BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

WANDA LONG, Claimant, vs. AYM, INC., Employer, Self-Insured, Defendant.	File No. 5048675 REHEARING DECISION

Defendant filed an application for rehearing (application). Claimant resists the application. The application is considered.

Defendant contends the appeal decision, finding claimant sustained a 40 percent industrial disability, is erroneous. Defendant contends the appeal decision is erroneous, in part, as it is based on a conclusion claimant had a cognitive disorder and because the decision is contrary to Iowa Code section 85.37(7)(a).

It is true the arbitration decision in this case indicated claimant had an industrial disability, in part, due to a "cognitive disorder". (Arbitration Decision, page 3) There is no evidence in the record claimant had a cognitive disorder. In her resistance to the application, claimant agrees there is no evidence of a cognitive disorder in the record. In the appeal decision, the undersigned considered the term "cognitive disorder" a scrivener's error. The appeal decision makes no reference to a cognitive disorder as a basis for finding client sustained a 40 percent industrial disability. The term "cognitive disorder" in the arbitration decision is determined to be a scrivener's error and was not a factor in determining claimant has a 40 percent industrial disability. Defendant's application is denied as to this ground.

Defendant contends the finding claimant has a 40 percent industrial disability does not conform to Iowa Code section 85.34(7)(a). Defendant did not raise apportionment as an issue on the hearing report. It was not discussed as an issue during discussion at hearing prior to the taking of evidence. (Transcript pages 4-8) The issue was not addressed by defendant in the post hearing brief. As defendant waived any argument under Iowa Code section 85.34(7)(a), defendant is precluded from

making any argument for apportionment on appeal or on the application for rehearing. Defendant's application is denied as to this ground.

The record indicates claimant was 64 years old at the time of hearing. She testified she believes she has a GED. Claimant has worked as a CNA, as a clerk in a retail store, and in manufacturing. Claimant has worked for AYM since 1989.

Three of the authorized treating physicians in this case, David Hatfield, M.D., Christian Ledet, M.D. and Kenneth Pollock, M.D., opined claimant's August 1, 2013 work injury resulted in a worsening of her spinal condition at the L3-L4 level. (Ex, 1, pp 1, 4, 7 and 13)

John Kuhnlein, D.O., defendant's expert, found claimant had a five percent permanent impairment from the August 1, 2013 injury. Sunil Bansal, M.D., claimant's expert, opined claimant had a six percent permanent impairment from the work accident. (Ex. A, p 20; Ex. 8, p. 130)

Following her August 1, 2013 work injury, claimant was limited to lifting no more than 10 pounds, with no bending or twisting. (Ex. 4, p. 37A; Ex. C, p. 46) Even Dr. Kuhnlein, defendant's expert, limited claimant, in part, to occasionally only lifting up to 20 pounds. (Ex. A, p. 21)

Claimant was put in a position that had no title, but which was typified as a floater-type of job. (Tr. p. 31) Defendant's plant manager suggested claimant's accommodated job was actually a larger plant process he called "cellularizing". (Tr. p. 91). However, claimant's direct supervisor essentially admitted claimant's job was created to accommodate claimant. (Tr. p. 85)

Claimant was 64 years old at the time of hearing. The record indicates she may have a GED. Most of claimant's work life has involved heavy lifting. She had work restriction at the time of hearing limiting her to lifting up to 10 pounds. This severe lifting restriction limits claimant from returning to most of her prior jobs. The record suggests defendant employer created a job to accommodate claimant's restriction. Given these factors, and the others discussed in the appeal decision, it is again found claimant has a 40 percent loss of earning capacity or industrial disability. Defendant's application is denied as to this ground.

ORDER

THEREFORE, IT IS ORDERED:

The application for rehearing is denied.

Signed and filed this 11th day of May, 2018.

Joseph S. Cortese II

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WORKERS' COMPENSATION
COMMISSIONER

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