BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MONIQUE SMITH, Claimant, vs. PUTNAM, INC. d/b/a A1 CAREERS, Employer, and TRAVELERS PROPERTY CASUALTY CO. OF AMERICA, Insurance Carrier, Defendants.	FILED FEB 19 2018 WORKERS COMPENSATION	File No. 5057094 ARBITRATION DECISION Head Note Nos.: 1803, 2500

STATEMENT OF THE CASE

Monique Smith, claimant, filed a petition in arbitration seeking workers' compensation benefits from Putnam Inc. d/b/a A-1 Careers, the employer and Travelers Property Casualty Co. of America, the insurance carrier. The arbitration hearing was held on October 24, 2017. The parties submitted post-hearing briefs on November 27, 2017, and the matter was considered fully submitted on that date.

The evidentiary record includes: Joint Medical Exhibits JE 1 through JE 11 and Defendants' Exhibits A through G.

At hearing, claimant provided testimony.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

ISSUES

The parties submitted the following disputed issues for resolution:

1. The extent of permanent partial disability (PPD).

2. The proper commencement date of PPD benefits.

3. Costs.

FINDINGS OF FACT

After a review of the evidence presented, I find as follows:

Claimant was 37 years old at the time of the hearing. She completed the 11th grade and obtained a G.E.D. Claimant completed certified nursing assistant training and also received a certificate in phlebotomy. (Testimony) She took additional college courses in nursing, but did not obtain a degree. (Exhibit C, page 3) Later after the injury, she took some courses in culinary arts.

Between 1999 and 2014 claimant was employed in 14 different jobs. She was unemployed from October 2008 to May 2011. (Ex. C, pp. 4-6) All of her employment during the above time period involved CNA work, except for one temporary/seasonal job at Wal-Mart. (Id.) In her work as a CNA, claimant earned between about $10.00 and $16.00 per hour. She reported being terminated from only one of her prior jobs. At claimant's last job before working for the defendant, she quit in September 2014, due to an aggravation of an old knee injury and transportation issues. (Ex. C, p. 6)

In about 2008, claimant was involved in a motor vehicle accident and received some treatment for her back. (Ex. D, p. 5) However, she testified that she had no back or leg pain or problems in the four to five year period before this work injury. (Testimony)

Claimant began working for defendant employer on May 1, 2015 in a long term care facility. On May 17, 2015, she was transferring a patient from a chair to a wheelchair. The patient buckled and stopped bearing weight during the transfer. Claimant and a co-worker kept the patient from falling by holding the patient's weight. She felt pain in her low back, down her right leg and into her knee, ankle and foot. She reported the injury to her employer and on the following day she testified that she could barely walk. (Testimony)

Claimant was fired following a failed drug test, which was positive for opiates. (Ex. 3, p. 20) Claimant explained that after the injury, her mother gave her Tylenol. After a while, she asked her mother for more Tylenol and realized that it was Tylenol 3 with codeine. She stated that she was unaware it was a Tylenol 3 when she took it and would not have taken it, had she known. She reported to her employer that she had taken it, knowing that she would be drug tested. (Testimony)

Claimant has not worked for any employer since the date of the injury of May 17, 2015. (Testimony; Ex. C. p. 6) She had not been employed for over two years and five months at the time of the hearing.

After the injury, claimant was sent by the employer to Concentra for medical treatment. On May 18, 2015, she was prescribed physical therapy and medication. (Ex. JE2, pp. 10, 12, 14, 17) On June 16, 2015, claimant reported that her ankle pain had resolved, but she continued to have pain in her right lower back. (Ex. JE2, p. 17) On June 23, 2015, claimant was referred to an orthopedic spine surgeon for further evaluation. (Ex. JE2, p. 19)

On July 13, 2015, claimant was seen by Todd Harbach, M.D., at Iowa Ortho and described pain in her low back and also in her right leg. (Ex. JE4, p. 21) An MRI was obtained and described by Dr. Harbach as "completely normal." (Ex. JE 4, p. 28)

On September 14, 2015, Dr. Harbach stated that claimant was not a candidate for surgery or injections and he placed her at maximum medical improvement (MMI) and released her to return to "activities as she can tolerate." (Id.) He stated that claimant was not having any pain on that particular day, but then stated that she did continue to have pain. (Ex. JE4, pp. 28, 30) Claimant testified that she did have pain on that particular day and she had ongoing pain. (Testimony) Dr. Harbach's note supports claimant's testimony, wherein he found on September 14, 2015, that her right sacroiliac joint was painful and her straight leg raise "radiates right," and that she had pain with motion. (Ex. JE4, p. 31)

On October 12, 2015, claimant went to her primary care facility, Unity Point Health, with lower back pain, describing it as being "much worse now." (Ex. JE6, p. 46)

On October 23, 2016, Dr. Harbach wrote a letter to the insurance adjuster and provided opinions concerning permanency. He placed claimant in the DRE category I in Table 15-3, page 384 of the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition, (AMA Guides) and he assigned "0% permanent partial impairment of the whole person because of waxing and waning symptoms and no observed problems at her last visit with me." (Ex. JE4, p. 33) However, it appears that claimant did exhibit symptoms at her visit on September 14, 2015, as described above.

Claimant testified that her symptoms continued and defendants sent her back to Iowa Ortho on January 8, 2016. At that time, claimant saw Kurt Smith, D.O., and reported that the pain in her right flank was fluctuating, but persistent. (Ex. JE 4, p. 34) She was prescribed physical therapy and over-the-counter medication. (Ex. JE 4, p. 35) On January 26, 2016, Dr. Smith indicated that claimant's right flank/gluteal strain was part of her back issues and recommended a functional capacity evaluation (FCE). (Ex. JE 4, p. 39)

On February 18, 2016 claimant underwent an FCE at ARC Physical Therapy, which was deemed "valid" and indicated that claimant's physical abilities included: lifting 20 pounds from waist to floor and 15 pounds from waist to above shoulder on an occasional basis, and push/pull of 35 to 40 pounds occasionally. She was also limited to occasional stooping, kneeling, squatting, and crouching. (Ex. JE7, p. 70) Claimant

was noted to be in the "Medium demand" category per the Dictionary of Occupational Titles.

On March 28, 2016, Dr. Smith assigned restrictions "per functional capacity of 02/2016," and placed claimant at MMI and discharged her from care. (Ex. JE4, p. 41)

On April 14, 2016, Dr. Smith stated that claimant had a "lumbar strain" and "myofascial pain," and he assigned a permanent partial impairment rating of five percent. (Ex. JE4, p. 44) He again confirmed restrictions "per the functional capacity evaluation of 2/18/2016" as permanent restrictions and recommended no additional medical care. (Id.)

On July 15, 2016, claimant was seen by Sunil Bansal, M.D., for the purpose of an independent medical evaluation (IME) at the direction of claimant's counsel. (Ex. JE10, p. 102) Dr. Bansal reviewed medical records, obtained a history from claimant of the injury and conducted a physical examination. Dr. Bansal diagnosed claimant with sacroiliitis. (Ex. JE10, p. 107) He described claimant as having radicular complaints, spasms, loss of range of motion, and pain, and he placed her in the DRE lumbar category II of the AMA Guides. (Id.) He then assigned 6 percent permanent impairment to the whole person and agreed that the restrictions identified in the FCE are appropriate. He recommended intermittent sacroiliac (SI) joint injections and physical therapy as appropriate future treatment. (Id.)

Claimant testified that after Dr. Smith released her with no recommendation for further care, she continued to have pain and she sought out care on her own with her primary care physician, Alexandra Hubble, D.O., and others at Unity Point Health. On December 30, 2016, claimant complained of low back pain and described symptoms of radiculopathy going down her right leg. (Ex. JE6, p. 60)

On January 9, 2017, claimant was seen at Metro Anesthesia and Pain Management upon a referral from Dr. Hubble. (Ex. JE11, p. 110) She described her pain as constant and ranging from 4-8 on a 10 point scale. (Id.) She was given an SI joint injection. (Ex. 11, p. 117) On March 6, 2017, claimant described 100 percent pain relief from the injection concerning her hip and pelvic pain, but that it provided no relief from posterior hip and leg pain. She was then given a right piriformis injection. (Ex. JE11, p. 122) This injection provided no relief. (Ex. JE11, p. 124)

Claimant has continued to treat with Metro Anesthesia and Pain Management. She has had injections, nerve blocks, and radiofrequency neurotomy. (Ex. JE11, pp. 126, 135) She has also done aqua therapy. (Ex. D, p. 6) She testified that her current symptoms include difficulty with: sitting and walking too long; sleeping; and continued daily pain in her right lower back, which is made worse with activity. (Testimony) She testified that she struggles to play with her children and that before this injury, she enjoyed taking them to the park. However, post-injury this activity has been significantly curtailed. After the injury, she uses a motorized cart when grocery shopping and her mother and children help her with household chores.

Claimant testified that she has not applied for Social Security Disability benefits and she wants to be employed. She took some culinary classes hoping that she would be able to work as a cook and avoid the heavy lifting demands of a CNA. However, she continues to have difficulty with prolonged standing and does not believe that she could be on her feet all day working as a line cook. (Testimony)

Claimant has applied for jobs in customer service at Medicom/CenturyLink, at a mail processing center, and for cooking positions. She testified that she did not believe that she could do an office job because of the long hours of sitting required. However, I note that the FCE results indicate that she demonstrated the ability to sit without restrictions provided she could have positional changes as required.

I find that although claimant has sought some retraining, she had not demonstrated a commitment to become re-employed. I note that at the time of the hearing, she remained unemployed although it had been more than two years since she was released to return to work by Dr. Harbach and over one and one-half years since she was released with restrictions by Dr. Smith on March 28, 2016.

Dr. Smith and Dr. Bansal are in agreement concerning the restrictions and both adopted the restrictions set forth in the FCE. It does not appear that Dr. Harbach was given the opportunity to review and consider the results of the FCE. Therefore, it is unknown whether this would alter his opinion concerning permanent restrictions.

Dr. Smith and Dr. Bansal provided somewhat similar permanent impairment ratings of five percent and six percent respectively. I note that Dr. Harbach's October 23, 2016 opinion finding zero percent permanent impairment relied, at least in part, on claimant having no problems at her last visit with him. However, Dr. Harbach's note from the prior visit of September 14, 2015, confirms that she did have right hip and low back pain, as described above. Therefore, I give less weight to the opinion of Dr. Harbach and greater weight to the opinions of Dr. Smith and Dr. Bansal.

I find that claimant's permanent restrictions are those identified by Dr. Smith and Dr. Bansal, which are contained in the valid FCE of February 18, 2016. I further find that the restrictions will likely prevent claimant from returning to work as a CNA. This is supported by the job description for the CNA position that claimant held with the defendant employer, which requires lifting up to 50 pounds and being able to "lift, turn and transfer patients weighting [*sic*] up to 200 pounds." (Ex. A, p. 1)

I find that claimant's permanent impairment is five percent as assigned by Dr. Smith in view of his multiple opportunities to see, evaluate and treat claimant, which put him in the best position to offer an opinion concerning claimant's condition, as a longer period of time allows him to take into consideration any potential waxing and waning of symptoms.

I find that claimant presented herself at hearing as an intelligent and thoughtful person. I find that her relatively young age and intelligence will be assets to her as she seeks to retrain for a new career.

I find that the evidence supports Dr. Bansal's statement that "prior to her injury she was not experiencing problems with her back, and had been able to perform all of her job duties without any difficulty." (Ex. JE10, p. 108)

Considering claimant's functional impairment, her medical condition and physical abilities before and after the work injury, her work experience, age, education and all other appropriate factors for the determination of industrial disability, I find that claimant has sustained 35 percent industrial disability.

The parties stipulated in the Hearing Report that claimant was paid 25 weeks of permanent partial disability benefits prior to the date of the hearing. (Hearing Report, p. 2)

CONCLUSIONS OF LAW

A) Extent of Industrial Disability

The primary disputed issue in this case is the extent of industrial disability.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 593; 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. 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 workers' qualifications intellectually, emotionally and physically; the worker's earning 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 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).

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck

Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

Assessments of industrial disability involve a viewing of 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 one's 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 (Iowa 1995).

Claimant's permanent restrictions, which prevent her from returning to her work as a CNA, would tend to support a higher finding of industrial disability. However, her age and her limited job seeking efforts would tend to support a lower finding of industrial disability.

I have found above that claimant has sustained 35 percent industrial disability. I note that both Dr. Smith and Dr. Bansal have adopted the restrictions set forth in the valid FCE which includes lifting restrictions that will prevent claimant from returning to her primary past relevant work as a CNA, which she was involved in for nearly all of her adult life. Claimant's age and intelligence will benefit her as she transitions into a new field of employment. I also note that although claimant described her concern about being able to do office work because of the extended sitting, the FCE results indicate that she was not restricted in this activity, provided she could have positional changes as required.

B) Commencement Date for PPD

Healing Period benefits are payable to an employee who has sustained a permanent partial disability "beginning on the first day of disability after the injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first." Iowa Code section 85.34(1).

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. Section 85.34.

In this case, claimant did not return to work following the work injury. I have found that she has permanent work restrictions that prevent her from returning to substantially similar work as a CNA. Therefore, the question is when was claimant no longer anticipated to have substantial improvement? In other words, what is her correct date of MMI? This will identify the end of the healing period and therefore, the commencement of permanent partial disability benefits.

Defendants argue that claimant was under a healing period until she was placed at MMI by Dr. Harbach on September 14, 2015 and that she then entered a period of

permanent disability until January 6, 2016, when she returned to Iowa Ortho and was seen by Dr. Smith. At that time, defendants argue that claimant had a second healing period until March 27, 2016. Claimant was then placed at MMI by Dr. Smith on March 28, 2016. (Ex. JE4, p. 41) Defendants state that any additional PPD benefits should begin on March 28, 2016, and should not be paid during the second healing period.

Our Supreme Court has recently addressed the question of whether a claimant may receive both permanent partial disability benefits and temporary benefits at the same time in the case of Evenson v. Winnebago Ind., Inc., 881, N.W.2d 360 (Iowa 2016).

The determination in Evenson was that the claimant's return to work established the commencement of PPD benefits, which was not precluded by the fact that claimant was later entitled to additional TPD benefits when he was assigned restrictions that prevented claimant from working his regular hours. Evenson v. Winnebago Ind., Inc., 881 N.W.2d at 372 (Iowa 2016). "Thus, because TPD and PPD benefits compensate for completely different categories of losses, an employee who receives TPD and PPD benefits following a single workplace injury is not paid twice for the same injury or loss." Evenson, at 373 (Iowa 2016). The Court stated that "the commencement of Winnebago's obligation to pay PPD benefits cannot be delayed until after the TPD benefits subsequently terminated on the plain meaning of section 85.34." Evenson, at 374 (Iowa 2016).

Applying the Evenson case, I conclude that September 14, 2016, which is the initial MMI date, is the appropriate commencement date because it is the first of the three triggering events to end healing period. Iowa Code section 85.34(1). This is not defeated by any subsequent healing period that claimant may have been entitled to.

C) Costs

Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I conclude that claimant was successful in this claim and therefore exercise my discretion and assess costs against the defendants in the sum of $100.00 for the filing fee.

ORDER

IT IS THEREFORE ORDERED:

Defendants shall pay claimant industrial disability benefits of one hundred and seventy-five (175) weeks, beginning on the commencement date of September 14, 2015, until all benefits are paid in full.

Defendants shall be entitled to credit for all weekly benefits paid to date. The parties have stipulated that defendants are entitled to a credit of twenty-five (25) weeks.

All weekly benefits shall be paid at the stipulated rate of two hundred and 95/100 dollars ($200.95) per week.

All accrued benefits shall be paid in a lump sum.

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

Defendants shall pay costs of one hundred and 00/100 dollars ($100.00).

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 19th day of February, 2018.

TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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TJG/srs

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876 4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.