

KATHY GAMBLE,

Claimant,

vs.

AG LEADER TECHNOLOGY,

Employer,

and

THE CHARTER OAK FIRE INS. CO.,

Insurance Carrier, Defendants.

File No. 5054686

1/1/2016

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Kathy Gamble, the claimant, seeks additional workers' compensation benefits from defendants, AG Leader Technology, the alleged employer, and its insurer, The Charter Oak Fire Ins. Co., as a result of a work injury on May 9, 2013. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on September 19, 2016, but the matter was not fully submitted until the receipt

of the parties' briefs and argument on September 26, 2016. Oral testimony and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Claimant's exhibits were marked numerically. Defendants' exhibits were marked alphabetically. References in this decision to page numbers of an exhibit shall be made by citing the exhibit number or letter followed by a dash and then the page number(s). For example, a citation to claimant's Exhibit 1, pages 2 through 4 will be cited as, "Ex 1-2:4." Citations to a transcript of testimony such as "Tr-4:5," either in a deposition or at hearing, shall be to the actual page number(s) of the original transcript, not to page number of a copy of the transcript containing multiple pages.

The parties agreed to the following matters in a written hearing report submitted at hearing:

1. On May 9, 2013, claimant received an injury arising out of and in the course of employment with Ag Leader Technology.
2. Claimant is seeking temporary partial disability benefits from October 1, 2014 through June 1, 2015.
3. The injury is a cause of some degree of industrial disability to the body as a whole.
4. Permanent partial disability benefits shall begin on September 30, 2013.
5. At the time of the work injury, claimant's gross rate of weekly compensation was \$878.00. Also, at that time, she was married and entitled to two exemptions for income tax purposes. Therefore, claimant's weekly rate of compensation is \$576.16 according to the workers' compensation commissioner's published rate booklet for this injury.
6. Medical benefits are not in dispute.
7. Prior to hearing, defendants voluntarily paid 50 weeks of permanent disability benefits for this work injury.

ISSUES

At hearing, the parties submitted the following issues for determination:

- I. The extent of claimant's entitlement to temporary partial disability benefits;
- II. The extent of claimant's entitlement to permanent disability benefits; and,
- III. The extent of defendants' entitlement to a credit against the award of permanency benefits in this case pursuant to Iowa Code section 85.34(7)(b)(1).

FINDINGS OF FACT

In these findings, I will refer to the claimant by her first name, Kathy.

From my observation of her demeanor at hearing including body movements, vocal characteristics, eye contact and facial mannerisms while testifying in addition to consideration of the other evidence, I found Kathy credible.

Kathy has worked for AG Leader Technology since November 2002 and continues to do so today. She began as an assembler, installing connectors on cables. In either late 2009 or early 2010, she was promoted to inspector and received a pay increase. She continued in this inspector job until her work injury in this case. Kathy testified that both jobs required lifting boxes, but the lifting in the inspector job was more demanding because the boxes were heavier and at times required her to stack the boxes below her waist and above her head. Kathy's description of the physical aspects of her job is uncontroverted in this record.

Kathy was off work for a time after her May 9, 2013 injury in this case. She returned to work at AG Leader Technology on September 30, 2013 after being released to do so by her treating physician. She, however, was given restrictions by her treating doctor and she was returned to her former assembly job because it was lighter duty work. She has continued in the assembly job since that time. Kathy admits that her higher inspection work pay was continued when she returned to the assembly job and she did not lose on any overtime opportunities because of her injury. (Ex. 8-40) When asked why her weekly earnings were less between October 2013 and June 2015, Kathy testified at hearing that she worked 40 hours a week but work slacked off. At the time of hearing, Kathy was still working in the assembly job and still receiving the higher inspection job pay. Kathy was earning \$17.50 per hour at the time of her injury and \$18.75 at the time of her deposition in June 2016 due to periodic raises since the date of injury. (Ex. 8-16) The record in this case fails to show the current rate of pay for an assembler, other than the rate is less than inspector pay. (Ex. 8-21) She was paid \$8.50 when she started in assembly in 2002. (Ex. 8-14)

The stipulated work injury on March 9, 2013 involves an injury to the left shoulder while attempting to pull a heavy box off of an overhead shelf. (Ex. 8-8) She was initially treated conservatively with physical therapy and placed on restrictions. (Ex. 2-1:6.) Eventually, she was referred to Peter Buck, M.D. an orthopedic surgeon, who diagnosed a rotator cuff tear. (Ex. 2-6) Kathy underwent surgery by Dr. Buck to repair the rotator cuff on August 13, 2013. (Ex. 4-3) As stated above, she returned to the assembly job on September 30, 2013. Dr. Buck initially placed her at MMI on January 22, 2014 and provided permanent lifting restrictions of 20 lbs. with no work above shoulder height. (Ex. 2-14) Dr. Buck gave an impairment rating at that time of 5 percent to the body as a whole due to lost range of motion and strength using the AMA Guides, fifth edition. (Ex. 2-15)

Kathy continued to have problems with her left shoulder and she returned to see Dr. Buck on October 1, 2014. Dr. Buck took x-rays and gave her an injection on the first visit. (Ex. 2-16) She returned to Dr. Buck on November 12, 2014 and he continued the same permanent restrictions as before, but Kathy was to return after six months for re-evaluation. (Ex. 2-18) Dr. Buck saw Kathy for the last time on May 13, 2015. This final assessment was "chronic

rotator cuff weakness left shoulder.” (Ex. 2-19) Following this final evaluation, Dr. Buck again placed her at MMI and provided a new impairment rating increasing the impairment rating to 8 percent of the whole body based on additional lost range of motion and weakness. (Ex. 2-22)

At the request of her attorney, Kathy was evaluated on June 14, 2016 by John Kuhnlein, D.O., an occupational medicine physician. Dr. Kuhnlein increased the impairment rating to 9 percent of the whole person under the same AMA Guides and agreed with Dr. Buck’s maximum medical improvement (MMI) date of June 1, 2014 and the permanent restrictions given by Dr. Buck. (Ex. 5-6)

Kathy testified that her left shoulder continues to get sore and achy after activity both at home and at work. She takes over-the-counter analgesics about three times per week. She performs home exercises to avoid stiffness. She explains that she modifies her work tasks to avoid stress on her shoulder. Although she continues to ride horses, she rides less often than she did before her injury and she is unable to saddle the horse on her own. She said that she lifted an entire bale of hay when feeding her horses before her left shoulder injury, but now she must break up a bale to carry the hay.

Kathy testified that she is not physically able to return to the inspection job she had at the time of her injury due to her residual left shoulder problems from the work injury and agreed that the assembly job is better suited to her permanent restrictions. Kathy did not express an interest in leaving AG Leader Technology and there is no evidence that she has sought other employment outside of AG Leader Technology.

Kathy was 58 years of age at the time of hearing. She is a high school graduate. In the early 1990s she attended DMAACC, but ended this schooling after being only one course short of receiving an associate of arts degree in accounting. She did not explain why she has not completed this course since that time.

Prior to her employment at AG Leader Technology, Kathy worked a variety of jobs including bookkeeping, waitressing, printing press operator and meat processing. She was also a supervisor at the meat processing plant. She states that she would have trouble returning to any of her past work due to her left shoulder problems. She had to lift large trays of food as a waitress and heavy boxes of paper as a printer operator. Even though she was a supervisor at the meat processing plant, she still had to perform manual labor work when needed which would violate her current restrictions.

Kathy suffered an injury to her right shoulder in 2005 while working for AG Leader Technology. She testified that this occurred from repetitive gripping at work. (Ex. 8-22) She had two surgeries on her right shoulder and was eventually released without restrictions by the treating orthopedic surgeon, on March 27, 2007. (Ex. 1; Ex. 8-6) Kathy testified that she was having no problems with her right shoulder at the time of her left shoulder injury in 2013. (Ex. 8-23:24) In her deposition, she states that her right shoulder now gets sore because she is forced to use it more because of her left shoulder problems. (Ex. 8-24)

Kathy's claim for workers' compensation benefits from the right shoulder injury case was settled by Compromise Settlement under Iowa Code 85.35(3) with the Guaranty Fund of Iowa after the original insurer, Atlantic Mutual Insurance Company went bankrupt. (Ex. 9) Defendants' position with regard to Kathy's claim for disability benefits at that time, as stated in the settlement papers, was that a substantial portion of the claimed disability was not related to the alleged injury. (Ex. 9-3) In discovery responses by defendants in this proceeding, Kathy admitted that she received indemnity benefits for the right shoulder from April 13, 2007 through June 5, 2010 for a period of 164.143 weeks. (Ex. A-1) The record does not indicate whether these benefits were for a claimed healing period or for permanency. She was paid an additional \$4,000.00 pursuant to the Settlement Agreement. (Ex. 9-4)

I find the work injury of May 9, 2013 is a cause of a 60 percent permanent loss of earning capacity. As a result of this work injury, Kathy is unable to perform physical activities consisting of lifting over 20 pounds and working with her arms above shoulder height. Claimant's credible, uncontroverted testimony establishes that she had no prior permanent impairment to her body as a whole and no prior permanent disability. As a result of the restrictions caused by the left shoulder injury, she was not able to return to the inspector job she had at the time of injury and she cannot return to most of the jobs she has held in the past. The only reason she has not suffered a permanent loss of earnings from this injury at this time is due to her employer's generosity in maintaining the inspection job pay. I cannot consider this accommodation because it can end at any time after these proceedings.

CONCLUSIONS OF LAW

I. The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

A treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2)(a-t), the disability is considered a scheduled member disability and measured functionally. If it is found that the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and measured industrially under Code subsection 85.34(2)(u). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. Delong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

Industrial disability was defined in Diederich v. Tri-City Ry. Co., 219 Iowa 587, 258 N.W.2d 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 workers' 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 worker's qualifications intellectually, emotionally and physically; the worker's earnings 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 Serv. Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

In this case, the parties agreed that the work injury was a cause of permanent impairment to the body as a whole, a nonscheduled loss of use. Consequently, this agency must measure claimant's loss of earning capacity as a result of this impairment.

A showing that claimant had no loss of his job or actual earnings does not preclude a finding of industrial disability. Loss of access to the labor market is often of paramount importance in determining loss of earning capacity, although income from continued employment should not be overlooked in assessing overall disability. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991); Collier v. Sioux City Comm. Sch. Dist., File No. 953453 (App. February 25, 1994); Michael v. Harrison County, Thirty-fourth Biennial Rep. of the Industrial Comm'r, 218, 220 (App. January 30, 1979).

Although claimant is closer to a normal retirement age than younger workers, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund v. Nelson, 544 N.W.2d 258 (Iowa 1995). However, this agency does consider voluntary retirement or withdrawal from the work force unrelated to the injury. Copeland v. Boones Book and Bible Store, File No. 1059319 (App. November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

Assessments of industrial disability involve a viewing of loss of earning capacity in terms of the injured workers' present ability to earn in the competitive labor market without regard to any accommodation furnished by one's present employer. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996); Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 617 (Iowa 1995). However, an employer's special accommodation for an injured worker can be factored into an award determination to the limited extent the work in the newly created job discloses that the worker has a discerned earning capacity. To qualify as discernible, employers must show that the new job is not just "make work" but is also available to the injured worker in the competitive market. Murillo v. Blackhawk Foundry, 571 N.W.2d 16 (Iowa 1997).

In the case sub judice, I found that claimant suffered a 60 percent loss of her earning capacity as a result of the work injury. Such a finding entitles claimant to 300 weeks of permanent partial disability benefits as a matter of law under Iowa Code section 85.34(2)(u), which is 60 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection.

II. Claimant's entitlement to temporary partial disability benefits is governed by Iowa Code sections 85.33(2). Such benefits are available for a loss of weekly earnings due to acceptance of suitable work consistent with claimant's disability following a work injury. In this case, claimant's hourly rate was maintained, she worked a full 40 hours per week, and she lost no overtime opportunity. However, she seeks temporary partial disability benefits between October 1, 2013 and June 1, 2015 because she had not reached MMI and her weekly earnings fell below her average gross weekly earnings computed to determine her weekly rate under Iowa Code section 85.36.

The question then is why was she earning less if she was working full time and lost no overtime opportunity? The answer was provided by claimant at hearing. She said that during this time work slacked off. I can only interpret that as stating that she was not getting the same overtime hours as before because overtime work opportunities were reduced due to economic conditions, not the result of her disability from the work injury. Iowa Code section 85.33(2) provides in part as follows:

...*"Temporary partial disability benefits"* means benefits payable, in lieu of temporary total disability and healing period benefits, to an employee because of the employee's temporary partial reduction in earnings ability as a result of the employee's temporary partial disability. ...

In other words, the reduction in earnings, if any, must be shown to have been caused by the disability from the work injury, not the result of an economic downturn in the employer's business.

In this case, claimant failed to show that the reduction in earnings was due to disability from the work injury. Therefore, the claim for temporary partial disability benefits is denied.

III. Finally, defendants seek a credit against the award of permanency benefits in this case for prior payment of benefits for a prior work injury to the right shoulder pursuant to Iowa Code section 85.34(7)(b)(1). According to that Code section, the employer is liable for the combined disability that is caused by the current and prior work injury, but that liability is to be considered partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer, assuming there had been no reduction in earnings after the prior injury. Defendants rely on an admission by claimant that she received a substantial amount of indemnity benefits for this prior injury.

Defendants' first problem with this issue is that the record does not show what type of weekly indemnity benefits were paid. They may well have been only healing period benefits, not permanency benefits that would generate a credit. However, the primary problem with defendants' assertions is that the claim was settled under Iowa Code section 85.35(3)). Such a settlement is a full and final disposition of the claim and a final bar to any further rights arising under Iowa Code Chapters 85, 85A, 85B, 86 and 87. (Iowa Code section 85.35(3,9). This includes claimant's right to reopen the matter and defendants' rights, including the right to claim a credit for payments under the settlement. Also, the statute provides that payments made pursuant to such agreements shall not be constructed as the payment of weekly compensation. (Id.) Consequently, Iowa Code section 85.34(7)(b)(1) is not applicable in this case.

Possibly, defendants could argue that Iowa Code section 85.34(7)(a) is applicable, as a non-employment related permanent disability should be apportioned from the award. However, given claimant's un rebutted testimony that she had no prior disability from the right shoulder injury at the time of her left shoulder injury, defendants have not shown a prior permanent disability even if apportionment is possible in such situations.

Therefore, defendants' claim for a credit in addition to the credit for the 50 weeks paid in this case, is denied.

Costs are assessed to defendants.

ORDER

1. Defendants shall pay to claimant three hundred (300) weeks of permanent partial disability benefits at the stipulated rate of five hundred seventy-six and 16/100 dollars (\$576.16) per week from the stipulated date of September 30, 2013.

2. Defendants shall pay accrued weekly benefits in a lump sum and shall receive credit against this award for the fifty (50) weeks of permanency benefits previously paid.

3. Defendants shall pay interest on unpaid weekly benefits awarded herein pursuant to Iowa Code section 85.30.

4. Defendants shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33, including reimbursement to claimant for any filing fee paid in this matter.

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

Signed and filed this 8th day of November, 2016.

LARRY
DEPUTY
COMPENSATION COMMISSIONER

WALSHIRE
WORKERS'

Copies to:

Nicholas W. Platt

Attorney at Law

2900 – 100th St., Ste. 304

Urbandale, IA 50322

plattlawpc@outlook.com

James W. Bryan

Attorney at Law



1089 Jordan Creek Pkwy., Ste. 360

West Des Moines, IA 50266

jbryan@travelers.com

LPW/sam