

## BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MACRINA HERNANDEZ,

Claimant,

vs.

OAK GROVE PORK, LTD,

Employer,

and

WESTERN AGRICULTURAL  
INSURANCE COMPANY,Insurance Carrier,  
Defendants.File Nos. 19006204.01  
21009807.01

A P P E A L

D E C I S I O N

Head Notes: 1402.20; 1402.40; 1803; 1804;  
2907

Defendants Oak Grove Pork, Ltd., employer, and its insurer, Western Agricultural Insurance Company, appeal from an arbitration decision filed on February 27, 2023. Claimant Macrina Hernandez cross-appeals. The case was heard on September 9, 2022, and it was considered fully submitted in front of the deputy workers' compensation commissioner on November 7, 2022.

In File No. 19006204.01, stipulated injury date of September 12, 2019, the deputy commissioner found claimant should take nothing because she failed to meet her burden of proof to establish the work injury caused permanent disability.

In File No, 21009807.01, stipulated injury date of December 4, 2020, the deputy commissioner found claimant did meet her burden of proof to establish the work injury caused permanent disability to claimant's right shoulder and cervical spine. The deputy commissioner found claimant sustained 85 percent industrial disability, which entitles claimant to receive 425 weeks of permanent partial disability (PPD) benefits, commencing on November 22, 2021. The deputy commissioner found defendants are entitled to a credit against permanency benefits in the amount of \$9,698.99 for overpayment of weekly benefits from May 25, 2021, through November 22, 2021. The deputy commissioner ordered defendants to pay claimant's costs of the arbitration proceeding in the amount of \$4,627.32.

On appeal, defendants assert the deputy commissioner erred in finding claimant sustained permanent injuries to her cervical spine while working for defendant-employer. Defendants assert the deputy commissioner erred in finding claimant sustained 85 percent industrial disability and contend the award should be reduced substantially. Defendants assert the remainder of the decision should be affirmed.

On cross-appeal, claimant asserts the deputy commissioner erred in finding claimant sustained 85 percent industrial disability, and claimant asserts she is entitled to receive permanent total disability benefits. Claimant asserts the remainder of the decision should be affirmed.

Those portions of the proposed arbitration decision pertaining to issues not raised on appeal are adopted as 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 section 17A.15 and 86.24 (2020), the arbitration decision filed on February 27, 2023, is affirmed in part, and is modified in part, with my additional and substituted analysis.

Some of the findings by the deputy commissioner in the arbitration decision were based on the deputy commissioner's findings regarding claimant's credibility. The deputy commissioner found claimant was a credible witness. I find the deputy commissioner correctly assessed claimant's credibility. While I performed a de novo review on appeal, I give considerable deference to the findings of fact which are impacted by the credibility findings, expressly or impliedly made, regarding claimant by the deputy commissioner who presided at the arbitration hearing. I find nothing in the record in this matter which would cause me to reverse the deputy commissioner's findings regarding claimant's credibility.

Without additional analysis, I affirm the deputy commissioner's finding that claimant should take nothing further in File No. 19006204.01 because claimant failed to prove the stipulated September 12, 2019, work injury caused permanent disability. For File No. 21009807.01, I affirm the deputy commissioner's finding that claimant proved the stipulated December 4, 2020, work injury caused permanent injuries to her right shoulder and cervical spine. I affirm the deputy commissioner's finding that defendants are entitled to receive credit against permanency benefits in the amount of \$9,698.99 for overpayment of weekly benefits from May 25, 2021, through November 22, 2021.

With the following additional and substituted analysis, I modify the deputy commissioner's finding that claimant sustained 85 percent industrial disability.

"Industrial disability is determined by an evaluation of the employee's earning capacity." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 852 (Iowa 2011). In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138. The statute also requires the factfinder "to take into account . . . the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury." Iowa Code § 85.34(2).

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u).

In Iowa, a claimant may establish permanent total disability under the statute, or through the common law odd-lot doctrine. Michael Eberhart Constr. v. Curtin, 674 N.W.2d 123, 126 (Iowa 2004) (discussing both theories of permanent total disability under Idaho law and concluding the deputy's ruling was not based on both theories, rather, it was only based on the odd-lot doctrine). Under the statute, the claimant may establish the claimant is totally and permanently disabled if the claimant's medical impairment together with nonmedical factors totals 100 percent. Id. The odd-lot doctrine applies when the claimant has established the claimant has sustained something less than 100 percent disability but is so injured that the claimant is "unable to perform services other than 'those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.'" Id.

"Total disability does not mean a state of absolute helplessness." Wal-Mart Stores, Inc. v. Caselman, 657 N.W.2d 493, 501 (Iowa 2003) (quoting IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 633 (Iowa 2000)). Total disability "occurs when the injury wholly disables the employee from performing work that the employee's experience, training, intelligence, and physical capacity would otherwise permit the employee to perform." IBP, Inc., 604 N.W.2d at 633.

Claimant lives in Marshalltown with her husband. (Hearing Transcript p. 10) Claimant attended school in Mexico through the sixth grade. (Exhibit 3, p. 43; Tr. p. 11) Claimant does not speak English. (Tr. p. 10) At the time of the hearing claimant was 44 year old. (Tr. p. 10)

Claimant has a limited work history. When she lived in Mexico claimant worked in agriculture. (Ex. 3, p. 44) In 2001, claimant moved to the United States and she stayed home to care for her children. (Ex. 3, p. 44; Tr. p. 13)

In 2012, JBS hired claimant to work on the line in its meat packing facility in Marshalltown. (Id.) Claimant had to lift boxes weighing between 40 and 50 pounds and she had to perform overhead work. (Ex. 3, p. 44; Tr. p. 13-14) Claimant sustained a work injury in 2015 when she fell down the stairs at JBS, and she left JBS in February 2017 when she settled her workers' compensation claim. (Ex. 3, p. 44; Tr. pp. 16-18)

In June 2017, defendant-employer hired claimant to work in farrowing caring for sows and piglets. (Ex. 3, p. 44; Tr. pp. 13-15, 21-22) Claimant assisted with castrating the piglets, administering vaccines to sick pigs, removing afterbirth from pigs, removing dead pigs, dispensing food to the pigs, and cleaning the facility using a pressure hose. (Tr. p. 22-23) Claimant's job required her to lift 40 to 45 pounds, move a cart with food weighing 150 to 200 pounds, and perform overhead work. (Tr. pp. 23-24) Claimant

worked for defendant-employer until 2021, when she was terminated for a reason unrelated to the work injury. (Tr. p. 15)

Sunil Bansal, M.D., performed an independent medical examination (IME) for claimant in February 2022, and opined claimant sustained nine percent permanent partial impairment of her right shoulder and cervical spine as a result of the stipulated December 4, 2020, work injury. (Ex. 1, p. 15) Dr. Bansal assigned permanent restrictions of no lifting over 25 pounds, no lifting over 10 pounds with the right arm only, no overhead lifting with the right arm, and avoid activities that require repeated neck motion or that place claimant's neck in a flexed position for more than 15 minutes. (Ex. 1, p. 15)

The deputy commissioner found claimant is capable of light work given the valid functional capacity evaluation (FCE). No physician ordered the FCE. In his supplemental IME report, Dr. Bansal found the results of the FCE were generally consistent with the IME, but he did not formally adopt restrictions consistent with the FCE. (Ex. 1, p. 20) I do not find the FCE sets forth claimant's restrictions. I find Dr. Bansal's restrictions are claimant's permanent restrictions.

Claimant submitted a job search report with her Answers to Interrogatories, reporting she applied for 42 jobs between June 2, 2021, and October 13, 2021. (Ex. 3:46-51) Claimant did not apply for any jobs from October 14, 2021, through the time of the hearing on September 9, 2022. I find claimant is not motivated to work.

Claimant has a limited work history. Given her work restrictions claimant cannot return to her past employment at JBS in meat packing or with defendant-employer in farrowing. I believe claimant is capable of performing work consistent with her permanent restrictions. I do not believe claimant is permanently and totally disabled under the statute or common law odd-lot doctrine. I believe claimant is not motivated to work. Considering all the factors of industrial disability, I find claimant has sustained 50 percent industrial disability, which entitles claimant to receive 250 weeks of PPD benefits.

#### ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on February 27, 2023, is affirmed in part, and is modified in part, with my additional and substituted analysis.

**For File Number 19006204.01 - Date of Injury September 12, 2019:**

Claimant shall take nothing further from these proceedings.

**For File Number 21009807.01 – Date of Injury December 4, 2020:**

Defendants shall pay claimant two hundred fifty (250) weeks of permanent partial disability benefits at the stipulated weekly rate of four hundred fifty-three and 50/100 dollars (\$453.50), commencing on November 22, 2021.

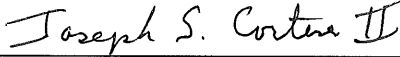
Defendants shall receive credit in the amount of nine thousand six hundred ninety-eight and 99/100 dollars (\$9,698.99) for overpaid weekly benefits from May 25, 2021, through November 22, 2021.

Defendants shall pay accrued weekly benefits in a lump sum together with interest 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.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding in the amount of four thousand six hundred twenty-seven and 32/100 dollars (\$4,627.32), and the parties shall split the costs 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 20<sup>th</sup> day of July, 2023.

  
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JOSEPH S. CORTESE II  
WORKERS' COMPENSATION  
COMMISSIONER

The parties have been served as follows:

James Byrne (via WCES)

David Meyers (via WCES)

James Russell (via WCES)