BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

EUNICE GRUGAN, Claimant, vs. WAL-MART STORES, Employer, and NEW HAMPSHIRE INS. CO., Insurance Carrier, Defendants.	File No. 5063207 A P P E AL D E C I S I O N Head Notes:	1407.40; 1703; 1803; 2907; 3002

Defendants Wal-Mart Stores, employer, and its insurer, New Hampshire Insurance Company, appeal from an arbitration decision filed on December 20, 2018. Claimant Eunice Grugan responds to the appeal. The case was heard on February 21, 2018, and it was considered fully submitted in front of the deputy workers' compensation commissioner on April 23, 2018.

In the arbitration decision, the deputy commissioner found claimant sustained 70 percent industrial disability as a result of the stipulated work-related injury to her back which occurred on January 19, 2017, which entitles claimant to receive 350 weeks of permanent partial disability (PPD) benefits. The deputy commissioner found the correct commencement date for PPD benefits is February 6, 2017, which is the date claimant returned to work. The deputy commissioner found claimant's correct weekly benefit rate for the injury is $357.53

On appeal, defendants assert the 70 percent industrial disability award is excessive. Defendants additionally assert the deputy commissioner chose the wrong commencement date and miscalculated claimant's rate. Lastly, defendants seek clarification of the credit which they are entitled to receive for benefits previously paid.

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 December 20, 2018, that relate to the issues properly raised on intra-agency appeal are affirmed in part and modified in part.

I will first address the extent of claimant's industrial disability. For the reasons that follow, I find claimant sustained 35 percent industrial disability as a result of the work injury instead of 70 percent as awarded by the deputy commissioner.

First, in terms of claimant's restrictions, I adopt the limitations set forth in the functional capacity evaluation (FCE) performed on June 1, 2017. (Joint Exhibit 8) Pursuant to the FCE, claimant is capable of working in the medium demand category. (JE 8) While I recognize claimant reported an increase in her symptoms after the FCE, I agree with defendants' expert, Todd Harbach, M.D., that the FCE is the best tool to obtain "objective conclusions" pertaining to claimant's functional limitations. (See Defendants' Exhibit B, p. 10)

Notably, claimant participated in an FCE in 2011 for a prior injury that also placed her in the medium work category. (JE 3) Thus, I find claimant's functional limitations and restrictions did not significantly change after the July 19, 2017, work injury.

Claimant's symptoms, however, worsened after the work injury. Claimant also did not return to the job she held at the time of her injury, and some of the duties in the greeting position she was performing at the time of the hearing were difficult. (Hearing Transcript, pp. 43-45) Even so, claimant was working full-time and continued to earn her pre-injury pay at the time of the hearing. (Tr., pp. 42, 49)

Claimant, who was 62 years old at the time of the hearing, has worked primarily in customer service positions. (See Tr., pp. 13-16) While claimant's subjective complaints may limit her ability to perform some of those jobs, claimant's ongoing work with defendant-employer indicates she continues to have the skills and physical ability to engage in the employment for which she is fitted. For these reasons, I find claimant sustained 35 percent industrial disability. The deputy commissioner's industrial disability finding is therefore modified.

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).

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).

Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Iowa Code section 85.34.

For the above-stated reasons, I modify the deputy commissioner's industrial disability award and I find claimant sustained 35 percent industrial disability. This entitles claimant to receive 175 weeks of PPD benefits for the work injury.

I affirm the deputy commissioner's finding that the commencement date for claimant's PPD benefits is February 6, 2017. I affirm the deputy commissioner's finding that claimant's return to work on February 6, 2017, was the first factor of Iowa Code section 85.34(2) to be met. I affirm the deputy commissioner's finding that claimant's weekly benefit rate is $357.53. I affirm the deputy commissioner's finding that two of the weeks included in defendants' rate calculation were non-representative of claimant's customary earnings and should therefore be excluded. I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to these issues.

Defendants also seek clarification regarding their credit for benefits previously paid. The parties agreed defendants paid $13,520.80 in benefits before the hearing, but the dispute concerns the type and extent of credits defendants should receive.

Defendants made several payments of both temporary total/healing period benefits and temporary partial disability benefits after February 6, 2017. (See Ex. D, pp. 8-24) Though it is not clear, defendants presumably seek a credit for those benefits against their obligation for permanent partial disability benefits.

Pursuant to the Iowa Supreme Court's holding in Evenson v. Winnebago Industries, Inc., a claimant may be entitled to receive additional intermittent periods of healing period benefits or temporary partial disability (TPD) benefits even after the commencement date for PPD benefits. Evenson, 881 N.W.2d 360, 372-73 (Iowa 2016) ("Our determination that Evenson's return to work in September 2010 established the commencement date for PPD benefits is not precluded by the fact that he was entitled to TPD benefits for subsequent weeks when he was medically restricted from working his regular hours.").

Defendants in this case note "[c]laimant had three gaps in employment where she was completely taken off of work, the last of which was in August 2017." (Defendants' Appeal Brief, p. 14) As a result, it was in August that defendants switched their benefit classification from temporary to permanent partial. (See Ex. D, p. 6) Further, the parties stipulated that temporary benefits were not in dispute. Based on this information, I find defendants did not provide sufficient evidence that the benefits they paid should be deemed permanency benefits instead of temporary benefits. In

other words, there is insufficient evidence for me to find claimant was not entitled to receive both the temporary benefits that were paid through August of 2017 in addition to the permanency benefits that commenced on February 6, 2017.

Although claimant is entitled to receive permanency benefits for the same periods during which she was paid temporary benefits, this will not result in a double recovery. Evenson, 881 N.W.2d at 373.

Defendants, however, are entitled to a credit against their obligation for permanency benefits for the payments they classified as permanent partial indemnity benefits for the period starting on August 14, 2017, going forward. (Ex. D, p. 6)

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on December 20, 2018, is affirmed in part and modified in part.

Defendants shall pay claimant one hundred seventy-five (175) 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 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 receive credit as set forth herein.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration hearing in the amount of one hundred dollars ($100.00), and the parties shall split 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 16th day of March, 2020.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Richard R. Schmidt	Via WCES
Lindsey Mills	Via WCES