BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

Gurpreet Sandhu,	:	File No. 5046628
Claimant,	:	APPEAL
vs.	:	DECISION
Nordstrom, Inc.,	:	
Self-Insured Employer,	:	
Defendants.	:	Head Note Nos: 1402.30; 1402.40; 1802; 1804; 2907

FILED
JAN 24 2019
WORKERS' COMPENSATION

Defendant Nordstrom, Inc., self-insured employer, appeals from an arbitration decision filed on July 11, 2017. Claimant Gurpreet Sandhu cross-appeals. The case was heard on February 3, 2017, and was considered fully submitted in front of the deputy workers' compensation commissioner on March 17, 2017.

In the arbitration decision, the deputy commissioner found claimant sustained a permanent work-related injury to her bilateral shoulders. The deputy commissioner also determined the medical treatment for claimant's shoulders, including surgery, was related to the work injury. However, the deputy commissioner concluded the extent of claimant's permanent disability was not ripe for determination because claimant had not yet reached maximum medical improvement for her work-related mental health condition. As a result, the deputy commissioner awarded claimant a running award of healing period benefits.

On appeal, defendant argues it was improper for the deputy commissioner to issue a running award of healing period benefits when claimant did not request a running award of healing period benefits and the parties stipulated claimant's healing period had ended.

In response, claimant disputes defendant's position that the parties stipulated claimant's healing period had ended. However, on cross-appeal, claimant asserts the deputy commissioner "unnecessarily prolong[ed] the litigation process" by concluding the extent of claimant's permanent disability was not ripe for determination. Claimant argues she is permanently and totally disabled and requests the undersigned to reverse the deputy commissioner's award of running healing period benefits and make findings and conclusions regarding the extent of her permanent disability.

In its reply brief to claimant's cross-appeal, defendant argues the case should be remanded to the deputy commissioner to determine the extent of claimant's permanent

disability. Alternatively, defendant argues claimant's current condition is not causally related to her work injury and that claimant is not permanently and totally disabled.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a 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 sections 17A.15 and 86.24, the proposed arbitration decision filed on July 11, 2017, is affirmed in part, reversed in part, and modified in part.

I affirm and adopt the deputy commissioner's finding that claimant's bilateral shoulder condition and resulting treatment, including surgery, are related to the work injury. I also affirm and adopt the deputy commissioner's finding that claimant's work-related bilateral shoulder condition is permanent. The deputy commissioner found Drs. Kennedy, Ott, Sassman, and Nepola to be more convincing than Dr. Broghammer, and I affirm that finding. I affirm the deputy commissioner's findings, analysis, and conclusions regarding that issue in their entirety.

However, I respectfully disagree with the deputy commissioner's determination that the extent of claimant's permanent disability was not ripe for adjudication. While the parties disagree on appeal as to whether the deputy commissioner improperly ignored a stipulation without providing proper notice to the parties, both parties agree they wanted and expected the deputy commissioner to decide the extent of claimant's permanent disability. (See Defendant's Appeal Brief, pp. 1-2; Claimant's Appeal Brief, p. 12; see also Hearing Report, p. 1, stipulating the injury was a cause of permanent disability and asserting alternative commencement dates for permanency benefits; Hearing Transcript, pp. 5-7, affirming the stipulation that the injury was a cause of permanent disability and clarifying the parties' alternative commencement dates.)

On appeal, both parties continue to assert that the extent of claimant's permanent disability is ready to be decided. (See Defendant's Appeal Brief, p. 5; Claimant's Appeal Brief, pp. 32-33) Thus, I respectfully disagree with the deputy commissioner and I find the extent of claimant's permanent disability was and continues to be ripe for determination. The deputy commissioner's determination that claimant is entitled to a running award of healing period benefits is therefore reversed, and the proposed arbitration decision filed on July 11, 2017 is modified, as follows, to address the extent of claimant's permanent disability:

FINDINGS OF FACT

I adopt the deputy commissioner's fact findings from pages 2 through 15 in their entirety.

The permanent impairment ratings for claimant's bilateral shoulder condition are moderate, ranging from 15 to 20 percent body as a whole (see Ex. 2, p. 61; Ex. 10, p. 11; Ex. 15, p. 10), but the more significant factor is the permanent restrictions assigned by claimant's various treating and evaluating physicians.

After his evaluation of claimant on September 17, 2013, Dr. Nepola commented that claimant "most likely" would not be able to work with her arms extended out from her body or overhead. (Ex. 10, p. 5) He subsequently assigned a formal permanent restriction of "no repetitive bi-lateral overhead reaching." (Ex. 10, p. 12)

Dr. Sassman, claimant's IME physician, recommended claimant "limit lifting, pushing, pulling and carrying 10 pounds rarely from floor to waist and waist to shoulder height, keeping her elbows at her sides." (Ex. 15, p. 11) Dr. Sassman also recommended avoiding all above-shoulder lifting, and limiting other upper extremity activities, including gripping and grasping, to below shoulder height. (Ex. 15, p. 11)

After claimant's evaluations with Dr. Nepola and Dr. Sassman, claimant participated in a valid functional capacity evaluation (FCE) that placed her in the "upper end of the sedentary to the lower end of the light work category." (Ex. 16, pp. 4-5) More specifically, the therapist recommended the following: "avoid performing floor-to-waist lifting, pushing/pulling, single UE carry and front carry on a constant basis, waist-to-shoulder lifting to no more than an occasional basis"; "avoid performing work activities which require bilateral upper extremity prolonged use and repetitive reaching at shoulder level and above"; and "limit performing work activities requiring prolonged use and repetitive reaching at chest height and below to an occasional basis." (Ex. 16, p. 5)

Dr. Sassman re-affirmed her restrictions and provided the following clarification on April 7, 2016, after claimant's valid FCE:

> [Claimant] should limit lifting, pushing, pulling and carrying to 10 pounds rarely while extending her arms from her body. . . . Due to her injury and symptoms, she should limit this type of activity to a rare basis. This would include reaching in front of her body, also limited to a rare to occasional basis.

(Ex. 15A, p. 2)

Dr. Ott also agreed with the permanent physical limitations as set out in claimant's valid FCE. (Ex. 4, p. 72)

While I adopt Dr. Nepola's restriction of no repetitive overhead reaching, I do not agree with Dr. Nepola that this is claimant's only restriction. Instead, I find the restrictions of Dr. Sassman and Dr. Ott, both of whom had the opportunity to review claimant's valid FCE, to be the most convincing and consistent with claimant's physical limitations due to her bilateral shoulder condition.

Defendant argues Dr. Sassman's restrictions are not credible because her 10-pound lifting restriction is not consistent with claimant's FCE, which indicates she is capable of lifting more. Claimant's FCE, however, only indicates the ability to occasionally or rarely lift, push, pull, or carry more than 10 pounds. (Ex. 16, p. 6) Further, both claimant and her husband testified that claimant commonly drops dishes as light as coffee cups. (Tr., pp. 41, 97) Thus, I do not find defendant's argument persuasive.

The inability to perform work that requires repetitive reaching at shoulder level and above, as set out in the FCE, precludes claimant from returning to her job with defendant, which required frequent reaching above shoulder level to hang clothes. (Tr., pp. 20-21) In fact, defendant terminated claimant's employment after Dr. Nepola opined claimant was permanently restricted from repetitive overhead reaching. (Tr., p. 51)

Claimant's full-time employment prior to her work with defendant consisted primarily of assembly and packaging work. (Tr., pp. 17-19) The assembly jobs were fast-paced, repetitive work, and the packaging job involved packing movies, games, and CDs into boxes and placing the boxes on a skid. (Tr. pp. 17-19) Claimant testified she could not return to these positions due to their repetitive, face-paced nature. (Tr., pp. 61-62) This testimony is consistent both with claimant's FCE, which indicated claimant should limit prolonged bilateral upper extremity use and repetitive reaching at chest height and below to an occasional basis, and Dr. Sassman's restrictions, which limited claimant's reaching to a rare to occasional basis. (Ex. 16, p. 5; Ex. 15A, p. 2) Thus, I find claimant's permanent restrictions preclude her from returning to many, if not all, of her prior full-time jobs and similar work for which she is suited.

Claimant's unsuccessful job search after being terminated by defendant also reflects the significance of her permanent work restrictions. Claimant worked with vocational counselors hired by defendant, utilized vocational services provided by the state of Iowa, and took a computer course through IowaWorks. (Tr., pp. 52, 56-57, 60) Through this process, claimant applied for numerous jobs; in fact, her job search log is several pages long. (Tr., p. 60; Ex. 24) From her applications, however, claimant was only selected for four interviews and was not offered any jobs. (Tr., pp. 54-55) Claimant eventually applied for and was awarded Social Security disability benefits in March 2016. (Tr., p. 57; Ex. 25)

In April 2016, Lana Sellner, M.S., the vocational expert hired by defendant, issued a final report to defendant after reviewing the clarification to Dr. Sassman's restrictions. She stated, "[I]f considering Dr. Sassman's restrictions, [claimant] is capable of working in small production/assembly work that would be at desk level, greeter, hostess or selective cashiering." (Ex. A, p. 55) As noted by claimants' vocational expert, Barbara Laughlin, M.A., it is unclear how claimant could return to small production/assembly work, even at desk level, given claimant's FCE that limited prolonged and upper extremity use and repetitive reaching to an occasional basis and Dr. Sassman's restrictions that limited claimant's reaching to a rare to occasional basis. (Ex. 19A, p. 7; see Ex. 16, p. 5; Ex. 15A, p. 2) Regardless, Ms. Sellner's conclusion

that claimant is only capable of working in a handful of capacities reflects the fact that claimant's permanent work restrictions have had a severe negative impact on her earning capacity. Further, claimant's job search included several greeting and assembly jobs, but she was not offered any of these positions. (See Ex. 24, pp. 3-9)

Ms. Laughlin opined claimant "will find few, if any, jobs she can perform given the restrictions of Dr. Sassman, and the reaching restrictions of Dr. Nepola." (Ex. 19A, p. 10) I agree. Claimant, who obtained a college education in India before moving to the United States, was motivated to find work, as evidenced by her willingness to work with defendant-retained vocational counselors and her extensive list of job applications. However, her permanent work restrictions proved to be a substantial barrier to re-entering the workforce. Ultimately, I find that while there may be some limited jobs claimant could perform, such as part-time greeting work, for example, her bilateral shoulder injury and resulting work restrictions essentially preclude her from returning to work that her experience, training, education, and physical capabilities would otherwise permit her to perform. Therefore, I find claimant is permanently and totally disabled due to her October 3, 2011, bilateral shoulder injury.

Claimant also alleged a mental injury for which defendants accepted liability and agreed to provide treatment. (Tr., pp. 10-11) However, having found claimant to be permanently and totally disabled due to her bilateral shoulder injury alone, the issue of how much, if at all, claimant's mental injury contributes to her permanent disability is moot.

CONCLUSIONS OF LAW

The parties stipulated claimant's disability is industrial in nature. Industrial disability was defined in Diederich v. Tri-City R. 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, 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).

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co.,

288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (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, however. 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).

As discussed above, I found claimant's work restrictions precluded her from returning to her job with defendant and much, if not all, of her earlier full-time employment. Notwithstanding being precluded from performing the work for which she is fitted, claimant remained motivated to return to work. Despite her cooperation with vocational counselors, numerous job applications, and education, however, claimant was unable to find employment and was eventually awarded Social Security disability benefits. For these reasons, I found claimant to be permanently and totally disabled by her October 3, 2011 work injury. Having considered all of the appropriate industrial disability factors, I therefore conclude claimant is permanently and totally disabled pursuant to Iowa Code section 85.34(3)(a).

Permanent total disability compensation is payable during the period of the employee's disability. Iowa Code section 85.34(3)(a). As such, permanent total disability benefits generally commence on the date of injury. The parties asserted competing commencement dates in the event something less than permanent total disability was awarded. However, having concluded claimant is entitled to permanent total disability benefits, the parties' asserted commencement dates are not applicable. I therefore conclude claimant's permanent total disability benefits shall commence on October 3, 2011, and any weekly benefits paid to claimant pursuant to Iowa Code section 85.34 will be credited against this award.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of July 11, 2017, is affirmed in part, reversed in part, and modified in part to address the extent of claimant's permanent disability.

Defendant shall pay claimant permanent total disability benefits at the stipulated weekly rate of two hundred sixty-eight and 54/100 ($268.54) dollars commencing on October 3, 2011.

Defendant shall receive credit for all benefits previously paid.

Defendant shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable 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. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Pursuant to rule 876 IAC 4.33, defendant shall pay claimant's costs of the arbitration proceeding in the amount of $832.20, 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 24th day of January, 2019.

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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