BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

NORA CORTEZ,	:	
	:	File Nos. 20700573.02, 20000903.02
Claimant,	:	
	:	R E V I E W – R E O P E N I N G
vs.	:	
	:	D E C I S I O N
TYSON FOODS, INC.,	:	
	:	
Employer,	:	
Defendant.	:	Head Note Nos. 2905, 1804

STATEMENT OF THE CASE

The claimant, Nora Cortez, filed two petitions for review-reopening and seeks workers' compensation benefits from Tyson Foods, Inc., a self-insured employer. The claimant was represented by Jamie Byrne. The defendant was represented by Dillon Carpenter.

The matter came on for hearing on October 25, 2022, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa via Zoom videoconferencing system. The record in the case consists of Joint Exhibits 1 through 3; Claimant's Exhibits 1 through 4; and Defense Exhibits A through F. The claimant testified at hearing through a Spanish language interpreter. Patricia Hillock served as the interpreter. Jeanne Strand served as court reporter. The matter was fully submitted on December 5, 2022, after helpful briefing by the parties.

ISSUES, STIPULATIONS & COURSE OF PROCEEDINGS

The parties submitted the following issues for determination:

The claimant has two stipulated work injuries. The first is a January 4, 2019, pulmonary injury, File No. 20700573.02. The second is an August 26, 2019, neck injury, File No. 20000903.02. Both claims were settled on Agreements for Settlement (AFS) on July 6, 2021. On September 27, 2021, claimant filed petitions on both files, alleging she is entitled to an increase in her disability benefits.

The primary dispute in this case is the extent of claimant's permanent disability under Iowa Code section 85.34(2)(v) (2021). Claimant alleges permanent total disability between her two work injuries. Defendant contends claimant has sustained minimal industrial loss. The parties have stipulated that the claimant's disability is industrial and the commencement date for permanent partial disability is March 4, 2020, for the January 4, 2019, injury and December 9, 2019, for the August 26, 2019, injury

The only other issues set forth in the Hearing Reports are the credit to which defendant is entitled and costs.

Through the hearing report, the parties specifically stipulated to the following:

1. The parties had an employer-employee relationship.

2. Claimant sustained an injury which arose out of and in the course of employment on January 4, 2019 (pulmonary) and August 26, 2019 (neck).

3. These injuries are a cause of both temporary and permanent disability.

4. Temporary disability/healing period and medical benefits are no longer in dispute.

5. The commencement date for any permanent disability benefits for the January 4, 2019, work injury, is March 4, 2020. The commencement date for any permanent disability benefits for the August 26, 2019, work injury is December 9, 2020.

6. The weekly rate of compensation for the January 4, 2019, work injury, is $454.94. The weekly rate of compensation for the August 26, 2019, work injury is $461.87.

7. Affirmative defenses have been waived on both claims and medical benefits are not in dispute.

FINDINGS OF FACT

Nora Cortez is a 54-year-old former employee of Tyson Foods. She was born in Guatemala and her native language is Spanish. She has a third-grade Guatemalan education. She is not fluent in English. She has no computer skills. Ms. Cortez testified live and under oath at hearing. I find her testimony to be highly credible. Her testimony matches closely with the medical records in evidence. She was a good historian. There was nothing about her demeanor which caused me any concern regarding her truthfulness. In fact, the opposite is true.

After coming to the United States, Ms. Cortez was employed at Tyson from approximately 1996 through 2021.[1] She had worked in housekeeping prior to this. Over the course of her career at Tyson, she sustained several work injuries as documented in the defense exhibits. (Defendant's Exhibits D, E, and F) In spite of these medical conditions, Ms. Cortez worked for a long period of time for Tyson as a hog driver, since approximately 1999.

As a result of her chronic exposure to hog dust and particulates in the hog driver position, Ms. Cortez developed occupational asthma. (Transcript, pages 20-23; Joint Exhibit 3, page 21) Tyson admitted this workplace injury and paid medical and indemnity benefits on this claim. Tyson used the date January 4, 2019, as the manifestation date for this condition.

Unfortunately, on August 26, 2019, Ms. Cortez sustained another work injury. On that date, she sustained a workplace fall, injuring her neck. Again, Tyson accepted this injury and paid both medical and indemnity benefits. The diagnosis was an aggravation of cervical facet arthropathy. (Claimant's Exhibit 1, p. 5)

Upon recuperating from both of these injuries, the parties eventually reached a settlement of both claims in July 2021. Those Agreements for Settlement are in evidence. (Cl. Exs. 1 and 2) They were approved by the Commissioner on July 6, 2021. For the occupational asthma claim, Ms. Cortez was paid 6 percent of the whole body (30 weeks) for her functional disability. (Cl. Ex. 1, p. 1) For the neck claim, Ms. Cortez was paid 1.02 percent of the whole body (5.1 weeks) for her functional disability. (Cl. Ex. 1, pp. 12-14) For both claims, portions of the medical report of Sunil Bansal, M.D., were attached, documenting her disabilities as of that time. (Cl. Ex. 1, pp. 4-10; 15-19) These agreements were clearly settled on a functional basis, meaning there was no compensation to Ms. Cortez for her loss of earning capacity. Importantly, her loss of earning capacity at that moment in time was in no way assessed or compensated in these agreements.

Approximately 6 months after her occupational asthma manifested, Tyson removed Ms. Cortez from the hog driver job and placed her in a position titled "ear skins." She worked in his position for approximately a year and a half.

She was eventually removed from this job due to her ongoing and continued exposure to dust, which was aggravating her asthma. (Tr., pp. 23-24) Next, she was placed in a position packing pancreases in approximately January 2021. This job was not a bid job, but rather a position created by Tyson to comply with her medical

[1] From the record, it appears she had been employed by Tyson sometime in 1994 as well and then perhaps left employment and returned in 1996.

restrictions. While she was working in this position, she and Tyson settled the two claims she had against Tyson on AFS. The terms of the agreements are set out above and were approved by the Commissioner on July 6, 2021. She worked in this position until July 22, 2021, when Tyson removed her and placed her on an involuntary leave of absence.

Ms. Cortez testified in detail regarding this leave of absence. She testified that a Tyson Human Resources representative, Alberto Olguin, and a plant nurse manager, Cody, told her that they were no longer going to continue the "packing pancreases" position. (Tr., pp. 26-30) She testified the nurse told her that they had looked for other positions in the plant that she could perform within her pulmonary/asthma restrictions, but they could not find any such positions. (Tr., pp. 30-33) She signed a document to place her on medical leave of absence. She was not given any other option. (Tr., pp. 31-32) The document in question is in evidence. It is titled "Leave of Absence Application" and sets forth in English that she is applying for FMLA for a work-related condition. Ms. Cortez signed this. (Jt. Ex. 1, p. 2) She further testified that she was instructed by Mr. Olguin to contact Tyson every Thursday to see if there were any job openings within her restrictions. She testified that she did so every week between July 2021, and the date of hearing in October 2022. She was never offered any work. (Tr., pp. 33-34)

The medical evidence in the record is not significantly disputed. Regarding her occupational asthma, she was evaluated by Gregory Hicklin, M.D., a well-known pulmonologist in Des Moines, in November 2019. He documented the following:

> Nora Cortez is a hardworking 51-year-old woman from Central America. She works at Tyson Foods around hogs and is exposed to hog dust and sanitizer that may contain chemicals or bleach. She has occupational asthma defined as reversible airway obstructions with triggers at work. This has been well documented on previous pulmonary function tests.
>
> …
>
> Assessment/Plan
>
> 1. Severe persistent occupational asthma with acute exacerbation.
>
> I believe Nora has occupational asthma. It seems to be treated with a current regimen of inhaled steroids and as-needed albuterol. She needs to avoid triggers, but that is difficult with her work. I will defer that. … We will continue the current treatment.

(Cl. Ex. 1, pp. 9-11)

She was evaluated by Sunil Bansal, M.D., in March 2020. He agreed with Dr. Hicklin's diagnosis of occupational asthma. (Cl. Ex. 1, p. 5) He assigned a 10 percent functional impairment rating per the AMA Guidelines, Fifth edition. (Cl. Ex. 1, p. 7) He recommended the following restrictions:

> I would place a restriction of no lifting over 15 pounds occasionally, and no lifting frequently. She needs to avoid frequent lifting, as she does not have the endurance or lung capacity. No prolonged walking more than 5 minutes at a time. She becomes easily short of breath, taking time to recover. Avoid multiple steps, stairs, and ladders. Any work environment must be free of air contaminants such as hog dust, and extreme heat or cold.

(Cl. Ex. 1, p. 8)

At some point, Fadi Alkhatib, D.O., became her authorized physician to treat her occupational asthma. Dr. Alkhatib, signed off on her involuntary leave of absence in August 2021, after her removal from the plant. (Jt. Ex. 1, p. 1) He continued to sign off on her leave of absence forms up through the date of hearing. (Jt. Ex. 1, pp. 3-6) He also signed off on medical opinions which agreed with Dr. Bansal's recommended restrictions on July 20, 2022. (Jt. Ex. 3, pp. 17-22) Dr. Alkhatib examined Ms. Cortez on July 20, 2022. Overall, her condition was slightly improved although she was having acute symptoms due to the weather. (Jt. Ex. 3, p. 26)

Regarding her neck condition, there is little medical evidence in the file. In his March 2020, IME report, Dr. Bansal had diagnosed an aggravation of cervical facet arthropathy, which had caused left sided cervical radiculopathy from the August 26, 2019, work injury. He assigned a 5 percent whole body rating per the AMA Guidelines, Fifth edition. (Cl. Ex. 2, pp. 16, 18-19) He did not recommend any further restrictions for this condition, beyond those already in place for her occupational asthma.

CONCLUSIONS OF LAW

Iowa Code Section 85.34(2)(v) states:

> If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity. Notwithstanding section 85.26, subsection 2, if an employee who is eligible for compensation under this paragraph returns to work with the same employer and is compensated based only upon the

> employee's functional impairment resulting from the injury as provided in this paragraph and is terminated from employment by that employer, the award or agreement for settlement for benefits under this chapter shall be reviewed upon commencement of reopening proceedings by the employee for a determination of any reduction in the employee's earning capacity caused by the employee's permanent partial disability.

Iowa Code section 85.34(2)(v) (2021).

Thus, the test created in subsection (v) is relatively straightforward. The first issue is whether the employee was compensated based only upon the functional impairment resulting from the injury. If so, then once the employee is "terminated" she or he is entitled to have their disability evaluated industrially.

In this case, there is no question that the claimant's work injuries and resulting disabilities were settled on an AFS on July 6, 2021, based solely upon her functional impairments. (Cl. Exs. 1 and 2) She was then terminated 16 days later, on July 21, 2021.[2] On that date, the evidence reflects she was placed on an involuntary leave of absence. Based upon the evidence in the record, there is no reasonable likelihood that she will ever be recalled. I base this finding on the fact that she has continued to call in as instructed for the past 15 months to seek work with Tyson and has not been offered work. Ms. Cortez testified credibly that she is unable to return to any of her past employment at the Tyson plant due to her restrictions and symptoms. Furthermore, Tyson presented no evidence at hearing that there is any gainful work she can do at the plant. I therefore find that the claimant has met both tests to qualify for a reassessment of her industrial disability under subsection (v).

It is noted that both parties have referenced section 86.14 in their arguments. I conclude that section 86.14(2) is inapplicable in review cases under section 85.34(2)(v). Subsection (v) creates its own criteria for reviewing an injured worker's disability which is inconsistent with section 86.14. Under section 86.14(2), an injured worker must compare two snapshots of the claimant's industrial disability to determine if there is a valid basis for increasing or decreasing the original award or settlement. Under subsection (v) there is inherently no first snapshot of the claimant's *industrial* disability. The only snapshot that exists is in regard to the injured worker's functional impairment. Subsection (v), by its explicit terms, sets forth different criteria, as set forth above. Namely, (1) whether the injured worker's disability was compensated only upon the functional impairment resulting from the work injury, and (2) whether the injured worker was terminated from employment after that award or settlement.

[2] Tyson did not argue at hearing or in briefing that claimant was not "terminated" as defined by subsection (v). To the extent they could have argued this point, such argument is rejected for the reasons set forth herein.

Stated another way, I read subsection (v) to allow an employer to compensate an injured worker exclusively based upon the functional impairment rating when certain criteria are met. This allows the employer an opportunity to manipulate the disability to which an injured worker is entitled by keeping them employed at the same or greater pay. However, once an employer terminates the injured worker, thereby satisfying the two-part test set forth in subsection (v), the injured worker is automatically entitled to have the claim evaluated industrially, regardless of whether she or he could meet the procedural requirements of section 86.14(2).

Since this is a case of first impression, I shall also consider, in the alternative, whether the claimant would be entitled to review-reopening under section 86.14(2).

In a proceeding to reopen an award for payments or agreement for settlement as provided by section 86.14(2), inquiry shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded or agreed upon. Iowa Code section 86.14(2) (2017). In order to demonstrate eligibility for an increase of compensation under section 86.14(2), the claimant must demonstrate what his physical or economic condition was at the time of the original award or settlement. At a subsequent review-reopening hearing, claimant has the burden to prove that there is a substantial difference in such condition which warrants an increase in compensation. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009). The difference can be economic or physical. Blacksmith v. All-American Inc., 290 N.W.2d 348 (Iowa 1980); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959). Essentially, two snapshots of the claimant's condition are taken, one in each hearing or settlement. The claimant must prove that there is something substantially different between the two snapshots such that it warrants an increase in benefits. Gosek v. Garmer & Stiles Co., 158 N.W.2d 731, 735 (Iowa 1968).

The principles of res judicata apply and the agency should not reevaluate facts and circumstances that were known or knowable at the time of the original action. Kohlhaas at 392. Review-reopening is not intended to provide either party with an opportunity to re-litigate issues already decided or to give a party a "second bite at the apple." The agency, however, is forbidden from speculating as to what was contemplated at the time of the original snapshot. Id.

The burden remains upon the injured worker to prove by a preponderance of the evidence that the current condition is proximately caused by the original injury. Kohlhaas, 777 N.W.2d at 392. When a work-related injury causes another injury to the worker, this new injury (sequela) may also be considered as a work-related injury under Iowa's workers' compensation laws.

When an employee suffers from a compensable injury and another condition or injury arises that is the consequence or result of the previous injury, the sequelae rule applies. If the employee suffers a compensable injury and later suffers further disability, which is the proximate result of the original injury, such further disability is compensable. If the employee suffers a compensable injury and thereafter returns to work and, as a result, the first injury is aggravated and accelerated so that the employee is more greatly disabled than they were before returning to work, the entire disability may be compensable. The employer is liable for all consequences that naturally and proximately flow from the accident. Oldham v. Scofield & Welch, 222 Iowa 764, 767-68, 266 N.W. 480 (1936).

The first snapshot to be examined would have to be the July 6, 2021, AFS. At that time, claimant's disability was assessed as a functional impairment. At that time, however, Ms. Cortez was working for Tyson earning higher wages than she earned at the time she was originally injured. At the time of the August 2022, hearing, claimant was compelled to take an involuntary leave of absence which ultimately amounted to a termination. She has not worked in any capacity since her termination. If I were to evaluate the facts under section 86.14(2), I would find that the claimant's forced leave of absence and termination amounted to a significant change in economic condition which would warrant an increase in industrial disability benefits.

The next issue is the extent of industrial disability for both injuries.

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 Ry. Co. of Iowa, 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 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.

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 Ry. Co. of Iowa, 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).

It has long been the law of Iowa that Iowa employers take an employee subject to any active or dormant health problems and must exercise care to avoid injury to both the weak and infirm and the strong and healthy. Hanson v. Dickinson, 188 Iowa 728, 176 N.W. 823 (1920). A material aggravation, worsening, lighting up or acceleration of any prior condition has been viewed as a compensable event ever since initial enactment of our workers' compensation statutes. Ziegler v. United States Gypsum Co., 252 Iowa 613; 106 N.W.2d 591 (1961). While a claimant must show that the injury is proximately caused by the medical condition sought to be compensable, it is well established in Iowa that a cause is "proximate" when it is a substantial factor in bringing about that condition. It need not be the only causative factor, or even the primary or the most substantial cause to be compensable under the Iowa workers' compensation system. Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980).

The refusal of defendant-employer to return claimant to work in any capacity is, by itself, significant evidence of a lack of employability. Pierson v. O'Bryan Brothers, File No. 951206 (App. January 20, 1995). Meeks v. Firestone Tire & Rubber Co., File No. 876894, (App. January 22, 1993); See also, 10-84 Larson's Workers' Compensation Law, section 84.01; Sunbeam Corp. v. Bates, 271 Ark. 609 S.W.2d 102 (1980); Army & Air Force Exchange Service v. Neuman, 278 F. Supp. 865 (W.D. La. 1967); Leonardo v. Uncas Manufacturing Co., 77 R.I. 245, 75 A.2d 188 (1950). An employer who chooses to preclude an injured worker's re-entry into its workforce likely demonstrates by its own action that the worker has incurred a substantial loss of earning capacity. As has previously been explained in numerous decisions of this agency, if the employer in whose employ the disability occurred is unwilling to accommodate the disability, there is no reason to expect some other employer to have

more incentive to do so. Estes v. Exide Technologies, File No. 5013809 (App. December 12, 2006).

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As of the date of hearing, Ms. Cortez was 54 years old, almost 55. She has a third-grade Guatemalan education. She is a native Spanish speaker and she has limited English proficiency. She is not computer literate. She is not a good candidate for any type of retraining. The only job she has held since the mid-1990's is at Tyson. Most of that time, she worked as a hog driver, handling hogs at a meatpacking facility.

As a result of her cumulative exposure to hog dust and particulates, she has developed the condition of occupational asthma. This condition impairs her breathing and endurance. She has a 10 percent functional impairment as a result of this condition; however, this number does not really describe how disabling the condition is upon her ability to earn wages in the competitive job market. Her restrictions appear to be undisputed in the record. They are:

> I would place a restriction of no lifting over 15 pounds occasionally, and no lifting frequently. She needs to avoid frequent lifting, as she does not have the endurance or lung capacity. No prolonged walking more than 5 minutes at a time. She becomes easily short of breath, taking time to recover. Avoid multiple steps, stairs, and ladders. Any work environment must be free of air contaminants such as hog dust, and extreme heat or cold.

(Cl. Ex. 1, p. 8; Jt. Ex. 3, p. 21) While these restrictions were originally provided by claimant's IME physician, they were endorsed by her authorized treating physician, Dr. Alkhatib. Ms. Cortez testified credibly that her condition significantly impairs her ability to perform work, in addition to her activities of daily living. (Tr., pp. 35-38)

Obviously, these restrictions are quite severe. In fact, these restrictions would be severe for a highly educated, English speaking worker with special skills. For Ms. Cortez, these restrictions are devastating. These restrictions undoubtedly preclude her from her primary past employment for the past 20 years as a hog driver. As a result of these restrictions, Tyson placed her on an involuntary leave of absence on January 21, 2022. She was specifically instructed to continue to call in to Tyson Human Resources to determine whether any positions at Tyson open up within her restrictions. I specifically find claimant is highly motivated as evidenced by her 25 plus year work history at Tyson. Furthermore, she did what she was directed to do and called in for 15 months prior to hearing and was never offered any job. This is undoubtedly because there is no job in a meatpacking plant which could accommodate her severe permanent restrictions. If Tyson wanted her to look for jobs in the competitive job market, it should

have provided her with vocational assistance to do this, or at least advised her that it was highly unlikely that it would ever locate a job for her which seems quite obvious in the record.

Tyson nevertheless argues strenuously that claimant is not motivated to find employment and should not receive a high award of disability due to her own failure to seek employment outside of Tyson. I reject this argument. Although I have found that Ms. Cortez has been, in fact, legally "terminated" from her employment, she testified credibly that she has followed Tyson's instructions to call in every week to see if a job within her restrictions has opened. Moreover, I find that given claimant's age, education, as well as her lack of English language and computer skills, even if she had sought work outside of Tyson, such a search likely would have been unsuccessful.

By a preponderance of evidence, I find that the claimant is permanently and totally disabled. Her total disability began on July 22, 2021, the date she was placed on involuntary leave and continues through the date of hearing.

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Regarding her neck injury, I find that the claimant has failed to prove any significant industrial disability beyond her impairment rating of 5 percent. While it is clear in the record that she, in fact, sustained a neck injury (aggravation of cervical facet arthropathy), which resulted in a 5 percent permanent impairment, it does not appear that this condition has resulted in any additional permanent restrictions, or has otherwise significantly adversely impacted her employability. Considering all of the factors of industrial disability, I find that claimant has sustained a new, discreet industrial disability of 5 percent. Therefore, I conclude she is entitled to twenty-five weeks of compensation commencing on December 9, 2019, as stipulated by the parties.

The next issue is credit.

The defendant asserts that it should receive a credit for all industrial disability benefits paid to the claimant under her past claims. The defendant cites no authority for this credit, either in its brief or in the Hearing Report. The Hearing Report simply states: "Defendant asserts credit for industrial disability benefits in the amount of 42.02% against any award of industrial impairment for benefits previously paid." (Hearing Report, para. 10) In its brief, defendant similarly states: "Alternatively, Defendant respectfully request [sic] it receive credit in the amount of 42.02% industrial disability for benefits previously paid." (Def. Brief, p. 5)

I gather that defendant is asserting that section 85.34(7) is applicable. Claimant did have a previous industrial disability as documented in prior arbitration decisions.

She was awarded a 5 percent industrial disability for precautionary restrictions assigned by a treating physician for an April 1999, injury. (Def. Ex. D) She was later awarded a 35 percent industrial disability for bilateral shoulder disability from an October 12, 2011, work injury. (Def. Ex. F)

Iowa Code section 85.34(7) (2021) states:

> *7. Successive disabilities.* An employer is liable for compensating only that portion of an employee's disability that arises out of and in the course of the employee's employment with the employer and that relates to the injury that serves as the basis for the employee's claim for compensation under this chapter, or chapter 85A, or 85B, or 86. An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment from a prior injury with the employer, to the extent that the employee's preexisting disability has already been compensated under this chapter, or chapter 85A, 85B, or 86. An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment with a different employer or from causes unrelated to employment.

In my reading of the law, however, the full-responsibility rule has never been overturned by statute or case law.

The Iowa Supreme Court has adopted the full-responsibility rule. Under that rule, where there are successive work-related injuries, the employer liable for the current injury also is liable for the preexisting disability caused by any earlier work-related injury if the former disability when combined with the disability caused by the later injury produces a greater overall industrial disability. Venegas v. IBP, Inc., 638 N.W.2d 699 (Iowa 2002); Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 265 (Iowa 1995); Celotex Corp. v. Auten, 541 N.W.2d 252, 254 (Iowa 1995). The full-responsibility rule does not apply in cases of successive, scheduled member injuries, however. Floyd v. Quaker Oats, 646 N.W.2d 105 (Iowa 2002).

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The occupational asthma case is relatively straightforward. I find there is no credit under section 85.34(7) for benefits previously paid against an award of permanent total disability. The parties, however, stipulated that all benefits were paid prior to the date of claimant's total disability, July 22, 2021, therefore, the defendant is not entitled to a credit.

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The neck claim is slightly more complicated. Section 85.34(7) is clear that an employer is "not liable for compensating an employee's preexisting disability that arose out of and in the course of employment from a prior injury with the employer, to the extent that the employee's preexisting disability has already been compensated under this chapter." Of course, that is not what is happening in this case at all. The claimant sustained a new work injury to her neck on August 26, 2019. The defendant has admitted that this injury occurred at work and is a cause of both temporary and permanent disability. The defendant, in fact, paid an additional 5.1 weeks of compensation in the AFS, without asserting any credit. (See Cl. Ex. 1)

I have found, as a matter of fact, that this condition has resulted in an additional five percent industrial disability, which is separate and discreet from her previous disabilities. Were I to strictly apply the full-responsibility rule, I would add all of her preexisting industrial disabilities to her new 5 percent industrial loss and allow a credit for the weekly payments actually made on all of her previous industrial disabilities. This, however, is unnecessary, since I have calculated her industrial disability as a new, discreet disability. In other words, this theory of credit, which the defendant has not even specifically alleged in this case, would only be applicable if her current disability was calculated including all of her preexisting disabilities together under the full-responsibility rule.

Based upon a thorough review of the evidence in this case, I find the defendant is entitled to a credit of 1.02 percent for the benefits actually paid in the AFS on this claim. (Cl. Ex. 2)

The final issue is costs. The claimant requested a specific taxation of costs. I find that the costs set forth in Claimant's Exhibit 4 are reasonable.

ORDER

THEREFORE, IT IS ORDERED

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All benefits shall be paid at the stipulated weekly rate of four hundred fifty-four and 94/100 ($454.94) per week.

Defendant shall pay the claimant permanent total disability benefits commencing from July 22, 2021, through the date of hearing and ongoing as long as she remains permanently and totally disabled.

Defendant shall pay accrued weekly benefits in a lump sum.

Defendant shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendant shall be given credit for all weeks of compensation paid since July 22, 2021.

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All benefits shall be paid at the stipulated weekly rate of four hundred sixty-one and 87/100 ($461.87) per week.

Defendant shall pay the claimant twenty-five (25) weeks of permanent partial disability benefits commencing December 9, 2020, as stipulated by the parties.

Defendant shall pay accrued weekly benefits in a lump sum.

Defendant shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendant shall be given credit for the 5.1 weeks previously paid.

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

For both Files

Costs are taxed to defendants in the amount of $221.06.

Signed and filed this 10th day of May, 2023.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James Byrne (via WCES)

Dillon Carpenter (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.