

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DWIGHT DUFOE,

Claimant,

vs.

LINCARE, INC.,

Employer,

and

LIBERTY MUTUAL INSURANCE
CORP.,

Insurance Carrier,
Defendants.

FILED

OCT 26 2017

WORKERS COMPENSATION

File No. 5054796

ARBITRATION DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Dwight Dufoe, claimant, filed a petition for arbitration against Lincare, Inc., as the employer and Liberty Mutual Insurance Corp., as the insurance carrier. An in-person hearing occurred on April 26, 2017, in Des Moines.

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 Joint Exhibits 1 through 9 and claimant's testimony. The evidentiary record closed at the end of the April 26, 2017 hearing. The case was considered fully submitted to the undersigned upon the filing of a post-hearing brief on May 10, 2017.

ISSUE

The parties submitted the following disputed issue for resolution:

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

FINDINGS OF FACT

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

Dwight Dufoe is a 57-year-old gentleman. He graduated from high school in 1978 and entered the workforce. Mr. Dufoe has not pursued any post-secondary education, but presented at hearing as an intelligent and well-spoken man.

Mr. Dufoe has worked in several different types of jobs during his work life. A summary of his full work history is included at Exhibit 7, pages 60-61. Among the jobs claimant has performed are maintenance, press operator, supervisor in a meat packing plant, shipping, and as a sales representative that delivers oxygen with his current employer.

Claimant sustained an admitted left shoulder injury at work on February 5, 2013, while delivering an oxygen canister to a Lincare customer. As claimant attempted to lift the 165 pound oxygen cylinder at the customer's home, he felt and heard his left shoulder pop. As a result of that injury, Mr. Dufoe required left shoulder surgery to repair his rotator cuff and biceps tendon. He was off work for approximately five months but was able to return to his pre-injury job with Lincare.

Mr. Dufoe had a reasonably good result after surgery. He testified that he has difficulties lifting away from his body and working overhead. He described both maneuvers as painful. He estimates that he has lost 20-30 percent of his strength in his left arm following this injury and surgery. However, he is able to perform the majority of his job duties close to his body and has worked at his pre-injury job since returning to work. Mr. Dufoe continues to work for Lincare and testified that he has no intention of retiring in the foreseeable future.

Claimant's treating surgeon, Steven A. Aviles, M.D., released Mr. Dufoe to return to work without restrictions. (Exhibit 1, pages 10-11) Claimant also secured an independent medical evaluation, performed by Sunil Bansal, M.D., on September 12, 2014. Dr. Bansal recommended permanent restrictions, including a lifting restriction of 20 pounds on an occasional basis with his left arm and no lifting greater than 15 pounds above shoulder level, as well as no frequent over shoulder lifting. (Ex. 2, p. 22)

Dr. Aviles opines that claimant sustained a two percent permanent impairment of the left upper extremity, which is equivalent to one percent of the whole person. (Ex. 1, p. 12; AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Table 16-3, p. 439) Dr. Bansal opines that Mr. Dufoe sustained six percent of the left upper extremity, or four percent of the whole person. (Ex. 2, p. 22)

When considering the competing medical opinions, I find the opinions offered by Dr. Aviles to be most credible and convincing on this record. Dr. Aviles is the treating

surgeon. He had the advantage of examining claimant multiple times, as well as inspecting claimant's left shoulder intra-operatively. Dr. Aviles also repaired a prior right shoulder injury for claimant and has knowledge of claimant's ability to recover and return to work successfully after such an injury.

Dr. Bansal only got to evaluate claimant one time. Perhaps more importantly, Dr. Bansal imposes permanent work restrictions that, if applied, would preclude Mr. Dufoe from continuing to work at Lincare. In his position with Lincare, Mr. Dufoe must lift significantly more than 20 pounds to complete his job duties with oxygen canisters that weigh in excess of 150 pounds. Clearly, Mr. Dufoe has worked for Lincare in his pre-injury position for a few years since the injury and surgery without any further need for treatment or re-injury. Claimant is clearly capable of continuing to perform his job duties at Lincare, which exceed the restrictions offered by Dr. Bansal.

Therefore, I accept the opinions of Dr. Aviles and find that claimant has proven he sustained a one percent impairment of the whole person as a result of his left shoulder injury and that he requires no formal medical restrictions.

Mr. Dufoe is a motivated individual. He clearly put forth effort in his rehabilitation and his return to work. He is the type of individual that an employer should desire, and it appears that Lincare appreciates Mr. Dufoe's services. Claimant reports that he has received good performance reviews from the employer, even after his left shoulder injury.

Mr. Dufoe presented credible testimony. He is believable when he describes pain when lifting away from his body and overhead. Mr. Dufoe is believable when he describes a sensation of reduced strength in his left arm after this injury. Mr. Dufoe also testified that he likely could not return to some of his prior employment positions. Specifically, he testified that his prior position at Maytag would be too repetitive for his arm to handle in its current condition. He also testified that he could not work at Farmland because it would require repetitive and heavy lifting away from his body.

Claimant also testified that he did not think he could perform all of his job duties at Certainteed. He acknowledged that he could perform the supervisory portions of that job, but testified that there were also packaging portions of the job that would be too repetitive for his left arm and shipping duties that would be too heavy. Claimant's testimony is credible and it is accepted that each of the listed jobs would be difficult to perform following his left shoulder injury and surgery. Although claimant does not have permanent work restrictions from his treating surgeon, claimant's testimony is convincing in this regard and it is found that claimant would struggle to return to some of his prior employment positions following his left shoulder injury and surgery.

Considering claimant's full duty work release by Dr. Aviles, his ability to continue to fish, garden, work his pre-injury job, as well as his age, impairment rating, education, employment history, and all other relevant factors, I find that Mr. Dufoe has proven he

sustained a minor loss of future earning capacity. He clearly has a minor functional loss in his left arm and shoulder, as reflected by the impairment rating offered by Dr. Aviles. He has some practical limitations that are not reflected in Dr. Aviles' full duty release.

Therefore, having considered claimant's age, education, employment history, permanent impairment, permanent work restrictions, motivation, ability to retrain, and all other relevant factors of industrial disability outlined by the Iowa Supreme Court, I find that Mr. Dufoe has proven he sustained a ten percent loss of future earning capacity as a result of the February 5, 2013 work injury.

CONCLUSIONS OF LAW

The parties stipulated that claimant sustained a work related left shoulder injury that arose out of and in the course of claimant's employment activities on February 5, 2013. 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) The primary dispute in this case is the extent of claimant's entitlement to permanent disability.

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.

Having considered all of the relevant industrial disability factors outlined by the Iowa Supreme Court, I found that claimant has proven a 10 percent loss of future earning capacity. This is equivalent to a 10 percent industrial disability and entitles claimant to an award of 50 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u).

ORDER

THEREFORE, IT IS ORDERED:


Defendants shall pay claimant fifty (50) weeks of permanent partial disability benefits commencing on September 10, 2013 at the stipulated weekly rate of four hundred ninety-three and 18/100 dollars (\$493.18).

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

Defendants shall be entitled to a credit for benefits paid, as stipulated to in the hearing report.

Defendants 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 26th day of October, 2017.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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WHG/srs

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.