BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ESMA LULIC,

Claimant,

vs.

WATERLOO COMMUNITY SCHOOL DISTRICT,

Employer,

and

UNITED WISCONSIN INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5057597

APPEAL

DECISION

Head Note Nos.: 1804, 2907

Defendants Waterloo Community School District, employer, and United Wisconsin Insurance Company, insurer, appeal from an arbitration decision filed on November 13, 2018.

On May 17, 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.

In the arbitration decision, the deputy commissioner found claimant sustained incontinence, depression, and agoraphobia as a result of the stipulated work-related injury to her back on October 2, 2015. As a result of these conditions, the deputy commissioner found claimant to be permanently and totally disabled. The deputy commissioner also awarded various medical expenses and costs to claimant.

On appeal, defendants assert claimant sustained only a moderate degree of industrial disability. They also dispute the deputy commissioner's costs assessment.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

Pursuant to Iowa Code section 17A.15 and Iowa Code section 86.24, I performed a de novo review of the evidentiary record before the presiding deputy workers' compensation commissioner. After my de novo review of the evidentiary record and the detailed arguments of the parties, those portions of the proposed arbitration decision filed on November 13, 2018 that relate to issues properly raised on intra-agency appeal are affirmed with additional analysis, with the exception of the deputy commissioner's finding regarding claimant's incontinence, which is respectfully reversed.

While I agree with the deputy commissioner's ultimate determination that claimant is permanently and totally disabled due to her work-related injury, I disagree that claimant's incontinence is causally related to her work injury. Claimant was evaluated by the University of Iowa Hospitals and Clinics urology department for her incontinence. (See Joint Exhibit 7) At claimant's last appointment, she was told "the etiology of her incontinence is unclear." (JE 7, p. 13) In her independent medical examination (IME) with Arnold Delbridge, M.D., Dr. Delbridge assigned a permanent impairment rating for claimant's incontinence but failed to address causation. (Ex. 1, p. 5) I therefore find insufficient evidence of a causal relationship between claimant's incontinence and her work injury, and I conclude claimant failed to carry her burden to prove her incontinence was causally related to her work injury. Thus, the deputy commissioner's finding regarding claimant's incontinence is respectfully reversed.

Even putting her incontinence issues aside, however, I agree with the deputy commissioner's finding that the limitations from claimant's back and mental health conditions resulted in a 100 percent loss of earning capacity.

Turning first to claimant's mental health condition, claimant offered the expert opinion of Catalina Ressler, Ph.D. Dr. Ressler diagnosed claimant with dysthymia and agoraphobia, both of which developed as a direct result of the work-related injury. (Ex. 2, p. 7) Dr. Ressler opined these conditions are permanent in nature and severe enough to render her unemployable in the competitive workforce. (Cl. Ex. 2, pp. 7-8) Significantly, this opinion was unrebutted.

With respect to claimant's back condition, claimant is either "not suitable for return to work" or only able to work on a part-time basis "up to 4 hours," depending on which doctor's opinion is considered. (Ex 1, p. 6; Ex. B) In other words, even defendants' expert acknowledged claimant could not return to her position on a full-time basis. (See Ex. B) Importantly, these opinions do not account for the limitations related to claimant's work-related mental health conditions, which Dr. Ressler indicated made claimant unemployable. (See Ex. 2, p. 8) For these reasons, I agree with the deputy commissioner's finding that claimant is unable to return to work in the competitive labor market due to her work-related back and mental health conditions.

Defendants focus much of their argument on appeal on claimant's lack of motivation to return to the competitive workforce. It is true that claimant failed to put forth any effort to return to work (Hearing Transcript, pp. 67-68), and defendants' criticism of the deputy commissioner's finding of permanent and total disability in this regard is understood. As is evidenced in the cases cited by defendants in their appeal brief, claimants are often found to be less than permanently and totally disabled when they fail to demonstrate any attempt to return to work.

This case is distinguishable from the cases cited by defendants, however. In Segura v. Kraft Foods Group, Inc., File No. 5046348 (App. April 13, 2017), the Commissioner reduced the presiding deputy commissioner's permanent and total disability award to 75 percent industrial disability. In doing so, the Commissioner noted claimant had not attempted to find work despite the fact that "no physician has stated in this matter that claimant cannot work." Id. In Salfi v. Whirlpool Corp., File Nos. 5034382, 5046927, 5046928 (App. Nov. 22, 2017), the Commissioner similarly reduced a permanent and total disability award after claimant failed to demonstrate motivation to re-enter the labor market, but again, no physician suggested claimant was unable to work. In the instant case, however, both of claimant's expert's opined claimant is unemployable, and defendants' expert acknowledged claimant is capable of only a graduated return to part-time work—and defendants' expert failed to consider claimant's significantly debilitating mental conditions. Thus, while I acknowledge claimant in this case failed to put forth a good faith effort to return to the work force, I find any attempt to do so would have been futile.

Consequently, under the specific circumstances of this case, I agree with the deputy commissioner that the restrictions and limitations outlined by both claimant's experts and defendants' expert render claimant permanently and totally disabled despite her lack of effort to re-enter the workforce. With this additional analysis, the deputy commissioner's finding that claimant sustained a 100 percent loss of earning capacity and is therefore permanently and totally disabled is affirmed.

Having affirmed the deputy commissioner's permanent and total disability award, any dispute regarding the date on which claimant reached maximum medical improvement is irrelevant.

Defendants additionally appeal the deputy commissioner's assessment of Dr. Ressler's report and the deposition of Barbara Laughlin. The deputy commissioner taxed defendants in the amount of $420.00 for Dr. Ressler's report. The deputy commissioner chose this amount because it accounted for one-third of Dr. Ressler's overall bill, which he indicated was not itemized. The deputy commissioner was

mistaken, however, as Claimant's Exhibit 7, page 3 indicates Dr. Ressler spent 3.5 hours on the report at a rate of $120.00 per hour, for a total of $420.00 for the report.

Pursuant to the Iowa Supreme Court's holding in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015) (hereinafter "DART"), only the costs for the preparation of a report can be awarded under rule 876 IAC 4.33. I conclude taxation of $420.00 for Dr. Ressler's report is consistent with the holding in DART and therefore appropriate. The deputy commissioner's assessment of $420.00 for Dr. Ressler's report is therefore affirmed with this substituted rationale.

With respect to Ms. Laughlin's deposition, rule 876 IAC 4.33 allows for an assessment of "transcription costs when appropriate." 876 IAC 4.33(5). While I understand the deposition was taken to avoid a late report, defendants waived any objection to the admissibility of Ms. Laughlin's deposition at the outset of the hearing. (Hrg. Tr., pp. 9-10) Furthermore, the deputy commissioner referred Ms. Laughlin's testimony in his decision and found it necessary. I therefore find an assessment of the transcription costs of Ms. Laughlin's deposition testimony is appropriate. The deputy commissioner's taxation of Dr. Laughlin's deposition costs in the amount of $443.50 is therefore affirmed.

Defendants, in what appears to be a throwaway sentence near the end of their brief, assert claimant is not entitled to medical expenses and mileage relating to treatment that was not authorized, reasonable, or otherwise necessary. Other than this single sentence, which references Claimant's costs exhibit and not her mileage or medical expenses exhibits, defendants make no additional argument. Without more, such as a reference to the particular treatment or mileage in question or a citation to the correct exhibits in the record, I do not find this argument convincing. The deputy commissioner's award of medical expenses and mileage is therefore affirmed.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on November 13, 2018 is affirmed with my additional analysis except for the deputy commissioner's finding regarding claimant's incontinence, which is reversed.

Defendants shall pay claimant permanent total disability at the weekly rate of three hundred five and 05/100 dollars ($305.05) for so long as she remains permanently disabled commencing on October 2, 2015.

Defendants shall pay claimant the filing fee of one hundred dollars ($100.00), the costs of Dr. Ressler's report in the amount of four hundred twenty and 00/100 dollars

($420.00), and the deposition costs of four hundred forty-three and 50/100 dollars ($443.50).

Defendants shall pay the medical expenses, medical mileage and IME expenses as set forth in the arbitration decision.

Defendants shall pay 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. April 24, 2018).

Defendants shall receive a credit for benefits previously paid.

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.

Defendants are responsible for the costs of the appeal, including the costs of preparation of the hearing transcript.

Signed and filed this 23rd day of May, 2019.

STEPHANIE J. COPLEY
DEPUTY WORKERS' COMPENSATION
COMMISSIONER

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