BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DELORIS SCHNEBERGER, Claimant, vs. MENARDS, INC., Employer, and ZURICH NORTH AMERICA, Insurance Carrier, Defendants.	:	File No. 5035504 REMAND DECISION Head Note No.: 1803

FILED
JUN 26 2015
WORKERS' COMPENSATION

STATEMENT OF THE CASE

Claimant filed a petition with this agency alleging a mental and physical injury occurring on July 23, 2008. Defendants stipulated to a physical injury to claimant's shoulder, but disputed liability for a mental condition. In an arbitration decision, filed June 22, 2012, the presiding deputy found claimant sustained a physical and mental injury arising out of and in the course of employment. The decision also found claimant had a total loss of earning capacity.

The appeal decision filed by then Iowa Worker's Compensation Commissioner Christopher Godfrey on September 23, 2013, affirmed the arbitration decision. Defendants then filed a petition for judicial review in the Polk County District Court. The district court found substantial evidence in the record to support the commissioner's decision that claimant's mental injury was caused by the right shoulder injury of July 23, 2008. The district court also determined that neither the presiding deputy nor the commissioner set forth the facts which support the finding that claimant sustained permanent total disability as a result of the work injury.

The district court noted:

> While the deputy commissioner set forth the body of law he was to consider in reaching his decision regarding the extent of Schneberger's loss and disability he failed to set forth the facts that he relied upon. In conclusory fashion he simply stated that Schneberger suffered a 100

> percent loss of earning capacity and thus 100 percent total industrial disability.
>
> The court cannot evaluate the agency's application of law to facts if the agency does not lay out an analysis of how it applied the appropriate factors under the law to the particular facts of this case. Accordingly, the case must be remanded to the agency for further proceedings consistent with this ruling. If on remand the agency still believes that its award of 100 percent of total industrial disability is appropriate, it needs to provide a proper analysis of how it reached this conclusion.

Menard v. Schneberger, Order RE: Petition for Judicial Review, Case No. CVCV046484, page 5 (Iowa District Court for Polk County, April 1, 2014).

In a February 11, 2015 decision, the court of appeals affirmed the district court and remanded the case to the district court for remand to the agency consistent with the April 1, 2014 decision.

This decision is a remand decision consistent with the district court's remand order of April 1, 2014.

ISSUE ON REMAND

Is the award of permanent and total disability appropriate, and if so, what facts in the record support that determination?

In their remand brief, defendants contend claimant's mental injury did not arise out of and in the course of employment. Both the district court and the Iowa Court of Appeals affirmed former Commissioner Godfrey's finding that claimant carried her burden of proof that her mental injury arose out of and in the course of the employment. Given those prior determinations, I do not have the discretion nor the authority to make a finding of fact and conclusion of law regarding the causation of claimant's mental injury. I appreciate defendants' position in this matter (See Exhibits B, D, F, H, and Transcript pages 95-101). However, for the reasons detailed above, the only issue on remand is whether the award of permanent and total disability is appropriate; and if so, what factors should be used to make that determination. Winnebago Industries v. Smith, 548 N.W.2d 582, 584 (Iowa 1996).

FINDINGS OF FACT

Claimant was 49 years old at the time of hearing. She graduated from high school. Claimant has a two-year degree in fashion merchandising from the Nebraska College of Business. (Tr. pp. 9-11)

Claimant worked in department stores, in a drycleaner, and at a supermarket. Claimant has worked as a bartender, a customer service manager, and at a

convenience store. Claimant has also worked at a Wal-Mart and a Burlington Coat Factory store. (Tr. pp. 12-20)

Claimant began with Menards in March of 2008. Claimant worked as a forklift truck driver. Claimant testified that approximately 80-90 percent of her time as a forklift driver was spent operating the forklift. (Tr. pp. 20-22)

On July 23, 2008 claimant injured her right shoulder at work. An MRI taken on September 11, 2008 showed a labral tear and a partial-thickness tear. (Ex. 10, p. 2) Claimant was referred to Daniel Larose, M.D., an orthopedic surgeon. After conservative care failed to resolve claimant's right shoulder problem, claimant underwent surgery with Dr. Larose on February 10, 2009. Dr. Larose performed a repair of the SLAP and Bankart tear, and a rotator cuff repair. (Ex. 3)

Claimant returned in followup with Dr. Larose in February and March of 2009 with complaints of significant right shoulder pain. In a March 31, 2009 visit claimant was assessed by Dr. Larose as potentially developing reflex sympathetic dystrophy (RSD). Claimant was put on Neurontin. (Ex. 2, pp. 7-14)

Claimant returned to Dr. Larose in May of 2009. Records indicate she had two nerve blocks for her right shoulder pain and was scheduled to undergo a third block. Claimant indicated her shoulder pain had improved by 30 percent. (Ex. 2, p. 16)

In May of 2009 claimant was returned to work five hours a day with no lifting. Claimant had improvement with nerve blocks and was scheduled for further nerve blocks. (Ex. 2, p. 17)

Claimant was evaluated by Dr. Larose on June 9, 2009. Claimant was feeling depressed and was overwhelmed by minor incidents. Dr. Larose recommended claimant stop taking Neurontin. He recommended claimant seek a psychiatrist. (Ex. 2, p. 24)

Claimant was evaluated by Christian Ledet, M.D. on August 21, 2009. Dr. Ledet, an anesthesiologist, specializes in pain medicine. Dr. Ledet opined claimant had symptoms suggestive of complex regional pain syndrome (CRPS). He recommended claimant have an MRI of the cervical spine and an EMG of the upper extremities. (Ex. 6)

On September 4, 2009 claimant was evaluated by Craig Seamands, M.D., a psychiatrist. Dr. Seamands suggested claimant's mental problems were due to gabapentin. Claimant's mental condition appeared to resolve when she discontinued the medication. (Ex. 7, pp. 2-4)

In a September 24, 2009 letter, Dr. Larose noted Dr. Seamands believed claimant's depression was secondary to taking Neurontin. Claimant was given work restrictions of lifting up to ten pounds with the right upper extremity and 20 pounds with both upper extremities. (Ex. 2, pp. 32-33)

On October 22, 2009 claimant was evaluated by Dr. Larose. He opined claimant had RSD that had resolved. Dr. Larose kept claimant on restrictions of lifting up to ten pounds with the right upper extremity, 20 pounds with both upper extremities, with no driving a forklift backward. (Ex. 2, p. 34) Claimant was returned to work on November 11, 2009 with those restrictions. (Ex. 2, pp. 36-40)

Claimant returned to Dr. Larose on April 19, 2010 with continued complaints of right shoulder pain. He recommended claimant be examined under anesthesia for potential surgery and potential release of adhesions. (Ex. 2, p. 51)

On May 20, 2010 claimant saw Dr. Larose with continued complaints of right shoulder pain. Radiofrequency ablation with Peter Piperis, M.D., was discussed and chosen as a treatment option. (Ex. 2, p. 57)

On May 24, 2010 claimant underwent radiofrequency ablation with Dr. Piperis. (Ex. 4, p. 19) Claimant indicated the procedure made her feel better. Claimant was again returned to work with lifting up to 10 pounds with the right upper extremity, 20 pounds with both upper extremities, and no backward driving. (Ex. 2, pp. 59-60)

Claimant returned to Dr. Larose on July 1, 2010. Nerve conduction studies revealed carpal tunnel syndrome on the left. Dr. Larose opined claimant's carpal tunnel syndrome was related to her right upper extremity injury from work. (Ex. 2, pp. 64-65) On July 23, 2010 claimant underwent a left carpal tunnel release performed by Dr. Larose. Claimant was taken off of work. (Ex. 2, p. 66; Ex. 3, p. 3)

Claimant was returned to work on August 16, 2010. She was again restricted to lifting up to 10 pounds with the right upper extremity, 20 pounds with both upper extremities, with no driving a forklift backward. (Ex. 2, pp. 68-71)

Claimant testified that on August 19, 2010, when she was driving to Menards, she had a panic attack. (Tr. pp. 42-43)

On August 19, 2010 claimant was evaluated by Dr. Seamands for her panic attack. She was kept off of work by Dr. Seamands. (Ex. 2, p. 71; Ex. 7, p. 5)

On October 7, 2010 claimant was found to be at maximum medical improvement (MMI) for the orthopedic condition. Claimant was limited to lifting up to ten pounds on the right with no restrictions on the left and no driving backwards. (Ex. 2, pp. 74-76)

In a November 4, 2010 letter Dr. Larose found claimant had a 2 percent permanent impairment of the left upper extremity for the carpal tunnel syndrome, and a 20 percent permanent impairment to the right upper extremity for her shoulder injury. He did not believe claimant could return to work at Menards. He gave permanent restrictions of no lifting over 10 pounds on the right, no restrictions on the left, and no driving backwards. (Ex. 2, pp. 77-78)

In a December 8, 2010 report, D.M. Gammel, M.D. gave his opinions of claimant's condition following an independent medical evaluation (IME). Claimant complained of pain, depression and anxiety. Dr. Gammel found claimant's depression and anxiety were chronic, but were unrelated to the work injury. He found claimant had a six percent permanent impairment of the right upper extremity for her shoulder injury, and no permanent impairment for her carpal tunnel syndrome. (Ex. B)

In a January 24, 2011 letter to claimant's counsel, Dr. Seamands opined claimant had a major depressive and generalized anxiety disorder. He opined claimant had major depression related to her work injury of July of 2008. Dr. Seamands opined claimant's difficulties with her injury and her inability to work have been a substantial psychological stressor contributing to her problems with depression and anxiety. (Ex. 7, pp. 20-21)

In an April 13, 2010 report, John Brooke, Ph.D., gave his opinions of claimant's condition following an IME. Dr. Brooke opined claimant had a pain disorder associated with psychological and medical factors. He believed claimant's pain disorder was not caused by her work injury of 2008, but was caused by her interactions with her preexisting tendencies and her perception of pain. (Ex. D)

In an August 22, 2011 letter to claimant's counsel, Dr. Seamands assessed claimant as having major depression, single episode, severe, and a panic disorder with agoraphobia. He noted that despite psychological therapy and medical management, claimant had never returned to the level of functioning she had prior to her symptoms following her work injury. He found claimant was at MMI. Dr. Seamands reiterated claimant's work injury of July 2008 substantially aggravated and led to her major depressive and panic disorder. (Ex. 7, pp. 26-27)

In a December 16, 2011 note, Dr. Seamands indicated claimant continued to have difficulties with generalized anxiety and major depressive disorder. He recommended claimant continue to follow up with his office every two months for medical management. He also noted:

> Patient continues to have the same level of dysfunction as she had previously and unfortunately I do not believe has recovered her ability to work on a full or part time basis.

(Ex. 7, p. 30)

On January 9, 2012 claimant was evaluated by Rosanna Jones-Thurman, Ph.D. for a psychological IME. Claimant reported being afraid of people touching her. She indicated she had panic attacks. Claimant reported overall emotional state of being mad at herself. Dr. Jones-Thurman assessed claimant as having a somatoform disorder. (Ex. H.)

In a March 1, 2012 report, Terry Davis, M.D., J.D., gave his opinions of claimant's condition following an IME. He opined claimant had a chronic pain disorder associated with psychological factors and general medical condition. Dr. Davis indicated this disorder was also referred to as a somatoform disorder. He opined claimant did not develop any mental, emotional or psychological injury as a result of the July 23, 2008 accident. He opined claimant did not have a permanent impairment or permanent restrictions caused by her mental condition. He opined a return to work would improve claimant's mental condition. He indicated claimant's problems stemmed, in part, because she was not working. (Ex. F)

At hearing, Dr. Davis testified that Dr. Seamands first diagnosed claimant as having a dysthymic disorder, suggesting claimant had been depressed since September of 2007. Dr. Davis testified that it was not until claimant's attorney's letter in 2011, that Dr. Seamands opined claimant had a major depressive disorder in January of 2011. Dr. Davis said a dysthymic disorder usually will come on gradually. He said a major depressive disorder generally has an abrupt onset caused by a precipitating event. Dr. Davis testified it was inconsistent and contradictory for Dr. Seamands to opine, in 2009, that claimant had a gradual dysthymic disorder, related to personality; and then later opine in January of 2011 that claimant had a major depressive disorder with a more abrupt onset. (Tr. pp. 97-98)

Dr. Davis also opined Dr. Seamands' assessment of claimant as having a generalized anxiety disorder was incorrect, as such a disorder was not usually caused by specific events like a work injury. (Tr. pp. 98-99) Based on this, Dr. Davis found Dr. Seamands' diagnosis contradictory and wrong. (Tr. pp. 99-100)

Dr. Davis testified claimant's condition would improve if she returned to work. (Tr. p. 105)

Claimant testified she believes the cause of her panic attack was Menards. (Tr. pp. 48-49) She testified that in 2012 she looked for work. She testified she only applied for part-time jobs online. (Tr. p. 49) The claimant testified she did not believe she could return to work in any of her prior positions. (Tr. p. 53) She testified she applied for 30-40 jobs. (Tr. p. 50) Claimant testified that in every job she applied for, she indicated she has a five-pound lifting restriction. (Tr. p. 50)

CONCLUSIONS OF LAW

The only issue on remand is whether the award of permanent and total industrial disability is appropriate, and if so, what facts in the record support that award.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

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.

Claimant was 49 years old at the time of hearing in 2012. She graduated from high school. Claimant has a two-year degree in fashion merchandising from the Nebraska College of Business. Claimant has worked in a department store and a drycleaner in a supermarket. She has also worked as a bartender, a customer service manager, and in a convenience store.

Two physicians have opined regarding claimant's permanent impairment for her shoulder and left upper extremity injuries. Dr. Larose treated claimant for over two years. He performed claimant's shoulder and carpal tunnel release. (Ex. 3)

Dr. Larose opined claimant had a 2 percent permanent impairment to the left upper extremity and a 20 percent permanent impairment to the right upper extremity. (Ex. 2, pp. 77-78) According to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Table 16-3, page 439, a 2 percent permanent impairment to the upper extremity converts to a 1 percent permanent impairment to the body as a whole. A 20 percent permanent impairment to the upper extremity converts to a 12 percent permanent impairment to the body as a whole. According to the combined value charts in the Guides, the combined value of both permanent impairments results in a 13 percent permanent impairment to the body as a whole. (Guides, p. 604)

Dr. Larose gave claimant permanent restrictions of no lifting more than ten pounds on the right, no restrictions on the left and no driving backwards. (Ex. 2, pp. 77-78)

Dr. Gammel evaluated claimant on one occasion for an IME. He found claimant had a 6 percent permanent impairment to the right upper extremity and no permanent impairment for the carpal tunnel release. (Ex. B)

Dr. Larose actively treated claimant for over 2 years. Dr. Gammel evaluated claimant once for an IME. Dr. Larose has a far better understanding of claimant's history, and her medical presentation than does Dr. Gammel. Based on this, it is found the opinions of Dr. Larose, concerning claimant's permanent impairment and restrictions for her left and right upper extremities are more persuasive than Dr. Gammel. Dr. Larose has also opined he did not believe claimant could return to work at Menards. (Ex. 2, pp. 77-78)

As noted in the statement of the case of this decision, the district court and the court of appeals affirmed the prior workers' compensation commissioner's decision that claimant's mental injury was caused by her 2008 work injury. As such, I am bound by this causation opinion.

In review of the appeal decision and the district court's remand order, I find nothing indicating there has been a finding claimant's mental injury is a permanent impairment. As such, a determination if the mental injury is permanent, needs to be made in this decision to determine the extent of claimant's industrial disability.

Only one expert, Dr. Seamands, has opined claimant's mental injury is a permanent impairment.

In his August 27, 2011 letter, in response to an inquiry from claimant's counsel, Dr. Seamands noted: "It does appear that this aggravation has caused a permanent state of affairs which has led to these two severe psychiatric conditions." (Ex. 7, p. 26) In a December 16, 2011 note, Dr. Seamands also noted: "Patient continues to have the same level of dysfunction as she had previously and unfortunately I do not believe has recovered her ability to work on a full or part time basis." (Ex. 7, p. 30)

Other than these two sentences, there is no analysis or rationale why Dr. Seamands considers that claimant has a ". . . permanent state of affairs. . ." (Ex. 7, p. 26) The Guides to the Evaluation of Permanent Impairment, Fifth Edition offer guidance for the evaluation of permanent impairment for mental disorders. See Guides, chapter 14. Dr. Seamands makes no reference to the Guides.

As noted in the finding of facts, Dr. Seamands initially, in September of 2009, assessed claimant as having a dysthymic disorder. (Ex. 7, p. 3) It was not until January of 2011, after correspondence from claimant's counsel, that this diagnosis was changed, without any rationale, to a major depressive disorder single incident. (Ex. 7, p. 20) As noted by Dr. Davis' testimony, and as indicated by the DSM-IV, the diagnoses given by Dr. Seamands in 2009, and later given in January of 2011, appear to be very different. (Tr. pp. 95-101; DSM-IV, pp. 344, 349)

At least one physician has opined claimant's mental condition is temporary in nature. (Ex. F)

Dr. Seamands offers no analysis or rationale for finding claimant has a permanent impairment for her mental injury. His assessment of claimant's mental injury significantly changed over the course of two years. Dr. Davis opined that Dr. Seamands' assessments of claimant are contradictory. Dr. Davis also noted claimant's mental injury was temporary in nature. No other expert has opined claimant has a permanent impairment from her mental injury caused by the 2008 work injury. Based on these facts, it is found Dr. Seamands' opinion, that claimant has a permanent impairment from her mental injury and that claimant cannot work a part-time or full-time job, are found not convincing. Based on this, claimant has failed to carry her burden of proof that she has a permanent impairment from her mental injury.

Claimant testified she has only looked for work online. She testified she has only applied for part-time jobs. (Tr. 49) Other than Dr. Seamands' opinion, which is found not convincing, no other doctor has restricted claimant from working full time. Claimant testified she has told all employers she has a five-pound lifting restriction. (Tr. 50) Claimant actually has a ten-pound lifting restriction on the right and no lifting restriction on the left. (Ex. 2, pp. 77-78) This record suggests claimant is limiting her job search with far greater restrictions than have actually been imposed by Dr. Larose.

Dr. Davis has opined it would be good for claimant's mental health to return to work. (Ex. F, p. 74; Tr. 105) Dr. Brooke also suggests it is best for claimant to return to work. (Ex. D, p. 46) Dr. Larose opined claimant could return to work within work restrictions. (Ex. 2, pp. 77-78) Dr. Gammel also suggests it is in claimant's best interest to return to work. (Ex. B, p. 21)

Claimant graduated from high school and has a two-year post-high school degree. Only Dr. Seamands has found claimant cannot work. Dr. Seamands' opinions are found not convincing regarding claimant's ability to return to work. Claimant has permanent restrictions of no lifting greater than 10 pounds on the right and has no lifting restriction on the left. She is also not allowed to drive a forklift backwards. Claimant has a 13 percent permanent impairment to the body as a whole. Dr. Larose opined claimant cannot return to her job at Menards. The record suggests claimant has looked for work, but is self-limiting in her job search. No other physician, other than Dr. Seamands, has opined claimant cannot return to full-time work. No vocational specialist has opined claimant cannot return to work. Three physicians have opined that it is in claimant's best interest to return to work. When all relevant factors are considered, it is found claimant has a 60 percent loss of earning capacity or industrial disability.

Dr. Larose found claimant could return to work on November 4, 2010. (Ex. 2, p. 78) For this reason, permanent partial disability benefits for claimant shall commence on November 4, 2010.

ORDER

THEREFORE, IT IS ORDERED:

That defendants shall pay claimant three hundred (300) weeks of permanent partial disability benefits at the rate of three-hundred thirty-eight and 96/100 dollars ($338.96) per week commencing on November 4, 2010.

That defendants shall pay accrued benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits as ordered above and as set forth in Iowa Code section 85.30.

That defendants shall file subsequent reports of injury as required under rule 876 IAC 3.1(2).

That defendants shall pay the costs of this matter.

Signed and filed this 26th day of June, 2015.

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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