BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DAVID REECK, Claimant, vs. PERISHABLE DISTRIBUTORS OF IOWA (PDI), A SUBSIDIARY OF HY-VEE, INC., Employer, and EMCASCO INSURANCE COMPANY, Insurance Carrier, Defendants.	FILED MAR 22 2018 WORKERS COMPENSATION	File No. 5057558 ARBITRATION DECISION Head Note No.: 1803

STATEMENT OF THE CASE

David Reeck, claimant, filed a petition in arbitration seeking workers' compensation benefits from Perishable Distributors of Iowa (PDI), the employer, and EMCASCO, the insurance carrier. The matter proceeded to hearing on November 14, 2017.

The evidentiary record includes: Joint Exhibits JE1 through JE36. At hearing, claimant provided testimony as did Leigh Walters, Senior Vice President of Human Resources at the defendant employer.

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 parties submitted post-hearing briefs on January 8, 2018 and the matter was considered fully-submitted on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Extent of Industrial Disability.

2. Costs.

FINDINGS OF FACT

After a review of the evidence presented, I find as follows:

Claimant was 63 years old at the time of the hearing. (Transcript page 7) He graduated from Johnston High School in 1972 with a class rank of 62 out of 74 students, which placed claimant in the bottom 17 percent of his class. (Tr. p. 8; JE34, p. 186)

Claimant has previously worked as: an automobile mechanic; a straight truck driver and delivery person; he repaired and replaced truck and tractor tires; he repaired small engines; he was a heavy equipment operator; and, he worked a significant portion of his life as a diesel mechanic/technician. (Tr. pp. 10-17)

Claimant began working for the defendant employer in March 2009 in the position of diesel technician. (Tr. p. 18; JE23) At the time of the hearing, defendants stated that claimant continued to be an employee, although he was taken off work by the employer on July 17, 2017, placed on medical leave and long-term disability for his non-work related back condition as well as his work-related shoulder injury, and has not returned to work. (Defendants' Brief, p. 2; JE28, pp. 170-171)

Prior to the work injury in this case on July 8, 2015, claimant's work for the defendant employer as a diesel technician also included some supervisory responsibilities. (Tr. p. 20) Before the injury occurred, claimant typically worked over 40 hours per week and he earned $25.50 per hour. (Ex. 27, p. 168)

Claimant testified that prior to the date of the work injury, he had never felt the type of pain in his right shoulder or arm that he did on that day. (Tr. p. 26)

On July 8, 2015, claimant was working for the defendant employer as a diesel technician. (Tr. pp. 18-21; Ex. 23, p. 157) He was taking the driveline apart on a truck using a 25 pound, one-inch impact gun overhead and he sustained a stipulated work injury to his right shoulder. (Hearing Report, p. 1; JE7, p. 21) Claimant had pain in his right shoulder following the incident. (Tr. pp. 26-27) He reported the pain to his employer and was sent to Methodist Occupational Health and Wellness. His first appointment was with Von Miller, PA-C on July 14, 2015. (JE1, p. 1)

After seeing Mr. Miller, on July 14, 2015, claimant continued to treat at the clinic with David Berg, D.O. On April 22, 2016, claimant had an MRI and was then referred to an orthopedic physician. (JE2, p. 20; JE1, pp. 8-9)

Claimant was seen by Kary Schulte, M.D., an orthopedic doctor, and on May 20, 2016, he underwent a right shoulder arthroscopy and subacromial decompression. (JE3, pp. 11-12)

Claimant continued to work from the date of his injury up to the date of the surgery with Dr. Schulte. (Tr. p. 29)

Dr. Schulte returned claimant to work without restrictions on August 11, 2016. (JE6, p. 20; Tr. p. 31) Claimant returned to the same job that he had done before the injury. (Tr. pp. 29-30) He had continuing pain in his shoulder and asked for a second opinion. (Tr. p. 30) Claimant was sent to Kyle Galles, M.D. at Iowa Ortho. (Tr. p. 31)

Dr. Galles provided an injection which did not help and on October 5, 2016, he recommended shoulder arthroplasty. (JE7, pp. 27-28, 30)

The shoulder replacement surgery was postponed because claimant had a non-work related back injury on October 19, 2016. (Tr. p. 34)

On January 20, 2017, Dr. Galles performed the total right shoulder replacement surgery. (JE7, pp. 32-33) Following surgery, claimant was off work doing physical therapy. (JE8, pp. 61-69)

On June 27, 2017, claimant was returned to work by Dr. Galles on light-duty with restrictions for his right arm of no lifting over ten pounds, avoid repetitive reaching above head and working above shoulder level. (JE7, p. 54)

Claimant's non-work related back injury that had interrupted his planned shoulder surgery continued to bother him. On November, 3, 2016, claimant underwent an L4-5 lumbar discectomy surgery with John Gachiani, M.D. (Tr. pp. 69-70; JE11, p. 96) This surgery did not relieve claimant's back and leg pain. (Tr. p. 70) On January 19, 2017 claimant received an injection for his back pain. (JE12, p. 102) On March 13, 2017, claimant had a second back surgery, a fusion of the L4-5, performed by Dr. Gachiani. (Tr. p. 72) After this surgery, claimant developed an infection in his back that kept him off work for a time. (Tr. pp. 72-73) On September 18, 2017, about two months prior to the hearing in this matter, claimant was asked in his deposition to rate his back and leg pain on a "0 to 10 scale, 10 being the worst pain," to which he replied "[p]robably a 7 to an 8." (Ex. 35, p. 199)

After being returned to work by Dr. Galles regarding the shoulder replacement with restrictions for light-duty on June 27, 2017, claimant accepted light-duty work which was offered based on his shoulder injury and his non-work related back injury as well.

(JE28, p. 169) His shoulder restrictions were noted as: "[r]ight arm – No lifting over 10 pounds, no reaching above head and no working above shoulder level, continue with physical therapy." (Id.) Claimant's back restrictions were stated as: "[n]o lifting more than 10 pounds, activity as tolerated, work 3 days for 5 hours the first week, work 4 days for 6 hours the second week, continue with physical therapy." (Id.) The light duty job that claimant accepted was to "[m]onitor new Diesel Technicians, tell them what they need to do, complete training progress paperwork." (Id.)

On July 17, 2017, claimant received a call from Leigh Walters, Senior Vice President of Human Resources, who requested that claimant go on medical leave. (Tr. p. 48; JE28, p. 170) Claimant was not aware of any new doctor recommendations or any change in his restrictions at that time that might have caused this change in the employer's position regarding his continued light-duty work. (Tr. p. 49)

Leigh Walters testified that she spoke to claimant on July 7th about how his return to work was going. (Tr. p. 97) She stated that claimant reported to her that he had constant pain in his back and numbness and tingling down his leg and that he was told the fusion may take up to a year to heal. (Id.) A week later, Ms. Walters spoke to claimant again and claimant advised that he was having an MRI scheduled in the future for his back and she stated that she was concerned about claimant's constant pain and the potential for re-injury of his back, which the parties agree, was not a work related injury. (Tr. pp. 97-98) Ms. Walters made the decision to stop accommodating claimant's work restrictions and to wait until after the MRI and "see how things went." (Tr. p. 99) This was documented in a memo to claimant dated July 17, 2017, stating that the employer would no longer accommodate claimant's work related shoulder restrictions or his non-work related back restrictions. (JE28, p. 170)

On August 8, 2017, claimant described his shoulder pain to Dr. Galles as constant and at a level "5." (JE7, p. 55) Dr. Galles noted that claimant was unable to do a recommended functional capacity evaluation (FCE) due to a "10 pound lifting restriction imposed on him by his neurosurgeon seeing him for back problems." (Id.) Dr. Galles placed claimant at maximum medical improvement (MMI) and assigned restrictions of "10-20 pound lifting . . . [and to] minimize work over shoulder height," however he also noted that "[i]f at some point he has been given the green light by his back specialist to obtain a functional capacity evaluation I think that would be optimal to more objectively evaluate his capabilities and I would be happy to see him for follow-up once that has been accomplished." (JE7, p. 56)

It would appear that on or about August 10, 2017, Dr. Gachiani, through Ashton McClairen, P.A., gave permission for claimant to do the FCE, stating that he "does not need to follow any activity restrictions from a neurosurgery standpoint, during his upcoming Functional Capacity Exam." (JE17, p. 116)

On August 17, 2017, claimant's counsel requested that the FCE be scheduled by defendants. (JE29, p. 172) However, defendants did not schedule the FCE.

On August 31, 2017, Dr. Galles wrote a letter to the insurance adjuster in response to a letter of inquiry. (JE18, pp. 117-118) Dr. Galles confirmed that claimant reached MMI on August 8, 2017 and he assigned 24 percent permanent impairment to the right upper extremity, which he converted to 14 percent impairment to the whole person. (JE18, p. 117) The impairment rating was based on the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides). Specifically, the impairment was due to a loss of range of motion of 12 percent plus 14.4 percent for the total shoulder arthroplasty (24% for the arthroplasty x 60% glenohumeral joint multiplier = 14.4%) for a total of 14 percent to the whole person. (Id.) Dr. Galles then assigned restrictions consistent with general restrictions for patients with a shoulder replacement of: "30-40 pound lifting restriction and suggestion of minimizing work repetitively over shoulder height." (JE18, p. 117)

On September 18, 2017, claimant's counsel sent a letter to defendants requesting to return to work under the restrictions assigned by Dr. Galles. (JE30, p. 173) Defendants did not offer claimant any return to work.

On October 3, 2017, claimant attended an FCE scheduled by claimant's counsel. (JE21) Claimant's medical history included not only his shoulder injury, but a history of three low back surgeries, including the lumbar fusion. (JE21, p. 122) Claimant was noted to have provided a consistent performance and a valid effort during the testing. (JE21, pp. 126, 128) His physical capabilities were determined to be in the light to sedentary work categories with restrictions of lifting up to 15 pounds occasionally at waist level, and limit grasping and twisting with his right hand to occasional based on his decreased right hand grip strength. (JE21, p. 128)

Claimant agreed that the October 3, 2017 FCE included an assessment of his ability considering both his shoulder and his non-work related back problem. (Tr. pp. 73-74)

On October 30, 2017, Dr. Gachiani adopted the FCE restrictions as applicable to claimant's back condition. (JE13, p. 107)

Leigh Walters testified at hearing that on November 6, 2017, about one week before the hearing in this matter, she received Dr. Gachiani's release for claimant to return to work with the FCE restrictions for his non-work related back condition and that there has been no offer made to claimant to return to work. (Tr. p. 111) She further testified that under the restrictions set forth in the October 3, 2017 FCE, the employer has no full-time work currently available to offer to claimant in the light to sedentary work category. (Tr. p. 112)

On September 28, 2017, claimant underwent an independent medical examination (IME) with Dr. Bansal. (JE22) Dr. Bansal reviewed claimant's medical history related to his shoulder, but did not appear to review medical records related to his back complaints, although he mentioned the L4-5 fusion surgery and resultant

infection. When discussing claimant's current condition, he described problems with claimant's right shoulder and numbness and tingling in his fingers. (JE22, p. 147) Dr. Bansal did not mention the back and leg pain that claimant described as 7-8/10 just 10 days earlier during his deposition. (JE35, p. 199) Dr. Bansal assigned 32 percent permanent impairment to the right upper extremity, which he converted to 19 percent impairment to the whole person. (JE22, p. 155) This impairment was based on a reduced range of motion, and the total shoulder arthroplasty per the AMA Guides. I note that the portion of Dr. Bansal's assessment that related to loss of range of motion was 11 percent impairment, which was less than the 12 percent assigned by Dr. Galles. However, Dr. Bansal did not apply the glenohumeral multiplier to the total shoulder arthroplasty, which Dr. Galles did. Dr. Bansal argued the multiplier should not be applied in this scenario and he assigned the 24 percent for the shoulder replacement. (JE22, p. 155) These distinctions account for the difference in the ratings from Dr. Galles and Dr. Bansal. Dr. Bansal then assigned restrictions based on the FCE, which as stated above, included an assessment of claimant's non-work related back condition. (JE22, p. 156)

Considering the expert opinions, I accept the rating and restrictions assigned by Dr. Galles, the treating surgeon who had the opportunity to see claimant on multiple occasions and observe first-hand the condition of claimant's shoulder. Also, his opinion concerning restrictions clearly does not include claimant's non-work related back condition.

Claimant agreed at hearing, that if he had not had the back injury, he would have continued to work for the defendant employer. He agreed that if the only restrictions he had were the 30-40 pound lifting restrictions for his shoulder per Dr. Galles, that he would be presently working for the defendant employer and that no one at the employer gave him any reason to conclude otherwise. (Tr. pp. 69, 73, 74)

Also, Leigh Walters testified that if Dr. Galles's restrictions of no lifting over 30-40 pounds and avoiding repetitive overhead work were the only restrictions in place, that the employer would have full-time work available for claimant and would have brought claimant back to work. (Tr. pp. 115-116)

However, I note that from the time that the restrictions assigned by Dr. Galles were in place, on August 31, 2017, until claimant's FCE on October 3, 2017, that no offer of employment was made. This remained true despite the letter of September 18, 2017 from claimant's counsel asking that claimant be returned to work under Dr. Galles's restrictions. I am reminded also that there was no new medical opinion or change in claimant's restrictions that caused him to be forced onto medical leave on July 17, 2017. Rather it was the employer's concern that claimant's non-work related back injury might be further injured even while on light duty, which of course, may cause the back to become a work injury in the form of an aggravation of an underlying condition.

I also note that the employer's job description for the position that claimant had previously worked as a diesel technician required the performance of "heavy work exerting 50 to 100 pounds of force occasionally, and/or 25 to 50 pounds of force frequently . . . ." obviously in excess of the restrictions assigned by Dr. Galles. (JE23, p. 157)

I find that it is very unlikely that claimant could return to work as a diesel mechanic/technician under the restrictions from Dr. Galles of 30-40 pound lifting and minimizing work over shoulder height.

However, I also find that claimant would more likely than not have transferable skills related to supervision, small engine work, delivery work, as an equipment operator, and general mechanical knowledge that may allow him to be employable in jobs such as: working at a parts counter; doing small engine work; light delivery; and supervisory work.

Claimant testified that he continues to take hydrocodone for his shoulder on an as needed basis per a prescription from Dr. Galles. (Tr. p. 59) It was not clear how often claimant needs to take the medication. He described continued difficulty with lifting. He stated that he cannot ride his motorcycle anymore and he has difficulty mowing the yard with a push mower. He rated his current shoulder pain at 5/10. (Tr. p. 60)

Claimant currently receives workers' compensation benefits and a reduced long-term disability benefit related to his back condition. (Tr. p. 61) He was required under the long-term disability policy to apply for Social Security Disability benefits, which he has done. The application is pending. (Id.)

Claimant does not believe that with his right shoulder condition, he can return to work as a diesel mechanic for the defendant employer based on the FCE restrictions. (Tr. pp. 61-61) He does believe that he could return to the type of supervisory work that he was doing while on light duty. (Tr. pp. 62-63)

Claimant testified that he would like to return to work for the defendant employer, and if that does not happen, that he intends to seek work within the FCE restrictions, although he has not thought much about what that might be. (Id.)

Claimant's functional impairment and permanent restrictions as assigned by Dr. Galles, his prior and present earnings, the situs and severity of the injury that resulted in total shoulder replacement, the extent of claimant's education and poor academic performance, along with his age would tend to support a higher industrial disability.

Claimant's work history, prior work experience and probable transferable skills, along with his indication that he would like to continue to work, would tend to support a lower industrial disability.

It is significant to the undersigned that claimant's permanent work restrictions preclude him from working as a diesel technician, a career that claimant has enjoyed for a significant period of time and one that has provided a substantial hourly wage. In view of the above and considering all other appropriate factors in the assessment of industrial disability, I find that claimant has sustained 45 percent industrial disability.

The parties stipulated that claimant has been paid permanent partial disability benefits from the stipulated commencement date of August 8, 2017 through the date of the hearing in this matter. (Hearing Report, p. 2)

CONCLUSIONS OF LAW

The primary disputed issue in this case is the extent of industrial 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, 593; 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. However, consideration must also be given to the injured worker's 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 workers' qualifications intellectually, emotionally and physically; the worker's earning 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 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).

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3

Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

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 (Iowa 1995).

In assessing an unscheduled, whole-body injury case, the claimant's loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009).

As stated above and for the reasons there given, I have determined that claimant has sustained 45 percent industrial disability.

The final issue is costs. Costs allowable under commissioner rule are as follows:

> Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

876 IAC 4.33.

Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I conclude that claimant was successful in this claim and therefore exercise my discretion and assess costs against the defendants in this matter in the sum of $100.00 for the filing fee.

ORDER

IT IS THEREFORE ORDERED

Defendants shall pay claimant industrial disability benefits of two hundred twenty-five (225) weeks, beginning on the stipulated commencement date of August 8, 2017, until all benefits are paid in full.

Defendants shall be entitled to a credit for all weekly benefits paid to date.

All weekly benefits shall be paid at the stipulated rate of seven hundred forty and 61/100 dollars ($740.61) per week.

All accrued benefits shall be paid in a lump sum.

Defendants shall pay interest on any accrued weekly benefits pursuant to Iowa Code section 85.30

Defendants shall pay costs of one hundred and 00/100 dollars ($100.00).

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 22nd day of March, 2018.

TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Fredd J. Haas
Attorney at Law
5001 SW 9th St.
Des Moines, IA 50315-4502
freddjhaas1954@gmail.com

Jeff M. Margolin
Attorney at Law
2700 Grand Ave., Ste. 111
Des Moines, IA 50312-5215
jmargolin@hhlawpc.com

TJG/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.