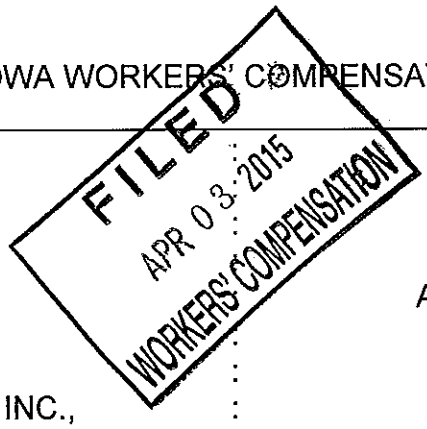
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



ROSA GUTIERREZ,

Claimant,

vs.

TYSON FRESH MEATS, INC.,

Employer,
Self-Insured,
Defendant.

File No. 5044551

ARBITRATION

DECISION

Head Note Nos.: 1803, 3701

STATEMENT OF THE CASE

Rosa Gutierrez, claimant, filed a petition in arbitration seeking workers' compensation benefits from Tyson Fresh Meats, Inc. (hereinafter Tyson) self-insured employer, as a result of an injury she sustained on June 20, 2012 that arose out of and in the course of her employment. This case was heard in Sioux City, Iowa and fully submitted on October 2, 2014. The evidence in this case consists of the testimony of claimant, and William Sager, II, and Renea Kestel, as well as claimant's exhibits 1 through 17 and defendant's exhibits A through H.

ISSUES

1. The extent of claimant's permanent partial disability.
2. The commencement date of the permanent partial disability benefits.
3. When the credit for permanent partial disability for the defendant payments should commence.

The stipulations contained in the Hearing Report are accepted and incorporated into this decision as if fully set forth. The parties agree that the defendant is entitled to a credit for the 20 percent disability they paid claimant for a different injury under Iowa Code section 85.34(7) and is also entitled to a credit for payment of permanent partial benefits paid in this claim. Costs were not in dispute.

FINDINGS OF FACT

The deputy workers' compensation commissioner, having heard the testimony and considered the evidence in the record, finds that:

Claimant, Rosa Gutierrez, had an injury to her back due to a fall at Tyson on June 20, 2012. The parties have stipulated that this injury arose out of and in the course of her employment and that claimant has permanent disability. Claimant slipped climbing on stairs at work and fell and hurt her back.

The claimant at the time of the hearing was 42 years old. She lives in Storm Lake, Iowa. Claimant was born in Mexico and received a high school diploma in California. (Exhibit 13, page 336) She has no other formal education. Claimant is fluent in English and Spanish, although claimant said she understands about 80 percent of written Spanish. Claimant began her work for Tyson in 2004. (Ex. B, p. 1) Claimant had an injury at work in 2010 to her shoulder. Claimant said her restrictions from that injury were no overhead lifting and no overhead reaching. (Tr. p. 23) Claimant also had a carpal tunnel injury in both hands while working for Tyson. Claimant said she had surgery in 2007 and continued to have loss of strength, tingling and numbness. Claimant said that operating a whizzard knife bothers her wrists. (Tr. p. 24) Claimant said that her supervisors at Tyson decided to limit her use of the whizzard knife. (Tr. p. 25)

Claimant's work prior to working at Tyson was working as an aide in a nursing home and working as a bartender. (Ex. 13, pp. 337, 338) Claimant did not believe she could do those types of work due to the amount of lifting, standing and bending.

Claimant began her work for Tyson in January 2004. (Ex. B, p. 1) Claimant worked about 30 different jobs at Tyson. (Tr. p. 30) Claimant worked on the kill floor. Claimant testified that she was not able to perform her prior work on the kill floor due to her restrictions of standing, reaching overhead, twisting, and bending.

During a portion of her time at Tyson, claimant worked as an in-house interpreter for about three years. Claimant said she still worked on the line when she interpreted. (Tr. p. 39) Claimant was removed from her interpreting position due to a dispute with her supervisor. (Tr. p. 79)

On June 20, 2012 claimant slipped on some stairs at Tyson and fell down stairs. She was seen by the nurse at Tyson. (Ex. C, p. 4)

Claimant went to David Archer, M.D. on June 21, 2012, the day after her fall at work. (Ex. 2, p. 109) She complained of pain in her left elbow, abrasion and pain in the left knee, and pain in the lower back radiating to the right knee. (Ex. 2, p. 109) Dr. Archer put claimant on half pace at work. (Ex. 2, p. 111; Tr. p. 42) She was later placed on light duty by Dr. Archer. Claimant's symptoms did not improve, and on July 13, 2012, Dr. Archer ordered lower extremity electrodiagnostic studies (EMG). The EMG studies were normal. (Ex. 4, p. 138)

Claimant was switched to lighter work. First she was assigned the fecal monitoring position and was then changed to the box line. Claimant was provided a chair for her work on the box line. (Tr. p. 43)

Dr. Archer ordered an MRI, which was completed on August 29, 2012. The conclusion of the MRI was,

1. Very small generalized disc bulges at L3-L4 and L4-L5 with ligamentous and facet joint hypertrophy causing mild to moderate central spinal stenosis and mild at L3-L4 and moderate to severe at L4-L5 bilateral neural foraminal stenosis as is outlined above in detail.

2. Small bilobed cyst in the right lamina of L4 as outlined above.

(Ex, 2, p. 124) Dr. Archer wrote claimant concerning the results of the MRI and concluded that they were chronic changes and were unlikely the result of her fall at Tyson. (Ex. 2, p. 125)

Claimant was referred by Dr. Archer to Wade Jensen, M.D. who saw claimant on August 31, 2012. At that time claimant testified that she had low back pain, with radiating pain into her right leg and buttocks and part of her left leg. (Tr. p. 47) Dr. Jensen recommended L4-L5 facet block injection. (Ex. 6, p. 152) Claimant said she had an adverse reaction and had to go to the emergency room. (Ex. 11, p. 313) On September 26, 2012 Dr. Jensen said she had significant radicular complaints. Dr. Jensen noted that claimant may need a fusion procedure on her spine. (Ex. 6, p. 153) Claimant had back surgery on December 11, 2012. Dr. Jensen performed a lumbar fusion at L4-L5 on December 11, 2012. (Ex. 8, pp. 209, 214) Claimant was returned to work with restrictions on January 28, 2013. (Ex. 6, p. 180)

Claimant received post-surgery care from Dr. Jensen. On March 27, 2013 Dr. Jensen lifted any restrictions on the claimant. (Ex. 6, p. 190) On April 29, 2013 Dr. Jensen noted claimant did not agree with his opinion that she should have no restrictions. Dr. Jensen ordered a functional capacity examination (FCE) and planned for maximum medical improvement (MMI) at the next visit. (Ex. 6, p. 198) Dr. Jensen wrote that claimant was not at MMI at that visit. (Ex. 6, p. 202)

On June 10, 2013 Dr. Jensen wrote,

> At this point, I believe her residual symptoms are likely chronic nerve irritation and/or residuals from her previous nerve compression. We had a postoperative MRI showing wide neural decompression. I do not think there is anything further that we need to do, given that she has a solid fusion now at this point, with regard to further working up of her intermittent residual ankle complaints. I think, ultimately, these should resolve with time. She has had an FCE, which is valid and her permanent work restrictions will be based on this FCE. At this point, we will place her at MMI, given that she is completely healed. I will see her back on an as-needed basis. Questions, concerns, or problems at any point in the future, I am happy to see her. Rating per letter.

(Ex. 6, p. 203)

On June 26, 2013 Dr. Jensen provided a 20 percent impairment rating. (Ex. A, p. 3) Claimant said she saw Dr. Jensen in February 2014 for her pain. She said Dr. Jensen did not think that a referral to a pain specialist would be helpful.

An FCE was completed on May 17, 2013. The results were deemed valid. The FCE recommended the following restrictions:

- Waist to floor lifting – 20 lbs.
- Waist to crown lifting – 15 lbs.
- Bilateral carry – 15 lbs.
- Sitting – Frequently
- Standing work – Frequently
- Walking – Frequently
- Stair climbing – Occasionally
- Kneeling/squatting – Occasionally with use of mechanical support as required to complete transitional movements.
- Forward bending – Occasionally.

(Ex. 10, p. 299) The FCE noted diminished ability to complete material handling activities including lifting waist to floor, waist to crown lifting and carrying. It also noted diminished ability to complete non-material handling activities including sitting, standing work, walking, stair climbing, forward bending, kneeling and squatting. (Ex. 10, p. 300)

Claimant was examined by Sunil Bansal, M.D. for the purpose of an independent medical examination (IME). (Ex. 11, pp. 311 – 325) Dr. Bansal agreed with Dr. Jensen that claimant was at MMI on June 10, 2013. Dr. Bansal provided a 23 percent body as a whole impairment rating. Dr. Bansal recommended restrictions based upon his evaluation and subjective reporting. Dr. Bansal's restrictions were,

> I would place a restriction of no lifting greater than 15 pounds occasionally, 5 pounds frequently. Doing more causes her discomfort.
>
> No frequent bending, squatting, climbing, twisting, pushing or pulling to avoid further damage to the back and keep pain levels in check. These activities cause her discomfort.
>
> No use of ladders and multiple stairs. It is very difficult and dangerous for Ms. Gutierrez to perform these tasks.

> Sit/Stand/Walk as tolerated. Bring in any one position for too long causes her discomfort. Specifically, avoid sitting for more than 30 minutes, avoid standing for more than 30 minutes, or walking for more than 20 minutes at a time.
>
> Avoid uneven terrain.

(Ex. 11, pp. 324, 325)

Claimant testified she was provided restrictions by Dr. Bansal and Dr. Jensen. Dr. Bansal provided more limiting restrictions than Dr. Jensen. Dr. Jensen provided his restrictions after claimant had a functional capacity examination (FCE). Claimant said she was sore for a week after her FCE, and she thought Dr. Bansal's restrictions were more appropriate for her. (Tr. p. 22)

The FCE noted claimant was unable to perform forward flexion for more than one minute and asked to change positions after 25 minutes. (Ex. 10, pp. 303, 304) The FCE also noted a diminished ability to complete non-material handling activities including sitting and standing work. (Ex. 10, p. 300) Despite these concerns the FCE provided claimant was able to frequently stand and sit.

I find the restrictions Dr. Bansal has recommended to be claimant's restrictions rather than the FCE restrictions. Dr. Bansal is board certified in occupational health, and his restrictions are consistent with the claimant's deficits noted in the FCE and based upon his examination.

Claimant was fired from Tyson on November 13, 2012. (Ex. 13, p. 341) Claimant testified that she would have continued to work light duty for Tyson, at least until the time of her surgery, had she not been fired. (Tr. p. 61) Claimant said she was fired for having too many points. Claimant contended she was not provided sufficient warning about her accumulation of points. Claimant acknowledged that she accumulated points for being late to work and said it was the result of the pain medication she was taking. Claimant said she told some nurses and work supervisors of this problem at Tyson. (Tr. p. 53) There is nothing to indicate that claimant requested FMLA leave for the time she was tardy due to medication. Claimant does not believe that she was discharged for her accumulation of points, but implied it was due to her injury and also her questioning of whether Tyson was paying her for all the hours she worked. (Tr. pp. 54- 56) Claimant offered no corroborating evidence to support her assertion concerning her discharge. I find that claimant's discharge was not as a result of her work injury.

Claimant applied for unemployment benefits and received benefits until she had to return the benefits due to a workers' compensation offset pursuant to Iowa Code section 96.5(5)a(2). The fact that a decision was reached allowing her unemployment benefits is not entitled to any weight in this proceeding. See Iowa Code section 96.6(4).

Claimant testified see looked for work at a number of jobs in Storm Lake, Iowa after her surgery and received no offers. (Tr. p. 66; Ex. 13, 339) Claimant applied for and received assistance through the Iowa Department of Vocational Rehabilitation. Claimant said she was found eligible for services and was likely to receive some additional education paid for by the Iowa Department of Vocational Rehabilitation. (Tr. p. 69) Claimant expected to start school in January 2015.

Claimant testified she continues to perform household chores, but it takes her much longer. (Tr. pp. 70, 71) Claimant said she uses a snow blower. She takes care of her children and a grandchild one or two days a week.

Defendant performed surveillance on the claimant on November 2, 3, and 4, 2012. Claimant described her activities of moving a table and chairs as helping her son, and the amount of activity was brief and limited. (Tr. pp. 59, 60) A surveillance report as well as the two DVDs were reviewed. (Ex. G) The surveillance shows claimant moving some chairs and a table from the back of a pickup truck on November 3, 2012 and moving a small mattress and box spring on November 4, 2012. Claimant was able to climb up and down from the bed of the pickup truck on November 3, 2012. The duration of the physical activity was short. Claimant did not appear in any distress performing these activities.

As the surveillance took place before claimant's back surgery, it has very little weight as to the extent of physical capabilities the claimant had at the time of the hearing.

The investigation of the claimant's social media presence did not provide any significant or material evidence in this case. (Ex. H, pp. 1 – 45)

Claimant testified that after her injury and while she was working light duty she would often work part of a day due to her pain. She said that when she could not work, due to her pain, Tyson would have her sign a form entitled Declination of Restricted Duty form. (Tr. p. 56)

Claimant did not believe she could perform any of her prior work at Tyson if she was provided a chair or stool that she could use to alternate between sitting and standing. (Tr. pp. 94 – 98)

William Sager, II, the complex human resources manager at Tyson Storm Lake testified. He testified claimant was disqualified from being an interpreter at Tyson when she got into an argument with a supervisor. (Tr. p. 113) He testified claimant was terminated due to her accumulation of too many points due to her attendance issues. (Tr. p. 116) He testified had claimant been still employed at Tyson when she reached MMI and assigned permanent restriction, Tyson would determine if there was work for her within her restrictions. Mr. Sager testified that after reviewing the claimant's FCE, he believed the jobs of round heads and mark snouts were within her restrictions. (Tr. p. 127) These were jobs she previously performed for Tyson. Mr. Sager said that

Tyson was normally able to place employees who have restrictions, and it was rare that Tyson was not able to do so. (Tr. p. 131)

Renea Kestral, Tyson Complex Nurse Manager testified at the hearing. She said that at the time of claimant's injury, claimant owned [pursuant to a union contract] the job of rounding heads. (Tr. p. 150) The rounding heads job alternated with the marking snouts job. Ms. Kestral testified that the rounding head/marking snouts job could be performed under the restrictions of the FCE. She said it could not be performed under the restrictions provided by Dr. Bansal. (Tr. p. 153) Ms. Kestral testified that she believed had claimant remained employed at Tyson, Tyson would have been able to find her a position that met the restrictions of the FCE and Dr. Bansal's restrictions. (Tr. p. 155)

I found it credible that Tyson would have been able to find an accommodated job based on Dr. Bansal's restrictions. I also found credible claimant's testimony that she would not be able to perform her past work at Tyson, without accommodation.

Claimant is receiving services from the Iowa Department of Vocational Services. Her plan was to obtain additional education so she could work in a social service field.

Claimant's labor market in Storm Lake is somewhat limited. While she has the skills to perform informal translating, there was no evidence that aside from Tyson, she could professionally use her bilingual abilities. She has a limited education and significant restrictions. She has made efforts to find work in Storm Lake.

Considering his age, employment history, educational background, language barrier, ability to retrain, motivation, the situs and severity of his injury, as well as the permanent work restrictions and job opportunities identified in the record, as well as all other industrial disability factors outlined by the Iowa Supreme Court, I find that the claimant has proven she sustained a 70 percent loss of future earning capacity as a result of the June 20, 2012 work injury.

Tyson paid claimant for a 25 percent industrial disability to the body as a whole for her June 20, 2012 injury. (Ex. A, p. 3)

CONCLUSIONS OF LAW

The parties have stipulated claimant has an industrial disability. The primary issues are the extent of her disability and when permanent partial benefits should commence.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312

N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Defendant contends that healing period benefits should end and permanency commence on April 24, 2013. Claimant contends that June 11, 2013 is the correct date to commence permanency benefits.

I find that permanency benefits should commence on June 11, 2013. Dr. Bansal adopts this date as well as Dr. Jensen. While Dr. Jensen originally indicated April 24, 2013 as the MMI date, he changed his opinion to June 11, 2013.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. 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).

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.

I previously found claimant had a 70 percent loss of earning capacity. This entitles claimant to a finding that she has a 70 percent industrial disability. This entitles claimant to 350 weeks of permanent partial disability benefits.

Iowa Code Section 85.34(7) Credit.

Iowa Code section 85.37(7) provides in part;

7. Successive disabilities.

b. (1) 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.

Defendant previously paid claimant for a 20 percent industrial disability. (Ex. 17, pp. 358, 359) The defendant's liability is partially satisfied by this payment. With the credit the defendant shall pay claimant 225 weeks of benefits in this case [70% – 20% = 50%. 500 x 50% = 250 weeks].

Defendant also receives credit for the permanent partial disability benefits they have paid in the claim, which was for a 25 percent industrial disability. The defendant started their permanency benefits as of April 24, 2013. As I have found that the commencement date for permanent partial disability benefits commences on June 11, 2013, the defendant shall receive credit for payment of partial permanent disability benefits for the period after June 11, 2013.

Defendant shall pay claimant 350 weeks of permanent partial disability benefits, minus the credit under Iowa Code section 85.34(7) and the credit for payment of permanent partial disability benefits after June 11, 2013.

ORDER

Defendant shall pay claimant three-hundred fifty (350) weeks of permanent partial disability benefits at the rate of four-hundred fifteen and 82/100 dollars ($415.82) per week commencing June 11, 2013.

Defendant shall have credit for permanent partial disability they have paid on this claimant after June 11, 2013 and a credit under Iowa Code 85.34(7) as set forth in this decision.

Defendant shall pay accrued weekly benefits in a lump sum.

Defendant shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

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

Signed and filed this 3rd day of April, 2015.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFE/sam

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 in writing and received by the commissioner's office 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 a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.