BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

COLLEEN TERRY, Claimant, vs. PARKER HANNIFIN CORP., Employer, Self-Insured, Defendant.	:	File Nos. 5037453 5041475 5041476 APPEAL DECISION Head Note No.: 1803

Defendant, Parker Hannifin Corporation, a self-insured employer, appeals from an arbitration decision filed on July 21, 2014. The case was heard on March 12, 2014, and it was considered fully submitted on March 31, 2014, in front of the deputy workers' compensation commissioner.

Claimant cross-appealed, but the only issues discussed in her appeal brief are the same issues raised by defendant. Therefore, the cross-appeal is moot.

In the arbitration decision, claimant was awarded workers' compensation benefits for three separate work injuries consisting of 300 weeks of permanent partial disability benefits and medical benefits.

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. Those portions of the proposed agency decision pertaining to issues not raised on appeal or cross-appeal are adopted as a part of this appeal decision.

Pursuant to Iowa Code sections 86.24 and 17A.15, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision of July 21, 2014, filed in this matter that relate to issues properly raised on intra-agency appeal except for the denial of a credit for defendant's payment of permanent disability benefits for a prior work injury in 2003; the failure to assess the combined permanent industrial disability for the 2003 and 2009 injuries; and, an incorrect amount of credit given to the employer for a combined disability for the 2003, 2009, 2010 and 2011 injuries. The following additional analysis is provided below:

Claimant is a 50-year-old factory worker with a high school education. She was an employee of defendant employer for 27 years at the time of hearing. Her only work experience prior to defendant employer was as a laborer for a tree service and

restaurant waitress. She occasionally did waitress work after her work hours with defendant but before the work injuries. She had a knee injury in 2002 which required surgery. She had a left shoulder impingement injury at work in 2003 for which she received surgery and workers' compensation benefits.

Defendant employer is a manufacturer of hydraulic hoses. There is little dispute that claimant's work is physically demanding including lifting up to 40-60 pounds of spoiled wire and compound to feed machines, which requires working overhead.

Defendant stipulated in the hearing report submitted at hearing to the occurrence of the three work injuries at issue in this case: a low back injury on September 8, 2009; a left shoulder injury on April 7, 2010; and, a neck injury on May 12, 2011. Consequently, Iowa Code section 85.34 (7) relating to successive disabilities is applicable to this case. As all of the work injuries, including a 2003 prior injury, occurred with the same employer, the defendant in this case, and there is no evidence that any preexisting disability caused a reduction in actual earnings, subsection (b)(1) applies which provides as follows:

> If an injured employee has a preexisting disability that was caused by a prior injury arising out of and in the course of employment with the same employer, and the preexisting disability was compensable under the same paragraph of subsection 2 as the employee's present injury, the employer is liable for the combined disability that is caused by the injuries, measured in relation to the employee's condition immediately prior to the first injury. In this instance, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer.

(Iowa Code section 85.34(7)(b)(1))

All of the prior injuries, including the 2003 injury, are to the body as a whole and must be compensated industrially pursuant to Iowa Code section 85.34(2)(u) as a percentage of 500 weeks, the maximum amount of weeks allowable for a permanent partial disability to the body as a whole.

Using the statutory language, the presiding deputy awarded benefits for a 10 percent permanent industrial disability for the 2009 low back injury consisting of 50 weeks; a 20 percent combined industrial disability for the 2009 and 2010 injuries, but only awarded 50 weeks after giving credit for the 10 percent awarded for the 2009 injury; and a 50 percent combined industrial disability for the 2009, 2010 and 2011 injuries, and awarded 200 weeks after giving credit for the 10 percent disability awarded for the 2010 injury.

The presiding deputy denied defendant's assertion of a credit against these awards for the $5,983.50 of permanent partial disability benefits paid to claimant by defendant-employer for a 2003 shoulder injury. The deputy held that defendants can only receive a credit for a percentage of previously compensated permanent disability under Iowa Code section 85.34(7)(b)(1) and defendants failed to submit evidence showing what percentage of disability is represented by this payment of benefits.

I agree with the deputy's assessment of industrial disability for the 2009 injury and the assessment of the combined disabilities as far as they go. I disagree as to the credits given to defendant and the lack of an assessment for the combined disabilities for the 2009 and the prior 2003 work injury.

As pointed out by defendant in its brief, the percentage of disability that was paid for the 2003 work injury can be calculated from the printout of payments made for that injury in exhibit H-18. There was a weekly disability payment twice for a full week in the amount of $398.90 each which clearly represents claimant's weekly rate at the time of the 2003 injury. Dividing the amount paid by that weekly rate shows a total of 15 weeks paid. This is equivalent to a three percent permanent partial industrial disability under 85.34(2)(u). Therefore, defendant is entitled to a three percent credit against any award of additional permanent disability in this case.

Defendants contend claimant suffered no permanent disability as a result of any of the three stipulated injuries due to an eventual returned to full duty by the treating doctors without loss of pay after each injury. Defendants voluntarily paid permanent disability benefits after the 2011 injury and indicated in the hearing report they will be paying 125 weeks at the rate of $537.12 through March 30, 2014. It is unknown whether these payments ended at that time as the hearing was held on March 12, 2014.

The company doctor, Dean Wampler, M.D., treated all three of the stipulated injuries.

The first injury on September 8, 2009, was considered by Dr. Wampler to be an aggravation of pre-existing degenerative disc disease. There was no surgery to the low back. An MRI revealed a bulging disc, but the consulting neurosurgeon, Douglas Long, M.D., and his PA-C, found that the bulging disc did not impact spinal nerves and there was no need for surgery. (Exhibit 3, pages 6-7) Dr. Wampler continued conservative care with limited work duty and medications and placed claimant into physical therapy. Claimant was also placed on light duty, but this was accommodated and claimant lost no work time. After a gradual lowering of restrictions, claimant was eventually released to full duty by Dr. Wampler on January 18, 2010. (Ex. 2, p. 9) Despite continued complaints, Dr. Wampler placed claimant at MMI on February 3, 2010, stating that the continued pain would fade with time and he stated there was no objective evidence upon which to base an impairment rating under the AMA Guides. (Ex. 2, p. 14)

When claimant's back and lower extremity pain did not subside, the doctor ordered EMG/NCS testing and a blood scan; both of which revealed no abnormalities. (Ex. C, p. 5; Ex. D, p. 7) Claimant's low back and lower extremity pain has waxed and waned since that time and was treated at all times by Dr. Wampler. Dr. Wampler attributed the pain to additional aggravations of claimant's spine condition from activity both at work and at home. When these aggravations occurred, Dr. Wampler would place claimant on light duty, which was again accommodated by the employer, until claimant again was placed back to full duty. (Tr. pp. 113-114) After a significant work-related aggravation of claimant's low back in February 2013, Dr. Wampler referred claimant back to Dr. Long. Dr. Long then re-assessed claimant's lumbar spine following another MRI which indicated a new herniation at the L4-5 level. However, Dr. Long and his PA-C stated that this herniation would not cause claimant's current complaints and they had no explanation for those complaints. (Ex. 3, pp. 16-17) Claimant did not include a February 2014 injury in this proceeding. Dr. Wampler has not changed his opinion as to the lack of any permanent impairment under the AMA Guides due to claimant's back condition. At the time of the hearing, claimant was again on restrictions by Dr. Wampler after another work aggravation on February 10, 2014, which was claimant's last day of work at defendant-employer. (Ex. 2, p. 36)

The second injury on April 7, 2010, required surgery on June 23, 2010, to repair a torn rotator cuff in claimant's left shoulder. Dr. Wampler restricted claimant's work, but this was again accommodated. The surgery was performed by Stephen Brown, M.D., an orthopedist on referral by Dr. Wampler. (Ex. 14, pp. 2-5) Dr. Brown had performed the prior left shoulder surgery in 2003. Claimant was released to work at home on June 28, 2010, and she returned to the plant on July 12, 2010, with a restriction against use of her left arm. (Ex. 14, p. 9) Dr. Brown released claimant to full duty on December 29, 2010. (Ex. 14, p. 15) Despite the release to full duty, Dr. Brown provided an eight percent upper extremity permanent impairment which converts to five percent impairment of the whole person for the injury. (Ex. 14, p. 17; Ex. A, p. 2) There is no record of any payment of permanent disability by defendants as a result of this impairment rating. Claimant returned to Dr. Brown a couple of months later complaining of recurrent shoulder pain and was given a MEDROL Dosepak. (Ex. 14, p. 20) Claimant did not return to Dr. Brown again before hearing.

The third injury, which was to claimant's neck with right upper extremity symptoms, which occurred on May 12, 2011, also was initially treated conservatively by Dr. Wampler. Upon a diagnosis of cervical radiculitis, the doctor treated claimant with modified duty, physical therapy and medications. For this injury Dr. Wampler prescribed narcotic medication for the first time, hydrocodone and/or Vicodin to aid in sleeping. (Ex. 2, pp. 22-23; Ex. 18, pp. 2-18) The doctor eventually referred claimant back to Dr. Long for his assessment of the neck condition. Dr. Long and his PA-C diagnosed a cervical radiculopathy and recommended fusion surgery at C5-6. (Ex. 20, p. 3) That surgery was done on July 14, 2011. Claimant testified she was off work for two weeks and then returned to modified duty at the plant. (Tr. p. 37) Dr. Long placed claimant on restrictions after the surgery. (Ex. 20, p. 4) Dr. Long returned claimant to full duty on

November 15, 2011. (Ex. 20, p. 13) Dr. Long placed claimant at maximum medical improvement (MMI) on January 10, 2012. (Ex. 20, p. 14) The doctor opines that clamant sustained a 25 percent permanent partial impairment to the whole person under the AMA Guides due to the fusion surgery. (Ex. 20, p. 15) Claimant had not returned to Dr. Long before hearing.

As stated above, claimant was on and off light duty for her back condition a number of times following her initial release to full duty after the 2009 injury. Claimant was still being treated by Dr. Wampler at the time of hearing. (Tr. p. 23)

Claimant is currently taking hydrocodone (now 10 per week), one Flexeril at night, and two Naproxen daily. (Tr. pp. 23-24; Ex. 2, p. 35) These medications are prescribed by Dr. Wampler for all of claimant's pain complaints and are mostly paid by the defendant. (Tr. p. 41) Claimant has been on opioids since they were first prescribed by Dr. Wampler after the 2011 neck injury. (Ex. 2, p. 23)

Claimant admits she has not sought further medical care for her shoulder or her neck, except for the last time she saw Dr. Wampler and reported her neck condition has worsened. (Tr. pp. 41-43) Her continued care with Dr. Wampler has been primarily for her continued low back and lower extremity symptoms. (Id.)

An independent medical examination was performed by Sunil Bansal, M.D., in January 2014. In his report, Dr. Bansal opines that claimant suffered a 5 percent permanent partial impairment of the whole person for the 2009 injury; a 10 percent permanent partial impairment of the whole person for the second shoulder injury; and a 26 percent permanent partial impairment of the whole person for the 2011 neck injury. Dr. Bansal causally relates these impairments to each of those injuries. He also provided permanent restrictions of no lifting over 25 pounds frequently, 50 pounds occasionally and no lifting more than 10 pounds overhead. Dr. Bansal recommends that claimant avoid sitting more than one hour, standing more than two hours and walking more than three hours. Also, according to Dr. Bansal, claimant should avoid work activities which require repeated neck motion. (Ex. 7)

There was no FCE performed, other than Dr. Bansal's evaluation. No vocational expert views were offered into evidence.

The events of claimant's last day at work, February 10, 2014, were the subject of controversy at hearing. Claimant said she started the day running a floor scrubber and developed additional back and leg pain. She asked for different duties, but this was not arranged, so she entered an incident report on the company computer. (Tr. pp. 22, 25) Claimant then was called to the office to meet with the human resources director, Michelle Nekuda. (Tr. p. 25) Ms. Nekuda admitted she learned of Dr. Bansal's restrictions at a prior mediation for this claim. (Tr. p. 129-131) On February 10, 2014, while on leave herself, Ms. Nekuda came to the plant to specifically talk to clamant about Dr. Bansal's restrictions. (Tr. p. 115) Ms. Nekuda testified she asked claimant

when she received these restrictions, and claimant did not reply, stating only that her attorney forwarded them to defendant's attorney. (Tr. pp. 116, 133) When asked, claimant agreed that the restrictions were correct. (Id.) Ms. Nekuda testified she would not allow claimant to continue to work in her job with those restrictions and asked for their clarification. Ms. Nekuda stated that she would place claimant on FMLA, because these restrictions came from her personal physician, not the company doctor. (Tr. p. 116) Ms. Nekuda said she could not accommodate restrictions from a personal doctor. (Id.) Claimant was supposed to provide supportive medical documentation for FMLA. (Tr. p. 117) Claimant said she was then escorted out of the plant by her supervisor as they would do with terminated employees. (Tr. p. 48)

Claimant's supervisor, Scott Stickler, apparently overheard what was said at that meeting and substantially agrees that claimant was not allowed to continue in her job and was placed on FMLA due to Dr. Bansal's restrictions. (Tr. pp. 93-95) Mr. Stickler admitted he walked claimant out the door, but denied claimant was terminated. (Tr. pp. 96-98) At first Mr. Stickler said he did so because claimant became angry at the meeting. (Tr. 96) Mr. Stickler later agreed it was "more manners than anything else." (Tr. p. 99) On the way out, they stopped to get claimant's things from her locker and to complete some paperwork. (Tr. pp. 96-98) Mr. Stickler stayed with claimant until she left the building. (Id) According to Mr. Stickler, claimant yelled at co-workers, "See you all. I'm out of here." (Tr. p. 96) Both Mr. Stickler and Ms. Nekuda testified that claimant became angry and used profanity during the meeting. (Tr. pp. 95, 120) Claimant has not worked since that day in any capacity for this employer or for any other employer. (Tr. p. 23) She did not receive unemployment benefits because she could not state whether she is ready and willing to work given Dr. Wampler's latest restrictions. (Tr. p. 48) Claimant has considered some jobs at defendant-employer, but none have been offered. In the past she has bid on other jobs, and some may be lighter duty. (Tr. p. 57) She has not sought employment with any other employers. (Tr. p. 58)

Ms. Nekuda asserts that claimant is still an employee and is out on medical leave. (Tr. p. 109) However, at the time of hearing claimant still has not returned the paperwork for FMLA leave, and Ms. Nekuda has extended the time for claimant to do so. Ms. Nekuda admitted she has not contacted claimant since receiving the temporary restrictions from Dr. Wampler. (Tr. p. 125) Claimant states she has exhausted any FMLA leave she had, and is confused as to her status. (Tr. pp. 25-27) Claimant reports that during the last five weeks before hearing she has received full paychecks from the defendant-employer without explanation. (Id.)

Claimant was referred back to Dr. Wampler as a result of reporting a new work incident during her last day of work. (Tr. pp. 124-125) Dr. Wampler placed claimant on greater restrictions than those recommended by Dr. Bansal. (Ex. 2, p. 38) Defendant contends the February 10, 2014, incident is just another exacerbation injury and the restrictions are only temporary. However, claimant is not being accommodated for Dr. Wampler's restrictions. Ms. Nekuda's only explanation as to why she is not following

her previously stated policy of accommodating the company physician's restrictions is to state she is still waiting for claimant's FMLA paperwork (Tr. p. 125)

The record in this case does not clear up the confusion as to claimant's status with this employer other than claimant is currently not allowed to return to work with Dr. Bansal's restrictions. No adequate explanation was provided why this employer is not now willing to accommodate for Dr. Wampler's restrictions.

The employer argues conflicting views. They assert clamant is not restricted by her work injuries, but they won't allow clamant to return to work due to the restrictions given by Dr. Bansal for these work injuries. I find, as did the presiding deputy, that claimant is off work due to work restrictions from the injuries. Clearly, the employer is giving credibility to Dr. Bansal's restrictions by refusing to return claimant to work pursuant to Dr. Bansal's restrictions.

As claimant is not presently working, the presiding deputy could have found a higher percentage of combined disability after the 2011 injury. However, I agree with the 50 percent industrial finding for the combined 2009, 2010 and 2011 injuries because claimant has failed to show she has made a reasonable effort to seek suitable work elsewhere. Consequently, there is no evidence submitted that suitable work is not available to claimant, albeit with a significant loss of employment opportunities, given Dr. Bansal's restrictions. On the other hand, defendants have not offered suitable work either, nor have they offered vocational rehabilitation. Claimant may have sustained a new exacerbation injury at the time of hearing resulting in Dr. Wampler's new restrictions, but that injury is not at bar. Claimant may be able to bid on other jobs at defendant, but not until her employment status is cleared up. As the restrictions by Dr. Bansal are permanent, it appears claimant likely will not be returned to work at defendant-employer.

I agree with the combined disability assessment of ten percent for the 2009 injury, except for the failure to assess the combined disability for the 2003 and 2009 injuries. The record does not show any chronic pain complaints before the 2009 injury, regardless of the evidence of degenerative conditions. Even when Dr. Wampler gave a zero percent rating for the first injury, he admitted claimant was obviously in pain. (Ex. 2, p. 16) I don't find convincing Dr. Wampler's view that claimant's continued symptoms are due to a progression of the degenerative condition, when she had no symptoms before the injury.

I find the combined disability for the 2003 and 2009 injuries is 13 percent of the body as a whole. Three percent of this has already been compensated by payment of permanent disability payments for the 2003 injury. Therefore, the proper award remains at 50 weeks for the 2009 injury.

I find the combined disability for the 2003, 2009 and 2010 injuries is 23 percent to the body as a whole. Thirteen percent of this has been compensated either by payment or award. Therefore, the proper award remains at 50 weeks for the 2010 injury.

I find the combined disability for the 2003, 2009, 2010 and 2011 injuries is 53 percent of the body as a whole. 23 percent of this has already been compensated, either by payment or award. Therefore, the proper payment for the 2011 injury is 150 weeks.

No medical issues were raised in this appeal.

ORDER

The arbitration decision of July 21, 2014, is modified in only file number 5041476 and the following is ordered:

In File No. 5041476, defendant shall pay to claimant one hundred fifty (150) weeks of permanent partial disability benefits at the rate of five hundred twenty-eight and 66/100 dollars ($528.66) per week from January 10, 2012.

Defendant shall pay the costs of this appeal.

The remaining orders in the arbitration decision are unchanged.

Signed and filed this 21st day of September, 2015.

Joseph S. Cortese II

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