. (Id.) On November 22, 2013, Dr. Abernathy assigned a seven percent whole body impairment rating based on reduced range of motion and he indicated he "will defer to Dr. Gordon regarding additional management at this time," indicating claimant required additional medical care/management. (Id.)

Claimant continued to have back and leg pain and was seen by Frank Hawkins, M.D. at Allen Hospital Center for Pain Medicine, on December 6, 2013. (Ex. 9, p. 36) Dr. Hawkins provided injections, which claimant testified did not help. (Ex. 9, pp. 36, 39, 40; Tr. p. 27)

Claimant was evaluated by Ivo Bekavac, M.D., Ph.D., of Cedar Valley Medical Specialists on March 11, 2014. (Ex. 11, p. 62) Dr. Bekavac noted the recent MRI showed disc protrusion at L3-4 on the left side and stated "[w]hen compared to previous study done in March 2013 [prior to the May 14, 2013, surgery with Dr. Abernathy] this appears to be unchanged." (Id.) Dr. Bekavac then referred claimant back to Dr. Abernathy for reevaluation. (Id.)

Claimant returned to Dr. Abernathy on March 21, 2014, "with increased sciatica." (Ex. 7, p. 31) Dr. Abernathy found on examination that claimant did, "demonstrate evidence of left L3-4 radiculopathy consistent with left L3-L4 disc extrusion . . ." (Id.)

On March 27, 2014, claimant underwent a second back surgery with Dr. Abernathy, which, similar to the first surgery, is described as a "left L3-4 partial hemilaminectomy, discectomy, microscope" but also included "re-exploration." (Ex. 8, p. 34)

Interestingly, on April 4, 2014, Dr. Abernathy used the same language that he used following the first surgery, stating "[s]he continues to demonstrate excellent relief of her pre-operative pain syndrome and is quite pleased with her surgical result." (Ex. 7, p. 31) Claimant denied this was a true statement of her condition. (Tr. p. 37) She reported post-operative pain in her follow up appointments with Dr. Bekavac and in her communication with Dr. Abernathy's office. (Ex. 7, p. 31; Ex. 11, p. 65)

On May 5, 2014, Dr. Abernathy noted claimant continued to have residual left sciatica. (Ex. 7, p. 31) On that date, Dr. Abernathy also noted claimant was offered physical therapy and an epidural steroid injection (ESI), but declined, indicating her

symptoms are "well tolerated and she does not wish to pursue any additional medical management." (Ex. 7, pp. 31-32) Claimant denied this occurred, stating in her testimony "I have not refused going to physical therapy." (Tr. p. 38) On May 12, 2014, claimant contacted Dr. Abernathy's office requesting an epidural steroid injection (ESI), which Dr. Abernathy approved. (Ex. 7, p. 32) Claimant also continued to receive additional medical care for back and leg pain from Dr. Bekavac and Dr. Hawkins. (Ex. 11, p. 66; Ex. 9, pp. 42-46)

At hearing, claimant testified she continued to have back and leg pain and was being treated in Iowa City, having received two injections in her back. (Tr. p. 25) She was also pursuing an evaluation for implantation of a spinal cord stimulator. (Tr. pp. 25-26)

On November 22, 2013, after the first surgery, but prior to the second surgery, Dr. Abernathy assigned a seven percent impairment of the body as a whole based on "chronic pain, decreased range of motion of the lumbosacral spine, previous disc extrusion and subsequent surgery." (Ex. 7, p. 30) This rating was given by Dr. Abernathy "[b]ased on the AMA Guidelines." (Id.) However, there is no particular reference to tables, figures, page numbers, or significant discussion as to how he arrived at seven percent.

On January 23, 2015, claimant was evaluated by Marc Hines, M.D. for claimant's IME. Dr. Hines found claimant sustained a 32 percent whole person impairment rating. (Ex. 2, pp.8-9) In arriving at this rating, Dr. Hines assigned 15 percent impairment based on anxiety and depression. However, the arbitration decision, the parties' briefs, and claimant's Exhibit 15 all indicate claimant did not pursue a claim at hearing for permanency based on mental injury. Therefore, I find the impairment rating assigned by Dr. Hines is substantially based on an unclaimed injury and therefore the rating is not reliable as a reflection of claimant's loss of functional impairment for the stipulated work injury. Therefore, I reject Dr. Hines' functional impairment rating.

On March 26, 2015, claimant was evaluated by Charles Mooney, M.D. at the request of defense counsel. (Ex. A, p. 1) Dr. Mooney stated the preferred method for assessment of permanent disability under the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition, (AMA Guides) for an individual in claimant's condition would be the range of motion method. However, Dr. Mooney notes his range of motion measurements were not valid, but contrary to defendant's argument, he declined to include specific range of motion measurements in his assessment of impairment. Rather, following section 15.8d, p. 402 of the AMA Guides, Dr. Mooney relied only on the diagnoses found in Table 15-7, p. 404, to determine impairment. Dr. Mooney stated claimant is assigned "a 10% impairment for a lumbar surgery with residual and medically documented pain and rigidity," and another "2%" for the required "second operation," which is combined to produce a "12% whole person impairment." (Ex. A, p. 6). He therefore declined to add impairment for any loss of range of motion per Table 15-8, p. 407 or Table 15-9, p. 409 of the AMA Guides. Dr.

Mooney also imposed work restrictions of: (1) lift no more than 20 pounds rarely; (2) lift no more than 10 pounds frequently; (3) no repetitive bending or lifting from floor to waist; and (3) no repetitive twisting.

On April 3, 2015, a letter prepared by defense counsel was signed by Dr. Abernathy, indicating he agreed with the statement that "the combined total functional impairment from the original surgery and the March 27, 2014 surgery is 10%." (Ex. B, p. 7) As with Dr. Abernathy's original impairment rating assigned, there is no discussion of how he arrived at the percentage he assigned, nor is there any reference to any particular portion of the AMA Guides. In the same letter, Dr. Abernathy indicated that based on his post-operative visits with claimant following the second surgery, he "anticipated that Ms. Devic would recover from the March 27, 2014 surgery without the need for permanent restrictions." (Ex. B, p. 6)

Based on the medical evidence in this matter, I find claimant continued to have back and left leg pain following her second surgery and she was continuing to receive treatment at the time of the hearing. I further find Dr. Mooney's assessment of permanent impairment and assessment of restrictions to be well reasoned and I find those assessments are more closely based on claimant's medical history and condition. I therefore affirm the deputy commissioner's finding that Dr. Mooney's opinions regarding permanent impairment and permanent restrictions are most persuasive.

Defendant argues that the 75 percent industrial disability awarded by the deputy commissioner is excessive. Defendant argues Dr. Abernathy was in the best position to assess permanency because he was the treating physician. (Defendant's Brief, p. 9) However, defendant does acknowledge that the seven percent rating was given prior to claimant's second surgery and that Dr. Abernathy revised his opinion following the second surgery and increased the rating to ten percent. (Ex, B, p. 7) As stated above, Dr. Abernathy's opinion of claimant's permanent impairment lacks any discussion or explanation concerning how he arrived at his conclusion. As also stated above, Dr. Abernathy's impairment rating is found to be less persuasive than the more informative and detailed opinion of Dr. Mooney.

Defendant agrees "[c]laimant has proven she has some permanent impairment," but argues "she has not proven she has work restrictions that can be credibly related to her work injury and subsequent surgeries." (Defendant's Brief, p. 11) However, Dr. Mooney, defendant's own IME physician, when referring to the March 6, 2013, work injury, stated "[i]t is reasonable to conclude . . . that Ms. Devic did sustain an aggravation of underlying disc herniation at L3-L4 resulting in her lumbar laminectomies and residual symptoms." (Ex. A, p. 6) After concluding that both surgeries and claimant's residual symptoms were related to the work injury, Dr. Mooney noted that although a functional capacity evaluation "may be of benefit, . . . [it] is not available." (Ex. A, p. 7) He then assigned restrictions as set forth above, "based on her prior surgery and current physical conditioning." (Ex. A. p. 7) Based on Dr. Mooney's analysis, I find claimant has established by a preponderance of the evidence that the

restrictions assigned by Dr. Mooney are appropriate based on claimant's medical history and her physical condition and I find those restrictions are related to claimant's March 6, 2013, work injury and subsequent surgeries.

Defendant argues claimant is unmotivated to return to work and has not made a good faith effort to obtain employment. I note the deputy commissioner took this into consideration when assessing industrial disability. The deputy commissioner stated the following in the arbitration decision:

> She is not especially motivated to seek work either within the packing plant or at some other employer. She does not want to lose her long-term disability benefits, her Social Security disability benefits or the benefits she receives under Title 19. If claimant does not work, she is able to stay at home with her spouse and other family members who do not have outside employment.

(Arb Dec., p. 9)

I also take into consideration claimant's questionable motivation to return to active employment, when assessing industrial disability. I also note the following: 1) Claimant was 51 years old at the time of the hearing. (Tr. pp. 14-15); 2) She does not speak, read or write the English language. (Tr. p. 15); 3) She sustained a 12 percent functional impairment as assigned by defendant's IME physician, Dr. Mooney, following two back surgeries performed by Dr. Abernathy. (Ex. A, p. 6); 4) Dr. Mooney assigned permanent restrictions of 20 pounds lifting-rarely; 10 pounds lifting-frequently, with no repetitive bending or lifting from floor to waist, and no repetitive twisting. (Ex. A, p. 6); 5) Claimant's work restrictions as assigned by Dr. Mooney would not allow claimant to return to her former job at Tyson, which required her to lift five-pound bags and put them in a container, with eight bags per container, and then lift the container, which was a total of more than 40 pounds. (Tr. p. 19); 6) Claimant did not work outside the home in Bosnia, and has primarily worked for Tyson since arriving in the United States. (Tr. pp. 15-17); 7) At the time of the hearing, claimant continued to have residual symptoms and was pursuing additional medical treatment. (Tr. pp. 25-26); and, 8) claimant was able to perform her job at Tyson for more than seven years prior to the injury, having passed a pre-employment physical prior to starting her employment at Tyson in 2005. (Tr. p. 16).

After consideration of the above factors, and all other factors to be considered in the assessment of industrial disability, I affirm the deputy commissioner's finding that claimant has sustained 75 percent industrial disability as result of the work injury of March 6, 2013.

3) Did the deputy commissioner err in finding claimant carried her burden of proof that defendants are liable for payment of medical expenses itemized in exhibit 15?

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Exhibit 15 contains claimant's outstanding medical expenses. Defendant argues in its appeal brief that claimant did not provide "an explanation as to what each of these bills is for so that any order can be made for their payment." (Defendant's Brief, p. 12) Claimant argues the medical expenses are subject to a stipulation which resolves the matter, such that no order is required.

Based on the opinion of Dr. Mooney, as stated above, I find the two surgeries performed by Dr. Abernathy on May 14, 2013, and on March 27, 2014, are causally related to the March 6, 2013, work injury. Defendant concedes claimant's "low back herniations" have been proven to be related to the work injury. (Defendant's Brief, p. 12) Therefore, I find the medical care which claimant received which is related to her low back and her left leg radicular symptoms are related to the work injury and defendant is obligated to pay those charges as itemized in Exhibit 15.

4) Did the deputy commissioner err in failing to find defendant is entitled to a credit for prior payment of long-term and short-term disability benefits?

Defendant argues the arbitration decision should have included clear reference to the parties' stipulation that defendant is to receive a credit for both the short-term and the long-term disability benefits that have been paid. Claimant offers no opposition to defendant's assertion.

I note the arbitration decision states defendant is to receive credit "for all benefits paid prior to the filing of this decision, including the net amount of any long-term disability benefits." (Arb. Dec. p. 11)

I find it is appropriate to clarify that the credit applies to all benefits paid, including both short-term and long-term disability benefits pursuant to the parties' stipulation.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of September 15, 2015, is affirmed in its entirety.

Defendant shall pay claimant three hundred seventy-five (375) weeks of permanent partial disability benefits commencing on September 27, 2014, payable at the stipulated weekly benefit rate of three hundred eighty-four and 40/100 dollars ($384.40).

Defendant shall pay accrued weekly benefits in a lump sum together with interest pursuant to Iowa Code section 85.30.

Defendant shall receive a credit for all benefits paid to date, including the net amount of both short-term and long-term disability benefits.

Pursuant to Iowa Code section 85.39, defendant shall pay the cost of Dr. Hines' IME in the amount of one thousand seven hundred twenty-five and no/100 dollars ($1,725.00).

Pursuant to rule 876 IAC 4.33, defendants are taxed claimant's costs in the arbitration proceeding in the amount of one hundred eighty-eight and 90/100 dollars ($188.90), and defendant shall pay the costs of the appeal, including the cost of the hearing transcript.

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

Signed and filed this 24th day of February, 2017.

Joseph S. Cortese II

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