BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LINDA TRUMBLEE, Claimant, vs. WALMART, Employer, and NEW HAMPSHIRE INSURANCE CO., Insurance Carrier, Defendants.	File No. 5058568 A P P E A L D E C I S I O N Head Note Nos: 1803, 3001, 3002

Defendants Walmart, employer, and New Hampshire Insurance Company, insurer, appeal from an arbitration decision filed on September 26, 2018. Claimant Linda Trumblee responds to the appeal. The case was heard on July 9, 2018, and it was considered fully submitted in front of the deputy workers' compensation commissioner on August 27, 2018.

The deputy commissioner found claimant sustained 80 percent industrial disability as a result of the stipulated work-related injury to her right shoulder which occurred on June 10, 2015. The deputy commissioner determined claimant's correct weekly benefit rate is $316.51. Lastly, the deputy commissioner found claimant established her entitlement to receive penalty benefits based on defendants' unreasonable failure to pay the additional weeks owed under the most recent impairment rating issued by Richard Naylor, D.O.

On appeal, defendants assert the deputy commissioner's award of 80 percent industrial disability is excessive. Defendants also argue the deputy commissioner erred in his determination that claimant is entitled to receive penalty benefits.

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

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.5 and 86.24, those portions of the proposed arbitration decision filed on September 26, 2018 that relate to the issues properly raised on intra-agency appeal are modified in part and affirmed in part with additional analysis.

Turning first to the extent of claimant's industrial disability, defendants argue on appeal that claimant has now been awarded 130 percent industrial disability between the 50 percent award she received in 2005 and the deputy commissioner's 80 percent award at issue in this case. Defendants assert it does not "make logical sense to conclude that Claimant has lost 130 % of her earning capacity, while she continues to work full time earning full wages" and when she sustained "no increase in her functional restrictions or reduction in her wages or work capability." (Defendants' Appeal Brief, p. 10) This argument, however, overlooks the "fresh-start rule." "Under the fresh-start rule, if the employee sustains a new work-related injury after commencing work for a new employer, any resulting loss of earning capacity is measured as a diminution of the new, complete earning capacity that existed at the time the employment with the new employer commenced." Roberts Dairy v. Billick, 861 N.W.2d 814, 819 (Iowa 2015).

As further explained by the court in Roberts Dairy:

> Under the modified fresh-start rule, the new employer is not liable for disability arising out of unscheduled injuries sustained during past employment with a former employer. The new employer's liability under section 85.34(2)(*u*) for permanent partial disability caused by a successive injury is measured by comparing the claimant's earning capacity "when the injury occurred" with "the reduction in earning capacity caused by the disability." *Id.* § 85.34(2)(*u*). The earning capacity when the injury occurred is a refreshed capacity provided by the fresh-start rule. When, as a consequence of a successive work-related injury, part of that refreshed earning capacity is lost, compensation is owed under section 85.34(2)(*u*). *See id.* In this context, the fresh-start rule holds the employer liable for a work-related permanent partial loss of the new earning capacity refreshed by market forces and existing at the time of the successive injury—not for a preexisting disability arising from employment with a different employer.

Roberts Dairy, 861 N.W.2d at 823–24 (emphasis added).

Applied to this case, the deputy commissioner's award of 80 percent industrial is not simply added to the prior award of 50 percent for a total industrial disability of 130 percent. Id. at 824 ("Under the rule, the injured employee recovers for a permanent partial loss of a fully refreshed earning capacity redefined by market forces at the time new employment began—not for an additional loss of whatever earning capacity may have been extant prior to commencement of the new employment.") Instead, the industrial disability sustained by claimant for her June 10, 2015, right shoulder injury is

to be viewed as a percentage lost of her refreshed earning capacity. Id. ("In this sense, the employee's recovery for a successive loss of earning capacity sustained in the employment with a new employer is not a double recovery for a prior loss. It is instead a full recovery of that which has been lost as a consequence of the successive injury: a percentage of the refreshed earning capacity.") Thus, defendants' assertion that claimant was awarded more than 100 percent of her earning capacity is rejected.

Defendants' argument that claimant sustained no increase in her functional restrictions or work capability is also unpersuasive. As noted by the deputy commissioner in this case, claimant's prior 50 percent industrial disability award was related to bilateral shoulder injuries that occurred while working for Menards. Those injuries resulted in the following permanent work restrictions as assigned by claimant's surgeon, Arnold Delbridge, M.D., in 2004:

> Linda can lift from her knees to her chest, 15-20 lbs on an occasional basis. She should not lift above shoulder level or above her head at all. She should not lift with her right upper extremity by itself, but the two together will allow her to lift 15-20 lbs providing she does it close to her body. She can do standing or sitting type work and walk around without difficulty.

(Exhibit E, p. 39)

Claimant subsequently began working for defendant-employer first in groceries, then in the seasonal department, and finally as a cashier. (Hearing Transcript, pp. 17-20) In her role as a cashier, claimant sometimes exceeded the lifting restrictions assigned by Dr. Delbridge. (See Tr., pp. 19-20) In fact, the essential job functions of a cashier exceeded Dr. Delbridge's restrictions, yet claimant performed this position without accommodation for roughly a decade leading up to her June 10, 2015, work injury. (See Claimant's Ex. 2, p. 6; Tr., p. 20)

As a result of claimant's June 10, 2015, right shoulder injury, Dr. Naylor initially assigned permanent restrictions of no lifting more than 5 to 10 pounds generally, no lifting more than 1 to 5 pounds away from her body, no more than 30 reps per hour, and no working at or above shoulder height with the right arm. (Joint Exhibit 6, p. 96) Dr. Naylor appeared to modify these restrictions in his final letter to defendants on January 3, 2018, when he assigned permanent restrictions of no lifting more than 5 to 10 pounds away from her body and 20 to 30 pounds close to her body and no working at or above her shoulder height. (JE 6, p. 97) Defendants eventually informed claimant that she could no longer work as a cashier based on Dr. Naylor's restrictions. (Cl. Ex. 2, p. 6)

Defendants are correct that on paper, claimant's permanent restrictions as assigned by Dr. Naylor on January 3, 2018 are not significantly more severe than those assigned in 2004. However, claimant exceeded her 2004 restrictions and did her job as a cashier in the years that followed. This is precisely the type of scenario envisioned by the legislature when it modified the fresh-start rule:

> The notion underlying the 2004 amendments that a refreshed earning capacity is established upon commencement of new employment is based in part on the proposition that earning capacity is not static. Physical and mental injuries sometimes heal over time, and rehabilitation sometimes restores functional capacity, at least in part. *See Bearce v. FMC Corp.,* 465 N.W.2d 531, 536 (Iowa 1991) (finding the claimant gained a fresh start because after a prior injury he rehabilitated and improved his physical condition). . . . Thus, the changing nature of factors affecting a claimant's postinjury earning capacity in the competitive labor market is an essential feature of the rationale for the modified fresh-start rule. *See Excel Corp. v. Smithart,* 654 N.W.2d 891, 898 (Iowa 2002) ("[A]n industrial disability is not a final indicator of the degree to which a worker can use his or her body to earn wages, and it does not consider the human capacity and spirit to overcome a disability through rehabilitation, adjustments, simple perseverance, or other methods.").

Roberts Dairy, 861 N.W.2d at 823-24 (emphasis added).

It was not until her June 10, 2015, injury and resulting permanent restrictions that defendant-employer deemed claimant unable to do her job a cashier. (Cl. Ex. 2, p. 6) As correctly noted by the deputy commissioner, claimant was able to work as a cashier and in the seasonal department with her 2004 restrictions, but due to her 2015 restrictions she can no longer perform those duties. Based on this change, I find claimant sustained increased functional restrictions and a loss of her work capability as a result of her June 10, 2015, work injury. I therefore affirm the deputy commissioner's determination that claimant's labor market was reduced by the June 10, 2015, injury.

However, for the reasons that follow, the deputy commissioner's finding that claimant sustained 80 percent industrial disability is reduced to 60 percent industrial disability.

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).

I agree with several of the deputy commissioner's findings regarding the elements of claimant's industrial disability. I agree claimant is unsophisticated, has a limited education, and is motivated to work. I agree her age and education are not positive factors for retraining. However, I diverge from the deputy commissioner's finding that "the only position that [claimant] qualifies for now is the sedentary position of people greeter" and "[t]he range of jobs claimant can now perform in her labor market is extremely limited." (Arbitration Decision, p. 6)

Claimant offered no testimony or evidence regarding why she would be unable to obtain, or have difficulty obtaining, other jobs or positions in the sedentary physical demand category. There was similarly no evidence that claimant struggled to perform the duties of a greeter before her third surgery or that she anticipated any problems when she returned to the greeter position after she healed from her non-work-related wrist injury. It also appears that the greeter position paid more per hour ($12.27) than a cashier ($11.25). (See Def. Ex. B, p. 4; Def. Ex. C) Thus, while I acknowledge claimant's labor market was reduced by the June 10, 2015, work injury, I find the facts do not support an award of 80 percent industrial disability. Instead, having considered all relevant industrial disability factors, I find claimant sustained 60 percent loss of her new earning capacity that existed at the time of her June 10, 2015, work injury. See Roberts Dairy, 861 N.W.2d at 823 (emphasis added). The deputy commissioner's finding that claimant sustained 80 percent industrial disability is therefore modified.

My finding that claimant sustained 60 percent industrial disability entitles her to 300 weeks of permanent partial disability benefits. Iowa Code section 85.34.

Defendants also appeal the deputy commissioner's determination that claimant proved her entitlement to penalty benefits. More specifically, defendants argue they had a reasonable basis for their position that no additional benefits were owed when Dr. Naylor issued his final impairment rating.

Iowa Code section 86.13 governs compensation payments. Under the statute's plain language, if there is a delay in payment absent a "reasonable or probable cause or excuse," the employee is entitled to penalty benefits, of up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse. Iowa Code section 86.13(4); see also Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996) (citing earlier version of the statute). If a delay occurs without a reasonable excuse, the commissioner is required to award penalty benefits in some amount to the employee. Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 236 (Iowa 1996).

The statute requires the employer or insurance company to conduct a "reasonable investigation and evaluation" into whether benefits are owed to the employee, the results of the investigation and evaluation must be the "actual basis" relied on by the employer or insurance company to deny, delay, or terminate benefits, and the employer or insurance company must "contemporaneously convey the basis for the denial, delay, or termination of benefits to the employee at the time of the denial,

delay, or termination of benefits." Iowa Code section 86.13(4)(a). An employer may establish a "reasonable cause or excuse" if "the delay was necessary for the insurer to investigate the claim," or if "the employer had a reasonable basis to contest the employee's entitlement to benefits." Christensen, 554 N.W.2d at 260. "A 'reasonable basis' for denial of the claim exists if the claim is 'fairly debatable.'" Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 267 (Iowa 2012). "Whether a claim is 'fairly debatable' can generally be determined by the court as a matter of law." Id. The issue is whether the employer had a reasonable basis to believe no benefits were owed to the claimant. Id. "If there was no reasonable basis for the employer to have denied the employee's benefits, then the court must 'determine if the defendant knew, or should have known, that the basis for denying the employee's claim was unreasonable.'" Id.

Even when defendants have a basis for delaying or denying a claimant's benefits, defendants must "contemporaneously" convey that basis "at the time" of the delay or denial. See Iowa Code section 86.13(4)(c)(3).

In this case, Dr. Naylor initially provided a nine percent whole body impairment rating on July 17, 2016, which was paid by defendants. (JE 6, p. 73; Hearing Report) Claimant subsequently had an additional right shoulder surgery in May of 2017. Then, on January 3, 2018, Dr. Naylor provided his final impairment rating:

> Using the combination chart, this gives her a 31% upper extremity impairment regarding her right upper extremity. This is not in addition to her old impairment rating. This is what the new impairment would be. Her previous impairment had her at a 15% upper extremity impairment and a 9% whole person impairment. Using the combination chart at this time a 31% impairment equals a 19% whole person impairment . . . .

(JE 6, p. 97)

Defendants assert the phrase "not in addition to her old impairment rating," means Dr. Naylor was assigning impairment for the totality of claimant's injuries, including the impairment caused by the injuries sustained by claimant before she was hired by defendant-employer. Defendants argue that because Dr. Naylor assigned an 11 percent whole body impairment rating, it follows that claimant's June 10, 2015, injury caused "new impairment" of 8 percent, which increased claimant's impairment to a total of 19 percent. (Def. App. Brief, p. 15) Because defendants already volunteered benefits for a 9 percent whole body impairment rating, they argue no additional benefits were due.

Defendants' position is problematic for several reasons, however. First, the phrase "not in addition to her old impairment rating" appears to refer to Dr. Naylor's original rating - not Dr. Delbridge's rating - as Dr. Naylor just two sentences later refers to claimant's "previous impairment" of 9 percent whole person, and Dr. Naylor's letter never mentions Dr. Delbridge's prior ratings. It does not appear from the record that defendants asked Dr. Naylor to clarify his position.

Defendants also overlook the fact that Dr. Naylor's January 3, 2018, impairment rating also occurred after claimant's third right shoulder surgery attributable to the June 10, 2015, injury and that claimant lost her cashiering position due to Dr. Naylor's restrictions. With these facts in mind, I find defendants' reliance on Dr. Naylor's January 3, 2018, letter was not a reasonable basis for their denial of additional benefits.

Even if defendants' position had been reasonable, I affirm the deputy commissioner's finding that defendants failed to contemporaneously communicate to claimant the basis for their decision to deny any additional benefits.

With this additional analysis, I affirm the deputy commissioner's finding that claimant proved her entitlement to penalty benefits in the amount of $4,100.00.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on September 26, 2018, is modified in part and affirmed in part with my additional analysis.

Defendants shall pay claimant three hundred (300) weeks of permanent partial disability benefits at the weekly rate of three hundred sixteen and 51/100 dollars ($316.51) commencing December 6, 2017.

Defendants shall pay claimant the underpayment as set forth in the arbitration decision.

Defendants shall receive credit for payment of forty-five (45) weeks of indemnity benefits at the weekly rate of two hundred seventy-two and 20/100 dollars ($272.20).

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

Defendants shall pay claimant four thousand one hundred and 00/100 dollars ($4,100.00) in penalty benefits.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding in the amount of one hundred thirteen and 12/100 dollars ($113.12), and the parties shall split the cost of the appeal, including the cost of the hearing transcript.

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

Signed and filed on this 8th day of January, 2020.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Robert J. Legislador Via WCES

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