BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RAFAELA L. ACEBEDO, Claimant, vs. HY-VEE, INC., HY-VEE DISTRIBUTION Employer, and EMC PROPERTY, Insurance Carrier, Defendants.	File No. 5066051 A P P E A L D E C I S I O N Head Notes: 1108.50; 1802; 2501; 2502 3002; 5-9999

Claimant Rafaela Acebedo appeals from an arbitration decision filed on January 3, 2019. Defendants Hy-Vee Inc., Hy-Vee Distribution, employer, and its insurer, EMC Property, respond to the appeal. This case was heard on July 19, 2018, and it was considered fully submitted in front of the deputy workers' compensation commissioner on September 4, 2018.

In the arbitration decision, the deputy commissioner found claimant's low back condition was more likely than not caused from her altered gait due to her stipulated knee injury. The deputy commissioner found claimant was entitled to receive temporary benefits from June 20, 2017 through October 17, 2017. The deputy commissioner found claimant continued to be in a healing period at the time of the hearing but was not entitled to any additional temporary benefits because claimant voluntarily quit her job with defendant-employer. In making this finding, the deputy commissioner found the testimony of Saira Flores, one of defendant-employer's former human resources employees, to be more reliable than claimant. The deputy commissioner adopted defendants' weekly benefit rate calculation of $449.70. The deputy commissioner ordered defendants to authorize appropriate medical care for claimant's back injury. The deputy commissioner found claimant failed to carry her burden of proof regarding requested medical expenses, reimbursement for her independent medical examination (IME), and penalty benefits.

On appeal, claimant asserts she is entitled to a running award of temporary benefits from May 11, 2016.

Defendants assert on appeal that the arbitration decision should be affirmed in its entirety.

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.5 and 86.24, those portions of the proposed arbitration decision filed on January 3, 2019, that relate to the issues properly raised on intra-agency appeal are affirmed in their entirety with the additional analysis set forth below.

I affirm the deputy commissioner's finding that claimant's low back condition was more likely than not caused from her altered gait due to her stipulated knee injury. I affirm the deputy commissioner's finding that claimant is entitled to receive temporary benefits from June 20, 2017, through October 17, 2017. I affirm the deputy commissioner's weekly benefit rate calculation of $449.70. I affirm the deputy commissioner's finding that defendants must authorize appropriate medical care for claimant's back injury. I affirm the deputy commissioner's finding that claimant failed to carry her burden of proof regarding requested medical expenses, reimbursement for her IME, and penalty benefits. I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to those issues.

With the additional analysis set forth below, I also affirm the deputy commissioner's finding that claimant is not entitled to receive additional temporary benefits beyond the period during which she was off work for surgery (June 20, 2017 through October 17, 2017).

Iowa Code section 85.33(3) provides in pertinent part:

> If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employee refuses to accept the suitable work with the same employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal.

Iowa Code section 85.33(3)

The Iowa Supreme Court held there is a two-part test to determine eligibility under section 85.33(3): "(1) whether the employee was offered suitable work, (2) which the employee refused. If so, benefits cannot be awarded, as provided in section 85.33(3)." Schutjer v. Algona Manor Care Center, 780 N.W.2d 549, 559 (Iowa 2010). "If the employer fails to offer suitable work, the employee will not be disqualified from receiving benefits regardless of the employee's motive for refusing the unsuitable work." Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 519 (Iowa 2012).

In this case, I affirm the deputy commissioner's finding that defendant-employer offered suitable work to claimant. The question then becomes whether claimant refused that offer of suitable work when she left work without having first secured FMLA leave approval.

An employer's acceptance of an employee's voluntary quit from suitable employment is a rejection of suitable work on that date and any future date. Schutjer v. Algona Manor Care Center, 780 N.W.2d 549, 559 (Iowa 2010). However, an injured worker will not be considered to have refused suitable work where the employee was unable to work as a result of a disciplinary action such as a suspension or termination based upon misconduct or a violation of a work rule unless the conduct is "serious and the type of conduct that would cause any employer to terminate any employee" and "have a serious adverse impact on the employer." Reynolds v. Hy-Vee, Inc., File No. 5046203 (App. Oct. 31, 2017). The burden of proof to show a refusal of suitable work is on the employer. Koehler v. American Color Graphics, File No. 1248489, (App. February 25, 2005).

In this case, the deputy commissioner determined claimant's decision to leave and not return with the hope that her FMLA leave would be approved was a "voluntary quit" as described in Schutjer v. Algona Manor Care Center, 780 N.W.2d 549, 559 (Iowa 2010). In Schutjer, the claimant stormed out of the nursing facility in which she was working. Id. at 448. In the instant case, claimant's termination resulted from her failure to show up for work. (Exhibit A, p. 14) In other words, Schutjer involved an overt act of walking off the job, while this case involves a more passive act of not showing up.

Claimant argues that unlike Schutjer she lacked the intent necessary for a voluntary quit given that she was not aware of defendant-employer's efforts to contact her and she intended to return to her job after she was finished caring for her mother. I disagree. While claimant may not have taken a volitional action such as storming off her jobsite or yelling "I quit" to her supervisor, her actions were still deliberate.

Claimant knew when she left for Mexico to care for her mother that her FMLA had not yet been approved. (Hearing Transcript, p. 34)

I also affirm the deputy commissioner's finding regarding the credibility of Saira Flores' testimony regarding approval of claimant's FMLA leave. While I performed a de novo review, I give considerable deference to findings of fact which are impacted by the credibility findings, expressly or impliedly made, by the deputy commissioner who presided at the arbitration hearing. I find the deputy commissioner correctly assessed the credibility of claimant and Ms. Flores. I find nothing in the record in this matter which would cause me to reverse the deputy commissioner's finding that Ms. Flores' testimony was more credible than claimant's with respect to their discussions about claimant's FMLA approval. As a result, I find claimant was not told that her FMLA would be approved or that she should leave before it was approved.

In sum, claimant left her job with an understanding that her FMLA had not yet been approved and might not be approved. The consequence of not obtaining FMLA

approval was a "no-call/no-show," which could result in termination as a result of job abandonment. (Tr., p. 95) Not only was this defendant-employer's policy, but defendant-employer called claimant and eventually sent her a letter on May 16, 2016, to warn her of possible termination. (Tr., pp. 90-92; Ex. A, p. 6)

I recognize claimant did not receive those phone calls or letters given the fact that she was out of the country. I also recognize claimant planned to return to work after her mother no longer needed her assistance. In this sense, her job abandonment may have been unintentional. However, it was claimant's voluntary and deliberate decision to leave the country before her FMLA was approved that led to her "no-call/no-shows" and ultimate termination. Thus, while the facts in this case may not rise to the blatant voluntary quit and refusal of suitable work as in Schutjer, I find claimant's decision to abandon her job before approval of her FMLA was an implied, yet intentional, refusal of suitable work.

I also agree with the deputy commissioner that claimant's failure to return to work and her status as a "no call/no show" for three consecutive days would lead any employer to reasonably terminate her employment. Thus, regardless of whether claimant's separation from defendant-employer's employment is couched as a voluntary quit or termination, claimant's decision to abandon her job prior to FMLA approval is still a refusal of suitable work that results in forfeiture of temporary benefits.

With this additional analysis, I affirm the deputy commissioner's finding that claimant is entitled to temporary benefits only for the period during which she was restricted from returning to work from June 20, 2017 through October 17, 2017.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on January 3, 2019, is affirmed in its entirety with the additional analysis set forth above.

Defendants shall pay claimant temporary total disability benefits for the period of June 20, 2017 to October 17, 2017, less a credit for temporary benefits paid to claimant prior to the hearing.

Claimant remains in a healing period having not returned to work after her total knee replacement, not being medically capable of returning to similar work in which she was engaged at the time of the work injury, and not attaining MMI. However, her eligibility for healing period benefits stopped on October 17, 2017. She may become eligible for additional healing period in the future if she undergoes further treatment and is removed from all employment for an additional period of healing.

All weekly benefits shall be paid at the weekly rate of four hundred forty-nine and 70/100 dollars ($449.70) per week.

Defendants shall pay accrued weekly benefits, if any, 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, if any, 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).

Defendants shall provide alternate medical care and authorize an appropriate medical provider for claimant's back injury, including but not limited to, the care recommended by Dr. Sassman of a lumbar MRI and evaluation and possible treatment with a physician specializing in pain management.

Pursuant to rule 876 IAC 4.33, defendants shall pay the costs of the arbitration proceeding in the amount of one thousand five hundred twenty-eight and 50/100 dollars ($1,528.50), and claimant shall pay 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 February, 2020.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Mary Hamilton Via WCES

Dennis Riekenberg Via WCES