BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LENORA CULPEPPER, Claimant, vs. FERGUSON ENTERPRISES, INC., Employer, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	File No. 5023819 APPEAL DECISION Head Note Nos.: 1100; 1803; 2500; 4000

Upon written delegation of authority by the workers' compensation commissioner pursuant to Iowa Code section 86.3, I render this decision as a final agency decision on behalf of the Iowa workers' compensation 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 of December 17, 2008 filed in this matter that relate to issues properly raised on intra-agency appeal and cross-appeal with the exception of the conclusions reached regarding permanent industrial disability contained in the first two paragraphs on page 7 of the decision. The following is submitted in lieu of those conclusions:

The parties agreed in this case that if the work injury is a cause of permanent disability, it is an industrial disability.

Industrial disability was defined in Diederich v. Tri-City Ry. Co., 219 Iowa 587, 258 N.W.2d 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. However, consideration must also be given to the injured worker's medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured worker's qualifications intellectually, emotionally and physically; the worker's earnings before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of

the injury to engage in employment for which the worker is best fitted; Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616, (Iowa 1995); McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Serv. Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Although claimant is closer to a normal retirement age than younger workers, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). However, this agency does consider voluntary retirement or withdrawal from the work force unrelated to the injury. Copeland v. Boones Book and Bible Store, File No. 1059319 (App. November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

A change or expected change in employee's actual earnings is strong evidence of the extent of the change in earning capacity. The factor should be considered and discussed in cases where the extent of industrial disability is adjudicated. Webber v. West Side Transport, Inc., File No. 1278549 (App. December 20, 2002).

In this case, I agree with the hearing deputy's finding that Dr. Rozek's opinions are the most convincing, given his greater familiarity with claimant's clinical presentations. However, the deputy based his conclusion on an opinion of Dr. Rozek that claimant could return to full duty. The hearing deputy misstated his own earlier findings in his decision that Dr. Rozek opined that claimant could return to any job, except heavy lifting. (Ex. 9-27) That was the last word from Dr. Rozek in this record. Dr. Rozek's views are buttressed by the views of Dr. Stoken who opined that this injury was a cause of permanent impairment and imposed permanent restrictions. (Ex. 16) Therefore, I must conclude that the work injury of June 7, 2007 was a cause of significant permanent impairment and disability.

As a result of this work injury, claimant lost her job at Ferguson and is unable to return to most of the jobs she held in the past as they required heavy lifting such as her past jobs with Omega Cabinets, Bertch Cabinet Manufacturing, and Roskamp, the jobs for which she was best suited given her age, education and work experience.

Claimant as a result of this injury has suffered a significant loss of actual earnings from her inability to return to Ferguson or to heavy manual labor and is now working only part-time.

Claimant does have some post high school education, but to date claimant has never held an administrative job.

Therefore, I find that the work injury of December 17, 2008 is a cause of a 50 percent loss of earning capacity. Such a finding entitles claimant to 250 weeks of permanent partial disability benefits as a matter of law under Iowa Code section

85.34(2)(u), which is 50 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection.

ORDER

IT IS THEREFORE ORDERED:

1. Defendants shall pay to claimant two hundred fifty (250) weeks of permanent partial disability benefits at a rate of two hundred ninety-six and 90/100 dollars ($296.90) per week from September 25, 2007.

2. Defendants shall pay to claimant healing period benefits from March 1, 2007 through September 24, 2007 at a rate of two hundred ninety-six and 90/100 dollars ($296.90) per week.

3. Defendants shall pay the medical expenses listed in the hearing report and reimburse claimant for any of those expenses she has paid.

4. Defendants shall pay accrued weekly benefits in a lump sum and shall receive credit against this award for all benefits previously paid.

5. Defendants shall receive credit for previous payments of benefits under a non-occupational group insurance plan, pursuant to Iowa Code section 85.38(2), as agreed in the hearing report.

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

7. Defendants shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33, including reimbursement to claimant for any filing fee paid in this matter.

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

Signed and filed this 13th day of July, 2009.

LARRY WALSHIRE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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