

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JANETTE CALIGIURI,

Claimant,

vs.

THE BON TON STORES,

Employer,

and

LIBERTY MUTUAL INSURANCE
COMPANY,

Insurance Carrier,

and

SECOND INJURY FUND OF IOWA,

Defendants.

File No. 5065325

A P P E A L

D E C I S I O N

Head Note No.: 5-999

On July 23, 2019, the Iowa Workers' Compensation Commissioner delegated authority to the undersigned to enter a final agency decision in this matter. Therefore, this appeal decision is entered as final agency action pursuant to Iowa Code section 17A.15(3) and Iowa Code section 86.24.

On November 28, 2018, the presiding deputy commissioner issued an arbitration decision. With respect to the claim against the Second Injury Fund of Iowa, the deputy found that claimant had sustained qualifying first and second injuries resulting in 10 percent industrial disability. On December 6, 2018, the Fund filed a notice of appeal. On December 18, 2018, Ms. Caligiuri filed her notice of cross-appeal. The defendant employer, The Bon Ton Stores d/b/a/ Younkers, and their insurance carrier, Liberty Mutual Insurance Company, did not file an appeal.

On appeal, the Fund asserts that the deputy commissioner erred in finding that claimant sustained a first qualifying injury on September 28, 2010. The Fund further argues that if on appeal the agency finds that there was a first qualifying injury, the award of 10 percent industrial disability is correct. Finally, the Fund asserts that interest

accrues on Fund benefits from the date of the final agency action.

On cross-appeal claimant argues that the award of 10 percent industrial disability is insufficient.

I performed a de novo review of the evidentiary record before the presiding deputy workers' compensation commissioner and the detailed arguments of the parties. Pursuant to Iowa Code section 86.24 and 17A.15, those portions of the proposed arbitration decision filed on November 28, 2018, that relate to issues properly raised on intra-agency appeal are affirmed in part without further analysis and modified in part, as explained below.

I affirm the deputy commissioner's finding that claimant sustained a first qualifying injury to her left upper extremity on September 28, 2010. In doing so, I affirm the deputy commissioner's reliance on the opinions of Dr. Bansal. The deputy's findings of fact are well-reasoned and supported by the greater weight of the evidence, and they are affirmed in their entirety without additional comment or analysis.

On cross-appeal claimant challenged the award of 10 percent industrial disability because claimant believes the award should be higher. The deputy's findings of fact with regard to the extent of industrial disability are well-reasoned and supported by the greater weight of the evidence, and they are adopted with the following modification and analysis.

At the time of hearing claimant was 64 years old and resided in Winterset, Iowa. She attended formal schooling until the age of 16. She left school to find work to help financially support her parents and younger brother. She did earn her GED in 1973. Ms. Caligiuri also took a few college courses, but did not obtain any type of degree. She describes her computer skills as poor. She knows how to use email, but does not know how to set up any forms or documents in Word. She described her typing skills as slow; she hunts and pecks for keys. Her work history includes baby-sitting and waitressing. Ms. Caligiuri was a stay-at-home mom for 17 years. For the last approximately 30 years she has worked in retail, including management positions. Her duties included unloading trucks, taking care of customers' problems, working on the financials, hiring and scheduling of employees, doing floor moves, and cleaning. At the time of the second injury, claimant was employed as a selling manager by Younkers and her job required being on her feet approximately seven and a half hours per day. Due to the pain in her left knee from prolonged standing, she resigned from that job. (Transcript pages 12-40)

Ms. Caligiuri went to work at Lowe's as the area manager for the inside lawn and garden department. She felt she could manage her pain in this position because it is a small department. She was paid \$18.00 per hour, which is more than she was making at the time of the injury. However, her job was eliminated. She applied for and received a different management job at Lowe's. The job was a promotion and she earned \$20.14 per hour. This job required walking the floors all day, similar to her job at

Younkers. She worked in this position for a few months, but then accepted a demotion because her left knee was too painful. At the time of hearing, she was employed with Lowe's as a sales associate in the lighting department. She estimates that the most she stands in a day is 6 hours and the standing/walking is not as intense as it was at Younkers. This job is primarily customer service and does not require a lot of walking. This job is physically easier on her knee. Lowe's has provided her with a chair to sit down behind the register. She tries to sit down every hour to relieve her leg. She is paid \$15.50 per hour and works 40 hours per week. (Tr. pp. 38-45)

Ms. Caligiuri continues to experience problems with her left knee. She has a prescription for Oxycodone 30s and uses a fentanyl patch 75. There are duties of her job at Lowe's that she cannot perform. She cannot perform the necessary lifting and she cannot go up and down the ladder; her coworkers help her with these duties. She also continues to have difficulty with her left upper extremity. Her arm gets prickles and gets hot in her biceps and elbow area. (Tr. pp. 43-47)

Ms. Caligiuri does have extensive retail management experience. She testified that her knee surgery helped her pain and if she had known the surgery would be so successful, she would not have voluntarily left her management position. (Tr. p. 53)

Her permanent restrictions are as set forth by Dr. Bansal. For her left knee, he restricted her to no frequent kneeling, squatting, climbing, or twisting, no prolonged standing greater than sixty minutes at a time, and to avoid multiple steps, stairs, or ladders. With regard to her left upper extremity, Dr. Bansal restricted her to no lifting greater than ten pounds with her left arm. Fortunately, Lowe's has allowed Ms. Caligiuri to receive help from her coworkers and to sit in a chair as needed.

Considering Ms. Caligiuri's age, educational background, employment history, ability to retrain, motivation to remain in the workforce, length of healing period, permanent impairment, and permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that she has sustained 25 percent industrial disability as a result of the cumulative effect of the scheduled injuries. The deputy commissioner's finding that claimant is entitled to 10 percent industrial disability is therefore modified to 25 percent industrial disability which amounts to 125 weeks of permanent partial disability benefits.

Ultimately, the Fund is responsible only for the industrial disability that exceeds the scheduled disability attributable to the first and second injuries. Iowa Code section 85.64. The parties stipulated that the Fund is entitled to a credit of 11.9 weeks of permanent partial disability benefits. (Hearing Report) Thus, Caligiuri is awarded 113.1 weeks of permanent partial disability benefits from the Fund.

The Fund correctly contends that interest accrues on Fund benefits from the date of the final agency action. Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990); see also Boles v. Enxco, Inc., File Nos. 5036958, 5036959, 2018 WL

3222809 (Appeal Dec., June 4, 2018). I conclude that interest shall begin to accrue as of the date of this decision.

The arbitration decision is modified as to the extent of industrial disability claimant sustained and regarding the date interest begins to accrue. The arbitration decision is otherwise affirmed.

ORDER

IT IS THEREFORE ORDERED that the decision of November 28, 2018, is AFFIRMED in part and MODIFIED in part, and that the following modification is ordered:

The Fund shall pay Claimant 113.1 weeks of permanent disability benefits, at the rate of four hundred forty-four and 18/100 dollars (\$444.18) per week, commencing after all benefits have been paid by Younkers and Liberty Mutual.

Interest accrues on unpaid Fund benefits from the date of this decision.

Signed and filed this 15th day of October, 2019.



ERIN Q. PALS
DEPUTY WORKERS' COMPENSATION
COMMISSIONER

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