BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BARBARA JASPER, Claimant, vs. NORDSTROM, INC., Employer, Self-Insured, Defendant,	File Nos. 5052714, 5063163 A P P E A L D E C I S I O N Head Notes: 1402.40; 1803; 1804; 5-9999

Defendant Nordstrom, self-insured employer, appeals from an arbitration decision filed on December 23, 2019. Claimant Barbara Jasper cross-appeals. The case was heard on September 4, 2019, and it was considered fully submitted in front of the deputy workers' compensation commissioner on October 21, 2019.

In File No. 5052471, the deputy commissioner found claimant failed to carry her burden of proof that the February 9, 2012, cumulative work injury resulted in permanent disability.

In File No. 5063163, the deputy commissioner found claimant sustained permanent total disability as a result of the May16, 2015, cumulative work injury to her bilateral shoulders. The deputy commissioner declined defendant's invitation to address the 2017 amendment to Iowa Code section 85.34, which makes, "the number of years in the future it was reasonably anticipated that the employee would work at the time of injury" a factor to be considered when analyzing industrial disability, as the amendment was not applicable to this case. Lastly, the deputy commissioner ordered defendant to pay claimant's costs of the arbitration proceeding in the amount of $459.00, which includes $350.00 for the cost of the functional capacity evaluation (FCE) report of Daryl Short, DPT.

On appeal in File No 5063163, defendant asserts that the deputy commissioner erred in finding claimant is permanently and totally disabled. Defendant further asserts the deputy commissioner erred in awarding the cost of the FCE report. Lastly, defendant renews its request for this agency to address the 2017 amendment to Iowa Code section 85.34(2)(v) (formerly Iowa Code section 85.34(2)(u)).

On cross-appeal in File No. 5052471, claimant asserts the deputy commissioner erred in finding claimant failed to prove the February 9, 2012, cumulative work injury resulted in permanent disability. In this regard, claimant asserts she is entitled to

receive an award of at least 15 percent industrial disability as a result of the February 9, 2012, work injury.

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 23, 2019, which relate to the issues properly raised on intra-agency appeal.

In File No. 5052471, I affirm and adopt the deputy commissioner's finding, without additional analysis, that claimant did not sustain permanent disability as a result of the February 9, 2012, left shoulder injury. I find the deputy commissioner provided a well-reasoned analysis of that issue and I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to that issue.

In File No. 5063163, I affirm and adopt the deputy commissioner's finding that claimant is permanently and totally disabled as a result of the May 16, 2015, work injury, with the following additional analysis:

Erin Kennedy, M.D., claimant's authorized treating physician, issued her final report on August 26, 2019, eight days before the evidentiary hearing. (See Joint Exhibit 5, page 1) In the report, Dr. Kennedy provided an updated impairment rating and restrictions for claimant's left shoulder condition. (JE5, p. 4)

Defendant asserts it was in the process of analyzing Dr. Kennedy's final report, and evaluating whether it could accommodate claimant's restrictions in a regular job, at the time of the evidentiary hearing. (Hr. Tr., pp. 110-112) Defendant asserts because Dr. Kennedy's final restrictions were not issued until the week before the evidentiary hearing, it did not have enough time to complete the aforementioned process. There is evidence in the record to support a finding that defendant was at least in the process of trying to locate a position for claimant. Rachel Firth, a health and safety technician at defendant, testified that defendant was evaluating whether claimant could perform the essential functions of a job that involved removing dunnage from boxes of shoes. (Hr. Tr. p. 113)

As of the date of hearing, claimant had not received an offer from defendant that was consistent with her permanent restrictions, and there was no evidence defendant had definitively determined such a position existed.

It is well established that when 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).

In this case, defendant knew, or should have known, it only had eight days until the evidentiary hearing when it received Dr. Kennedy's report. In those eight days, it appears as though defendant was only able to identify one position that could potentially meet claimant's updated restrictions. As of the date of hearing, defendant had not conducted its weight testing of the potential position, nor had it offered the position to claimant. Defendant did not offer a job description for the potential position, or explain why one was not available. Claimant offered a job description for the position of "Processing Flat/GOH/Shoes," which is a position that falls within the medium physical demand category. (Ex. 4, p. 1) This does not appear to be the same job described by Ms. Firth. (*Compare* Ex. 4, p. 1 *to* Hr. Tr., pp. 113-114)

Defendant offers no reasonable explanation as to why eight days was not a sufficient amount of time to complete its return to work process. A motion to continue could have remedied the alleged prejudice asserted by defendant. There is no evidence defendant filed a motion to continue the evidentiary hearing upon receipt of Dr. Kennedy's final report.

In this case, there is no competent evidence to show claimant can return to her pre-injury position as a cleaner. (See Ex. 5, p. 1) As of the date of hearing there was also no competent evidence that there were any regular positions available and offered to claimant. To rely on defendant's contention that it may have a position available for claimant in the near future as a means to reduce claimant's industrial disability would be inappropriate as such a contention is purely speculative. If defendant's contention does become reality, it has the option of initiating a review-reopening proceeding.

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-Citv R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

Assessments of industrial disability involve a viewing of loss of earning capacity in terms of the injured worker's present ability to earn in the competitive labor market without regard to any accommodation furnished by one's present employer. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996)

The loss which this claimant has suffered due to the May 16, 2015, work injury is the inability to continue the work she was able to perform for defendant for approximately twenty years prior to the date of injury. The mere possibility that claimant might be able to continue her employment with defendant in an alternative position within her permanent restrictions is not evidence that employment exists for claimant in the competitive labor market. At age 67, with a ninth grade education, and with significant permanent restrictions, it appears unlikely claimant would be able to secure other employment in the competitive labor market.

With this additional analysis, I affirm and adopt the deputy commissioner's finding that claimant is permanently and totally disabled.

The next issue to be addressed on appeal is claimant's entitlement to reimbursement for the cost of Mr. Short's FCE report. I affirm the deputy commissioner's order taxing defendant with the $350.00 charge for the FCE report, and I provide the following additional analysis:

Claimant submitted a request for reimbursement in the amount of $900.00 for the full cost of the FCE. The FCE performed by Mr. Short was not ordered by a treating or evaluating physician. Therefore, the cost of the FCE cannot be assessed as a medical expense under Iowa Code section 85.27.

Claimant submitted an itemized invoice with respect to the FCE. While not discussed in great detail, the deputy commissioner correctly limited the amount that could be taxed to defendant to the cost associated with the FCE report, while excluding the cost associated with Mr. Short's examination. (Arbitration Decision, page 13)

Under DART, the only allowable taxable costs are the reports themselves, not the underlying examination. DART v. Young, 867 N.W.2d 839, 846-847 (Iowa 2015). The claimant has the burden to establish which portion of the charges associated with those reports are taxable as costs under rule 876 IAC 4.33(6). As claimant has provided the necessary information to determine what portion of the FCE charge is taxable, she has met that burden. As such, I affirm the deputy commissioner's award of $350.00 for the cost of claimant's FCE report. The remainder of the deputy commissioner's decision regarding costs is affirmed without additional comment.

Lastly, I affirm and adopt the deputy commissioner's finding that issues pertaining to the 2017 amendment to Iowa Code section 85.34(2)(v) are moot as claimant's injuries occurred before July 1, 2017, and thus, the amended code section is not applicable in this case.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on December 23, 2019, is affirmed.

File No. 5052714 – Date of Injury: February 9, 2012

Claimant shall take nothing further from these proceedings.

Defendant shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

File No. 5063163 – Date of Injury: May 16, 2015

Defendant shall pay claimant permanent total disability for so long as claimant remains permanently and totally disabled at the weekly rate of three hundred ninety-nine and 48/100 dollars ($399.48) commencing on August 29, 2018.

Defendant shall receive credit for all benefits previously paid.

Defendant 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).

Pursuant to rule 876 IAC 4.33, defendant shall pay claimant's costs of the arbitration proceeding in the amount of four hundred fifty-nine and 00/100 dollars ($459.00) 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), defendant shall file subsequent reports of injury as required by this agency.

Signed and filed on this 7th day of October, 2020.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

James Peters (via WCES)

Mark Sullivan (via WCES)