BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TERESA GLADE, Claimant, vs. CENTERVILLE COMMUNITY BETTERMENT, INC., Employer, and TECHNOLOGY INSURANCE COMPANY, Insurance Carrier, Defendants.	FILED AUG 22 2017 WORKERS COMPENSATION	File No. 5056268 ARBITRATION DECISION Head Note Nos.: 1803, 4100

STATEMENT OF THE CASE

Teresa Glade, claimant, filed a petition in arbitration seeking workers' compensation benefits from Centerville Community Betterment (CCB) and its insurer, Technology Insurance Company, as a result of an injury she sustained on February 9, 2016 that arose out of and in the course of her employment. This case was heard and fully submitted in Des Moines, Iowa on May 7, 2017. The evidence in this case consists of the testimony of claimant, claimant's exhibits 1 – 19 and defendants' exhibits A – V. Both parties submitted briefs.

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.

ISSUES

The extent of claimant's disability.

Whether claimant is entitled to penalty benefits.

Assessment of costs.

FINDINGS OF FACT

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

Teresa Glade, claimant, was 52 years old at the time of the hearing. She graduated from high school. Claimant described her grades in high school as Bs, Cs and Ds. Claimant obtained 3 certificates post-high school. She is certified as a CMA, CNA and a HHA. The CNA required classroom training of about 75 hours at a community college. The CMA required about a week of study and working with a nursing home. (Transcript page 44) Claimant earned the HHA though her workplace. (Tr. p. 44)

As a CNA claimant can work in a nursing home. With her CMA claimant can pass out medication and with the HHA she can provide services in the home of clients, such as homemaker services.

Almost all of claimant's past relevant work years has been in the health care field. Her primary employment has been assisting persons with illnesses or persons with disabilities. (Exhibit 18, pp. 122, 113; Ex. 17, pp. 106, 107) Claimant testified that two of her early jobs, at Schwan and Redfield Chicken Farm she could not now perform due to the standing and climbing.

At the time of her injury at CCB claimant had three jobs. She worked for CCB providing adult daily living skills to clients. She worked, as needed, for Hospice of Central Iowa and provided homemaker care to a patient. Claimant also worked at Hy-Vee in the food service area, part-time. Claimant considered her CCB job as her full time, primary job. (Tr. p. 13)

Claimant has not worked since the day of her work injury, February 9, 2016. Claimant is no longer employed by Hospice of Central Iowa due to the fact that she was not available for a significant period of time and was taken off the employee registry. Claimant was not working for CCB as she was told that she could only work when she had no restrictions. (Tr. p. 26) While claimant had not been officially terminated by Hy-Vee, she was also told that she could return when she had no restrictions. (Tr. p. 30) Claimant was working between the 3 jobs about 60 hours per week at the time of her injury. (Tr. p. 31)

Claimant has not applied at any of these employers since she stopped working. A nurse case manager did make an inquiry on her behalf as to whether she could return to CCB, but claimant has not heard any response. (Tr. p. 54) Claimant has not looked for any work, applied for vocational assistance or education/training since her work injury.

Claimant has applied for Social Security Disability, but has been denied. She received her reconsideration denial on March 8, 2017. (Ex. U, pp. 119, 120) Claimant intends to appeal this decision to an administrative law judge. The reconsideration decision noted that while claimant may not be able to perform the work she did in the past, she was capable of some types of less strenuous employment. (Ex. U, p. 120)

Claimant testified she has not received some of her weekly workers' compensation checks timely. (Tr. p. 35) Claimant has not been provided any explanation by the defendants as to why the checks were late. (Tr. p. 37) Claimant testified that she had not received her weekly check for the week prior the hearing, nor an explanation, which check was due March 13, 2017. (Tr. p. 38)

Claimant currently resides with her daughter. She sold her home after her work injury. She testified that now she does not go anywhere. That she has pain, depression, and has difficulty sleeping on her right side. She limits steps and bending. Claimant admitted no physician has suggested that surgery would help her and her functional capacity evaluation (FCE) recommended medium work.

Claimant's medical history is relevant to her current claim. Claimant was diagnosed with rheumatoid arthritis when she was 24 years old. She has received treatment every 3 to 6 months for this condition. She has received injections in her knee on a regular basis and has had numerous medications due to this condition. She has been on a different narcotic medication for the rheumatoid arthritis for over 16 years. In 2009, clamant applied for Social Security Disability when the rheumatoid arthritis affected her knees and claimant could not work. Claimant's knee condition improved and she was not awarded Social Security Disability for that application. (Ex. S, pp. 106 – 109) The medical records also show that claimant has had low back pain in the past. There are records of x-rays of her back in 1993. (Ex. A, p. 1) In 1994 claimant had additional x-rays due to low back pain. (Ex. B, p. 2) In 1997 claimant was involved in a motor vehicle accident. A bilateral pars defect was found at that time. (Ex. B, p. 3) In February 1999 claimant received physical therapy for low back pain. (Ex. B, p. 4) In July 2007 Debbie Wardlow, ARNP provided claimant treatment for her back pain. ARNP Wardlow noted that she was hoping to return claimant to work. (Ex. C, p. 7) In January 2008 claimant was complaining of severe aches and pains throughout her back. (Ex. C, p. 9) Claimant testified that her knee condition worsened in 1999 and she was provided narcotic medications. (Ex. C, pp.10 – 12) A May 23, 2013 progress note by PA-C Amy Wood noted claimant had osteoarthritis and chronic pain syndrome. (Ex. C, p. 14) In May 2012 claimant applied for short term disability due to increased pain from her rheumatoid arthritis. (Ex. C. p. 19) On December 7, 2013, claimant was evaluated and received treatment for leg pain, numbness and tingling in feet and pain in the right ribs. (Ex. C, p. 31)

On February 9, 2016, claimant was assisting a client for CCB when she tripped and fell on her left side. (Tr. pp. 16, 62) On February 9, 2016, claimant was seen by

Jennifer Haden, D.O. Dr. Haden's assessment was a fall, acute hip pain and pars defect. (Ex. 2, p. 11)

Claimant said Todd Harbach, M.D. provided claimant a 10-pound lifting restriction. As claimant was already taking tramadol for her rheumatoid arthritis, Dr. Harbach continued that medication for her work injury. (Ex. 5, pp. 21, 22) Claimant had an FCE in November 2016. Claimant reported that the results of the FCE were that she could work at a medium level.

On February 23, 2016, Todd Harbach, M.D. examined claimant. Dr. Harbach noted claimant had chronic rheumatoid arthritis and fell two weeks prior. Dr. Harbach wrote,

> She has low back pain predominantly and some pain in her RIGHT buttocks but really nothing down the leg. She does have lateral recess stenosis to the RIGHT at L4-L5 that is not an acute herniated disk but rather a combination of facet disease and a chronic disk bulge. She also has a grade 1 degenerative spondylolisthesis at L3-L4 with no neural impingement at that level. Her cervical films are unremarkable, but she does seem to have cervical radiculitis in the RIGHT upper extremity. Her lumbar magnetic resonance imaging has also been read as having bilateral L5 pars fractures, and there is something going on there, but I cannot tell if it is an acute injury or not, and she has no evidence or a slip at that level.

(Ex. 5, p. 21) He provided a 10-pound lifting restriction and restrictions on bending, lifting, twisting, climbing, stooping and pushing/pulling. (Ex. 5, pp. 21. 22) On March 28, 2016, Dr. Harbach continued physical therapy and continued his restrictions. (Ex. 5, p. 25) On May 27, 2016, Dr. Harbach noted that a bone scan showed that the bilateral pars fracture was an old injury but may be related to her pain. She has grade 1 degenerative spondylolisthesis at L3 –L4 and some stenosis. Her EMG was normal. He recommended referral to a pain clinic and if that did not work get claimant into a work conditioning program. (Ex. 5, p. 31) On October 13, 2016, Dr. Harbach found claimant at maximum medical improvement (MMI) and stated that he would have the claimant undergo an FCE to set her restrictions. (Ex. 5, p. 34)

On November 2, 2016, claimant underwent an FCE.

> Based on results obtained, the client demonstrates the ability to perform within the MEDIUM Physical Demand Category. The client lifted 33# waist to floor height and 26# waist to crown height. The client unilaterally lifted 33# on the right and 40# on the left. The client bilaterally carried 33#. Static push and pull strengths were measured at 65# and 80# respectively. Tasks listed here were demonstrated at an occasional frequency.

> With respect to non-material handling, the client demonstrates an occasional tolerance for bending, stooping and kneeling. Squatting was performed on a frequent basis. Sitting, standing, walking and stairs were demonstrated on a constant basis.

(Ex. 12, p. 68) The FCE found the claimant could lift within the weight restrictions on an occasional basis and bending, stooping and kneeling occasionally. (Ex. 13, pp. 69, 70)

On November 29, 2016, Dr. Harbach provided an impairment rating for the claimant. He said,

> I am in receipt of your request for a final impairment rating on the above-named patient, Ms. Theresa Glade. As you are well aware, she fell on her left side at work on February 9, 2016 and aggravated multiple preexisting degenerative problems that she had in her back. She has gone through a long treatment course of physical therapy and multiple different injections in the pain clinic and is improved, but continues to have chronic pain. She also has a chronic diagnosis of rheumatoid arthritis. Although her fall was definitely a factor in her symptomatology, I do not think I or any other health provider could say with a reasonable degree of medical certainty that all of her current complaints are related to her fall. Certainly some of it is related to her chronic rheumatoid arthritis also. She has gone through a functional capacity evaluation and has been given permanent limitations, and I agree with those because the test was read as being valid. Because there is significant question in my mind of how much of her problem is related to the fall versus how much are chronic problems related to her chronic disease of rheumatoid arthritis, I find it difficult to give a final impairment rating. If pressed, I would state that she fits into DRE lumbar category II, which is in Table 15-3 on page 384 in the book the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition. In that category, she would receive a 5% permanent partial impairment of the whole person because of mild to moderate tenderness and guarding and discomfort on exam.

(Ex. 5, p. 36)

Claimant received bilateral S1 joint injection and right GTB injection on June 6, 2016. (Ex. 10, p. 53) On June 27, 2016, claimant received another injection. (Ex. 10, p. 58) On July 26, 2016 and August 2, 2016, claimant had a bilateral L2-5 branch block infection. (Ex. 10, pp. 60, 62) Claimant also had a nerve ablation which only helped for about 4 days. (Ex. 16, p. 97)

Suni Bansal , M.D. performed an independent medical examination on February 6, 2017. His diagnosis was, "Aggravation of L-5 spondylolisthesis with pars fracture." (Ex. 16, p. 99) Dr. Bansal agreed with the limitations of the November 2,

2016 FCE and also added, "No frequent bending or twisting. No prolonged standing/walking greater than 60 minutes at a time." (Ex. 16, p. 102) He agreed with Dr. Harbach that claimant was at MMI on October 13, 2016. (Ex. 16, p. 103)

Phil Davis, M.S. provided a vocational assessment on February 20, 2017. Mr. Davis noted that claimant's work as a CNA required transferring and assisting patients in excess of 100 pounds which is considered heavy to very heavy physical work. (Ex. 17, p. 107) Mr. Davis noted that the restrictions from the FCE and Dr. Bansal would limit claimant to the light to medium physical demand level. (Ex. 17, p. 109) His opinion was that claimant would not be able to perform her work as a CNA without significant accommodations. (Ex. 17, p. 109)

On March 9, 2017, Ronald Schmidt, M.S., CRC, LPC provided a loss of earning capacity analysis. (Ex. I, pp. 60 – 66) Mr. Schmidt did not interview claimant. Using the Des Moines – West Des Moines labor market, and depending whether claimant is limited to light or medium work, she has a 21 to 60 percent loss. Claimant resides in Corydon, Iowa and does not live in Des Moines or West Des Moines. Mr. Schmidt concluded claimant is capable of earning $13.21 an hour post-accident. He concluded claimant lost between 5 and 10 percent of her earning capacity. (Ex. I, p. 65)

I find that the restrictions recommended by Dr. Bansal are claimant's restrictions. I find that claimant's fall at work lit up her back condition. She has undergone a number of treatments including medication, TENS unit, injection, nerve ablation and physical therapy. I find that due to her work impairment and her vocational abilities, claimant has an 80 percent loss of earning capacity.

On May 15, 2016, defendants issued a check for temporary total disability (TTD) for the week ending May 13, 2016. (Ex. 19, p. 4) On May 23, 2016, defendants issued a check for TTD for the week ending May 20, 2016. (Ex. 19, p. 115)

On May 26, 2016, defendants issued a check for TTD for the week ending May 27, 2016 at the incorrect rate of $248.06. (Ex. 19, p. 116) On June 3, 2016, defendants issued a check for TTD for the week ending June 3, 2016 at the incorrect rate of $248.06. (Ex. 19, p. 117) These incorrect payments resulted in an underpayment of $36.00 per week, $72.00 total underpayment. Claimant's unrefuted testimony was some of her checks were late. Claimant also testified that as of the date of the hearing, March 23, 2017, the last indemnity payment she received was for the week on March 8, 2017. I find this payment was late. The claimant has also proven the checks issued for May 26, 2016; June 3, 2016; and April 20, 2016 were sent late. (Ex. 19, pp. 116, 117; Ex. V, p. 124)

I find that claimant's relevant gross earnings were $444.00 per week. Using the rate book in effect at the time of the injury, with claimant single and with one exemption, claimant's weekly rate is $284.06.

RATIONALE AND CONCLUSIONS OF LAW

EXTENT OF DISABILITY

The parties stipulated that claimant has an industrial disability that arose out of and in the course of her employment.

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).

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-City 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).

Claimant has CNA and CMA certificates that allow her to work in nursing homes or similar facilities. Claimant's restrictions preclude her returning to this type of work. Claimant does not have the ability to return to her positions at Schwan's or cleaning egg processing equipment. Claimant does not have any significant education post-high school. Her most relevant vocational history is working as a CNA.

Defendants have alleged claimant's "lack of motivation" should be a factor in considering her industrial disability. Claimant has not looked for work since her injury. However claimant was not at MMI until October 13, 2016 and did not have final restrictions from the FCE until November 2, 2016. Claimant did ask the case manager to check the status of work for CCB and did not receive a response. Claimant has filed an application for Social Security Disability and claimant is pursuing an appeal of her denial. Claimant was working up to 60 hours a week before her work injury. Now she is in chronic pain.

I do not find Mr. Schmidt's evaluation convincing. Mr. Schmidt's' use of the Des Moines and West Des Moines labor market significantly overestimates the number of available jobs for the claimant. Claimant lives in Corydon, Iowa, a much smaller labor market even considering the contiguous counties.

The refusal of defendant-employer to return claimant to work in any capacity is, by itself, significant evidence of a lack of employability. Pierson v. O'Bryan Brothers, File No. 951206 (App. January 20, 1995). Meeks v. Firestone Tire & Rubber Co., File No. 876894, (App. January 22, 1993); See also, 10-84 Larson's Workers' Compensation Law, section 84.01; Sunbeam Corp. v. Bates, 271 Ark. 609 S.W.2d 102 (1980); Army & Air Force Exchange Service v. Neuman, 278 F. Supp. 865 (W.D. La. 1967); Leonardo v. Uncas Manufacturing Co., 77 R.I. 245, 75 A.2d 188 (1950). An employer who chooses to preclude an injured worker's re-entry into its workforce likely demonstrates by its own action that the worker has incurred a substantial loss of earning capacity. As has previously been explained in numerous decisions of this agency, if the employer in whose employ the disability occurred is unwilling to accommodate the disability, there is no reason to expect some other employer to have more incentive to do so. Estes v. Exide Technologies, File No. 5013809 (App. December 12, 2006).

Claimant cannot perform her CNA work. She is limited in bending and twisting. While claimant's disability reduces her ability to work in most of her prior fields, I do not find she is totally disabled. Based upon her ability to do some limited amount of lifting it appears that she has the ability to perform some homemaker duties, assuming that she is limited to light cleaning chores.

Claimant is not a surgical candidate and has only had limited success in controlling her pain with other treatment modalities. Claimant's age and limited education is not a positive employment factor. Claimant's labor market is very limited.

Considering all the factors of industrial disability, I find that claimant has an 80 percent industrial disability. This entitles claimant to 400 weeks of permanent partial disability benefits at the weekly rate of $284.06.

PENALTY

Iowa Code section 86.13(4) provides:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination in benefits.
>
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.
>
> c. In order to be considered a reasonable or probable cause or excuse under paragraph "b," an excuse shall satisfy all of the following criteria:
>
> (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.
>
> (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.
>
> (3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

For purposes of determining whether an employer has delayed in making payments, payments are "made" either when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or when (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235. Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

Defendants offered no convincing evidence that they provided notice to claimant and that they had a reasonable excuse. I find that claimant has proven a delay in payment of benefits and an underpayment of benefits. Defendants offered no evidence to refute the late and underpayment of benefits. Defendants provided no excuse or rationale for their conduct. Any delay for an injured worker in payment of weekly benefits can cause significant hardship. I award $300.00 in penalty benefits. I find this appropriate considering the delay and to encourage timely compliance in the future.

Using my discretion, I find that claimant is entitled to reimbursement of the $100.00 filing fee pursuant to 876 IAC 4.33.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant four hundred (400) weeks of permanent partial disability benefits at the weekly rate of two hundred eighty-four and 06/100 dollars ($284.06) commencing October 13, 2016.

Defendants shall receive credit for benefits they have paid.

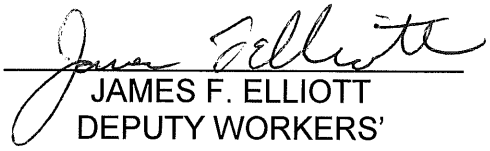
Defendants shall pay claimant three hundred and 00/100 dollars ($300.00) for penalty benefits.

Defendant shall pay claimant costs of the filing fee of one hundred and 00/100 dollars ($100.00).

Defendants shall pay any past due amounts in a lump sum with interest.

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

Signed and filed this 22nd day of August, 2017.



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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.