

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

REMEDIOS MARQUEZ de
RODRIGUEZ,

Claimant,

vs.

MENARDS, INC.,

Employer,

and

XL INSURANCE AMERICA, INC.,

Insurance Carrier,
Defendants.

File No. 5067292

ARBITRATION DECISION

Head Note Nos.: 1802, 1804

STATEMENT OF THE CASE

Remedios Marquez de Rodriguez seeks workers' compensation benefits from the defendants, employer Menards, Inc. (Menards) and insurance carrier XL Insurance America, Inc. The undersigned presided over an arbitration hearing on May 12, 2021. Marquez de Rodriguez participated personally and through attorneys Michael P. Dowd and John Corrigan. The defendants participated by and through Thomas B. Shires.

ISSUES

Under rule 876 IAC 4.149(3)(f), the parties jointly submitted a hearing report defining the claims, defenses, and issues submitted to the presiding deputy commissioner. The hearing report was approved and entered into the record via an order because it is a correct representation of the disputed issues and stipulations in this case. The parties identified the following disputed issues in the hearing report:

- 1) Is Marquez de Rodriguez entitled to temporary total disability (TTD) or healing period (HP) benefits for the following time periods:
 - a) April 13, 2018, through May 2, 2018; and
 - b) October 25, 2018, through May 2, 2019?

- 2) What is the extent of permanent disability caused by the stipulated work injury?

STIPULATIONS

In the hearing report, the parties entered into the following stipulations:

- 1) An employer-employee relationship existed between Marquez de Rodriguez and Menards at the time of the stipulated injury.
- 2) Marquez de Rodriguez sustained an injury on December 4, 2017, which arose out of and in the course of her employment with Menards.
- 3) The alleged injury is a cause of temporary disability during a period of recovery.
- 4) The alleged injury is a cause of permanent disability.
- 5) The commencement date for permanent partial disability (PPD) benefits, if any are awarded, is May 2, 2019.
- 6) At the time of the stipulated injury:
 - a) Marquez de Rodriguez's gross earnings were six hundred twenty-five and 96/100 dollars (\$625.96) per week.
 - b) Marquez de Rodriguez was married.
 - c) Marquez de Rodriguez was entitled to three exemptions.
- 7) Prior to hearing, the defendants paid to Marquez de Rodriguez forty-eight (48) weeks of compensation at the rate of four hundred thirty-three and 81/100 dollars (\$433.81) per week.

The parties' stipulations in the hearing report are accepted and incorporated into this arbitration decision. The parties are bound by their stipulations. This decision contains no discussion of any factual or legal issues relative to the parties' stipulations except as necessary for clarity with respect to disputed factual and legal issues.

FINDINGS OF FACTS

The evidentiary record in this case consists of the following:

- Claimant's Exhibits (Cl. Ex.) 1 through 11;
- Defendants' Exhibits (Def. Ex.) A through I; and
- Hearing testimony by Marquez de Rodriguez and Patty Welch.

After careful consideration of the evidence and the parties' post-hearing briefs, the undersigned enters the following findings of fact.

Marquez de Rodriguez was fifty-one years of age at the time of hearing. She completed the sixth grade and then began working. Marquez de Rodriguez performed agricultural work on her family's ranch such as planting and picking produce. She also worked cleaning houses for three or four years, when she was still living at home. (Testimony)

Marquez de Rodriguez moved to the United States in the year 2000. (Testimony; Ex. E, p. 2) While Marquez de Rodriguez has picked up some words in English, she has limited proficiency in the language. She is unable to read, write, or speak the English language. (Testimony)

After arriving in the United States, Marquez de Rodriguez worked for Nebraska Beef from 2001 through 2005 as a production worker. (Ex. E, p. 2) Marquez de Rodriguez then took a job with Quality Pork International (QPI) as a production worker. (Ex. E, p. 2) In 2014, she took a job cleaning the office for KB Building Services, where she worked until 2015. (Ex. E, p. 2) In 2016, Marquez de Rodriguez worked for Greater Omaha Packing Co. for a short time and then as a meat trimmer at JBS for three months. (Ex. E, p. 2)

In November of 2016, Marquez de Rodriguez got a job at the Menards store in Shelby, Iowa. This is when she and human resources coordinator Patty Welsh first met. Marquez de Rodriguez worked as a warehouse team member in "depal," with job duties that included unloading trailers and loading products on pallets. (Testimony; Ex. C) The Menards job description states the position "[r]equires intermittent periods during which continuous physical exertion is required, such as walking, standing, stooping, bending, climbing, and lifting material or equipment, some of which may be heavy or awkward" and "[l]ift[ing] up to 50 lbs. frequently; lift[ing] up to 70 lbs. occasionally." (Ex. C)

As the parties stipulated, Marquez de Rodriguez sustained an injury arising out of and in the course of her employment with Menards on December 4, 2017. Welsh completed a first report of injury. (Ex. A) She also immediately arranged care for Marquez de Rodriguez's back injury. Menards first sent her to a chiropractor in Shelby. (Testimony) Then Marquez de Rodriguez went to Mercy Occupational Health Services at Alegent Creighton Health where she saw George Smith, A.R.N.P. (Ex. 1) Smith advised her to perform sedentary work only and assigned her work restrictions of minimal standing and walking; no kneeling, climbing, crawling, bending at the waist, stooping, squatting, or crouching; to use negligible amounts of force when moving objects up to five pounds occasionally. (Ex. 1)

It is Menards policy to accommodate work restrictions caused by work injuries. Menards was able to accommodate all of Marquez de Rodriguez's work restrictions. Because Marquez de Rodriguez violated the work restrictions to help coworkers,

Menards reprimanded her. The only work Marquez de Rodriguez missed due to the injury was for doctor's appointments, but that was minimal. (Testimony)

On March 8, 2018, Gallagher Bassett informed Menards that after an investigation, it concluded it was going to deny Marquez de Rodriguez's claim because the injury did not arise out of and in the course of employment. Welsh and other Menards staff met with Marquez de Rodriguez to inform her that her workers' compensation claim was being denied. Menards wanted to make sure Marquez de Rodriguez knew that she would be responsible for medical bills relating to care for her injury because of the denial of liability and that she had Gallagher Bassett's contact information. (Testimony)

The news Gallagher Bassett had denied her workers' compensation claim upset Marquez de Rodriguez. She wanted to go home and call Gallagher Bassett. Welsh explained to Marquez de Rodriguez her rights under the federal Family and Medical Leave Act (FMLA). The Menards employees provided her with paperwork she had to have a doctor complete and submit to take a leave of absence. This included a form a doctor would fill out to certify she is qualified for FMLA leave. (Testimony)

Welsh believed they had a plan for Marquez de Rodriguez to take two weeks of FMLA leave and then return to work. But Marquez de Rodriguez did not have the same understanding. Marquez de Rodriguez incorrectly believed she had three months to find a doctor to give her a note allowing her to return to work. She set out to arrange care with a doctor for her injury. (Testimony)

Menards paid Marquez de Rodriguez what it classified at the time as temporary total disability benefits beginning on March 8, 2018. (Ex. B, p. 1) As the parties stipulated, Marquez de Rodriguez has sustained a permanent disability from the stipulated work injury; therefore, these benefits are properly considered healing period benefits under the Iowa Workers' Compensation Act. The weekly rate for these benefits was four hundred nineteen and 81/100 dollars. (Ex. B, p. 1) Menards paid these benefits through April 12, 2018. (Ex. B, p. 1) In total, Menards paid Marquez de Rodriguez two thousand one hundred fifty-nine and 5/100 dollars in healing period benefits.

Because Marquez de Rodriguez had no income after Menards informed her it had no work within her restrictions and placed her on leave, she filed claims for unemployment insurance benefits. (Testimony) This caused Iowa Workforce Development (IWD) and the Nebraska Department of Labor (NDOL) to send forms to Menards seeking information about the nature of her separation from employment. (Exs. 5, 6) Welsh completed the forms for both agencies, signed them, and dated them March 19, 2018. (Exs. 5, 6) On both forms, Welsh asserted Marquez de Rodriguez was a current employee who was on a voluntary leave of absence due to a non-work-related injury. (Exs. 5, 6)

NDOL determined Marquez de Rodriguez was entitled to unemployment insurance benefits and she collected them from May 3, 2018, through October 24, 2018. Marquez de Rodriguez applied for jobs during this time period but was unable to obtain lasting employment. She attempted to work at Reg's Meat, but the duties caused her significant back pain, so she quit. (Testimony)

On March 26, 2018, which was fourteen days without hearing from Marquez de Rodriguez and seven days after Welsh submitted documents to IWD and NDOL, Menards deemed her to have abandoned her job with the company. (Testimony; Ex. 7) On the Menards computer system, staff dated the separation back to March 8, the last day she worked. (Testimony) Under Menards policy, an employee who quits without giving notice at least two weeks in advance is considered ineligible for rehire. Due to this policy and the belief Marquez de Rodriguez had abandoned her job, Menards deemed her ineligible for rehire, though an exception could be granted. (Testimony; Ex. 7)

Ultimately, Marquez de Rodriguez received care from Wolfgang Rodriguez, M.D., on March 22, 2018. (Ex. I, p. 1; Testimony) Dr. Rodriguez noted she complained of "lumbar and left hip pain, intermittent, recently almost constant, radiated to left lower extremity." (Ex. I, p. 1) Marquez de Rodriguez stated her "[p]ain improved with rest, and Tylenol, and is exacerbated by physical activity." (Ex. I, p. 1) He prescribed medication to help with her pain and ordered an x-ray. (Ex. I, p. 3)

On April 3, 2018, twenty-two days after the meeting regarding FMLA leave, Marquez de Rodriguez telephoned Menards. At that time, Menards had processed her separation as a voluntary quit via job abandonment. Welsh advised Marquez de Rodriguez she could reapply to work at Menards but made her no promises regarding future employment. (Testimony)

On April 12, 2018, Marquez de Rodriguez had a follow-up appointment with Dr. Rodriguez during which she reported improved lower back and hip pain to the point she was asymptomatic most of the time. (Ex. I, p. 4) Because of her improvement in symptoms, she declined a referral to physical therapy. (Ex. I, p. 4) Marquez de Rodriguez also requested a note releasing her to return to work with no restrictions because she felt well enough to return to full duty. (Ex. I, p. 4) Dr. Rodriguez noted a normal physical examination and released her to return to work with no restrictions. (Ex. I, p. 6)

Menards arranged for George Green, M.D., to perform an independent medical examination (IME) of Marquez de Rodriguez on May 28, 2020. (Ex. G, p. 1) Dr. Greene conducted a physical examination and medical record review. (Ex. G, pp. 4–6) He diagnosed Marquez de Rodriguez with left-sided low back and sacroiliac joint pain. (Ex. G, p. 6)

Dr. Greene recommended Marquez de Rodriguez return to a physiatrist for options regarding injection therapy for her left sacroiliac joint dysfunction. (Ex. G, p. 9)

His opinion on whether she had reached maximum medical improvement was based in part on her pursuit of such care. (Ex. G, pp. 7–8) After Marquez de Rodriguez refused to undergo injection therapy with a physiatrist, Dr. Greene issued a supplement to his report stating her refusal of additional care meant she reached MMI on May 28, 2020. (Ex. G, p. 10)

On causation, Dr. Greene opined her work for Menards was the most likely cause of the injury. (Ex. G, p. 7) Using Tables 15-7 and 15-19 of the Fifth Edition of American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (Guides), Dr. Greene assigned her a whole-person functional impairment of five percent due to the injury. (Ex. G, p. 8) He recommended a functional capacity evaluation (FCE) to determine what, if any, permanent work restrictions are necessitated by the injury. Ex. G, p. 9)

On June 29, 2020, Marquez de Rodriguez underwent an FCE at Premier Therapy Associates with Jennifer Beran, P.T., D.P.T. Beran determined Marquez de Rodriguez's effort was valid. (Ex. 9, p.3) It placed her in the "sedentary-light" physical demand category of work.

Marquez de Rodriguez's attorney arranged for her to undergo an industrial disability assessment with Ted Stricklett, M.S. (Ex. 9) Stricklett reviewed records, interviewed Marquez de Rodriguez, and performed a labor market survey of the Omaha, Nebraska area, then issued a report. (Ex. 9, p. 1) He developed a vocational profile for her and eliminated occupations incompatible with the permanent work restrictions from Beran's FCE. (Ex. 9, p. 7) Stricklett summarizes her work restrictions under the FCE report as follows:

Ms. Marquez de Rodriguez is safe to return to work in the Sedentary-Light physical demand category with the ability to power lift from 14" height 15 pounds on occasion and power lift from the floor 10 pounds on occasion. Ms. Marquez de Rodriguez can shoulder and overhead lift 10 pounds on occasion and push/pull/one-hand carry 13 pounds on occasion. In regard to non-material handling restrictions, Ms. Marquez de Rodriguez can bend, squat, kneel, and stair climb on an occasional basis. In her report, Ms. Beran notes that Ms. Marquez de Rodriguez can sit on a constant basis and stand and walk on a frequent basis but not, "Able to reposition every 30-60 minutes."

(Ex. 9, pp. 3–4)

Stricklett's analysis showed Marquez de Rodriguez sustained a loss of access to jobs in the labor market of the Omaha area of about seventy percent. (Ex. 9, p. 7) However, Stricklett opined Marquez de Rodriguez's loss of access is higher than seventy percent because of her sixth-grade education level from Mexico schools and her inability to read, write, or speak English. (Ex. 9, p. 7) Stricklett opined the combination of her education, limited English proficiency, employment history, and work

restrictions caused a one hundred percent loss of access to the Omaha labor market. (Ex. 9, p. 7)

Menards hired Lana Sellner, M.S., C.R.C., to opine on Marquez de Rodriguez's vocational outlook after the work injury and permanent work restrictions necessitated by it. (Ex. F.) Sellner reviewed documents but did not interview Marquez de Rodriguez. (Ex. F, p. 1) Sellner concluded (sic):

Ms. Marquez de Rodriguez can work in positions such as visual inspector, machine tending, food delivery driver, and courtesy driver at local dealerships or rental agencies, hostess and other assistance in local Hispanic stores/restaurants. These types of jobs are usually word of mouth. Restaurants and stores such as Pan Dulce, Supermercado Neustra Familia, Jacobo's Grocery, Taqueria Tijuana, El Rancho, or Guaca Maya are just a few stores and restaurants.

When reviewing the 137 SSDI unskilled sedentary positions that would be located in the Omaha, NE area that can be considered are order clerk, food and beverage, weight tester, egg processor, brake linings coater, hand suture winder, lens inserter, final assembler (optical), atomizer assembler, printed circuit board assembly, touch up screener, and semiconductor bonder are examples that Ms. Marquez Rodriguez would be consider under all medical providers' parameters.

As Omaha, NE has a large population of individuals who are Spanish-speaking, there are local resources and agencies that this consultant would encourage her to explore such as, but not all inclusive, Latino Center of the Midlands, Nebraska Job Service, Randstad, Aerotek, and Remedy Staffing. She can utilize the El Perico Newspaper on events and jobs. The following are jobs that were located on websites that assist Spanish Speaking employees:

- Sales Associates-Mega Saver, Omaha. No experience needed. Spanish or Russian Language preferred.
- Remedy Staffing indicated they have requests from many employers on face mask making to packaging.
- Production Worker-Plas Tech, Omaha. Looking for many positions.
- Van Drivers and Riders and Food Services Workers-Papillion La Vista Community Schools, Papillion, NE
- Drivers- Uber Eats, DoorDash, GrubHub, Postmates are all employers that she can chose her own hours and assignments.

(Ex. F, p. 4)

With respect to Marquez de Rodriguez's limited English proficiency and Stricklett's opinion on her ability to obtain competitive employment, Sellner opined:

This consultant is aware of Ms. Marquez de Rodriguez's English ability, but she has been able to participate in the workforce since 2000 and participate in her community. She reported she could understand English better than speaking English. This consultant disagrees with Mr. Stricklett's conclusion of precluding Ms. Marquez de Rodriguez due to her lack of English, as this has not impeded her employment thus far. When analyzing one's employability, skill acquisition is still learned despite what language one speaks. The lack of English communication hinges on placement which Ms. Marquez de Rodriguez resides in Omaha, NE, which possesses a sizeable diverse labor market, English and Non-English speaking employers and employees.

This consultant does not agree with Mr. Stricklett's concluding Ms. Marquez de Rodriguez is precluded from 100% of the complete employment. When utilizing a transferable skills analysis one cannot input sit/stand/walk changes of position and a selected range of material handling and delineate the reaching levels. So if you utilize the light duty with restrictions in manual dexterity and motor coordination, to account for some change in positions and reaching parameters which incorporates all parameters along with occasional activities this would be 56.6% loss of employability. If you input solely as Sedentary which does not account for change in positions and/or 15 lbs lifting then it would preclude all occupations as would if you would set the reaching at occasionally. As per the Skilltran 2020 update, there are approximately 417 unskilled to semiskilled sedentary jobs and 3,377 unskilled to semiskilled light jobs in the national economy which would be within Ms. Marquez de Rodriguez work skill set. With this information, this consultant does not agree Ms. Marquez de Rodriguez has a 100% loss of employability; however she has incurred a significant loss.

(Ex. F, p. 5) Sellner concluded Marquez de Rodriguez has sustained an industrial disability of fifty-six and 6/100 percent. (Ex. F, p. 5)

Counsel for Marquez de Rodriguez shared Sellner's report with Stricklett, who provided a written response dated April 12, 2021. (Ex. 10) With respect to the specific positions Sellner offered as potential jobs for Marquez de Rodriguez, Stricklett stated:

The six job openings that Ms. Sellner identified are inappropriate considerations from either a physical standpoint or due to the fact that they require a high school education and/or English skills. The Sales Associate position with Mega Saver requires a high school education. In

addition, contact with the Human Resources department indicated that this position requires strong English skills, with Spanish and Russian speaking skills also preferred. The job posting for this position lists “Spanish (preferred) and Russian (preferred),” under the “Qualifications” section. It appears that Ms. Sellner reviewed this posting and made the assumption that Ms. Marquez de Rodriguez’s Spanish skills would qualify her for the position. The Spanish skills preferred in this position, are *in addition to* English.

Contact was made with Remedy Staffing to inquire into their production worker openings. It was reported that current openings in packaging require working on a production line with constant standing and walking, and limited flexibility to alter positions every 30-60 minutes. In addition, English communication skills are needed.

When contact was made with Plas Tech regarding their Production Worker openings, it was reported that this position requires the ability to read, write and speak English. Contact with Papillion La Vista Community Schools revealed that a high school diploma or GED is preferred for the position of Food Service Worker I and Food Service Worker II. A high school diploma or GED is required for the position of Van Driver.

A Driver position with a company such as Uber Eats or DoorDash requires a valid driver’s license/vehicle and the ability to read English as they are using an app to read orders/instructions. These positions also do not offer a set schedule and hours could vary each day/week.

I feel that if Ms. Sellner had contacted employers to inquire into the specific requirements for the positions that she identified for Ms. Marquez de Rodriguez, she would have determined that the jobs she identified are not appropriate considerations for her based on the reasons identified above. The information that Ms. Sellner provided in her report does not alter the original analysis that I authored.

(Ex. 10, pp. 2–3)

Sellner responded on April 20, 2021, to Stricklett’s assessment of her employability analysis of Marquez de Rodriguez. (Ex. F, pp. 6–7) Sellner stated (sic):

As Mr. Stricklett speculated that this consultant did not have any contact with all these employers is simply inaccurate. This consultant has an ongoing discussion with these employment agencies across the Midwest, mainly to complete job development. In requires to the School District position, these were posted under the Spanish community jobs. As noted this consultant utilized specific job search engines to meet the limited

English communication that Ms. Marquez de Rodriguez reported in the records reviewed. The position identified at Mega Saver does not require a high school diploma. It does not require any experience. And they would prefer someone with Spanish and/or Russian language. This continues to be a viable option for Ms. Marquez de Rodriguez's skills and within her imposed limitations. The identified production positions do hire limited English-speaking individuals, as noted from ongoing discussions with these employment agencies. In regards to standing, this consultant provided examples such as sit/stand stations, lift tables, reachers, telescoping tools, stools/low task chairs, flexible breaks, carts, and lifting aids. These examples are not always considered reasonable accommodations, but self-modifications or many employers have these already implemented to increase awareness of employees' wellness. In regards to driving positions, selected, these are set up your hours, which means Ms. Marquez de Rodriguez can allow herself to work the number of hours she is interested in and set up breaks for a change of positions as needed. She can be in charge of setting up her schedule for her imposed restrictions. Ms. Marquez de Rodriguez can understand English and does not require to write or have intermediate English skills.

(Ex. F, p. 6)

Thus, Stricklett made direct contact with the employers whose jobs Sellner listed as potential fits for Marquez de Rodriguez. Sellner responded by taking issue with the suggestion she "did not have any contact with all these employers" because she "has ongoing discussion with these employment agencies across the Midwest, mainly to complete job development." Based on Sellner's choice of wording, she has regular contact with employment agencies across the Midwest. She also states she used certain search criteria on databases. However, Sellner does not expressly state she had direct communication with the employers identified in her report regarding the jobs she listed as potential fits for Marquez de Rodriguez. Stricklett did have such contact. Because Stricklett made direct inquiries to the employers about the jobs and Sellner did not, Stricklett's findings regarding the requirements for the positions are more credible. They are adopted.

Sellner also reasoned Marquez de Rodriguez could find work despite the permanent work restriction necessitated by the stipulated work injury because she was able to participate in the workforce from the year 2000 to the date of her injury despite her limited English proficiency. This rationale is unavailing. The evidence establishes Marquez de Rodriguez found employment in the United States before her work injury and with limited English proficiency because she was able to work physically demanding jobs that did not require extensive communicating in English. Because of the jury and work restrictions, Marquez de Rodriguez is no longer able to work these types of physically demanding jobs. Thus, the evidence shows it is more likely than not her limited English proficiency is a greater hindrance to her obtaining employment now than it was before the stipulated work injury.

Sellner listed businesses with names in Spanish and posited Marquez de Rodriguez could find a job at one of them because she speaks Spanish fluently. However, she did not identify any open positions and the businesses or discuss the job duties of such positions. It is likely that a business with Spanish-speaking employees and customers is a more likely avenue for Marquez de Rodriguez to find employment given her limited English proficiency and work restrictions.

It would be erroneous to conclude Marquez de Rodriguez can get a job at a locally owned business (such as a restaurant, grocery store, or bakery) that serves Spanish-speaking customers despite her permanent job restrictions because she is fluent in Spanish. There is an insufficient basis in the record from which to conclude such employers could accommodate her functional limitations, given the size of their workforce, revenue, and operational needs. That Sellner was unable to identify a specific employer with a job within Marquez de Rodriguez's work restrictions in support of her opinion that such an employer and position exists is evidence that the ability to accommodate Marquez de Rodriguez's work restrictions is not a given. Without more information in evidence, such a conclusion amounts to speculation, not reasonable inference.

Also on April 20, 2021, Marquez de Rodriguez participated in a second FCE, this one at Nebraska Spine and Pain Center. (Ex. H) Katie Cook, PA-C, performed the FCE. (Ex. H, p. 4) Cook rated Marquez de Rodriguez's FCE "borderline valid" at the sedentary-light level. (Ex. H, p. 6) Based on the valid FCE results, Cook found Marquez de Rodriguez needs the following work restrictions:

- Occasionally lift up to fifteen pounds;
- Occasionally carry up to fifteen pounds with one hand;
- Occasionally carry up to twenty pounds with two hands;
- Frequently sit, stand, walk, and bend;
- Occasionally squat, kneel, and reach overhead; and
- Never climb stairs or balance. (Ex. H, p. 6)

The work restrictions from this FCE are largely similar to those from the first.

At the time of hearing, Marquez de Rodriguez continued to experience symptoms relating to her back injury. She credibly described her pain as very deep. It prevents her from sitting or standing for an extended period of time. She lives with pain at a level of eight on a scale of one to ten, with ten as a highest. Injections reduce her pain level to a four on the one-to-ten scale for a few weeks. (Testimony)

Marquez de Rodriguez attempts to reduce her pain with medication and rest. She takes ibuprofen every eight hours. It helps reduce her pain, but also gives her stomach problems. She often has to sit down in an effort to alleviate her pain. Marquez de Rodriguez lays down about three times per day to help manage the pain. (Testimony)

Everyday tasks take her longer than they did before her injury. For example, doing the dishes takes her much longer than it did before, because she must take breaks due to the pain it causes her. Marquez de Rodriguez also has trouble using stairs. She has to use stairs one at a time, ascending or descending only after both feet are on a step. (Testimony)

Nonetheless Marquez de Rodriguez still performs housework. She cooks, washes dishes, cleans, and does laundry. Marquez de Rodriguez takes breaks as needed while performing these tasks. (Testimony)

CONCLUSIONS OF LAW

In 2017, the Iowa legislature amended the Iowa Workers' Compensation Act. See 2017 Iowa Acts, ch. 23. The 2017 amendments apply to cases in which the date of an alleged injury is on or after July 1, 2017. Id. at § 24(1); see also Iowa Code § 3.7(1). Because the stipulated work injury at issue in this case occurred after July 1, 2017, the Iowa Workers' Compensation Act, as amended in 2017, applies. Smidt v. JKB Restaurants, LC, File No. 5067766 (App. December 11, 2020).

1. Healing Period.

Iowa Code section 85.34(1) requires an employer to pay to an employee who has sustained a permanent disability from a work injury healing period benefits from the first day after the injury until the occurrence of one of following three alternative events:

- 1) The employee returns to work;
- 2) The employee reaches MMI; or
- 3) 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.

Marquez de Rodriguez seeks healing period benefits from April 13, 2018, through May 2, 2018, and from October 25, 2018, through May 2, 2019. On April 12, 2018, Dr. Rodriguez released Marquez de Rodriguez to return to work without restrictions. Consequently, the evidence shows Marquez de Rodriguez was medically capable of returning to employment substantially similar to her job at Menards on April 12, 2018. There is an insufficient basis from which to conclude Marquez de Rodriguez was under work restrictions again before May 28, 2020, the date on which Dr. Greene found her to have reached MMI from the stipulated work injury. Marquez de Rodriguez is not entitled to healing period benefits for the time periods in question.

2. Permanent Disability.

Iowa Code section 85.34(3) is entitled, "Permanent total disability," but does not define the term or contain a framework for determining whether an injured employee is

permanently and totally disabled due to a work injury. The Iowa Supreme Court has held the factors used to evaluate industrial disability under section 85.34(2)(v) are also used to determine whether a work injury has caused permanent total disability under section 85.34(3). See Wal-Mart Stores, Inc. v. Caselman, 657 N.W.2d 493, 495 (Iowa 2003) (quoting Guyton v. Irving Jensen Co., 373 N.W.2d 101, 103 (Iowa 1985)). The extent of an injured employee's industrial disability is based on consideration of the following factors: functional disability, age, education, qualifications, work experience, inability to engage in similar employment, earnings before and after the injury, motivation to work, personal characteristics, and the employer's inability to accommodate the injured employee's functional limitations. See Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 526 (Iowa 2012); IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 632–33 (Iowa 2000); E.N.T. Assoc. v. Collentine, 525 N.W.2d 827, 830 (Iowa 1994); Ehlinger v. State, 237 N.W.2d 784, 792 (Iowa 1976).

The Iowa Supreme Court has quoted the Commissioner with approval for the principle that under the Iowa Workers' Compensation Act, "[t]otal disability does not mean a state of absolute helplessness." Caselman, 657 N.W.2d at 501 (quoting Al-Gharib, 604 N.W.2d at 633). "Such disability occurs when the injury wholly disables the employee from performing work that the employee's experience, training, intelligence, and physical capacities would otherwise permit the employee to perform." Al-Gharib, 604 N.W.2d at 633 (citing Diederich v. Tri-City Ry., 219 Iowa 587, 593–94, 258 N.W. 899, 902 (1935)). A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982). "Simply put, the question is this: Are there jobs in the community that the employee can do for which the employee can realistically compete?" Second Injury Fund of Iowa v. Shank, 516 N.W.2d 808, 815 (Iowa 1994) (citing Guyton v. Irving Jensen Co., 373 N.W.2d 101, 103, 104 (Iowa 1985)).

A personal characteristic of Marquez de Rodriguez that must be considered is her limited English proficiency. See Lovic v. Constr. Prod., Inc., File No. 5015390 (App. 2007); see also Merivic, Inc. v. Gutierrez, 825 N.W.2d 327 (Iowa App. 2012) (table) (rejecting a collateral attack on Lovic, recognizing it as controlling agency precedent, and affirming a final agency decision that relied on it). The test for English language learning is the same as other retraining or education. Does the record show the claimant would likely be successful and the knowledge gained would more likely than not lead to gainful employment? Id. "Without such proof, use of any retraining effort, or lack thereof, in assessing a loss of earning capacity would be speculative, at best." Id.

Marquez de Rodriguez had lived in the United States for about twenty years before the date of hearing. She was fifty-one years old. She completed school in Mexico through the sixth grade. Marquez de Rodriguez has had no schooling or training since then. Given these facts, it is more likely than not Marquez de Rodriguez will not return to school and enjoy success that would allow her to find gainful employment.

English is the language most used in the United States. Marquez de Rodriguez moved to the United States over twenty years before the date of hearing. Despite living and working in a country where English is the most common language for about two decades, she has limited English proficiency. Marquez de Rodriguez has a limited understanding of spoken English. She cannot speak English well. She is unable to understand written English or write in English. Given her age, educational history, and limited English proficiency after living in the United States for an extended period of time, it is unlikely that Marquez de Rodriguez's English skills will improve to the extent necessary to increase her prospects at obtaining gainful employment.

Marquez de Rodriguez has been able to find employment in the United States despite her limited English proficiency because she has worked physically demanding jobs that do not require her to read, write, or communicate extensively in spoken English. The two FCEs Marquez de Rodriguez underwent show the stipulated work injury has necessitated permanent work restrictions that preclude her from returning to the type of jobs she held before the injury. Her injury and the resultant work restrictions have foreclosed her from returning to the types of jobs she has held since moving to the United States.

Throughout her life, Marquez de Rodriguez has been motivated to work. She dropped out of school to work. After moving to the United States, Marquez de Rodriguez has worked physically demanding jobs. After Menards placed her on a leave of absence, she sought out a doctor to lift her work restrictions so she could return to work. Marquez de Rodriguez attempted to work for a meat-packing facility after Menards ended her employment, but she was physically unable to perform her job duties. Marquez de Rodriguez wants to work, but the disability caused by her work injury at Menards prevents her from doing so.

This is not to say that Marquez de Rodriguez is helpless. She can perform housework such as cooking, washing dishes, cleaning, and doing the laundry. But she is able to take breaks as needed while performing these chores. Her work around the house does not undercut the extent of her permanent disability under Iowa law because a finding of total helpless is not required.

Each side hired a vocational expert to opine on the question. Marquez de Rodriguez hired Stricklett, who found her industrial disability was one hundred percent. Sellner concluded Marquez de Rodriguez sustained a loss of employability of fifty-six and 6/100 percent. For the reasons discussed above, Sellner's opinion lacks credibility. Because of the unpersuasive nature of Sellner's opinion and the factors discussed above, Stricklett's is more persuasive.

For these reasons, Marquez de Rodriguez has met her burden of proof on permanent total disability under the Iowa Workers' Compensation Act. The evidence establishes the stipulated work injury prevents her from performing work that her experience, training, intelligence, and physical capacities would otherwise permit her to

perform. Marquez de Rodriguez has sustained permanent total disability from the work injury.

3. Rate.


The parties stipulated Marquez de Rodriguez's gross earnings at the time of the stipulated work injury were six hundred twenty-five and 96/100 dollars. They also stipulated she was married and entitled to three exemptions. Based on the parties' stipulations, Marquez de Rodriguez's weekly workers' compensation rate is four hundred twenty-five and 34/100 dollars.

ORDER

Based on the above findings of fact and conclusions of law, it is ordered:

- 1) Marquez de Rodriguez shall take no more healing period benefits from this case.
- 2) The defendants shall pay to Marquez de Rodriguez permanent total disability benefits at the rate of four hundred twenty-five and 34/100 dollars per week, commencing May 2, 2019, and continuing during the period of permanent total disability.
- 3) The defendants shall pay accrued weekly benefits in a lump sum.
- 4) The defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.
- 5) The defendants shall be given credit for benefits previously paid to Marquez de Rodriguez in the stipulated amount of forty-eight weeks at the rate of four hundred thirty-three and 81/1000 dollars per week.
- 6) The defendants shall file subsequent reports of injury as required by Rule 876 IAC 3.1(2).

Signed and filed this 16th day of March, 2022.


BENJAMIN G. HUMPHREY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Michael Dowd (via WCES)

John Corrigan (via WCES)

Timothy Clarke (via WCES)

Thomas Shires (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.