BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MAURA MERINO, Claimant, vs. EMCO ENTERPRISES, LLC d/b/a ANDERSEN STORM DOORS, Employer, and OLD REPUBLIC INSURANCE CO., Insurance Carrier, Defendants.	File No. 5064022 A P P E A L D E C I S I O N Head Notes: 1402.30; 1802; 1803; 2501; 2701; 2907; 5-9999

Defendants EMCO Enterprises LLC d/b/a Anderson Storm Doors, employer, and its insurer, Old Republic Insurance Co., appeal from an arbitration decision filed on December 24, 2019. The case was heard on August 21, 2019, and it was considered fully submitted in front of the deputy worker's compensation commissioner on October 11, 2019.

In the arbitration decision, the deputy commissioner found that the work injury of August 19, 2016, exacerbated and/or aggravated claimant's pre-existing lumbar spondylosis. The deputy commissioner found claimant sustained 40 percent industrial disability as a result of the work injury, which it was found manifested on August 19, 2016. The commencement date for permanent partial disability benefits was found to be August 22, 2016. The deputy commissioner found claimant is entitled to receive healing period benefits from September 30, 2016, through April 28, 2017, along with the requested past medical expenses itemized in Exhibit 6. The deputy commissioner ordered defendants to pay claimant's costs of the arbitration proceeding in the amount of $100.00.

Defendants assert on appeal that the deputy commissioner erred in all of the findings. Defendants assert claimant did not sustain a causally related work injury but instead defendants assert claimant's current symptomatology relates solely to her pre-

existing degenerative spondylosis, thus entitling defendants to a decision in their favor with an award of no benefits to claimant.

Defendants specifically take issue with the deputy commissioner's reliance on the causation opinion of Sunil Bansal, M.D., the independent medical examiner retained by claimant, over that of Troy Munson, M.D., a neurosurgeon claimant saw during the course of her treatment in 2016 and then again in 2019.

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, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on December 24, 2019, which relate to the issues properly raised on intra-agency appeal.

I find the deputy commissioner provided a well-reasoned analysis of all the issues raised in the arbitration proceeding. I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to those issues with the following additional analysis:

Defendants authorized no care for claimant and Dr. Munson was a medical provider with whom claimant sought treatment on her own. Dr. Munson examined claimant on two occasions: September 29, 2016 (Joint Exhibit 4, p. 85), and March 7, 2019 (JE 4, p. 96). A physician's assistant in Dr. Munson's office examined claimant on January 15, 2019. (JE4, pp. 89-92) Dr. Bansal conducted one examination of claimant on September 5, 2018. The deputy commissioner noted Dr. Munson's training as a neurosurgeon was superior to that of Dr. Bansal's training as an occupational medicine doctor. (Arbitration Decision, p.15)

During Dr. Munson's first evaluation of claimant on September 26, 2016, Dr. Munson acknowledged that if claimant continued to work a manual labor job her symptoms may worsen. (JE 4, p. 87) Dr. Munson further wrote that "[h]er degenerative condition may in fact progress anyway simply with aging, but may in fact slow down if she stops working or changes her line of work." (Id.) Later, in his opinion letter of July 1, 2019, Dr. Munson wrote that he was "unable to determine by any reasonable degree of certainty if patient Maura Merino's...medical condition is work related." (JE 4, p. 99)

As did the deputy commissioner, I find Dr. Munson's opinion did not rule out that claimant's ongoing symptoms are the result of an aggravation of the pre-existing condition but rather he could not state to a reasonable degree of certainty whether there was a causal relationship between the work injury and claimant's current symptomatology. Defendants argue that reliance on an opinion that was not stated is

improper but Dr. Munson's opinion is only one of a number of pieces of evidence taken into consideration.

Defendants also assert claimant was not a credible witness because of her inconsistency about her English proficiency and the origin of her back complaints. However, the record does not does support a finding that claimant was not credible. Claimant does have some English language skills. She was able to answer some questions without the need for an interpreter, however she is not proficient. For example, on her voluntary termination form, her daughter filled out the explanation section. (Ex. D, p. 1) I affirm the deputy commissioner's finding that claimant would not be able to perform any job that required reading, writing, and speaking in English.

While I performed a de novo review, I give considerable deference to findings of fact that are impacted by the credibility findings, expressly or impliedly made, by the deputy commissioner who presided at the arbitration hearing. There was no finding that claimant was not credible.

I affirm the deputy commissioner's finding that claimant sustained a work-related injury on August 19, 2016.

Defendants argue that even if claimant were able to establish a causal connection between the work injury and her current symptomatology, a rating of 40 percent industrial disability is excessive. Claimant was 51 years old at the time of the hearing and can communicate in English but used a translator. Dr. Bansal assigned eight percent impairment of the whole person due to radicular complaints, guarding, significant ongoing pain and loss of range of motion. (Ex. 1, p. 14)

Dr. Bansal recommended permanent work restrictions of no lifting over 20 pounds occasionally and no lifting over 10 pounds frequently. He also recommended no frequent bending or twisting and no prolonged standing or walking greater than 60 minutes at a time. (Id.) Dr. Munson recommended no restrictions, but he did agree claimant was a candidate for surgery because her conservative treatment had failed. (JE 4, pp. 96-97)

Claimant had strong motivation to return to work and to continue working for over a year at full duty until she could no longer perform the job anymore because of the pain. She voluntarily terminated her employment with defendant-employer on June 29, 2018. (Ex. B, p. 2; Ex. C, pp 4-5; Ex. D, p.1; Hearing Transcript, p. 36) Claimant and her husband then started a restaurant serving Hispanic food. Claimant testified she is the manager of this restaurant and serves as a hostess, server, cashier, and she orders supplies. She does not cook, carry trays, or wash the dishes. (Tr. pp. 37-39, pp. 51-52) Claimant currently pays herself $800.00 every two weeks. (Tr. p. 40) Her average weekly wage for the work injury agreed to by the parties was $722.83. Defendants

inaccurately claimed that claimant's wage reduction was only 16% using her worker's compensation rate of $476.20 instead of her average weekly wage.

Defendants provided surveillance footage of claimant where she is seen carrying produce and groceries, sometimes up to two or three sacks on each arm. (Exs. E and F) She is seen pushing a cart with a plastic tub, a box and a metal bowl. (Ex. F) She testified that various items she lifts include a box of tomatoes or five pounds of meat. (Tr. p. 43) The surveillance did not show the claimant lifting heavy objects.

Based on claimant's English-language deficiencies, her lack of education, her history of primarily manual labor work, her reduction in earnings, her motivation to return to work, and considering all other industrial disability factors, I affirm the deputy commissioner's finding that claimant sustained 40 percent industrial disability as a result of the work injury.

I further affirm the deputy commissioner's commencement date of permanent benefits as well as claimant's entitlement to healing period benefits.

Defendants take issue with the commencement date for permanent partial disability benefits. The deputy commissioner determined the appropriate commencement date for permanency benefits is August 22, 2016, as that is the date claimant's personal physician returned claimant to work. Claimant stopped working as of September 30, 2016, and the parties stipulated claimant was off work between September 30, 2016, through April 28, 2017.

Claimant was off of work because of an injury that occurred on August 19, 2016, and returned to work on August 22, 2016. She continued to work until September 30, 2016, and then was off work again through April 28, 2017.

Entitlement to healing period benefits ends when "the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until 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, *whichever occurs first.*" Iowa Code section 85.34(1)-(2) (2020) (emphasis added) Thus, permanent benefits, if owed, are statutorily mandated to begin upon claimant's return to work on August 22, 2016. The Iowa Supreme Court determined that payment of permanent partial disability and healing period benefits occurring at the same time is not a double recovery because those benefits compensate for completely different categories of losses. Evenson v. Winnebago Indus., Inc., 881 N.W.2d 360, 373 (Iowa 2016)

Defendants argue Evenson does not apply because in order to have an interruption of healing period benefits, there must be a primary instance of healing period entitlement, but neither the statute nor the Evenson ruling requires that. Instead,

the primary thrust of Evenson is that healing period benefits and permanent disability benefits compensate claimant for two different types of losses. Claimant is entitled to receive permanent disability benefits beginning on August 22, 2016, and temporary disability benefits during claimant's stipulated time off of work between September 30, 2016, and April 28, 2017.

I affirm the deputy commissioner's findings, conclusions and analysis regarding all other issues.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on December 24, 2019, is affirmed in its entirety.

Defendants shall pay claimant two hundred (200) weeks of permanent partial disability benefits at the stipulated weekly rate of four hundred seventy-six and 20/100 dollars ($476.20), commencing on August 22, 2016.

Defendants shall pay claimant healing period benefits from September 30, 2016, through April 28, 2017, at the stipulated weekly rate of four hundred seventy-six and 20/100 dollars ($476.20).

Defendants shall receive a credit for all benefits paid to date, including the benefits totaling two hundred eighty-eight and 12/100 dollars ($288.12), as stipulated by the parties.

Defendants 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).

Defendants are responsible for the lien medical expenses itemized in Exhibit 6, totaling two thousand one hundred eighty-seven and 55/100 dollars ($2,187.55), and are responsible for all causally related medical treatment.

Pursuant to rule 876 IAC 4.33 defendants shall pay claimant's costs of the arbitration proceeding in the amount of one hundred and no/100 dollars ($100.00), and defendants 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 19th day of June, 2020.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Matthew Milligan (via WCES)

Timothy Wegman (via WCES)