

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

 KRYSTAL FOSTER,

Claimant,

vs.

EAST PENN MANUFACTURING CO.,
INC.,

Employer,

and

SENTINEL INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 5061342.01

A P P E A L

D E C I S I O N

 Head Notes: 1402.40; 1403.10; 1703; 1803;
2501; 2502; 2905; 4000

Claimant Krystal Foster appeals from a review-reopening decision filed on August 31, 2022. Defendants East Penn Manufacturing Company, employer, and its insurer, Sentinel Insurance Company, cross-appeal. The case was heard on May 16, 2022, and it was considered fully submitted in front of the deputy workers' compensation commissioner on June 20, 2022.

In the review-reopening decision, the deputy commissioner found claimant met her burden of proof to establish she sustained a change of physical condition after the arbitration decision was filed in this matter on April 19, 2019. In the review-reopening decision, the deputy commissioner found claimant sustained ten percent industrial disability and adopted the permanent restrictions assigned by Sunil Bansal, M.D. The deputy commissioner found defendants are responsible for all medical bills causally related to claimant's three shoulder surgeries and her injury as set forth in Exhibit 12, noting defendants had not paid for all of the medical bills they were ordered to pay in the April 19, 2019, arbitration decision. Pursuant to Iowa Code section 86.13, the deputy commissioner ordered defendants to pay claimant \$3,885.22 in penalty benefits for the 61-day delay in paying benefits awarded by the Iowa Court of Appeals on December 15, 2021, and the deputy commissioner ordered defendants to pay \$1,086.55 in penalty benefits for late paid temporary benefits from February 20, 2019, through March 26, 2019, for a total of \$4,971.77 in penalty benefits. The deputy commissioner found defendants failed to meet their burden of proof to establish they are entitled to a credit for the alleged payment of \$11,533.00. The deputy commissioner

found claimant is not entitled to recover the cost of Dr. Bansal's independent medical examination (IME) pursuant to Iowa Code section 85.39. The deputy commissioner found defendants should reimburse claimant \$2,060.00 for the cost of Dr. Bansal's report, for the cost of the filing fee, for the cost-of-service fees, and for the deposition transcript pursuant to 876 Iowa Administrative Code 4.33. The deputy commissioner found that pursuant to 876 IAC 4.33, claimant is not entitled to recover the cost of the April 19, 2019, hearing transcript, the cost of a functional capacity evaluation (FCE), or copying costs.

On appeal, claimant asserts the award for industrial disability should be increased substantially beyond the ten percent awarded in the review-reopening decision. Claimant asserts the remainder of the decision should be affirmed.

On cross-appeal, defendants assert the deputy commissioner erred in finding claimant proved entitlement to review-reopening and in finding claimant sustained any industrial disability. Defendants assert the deputy commissioner erred in awarding claimant penalty benefits. Defendants assert the deputy commissioner erred in finding defendants failed to prove they are entitled to a credit for the alleged payment of \$11,533.00, and defendants assert they are entitled to a credit in that amount.

Those portions of the proposed review-reopening decision pertaining to issues not raised on appeal are adopted as 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, the review-reopening decision filed on August 31, 2022, is affirmed as modified with the following additional analysis.

Without further analysis, I affirm the deputy commissioner's finding that defendants are responsible for all medical bills causally related to claimant's three shoulder surgeries and her injury as set forth in Exhibit 12, including the bills they were previously ordered to pay in the April 19, 2019, arbitration decision. I affirm the deputy commissioner's finding that defendants should pay claimant \$3,885.22 in penalty benefits for the 61-day delay in paying benefits awarded by the Iowa Court of Appeals on December 15, 2021, and I affirm the deputy commissioner's finding that defendants should pay claimant \$1,086.55 in penalty benefits for late paid temporary benefits from February 20, 2019, through March 26, 2019, for total of \$4,971.77 in penalty benefits. I affirm the deputy commissioner's finding that defendants failed to prove they are entitled to a credit for the alleged payment of \$11,533.00. I affirm the deputy commissioner's finding that claimant is not entitled to recover the cost of Dr. Bansal's IME pursuant to Iowa Code section 85.39. I affirm the deputy commissioner's finding that defendants should reimburse claimant \$2,060.00 for the cost of Dr. Bansal's report, for the cost of the filing fee, for the cost-of-service fees, and for the cost of the deposition transcript. I affirm the deputy commissioner's finding that pursuant to 876 Iowa Administrative Code

4.33 claimant is not entitled to recover the cost of the April 19, 2019, hearing transcript, the cost of the FCE, or copying costs.

With the following additional analysis, I affirm the deputy commissioner's finding that claimant proved she sustained a change of physical condition and I affirm the finding that Dr. Bansal's restrictions are claimant's permanent restrictions. I modify the deputy commissioner's finding that claimant sustained ten percent industrial disability and I find claimant has sustained 25 percent industrial disability as a result of the November 21, 2016, work injury.

Iowa Code section 86.14 governs review-reopening proceedings. When considering a review-reopening petition, the inquiry "shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded." Iowa Code § 86.14(2). The deputy workers' compensation commissioner does not re-determine the condition of the employee adjudicated by the former award. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391 (Iowa 2009). The deputy workers' compensation commissioner must determine "the condition of the employee, which is found to exist subsequent to the date of the award being reviewed." Id. (quoting Stice v. Consol. Ind. Coal Co., 228 Iowa 1031, 1038, 291 N.W. 452, 456 (1940)). In a review-reopening proceeding, the deputy workers' compensation commissioner should not reevaluate the claimant's level of physical impairment or earning capacity "if all of the facts and circumstances were known or knowable at the time of the original action." Id. at 393.

The claimant bears the burden of proving, by a preponderance of the evidence, that, "subsequent to the date of the award under review, he or she has suffered an *impairment or lessening of earning capacity proximately caused by the original injury.*" Simonson v. Snap-On Tools Corp., 588 N.W.2d 430, 434 (Iowa 1999) (emphasis in original).

"Industrial disability is determined by an evaluation of the employee's earning capacity." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 852 (Iowa 2011). In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-138 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(v). When considering the extent of

disability, the deputy commissioner considers all evidence, both medical and nonmedical. Evenson v. Winnebago Indus., Inc., 881 N.W.2d 360, 370 (Iowa 2016).

Claimant in this matter underwent three shoulder surgeries. The deputy commissioner correctly adopted Dr. Bansal's restrictions from the valid April 8, 2022, functional capacity evaluation (FCE) as claimant's permanent restrictions. (Joint Exhibit 3, p. 36) Claimant's permanent restrictions include no lifting over 10 pounds occasionally waist to shoulder, no bilateral carrying over 25 pounds occasionally, horizontal pushing and pulling with up to 35 pounds of force occasionally, left unilateral forward reaching frequently, left unilateral sustained forward reaching occasionally, and avoid waist to overhead lifting, and avoid left unilateral overhead reaching and sustained overhead reaching. (JE 3:36) The deputy commissioner also correctly found Dr. Bansal's opinion most persuasive that claimant sustained 15 percent permanent impairment of the left upper extremity, which converts to nine percent of the body. (JE 3:35)

At the time of the hearing claimant was 30 years old. (Tr.:25-26) Claimant resides in Corydon, a small town with a population of approximately 2,000 people. (Tr.:25) Claimant graduated from high school and she attended Indian Hills Community College for approximately six months before she dropped out of school. (Tr.:26) Claimant has worked in a grocery store, in convenience stores, as a caregiver for individuals with disabilities and the elderly, in lawn care, and as a factory worker for defendant-employer. (Tr.:26-27; Ex. 10:26-27; Ex. 11:31)

Claimant is a young and motivated worker with significant permanent restrictions as a result of the November 21, 2016, injury to her left shoulder. The valid FCE found claimant is capable of work in the light physical demand category. I find claimant's functional ability and her access to jobs in the labor market has been permanently reduced by the work injury. Based on all the factors of industrial disability, I find claimant has sustained 25 percent industrial disability, which entitles claimant to receive 125 weeks of permanent partial disability benefits commencing on August 8, 2019.

ORDER

IT IS THEREFORE ORDERED that the review-reopening decision filed on August 31, 2022, is affirmed as modified with my additional analysis.

Defendants shall pay claimant 125 weeks of permanent partial disability benefits at the weekly rate of four hundred thirty-four and 62/100 dollars (\$434.62), commencing on August 8, 2019.

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 pay claimant four thousand nine hundred seventy-one and 71/100 dollars (\$4,971.71) in penalty benefits.

Defendants shall pay claimant's medical bills causally related to claimant's three shoulder surgeries and her injury as set forth in Exhibit 12, including the bills defendants were previously ordered to pay in the April 19, 2019, arbitration decision.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant two thousand sixty and 00/100 (\$2,060.00) for the cost of Dr. Bansal's report, for the cost of the filing fee, for service costs, and for the cost of the deposition transcript, and defendants shall pay the cost 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 3rd day of January, 2023.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Randall Schueller (via WCES)

Tiernan Siems (via WCES)