BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

NEAL ROGER HANSEL,

Claimant,

vs.

ALL AMERICAN HOMES OF IOWA, L.L.C.,

Employer,
Self-Insured,
Defendant.

File No. 5048526

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Neal Hansel, claimant, filed a petition for arbitration against All American Homes of Iowa, L.L.C. (hereinafter referred to as "All American Homes"), as the self-insured employer. Debate and confusion arose in this case about the employer's status as a self-insured employer and the file contains motions pertaining to a potential insurance carrier being involved. Ultimately, the parties notified the undersigned that there is no insurance carrier and that the employer is self-insured for purposes of workers' compensation in Iowa. Claimant dismissed his motion to amend to add an insurance carrier.

Prior to trial, there was also a motion to stay all proceedings. The employer alleged it was in bankruptcy and requested a stay of all proceedings. The request for a stay was denied and this case proceeded to an in-person hearing on August 24, 2016. The employer renewed its motion for stay at the arbitration hearing. The renewed motion was again denied and hearing proceeded.

However, the evidentiary record was suspended and the parties were given additional time to conduct discovery pertaining to the status of any insurance carrier. Ultimately, this case was not fully submitted to the undersigned until the filing of defendant's closing argument/final brief on December 30, 2016.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The evidentiary record includes claimant's exhibits 1 through 10 and claimant's testimony. No other witnesses were called to testify live. Defendant offered no additional exhibits.

ISSUES

The parties submitted the following disputed issues for resolution:

1. The extent of claimant's entitlement to permanent disability benefits.

2. Whether costs should be assessed against either party.

FINDINGS OF FACTS

The undersigned, having considered all of the evidence and testimony in the record, finds:

Neal Hansel is a 57 year old gentleman, who lives in Edgewood, Iowa. (Transcript, page 32) Defendants challenged claimant's credibility. However, Mr. Hansel presented at hearing as a very straight-forward and pleasant witness. He presented credible testimony about his injury and his ongoing symptoms.

Mr. Hansel graduated from high school in 1977, but has no additional training or education. (Tr., p. 33) He began working for All American Homes after graduating from high school and worked for All American Homes for nearly 40 years before being laid off in February 2016 and ultimately terminated due to a plant closure in May 2016. (Tr., pp. 34, 63; Exhibit 3) The All American Homes plant included a large indoor facility located in Dyersville, Iowa. (Tr., pp. 37, 58)

Mr. Hansel held many different positions with All America Homes, but all positions involved some aspect of framing a modular home. (Tr., p. 35) Claimant was required to lift all of the lumber necessary to frame a house, as well as sheetrock that was sometimes installed manually. He used a nail gun to construct walls. His work required a significant amount of work over head as well. (Tr., pp. 39, 41) Claimant described his job framing houses as very hard work. (Ex. 38)

On March 7, 2012, Mr. Hansel was performing his typical work duties at All American Homes. He picked up a beam that weighed at least 100 pounds. (Tr., p. 45) As he went to toss the beam onto a table he had a feeling that his right "shoulder all let go on me." (Tr., p. 44) Claimant reported the injury to his supervisor but continued to work for approximately one week after the injury. He testified that he did not use his arm during that week, but was not evaluated by a medical professional until a week later. (Tr., p. 48)

The employer sent claimant to Medical Associates Clinic, where he was examined by Thomas Miner, D.O., on March 16, 2012. Dr. Miner initially assessed claimant with only a shoulder sprain or strain. (Ex. 2, p. 19) Dr. Miner attempted

conservative measures, but claimant's symptoms did not resolve. On June 11, 2012, Dr. Miner ordered an MRI of claimant's right shoulder. (Ex. 2, p. 35) After receiving the results of the MRI, Dr. Miner referred claimant to an orthopaedic surgeon, Judson Ott, M.D.

Dr. Ott evaluated claimant on June 29, 2012 and diagnosed him with a biceps tendon rupture, as well as an abnormality in his superior labrum of his right shoulder. Dr. Ott recommended surgical intervention. (Ex. 2, pp. 40-41) Dr. Ott took claimant to surgery on July 9, 2012. He performed a right shoulder arthroscopy, which included a debridement of the retained biceps tendon stump and a superior labral debridement. (Ex. 2, p. 87) Claimant's torn biceps tendon was not repairable. (Ex. 2, p. 43)

Dr. Ott released claimant for light-duty work and claimant returned to light-duty work for All American Homes for an extended period of time. Dr. Ott also prescribed an extended course of physical therapy to work on claimant's right shoulder range of motion. (Ex. 2, p. 42)

On February 13, 2013, Dr. Ott records that claimant "reports minimal discomfort most of which is with straight abduction although he demonstrates essentially full range of motion minus just a few degrees of internal rotation." (Ex. 2, p. 81) Dr. Ott also noted that claimant "feels comfortable working without restrictions" as of February 13, 2013 and declared maximum medical improvement (MMI) as of that date. (Ex. 2, p. 81) Dr. Ott released claimant to return to work without restrictions as of February 13, 2013. (Ex. 2, p. 81)

Dr. Ott confirmed MMI on March 20, 2013 and reiterated that claimant could return to work without restrictions. (Ex. 2, p. 84) In a report dated June 7, 2013, Dr. Ott opined that claimant sustained a three percent permanent impairment of the whole person as a result of his right shoulder and right biceps injury. (Ex. 2, p. 86)

Mr. Hansel testified that he did return to work technically without restrictions in February 2013. However, he testified that he did not have full strength in his arm and that he felt as though he had decreased range of motion. (Tr., p. 53) Upon returning to work after surgery, claimant testified that the employer instructed him that he should not "do anything to hurt your arm again. Do what you can do." (Tr., p. 51) Claimant testified that those instructions from the employer never changed, even after being released from care by Dr. Ott. (Tr., p. 51)

Claimant testified that he was never able to perform the full range of his job duties again at All American Homes after his March 7, 2012 work injury. Instead, he would read blueprints, mark wall and window openings, inspect work performed by others, would install some studs but carried and installed one stud at a time, rather than the ten he could carry before the injury date. (Tr., pp. 52-53)

Claimant also introduced an affidavit from his former supervisor, Ronald Rosacker. (Ex. 1) Mr. Rosacker confirmed that claimant was physically capable of performing any and all jobs within the framing department at All American Homes prior to March 7, 2012. He confirmed that all of those jobs required heavy and constant lifting all day. (Ex. 1, p. 1)

However, after the March 7, 2012 injury, Mr. Rosacker observed that claimant had a deformed biceps and that claimant was "no longer able to do the physical work required for every job in the framing department." (Ex. 1, p. 1) Mr. Rosacker confirmed that he accommodated claimant's injury and inability to perform his regular job duties after the injury. (Ex. 1, p. 1) Mr. Rosacker opined that, based on his observations of claimant after the injury, Mr. Hansel "could not lift 25 or 50 lbs. due to his injury. If he tried picking up something heavier he would lose his balance and was unable to proceed." (Ex. 1, p. 2) Mr. Rosacker specifically instructed claimant that he "did not want him lifting heavy items." (Ex. 1, p. 2)

Nevertheless, the employer valued claimant's work. The supervisor told claimant that he would eventually be promoted to a supervisory role once the supervisor retired. (Tr., p. 71) Therefore, All American Homes kept Mr. Hansel employed until he was laid off on February 2016.

Mr. Hansel sought an independent medical evaluation performed by Jacqueline M. Stoken, D.O., on September 14, 2015. (Ex. 1, pp. 4-10) Dr. Stoken appears to have had claimant's past medical records available for review and to have performed a thorough interview and examination of claimant. Dr. Stoken opined that claimant sustained an eight percent impairment of the whole person as a result of his March 7, 2012 work injuries. Dr. Stoken's impairment rating is based upon deficits in claimant's range of motion. (Ex. 2, p. 9) She documented her specific findings pertaining to range of motion, which demonstrated some functional losses in claimant's right shoulder. (Ex. 2, p. 8)

Dr. Stoken also addressed claimant's work abilities. She opined that claimant requires permanent work restrictions. Specifically, Dr. Stoken assigned a lifting restriction that permits no more than 10 pounds lifting on a constant basis, 25 pounds lifting on a frequent basis and 50 pounds lifting on an occasional basis. (Ex. 2, p. 10) Dr. Stoken also restricted claimant to avoid work at or above the shoulder level. (Ex. 2, p. 10)

Dr. Stoken's permanent restrictions correspond with claimant's practical limitations and testimony. Having found claimant's testimony to be credible, I find Dr. Stoken's restrictions to be practical and realistic. Similarly, Dr. Stoken's restrictions correspond with the observations and affidavit provided by claimant's supervisor, Mr. Rosacker.

Although I acknowledge that Dr. Ott is an orthopaedic surgeon, that he observed claimant multiple times over an extended period of time, and that he had the opportunity to observe claimant's shoulder intra-operatively, I find Dr. Stoken's restrictions to be more realistic and convincing. Claimant has a torn biceps tendon that is not repairable. He continues to experience symptoms and his supervisor deemed it unsafe for Mr. Hansel to continue to lift heavy items. Dr. Stoken's permanent restrictions appear more consistent with the reality of this situation than the full duty release provided by Dr. Ott. Therefore, I accept Dr. Stoken's restrictions and impairment rating as the most convincing and accurate in this case.

Realistically, with permanent work restrictions, claimant cannot perform the full range of necessary duties to be a house framer. This is the only job he has performed since high school. Claimant is of an age where retraining makes less sense than it would for a younger worker, and he is not realistically going to go seek further education.

On the other hand, I am not inclined to agree with claimant that he is permanently and totally disabled. Claimant had not performed a terribly thorough job search prior to the hearing. He had applied at only two employers, one of which was located in Minnesota and only speculatively was going to purchase the All American Homes plant. (Tr., p. 95) Although claimant is not capable of performing carpentry work such as framing houses, I find that with a 50 pound occasional lifting ability, he is capable of other gainful employment within the competitive labor market. That being said, claimant has proven a significant loss of his future earning capacity as a result of the March 7, 2012 work injury.

Considering the situs of claimant's injury, his need for surgical intervention, the inability to repair his torn biceps tendon, his age, the length of healing period, his permanent impairment, his permanent work restrictions, his inability to return to work as a house framer, his motivation, and all other factors of industrial disability outlined by the Iowa Supreme Court, I find that Mr. Hansel has proven a 70 percent loss of future earning capacity.

CONCLUSIONS OF LAW

The parties stipulated that claimant sustained a work-related right shoulder injury on March 7, 2012. The parties further stipulate that the injury caused permanent disability and should be compensated industrially pursuant to Iowa Code section 85.34(2)(u). (Hearing Report)

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, 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, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. 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).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

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 found that Mr. Hansel remains capable of gainful employment. With a 50 pound lifting restriction, I found that there remain employment opportunities for Mr. Hansel in the competitive labor market. Therefore, I conclude that claimant has not proven entitlement to a permanent total disability award.

However, having considered all of the relevant industrial disability factors outlined by the Iowa Supreme Court, I found that claimant has proven a 70 percent loss of future earning capacity. This is equivalent to a 70 percent industrial disability and entitles claimant to an award of 350 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u).

Claimant also seeks assessment of his costs and specifically his $100.00 filing fee. (Statement of Costs) Costs are assessed at the discretion of the agency. Iowa Code section 85.40. Exercising the agency's discretion and recognizing that claimant has received a significant industrial disability award in this case, claimant's filing fee of $100.00 shall be assessed pursuant to 876 IAC 4.33(7).

Mr. Hansel also seeks assessment of his service fees for this case, which total $70.95. The service fees are assessed pursuant to 876 IAC 4.33(3).

Claimant seeks assessment of the expense of his independent medical evaluation as a cost pursuant to 876 IAC 4.33(6). Dr. Stoken's charges totaling $2,200.00 will not be assessed as a cost. However, at the time of the arbitration hearing, the undersigned noted that there is a pending order by this agency directing defendant to reimburse the IME charge. (Ex. 8, p. 118) Defense counsel had no challenge to entry of another order confirming the prior deputy's order and directing defendant to pay Dr. Stoken's IME charge. (Tr., p. 110) Defendant was directed to pay that charge at the time of the arbitration hearing and that order will be documented in this decision for purposes of documenting the order should a judgment be necessary following entry of this decision. (Tr., p. 111)

Finally, claimant seeks assessment for the cost of collecting medical records that were introduced into evidence. Agency rule 876 IAC 4.33(6) provides that "the reasonable costs of obtaining no more than two doctors' or practitioners' reports" may be assessed as costs. However, claimant does not delineate the specific records or reports obtained and contained within the claimed costs. More than one medical providers' medical records are in evidence. The undersigned cannot tell whether the costs comply with rule 4.33(6). Therefore, claimant's request for assessment of these costs is denied.

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay claimant three hundred fifty (350) weeks of permanent partial disability benefits commencing on March 21, 2013 at the stipulated weekly rate of four hundred nine and 37/100 dollars ($409.37).

Defendant shall be entitled to a credit in the amount stipulated to on the hearing report against this award.

Defendant shall pay all accrued weekly benefits in lump sum, along with applicable interest calculated pursuant to Iowa Code section 85.30.

Pursuant to the August 28, 2015 order and the undersigned's verbal order at the arbitration hearing, defendant is again ordered to reimburse claimant's independent medical evaluation charges with Dr. Stoken totaling two thousand two hundred dollars ($2,200.00).

Defendant shall reimburse claimant's costs totaling one hundred seventy and 95/100 dollars ($170.95) as a cost of this contested case proceeding.

Defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 21st day of February, 2017.

WILLIAM H. GRELL
DEPUTY WORKERS'
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WHG/kjw

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.