

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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COLLEEN QUASTAD,

Claimant,

vs.

POLARIS INDUSTRIES, INC.,

Employer,

and

SAFETY NATIONAL  
CASUALTY CORPORATION,

Insurance Carrier,  
Defendants.

File Nos. 5043011, 5045045,  
5045046

APPEAL  
DECISION

**FILED**  
FEB 25 2015  
WORKERS' COMPENSATION

Head Note Nos.: 1402.40, 1803, 2907

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Defendants, Polaris Industries, Inc., and Safety National Casualty Corporation, appeal from an arbitration decision filed February 24, 2014, in which the presiding deputy commissioner found that claimant Colleen Quastad sustained a 25 percent industrial disability as a result of a work injury she sustained on November 24, 2010. Defendants assert on appeal that claimant failed to prove by a preponderance of the evidence that she is entitled to any industrial disability. Claimant asserts on cross-appeal that the award of industrial disability should be increased and that the deputy erred in his assessment of costs such that modification of the award of costs should be made. The detailed arguments of the parties have been considered and the record of the evidence has been reviewed de novo.

The factual background and the factual findings of the presiding deputy commissioner are comprehensive and well-supported by reference to the record. Therefore the factual findings of the presiding deputy commissioner are incorporated herein by reference to the findings in the arbitration decision.

The first issue for consideration on appeal is whether the presiding deputy commissioner erred in his assessment of claimant's industrial disability. In his assessment of the extent of industrial disability the deputy made the following findings:

The following appears at page 3 of the Arbitration Decision:

On November 24, 2010, claimant exited the warehouse where she worked, and walked over an icy parking lot in an effort to unload a trailer that was arriving. She attempted to salt the lot as she walked out to the trailer. Unfortunately, claimant slipped on the ice, fell, and landed on her left side.

As a result of the November 24, 2010 work injury, claimant experienced left shoulder, right hip and low back symptoms. (Tr., pp. 28-29; Ex. 4, p. 10) Her left shoulder was the primary initial injury treated. Claimant was treated conservatively and was eventually referred to an orthopaedic surgeon, Jason C. Hough, D.O. Dr. Hough performed a left shoulder arthroscopy, including an anterior labral repair and a subacromial decompression on May 19, 2011. (Ex. 3, p. 1)

The following appears at page 4 of the Arbitration Decision:

Both Dr. Hines and Dr. Hough impose no permanent work restrictions. Therefore, I find that claimant requires no permanent work restrictions for her shoulder injury. However, claimant credibly testified that she has ongoing symptoms and difficulties using her left arm as a result of the shoulder injury. I find that although claimant does not require permanent work restrictions from a medical perspective, she does experience symptoms in her left shoulder when performing heavy lifting and work. Given that claimant has been declared to be at maximum medical improvement, her ongoing symptoms and difficulties in performing heavy work is likely permanent.

With respect to claimant's low back injury, she has an extensive history of low back symptoms. The chiropractic records in evidence demonstrate that claimant required extensive and relatively frequent chiropractic interventions prior to November 2010. The pre-existing records describe claimant's low back condition as being relatively severe.

The following appears at page 5 of the Arbitration Decision:

Unfortunately, the conservative care attempted on claimant's low back following this work injury did not resolve her symptoms. Ultimately, claimant submitted to low back surgery on January 9, 2013. Her treating surgeon, Bryan J. Wellman, M.D., performed surgery on claimant's low back, which he described as an L4-5 anterior lumbar interbody fusion, L5-S1 interbody cage, L5-S1 anterior instrumentation, left L5-S1 pedicle screw placement, posterolateral fusion with a Trinity allograft. (Ex. 6, pp. 8-9)

The following appears at page 6 of the Arbitration Decision:

Ms. Quastad describes ongoing low back symptoms that include chronic pain, difficulty sleeping as well as difficulties with sitting and bending. (Tr., p. 51) She testified that she does not believe she could return to work performing housekeeping, clothing store duties, her prior job at Godfathers or work as a welder. However, she concedes that she could probably perform her prior telephone sales job. (Tr., pp. 60-61) Claimant's full-duty releases by the medical providers suggest she could perform all of her prior jobs, though I find that she would likely experience pain and symptoms related to the performance of many of those job duties. It is likely that the pain she experienced in some of these jobs would ultimately preclude her from continuing employment in such positions over the long term. In this sense, claimant has experienced some permanent disability.

Dr. Hines is the only physician that has offered a permanent impairment rating pertaining to claimant's low back condition. He assigns a 13 percent impairment related to claimant's low back. He also assigns an additional 3 percent relative to ischial bursitis of the hip. (Ex. 13, p. 5) Given that Dr. Hines' low back rating is not rebutted, I accept that as an accurate estimate of the anatomical and functional loss related to the low back injury. While I find Dr. Hines' assignment of an impairment rating related to the ischial bursitis to be odd given that he provides no corresponding diagnosis or impression in his report, this impairment is also not rebutted in the evidentiary record. Therefore, I accept Dr. Hines' functional impairment ratings and find that the combined impairment rating of 25 percent impairment rating of the body as a whole for claimant's left shoulder and low back injuries is representative of the likely functional loss sustained by claimant as a result of this work injury.

The following appears at page 7 of the Arbitration Decision:

Claimant's permanent impairment rating, particularly coupled with the fact that claimant submitted to surgical intervention on both her left shoulder and low back, suggest that claimant has sustained some permanent structural changes and likely some permanent loss of future earning capacity as a result of these work injuries. The surgical interventions and the permanent impairment rating from Dr. Hines suggest a moderate loss of future earning capacity.

In considering industrial disability the Iowa Supreme Court has instructed the division to award industrial disability based upon the facts as they exist at the time of the arbitration hearing and not speculate about future facts. In determining a

scheduled or unscheduled award, the commissioner finds the facts as they stand at the time of the hearing and should not speculate about the future course of the claimant's condition. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

Industrial disability was defined in Diederich v. Tri-City R. Co., 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 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, 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).

Industrial disability is determined by measuring the 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 the 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, 617 (Iowa 1995).

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. Iowa Code section 85.34.

After consideration of the record, and based upon the facts as they relate to industrial disability at the time of the arbitration hearing in this case, it is concluded that claimant has suffered a 35 percent loss of her earning capacity as a result of the work injury which has resulted in surgery to both her left shoulder and her low back. Such a finding entitles claimant to 175 weeks of permanent partial disability benefits as a matter of law under Iowa Code section 85.34(2)(u), which is 35 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection. The parties have stipulated these benefits should commence on May 8, 2013 and be paid at the weekly rate of \$545.95.

The final issue for consideration on appeal is whether the presiding deputy commissioner erred in his assessment of costs such that modification of the award of costs should be made.

Claimant requested a specific assessment of costs. Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40. Given that claimant

prevailed on the primary dispute involved in this case, the deputy commissioner exercised the agency's discretion and concluded that it was appropriate to assess claimant's costs against defendants.

However, claimant did not submit an itemized list of costs being sought. Therefore, the only known costs before this agency at the time of hearing were claimant's filing fees. Claimant dismissed one file and proceeded to hearing on the remaining three files. The deputy commissioner concluded that it was appropriate to assess claimant's filing fees for the three files that proceeded to hearing. Rule 876 IAC 4.33(7). Therefore, the deputy commissioner assessed claimant's costs totaling \$300.00 against defendants. On appeal, it appears the deputy commissioner's award of costs was reasonable and did not constitute an abuse of discretion. Therefore, the deputy's award of costs is affirmed.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of February 24, 2014 is MODIFIED as set forth herein and that:

Defendants shall pay unto claimant one hundred seventy-five (175) weeks of permanent partial disability benefits at the stipulated rate of five hundred forty-five dollars and 95/100 (\$545.95) per week from May 8, 2013.

Defendants shall pay accrued weekly benefits in a lump sum.

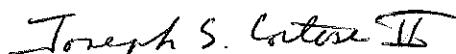
Defendants shall pay interest on accrued weekly benefits awarded herein pursuant to Iowa Code section 85.30.

Defendants shall pay the costs of this action in the amount of three hundred dollars (\$300.00) pursuant to Iowa Code section 86.40.

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

Defendants shall file reports with this agency on the payment of this award pursuant to rule 876 IAC 3.1.

Signed and filed this 25th day of February, 2015.



JOSEPH S. CORTESE II  
WORKERS' COMPENSATION  
COMMISSIONER

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