

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KEVIN LANCIAL,

FILED

Claimant,

FEB 21 2019

File No. 5059608

vs.

WORKERS COMPENSATION

ARBITRATION

CITY OF DES MOINES,

DECISION

Employer,
Self-Insured,
Defendant.

Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Kevin Lancial, filed a petition in arbitration seeking workers' compensation benefits from self-insured employer, City of Des Moines. This matter was heard in Des Moines, Iowa on December 19, 2018.

The record in this case consists of Joint Exhibits 1-16, Claimant's Exhibits 1 and 2, and the testimony of claimant.

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.

ISSUE

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

FINDINGS OF FACT

Claimant was 60 years old at the time of hearing. Claimant graduated from high school. Claimant attended a local community college but did not receive a degree.

Claimant began his employment with Des Moines in November of 1979. Claimant has spent his career with Des Moines as a laborer. For the past ten years, claimant has worked in the sewer division in the Department of Public Works for the City.

On June 7, 2017, claimant was injured when he was inserting a pressure washer into a sewer drain. When the hose was turned on, the pressure in the pipe caused the

pipe to explode and claimant was hit in the face with pieces of the pipe. Claimant said he was knocked unconscious for a few minutes following the explosion.

Claimant was evaluated at Iowa Methodist Hospital on June 7, 2017. Claimant had been unconscious but had returned to consciousness when emergency service technicians arrived. The claimant was assessed as having a fracture of the right orbital, a right zygomatic arch and right nasal fracture. Due to the right eye globe rupture, claimant was transported by helicopter to the University of Iowa Hospitals and Clinics (UIHC). (Joint Exhibits 1, 2)

At the UIHC, claimant was assessed as having an open fracture of the zygomatic arch, a vertical laceration of the auricle of the right ear, multiple facial fractures, a disruption of the orbit with an open globe injury to the right eye, a right temporal bone fracture, a fracture of the maxillary and orbital walls and a fracture of the right nasal bone. (Jt. Exs. 4-7)

Claimant underwent surgery consisting of a repair of the ruptured eye globe and the right malar facial laceration. (Jt. Ex. 7) Claimant also had a separate surgery for repair of the right auricle laceration. (Jt. Ex. 5, pages 34-40)

On June 21, 2017, claimant underwent another surgery to repair the right orbital floor and a removal of the right eye. (Jt. Ex. 5, pp. 41-44)

On June 7, 2017, claimant returned to the UIHC and was evaluated by Steven Rippentrop, M.D. Claimant had neck pain, thoracic back and joint pain, and right flank pain. Claimant had headaches every day. Claimant had difficulty with concentration, sleep and anxiety. Claimant was assessed as having removal of the right eye, a zygomatic fracture of the right cheek, laceration of the auricle in the right ear, neck and thoracic back pain, headaches and adjustment disorders. All diagnoses were related to the June 7, 2017 injury. Claimant was treated with pain medication, prescribed physical therapy, and given work restrictions. (Jt. Ex. 3)

On August 10, 2017, claimant was evaluated by Hiroyuki Oya, M.D., for evaluation of mid-scapular back pain. A review of the MRIs of claimant's cervical, thoracic and lumbar spine did not indicate surgery. Claimant also complained of headaches and short-term memory loss. Claimant was referred to neurology for the headaches and memory loss issues. (Jt. Ex. 8)

Claimant returned to the UIHC on August 24, 2017, concerning the loss of hearing in the right ear. Claimant was assessed as having low frequency hearing loss in both ears caused by the June 7, 2017 accident. (Jt. Ex. 10)

On September 12, 2017, claimant was fitted with a prosthetic for his right eye. (Jt. Ex. 11)

On September 15, 2017, claimant was evaluated by Hyungsub Shim, M.D., at the UIHC behavioral clinic. Claimant had headaches, short-term memory loss, and

issues with anger and frustration. Claimant's headaches, memory problems and cognitive deficits were believed to be related to the June 7, 2017 injury. A brain MRI was recommended. (Jt. Ex. 12, pp. 79-82) Claimant was prescribed physical therapy and recommended to undergo neuropsychological testing. (Jt. Ex. 12, pp. 79-86)

On November 29, 2017, claimant underwent psychological evaluation performed by Paul Ascherman, Ph.D. Claimant had headaches, short-term memory problems and depression due to loss of his eye. Claimant also had difficulties with performing tasks requiring depth perception. Claimant was assessed as having an adjustment disorder and mixed disturbance of emotion and conduct. (Jt. Ex. 13)

Claimant returned to the UIHC behavioral clinic on December 8, 2017. Claimant had some improvement with memory, but still had deficits with memory. Claimant had continued headaches and difficulties with anger control. Claimant's headaches, cognitive and memory issues were again found to be work related. (Jt. Ex. 12, pp. 87-90)

On December 7, 2017, claimant underwent neuropsychological testing and evaluation with Derek Campbell, Ph.D. Claimant was assessed as having mood dysregulation and recurrent headaches which were found to distract from concentration. These symptoms were thought to be the cause of claimant's difficulty with memory. Claimant was thought to have a reduced impulse control caused by brain trauma. (Jt. Ex. 14)

Claimant testified he believed he returned to full duty work either in April or May of 2018.

On October 12, 2018, claimant was seen by Joseph Chen, M.D. Dr. Chen found claimant at maximum medical improvement (MMI). He found claimant had no permanent restrictions. He believed claimant had a 29 percent permanent impairment for the loss of the right eye; a 14 percent permanent impairment to the body as a whole for the brain injury; a 5 percent permanent impairment to the body as a whole regarding the facial scarring; and a 1 percent permanent impairment to the body as a whole for hearing loss. Combined values for all impairments resulted in a 43 percent permanent impairment to the body as a whole. (Jt. Ex. 15)

In a November 21, 2018 report, Robert Rondinelli, M.D., gave his opinions of claimant's condition following an independent medical evaluation (IME). Dr. Rondinelli assessed claimant as having:

1. Post-concussive syndrome with a mild traumatic brain injury with symptoms including impaired memory, attention, and concentration;
2. Multiple facial fractures;
3. Loss of the right eye;

4. Laceration of the auricle of the right ear;
5. Mild hearing loss;
6. Multi-level sprains of the cervical spine.

(Claimant's Ex. 1)

Dr. Rondinelli found claimant had a 20 percent permanent impairment to the body as a whole for the loss of function due to the brain injury. He found claimant had a 16 percent permanent impairment for the loss of function due to the brain injury. He found claimant had a 16 percent permanent impairment to the body as a whole for the loss of an eye. He found that claimant had an 8 percent permanent impairment for the cervical impairment. The combined values of all permanent impairments were thought to result in a 38 percent permanent impairment to the body as a whole. (Cl. Ex. 1)

Dr. Rondinelli recommended claimant have periodic evaluations with an ophthalmologist and ongoing psychological counseling. He recommended claimant avoid ladders or use of scaffolds. He recommended claimant be allowed to take breaks of 15 to 30 minutes if claimant experienced headaches on the job. (Cl. Ex. 1)

On December 18, 2018, claimant completed an application for Family and Medical Leave Act (FMLA) for Des Moines. The application indicates claimant was requesting intermittent leave between December 18, 2018 through December 18, 2019. (Jt. Ex. 16)

Claimant testified the City requested he fill out the FMLA application to document when he may need time off due to his work injury.

Claimant testified he still has headaches three to four times a week. He said his headaches last from one to two hours. He said that when he has headaches at work, he tells his co-workers. He said he is allowed by his supervisor to take time off for his headaches if needed.

Claimant said he has memory issues and occasionally will miss exit turns while on the interstate. Claimant has difficulty driving at night due to his depth perception issues. Claimant says he has issues with impulse control. Claimant said he has lost hearing in both of his ears. Claimant says he has loss of range of motion in his neck.

Claimant testified he is on the same job as he was at the time of the injury. He said he earns the same amount of pay. Claimant said he has no job restrictions. He said his supervisor tries to accommodate his limitations caused by his injury.

CONCLUSIONS OF LAW

The only issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

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.

Claimant was 60 years old at the time of hearing. He graduated from high school. Claimant has spent his entire work life as a laborer with the City of Des Moines.

As noted, claimant was injured when a pipe used for cleaning sewer drains exploded and hit claimant in the face. Claimant was briefly unconscious from the blast.

Claimant has had three surgeries to his face and head. These include repair for his ruptured eye and facial fractures, removal of his eye, and repair of the auricle laceration. Claimant has been assessed as having:

1. A post-concussive syndrome with mild traumatic brain injury resulting in impaired memory, attention and concentration;
2. Multiple facial fractures;
3. Loss of the right eye;
4. Laceration of the auricle of the right ear;
5. Mild hearing loss;
6. Multi-level sprains of the cervical spine.

(Cl. Ex. 1)

Dr. Chen found claimant had a total permanent impairment of 43 percent to the body as a whole. (Jt. Ex. 10) Dr. Rondinelli opined that claimant had a 38 percent permanent impairment to the body as a whole. (Cl. Ex. 1) Both of these ratings are fairly high. They are indicative of the high functional impairment claimant has sustained as a result of his work injury. Given this record, I find it is not necessary to make a finding of fact regarding which functional impairment is more convincing. It is found that claimant has a high functional impairment rating between 38 to 43 percent to the body as a whole.

Claimant returned to his same job at Des Moines. He testified he has no permanent restrictions. However, the record indicates that claimant has difficulty with headaches, loss of depth perception, loss of hearing, and impulse control issues as a result of his injury. Claimant's un rebutted testimony is that he has difficulty at work with headaches and loss of depth perception. The record indicates that claimant's supervisor allows claimant to rest 20 to 30 minutes when he has headaches at work. The City has requested claimant make an FMLA application if he needs to take time off from work for his work injury. In short, while it is true that claimant has returned to work with no permanent restrictions, it is also true that Des Moines recognizes claimant has limitations and attempts to accommodate claimant's limitations due to his work injury.

Claimant is 60 years old. He has had to learn to adjust to losing an eye. He has a permanent brain injury that affects his memory, concentration, and attention. These problems, along with claimant's other injuries, are permanent physical conditions that affect not only his ability to work, but will affect him for the rest of his life. It is admirable that Des Moines has accommodated claimant's limitations so that he can return to work. It is also commendable that claimant has made much effort to return to his job despite his adversity from his work injury.

When all relevant factors are considered, it is found that claimant has a 65 percent loss of earning capacity or industrial disability.

ORDER

THEREFORE, IT IS ORDERED:

That defendant shall pay claimant 325 weeks of permanent partial disability benefits at the rate of \$634.02 per week commencing on October 12, 2018.

That defendant shall pay accrued weekly benefits in lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30. Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal

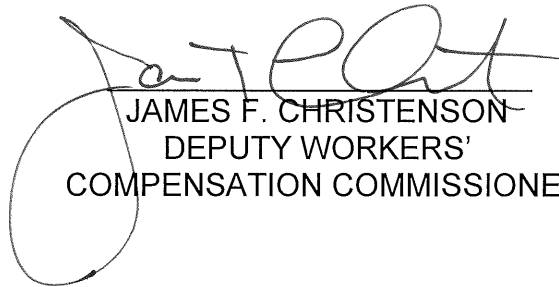
reserve in the most recent H15 report settled as of the date of injury, plus two percent.
See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

That defendant shall receive a credit for benefits previously paid.

That defendant shall pay costs.

That defendant shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

Signed and filed this 21st day of February, 2019.



JAMES F. CHRISTENSON
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.