BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LINA THIEDE, Claimant, vs. ELITE CASINO RESORTS, LLC, Employer, and ZURICH AMERICAN INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5068126 A P P E A L D E C I S I O N Head Notes: 1802; 1803; 2907

Claimant Lina Thiede appeals from an arbitration decision filed on January 4, 2021, and from a ruling on rehearing filed on February 10, 2021. Defendants Elite Casino Resorts, LLC, employer, and its insurer, Zurich American Insurance Company, cross-appeal. The case was heard on June 15, 2020, and it was considered fully submitted in front of the deputy workers' compensation commissioner on July 14, 2020.

In the arbitration decision, the deputy commissioner found claimant failed to prove her entitlement to a running award of healing period benefits for her neck condition. The deputy commissioner found the extent of claimant's permanent disability was ripe for determination and found claimant sustained 70 percent industrial disability.

In the ruling on rehearing, the deputy commissioner found claimant was not at maximum medical improvement (MMI) for her neck condition and that any issues regarding permanency and industrial disability related to her neck condition were not ripe for adjudication. However, the deputy commissioner did not alter the 70 percent industrial disability finding made in the arbitration decision.

On appeal, claimant asserts she has not reached MMI for her neck injury and is entitled to receive a running award of healing period benefits. In the alternative, claimant asserts she is entitled to receive permanent total disability benefits.

On cross-appeal, defendants seek a credit for permanency benefits previously paid.

Those portions of the proposed arbitration decision and the ruling on rehearing pertaining to issues not raised on appeal are adopted as a 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 86.24 and 17A.15, the arbitration decision filed on January 4, 2021, and the ruling on rehearing filed on February 10, 2021, are affirmed in part and are reversed in part.

There are several interrelated questions presented on appeal. The deputy commissioner in the arbitration decision found claimant sustained 70 percent industrial disability as a result of the April 27, 2016, work injury. Yet in the ruling on rehearing, the deputy commissioner found the issues of permanency and industrial disability resulting from claimant's neck condition, which also stemmed from the April 27, 2016, work injury, were not ripe for adjudication because claimant had not yet reached MMI for her neck condition.

I affirm the deputy commissioner's finding that claimant had not yet reached MMI for her neck at the time of the hearing. Both Patrick Hitchon, M.D., and Benjamin MacLennon, M.D., recommended additional treatment for claimant's neck, and Mark Taylor, M.D., the only physician to specifically opine on whether claimant reached MMI for her neck—opined claimant had not yet reached MMI. (Joint Exhibit 3, p. 134; Defendants' Ex. F, p. 48; Claimant's Ex. 1, p. 10).

However, because claimant had not yet reached MMI for her neck condition at the time of the hearing, it was not appropriate for the deputy commissioner to assess the extent of claimant's industrial disability resulting from the work injury. The Iowa Supreme Court has indicated that this agency cannot speculate as to the extent of permanent disability before MMI has been achieved. Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 201 (Iowa 2010) Deciding the issue of permanency before it is ripe risks making a final decision that could be undermined or altered by later evidence. Id.

In this case, claimant has reached MMI for all of her conditions resulting from the work injury except for her neck. It may well be that claimant's neck condition results in no additional permanent disability as the deputy commissioner predicted. However, the treatment must be allowed to run its course so all relevant evidence may be known at the time permanency is adjudicated. Assessing claimant's industrial disability for some but not all of her work-related conditions could result in piecemeal litigation with

confusing and potentially conflicting results. Thus, the deputy commissioner's adjudication of the extent of claimant's permanent disability/industrial disability was premature and is respectfully reversed. Instead, I find claimant's claim for permanent disability is not yet ripe and should not be decided until claimant has reached MMI for her neck condition.

With respect to her claim for a running award of healing period benefits, Iowa Code section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery.

As established above, claimant had not yet achieved MMI for her neck condition at the time of the hearing. Thus, that factor had not yet occurred, meaning claimant's entitlement to a running award of healing period benefits turns on whether claimant had returned to work or was medically capable of returning to employment substantially similar to her job with defendant-employer.

At the time of her injury, claimant was working as a blackjack dealer. In February 2018, claimant was given restrictions that included no dealing at the blackjack table. (JE 3, p. 73) These restrictions remained in place through June of 2018 when claimant was placed at MMI for her left arm and instructed to get a functional capacity evaluation (FCE). Claimant's treating physician, Eric Aschenbrenner, M.D., then adopted the limitations identified in the FCE as claimant's permanent restrictions. (JE 3, p. 127) These restrictions placed claimant in the sedentary work category and would prohibit claimant from performing her job as a table dealer per defendant-employer's job description. (See Cl. Ex. 7, p. 42) As such, from February of 2018 through the time of the hearing, I find claimant was not capable of returning to employment substantially similar to her blackjack dealer position with defendant-employer.

Claimant was not working at the time of the hearing and, but for a short stint of work in March of 2020, had not worked since February of 2018. (Hearing Transcript, p. 85) Defendants in their brief on appeal argue defendant offered claimant work in February of 2018 that she declined.

Iowa Code section 85.33(3) provides that an employee's refusal of an offer of suitable work "consistent with the employee's disability" results in a forfeiture of benefits during the period of refusal. In this case, however, defendants failed to prove that they offered claimant work or that any such offers were for "suitable" work.

At hearing, Anna Cavanaugh, the human resources contact for defendant-employer, testified she offered claimant "retail options" but that claimant refused because she wanted to do table games. (Tr., pp. 91-93) Ms. Cavanaugh testified these offers were presented in writing, but no such written offers were in evidence. (Tr., pp. 100-101) Ms. Cavanaugh was also unaware that defendants' counsel indicated in October of 2018 that there was "no work available within [claimant's] restrictions." (Cl. Ex. 5, p. 34; Tr., p. 102)

Claimant testified in her deposition and at hearing that she was sent some job openings in an e-mail in October of 2019 for which she applied but was not hired because Ms. Cavanaugh did not think the positions were within claimant's restrictions. (Def. Ex. A, pp. 30-31; Tr., pp. 108-09) At hearing, Ms. Cavanaugh confirmed this to be true. (Tr., p. 94)

There is no dispute claimant had discussions with defendant-employer about potential job openings. However, I find insufficient evidence that there were ever any official offers of work made to claimant that she refused. Furthermore, even if offers were made, there is insufficient evidence to determine whether the work offered was suitable and within claimant's restrictions.

To the contrary, defendants' own counsel indicated to claimant's counsel that there was no work available within claimant's restrictions, and both claimant and Ms. Cavanaugh testified that they had discussions about specific jobs being unsuitable for claimant because they were outside her restrictions. For these reasons, I find claimant had not returned to work at the time of the hearing and did not refuse any offers of suitable work.

Ultimately, therefore, but for the short stint in March of 2020 when claimant returned to work, none of the factors of Iowa Code section 85.34(1) had occurred starting in February of 2018, when claimant was restricted from working, through the time of the hearing. Claimant, therefore is entitled to receive healing period benefits for this period and until the requirements for termination of healing period benefits under Iowa Code section 85.34(1) are met. The deputy commissioner's finding against an award of running healing period benefits is respectfully reversed.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on January 4, 2021, and the ruling on rehearing filed on February 10, 2021, are affirmed in part and are reversed in part.

Defendants shall pay claimant running healing period benefits from the date defendants were unable to accommodate claimant's restrictions in February of 2018 until the requirements for termination of healing period benefits under Iowa Code section 85.34(1) are met. These benefits shall be paid at the weekly benefit rate of four hundred eighty-two and 37/100 dollars ($482.37).

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 receive credit for all benefits previously paid.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs as set forth in the arbitration decision, and defendants shall pay the costs of the appeal, including the cost of the hearing transcript.

Pursuant to rule 876 IAC 3.1(2), defendant shall file subsequent reports of injury as required by this agency.

Signed and filed on this 7th day of September, 2021.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Emily Anderson (via WCES)

Dillon Besser (via WCES)

Kathryn R. Johnson (via WCES)