BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

NORA CORTEZ, Claimant, vs. TYSON FOODS, INC., Employer, Defendant.	:	File Nos. 20700573.02 and 20000903.02 APPEAL DECISION Head Notes: 1402.40; 1803; 1804; 2905; 2907

Defendant Tyson Foods, Inc., self-insured employer, appeals from a review-reopening decision filed on May 10, 2023. This case involves consolidated claims for two dates of injury.

File No. 20700573.02 involves a stipulated work injury in which the parties filed and obtained approval of an agreement for settlement on July 6, 2021. Claimant sustained a pulmonary injury related to her employment on January 4, 2019. In the review-reopening action, the deputy commissioner awarded claimant permanent total disability benefits for the January 4, 2019, work injury.

The injury in File No. 20000903.02 involves a stipulated neck injury which occurred on August 26, 2019. This injury was also settled via an agreement for settlement on July 6, 2021. In the review-reopening action, the deputy commissioner awarded claimant 25 weeks of benefits for the August 26, 2019, work injury.

Defendant's notice of appeal and appeal brief bear both agency file numbers. However, neither party challenges the result in File No. 20000903.02 and the decision in that file is affirmed without further comment.

The review-reopening case in these files was heard on October 25, 2022, and it was considered fully submitted in front of the deputy workers' compensation commissioner on December 5, 2022.

In File No. 20700573.02, defendant asserts on appeal that the deputy commissioner utilized an improper legal standard to analyze claimant's permanent disability claim. Specifically, defendant asserts the deputy commissioner erroneously utilized the odd-lot doctrine to assess claimant's industrial disability. Defendant further challenges the extent of claimant's permanent disability, seeking reduction of the permanent total disability award. Claimant responds to the appeal and asserts that the decision should be affirmed in its entirety.

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, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on May 10, 2023, which relate to the issues not properly raised on intra-agency appeal. As stated above, File No. 20000903.02 is affirmed in its entirety. However, I respectfully disagree with the deputy commissioner's evaluation and assessment of permanent disability in File No. 20700573.02, and I modify the permanent disability award.

FINDINGS OF FACT

Having conducted a de novo review of the record, I find and substitute the following findings of fact:

Claimant Nora Cortez is a 54-year-old former employee of defendant Tyson Foods. Claimant was born in Guatemala and her native language is Spanish. She has a third-grade Guatemalan education. She is not fluent in English. She has no computer skills. Claimant testified live and under oath at hearing. I accept the deputy commissioner's finding that claimant's testimony is highly credible. Her testimony matches closely with the medical records in evidence. She was a good historian.

After coming to the United States, claimant was employed at defendant from approximately 1996 through 2021.[1] She worked in housekeeping prior to her employment at defendant. Over the course of her career at defendant, claimant sustained several work injuries as documented in the defense exhibits. (Defendant's Exhibits D, E, and F) In spite of these medical conditions, claimant worked for a long period of time for defendant as a hog driver, since approximately 1999.

As a result of her chronic exposure to hog dust and particulates in the hog driver position, claimant developed occupational asthma. (Transcript, pages 20-23; Joint Exhibit 3, page 21) Defendant admitted this workplace injury and paid medical and indemnity benefits on this claim. Defendant used the date January 4, 2019, as the manifestation date for this condition.

Unfortunately, on August 26, 2019, claimant sustained another work injury. On that date, she sustained a workplace fall, injuring her neck. Again, defendant accepted that injury and paid both medical and indemnity benefits. The diagnosis was an aggravation of cervical facet arthropathy. (Claimant's Exhibit 1, p. 5)

Upon recuperating from both of these injuries, the parties eventually reached a settlement of both claims in July 2021. Those Agreements for Settlement are in

[1] From the record, it appears she had been employed by Tyson sometime in 1994 as well and then perhaps left employment and returned in 1996.

evidence. (Cl. Exs. 1 and 2) They were approved by this agency on July 6, 2021. For the occupational asthma claim, claimant was paid six percent of the whole body (30 weeks) for her functional disability. (Cl. Ex. 1, p. 1) For the neck claim, claimant was paid 1.02 percent of the whole body (5.1 weeks) for her functional disability. (Cl. Ex. 1, pp. 12-14) For both claims, portions of the independent medical evaluation (IME) report of Sunil Bansal, M.D., were attached, documenting claimant's disabilities as of that time. (Cl. Ex. 1, pp. 4-10; Cl. Ex. 2, pp.15-19) These agreements were clearly settled on a functional basis, meaning there was no compensation to claimant for her loss of earning capacity. Importantly, her loss of earning capacity at that moment in time was in no way assessed or compensated in those agreements.

Approximately six months after claimant's occupational asthma manifested, defendant removed claimant from the hog driver job and placed her in a position titled "ear skins." She worked in this position for approximately a year and a half.

Claimant eventually was removed from the ear skins job due to her ongoing and continued exposure to dust, which was aggravating her asthma. (Tr., pp. 23-24) Next, in approximately January 2021, claimant was placed in a position packing pancreases. This job was not a bid job, but rather it was a position created for claimant by defendant to comply with claimant's medical restrictions. While claimant was working in this position, she and defendant settled the two claims claimant had against defendant pursuant to agreements for settlement. The terms of the agreements are set out above and were approved by this agency on July 6, 2021. Claimant worked in the packing pancreases position until July 22, 2021, when defendant removed her and placed her on an involuntary leave of absence.

Claimant testified in detail regarding this leave of absence. She testified that a Tyson Human Resources representative, Alberto Olguin, and a plant nurse manager, Cody, told claimant that defendant would longer continue the "packing pancreases" position. (Tr., pp. 26-30) Claimant testified the nurse told her defendant had looked for other positions in the plant claimant could perform within her pulmonary/asthma restrictions, but they could not find any such positions. (Tr., pp. 30-33) Claimant signed a document to place her on medical leave of absence. She was not given any other option. (Tr., pp. 31-32) The document in question is in evidence. It is titled "Leave of Absence Application" and sets forth in English that claimant is applying for FMLA for a work-related condition. Claimant signed the Leave of Absence Application. (Jt. Ex. 1, p. 2)

Claimant further testified she was instructed by Mr. Olguin to contact defendant every Thursday to see if there were any job openings within her restrictions. Claimant testified she did so every week between July 2021, and the date of hearing in October

2022. She was never offered any work. (Tr., pp. 33-34) I find defendant effectively terminated claimant on July 22, 2021.

The medical evidence in the record is not significantly disputed. Regarding her occupational asthma, claimant was evaluated by Gregory Hicklin, M.D., a well-known pulmonologist in Des Moines, in November 2019. Dr. Hicklin documented the following:

> Nora Cortez is a hardworking 51-year-old woman from Central America. She works at Tyson Foods around hogs and is exposed to hog dust and sanitizers that may contain chemicals or bleach. She has occupational asthma defined as reversible airway obstructions with triggers at work. This has been well documented on previous pulmonary function tests.
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> ...
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> Assessment/Plan
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> 1. Severe persistent occupational asthma with acute exacerbation.
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> I believe Nora has occupational asthma. It seems to be treated with a current regimen of inhaled steroids and as-needed albuterol. She needs to avoid triggers, but that is difficult with her work. I will defer that . . . We will continue the current treatment.

(Cl. Ex. 1, pp. 9-11)

Claimant had an IME with Sunil Bansal, M.D., in March 2020. Dr. Bansal agreed with Dr. Hicklin's diagnosis of occupational asthma. (Cl. Ex. 1, p. 5) Dr. Bansal assigned a ten percent functional impairment rating per the AMA Guidelines, Fifth edition. (Cl. Ex. 1, p. 7) He recommended the following restrictions:

> I would place a restriction of no lifting over 15 pounds occasionally, and no lifting frequently. She needs to avoid frequent lifting, as she does not have the endurance or lung capacity. No prolonged walking more than 5 minutes at a time. She becomes easily short of breath, taking time to recover. Avoid multiple steps, stairs, and ladders. Any work environment must be free of air contaminants such as hog dust, and extreme heat or cold.

(Cl. Ex. 1, p. 8)

At some point, Fadi Alkhatib, D.O., became claimant's authorized physician to treat her occupational asthma. Dr. Alkhatib, signed off on claimant's involuntary leave of absence in August 2021, after her removal from the plant. (Jt. Ex. 1, p. 1) Dr. Alkhatib continued to sign off on claimant's leave of absence forms up through the date

of hearing. (Jt. Ex. 1, pp. 3-6) Dr. Alkhatib also signed off on medical opinions which agreed with Dr. Bansal's recommended restrictions on July 20, 2022. (Jt. Ex. 3, pp. 17-22) Dr. Alkhatib examined claimant on July 20, 2022. Overall, claimant's condition was slightly improved although she was having acute symptoms due to the weather. (Jt. Ex. 3, p. 26)

Regarding claimant's neck condition, there is little medical evidence in the file. In his March 2020 IME report, Dr. Bansal diagnosed an aggravation of cervical facet arthropathy, which caused left sided cervical radiculopathy from the August 26, 2019, work injury. Dr. Bansal assigned a five percent whole body rating per the AMA Guidelines, Fifth edition. (Cl. Ex. 2, pp. 16, 18-19) He did not recommend any further restrictions for this condition, beyond those already in place for her occupational asthma.

CONCLUSIONS OF LAW

I adopt and substitute the following conclusions of law:

Iowa Code Section 85.34(2)(v) states:

> If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity. Notwithstanding section 85.26, subsection 2, if an employee who is eligible for compensation under this paragraph returns to work with the same employer and is compensated based only upon the employee's functional impairment resulting from the injury as provided in this paragraph and is terminated from employment by that employer, the award or agreement for settlement for benefits under this chapter shall be reviewed upon commencement of reopening proceedings by the employee for a determination of any reduction in the employee's earning capacity caused by the employee's permanent partial disability.

Iowa Code section 85.34(2)(v) (2021).

Thus, the test created in subsection (v) is relatively straightforward. The first issue is whether the employee was compensated based only upon the functional impairment resulting from the injury. If so, then once the employee is "terminated" she or he is entitled to have their disability evaluated industrially.

In this case, there is no question claimant's work injuries and resulting disabilities were settled on an agreement for settlement basis on July 6, 2021. Claimant's recovery of permanent disability benefits was based solely upon her functional impairments. (Cl. Exs. 1 and 2) She was then terminated by defendant 16 days later, on July 21, 2021.[2] The evidence reflects that on that date claimant was placed on an involuntary leave of absence. Based upon the evidence in the record, there is no reasonable likelihood claimant will ever be recalled by defendant. I base this finding on the fact claimant continued to call in as instructed throughout the 15 months prior to the hearing to seek work with defendant and has not been offered work. Claimant testified credibly that she is unable to return to any of her past positions at defendant's plant due to her restrictions and symptoms. Furthermore, defendant presented no evidence at hearing that there is any gainful work claimant can do at the plant. I therefore find claimant has met both tests to qualify for an assessment of her industrial disability under Iowa Code section 85.34(2)(v).

The next issue is the extent of industrial disability for both injuries. Defendant does not challenge the deputy commissioner's award of 25 weeks of permanent partial disability benefits in File No. 20000903.02. That award is affirmed without further analysis or comment. With respect to File No. 20700573.02, I disagree with defendant's assertion that the deputy commissioner utilized the odd-lot theory to reach his conclusions and award of benefits. However, to the extent necessary, I specifically state I am not utilizing the odd-lot doctrine and I am using a traditional industrial disability analysis to determine claimant's permanent disability entitlement.

Since claimant has an impairment of the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Ry. Co. of Iowa, 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 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).

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[2] Tyson did not argue at hearing or in briefing that claimant was not "terminated" as defined by subsection (v).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

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 Ry. Co. of Iowa, 219 Iowa 587, 258 N.W. 899 (1935).

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).

It has long been the law of Iowa that Iowa employers take an employee subject to any active or dormant health problems and must exercise care to avoid injury to both the weak and infirm and the strong and healthy. Hanson v. Dickinson, 188 Iowa 728, 176 N.W. 823 (1920). A material aggravation, worsening, lighting up or acceleration of any prior condition has been viewed as a compensable event ever since initial enactment of our workers' compensation statutes. Ziegler v. United States Gypsum Co., 252 Iowa 613; 106 N.W.2d 591 (1961). While a claimant must show that the injury is proximately caused by the medical condition sought to be compensable, it is well established in Iowa that a cause is "proximate" when it is a substantial factor in bringing about that condition. It need not be the only causative factor, or even the primary or the most substantial cause to be compensable under the Iowa workers' compensation system. Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980).

The refusal of defendant-employer to return claimant to work in any capacity is, by itself, significant evidence of a lack of employability. Pierson v. O'Bryan Brothers, File No. 951206 (App. January 20, 1995). Meeks v. Firestone Tire & Rubber Co., File No. 876894, (App. January 22, 1993); See also, 10-84 Larson's Workers' Compensation Law, section 84.01; Sunbeam Corp. v. Bates, 271 Ark. 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 who chooses to preclude an injured worker's re-entry into its workforce likely demonstrates by its own action that the worker has incurred a substantial loss of earning capacity. As has previously been explained in numerous decisions of this

agency, if the employer in whose employ the disability occurred is unwilling to accommodate the disability, there is no reason to expect some other employer to have more incentive to do so. Estes v. Exide Technologies, File No. 5013809 (App. December 12, 2006).

As of the date of hearing, claimant was 54 years old, almost 55. She has a third-grade Guatemalan education. She is a native Spanish speaker, and she has limited English proficiency. She is not computer literate. She is not a good candidate for any type of retraining. The only job she has held since the mid-1990's is at defendant. Most of that time, claimant worked as a hog driver, handling hogs at a meatpacking facility.

As a result of her cumulative exposure to hog dust and particulates, she has developed the condition of occupational asthma. This condition impairs her breathing and endurance. She has a ten percent functional impairment as a result of this condition; however, this number does not really describe how disabling the condition is upon claimant's ability to earn wages in the competitive job market. Her restrictions appear to be undisputed in the record. Those restrictions are:

> I would place a restriction of no lifting over 15 pounds occasionally, and no lifting frequently. She needs to avoid frequent lifting, as she does not have the endurance or lung capacity. No prolonged walking more than 5 minutes at a time. She becomes easily short of breath, taking time to recover. Avoid multiple steps, stairs, and ladders. Any work environment must be free of air contaminants such as hog dust, and extreme heat or cold.

(Cl. Ex. 1, p. 8; Jt. Ex. 3, p. 21)

While these restrictions were originally provided by claimant's IME physician, they were endorsed by her authorized treating physician, Dr. Alkhatib. Claimant testified credibly that her condition significantly impairs her ability to perform work, in addition to her activities of daily living. (Tr., pp. 35-38)

Obviously, these restrictions are quite severe. In fact, these restrictions would be limiting for a highly educated, English-speaking worker with special skills. For Ms. Cortez, these restrictions are very limiting. These restrictions undoubtedly preclude her from her primary past employment for the past 20 years as a hog driver. As a result of these restrictions, defendant placed claimant on an involuntary leave of absence on January 21, 2022. She was specifically instructed to continue to call in to defendant's Human Resources Department to determine whether any positions at defendant open up within her restrictions.

I specifically find claimant is a highly motivated and dependable worker, as evidenced by her 25-plus year work history at Tyson. Furthermore, she did what she was directed to do and called in for 15 months prior to hearing and was never offered any job. This is undoubtedly because there is no job in a meatpacking plant which could accommodate her significant permanent restrictions. However, Ms. Cortez also took no independent action to seek alternate employment. Nor has she introduced any vocational expert analysis or opinion to substantiate a claim for permanent total disability.

I understand the deputy commissioner's analysis and concur that this injury has a very significant effect on claimant and very significant impact on claimant's future earning capacity. I acknowledge this is a close call on whether claimant proved she is permanently and totally disabled under the traditional industrial disability analysis. However, claimant made no attempt to seek alternate employment, she sought no manufacturing positions that would be within her restrictions, and offered no vocational opinions that would demonstrate by a preponderance of the evidence that it would be futile for her to attempt to seek employment within her current restrictions.

Ms. Cortez's permanent restrictions clearly preclude her from returning to Tyson. However, they are not so restrictive that they would eliminate all manufacturing positions. Claimant carries the burden to establish she is permanently and totally disabled. I find claimant failed to carry that burden of proof on this evidentiary record. Nevertheless, the injury sustained, and the restrictions imposed, result in a significant future loss of earning capacity for claimant. I find claimant has proven by a preponderance of the evidence that she has sustained 80 percent industrial disability as a result of the January 4, 2019, pulmonary injury caused by her work at defendant. Pursuant to the stipulation of the parties, claimant's permanent partial disability benefits should commence on March 4, 2020. (Hearing Report)

None of the remaining issues identified in the review-reopening decision were disputed on appeal. All remaining issues are affirmed.

ORDER

THEREFORE, IT IS ORDERED

For File No. 20700573.02:

All benefits shall be paid at the stipulated benefit rate of four hundred fifty-four and 94/100 ($454.94) per week.

Defendant shall pay claimant four hundred (400) weeks of permanent partial disability benefits commencing on March 4, 2020.

Defendant shall pay accrued weekly benefits in a lump sum together with interest 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.

Defendant shall receive credit for all weeks of compensation paid since March 4, 2020.

For File No. 20000903.02:

All benefits shall be paid at the stipulated benefit rate of four hundred sixty-one and 87/100 ($461.87) per week.

Defendant shall pay the claimant twenty-five (25) weeks of permanent partial disability benefits commencing December 9, 2020, as stipulated by the parties.

Defendant shall pay accrued weekly benefits in a lump sum together with interest 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.

Defendant shall receive credit for all weeks of compensation previously paid.

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

For Both Files:

Pursuant to rule 876 IAC 4.33, defendant shall pay claimant's costs of the review-reopening proceeding in the amount of two hundred twenty-one and 06/100 ($221.06) and defendant 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 13th day of December, 2023.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served, as follows:

James Byrne (via WCES)

Dillon Carpenter (via WCES)