BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RACHAEL GOUGH, Claimant, vs. JACK LINKS, Employer, and THE HARTFORD, Insurance Carrier, Defendants.	:	File No. 5063679 ARBITRATION DECISION Head Note Nos.: 1803; 3003

FILED
MAY 23 2018
WORKERS' COMPENSATION

STATEMENT OF THE CASE

Claimant, Rachael Gough, filed a petition in arbitration seeking workers' compensation benefits from Jack Links, employer, and The Hartford, insurer, both as defendants. This matter was heard on April 10, 2018 in Council Bluffs, Iowa.

The record in this case consists of Joint Exhibits 1 through 5, Claimant's Exhibits 1 through 3, Defendants' Exhibits A through E, and the testimony of claimant.

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

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

2. Rate.

FINDINGS OF FACT

Claimant was 26 years old at the time of hearing. Claimant graduated from high school. Claimant has worked in a Subway sandwich shop. (Exhibit D, page 18)

Claimant began at Jack Links in May 2012. (Ex. D, p. 18) Claimant testified that while at Jack Links she drove a pallet jack and a stand-up fork lift. Claimant's job duties included, but were not limited to, taking pallets off the receiving dock, loading trucks, and picking orders. Claimant said picking orders would require stacking boxes, weighing between 5-35 pounds, on pallets to make up orders. Claimant worked a 12-hour shift, three days a week. (Ex. D, pp. 19-20)

Claimant testified she was riding a pallet jack on December 6, 2014. She says it was her understanding a pallet of cardboard boxes fell on her from approximately 20 feet. Claimant said she recalls waking up in the emergency room at the hospital. Claimant said she had no idea how long she was unconscious.

On December 6, 2014, claimant was evaluated at Mercy Hospital in Council Bluffs. Claimant lost consciousness at work after a pallet fell and hit her on the head. Claimant was assessed as having a concussion with loss of consciousness, head laceration, and a closed fracture of the C2 vertebrae. Claimant was placed in the ICU. (Joint Exhibit 1, pp. 1-10)

Claimant testified she was in the hospital for approximately three days. She said that she had severe back pain, headaches, and a laceration on the top of her head.

On December 7, 2014, claimant had a hospital consultation with Huy Trinh, M.D., an orthopaedic surgeon. Claimant had a CT scan. Claimant had a fracture at the T12 level. Claimant was assessed as having a T12 fracture, a concussion, and a C2 fracture. Claimant was put in a back brace and told to wear the back brace at all times. (Joint Ex. 2)

Claimant was discharged from Mercy on December 9, 2014. Claimant was assessed as having a C2 fracture, a T12 compression fracture, a concussion, and a laceration of the head. (Jt. Ex. 1, pp. 69-70)

Claimant testified that when she was discharged on December 9, 2014, she was told to wear her back brace at all times. Claimant said she was off work until approximately March 16, 2015. She said she wore her back brace until that time.

Claimant saw Dr. Trinh in follow up in January through March 2015. (Jt. Ex. 3, pp. 79-82) On March 16, 2015, Dr. Trinh found claimant at maximum medical improvement (MMI). Claimant was returned to work with normal activity. (Jt. Ex. 3, p. 82)

Claimant testified that when she returned to work at Jack Links she was always fearful of an accident happening. Claimant said she had anxiety at and away from work. Claimant said she had difficulty sleeping as a result of anxiety.

On April 24, 2015, Dr. Trinh found that claimant had a 15 percent permanent impairment to the body as a whole for the T12 compression fracture. (Jt. Ex. 3, p.83)

On August 6, 2015, claimant returned to Dr. Trinh. Claimant had back pain. Claimant was moving 30-pound boxes on a repetitive basis at work. Claimant was put on light duty and referred to physical therapy. (Jt. Ex. 3, p. 84)

Claimant returned to Dr. Trinh on October 1, 2015. Claimant had reduced pain. Claimant's restrictions were increased to lifting up to 20 pounds regularly, and 40 pounds occasionally. (Jt. Ex. 3, p. 87)

Claimant was returned to work at full duty on November 2, 2015. (Jt. Ex. 3, p. 88)

Claimant returned to Dr. Trinh on November 30, 2015 indicating her back pain increased when she was returned to regular duty. A functional capacity evaluation (FCE) was recommended. (Jt. Ex. 3, p. 89)

On December 21, 2015, claimant underwent an FCE. Claimant gave valid effort in the FCE. Claimant was limited to lifting 15 pounds frequently and 30-35 pounds occasionally. Claimant was found to be able to work in the light to medium work category. (Jt. Ex. 4)

Claimant returned to Dr. Trinh on January 7, 2016. Dr. Trinh adapted the restrictions found in the FCE as permanent restrictions.

Claimant saw Dr. Trinh on February 9, 2017 with complaints of persisting mid-back pain. Claimant was told to use home exercises. Surgery was also discussed as a treatment modality. (Jt. Ex. 2, p. 91) Claimant testified Dr. Trinh told her that she was either going to have to get used to the pain or have fusion surgery to deal with the pain.

On April 11, 2017, claimant was evaluated by Liane Donovan, M.D. Claimant had mid-back pain. Claimant was told to use topical lidocaine to treat back pain. (Jt. Ex. 5)

On January 26, 2018, claimant resigned from her job at Jack Links. (Ex. A) Claimant testified at hearing that she told her supervisors that she left Jack Links because she felt unsafe at work. Claimant said she left Jack Links due to anxiety and to back pain.

In February 2018, claimant began employment at McKnight Family Dental as a dental assistant.

When claimant left Jack Links she earned $15.40 per hour and worked 36 hours per week. Claimant said she earns $15.00 per hour as a dental assistant and works 40 hours per week. Claimant said she takes over-the-counter medication for pain.

Claimant said she continues to have headaches. Claimant said she has back pain. Claimant has said she also has anxiety, which she has never been treated for. Claimant said she also has occasional neck pain.

CONCLUSIONS OF LAW

The first issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

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.

Claimant was 26 years old at the time of hearing. She graduated from high school. Claimant has worked at a Subway sandwich shop. Claimant operated a pallet jack and a stand-up fork lift while working at Jack Links.

Claimant has a 15 percent permanent impairment rating to the body as a whole due to a T12 compression fracture. (Jt. Ex. 3, p. 83) She has not had surgery. Claimant has ongoing pain with her back. Claimant was told by Dr. Trinh to either get used to her pain or to undergo a fusion surgery. Claimant has restrictions limiting her to lifting up to 15 pounds frequently and 30-35 pounds occasionally. (Jt. Ex. 4) Claimant's unrebutted testimony is that she cannot return to work at her job at Subway given her lifting limitations.

Claimant voluntarily left Jack Links. At Jack Links, claimant earned $15.40 per hour in a 36 hour work week. Claimant earns $15.00 per hour as a dental assistant and works 40 hours per week.

Claimant had no permanent restrictions or permanent impairment prior to her injury. Claimant is only 26 years old. She has had ongoing back pain for over three years. She has lifting restrictions that allow her only to work in light to medium work level jobs. Claimant now works four hours more per week than she did at Jack Links, but she earns less per hour than she did at Jack Links. When all relevant factors are considered, it is found claimant has a 30 percent industrial disability or loss of earning capacity.

The next issue to be determined is rate.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings that fairly represent the employee's customary earnings, however. Section 85.36(6).

Claimant and defendants have both submitted wage and rate calculations, found at Claimant's Exhibit 2 and Defendants' Exhibit B. Claimant contends that she has an average weekly wage of $718.41 per week. Defendants contend claimant's average weekly wage is actually $662.13 per week.

Neither party has submitted any payroll records from Jack Links. Claimant appears to contend, in her rate calculation, that the week's ending November 22, 2014, and October 25, 2014, should be excluded from her rate calculation as they do not accurately reflect the hours claimant worked per week. Claimant's unrebutted testimony is that she worked 35 hours per week, and 70 hours biweekly. Given this record, it is found that the weeks ending October 25, 2014 and November 22, 2014 (designated on Defendants' Table as week's 9-10 and 13-14 at Exhibit B) are short weeks and should be excluded from the rate calculation. Based on this finding, it is found that claimant has an average weekly wage of $718.41 per week. Claimant was single with one exemption. Claimant's rate is $440.96 per week.

ORDER

THEREFORE, IT IS ORDERED:

That defendants shall pay claimant one hundred fifty (150) weeks of permanent partial disability benefits at the rate of four hundred forty and 96/100 dollars ($440.96) per week commencing on March 17, 2015.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on the unpaid weekly benefits as ordered above and as set forth in Iowa Code section 85.30.

That defendants shall receive credit for benefits previously paid.

That defendants shall pay costs.

That defendants shall file subsequent reports of injury as required by this agency under Rule 876 IAC 3.1(2).

Signed and filed this 23rd day of May, 2018.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.