BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CHARLIE ANNE MCNITT,	:	
Claimant,	:	File No. 5065697
vs.	:	REHEARING DECISION
NORDSTROM, INC.,	:	RE: DEMEANOR
Employer, Self-Insured, Defendant.	:	Head Note Nos.: 1402.40, 1803

STATEMENT OF THE CASE

Claimant Charlie Anne McNitt filed a petition in arbitration seeking workers' compensation benefits from defendant Nordstrom, Inc., self-insured employer. This matter was originally heard in Des Moines, Iowa, on June 1, 2018, by Deputy Workers' Compensation Commissioner Erica J. Fitch.

On July 2, 2019, pursuant to Iowa Code section 17A.15(2), the Iowa Workers' Compensation Commissioner delegated authority to the undersigned to enter a proposed decision in this matter due to the unavailability of Deputy Commissioner Fitch.

I issued an arbitration decision on July 19, 2019. In my decision, I concluded it was appropriate to issue my proposed decision without a rehearing pursuant to Iowa Code section 17A.15(2) because neither party argued demeanor was the operative decision-making factor in this case.

Defendant appealed and claimant cross-appealed the arbitration decision. Among other issues, defendant asserted the decision was in violation of Iowa Code section 17A.15(2) because demeanor was a substantial factor in determining claimant's employability.

On April 23, 2020, the Commissioner ordered defendant to show cause as to why portions of the hearing involving demeanor should be reheard. After responsive pleadings by the parties, the Commissioner issued an Order for Rehearing on May 12, 2020, that remanded the case back to me to rehear the portions of the case involving demeanor.

The rehearing was conducted on July 16, 2020, by the undersigned. The only evidence introduced at rehearing was claimant's testimony in response to questions from defendant's counsel. The evidentiary record closed and the rehearing was considered fully submitted upon the conclusion of claimant's testimony on July 16, 2020.

ISSUE

Whether claimant's testimony in the July 16, 2020 rehearing regarding demeanor impacted or changed the findings of fact or conclusions of law contained in the proposed July 19, 2019 arbitration decision.

FINDINGS OF FACT

At the outset of her testimony on rehearing, claimant agreed with defendant's counsel that she tends to be an even-keeled, positive, and upbeat person. She likewise agreed she does not consider herself to be an "Eeyore."

In terms of her motivation and employability, claimant agreed that she has always been a motivated, hard worker who generally met or exceeded the expectations of defendant. Claimant's testimony in this regard was consistent with my finding in the arbitration decision that she is motivated to work.

Claimant also answered questions regarding her participation in defendant's re-employability program known as "REA." She explained that she provided clerical services for the local science center and greeting services for Mercy Hospital. The greeter position required her to interact regularly with the general public, and claimant testified she enjoyed helping people in this role.

Considering all of claimant's testimony on rehearing, I find—borrowing defendant's terminology—that claimant's "outward manner" or "bearing" is very pleasant, likeable, and approachable. I find her demeanor is a positive factor in terms of her employability, meaning it makes her a more desirable candidate for rehire.

However, despite her favorable demeanor, claimant only received one offer—which was later retracted—from the 15 job applications she submitted with the assistance of defendant's vocational counselor, Lana Sellner. (Arbitration Hearing Transcript, pages 38, 40)

Ms. Sellner indicated claimant is "employable in customer service type positions" considering her physical capacity and restrictions. (Exhibit A, p. 54) After hearing claimant's testimony on rehearing, I find claimant's demeanor would make her well-suited for such positions as well. However, as I found in the arbitration decision, claimant lacks the computer literacy required in many of these roles. (See Arb. Hrg. Tr., p. 58)

Perhaps most importantly, claimant's favorable demeanor changes nothing about my finding in the arbitration decision that claimant is now precluded from returning to the warehouse work for which she is fitted and to which she is accustomed. Claimant's physical capabilities essentially limit her to customer service or receptionist positions. Though her demeanor would make her a favorable candidate for these positions, many require computer skills she lacks. Further, while her demeanor is well-suited for the greeter positions she performed through REA, these positions are volunteer in nature and, based on claimant's inability to find work even with Ms. Sellner's assistance, they do not appear to be widely available in the competitive labor market.

For these reasons, claimant's testimony on rehearing regarding demeanor does not impact or change my finding in the arbitration decision that claimant is wholly disabled from performing work that her experience, training, education, intelligence, and physical capabilities would otherwise allow her to perform, nor does it change my finding in the arbitration decision that claimant is permanently and totally disabled as a result of her work injuries.

Thus, with additional findings of fact set forth above, the findings of fact in the arbitration decision are adopted in their entirety.

CONCLUSIONS OF LAW

Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Claimant argues she is permanently and totally disabled as a result of her work-related injuries.

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co.,

288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

The focus for evaluating total disability is on the person's ability to earn a living. Diederich v. Tri-City R. Co., 258 N.W. at 902. The question is whether the person is capable of performing a sufficient quantity and quality of work that an employer in a well-established branch of the labor market would employ the person on a continuing basis and pay the person sufficient wages to permit the person to be self-supporting. Tobin-Nichols v. Stacyville Community Nursing Home, File No. 1222209 (Appeal December 2003). A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982). Industrial disability is determined by the effect the injury has on the employee's earning capacity. Bearce v. FMC Corp., 465 N.W.2d 531, 535 (Iowa 1991); Trade Professionals, Inc. v. Shriver, 661 N.W.2d 119, 123 (Iowa App. 2003).

Another important factor in the consideration of permanent and total disability cases is the employer's ability to retain the injured worker with an offer of suitable work. The refusal or inability of the employer to return a claimant to work in any capacity is, by itself, significant evidence of a lack of employability. Clinton v. All-American Homes, File No. 5032603 (App. April 17, 2013); Western v. Putco Inc., File Nos. 5005190/5005191 (App. July 29, 2005); Pierson v. O'Bryan Brothers, File No. 951206 (App. Jan. 20, 1995); Meeks v. Firestone Tire & Rubber Co., File No. 876894 (App. Jan. 22, 1993); see also Larson, Workers' Compensation Law, Section 57.61, pps. 10-164.90-95; Sunbeam Corp. v. Bates, 271 Ark 385, 609 S.W.2d 102 (1980); Army & Air Force Exchange Service v. Neuman, 278 F.Supp. 865 (W.D. La 1967); Leonardo v. Uncas Manufacturing Co., 77 R.I. 245, 75 A.2d 188 (1950). An employer knows the demands that are placed on its workforce. Its determination that the worker is too disabled for it to employ is entitled to considerable weight. If the employer in whose employ the disability occurred is unwilling or unable to accommodate the disability, there is no reason to expect some other employer to have more incentive to do so.

In this instance, defendant was unable to find work within claimant's restrictions. Despite her favorable demeanor, her motivation to return to work, and her attempts to find work both on her own and with the assistance of a vocational counselor retained by defendant, claimant has been unable to do so. Claimant is not capable of returning to her prior employment and is of an age and skillset in which it is unrealistic to expect her to retrain, particularly for positions that require the use of a computer. Considering these factors, along with claimant's age, the situs and severity of her injuries, her residual function, permanent restrictions, educational background, employment background, motivation to improve, and all other relevant industrial disability factors outlined by the Iowa Supreme Court, I found claimant was permanently and totally disabled as a result of her work-related injuries.

Ultimately, therefore, nothing about claimant's testimony on rehearing regarding demeanor impacted or changed my conclusion of law that claimant satisfied her burden to prove her entitlement to permanent total disability benefits.

With the additional conclusions stated above, the conclusions of law in the arbitration decision are therefore adopted in their entirety.

ORDER

The arbitration decision on July 19, 2019 is adopted in its entirety with the above-stated additional findings of fact and conclusions of law.

Defendant shall pay to claimant permanent total disability benefits, commencing on May 23, 2016, and payable through the present and continuing during claimant's ongoing period of total disability.

Defendants shall pay benefits at the stipulated rate of four hundred twelve and 14/100 dollars ($412.14) per week.

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).

Per the parties' stipulations, defendants are entitled to credit for any weekly benefits paid after May 26, 2016.

Defendants shall reimburse claimant for the remainder of Dr. Sassman's independent medical evaluation in the amount of two thousand seven hundred seventy-two and 50/100 dollars ($2,772.50).

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.

Signed and filed this 20th day of July, 2020.

STEPHANIE J. COPLEY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Dirk Hamel (via WCES)

James M. Peters (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.