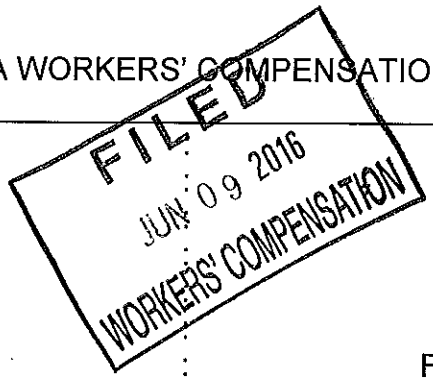
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



BARRY SMITH, Claimant, vs. NICHOLS ALUMINUM, LLC, Employer, and SENTRY CASUALTY COMPANY, Insurance Carrier, Defendants.	File No. 5053061 A R B I T R A T I O N D E C I S I O N Head Note No.: 1803

STATEMENT OF THE CASE

Barry Smith, the claimant, seeks workers' compensation benefits from defendants, Nichols Aluminum, LLC, the alleged employer, and its insurer, Sentry Casualty Company, as a result of an alleged injury on December 1, 2014. The caption was changed at hearing to identify the proper name of the defendant employer, Nichols Aluminum, LLC. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on May 17, 2016, and the matter was considered fully submitted at the close of that hearing. 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 are to the page of the original transcript, not the page of a copy containing 4 pages of the original transcript.

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

1. On December 1, 2014, claimant received an injury arising out of and in the course of employment with Nichols Aluminum, LLC.

2. Claimant is not seeking temporary total or healing period benefits.

3. The injury is a cause of some degree of permanent, industrial disability to the body as a whole; the extent of which remains in dispute.

4. If I award permanent partial disability benefits, they shall begin on November 19, 2015.

5. At the time of the injury, claimant's gross rate of weekly compensation was $1,015.34. Also, at that time, he was married and entitled to 4 exemptions for income tax purposes. Therefore, claimant's weekly rate of compensation is $659.69 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 15 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 permanent disability benefits; and,

II. The extent of claimant's entitlement to reimbursement for a disability examination by Marc Hines, M.D.

FINDINGS OF FACT

In these findings, I will refer to the claimant by his first name, Barry, and to the defendant employer as Nichols.

From my observation of his 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 Barry credible.

Barry, age 52, dropped out of high school during his junior year. He later obtained a GED. He has no post high school education or training. While in school he sorted pop cans and laid sod. He then was a cook at a dock restaurant and later on a construction equipment operator before coming to Nichols in 1996. (Ex. G-9:11)

Barry has worked at the same plant since 1996 and continues to do so today. At the time of the December 1, 2014 injury, the plant was owned and operated by Nichols Aluminum, LLC, but it is now operated by Alaris Aluminum, apparently a subsidiary. For the last 7 years, Barry's job has involved maintenance and utility work. He continues in this same job today, although Barry stated without contradiction that his job is physically

easier today because the company has reduced the size of trash cans and now requires two persons to dump heavier trash containers.

The stipulated injury on December 1, 2014 consisted of significant tears of the rotator cuff tendons and a SLAP lesion in the left shoulder after picking up a heavy 55 gallon trash barrel and dumping its contents into a movable trash dumpster. Barry estimated the weight to be around 100 pounds. Treatment of the injury was promptly provided by Nichols. He was first treated by the company occupational physician, Camilla Frederick, M.D. However, following an MRI, Barry was referred to Abdul Foad, M.D., a board certified orthopedic surgeon. Dr. Foad performed arthroscopic surgery on February 16, 2015 which he described as double row transosseous equivalent rotator cuff repair of the supraspinatus/infraspinatus with arthroscopic biceps tenolysis secondary to some significant biceps tenosynovitis with adhesive capsulitis. (Ex. C-3a:3d; Ex. C-6) Following surgery, claimant was placed in a shoulder immobilizer for several weeks and was restricted to sit down jobs and no use of the left arm. On November 19, 2015, Dr. Foad reports that claimant was doing well and reports 5/5 strength or normal strength. At this time he placed Barry at MMI and released him from his care. (Ex. C-6) The doctor opined that claimant suffered a 2 percent permanent partial impairment to the upper extremity or a 1 percent body as a whole impairment under the AMA Guides, Fifth Edition. (Ex. C-7) This rating under the AMA Guides is apparently based on his findings of 160 degree forward flexion, 160 degrees of adduction, with 70 degree and 80 degree external and internal rotation. (Ex. C-6)

At the request of his attorney, Barry was evaluated in early February 2016 by Marc Hines, M.D., a board certified neurologist who is also board certified in headache medicine and pain management. (Ex. 7-100) In his six page report, the doctor reiterated Barry's history and the prior medical treatment records. From his physical examination of Barry, Dr. Hines found weakness (4/5) with abduction with internal rotation, external rotation and with forward flexion. Given the loss of strength, limited range of motion and pain, the doctor used a different chart in the Guides for other disorders of the shoulder not previously addressed and provided an impairment rating of 10 percent of the whole person to the AC joint and 15 percent of the whole person for the glenohumeral impairments, resulting in a total 24 percent impairment to the whole person. This was to also include his problem with an inability to use the left arm above shoulder height and his sleep problems from his left shoulder pain.

Dr. Foad disagreed with providing a rating for the AC joint and for the glenohumeral impairment because they had nothing to do with claimant's rotator cuff injury.

While impairment ratings are quite important in assessing a scheduled member loss of use, they have limited value in industrial cases, as this agency is to assess lost earning capacity from a loss of use of the shoulder. Consequently, it was significant that neither Dr. Foad, nor Dr. Hines, recommended permanent activity restrictions.

Barry testified that he has trouble working overhead because he cannot lift his left arm straight up. This is especially troublesome with working underneath forklifts. Consequently, he must use his right arm to compensate. Also, to compensate for the loss of strength in the left arm, he must use hand-made extensions on wrenches to gain more leverage. He also cannot lift much while his left arm is extended and cannot reach behind his back with his left arm. Also, he has trouble sleeping due to pain. Although Barry is right hand dominate (Ex. G-6), his maintenance type of work does require considerable use of his left arm. Consequently, Barry has a significant loss of use of the left arm in his maintenance job.

On the other hand, Barry has learned to accommodate for his left arm disability. He is able to competently perform his normal work tasks. He has returned to a similar job he had at the time of the injury and has not suffered a permanent loss of income. He continues to work 50-64 hours a week.

However, his job description provides that the job requires occupants to be in "very good physical condition and be able to walk, climb, and lift all the time." (Ex. H-4) The job he had at the time of injury required lifting heavy 100 pound barrels. The job today only requires lifting smaller waste basket size trash containers, and significant lifting must now be with two people. Claimant would have trouble returning to the job absent these modifications. Given the impact of lost use of left arm upon his work activity, I find that the work injury of December 1, 2014 is a cause of a mild 15 percent loss of earning capacity.

CONCLUSIONS OF LAW

I. 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).

The parties agreed in this case that the work injury is a cause of some degree of permanent industrial disability. 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 of Iowa 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.

A release to return to full duty work by a physician is not always evidence that an injured worker has no permanent industrial disability, especially if that physician has also opined that the worker has permanent impairment under the AMA Guides. Such a rating means that the worker is limited in the activities of daily living. See AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Chapter 1.2, page 2. Work activity is commonly an activity of daily living. This agency has seen countless examples where physicians have returned a worker to full duty, even when the evidence is clear that the worker continues to have physical or mental symptoms that limit work activity, *e.g.* the worker in a particular job will not be engaging in a type of activity that would cause additional problems, or risk further injury; the physician may be reluctant to endanger the workers' future livelihood, especially if the worker strongly desires a return to work and where the risk of re-injury is low; or, a physician, who has been retained by the employer, has succumbed to pressure by the employer to return an injured worker to work. Consequently, the impact of a release to full duty must be determined by the facts of each case.

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).

In the case sub judice, I found that claimant suffered a 15 percent loss of his earning capacity as a result of the work injury. Such a finding entitles claimant to 75 weeks of permanent partial disability benefits as a matter of law under Iowa Code section 85.34(2)(u), which is 15 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection.

II. Iowa Code section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. Claimant's disability was evaluated by the authorized physician, Dr. Foad, in November 2015. Dr. Hines' evaluation was performed in February 2016. Claimant is entitled to reimbursement for Dr. Hines' evaluation.

Dr. Hines charged $595.83 for a chart review; $325.00 for the physical examination; and, $750.00 to prepare the written report. I find such charges reasonable given prior awards of this agency. Therefore, the entire fee of $1,670.83 will be awarded.

ORDER

1. Defendants shall pay to claimant seventy-five (75) weeks of permanent partial disability benefits at the stipulated rate of six hundred fifty-nine and 69/100 dollars ($659.69) per week from the stipulated date of November 19, 2015. Defendants shall receive a credit for the fifteen (15) weeks previously paid to claimant.

2. Defendants shall reimburse claimant for the costs of Dr. Hines' evaluation in the amount of one thousand six hundred seventy and 83/100 dollars ($1,670.83).

3. Defendants shall pay accrued weekly benefits in a lump sum.

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

5. 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.

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

Signed and filed this 9th day of June, 2016.

LARRY WALSHIRE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.