BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SARA MORE, Claimant, vs. AVERA HOLY FAMILY, Employer, AVERA WORKERS' COMPENSATION FUND, Insurance Carrier, Defendants.	:	File No. 5065978 ARBITRATION DECISION Head Note Nos.: 1803, 2907

FILED
APR 02 2018
WORKERS' COMPENSATION

STATEMENT OF THE CASE

Sara More, claimant, filed a petition in arbitration and seeks workers' compensation benefits from defendants, Avera Holy Family, as the employer and Avera Workers' Compensation Fund, as the insurance carrier. Hearing occurred before the undersigned on February 26, 2018, in Sioux City.

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. 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.

The evidentiary record includes Claimant's Exhibits 1 through 10, and Defendants' Exhibits A through D and G. All exhibits were received without objection.

Claimant testified on her own behalf. Defendants called Janette Jensen to testify. The evidentiary record closed at the conclusion of the February 26, 2018 hearing.

ISSUES

1. The extent of claimant's entitlement to permanent disability benefits.

2. Whether costs should be assessed against either party.

FINDINGS OF FACT

Having considered all of the evidence and testimony in the record, recognizing that there may be competing or contradictory facts within this evidentiary record, I find the following facts:

Sara More is a 39-year-old woman, who sustained a stipulated low back injury at Avera Holy Family while assisting a patient on May 24, 2015. Ms. More has a high school diploma and earned degrees as a licensed practical nurse (LPN) and subsequently as a registered nurse (RN) through a local community college. At the time of her injury, Ms. More was working as a registered nurse.

Ms. More presented as an intelligent woman. She was well-spoken at trial. Her work history and motivation prior to her injury were impressive. Ms. More worked full-time, while also attending school on a full-time basis to obtain her nursing licenses.

Claimant has experience in food service as a waitress. She has worked in telemarketing, as well as at convenience stores as a clerk. Prior to becoming a nurse, Ms. More worked as a ward clerk for the employer, answering phones, checking patient monitors, answering call lights for patient rooms, doing telemetry monitoring, and entering physician orders into the employer's computer notes. While working full-time as a ward clerk, claimant obtained her schooling and ultimately her LPN licensure in 2006.

Claimant then began working for the employer as an LPN and continued her education until she obtained her RN degree and licensure in 2007. Ms. More continued on with the employer as an RN thereafter until her work injury in May 2015.

Unfortunately, Ms. More injured her low back while performing patient care in May 2015. The employer authorized appropriate medical care for claimant.

Ms. More has treated with a local family medicine provider, James C. Creech, M.D. and was later referred to a physiatrist, Thomas J. Ripperda, M.D. She has submitted to a couple of MRIs of her low back as well as an EMG. The EMG confirmed some radiculopathy or symptoms in her right leg. Claimant was also referred to and evaluated by a surgeon, Daniel G. Tynan, M.D.

However, both Dr. Tynan and Dr. Ripperda recommended against any type of surgical intervention. (Defendants' Exhibit A, page 5; Claimant's Ex. 7-b) Having identified no invasive procedures to be performed, Dr. Ripperda declared that claimant had achieved maximum medical improvement on April 11, 2016. (Claimant's Exhibit 7-b) Dr. Ripperda has opined that claimant sustained a 13 percent permanent impairment of the whole person as a result of her injuries. (Claimant's Ex. 7-a) No competing impairment rating is offered in this evidentiary record. Dr. Ripperda's 13 percent permanent impairment rating of the whole person is accepted.

Following conservative treatment, claimant has residual symptoms. She is not a surgical candidate at this time. She has permanent physical restrictions as a result of her May 24, 2015 work injury that limit her ability to lifting no more than 20 pounds on an occasional basis. Ms. More is also restricted and cannot stoop. She is restricted from prolonged bending as well. (Claimant's Ex. 8-a) These restrictions are accepted as reasonable and appropriate for claimant's condition.

Since her work injury, the employer has accommodated claimant. She was initially assigned light duty and maintained her pay level as an RN. However, after she achieved maximum medical improvement, the employer could not justify or continue to permit claimant to work light duty. She was permanently re-assigned into patient registration and her pay was adjusted accordingly.

As a nurse, Ms. More earned $24.01 per hour. (Claimant's Ex. 10-b) In her current position in patient registration, claimant only earns $13.26 per hour. Accordingly, Ms. More has experienced an approximate 45 percent decrease in her hourly rate after being reassigned from her RN position to her current patient registration position.

Defendants presented evidence suggesting that there are likely alternate employment opportunities within a reasonable distance from claimants' residence where she could obtain alternate employment as an RN but not be required to lift more than 20 pounds. (Testimony of Janette Jensen) Claimant has not sought additional training to obtain a BSN degree, or alternate positions outside of Avera Holy Family.

Claimant contends that she has a significant loss of actual earnings since the injury date and a corresponding significant loss of future earning capacity as a result of the injury, including the loss of the ability to provide patient care as an RN. Defendants contend that claimant's loss of wages is the result of her willingness to accept the lower wage in patient registration, and that other opportunities exist for claimant to utilize her RN training and license, if she pursued such opportunities.

Realistically, despite Ms. Jensen's testimony, there are not significant numbers of alternate nursing jobs available to claimant in the area near her home. It is likely that some positions are available for an RN that do not require significant patient care or lifting. However, claimant has experienced a significant reduction in her earnings and is not physically capable of returning to patient care. She has clearly experienced a loss of future earning capacity.

Defendants cite a few cases and argue that claimant's industrial disability is limited. Realistically, however, claimant has lost numerous patient care nursing opportunities and has relatively limited options left as a nurse in her area of residence. Avera attempted to find work for claimant as a registered nurse, even if only 50 percent of the time to maintain her wage rate. Avera was unable to maintain her work status as an RN and reduce her wages.

If Avera is not willing to accommodate and find work for an RN that apparently worked within their company for more than 8 years, it is not likely that another employer is going to want to accommodate claimant's restrictions and limitations as an RN. Claimant desires to remain in healthcare, but the best the employer could provide is a position that results in a 45 percent wage reduction. I find this is strong evidence of the level of claimant's loss of future earning capacity.

Considering claimant's age, the situs and severity of her physical and mental injuries, her educational background, her current language barriers, her level of motivation to return to work, her permanent functional restrictions, her permanent impairment, as well as all other factors of industrial disability outlined by the Iowa Supreme Court, I find that Ms. More has proven she sustained a 45 percent loss of future earning capacity as a result of the work injuries she sustained on May 24, 2015.

CONCLUSIONS OF LAW

The parties stipulate that claimant sustained a work-related injury on May 24, 2015 and that the injury should be compensated industrially pursuant to Iowa Code section 85.34(2)(u). (Hearing report) 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, 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).

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.

Having considered claimant's age, the situs and severity of her injuries, her permanent impairment, permanent restrictions, ability to return to gainful employment, her motivation level, educational background, employment history, language barriers, and all other industrial disability factors identified by the Iowa Supreme Court, I found that claimant sustained a 45 percent loss of future earning capacity. This entitles claimant to a 45 percent industrial disability award, or 225 weeks of permanent disability benefits. Iowa Code section 85.34(2)(u). Pursuant to the parties' stipulations,

permanent partial disability benefits shall commence on February 14, 2016. (Hearing Report)

Claimant also seeks assessment of her costs. Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40. Claimant sustained a work-related injury and recovers an award in this case. I conclude that it is appropriate to assess claimant's costs in some amount.

Ms. More requests assessment of her filing fee ($100.00) and her service fee ($13.18). Both requests are reasonable and are assessed pursuant to 876 IAC 4.33(3), (7).

Claimant also seeks the cost of her deposition transcript. Claimant's deposition was not introduced into hearing. Obtaining a copy of the transcript was part of the discovery process and was not an evidentiary issue. I conclude this expense is not appropriately taxed under the circumstances presented.

ORDER

THEREFORE, IT IS ORDERED:

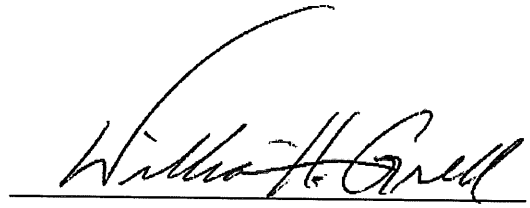
Defendants shall pay claimant two hundred twenty-five (225) weeks of permanent partial disability benefits commencing on February 14, 2016 at the stipulated rate of five hundred eighty-two and 86/100 dollars ($582.86).

All accrued weekly benefits shall be paid in lump sum with interest pursuant to Iowa Code section 85.30.

Defendants shall reimburse claimant's costs totaling one hundred thirteen and 18/100 dollars ($113.18).

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 2nd day of April, 2018.



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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.