BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

VENECIA DeCAMACHO,

Claimant,

vs.

PINE RIDGE FARMS,

Employer,

and

GREAT AMERICAN ALLIANCE INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5063576

ARBITRATION DECISION

Head Note Nos.: 1402.40, 1803, 2907

STATEMENT OF THE CASE

Venecia De Camacho, claimant, filed a petition in arbitration seeking workers' compensation benefits from defendants Pine Ridge Farms, employer, and its insurer, Great American Alliance Insurance Company. The hearing occurred before the undersigned on May 9, 2018, in Des Moines, Iowa.

The parties filed a hearing report at the commencement of the arbitration hearing. In 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.

The evidentiary record consists of: Joint Medical Exhibits JE 1 through JE 4, Claimant's Exhibits 1 through 3, and Defendants' Exhibits A through C.

Claimant testified on her own behalf. Serving as an interpreter for claimant was Rafael Geronimo. Larry Gaskill, representative of the defendant employer, also testified. The evidentiary record closed on May 9, 2018. The case was considered fully submitted upon receipt of the parties' briefs on May 30, 2018.

ISSUES

The parties submitted the following disputed issues for resolution:

1. The extent of industrial disability sustained as a result of the May 1, 2014 injury.
2. Costs.

FINDINGS OF FACT

After a review of the evidence presented, the undersigned finds as follows:

Background

Claimant was 65 years old at the time of the hearing. (Hearing Transcript p. 11) Her native language is Spanish, and her ability to understand, write, and speak English is limited. (Hrg. Tr. p. 11) While she attended some schooling in Mexico, she left school before earning a high school diploma (or its equivalent). (Hrg. Tr. p. 12)

Claimant came to the United States in 1993. (Hrg. Tr. p. 13) Her first job upon arrival in the United States was at a furniture store, where she put handles and other hardware on furniture. (Hrg. Tr. p. 36) This job required constant standing.

Claimant next worked as a custodian for several months. (Hrg. Tr. p. 38; Claimant's Exhibit 2:11) Her custodial work, specifically sweeping and mopping, required the ability to twist and bend. (Hrg. Tr. p. 38)

Claimant's last job before being hired by the defendant employer was with a print shop, where she was tasked with putting paper in envelopes or folders. (Hrg. Tr. pp. 37, 39; Cl. Ex. 2:11)

Claimant testified she could not return to any of her former jobs in her current physical condition. (Hrg. Tr. pp. 37-40)

Claimant was hired by the defendant employer in 1998, and she continued to work there at the time of the hearing. (Hrg. Tr. p. 14) The defendant employer is a meat-packing facility, and claimant has worked as a "Box Ribstrip 2" in the facility for the entirety of her tenure. (Hrg. Tr. p. 14; Defendants' Exhibit C:13)

In claimant's area of the facility, meat comes down a conveyor belt where it is weighed, packed, sealed with poly liner, and labeled before being sent further down the line. (Hrg. Tr. p. 17) Claimant is one of several individuals with the title of "Box Ribstrip 2," and each individual performs a different task in the larger process. (Hrg. Tr. p. 55)

Claimant's task is to cover the meat with poly liner, close the box lid, add a label, and push the box further down the conveyor. (Hrg. Tr. pp. 57-58) The meat is already boxed and weighed by the time it gets to claimant, meaning, in theory, claimant's job should require no lifting. (Hrg. Tr. pp. 58-59) However, claimant indicated she sometimes has to lift the boxes slightly when the scale and conveyor are not flush with one another. (Hrg. Tr. pp. 70-71) The boxes are either 10, 30, or 60 pounds. (Hrg. Tr. p. 16)

Claimant is also required to package bags of meat weighing either 15 or 20 pounds. (Hrg. Tr. p. 59) These bags are made up of three-pound cushions, meaning claimant is never required to lift more than three pounds at a time. (Id.) Once the bag is full, she pushes it down the conveyor. (Id.)

Claimant stands for the entirety of her shift as a "Box Ribstrip 2," though she, like the rest of the workers, is given three breaks during a shift. (Hrg. Tr. p. 17, 56).

Claimant's job has never been modified as a result of her stipulated work injury, and she continued to perform all essential functions of her job at the time of the hearing without accommodation. (Hrg. Tr. p. 22, 55, 63). Claimant was earning $14.35 per hour at the time of the hearing; this is compared to the $11.25 or $11.75 per hour she was making at the time of her work injury. (Hrg. Tr. p. 15) She missed no work as a result of the work injury, and she was described as having "very good" attendance. (Hrg. Tr. pp. 43, 63)

May 1, 2014 Injury and Subsequent Medical Treatment

Claimant sustained a stipulated work injury to her back on May 1, 2014, after moving a 60-pound box on the conveyor. (Hrg. Tr. p. 13) On May 9, 2014, claimant presented to Cassim M. Igram, M.D., at Iowa Ortho with "complaints of back pain and pain that goes into both legs." (Joint Exhibit 1:3) Claimant had apparently been placed on light duty by a different physician and gone to physical therapy prior to seeing Dr. Igram. Dr. Igram diagnosed claimant with a back strain and kept her on modified duty. (JE 1:5, 7) He also recommended a referral to Kurt A. Smith, D.O., in physical medicine and rehabilitation. (JE 1:5)

Before her evaluation with Dr. Smith, claimant sought treatment at Primary Health Care for pain in her hips and lower back. (JE 2:37) She was prescribed medication for pain. (Id.)

Claimant was then evaluated by Dr. Smith on May 27, 2014. (JE 1:12) Dr. Smith instructed claimant to continue taking the pain medication, and he prescribed a Medrol Dosepak for her lumbar spine strain. (Id.) Claimant was again given work restrictions. (Id.)

At her follow-up appointment on June 11, 2014, claimant reported some improvement with the Medrol Dosepak, but she told Dr. Smith her symptoms returned

when the medication ran out. (JE 1:17) Due to her ongoing symptoms, Dr. Smith ordered a lumbar MRI. (Id.) He also prescribed more Medrol and renewed claimant's restrictions. (JE 1:19-20)

The MRI, performed on June 20, 214, revealed "moderately severe lumbar spondylosis with accelerated disc degeneration at L2-L3"; a "small right paracentral subligamentous disc herniation at L4-L5"; and a "[b]road-based left paracentral disc herniation at L1-L2." (JE 1:21-22)

After a review of claimant's MRI, Dr. Smith referred claimant to pain management for the possibility of injections. (JE 1:25) He also instructed claimant to continue her medications and remain on light duty. (JE 1:25, 28) Claimant testified she never received any injections, but it is not clear from the record why the injections were never performed. (Hrg. Tr. pp. 19-20)

Claimant did not return to Dr. Smith until October 1, 2014. At that appointment, Dr. Smith noted that claimant's improvement had "plateaued." (JE 1:30) He placed claimant at maximum medical improvement and recommended a functional capacity evaluation (FCE). (Id.)

The FCE was performed on October 16, 2014, and claimant "demonstrated consistency of effort" throughout the evaluation. (JE 3:45) Physical testing revealed claimant was capable of performing at the light physical demand level. (Id.) Based on the FCE results, it was determined claimant's regular work duties were within her physical capabilities, and as such, claimant would be able to continue performing her full-duty job with the defendant employer without modification. (Id.)

Claimant did not return to Dr. Smith for treatment. Instead, on June 5, 2015, Dr. Smith authored a letter to defendants' counsel. (JE 1:34) In the letter, Dr. Smith indicated claimant's injury in May of 2014 exacerbated her underlying severe lumbar spondylosis with multilevel degenerative disk disease. (Id.) He assigned a five percent whole body impairment due to ongoing muscular spasms that limited the range of motion of her lumbar spine. (Id.) Dr. Smith assigned restrictions consistent with claimant's FCE:

> 10 pounds from floor to waist, frequently 5 pounds from floor to waist, waist to shoulder level 20 pounds occasionally, 10 pounds frequently; shoulder overhead occasionally 10 pounds, frequently 5 pounds; carrying, 2 hands, occasionally 15 pounds, frequently 10 pounds. She can frequently sit, walk occasionally and constantly stand.

(Id.)

The last time claimant received medical treatment specific to her back injury was her final visit with Dr. Smith on October 1, 2014. Claimant was seen at Primary Health Care once in April of 2015 and again in December of 2016 for

unrelated complaints, and she mentioned back pain at both visits. (JE 2:40, 44) However, it does not appear from the record that claimant received or pursued any additional treatment for her back as a result of these appointments.

Expert Opinions

Both Dr. Smith (discussed above) and claimant's independent medical examination physician, Sunil Bansal, M.D., rendered opinions regarding impairment and restrictions in this case. Claimant was evaluated by Dr. Bansal on March 23, 2018. (JE:4) Dr. Bansal diagnosed claimant with an L4-L5 right-sided disc herniation as a result of the May 1, 2014 lifting incident, and he also opined that claimant's work with the defendant employer advanced the degenerative changes in her spine. (JE 4:60-61) Pursuant to Table 15-3 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Dr. Bansal assigned an eight percent whole body impairment based on claimant's radicular complaints, guarding, loss of range of motion, continued pain, and disc pathology at L4-L5. (JE 4:63) Like Dr. Smith, Dr. Bansal adopted restrictions consistent with the FCE:

> Occasionally 10 pounds from floor to waist, frequently 5 pounds from floor to waist, waist to shoulder 20 pounds occasionally and 10 pounds frequently, shoulder overhead occasionally 10 pounds and frequently 5 pounds, carrying with two hands occasionally of 15 pounds and frequently 10 pounds.

(Id.) However, Dr. Bansal also recommended additional restrictions of no frequent bending or twisting. (Id.)

Each party also submitted a vocational analysis. Claimant's vocational report was prepared by Carma Mitchell, MS. (Cl. Ex. 1) Ms. Mitchell opined that claimant lost access to 89.5 percent of the unskilled jobs she had access to prior to her work injury based on her physical limitations, including lifting and bending, and her limited English skills. (Cl. Ex. 1:4)

Defendants' vocational report was authored by Tom Karrow, M. Ed. Mr. Karrow provided labor market research and identified several sedentary to light duty jobs currently available consistent with claimant's transferrable skills and physical and language limitations. (Def. Ex. A:6) With respect to loss of wages/earning capacity, Mr. Karrow noted claimant would not experience a wage loss if she chose to continue working in her current full-time job with the defendant employer. (Def. Ex. A:7) However, Mr. Karrow acknowledged the jobs he identified in the labor market survey had an average hourly pay of $9.54, representing a 34 percent wage loss compared to claimant's hourly earnings at the time of the hearing. (Id.) Mr. Karrow also indicated claimant sustained a 25 percent "physical access loss" because her job with the defendant employer is rated as medium duty and she is now limited to light-duty work. (Id.)

Industrial Disability

While the parties agree that claimant sustained permanent disability to her back as a result of her May 1, 2014 injury, they dispute the extent of claimant's industrial disability. With respect to claimant's physical impairment, both claimant's authorized treating physician, Dr. Smith, and her IME physician, Dr. Bansal, assigned permanent impairment due to claimant's May 1, 2014 work injury. Dr. Smith assigned a five percent whole body impairment but offered little explanation as to how he arrived at that rating. (JE 1:34) Dr. Bansal, on the other hand, explained that his eight percent whole body impairment rating was based on claimant's symptoms matching several criteria for a DRE Category II impairment, as laid out in Table 15-3 of the Guides. (JE 4:63) Unlike Dr. Smith, Dr. Bansal specifically mentioned claimant's radicular complaints, which claimant reported consistently throughout her treatment. (JE 4:63; JE 1:1, 3, 10, 15, 17, 23) Because Dr. Bansal offered a reasoned explanation for his rating that was consistent with claimant's reported symptoms, it is found that claimant sustained an eight percent whole body impairment as a result of her May 1, 2014 injury.

Regarding claimant's functional limitations, both Dr. Smith and Dr. Bansal adopted restrictions consistent with claimant's FCE. (JE 1:34; 4:63). Dr. Bansal, however, added restrictions of no frequent bending or twisting. (JE 4:63) The physical abilities assessment from claimant's FCE indicates she is unable to perform sustained trunk bending or repetitive trunk bending and capable of only occasional trunk twisting. (JE 3:46) Because Dr. Bansal's additional restrictions are consistent with the objective testing in the FCE, it is found that claimant requires the permanent restrictions as set out by Dr. Bansal.

While both vocational reports considered these restrictions, Mr. Karrow's report is found to be more convincing. Ms. Mitchell opined claimant lost access to 89.5 percent of the unskilled jobs she had access to prior to her work-related injury (Cl. Ex. 1:4), but she offered next to no analysis in support of her conclusion. She also failed to explain why she considered only unskilled work. Mr. Karrow, on the other hand, provided a transferrable skills analysis, work analysis, and labor market research in his report. For these reasons, Mr. Karrow's report is given more weight.

As noted by Mr. Karrow in his report and of great significance to the undersigned is the fact that claimant continues to work in the same job that she has held since 1998, and she is physically capable of performing its essential functions without modification despite her restrictions. (Hrg. Tr. pp. 22, 63) This is consistent with the fact that she has never missed work because of her back injury. (Hrg. Tr. p. 43) Importantly, claimant is earning roughly 3 dollars more per hour and 8,000 dollars more per year than she was at the time of her injury in 2014. (Hrg. Tr. pp. 15, 43) Claimant testified she works less overtime hours due to her back injury, but she offered no evidence, such as time sheets or attendance records, to show the hours lost. Thus, it is found that claimant's May 1, 2014 injury has not resulted in an actual loss of earnings.

Although claimant testified her permanent restrictions and limitations would preclude her from returning to all of her past work, this testimony was not entirely credible. She testified she could not return to the job at the furniture store because she is physically incapable of constantly standing; claimant later acknowledged, however, that she stands throughout the entirety of her shift with the defendant employer. (Hrg. Tr. p. 47) Claimant also testified she could not return to the job at the print shop because it required bending; she later acknowledged, however, that the print shop job entailed "very little" bending, and she is currently capable of bending occasionally in her job with the defendant employer. (Hrg. Tr. pp. 48, 51) Thus, it is found that claimant would be physically capable of returning to at least some of her former work.

Ultimately, claimant is performing a legitimate job with the defendant employer without accommodation, and there is no indication that she will not be able to continue to do so as a result of her back injury. However, as acknowledged by defendants' own vocational expert, claimant cannot perform the full range of jobs that she could have performed prior to May 1, 2014. Considering the above and all other appropriate factors related to industrial disability, it is found that claimant sustained a 25 percent loss of future earning capacity.

CONCLUSIONS OF LAW:

Industrial Disability

Because 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).

Industrial disability can be equal to, less than, or greater than functional impairment. Taylor v. Hummel Insurance Agency, Inc., 2-2, Iowa Industrial Comm'r Dec. 736 (1985); Kroll v. Iowa Utilities, 1-4, Iowa Industrial Comm'r Dec. 937 (App. 1985);Birmingham v. Firestone Tire & Rubber Company, II, Iowa Industrial Comm'r Rep., 39, (App. 1981).

Based on the above findings of fact, it is concluded that claimant sustained a 25 percent industrial disability due to the May 1, 2014 injury. As explained above, claimant's functional impairment, age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, and inability to engage in employment for which the she is fitted were all contemplated when determining claimant's industrial disability. More specifically, consideration was given to the fact that claimant now requires restrictions but is still capable of performing her regular job without accommodation or modification. Claimant is also earning more per hour than she was at the time of her injury, and she is likely to be able to continue working in the same capacity for the defendant employer for the foreseeable future. However, as acknowledged by defendants' own expert report, claimant is precluded from returning to the same array of jobs that she could have performed before her work injury.

Claimant in her brief cites Diederich v. Tri-City Railroad Company of Iowa, an Iowa Supreme Court decision from 1935, as authority for her position that she is significantly industrially disabled. In Diederich, the claimant was found to be permanently and totally disabled. 258 N.W. 899, 902 (Iowa 1935). An important distinction between Diederich and this case, however, is that the claimant in Diederich was physically unable to return to his job with his employer after his work injury, while the claimant in this case is back to her regular job. Id. at 901-02. Thus, the holding in Diederich is not persuasive.

Having found that claimant proved she sustained a 25 percent loss of future earning capacity as a result of the May 1, 2014 work injury, claimant is entitled to a 25 percent industrial disability award, or 125 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u).

Costs

Claimant seeks the following costs: $100.00 (filing fee) and $325.00 (vocational expert report). Claimant originally indicated on the hearing report that she was seeking reimbursement for the IME performed by Dr. Bansal, but the undersigned removed this dispute from the hearing report at the direction of counsel. As such, the cost of claimant's IME is not considered.

Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33.

Because claimant was generally successful in her claim, an assessment of costs is appropriate. In the discretion of the undersigned, costs are assessed as follows:

The $100.00 filing fee is taxed to defendants pursuant to rule 876 IAC 4.33(7).

With respect to the cost of the vocational report, rule 876 IAC 4.33(6) allows for the taxation of reasonable costs associated with obtaining two reports of doctors or

practitioners. However, only the expense of preparing the report is a taxable expense. 876 IAC 4.33(6); Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015). In this case, Ms. Mitchell's itemized bill indicates the report itself took two hours at the rate of $65.00 per hour. Therefore, $130.00 is taxed to defendants pursuant to rule 876 IAC 4.33(6).

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant industrial disability benefits of one hundred twenty-five (125) weeks, beginning on the stipulated commencement date of October 1, 2014, until all benefits are paid in full.

Defendants shall be entitled to a credit for all weekly benefits paid to date. The parties have stipulated that defendants are entitled to a credit of five thousand eight hundred fifty-eight and 75/100 dollars ($5,858.75).

All weekly benefits shall be paid at the stipulated rate of three hundred and eighteen and 41/100 dollars ($318.41) per week.

All accrued benefits shall be paid in a lump sum.

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. April 24, 2018).

Defendants shall reimburse claimant costs in the amount of two hundred and thirty dollars ($230.00).

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 8th day of June, 2018.

STEPHANIE J. COPLEY
DEPUTY WORKERS'
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SJC/kjw

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.