

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

EUNICE GRUGAN,

Claimant,

vs.

WAL-MART STORES,

Employer,

and

NEW HAMPSHIRE INS. CO.,

Insurance Carrier,
Defendants.

FILED

DEC 20 2018

WORKERS COMPENSATION

File No. 5063207

ARBITRATION

DECISION

Head Note No.: 1803, 3001

STATEMENT OF THE CASE

Eunice Grugan, claimant, filed a petition in arbitration seeking workers' compensation benefits from Wal-Mart Stores (Wal-Mart) and its insurer, New Hampshire Insurance Company, as a result of an injury she sustained on January 19, 2017, that arose out of and in the course of her employment. This case was heard in Des Moines, Iowa, and fully submitted on April 23, 2018. The evidence in this case consists of the testimony of claimant, Joint Exhibits 1 – 12, Defendants' Exhibits A – F and Claimants' Exhibits 1 – 8. Both parties submitted briefs.

ISSUES

1. The extent of claimant's disability.
2. Whether claimant is permanently and totally disabled.
3. The determination of claimant's gross earning and resulting weekly workers' compensation rate.
4. Commencement date of permanent benefits.
5. The amount of credit defendants are entitled to receive.
6. Assessment of costs.

STIPULATIONS

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.

The parties agreed at the hearing that defendants were responsible for the medical cost of the authorized medical providers and that defendants would pay the independent medical examination (IME). (Transcript, pages 6, 7)

FINDINGS OF FACT

The deputy workers' compensation commissioner having heard the testimony and considered the evidence in the record finds that:

Eunice Grugan was 62 years old at the time of the arbitration hearing. Claimant graduated from high school and received a certificate after attending a commercial art design school for two years. (Tr. p. 13)

Claimant described most of her work history as being in customer service. A detailed description of claimant's entire work history is in Exhibit A pages 5 through 15. Claimant's work started with designing newspaper ads. Claimant worked in print shops for a number of years. Claimant worked for a manufacturer that made store shelving and became an assistant manager and helped with scheduling. (Tr. p. 13) Claimant also did some data entry when she was an assistant manager. Claimant said she still had the ability to do data entry. (Tr. p. 16) In October 2011, claimant was tested to see if she could perform factory work. The results showed she could work in a medium category. (Tr. p. 19; JEx. 3, p. 1)

Claimant began her employment at Wal-Mart in September 2015. Claimant started working at Wal-Mart as a stocker. Claimant's next position at Wal-Mart was as a department manager in the infants and shoe departments. (Tr. p. 22)

On January 19, 2017, claimant was moving a box at Wal-Mart when the box slipped while claimant had a hold of it and when the box hit the floor the box made claimant jerk, and she hurt her back. (Tr. p. 24) Claimant felt pain in her back. She completed her shift. Claimant went into work the next day in a lot of pain and asked co-workers to help her with her work that required her to use ladders. (Tr. p. 27) Claimant reported to human resources and filled out an accident report. (Tr. p. 28)

Wal-Mart arranged for medical care and claimant was seen by Scott Hixson, PA. Claimant was taken off work at that time. (Tr. p. 29) Claimant was not improving and was sent to David Boarini, M.D., who referred her to a pain physician, Thomas Hansen, M.D. (Tr. p. 30)

Claimant was returned to work at the dressing room for about 4-hours a day. This was on February 1, 2017. (Tr. p. 56) Claimant thinks she went back to full time work around April 2017. (Tr. p. 42) Claimant has been told by her supervisor that she

would continue to receive her management pay rate until her case regarding her back was settled and then her pay would drop down to about \$11.00 per hour. (Tr. p. 49) At the time of the hearing, claimant was working in the lawn and garden department at Wal-Mart. Claimant is able to perform the door greater portion of her job and avoids bending. (Tr. p. 43) Claimant testified that 90 percent of her problem in back pain and 10 percent is in the tingling and numbness in her leg. (Ex. A, p. 29)

Claimant was working, as management 6:30 a.m. to 3:30 p.m., Monday through Friday with alternating Saturdays. (Tr. p. 44) In her deposition, claimant said that as a manager she was to work 40 hours a week and would go over that time to get work done. (Ex. A, pp. 19, 20) Claimant testified that she was receiving a rate of pay as a manager of \$12.75 at the time of her injury and receive a raise to \$13.00 per hour after her injury. (Tr. pp. 52, 53) Claimant tried to work as a cashier but could not continue due to pain.

Claimant had some facet injections by Dr. Hansen which claimant described as taking the edge off her pain. (Tr. p. 33) Claimant's first injection was on April 27, 2017 and a third injection on September 8, 2017. (Tr. pp. 58, 62) Claimant had radiofrequency ablations in August 2017. (Tr. p. 33) On August 16, 2017, Dr. Hansen responded, in check box form, to claimant's counsel's questions. Dr. Hansen agreed that the incident of January 19, 2017 was a substantial causal contributing or aggravating factor in claimant's back condition. (Ex. 1, p. 1)

On January 20, 2017, Scott Hixson, PA, saw claimant for discomfort in her lumbar spine. (Joint Exhibit 1, page 4) On January 23, 2017, claimant saw PA Hixson and was taken off work. (JEx. 1, pp. 8, 10) Claimant returned to work with significant lifting restrictions and limited to four hours per day as of February 6, 2017. (JEx. 1, p. 15) On February 8, 2017, claimant reported to PA Hixson lower back pain including radicular right leg pain. (JEx. 1, p. 18)

On March 6, 2013, claimant had an MRI. The results of the MRI showed:

Impression:

1. Levoscoliosis
2. Multilevel spondylosis resulting in multilevel central canal and neural foraminal narrowing as discussed above.
3. Mild degenerative spondylolisthesis at L4-L5.
4. Small right paracentral disc herniation at L1-L2.

(JEx 5, pp. 1, 2) Claimant reported that her back was not getting better. She decided to take FMLA leave and have a non-work related medical procedure. Claimant was on FMLA leave from March 13, through April 25, 2017. (JEx. 6, p. 2)

Claimant saw David Boarini, M.D., on April 27, 2017. Dr. Boarini noted claimant had significant underlying degenerative changes in her spine. Dr. Boarini recommended epidural steroid injections and aggressive physical therapy. He did not think that spine surgery should be considered at this point. (JEx. 6, pp. 5, 8) On April 27, 2017, claimant had a L4-L5 epidural, right lumbar facet blocks. (JEx. 6, p. 12) On May 31, 2017, Dr. Boarini wrote:

Eunice Grugan was in the office on May 24, 2017. We are following her for back pain with degenerative changes and scoliosis. She has had a variety of treatments and is a bit better but feels that work aggravates her back difficulties too much to continue with her present work level. She is really not interested in surgery, and I don't think that would be appropriate at the present time given her symptoms. I suggested a functional capacity evaluation to see if we get any objective suggestions for limitations on work activities.

(JEx. 6, p. 21)

Claimant had a functional capacity examination (FCE) on June 1, 2017. The FCE found:

- Waist to floor lifting – 25 lbs. occasionally
- Above shoulder lifting – 20 lbs. occasionally
- Carrying – 25 lbs. occasionally
- Horizontal pushing/pulling – 25/30 lbs. of force occasionally
- Sitting/Standing – Constantly with positional changes as required in order to maintain reasonable level of comfort throughout the workday.
- Walking/ladder climbing/squatting/twisting – Frequently
- Stooping/Bending - Occasionally

(JEx. 8, p. 1)

Claimant had medial test block injections on June 6, 2017. At this appointment, claimant reported that her FCE flared up her symptoms. (JEx. 6, p. 22)

Claimant had lumbar radiofrequency on August 4, 2017. (JEx. 6, p. 29; JEx. 9, p. 1) On September 8, 2017, claimant had repeat epidural and facet block. (JEx. 6, p. 33) On September 8, 2017, Thomas Hansen provided claimant restrictions of 20 pounds lifting, avoid repetitive forward flex and that she should alternate sitting, standing every

30 minutes. Claimant wrote at the bottom of this note that these were her permanent restrictions.

On October 13, 2017, Todd Harbach, M.D., issued an independent medical examination report (IME). (Ex. B, pp. 1 -5) Dr. Harbach's diagnosis was:

1. Degenerative lumbar scoliosis.
2. Grade I degenerative spondylolisthesis L4-L5.
3. Multilevel lumbar degenerative disk disease.
4. Lateral recess stenosis at L2-L3, L3-L4 and L4-L5.
5. Right lower extremity radiculitis.
6. Intractable low back pain.

(Ex. B, pp 4, 5) Dr. Harbach noted that all of claimant diagnoses preexisted her work injury of January 19, 2017 except for the back pain. (Ex. B, p. 5) On December 11, 2017, Dr. Harbach noted that claimant was at maximum medical improvement and that claimant's progressive right lower extremity symptoms were due to neuropathy not her work injury. (Ex. B, p. 7) Dr. Harbach was asked to review Dr. Sassman's IME. Dr. Harbach did not agree with Dr. Sassman's IME and characterized her report as "terrible" and "completely incorrect." (Ex. B, p. 10)

On November 12, 2017, claimant had an EMG of her right lower extremity. There were no findings that suggested right lumbar radiculopathy. (JEx. 10, p. 2)

On January 15, 2018, Robin Sassman, M.D., issued an IME. Dr. Sassman diagnosed claimant with "Low back pain with radiculopathy with MRI evidence of an L1-2 disc herniation." (Ex. 2, p. 9) Dr. Sassman opined that claimant's back condition was causally related to her January 19, 2017 work injury. (Ex. 2, p. 9) Dr. Sassman provided the following restrictions:

Ms. Grugan should limit lifting, pushing, pulling and carrying to 20 pounds rarely from floor to waist, 20 pounds occasionally from waist to shoulder, and 20 pounds rarely above shoulder height. She should limit standing and walking to an occasional basis and should change positions frequently.

(Ex. 2, p. 10) I find that these are claimant's restrictions due to her January 19, 2017 work injury.

Claimant started to see pain doctor Alison Weisheipl, M.D. January 25, 2018. (JEx. 12, p. 10) Claimant was in the process of a series of injections at the time of the hearing. (Tr. p. 40) Dr. Weisheipl's diagnosis was:

M51.16 Intervertebral disc disorders with radiculopathy, lumbar region

M43.16 Spondylolisthesis, lumbar region

M53.3 Sacrococcygeal disorders, not elsewhere classified.

(JEx. 12, p. 13)

Claimant was currently working at Wal-Mart with restrictions. While her rate of pay had not been reduced, she has been told that it would be evaluated after the case is resolved. Claimant credibly testified that she is likely to have her pay reduced.

Claimant has significant restrictions. Claimant has a long history of performing customer service jobs. Claimant's ability to perform work in the medium level and some light work is diminished. Even work that is relatively sedentary is compromised by claimant's need to alternate sitting and standing.

I find that claimant has a 70 percent loss of earning capacity.

Claimant asserts her weekly workers' compensation rate is \$357.53 (Ex. 8, p. 1) Defendant asserts claimant's weekly workers' compensation rate is \$338.02. (Ex. C, p. 1) Claimant excludes two weeks that we used by the defendant; The week of November 5, 2016 through November 11, 2016 with 32.41 hours and the week of December 3, 2016 through December 9, 2016 with 32.30 hours. (Ex. 8, p. 1; Ex. C, p. 1) Based upon claimant's testimony that as a member of management she would work 40 hours per week, that the weeks of November 5, 2016 through November 11, 2016 and December 3, 2016 through December 9, 2016 are unrepresented and should be excluded. Claimant's weekly workers' compensation rate is \$357.53.

Claimant has requested costs consisting of the \$100.00 filing fee and \$32.54 copying costs. (Tr. p. 8; Attachment to Hearing Report)

CONCLUSIONS OF LAW

The parties have stipulated that claimant has an industrial disability due to work injury of January 19, 2017 and that she has an industrial disability.

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.

In assessing an unscheduled, whole-body injury case, the claimant's loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

Claimant is 62 years old. Her age is not a positive factor. Claimant has continued to work despite her symptoms in her back and right leg. Claimant is motivated to work and believes that she has skills that she would be able to perform some of her past work.

Claimant's lifting limitations and need to alternate between sitting and standing limits a number of service jobs claimant can perform. Claimant attempted to be a cashier at Wal-Mart, but was unable to perform this work.

Considering all of the factors of industrial disability, I find claimant has a 70 percent industrial disability, which entitles claimant to 350 weeks of permanent partial disability.

The Iowa Supreme Court has specifically noted that permanent partial disability benefits commence whenever the first factor of Iowa Code section 85.34(1) is met. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360 (Iowa 2016). In other words, once a claimant achieves one of the factors outlined in Iowa Code section 85.34(1), permanent disability benefits should commence.

The factors are whether (1) "the employee has returned to work," (2) "it is medically indicated that significant improvement from the injury is not anticipated" (MMI), or (3) "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." Iowa Code section 85.34(1).

With respect to the second factor, the Iowa Supreme Court has described MMI as “stabilization of the condition or at least a finding that the condition is ‘not likely to remit in the future despite medical treatment.’” Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 200 (Iowa 2010) (citing Guides, Sixth Edition, p. 27). “[T]he persistence of [symptoms] may not itself prevent a finding that the healing period is over, provided the underlying condition is stable.” Myers v. F.C.A. Servs., Inc., 592 N.W.2d 354, 359 (Iowa 1999) (citations omitted). When it is not likely that further treatment will decrease the extent of permanent industrial disability, then continued treatment does not prolong the healing period. See id. In other words, neither maintenance medical care nor a claimant’s persistent symptoms will necessarily prolong the healing period when claimant’s condition is stable.

Claimant returned to work on February 6, 2017. The claimant met the first factor on February 6, 2017. Permanent partial disability benefits commence on February 6, 2017.

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 the employee was 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 is excluded, however. Section 85.36(6).

Defendant has argued that the two weeks of November 5, 2016 through November 11, 2016 and December 3, 2016 through December 9, 2016 should be included. Defendants assert there is no evidence that those weeks were unrepresentative of the number of hours claimant worked.

Claimant’s un rebutted testimony was that she was expected to work 40 hours a week. The two weeks defendants’ included showed of 32.41 and 32.30 hours per week. Based upon the credible testimony of the claimant, I found those two weeks to be unrepresentative. I find the claimant’s calculation to be representative of claimant’s earnings and hold claimant’s weekly workers’ compensation rate is \$357.53.

I award claimant cost for the filing fee of \$100.00. I decline to order the copy costs as they are not authorized by 876 IAC 4.33.

ORDER

Defendants shall pay claimant three hundred fifty (350) weeks of permanent partial disability benefits at the weekly rate of three hundred fifty-seven and 53/100 dollars (\$357.53) commencing on February 6, 2017.


Defendants shall have a credit for benefits previously paid.

Defendants shall pay claimant costs in the amount of one hundred dollars (\$100.00).

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 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 20th day of December, 2018.


JAMES F. ELLIOTT
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.