BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARIA DEL CARMEN OSORIO,	
Claimant,	File No. 5052625
vs.	APPEAL DECISION
TYSON FRESH MEATS,	
Employer, Self-Insured, Defendant.	Head Note No. 1803

Defendant appeals from an Arbitration Decision filed October 24, 2016. The matter was heard on May 27, 2016 and fully submitted on June 27, 2016. On April 16, 2018, the matter was delegated to the undersigned to issue the final agency decision of the intra-agency appeal.

The portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

Defendant appeals from the presiding deputy commissioner's conclusion that claimant met her burden of proof that she is entitled to permanency benefits concerning the stipulated work injury that occurred on November 4, 2013. Defendant argues that both the medical evidence and non-medical evidence to support such a conclusion is lacking.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner, with the following additional analysis:

Defendant argues on appeal that the deputy erred when he concluded that claimant sustained permanent impairment. In support therefore, defendant argues that three treating physicians opined that claimant did not sustain any permanent impairment and concluded that claimant could be returned to work with no restrictions. Only claimant's IME physician found permanent impairment and the need for restrictions.

Claimant argues that the number of experts is irrelevant and that the deputy correctly found claimant's IME physician more persuasive. Sherman v. Pella Corp, 576 N.W.2d 312, 321 (Iowa 1998).

Considering the expert opinions, I first consider the issue of whether claimant sustained permanent functional impairment. I note that Daniel Miller, D.O., one of the three treating physicians referred to by defendant, did not offer an opinion on the extent of permanent impairment. Rather, he concluded with no discussion, that claimant's current condition was not work related. (Exhibit 2, page 51) Therefore, it cannot be said that Dr. Miller's opinion is clearly stated that claimant sustained no permanent impairment. Rather, it is just as likely that having opined without comment that claimant's condition is not work related, that he did not address the issue of permanent impairment because he found it unrelated to the work injury.

Kurt Smith, D.O., another treating physician referred to by defendant stated that claimant had "chronic neck pain secondary to described injury 11/04/2013," which is the date of injury herein. (Ex. 7, p. 84) Dr. Smith recorded that claimant continued to have constant pain in the right shoulder and neck, which was made worse when she turned her head or used her arms. (Id.) Claimant's job description requires pushing, pulling, reaching and grasping and pulling boxes from shoulder height. (Ex. 12, p. 129) It is reasonable to conclude that claimant's job activities involve using her arms, which she described as an aggravating factor of her chronic neck pain. Although Dr. Smith agreed that claimant had reached MMI and could return to full duty, he did not offer a specific opinion concerning the extent of, or lack of, permanent functional impairment.

Sunil Bansal, M.D., claimant's IME physician, agreed with Dr. Smith that claimant's current condition was secondary/causally related to the work injury. Dr. Bansal also stated that claimant sustained a 3 percent whole person impairment to her neck based on placement in the DRE Category II for the cervical spine, due to spasms and reduced range of motion. He further stated that claimant sustained an additional 3 percent whole person impairment to the right shoulder due to reduced range of motion. (Ex. 8, pp. 97-98) The reduced range of motion in claimant's neck and shoulder were observed and documented by Dr. Bansal in his evaluation of claimant. (Ex. 8, p. 94)

Concerning restrictions, Kary Schulte, M.D. and Dr. Smith found that no restrictions were needed. However, on March 25, 2014, Dr. Miller noted that claimant "is working with restrictions," and that she continued to have pain in her neck, back and shoulders. (Ex. 2, p. 50) Dr. Miller then concluded without discussion that "her persistent pain is not work related." (Ex. 2, p. 51) Dr. Miller stated "Full Duty," under the section titled "Orders & Requisitions." (Id.) However, similar to the issue of permanent functional impairment, it cannot be clearly said that Dr. Miller's opinion is that claimant did not require any permanent restrictions, rather, it is just as likely that having opined without comment that claimant's condition is not work related, he released claimant to return to work "full-duty" concerning the perceived work injury and not in consideration of claimant's current condition that he described above. Again, at best it is unclear.

I note that claimant continued to complain of pain and symptoms to her primary care provider and continued to receive prescription medication long after she was released to return to work and at least through January, 2016. (Ex. 6, p. 78A)

Dr. Bansal assigned work restrictions of: "no frequent reaching with either arm; no lifting greater than 15 pounds with either arm occasionally, 10 pounds frequently; and no pushing or pulling greater than 40 pounds occasionally, 25 pounds frequently." (Ex. 8, p. 98) I note that these restrictions are near the limits of the physical requirements of claimant's current job. Claimant worked in the job of "Box Bellies" for 9 years prior to the arbitration hearing. She continued in that same position at the time of the hearing. (Tr. p. 19) This job has physical requirements of lifting bellies weighing about 10 pounds each into a box and if needed stacking the boxes, which weigh about 40 pounds each. (Ex. 12, p. 129) The force required to complete the work tasks, including pushing and pulling, reaching and grasping is described as minimal to heavy force. (Ex. 12, p. 130)

The deputy found in the arbitration decision that it was "difficult to accept" the full duty release of claimant by Dr. Schulte and Dr. Miller to mean that claimant has no permanent work restrictions. (Arbitration Decision, p. 4) The deputy noted that Dr. Smith diagnosed claimant with chronic neck pain and released her to return to her job without restrictions, which was appropriate for the physical demand level of her current job, but that given her chronic pain "she is not likely capable of fully unrestricted work" beyond her current job requirements. (Arb, Dec. p. 5) I agree with this conclusion based on the totality of the evidence including the testimony of claimant and the testimony of Tomas Macias, who stated that he works with claimant and that she is able to do her job, but that he has observed claimant complain of neck and shoulder pain on the job and he knows that she is in pain because it is obvious that she is hurting. (Tr. p. 76) He tries to help claimant with lifting because he knows that she is hurt. (Tr. p. 77) He also testified that another co-worker gives claimant a break from time to time so that claimant can rest due to the pain in claimant's neck and shoulders. (Tr. p. 78)

Defendant is critical of Dr. Bansal's opinion that claimant's current condition is causally related to her work injury, but defendant does not provide explanation as to Dr. Smith's opinion that claimant's condition is secondary to the November 4, 2013 work injury, as stated above. (Ex. 7, p. 84)

Defendant further criticizes Dr. Bansal's thoroughness because he does not discuss claimant's height, weight, BMI, hypertension or diabetes when discussing impairment ratings and assignment of restrictions. However, defendant does not point to any medical record that correlates these conditions to lifting restrictions, or reduced range of motion of the cervical spine or shoulder. I do not find defendant's argument on this matter persuasive.

Defendant argues that although claimant had a stipulated work injury on November 4, 2013, she failed to prove any loss of earning capacity and therefore any

entitlement to industrial disability. In support of this position, defendant argues that claimant did not miss any time from work, she had no changes in her job duties, she still does the same job, working the same hours and she has had pay increases since the injury.

Defendant's arguments ignore the finding of the deputy that claimant sustained functional impairment to her shoulder and cervical spine and has permanent work restrictions. In addition, claimant argues that the MRI findings on January 8, 2014 indicate an objective basis supportive of her ongoing symptoms. (Ex. 4, pp. 55-56) Further, claimant argues that she continued to receive medical treatment, including prescription medication to address her symptoms after being released by the authorized physicians. (Ex. 6, pp. 68-69) These factors along with the testimony of claimant that she would no longer be able to physically perform her prior jobs of working as a street vender selling chickens or other food, or working in her initial job of packaging ribs due to the lifting involved in each job; and, her complaints and continued pain along with the corroborating testimony of Mr. Macios, her co-worker, lead me to agree with the deputy, that although claimant is capable of continuing in her current job, the permanent impairment ratings and restrictions assigned by Dr. Bansal are more consistent with claimant's outcome and ongoing condition. I therefore conclude that claimant sustained permanent injury from the November 4, 2013 work injury.

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, 593; 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. However, consideration must also be given to the injured worker's medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured workers' qualifications intellectually, emotionally and physically; the worker's earning before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted. Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616 (Iowa 1995); 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).

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae

which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

Industrial disability measures an injured worker's lost earning capacity. Factors that should be considered include the employee's functional impairment, age, intelligence, education, qualifications, experience, and the ability of the employee to engage in employment for which he is suited. Id. Thus, the focus is not solely on what the worker can and cannot do; the focus is on the ability of the worker to be gainfully employed. Second Injury Fund v. Shank, 516 N.W.2d 808, 813 (Iowa 1994); Guyton v. Irving Jensen, Co., 373 N.W.2d 101, 104 (Iowa 1985); Second Injury Fund v. Nelson, 544 N.E.2d 258 (Iowa 1996).

The fact that claimant remains in the same position, doing the same job is informative as to industrial disability, but is not dispositive. When considering claimant's ability to be engaged in employment, her age, limited English and ability to be retrained, lack of education, work restrictions and other relevant factors must be considered along with her continued employment, motivation to remain employed, and other factors appropriate for the consideration of industrial disability.

In this case, I agree with the deputy's assessment of industrial disability of 15 percent based on the above.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision is affirmed.:

Defendant shall pay claimant seventy-five (75) weeks of permanent partial disability benefits commencing on November 5, 2013 at the rate of three hundred sixty and 78/100 dollars ($368.78) per week.

Defendant shall pay interest on all accrued benefits pursuant to Iowa Code section 85.30.

Defendant shall pay the costs of this appeal including preparation of the hearing transcript.

Defendant shall file subsequent reports of injury (SROI) as required by our administrative rule 876 IAC 3.1(2).

Signed and filed this 30th day of August, 2018.

TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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