

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JODY WILSON,

Claimant,

vs.

J & L INVESTMENTS, INC.,

Employer,

and

AMERICAN FAMILY INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 5060690.02

RULING ON APPLICATION

FOR REHEARING

Claimant filed a motion for reconsideration. This motion is considered an application for rehearing under Rule 876 IAC 4.24 (application). Defendants resist the application. The application is considered.

Claimant requests that she be awarded 150 weeks of permanent partial disability benefits. She requests a finding for the commencement date of permanent partial disability benefits. She requests that a finding be made that her permanent partial disability exceeds the functional impairment rating. She requests defendants be assessed a penalty for delayed payment of permanent partial disability benefits. Claimant also requests that the stipulations agreed to by both parties be detailed in the order of the rehearing decision.

Regarding claimant's request for permanent partial disability benefits, on January 26, 2022, the undersigned issued a review-reopening decision. That decision found, in part, that claimant had a 30 percent permanent impairment to the body as a whole as a result of her bilateral total knee replacements. That finding was based upon the opinion of Jason Stanford, D.O., who treated and performed both knee replacements. (Joint Exhibit 6, p. 47; Review-Reopening Decision pp. 3, 5)

The decision found that because claimant failed to show a loss of earning capacity proximately caused by the July 13, 2015, date of injury, claimant failed to carry her burden of proof she is entitled to additional permanent partial disability benefits under review-reopening proceeding. (Review-Reopening Decision p. 6)

This would have been the correct analysis had claimant's case been of an industrial disability or if claimant had been found to be permanently and totally disabled. However, claimant's case is a scheduled member case. There were no findings of fact or conclusion of law that claimant was permanently and totally disabled. As such, the analysis used in the January 26, 2022 review-reopening decision regarding claimant's entitlement to additional permanent partial disability benefits was incorrect as to the application of law to the findings of fact.

Under Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391 (Iowa 2009), claimant must prove an increased physical disability in a scheduled member case and a change in earning capacity in an industrial disability case. As detailed in the Findings of Fact and Conclusion of Law, Dr. Stanford opined that claimant had a 30 percent permanent impairment to the body as a whole for her bilateral total knee replacements. (JE 6, p. 47; Review-Reopening Decision pp. 3, 5) As noted in the Conclusion of Law section of the Review-Reopening Decision, there is no evidence to suggest that claimant's physical condition has not worsened since her 2017 Agreement for Settlement. Given this record, claimant has carried her burden of proof her physical condition has worsened since the 2017 Agreement for Settlement. (Review-Reopening Decision, p. 5)

Claimant carried her burden of proof she had a worsening of her physical condition since her 2017 Agreement for Settlement. Dr. Stanford found claimant had a 30 percent permanent impairment to the body as a whole for her bilateral knee injuries. Given this record, claimant is entitled to an additional 150 weeks of permanent partial disability benefits under review-reopening proceeding.

Claimant also requests a finding that her permanent partial disability exceeds the functional impairment rating assigned by Dr. Stanford.

As noted in the Review-Reopening Decision, claimant had the opportunity to return to work to her job by reapplying for her position. Claimant knew she needed to reapply. Claimant failed to reapply. Claimant testified she would not return to work at McDonald's if offered a job. She testified she has not looked for a job since leaving McDonald's to have surgery. No expert has opined claimant could not return to work.

A loss of earning capacity due to voluntary choice or lack of motivation to return to work is not compensable. Malget v. John Deere Waterloo Works, File No. 5048441 (Remand Dec. May 23, 2018); Rus v. Bradley Puhmann, File No. 5037928 (App. December 16, 2014); Gaffney v. Nordstrom, File No. 5026533 (App. September 1, 2011); Snow v. Chevron Phillips Chemical Co., File No. 5016619 (App. October 25, 2007). Copeland v. Boone's Book and Bible Store, File No. 1059319 (App. November 6, 1997). See also, Brown v. Nissen Corp., 89-90 IAWC 56, 62 (App. 1989) (no prima facie showing that claimant is unemployable when claimant did not make an attempt for vocational rehabilitation).

Given this record, claimant is not entitled to permanent partial disability benefits exceeding the functional rating given by Dr. Stanford.

Regarding the commencement date for payment of permanent partial disability benefits, benefits awarded in a review-reopening are to begin at the time the petition for review-reopening was filed, which in this case was October 7, 2020. Dickenson v. John Deere products Engineering, 395 N.E.2d 644 (Iowa Ct. App. 1986); Verizon Business Network Services, Inc. v. McKenzie, 823 N.W.2d 418 (Table) 2012 WL 4899244 (Iowa Ct. App. October 17, 2012); and, Searle Petroleum, Inc. v. Mlady, 842 N.W.2d 679 (Table) 2013 WL 6405393 (Iowa Ct. App. December 5, 2013). Claimant's petition in this matter was filed on October 7, 2020. Benefits shall commence on that date.

Regarding the penalty for alleged delay in payment of permanent partial disability benefits, in a May 17, 2021 letter, Dr. Stanford found claimant had a 30 percent permanent impairment to the body as a whole for the combined permanent impairment for her bilateral total knee replacements. (JE 6, p. 47) This report was faxed to defendants on June 10, 2021. Id.

Defendants made a single payment on June 23, 2021, of 24.429 weeks of permanent partial disability benefits. (Ex. D, p. 7; Ex. 5, p. 12; Ex. C, p. 6; Claimant's Post-Hearing Brief, p. 9) This amount was for permanent partial disability benefits for December 26, 2020 through May 14, 2021. (Ex. 5, p. 12) An additional 15 weeks of permanent partial disability benefits had accrued up to the date of hearing. (Claimant's Post-Hearing Brief, p. 9) There is no evidence of any excuse for defendants' failure to pay continued permanent partial disability benefits. A 50 percent penalty is appropriate. Defendants are liable for \$1,894.13 for the delay in payment of permanent partial disability benefits (15 weeks x \$252.55 x 50 percent).

Claimant also requests that the stipulations between the parties be put in the order in this matter to avoid confusion. There is no indication or evidence in claimant's application that the parties have confusion regarding matters stipulated to in the hearing report. As noted in the Review-Reopening Decision, the parties are bound by their stipulations. It is unclear why it is necessary to order matters where stipulations have been made. However, to avoid any confusion, claimant's request will be granted as to ordering stipulations agreed to in the hearing report.

ORDER

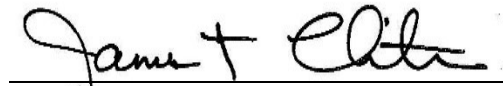
THEREFORE IT IS ORDERED:

That claimant's application is granted, in part, and denied, in part.

That the Review-Reopening Decision is supplemented as discussed herein:

1. That defendants shall pay healing period benefits from July 1, 2020 through November 25, 2020 at the rate of two hundred fifty-two and 55/100 dollars (\$252.55) per week.
2. That defendants shall pay one hundred fifty (150) weeks of permanent partial disability benefits commencing on October 7, 2020 at the rate of two hundred fifty-two and 55/100 dollars (\$252.55) per week.
3. That 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)
4. That defendants shall pay medical expenses as detailed in Exhibits E and 8.
5. That defendants shall pay two thousand six hundred fifty-one and 78/100 dollars (\$2,651.78) in penalty regarding the delay of temporary benefits.
6. That defendants shall pay one thousand eight hundred ninety-four and 13/100 dollars (\$1,894.13) in penalty for the delay in payment of permanent partial disability benefits.
7. That defendants shall pay costs.
8. That defendants shall file subsequent reports of injury as required under rule 876 IAC 3.1(2).
9. That the Review-Reopening Decision remains the same in all other respects.

Signed and filed this 10th day of February, 2022.


JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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The parties have been served, as follows:

Benjamin Roth (via WCES)

Kelsey Paumer (via WCES)