BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SEVDA KURDIC,	File No. 5055279
Claimant,	
vs.	APPEAL
TYSON FRESH MEATS, INC.,	DECISION
Employer, Self-Insured, Defendant	Head Notes: 1402.40; 1803.1; 1804; 2501; 2907

Defendant Tyson Fresh Meats, Inc., self-insured employer, appeals from an arbitration decision filed on August 30, 2019. Claimant Sevda Kurdic responds to the appeal. The case was heard on May 25, 2018, and it was considered fully submitted in front of the deputy workers' compensation commissioner on July 9, 2018.

The deputy commissioner found claimant was unable to perform substantial, gainful work in the competitive job market due to her work-related bilateral upper extremity injuries. As a result, the deputy commissioner found claimant was permanently and totally disabled under Iowa Code section 85.34(3). The deputy commissioner also found claimant was entitled to ongoing reasonable and necessary medical treatment for her mental health symptoms. In making these findings, the deputy commissioner specifically found claimant to be a credible witness.

On appeal, defendant argues claimant is not permanently and totally disabled as a result of her bilateral upper extremity injuries. Defendant asserts claimant is only entitled to her functional disability under Iowa Code section 85.34(2)(s). Defendant additionally argues claimant failed to prove a causal connection between her work injuries and her mental health symptoms.

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

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 86.24 and 17A.15, the arbitration decision filed on August 30, 2019, is reversed.

FINDINGS OF FACT

I turn first to the extent of claimant's permanent disability. I agree with many of the deputy commissioner's fact findings, including the finding regarding claimant's credibility. The deputy commissioner found claimant to be a credible witness. More specifically, the deputy commissioner found claimant credibly testified regarding her ongoing pain and that she could not physically perform the mark tenders job for defendant.

While I performed a de novo review, I give considerable deference to findings of fact that are impacted by the credibility findings, expressly or impliedly made, by the deputy commissioner who presided at the arbitration hearing. I find the deputy commissioner correctly assessed the credibility of claimant. I find nothing in the record in this matter which would cause me to reverse the deputy commissioner's credibility findings.

I also accept the deputy commissioner's finding that the invalid FCE should be given little weight. As correctly noted by the deputy commissioner, claimant had several relatively unsuccessful surgeries prior to the FCE and was experiencing ongoing symptoms at the time the FCE was completed.

Based largely on the invalid FCE, none of claimant's treating physicians assigned any permanent work restrictions for claimant. However, as noted, I adopted the deputy commissioner's credibility findings. This includes claimant's testimony that none of her surgeries alleviated her ongoing pain and that she was unable to return to her mark tenders job with defendant. Like the deputy commissioner, therefore, I am not persuaded by the authorized treating physicians' opinions that claimant does not require any permanent restrictions.

Where I diverge from the deputy commissioner's fact findings, however, is what impact claimant's restrictions have on her ability to return to substantial, gainful employment. The deputy commissioner adopted the permanent work restrictions as recommended by claimant's chosen independent medical examiner, Marc Hines, M.D. Even if I were to adopt Dr. Hines' restrictions in full, there is nothing in Dr. Hines' report indicating claimant is precluded from returning to work in any capacity. To the contrary, Dr. Hines encouraged claimant to seek vocational counseling for work within her restrictions. (Claimant's Exhibit 1, p. 8)

Furthermore, I find claimant was not significantly motivated to return to work after she determined she was unable to return to the mark tenders job. I acknowledge claimant participated in defendant's bid walk for a year. (Hearing Transcript, p. 28) However, when she was offered a job, she declined to even attempt it. Instead, claimant determined she was unable to perform it just by observing others. (Tr., pp. 28-29, 45-46) Claimant additionally failed to apply for any other jobs with any other employers after her employment with defendant was separated. (Tr., p. 44-46)

Because claimant failed to attempt to return to any jobs after she was unable to perform the mark tenders job, there is insufficient evidence to determine whether claimant is actually precluded from working in meatpacking or other substantial, gainful employment. In other words, claimant did not provide evidence that she is wholly disabled from performing work that her experience, training, education, intelligence, and physical capacities would otherwise permit her to perform. I therefore respectfully reverse the deputy commissioner's finding that claimant is unable to perform substantial, gainful work in the competitive job market.

I likewise respectfully reverse the deputy commissioner's finding that claimant's mental health symptoms are causally connected to her work injury. In Joint Exhibit 6, on which the deputy commissioner relied, claimant's doctor indicated claimant's "constant pain . . . really triggers a lot of depressive symptoms." (Joint Exhibit 6, p. 127) This statement, however, is the extent of any causation opinion in the record. At no point in the record did any physician affirmatively state that claimant's mental health symptoms are caused by, or are materially aggravated by, or are accelerated by, claimant's work-related bilateral upper extremity injuries. As a result, there is simply insufficient evidence to find claimant's mental health symptoms are causally related to her work-related injuries. Without sufficient evidence of a causal connection, the deputy commissioner's finding that claimant is entitled to ongoing medical treatment for her mental health symptoms is respectfully reversed.

Having found claimant's injuries are limited to her bilateral upper extremities, I must now determine the extent of claimant's functional impairment. Defendant asserts Dr. Hines' rating should not be adopted because he did not follow the measures set forth in the Guides. Per Robert Gordon, M.D., Dr. Hines inappropriately used handgrip strength measurements in the presence of decreased range of motion. (Defendant's Ex. K, p. 25)

However, Dr. Hines addressed the rationale for his methods in detail in a subsequent report. (Cl. Ex. 2) He modified his original rating to a combined 35 percent whole body impairment (18 percent from each side). (Cl. Ex. 2, p. 13)

Given that claimant underwent several unsuccessful procedures and continued to have ongoing pain at the time of the hearing, I find Dr. Hines' 35 percent whole body impairment rating is the most accurate representation of claimant's functional impairment.

CONCLUSIONS OF LAW

As correctly noted by the deputy commissioner, claimant's compensation for her bilateral hand and arm injuries is governed by Iowa Code section 85.34(2)(s) (2015). That section states:

> The loss of both arms, or both hands, or both feet, or both legs, or both eyes, or any two thereof, caused by a single accident, shall equal five hundred weeks and shall be compensated as such; however, if said employee is permanently and totally disabled the employee may be entitled to such benefits under subsection 3.

Section 85.34(3) is the permanent total disability section. Thus, if claimant's resulting disability is less than permanent and total, the disability is calculated using the functional method. If the resulting disability is permanent and total, then permanent total disability must be awarded against the employer.

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 R. Co., 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).

In this case, I reversed the deputy commissioner's finding that claimant is unable to perform substantial, gainful work in the competitive job market. Instead, I found claimant did not provide sufficient evidence that she is wholly disabled from performing work that her experience, training, education, intelligence, and physical capacities would otherwise permit her to perform. I therefore find claimant did not satisfy her burden to prove she is permanently and totally disabled. The deputy commissioner's determination that claimant is entitled to permanent total disability benefits is therefore respectfully reversed.

As discussed, when a claimant is not permanently and totally disabled from the injuries of two members caused by a single accident, benefits are scheduled under section 85.34(2)(s); the degree of disability must be computed on a functional basis with a maximum benefit entitlement of 500 weeks. Simbro v. DeLong's Sportswear, 332 N.W.2d 886 (Iowa 1983).

In this case, I adopted the permanent impairment ratings of Dr. Hines as set forth in his second report. Combined, Dr. Hines' rating equates to a 35 percent whole body impairment. Using the 500-week schedule pursuant to Iowa Code section 85.34(2)(s), this entitles claimant to receive 175 weeks of permanent partial disability benefits. These benefits will commence on the stipulated commencement date of December 4, 2015, at the stipulated rate of $456.69.

Claimant also made a claim for medical treatment relating to her mental health symptoms under Iowa Code section 85.27.

Under Iowa law, the employer is required to provide care to an injured employee and is permitted to choose the care. Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997).

> [T]he employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

Iowa Code section 85.27(4)

In this case, however, I reversed the deputy commissioner's finding that claimant's mental health symptoms are causally connected to her work injury. As a result, defendant has no obligation to provide claimant with ongoing medical treatment for that condition. The deputy commissioner's award of medical treatment is therefore respectfully reversed.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on August 30, 2019, is reversed.

Defendant shall pay claimant 175 weeks of permanent partial disability benefits at the rate of four hundred fifty-six and 69/100 ($456.69) per week commencing on December 4, 2015.

Defendant shall be given credit for all benefits previously paid.

Defendant 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).

Pursuant to rule 876 IAC 4.33, defendant shall pay claimant's costs of the arbitration proceeding and the parties shall split 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 10th day of July, 2020.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

J. Richard Johnson (Via WCES)

Jason P. Wiltfang (VIA WCES)