BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RODNEY EUGENE LUETGER, Claimant, vs. MENARD'S, Employer, and ZURICH NORTH AMERICA, Insurance Carrier, Defendants.	FILED JAN 15 2016 WORKERS' COMPENSATION File No. 5045116 APPEAL DECISION Head Note No.: 1803

Defendants Menard's, Inc., employer, and its insurance carrier, Zurich North America, appeal from an arbitration decision filed on November 6, 2014. The case was heard on October 9, 2014, and it was considered fully submitted on October 16, 2014, in front of the deputy workers' compensation commissioner.

The deputy commissioner awarded claimant permanent total disability benefits and found that claimant's bonus was a regular bonus to be included in the weekly benefit rate calculation. The deputy commissioner also ordered defendants to pay the costs of the action.

Defendants assert on appeal that the deputy commissioner erred in awarding benefits based on industrial disability rather than scheduled member disability. Defendants assert the deputy commissioner erred in awarding permanent total disability benefits. Defendants assert the deputy commissioner erred in concluding that claimant's bonus is a regular bonus and should be included in the weekly benefit rate calculation. Claimant asserts on appeal that the arbitration decision should be affirmed in its entirety.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, 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 filed in this matter on November 6, 2014, which relate to issues of whether claimant's disability is an industrial disability rather than scheduled member disability and whether claimant's bonus is a regular bonus and should be included in the weekly

benefit rate calculation. I modify the award of permanent total disability and I find claimant has sustained industrial disability of 80 percent. I provide the following analysis with respect to these issues:

ISSUES ON APPEAL

1) Did the deputy commissioner err in awarding benefits based on industrial disability rather than scheduled member disability?

2) Did the deputy commissioner err in awarding permanent total disability?

3) Did the Deputy Commissioner err in concluding that claimant's bonus is regular and should be included in the rate calculation?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the time of the hearing, claimant was 49 years old. Claimant worked for defendant Menard's since June 24, 1996, about 18 years at the time of the hearing. At the time of the hearing, claimant was employed on a full-time basis with Menard's in a regular position, with accommodation. Claimant has held a number of different positions with defendant-employer. When he was hired, claimant worked initially in receiving, where he loaded and unloaded trucks, which required him to lift "hundreds of pounds" and stand on his feet "all day long". (Transcript page 18). Clamant then held various assistant manager positions in different departments in the store. Each of those jobs required claimant to: help guests, do paperwork, and make sure employees in the department were working. These jobs also required claimant to stock shelves, carry products for customers, lift 50 to 100 pounds and be on his feet for the duration of his shift. (Tr. p. 18-21).

The stipulated injury to claimant's left ankle resulted in complex regional pain syndrome (CRPS), which neither the doctors nor defendants dispute. (Defendants' Brief, p.3). Theron Jameson, D.O. and Levi Gause, M.D. performed orthopedic surgeries on three different occasions. In addition, Chandan Reddy, M.D., a surgeon from the University of Iowa Hospitals and Clinics, performed a peripheral nerve stimulator implant and a spinal cord stimulator implant. (Ex. 6, pp. 6-9). Dr. Reddy then assigned a 39 percent whole person impairment rating based on Example 17-18 of the AMA Guides to Evaluation of Permanent Impairment, 5th Ed., (hereinafter "the Guides"). (Ex. 4, p.2). Example 17-18 of the Guides refers to an example of a diagnosis of causalgia of the lower extremity. On page 553 of the Guides, causalgia is also described as CRPS. (*Guides*, 5th Ed., p. 553).

Dr. Gause, a treating orthopedic surgeon, defers to the 39 percent whole person impairment rating assigned by Dr. Reddy. (Ex. 5, p.1). Dr. Boulden, a one-time evaluator hired by defendants, is critical of the rating assigned by Dr. Reddy, and assigns a 20 percent whole person rating, arguing that claimant has CRPS of the foot, not CRPS of the leg. In doing so, Dr. Boulden relies on Table 13-15 of the Guides.

Defendants argue that this supports the conclusion that claimant sustained only a scheduled member injury. (Def. Brief, p.14). Dr. Boulden also adopts the restrictions set out in the FCE conducted on December 18, 2013. (Ex. A, p. 7). The FCE restrictions are as follows: (1) waist to floor lifting – 50 pounds, occasionally; (2) waist to crown lifting – 50 pounds, occasionally; (3) carrying – 20 pounds, occasionally; (4) standing/walking/stair climbing – occasionally, with assistive device or mechanical support as required; (5) kneeling/squatting – occasionally, with mechanical support as required for transitional movements; and, (6) Sitting – continuously. (Ex. B, p.1). The FCE report states that claimant provided a "valid effort" and that "he meets the material handling demands for a medium demand vocation, per the Dictionary of Occupational Titles." (Ex. B, p.1).

Dr. Reddy assigned permanent restrictions on January 28, 2013, of: (1) 30-pound weight restriction; (2) no more than eight-hour long shift per day; (3) no stairs; (4) no ladders. (Ex. 4, p.1). Other than the restrictions on stairs and ladders, Dr. Reddy did not assign any restrictions for standing/walking. Dr. Gause recommended the same restrictions set out by Dr. Reddy and added the additional restrictions of: (1) carrying 20-pounds on an occasional basis; (2) standing on an occasional basis with assisted device as needed; (3) kneeling and squatting occasionally with mechanical support as required for transitional movements. The three additional restrictions assigned by Dr. Gause are identical to certain restrictions found in the FCE. Although, Dr. Gause recommended a restriction on standing, he did not think it was necessary to include a restriction on walking, as was contained in the FCE.

Claimant testified he takes medication regularly and is "maxed out" on his prescription for gabapentin. (Tr. p. 37). He further testified the stimulator implant in his back can become uncomfortable with sitting in certain positions. (Tr. p. 38). Claimant testified his pain level on a scale of 0-10 is, at best, 5/10, (Tr. p. 40) and at worst, 8-9/10. (Tr. p. 36). Claimant continues to work for defendant-employer in the millwork department in sales on a full time basis, although he is no longer in a management position since returning from the injury. (Tr. p. 41). Claimant testified he uses crutches or a scooter to ambulate and wears a brace on his left leg all the time, unless he's sleeping. (Tr. p. 43-44)

Concerning the employer-provided accommodations, claimant testified he is limited in the amount of weight he can pick up and he avoids stairs. Claimant also stated he primarily sits at a desk and sells products to customers and provides assistance to customers within his restrictions. (Tr. p.42) However, claimant also admitted he is not limited strictly to a sit-down job. He stated he gets up from the desk and helps customers, he takes them to the products they are looking for, he gets the product for them, etc., but he does not carry windows or countertops. (Tr. p. 58-59). Claimant testified if he was not injured and was working in his current job, he would likely be on his feet all day and helping people lift or carry heavy things to their vehicle. (Tr. p. 43).

The parties stipulated in the hearing report that the commencement date for PPD benefits is December 17, 2012. (Hearing Report, p.1).

1) Did the deputy commissioner err in awarding benefits based on industrial disability rather than scheduled member disability?

Defendants argue on appeal that CRPS is a scheduled member injury rather than a body-as-a-whole injury. Defendants argue that the situs of the injury is limited to the left foot and does not extend to the whole body and, therefore, this is a scheduled member injury (Def. Reply Brief, p. 2). The deputy commissioner found "that claimant has a significant impairment to the body as a whole. I find the injury extends beyond the foot and ankle and into the body as a whole due to the development of CRPS and the permanent implantation of the stimulator device in the back." (Arbitration Decision, p. 4). Defendant relies on Dr. Boulden's statement that claimant's CRPS is of the foot and not the leg and cites the non-binding cases of White v. AG Processing, Inc, File No. 5040774, 2013 IA Wrk. Comp. LEXIS 559, at 13 (Arb. Sep. 24, 2013) and Corry v. Olive Garden, File Nos. 5028389, 5028417, 2010 IA Wrk. Comp. LEXIS 78, at 14-15 (Arb. March 5, 2010). White is factually distinguishable from the present case due to the fact that the claimant in White sought an unscheduled industrial disability award for a leg injury that resulted in an infection and a course of antibiotics. However, the medication use ended and the infection resolved prior to hearing. Claimant in this matter had a CRPS diagnosis and a permanent spinal cord stimulator placed in his back at the time of the hearing, which required daily charging and use to have some impact on claimant's ongoing pain.

I agree with the hearing deputy that CRPS is to be compensated on a whole person basis as it involves the sympathetic nervous system per Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961) and Collins v. Department of Human Services, 529 N.W.2d 627, 629 (Iowa Ct. App. 1995). "Under Barton, Collins is entitled to compensation for an industrial disability. She suffered an injury to a scheduled member, her hands, and also to a part of the body not included in the schedule, her nervous system. Reflex sympathetic dystrophy is a dysfunction of the sympathetic nervous system." Collins, 529 N.W.2d at 629.

Defendants argue that Smith v. Woodward State Hosp. Sch., 2003 Iowa App. LEXIS 339 (Iowa App. 2003), distinguishes the otherwise clear proposition in Collins that CRPS/RSD is to be compensated on a whole person basis. In Smith, the claimant had pain, tenderness and swelling in the lower portion of her left leg, with evidence that the pain "sometimes radiated up Smith's leg toward her hip . . ." Dr. Ban opined that Smith had certain diseased veins in her lower leg, which did not preclude a finding that the injury was limited to the lower leg. The Court of Appeals then specifically contrasted the case with Collins in which a sympathetic nerve system injury was found to be an injury "to her entire nervous system".

I find that claimant sustained a whole body injury, based on the diagnosis of CRPS and the permanently placed spinal cord stimulator in his back with leads placed in his thoracic spine.

2) Did the deputy commissioner err in awarding permanent total disability?

Defendants argue that claimant's vocational expert overstated claimant's restrictions by failing to appropriately consider the restrictions established by the FCE and adopted by Dr. Boulden. Claimant argues the vocational expert retained by claimant is more accurate concerning loss of access to the labor market, based on that expert's reliance on the restrictions assigned by Dr. Reddy and Dr. Gause.

The FCE finding placed claimant in the medium work category. The restrictions assigned by Dr. Reddy and Dr. Gause do not require a sedentary position. Although, claimant understood Dr. Reddy to indicate that a sit-down job may be the most appropriate (Ex. 7, p. 9), Dr. Reddy did not offer a permanent restriction on standing or walking. (Ex. 4, p.1). Nevertheless, Ms. Laughlin relied on a non-existent restriction of a sedentary job based on claimant's understanding, rather than the more clear written record. Ms. Laughlin states, "It is Mr. Luetger's understanding Dr. Reddy felt he should have a sedentary job. If that is the case, he would have the following loss." (Ex. 7, p.9). Ms. Laughlin then offered an opinion that claimant has lost from 95.6 percent of unskilled occupations to 100 percent of directly transferable occupations. Without the sedentary restriction assumption, Ms. Laughlin opined that claimant has sustained a loss between 27.5 percent of directly transferable occupations to 46.6 percent of unskilled positions. (Ex. 7, pp. 8-9)

Ms. Laughlin makes the same sedentary assumption concerning the restrictions assigned by Dr. Gause based upon her assertion that "four months earlier, Dr. Gause recommended a sit down job." (Ex. 7, p. 8) However, there is no permanent restriction from Dr. Gause in his most recent opinion of May 15, 2014, requiring a sit-down job. (Ex. 5, p.2). With the sedentary requirement assumption, Ms. Laughlin opines that claimant's loss of unskilled occupations to directly transferable occupations would also be from 95.6 percent to 100 percent. Without this assumption, Ms. Laughlin offers that claimant has sustained a loss between 27.5 percent of directly transferable occupations to 47.8 percent of unskilled positions. (Ex. 7, p. 8) Ms. Laughlin offers no opinions based on the FCE restrictions.

The definition of sedentary work as provided in Ms. Laughlin's report is as follows:

> Exerting up to 10 lbs. of force occasionally (Occasionally: activity or condition exists up to 1/3 of the time) and/or a negligible amount of force frequently (Frequently: activity or condition exists from 1/3 to 2/3 of the time) to lift, carry, push, pull, or otherwise move objects, including the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. **Jobs are sedentary**

if walking and standing are required only occasionally and all other sedentary criteria are met.

(Ex. 7, p.15) (emphasis added).

In this matter, if it is assumed that the standing/walking restrictions as assigned by either Dr. Reddy or Dr. Gause would be within the sedentary description, by definition, claimant is excluded from the classification because he is not also limited to exerting only up to 10 pounds of force occasionally.

Therefore, the undersigned finds that the report of Ms. Laughlin is not reliable as it relates to her opinions based on assumptions of sedentary work.

Ms. Laughlin also offered an opinion regarding accommodations being received by claimant in his current job with Menard's, stating that while these accommodations are admirable, "I do not believe other employers would so readily accommodate Mr. Luetger." (Ex. 7 p.14) However, the restrictions assigned by Drs. Reddy and Gause would, per the above definition, not place claimant in the sedentary work classification per the Dictionary of Occupational Titles, Volume II, 4th Ed., but would rather place him most likely in the light work category. Further, the FCE found at Exhibit B, shows claimant provided a valid effort and he was classified in the medium work category. The undersigned finds claimant is most appropriately classified in the light-to-medium work category based on the restrictions assigned by Dr. Reddy, Dr. Gause and the FCE. As such, the opinions of Ms. Laughlin concerning a 100 percent or near 100 percent vocational loss are not persuasive.

Defendants hired Scott Mailey, a vocational expert, who prepared a report dated April 21, 2014. Mr. Mailey used the objective medical evidence, rather than claimant's subjective statements or beliefs, to conclude that claimant sustained a loss of access of ten of 20 percent in the competitive labor market. (Ex. C, p. 5). To support this figure, Mr. Mailey compared claimant's functional abilities as identified in the medical records and in the FCE report to the requirements of claimant's current position at Menard's to conclude that claimant had the physical capacity to work as a sales associate in most settings across the labor market. Even if claimant's employment at Menard's ended, Mr. Mailey identified other occupations within claimant's geographic area in which claimant has the transferable skills and the ability to compete within his permanent restrictions. (Ex. C, pp. 4-5) Mr. Mailey listed six different positions claimant could perform despite his ongoing limitations, five of which pay a higher hourly wage than claimant's pre-injury wage. (Ex. C, p. 5; Ex. 9, p. 1) I find the opinions of Mr. Mailey to be more convincing.

I find claimant is being accommodated in his employment, but he remains capable of performing the majority of his work duties, albeit, without being on his feet all day, or lifting heavy items and being limited to eight-hour days. While it is true Menard's accommodates claimant's permanent restrictions, those accommodations are not

substantial, the job is not "make work" or a newly-created position special for claimant, and the accommodations do not cast light on claimant's ability to earn a living in the competitive marketplace. Instead, claimant's job at Menard's is a regular position which requires full-time workers such as claimant. Claimant's continued employment at Menard's meets their needs for this position. According to Michael Wendt, Menard's general manager, who testified at hearing, if claimant's employment at Menard's ended, a new full-time sales associate would need to be hired to replace claimant. (Tr. pp.75-77) Therefore, although claimant is being accommodated in his current employment, the evidence leads me to conclude claimant has transferable skills per the vocational reports, I find claimant is capable of performing more than sedentary work and I find he continues to have some level of employability in the competitive labor market in the light-to-medium duty capacity.

Because claimant is capable of performing light-to-medium work, and in view of claimant's age, experience, education, qualifications and all of the other factors relevant to industrial disability, I find claimant has sustained 80 percent industrial disability. See e.g., Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 265-66 (Iowa 1995) regarding the elements to consider in assessing industrial disability.

3. Did the deputy commissioner err in concluding claimant's bonus is a regular bonus and should be included in the weekly benefit rate calculation?

I affirm the deputy commissioner finding that the bonus in question is a regular bonus and should be included in the rate calculation.

The bonus was received by claimant for 12 years in a row (Tr. p.48). The bonus was not exactly the same amount each year. In 2009, claimant's bonus was $6,390.37. (Tr. p. 50). In 2010, the bonus was $6,414.95, which as slightly more than 2009. (Tr. p. 49). The bonus was based on 15 percent of claimant's wage. To be eligible for the bonus, claimant needed to (1) work 1,000 hours in the calendar year; (2) be employed on December 15th of the year the bonus is calculated; and, (3) the store must be profitable. Whether the individual department also must be profitable was not clear in the record. (Tr. p. 66-67).

Claimant was an hourly employee, with his rate to be calculated under Iowa Code Section 85.35(6).

In Burton v. Hilltop Care Center, 813 N.W.2d 250 (Iowa 2012), the Iowa Supreme Court interpreted sections 85.36 and 85.61 as requiring the commissioner to determine what an employee actually earns for employment. In that case a teacher's wage was calculated based on the actual time worked, not when the wage was paid or received. In the present case, the 2010 bonus paid in February was earned in 2009. (Tr. p. 47).

The Supreme Court in Area Educ. Agency 7 v. Bauch, 646 N.W.2d 398 (Iowa 2002), referenced Meyer v. Employment Appeal Board, 441 N.W2d 766, 768069 (Iowa 1989), stating

> [The Iowa Supreme Court] held "deferred wages were actually 'payable' [when] earned." There, in the context of our unemployment statutes, we agreed that once the school year ended, Meyer no longer drew wages; rather, she was merely collecting her past earnings due. *Id.* at 769. We believe the proposition applies equally well in the workers' compensation context. While Bauch is *paid* $3359.85 per month for twelve months, she actually *earns* approximately $4031.82 per month under her ten-month contract.

(646 N.W.2d at 402)

The deputy commissioner accepted claimant's rate calculation including the 2010 bonus of $6,414.95 divided by 52 weeks, which is $123.36 per week. This amount was included in the average weekly wage (AWW) calculation to arrive at a total AWW of $787.53. (Ex. 8 p. 1) I likewise find the bonus was a regular bonus and it should be included in the rate calculation based on the above. Claimant received the bonus for 12 years in a row and it was a regular part of claimant's overall salary structure.

However, a further discussion of the rate calculation is warranted. Claimant's rate calculation is based on the last date of the work week. (Ex. 8, p. 1) Defendants' rate calculation appears to be based on the date the check was issued, rather than the week the wage was earned. (Ex. I, p. 1) As a result, defendants neglected to include in their calculations the weeks ending October 17, 2009, and October 10, 2009. These weeks occurred prior to the injury date of October 20, 2009, and should be included in the calculations. Defendants' rate calculation begins with the "check date" of October 16, 2009, which according to Joint Exhibit 9, p.1, is the work week ending October 3, 2009. Therefore, defendants failed to include the proper weeks in addition to excluding the regular bonus. I find Claimant's rate calculation is correct and it should be adopted, including the bonus calculation as discussed above and shown in Joint Exhibit 8, p.1.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of November 6, 2014, is MODIFIED as follows:

1) Defendants shall pay claimant four hundred (400) weeks of permanent partial disability benefits at the rate of four hundred eighty-five and 18/100 dollars ($485.18) per week from the stipulated commencement date of December 17, 2012.

2) Defendants shall pay accrued weekly benefits in a lump sum, less a credit for PPD benefits previously paid.

3) Defendants shall pay interest on accrued weekly benefits awarded herein pursuant to Iowa Code section 85.30.

4) Each party shall pay their own costs of the appeal.

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

Signed and filed this 15th day of January, 2016.

Joseph S. Cortese II

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WORKERS' COMPENSATION
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