

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LUJEAN WELANDER,

Claimant,

vs.

MAUER-JOHNSON-EARNEST
FUNERAL HOME, INC.,

Employer,

and

LEMARS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5043235

A P P E A L

D E C I S I O N

FILED

JAN 8 2016

WORKERS' COMPENSATION

Head Note No.: 1803

Claimant LuJean Welander appeals from an arbitration decision filed on September 24, 2014. The case was heard on April 17, 2014, and it was considered fully submitted on May 14, 2014, in front of the deputy workers' compensation commissioner.

The deputy commissioner awarded claimant 50 percent industrial disability, which entitles claimant to 250 weeks of permanent partial disability benefits, with a credit for benefits previously paid.

Claimant asserts on appeal that the deputy commissioner erred in not awarding permanent total disability benefits. Defendants assert on appeal that the arbitration decision should be affirmed.

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 86.24 and 17A.15, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed in this matter on September 24, 2014, which relate to issues properly raised on intra-agency appeal with the following modifications and additional analysis:

Claimant is a 57-year-old former funeral director who had an initial injury to her right ankle on March 4, 2011, from pushing a casket. The initial injury was followed by two sequelae injuries. While in a cast for the ankle injury, claimant's crutches caught on carpeting and she fell injuring her right shoulder. After that, claimant suffered a low back injury due to an altered gait from her ankle injury. There is no dispute as to the sequelae injuries.

Claimant was terminated from the funeral director job she performed at the time of her injury because defendant-employer could not accommodate claimant's permanent activity restrictions caused by the work injuries.

The deputy commissioner issued a four-page decision. The shortness of the decision was criticized by claimant, especially the final paragraph analyzing the issue of industrial disability. Claimant asserts the analysis was far too brief and failed to consider all of the various factors for determining industrial loss set forth in the venerable case of McSpadden v. Big Ben Coal Co, 288 N.W.2d 181 (Iowa 1980), which include age, education, qualifications, experience, motivation, loss of earnings, the severity and situs of the injury, work restrictions, inability to engage in the employment for which the claimant is best suited, and the lack of any offer of re-employment or help in securing other employment. In the paragraph discussing industrial disability, the deputy commissioner analyzed claimant's ability to learn and adapt to a new occupation as she had done in the past and her transferable skills as set forth by defendants' vocational expert. However, the deputy commissioner determined that claimant sustained a significant loss of earning capacity due to the significant permanent restrictions on claimant's physical activities.

I do not believe the attack upon the arbitration decision's brevity to be valid. Relevant findings of fact were made concerning the various factors of industrial disability. The final paragraph of the decision merely pointed out the major aspects of how the deputy commissioner arrived at his industrial disability finding.

However, the findings of fact did contain an error in describing claimant's education. Contrary to the decision, claimant actually received an associate of arts degree from Iowa Lake's Community College in 1996 and she also received her degree in mortuary science in 1998 from Worsham College of Mortuary Science.

After completing a one-year internship with Hamilton's Funeral Home in Des Moines, Iowa, and passing her Iowa boards in April 1999, claimant became a licensed funeral director in Iowa. Claimant worked part-time for a funeral home while attending Worsham. Claimant also obtained a license to sell burial insurance in Iowa. (Ex. 33, p. 151)

Using the Combined Values Chart in the AMA Guides, fifth edition, at page 604, the physician ratings to the body as a whole of 4 percent for the right ankle, 18 percent

for the right shoulder, and 10 percent for the low back in this case result in a combined permanent impairment rating of 29 percent of the body as a whole. The deputy commissioner set forth the results of the two functional capacity evaluations (FCE) in evidence. However, the deputy did not specifically make a finding as to which FCE was the more descriptive of claimant's permanent disability resulting from this work injury. I find that the most recent FCE on February 12, 2014, is the most credible as it includes disability from the back injury. According to that FCE, claimant is limited to the light-medium physical demand level. Generally, she is limited to lifting and carrying 35 pounds occasionally, 20 pounds frequently and she must limit prolonged forward bending. (Ex. 22)

Claimant now has allowed her funeral director and insurance sales state licenses to expire. (Ex. 33, p. 151) At hearing, she explained she does not believe she can perform the duties of a funeral director anywhere in Iowa with her work-related restrictions. (Tr. pp. 18-46) Claimant stated she did not have a major role in selling pre-death burial plans in her last job as a funeral director and she stated she does not "feel comfortable trying to sell something to somebody." (Tr. p. 111)

In support of her claim that she is unemployable, claimant relies upon the views of Michael Newman, M.S., a vocational expert retained by claimant's attorney. Mr. Newman rejected the opinion of defendants' vocational expert, Theresa Wolford, M.S., that claimant continues to possess numerous skills transferable to other jobs or occupations as a result of her training and experience as a funeral director, and also from her prior employment before seeking her mortuary science degree, which included working for four years as a licensed cosmetologist, and working for seven years as a teacher's aide for moderately handicapped children, all of which involved management, coordination and supervisory skills, along with sales experience in burial services. (Ex. 40, p. 250; Ex. 41, p. 255)

Mr. Newman asserts claimant has no viable transferable skills and rejects any work experience more than 15 years prior to her injury as such skills would be out-of-date. Newman questions claimant's ability to physically assist disabled students as a teacher's aide with her restrictions. (Ex. 33, pp.163-165) He does not mention claimant's past experience as a five-year member of the Iowa Board of Funeral Directors which regulates funeral directors in this state. (Tr. pp. 42-43) Mr. Newman solely focuses on claimant's asserted inability to return to the job of funeral director or funeral attendant. Newman based this conclusion on a job description of the duties of a funeral director prepared by claimant which was attached to Newman's report as Exhibit B. In this narrative, claimant sets forth three essential job functions for the job of funeral director: transporting the body to the mortuary; embalming, dressing and casketing the body; and directing funeral or memorial services. (Ex. 33, pp. 174-176) Claimant testified that this was an accurate description of the duties of funeral directors state-wide, and she testified that funeral homes generally do not provide funeral directors with assistance in performing these duties. (Tr. p. 44-46) Mr. Newman rejects claimant's

sales experience stating that her limited sales experience would not be beneficial in selling traditional insurance such as life, health and disability insurance or to be an independent broker. (Ex. 33, p.165) Newman rejects Wolford's view that claimant can serve as a mortician investigator for the State of Iowa as she has no past experience as an investigator. (Id.)

In her last report, Ms. Wolford did not opine claimant could be an independent insurance salesperson, but adds that the most important attribute for a salesperson is the ability to deal with people in stressful encounters and claimant has done that for the last 15 years. While conceding claimant cannot perform all of the physical duties of a funeral director, Ms. Wolford explains that claimant performed a variety of functions that are transferable to other jobs. Ms. Wolford states she identified jobs within the funeral industry available to claimant, along with other unskilled or semi-skills jobs generally in the labor market, such as telemarketer, order clerk, receptionist and survey worker. Ms. Wolford notes that under the Dictionary of Occupational Titles, the occupation of funeral director is placed at the light physical capacity level, the same level claimant is restricted to under the last FCE. She agrees that positions claimant held many years ago may not be available due to advances in new techniques and technology, but this would not be the case for unskilled or semi-skilled work. Ms. Wolford adds that claimant's experience as a funeral director and on the Board of Funeral Directors provided useful knowledge of state regulations and their enforcement. (See generally Ex. 42)

I agree with the presiding deputy who found Ms. Wolford's views on transferable skills convincing. The problem with Mr. Newman's views is two-fold: he summarily concludes that claimant cannot work outside of the duties of a funeral director or attendant. This completely overlooks claimant's past work experience as a cosmetologist and teaching assistant. I do not doubt there may be advancements in technology since claimant last worked in such jobs, but a person with the ability to obtain a liberal arts associate degree and a degree in mortuary science is well-suited to learn such new techniques in a relatively short time. However, I would agree that a teaching associate job for disability students which would typically require assisting students physically in transfers, changes of position, ambulation and changing diapers, would likely not be suitable to claimant's disability.

Also, the problem with claimant's job description is that only the physical aspects of the job were described. A funeral director, as the name implies, directs, manages, and coordinates all aspects of a funeral, from the time clients arrive at the funeral home until the casket is buried and the grave stone installed. While claimant may not have sold pre-death burial plans, she was totally involved in selling burial arrangements to clients, from the selection of the vault and casket and the type and extent of the funeral service and the head stones. There is a wealth of coordination and management activity involved in being a funeral director such as locating and purchasing the grave site, excavation of, and preparation of, the grave site, assisting in the preparation of the

public announcements and obituaries, arranging the funeral services at the funeral home or church and at the grave site, arranging and managing the funeral processions, the removal of the casket burial equipment, and the burial of the casket and installation of the head stone. I am convinced that such experience does produce viable transferable skills which can be useful in seeking other employment. I am unconvinced that claimant performed all of the various physical tasks described above by herself, although smaller funeral homes such as the one she worked for would certainly have far less staff members than larger businesses.

Also, I cannot think of a better mortician investigator than one who has actually served on a regulatory enforcement board for that profession.

Finally, even claimant asserts that motivation is a factor in analyzing industrial disability. In this case, claimant made no effort to seek other employment until a week before the arbitration hearing and that effort was merely contacting the Department of Workforce Development. Ms. Wolford states she found funeral director positions which fit within claimant's permanent restrictions in Sioux City, Iowa (Ex. 42, p. 259), a 30-minute drive from Kinsley, Iowa, where claimant resides.

However, I also agree with the presiding deputy that given claimant's age and her permanent restrictions, and the inability of defendant-employer to accommodate those restrictions, the work injury significantly reduced claimant's earning capacity. The deputy commissioner's assessment of 50 percent industrial disability was correct.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of September 24, 2014, is AFFIRMED in its entirety.

Claimant shall pay the costs of the appeal, including the preparation of the hearing transcript.

Signed and filed this 8th day of January, 2016.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

Copies to:

Richard N. Willia, Jr.
Attorney at Law
PO Box 1768
Sioux City, IA 51102
nrwilliajr@aol.com

René Charles Lapierre
Attorney at Law
4280 Sergeant Rd., Ste. 290
Sioux City, IA 51106-4647
lapierre@klasslaw.com