BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOHN C. DAVIS, JR., Claimant, vs. RED GIANT OIL COMPANY, Employer, and NATIONAL UNITED FIRE INSURANCE, Insurance Carrier, Defendants.	File No. 5055903 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1803, 3000

STATEMENT OF THE CASE

John C. Davis, Jr., filed a petition for arbitration seeking workers' compensation benefits from, the employer, Red Giant Oil Company, employer, and National United Fire Insurance Company, the insurance carrier.

The matter came on for hearing on September 14, 2018, before Deputy Workers' Compensation Commissioner Joseph L. Walsh in Des Moines, Iowa. The record in the case consists of joint exhibits 1 through 12; claimant's exhibits 1 through 6; and defense exhibits A through F; as well the sworn testimony of claimant. Jane Fitzgerald served as the court reporter. The parties argued this case and the matter was fully submitted on October 19, 2018. While the issues are fairly limited, the record is voluminous.

ISSUES AND STIPULATIONS

Most of the issues have been stipulated by the parties through the hearing report and order. The stipulations submitted by the parties in that order are hereby accepted and are deemed binding upon the parties at this time.

Mr. Davis suffered an injury which arose out of and in the course of his employment on February 17, 2011. This work injury is a cause of both temporary and permanent disability. Prior to hearing, claimant was paid both temporary and permanent benefits as set forth in an attachment to the hearing report. The primary dispute before the agency is the extent of industrial disability caused by this work injury.

There are also disputes about the rate and hearing costs. The remaining issues are stipulated.

FINDINGS OF FACT

John C. Davis, Jr., is a pleasant, 44-year old man, who resides in Oregon, Missouri. Mr. Davis testified live and under oath at hearing. Mr. Davis has a military and law enforcement/security background. His testimony was highly credible. He testified in a manner which was straightforward and clear. His testimony was consistent with the medical records and other documentary evidence in the file. There was nothing about his demeanor while testifying which caused the undersigned any concern regarding his truthfulness.

Mr. Davis graduated from high school in Lee Summit, Missouri, in 1992. He appears to be bright and articulate. He has taken a few courses in criminal justice at Metropolitan Community College in Omaha. He served his country in the U.S. Air Force from December 1992 to December 1996. He served three tours in Operation Dessert Storm as a combat engineer. He also worked as a firefighter and paramedic. He did suffer injuries to his hearing, as well as his lumbar spine, while serving in the military. He received 18 college credit hours through the Air Force in air training and fire science. He testified that by the time he began working for the employer in this case, Red Giant, his low back was not giving him any significant difficulties.

His work history since serving in the Air Force is varied and interesting. He worked as an armed security guard for a hospital and a nuclear facility, as well as for the State of Nebraska. For Nebraska, Mr. Davis supervised other security guards. He eventually became a federal police officer for the Veterans' Administration, from approximately 2002 to 2005. From 2005 through 2007, he worked security control for a large bank in Omaha, Nebraska. For a period of time, in 2007, Mr. Davis stayed at home and cared for his infant child. He reentered the paid workforce in November 2007, as an over-the-road truck driver. He testified that it is an area of work he always wanted to get involved with. To that end, he participated in truck driving school in October 2007, in Omaha, Nebraska.

In November 2007, he worked for Ferrell gas hauling propane cylinders for delivery and pickup. He performed this work through July 2008. In August 2008, he began working for Red Giant Oil Company (hereafter, Red Giant) as an over-the-road driver. He hauled oil in a tank trailer throughout all 48 states. His work performance was good. He was paid by the mile and earned approximately $747.00 per week plus a small bonus (which equated to approximately $13.00 per week if he had no accidents). (Claimant's Exhibit 1-3)

On February 17, 2011, he was performing a visual inspection of his tractor/trailer. While observing the inspection of the kingpin, he turned his head and experienced a sudden, sharp onset of pain in his neck, down through his right arm. Mr. Davis continued working and drove his load to Denver, Colorado. During the drive, Mr. Davis

noticed numbness in the fingers in his right hand, as well as a pins and needles type sensation, as well as muscle spasms, through his right arm. He reported this by telephone to his supervisor, Bill Grace. Mr. Davis finished dropping off his load. When he awoke the next day, he was in severe pain, primarily in his neck.

Mr. Davis was directed to treatment through Concentra. He described a stabbing pain on the right side at the base of his neck which was severe and constant. (Jt. Ex. 5-a) An MRI was performed on March 7, 2011, which showed a disc herniation at C6-C7 and a protrusion at C5-C6. (Jt. Ex. 5-c-1) Mr. Davis was referred to Nebraska Spine Center.

On March 17, 2011, Mr. Davis was evaluated by Eric Phillips, M.D. Dr. Phillips documented the work injury and diagnosed C7 radiculopathy and a herniated disc at C6-7 into the right neural foramina. (Jt. Ex. 7-b-5) Dr. Phillips recommended an anterior cervical discectomy and fusion at C5-6 and C6-7 levels. (Jt. Ex. 7-b-5) Surgery was performed on April 8, 2011. (Jt. Ex. 8-a) Mr. Davis had relatively standard follow up care thereafter. Dr. Phillips provided a return to work order in July 2011. (Jt. Ex. 7i) Mr. Davis continued to experience significant symptoms at this time, including weakness in his right tricep. He testified credibly that he had significant difficulty performing his work at Red Giant. (Tr., pp. 36-37) In October 2011, Dr. Phillips assigned a 26 percent whole body impairment rating. (Jt. Ex. 7-n)

On or about February 21, 2013, Red Giant terminated Mr. Davis. Mr. Davis testified that he was sent to the Transportation Supervisor Bill Grace's office, and was told to clean out his truck and turn in his keys. (Tr., p. 42) Mr. Davis testified credibly that no reason was given, he was just released. Red Giant offered some paperwork from his personnel file showing that he was terminated for making negative comments about the employer to a new employee. (Def. Ex. E2-E5) The employer contended this was progressive discipline but offered no evidence of any prior incidents. At hearing, Mr. Davis testified credibly that he had not been shown any of this documentation prior to his termination. (Tr., pp. 43-44)

Mr. Davis secured employment right away, hauling corn for Talley Farms. He was paid $13.00 per hour. It was a pure hauling job which was near his residence in Missouri. He also began working for the Missouri Department of Transportation as an on-call snow plow driver in 2013 and 2014. He earned $13.00 for Missouri DOT. He next started working for Cargill in Forest City, Missouri in July 2014 as a seasonal elevator operator. He earned $14.00 per hour. He testified the work was physically demanding and aggravated his symptoms. Mr. Davis started at Golden Triangle in Craig, Missouri in April 2015, as an ethanol plant operator. He monitored grain storage primarily. He climbed ladders and performed other strenuous work.

In September 2016, Mr. Davis was evaluated for an independent medical evaluation by Robin Sassman, M.D. (Jt. Ex. 10-b) He described his symptoms at that time which were significant, including weakness in his right arm, reduced energy, sleeping problems, fatigue and muscle spasms, as well as loss of grip strength and

numbness. (Jt. Ex. 10-b-4) After a thorough record review, history and evaluation, Dr. Sassman assigned a 28 percent whole body impairment rating and permanent restrictions limiting lifting, pushing and pulling to 20 pounds, occasional floor to waist lifting and waist to shoulder and only 20 pounds rarely above the shoulder. (Jt. Ex. 10-c-8) She also recommended a follow up CT of the cervical spine and a prescription for Gabapentin.

After receiving the restrictions from Dr. Sassman, Golden Triangle learned of his recommended restrictions and let him go. They explained they had no work within those restrictions. Mr. Davis testified that he was having significant difficulty performing the work in any event. He drew unemployment benefits for a time thereafter. He did not secure employment until May 2017, when he applied for work through a staffing agency.

In December 2016, Mr. Davis followed up with Dr. Phillips. Dr. Phillips continued with follow up visits, including diagnostic tests (x-rays, MRI) and an interlamina epidural steroid injection between December 2016 through March 2017. Dr. Phillips placed a light-duty restriction of no lifting over 15 pounds, no excessive bending, need to change positions, no overhead work or lifting and no out of body reaches greater than 12 inches. (Jt. Ex. 7-s-4; 7-u) The injection helped with some of the throbbing pain Mr. Davis had been experiencing. Mr. Davis began delivering electrical supplies for a machine company through the staffing agency in July 2017. After a pay dispute with this company, he began working through the staffing agency for the City of St. Joseph in approximately August 2017. He eventually became fully employed through the City of St. Joseph. He primarily drives a dump truck hauling sludge from the water waste treatment plant. No loading or unloading is required.

Mr. Davis followed up again with Dr. Phillips in February 2018. He continued to have significant symptoms which were not improving a great deal. More x-rays were taken and an EMG was recommended and performed. An FCE was conducted in August 2018. Mr. Davis was placed in the medium to heavy level of work. Restrictions were recommended of 30 pounds overhead on an occasional basis and 40 pounds at shoulder level occasionally. (Cl. Ex. 2-b)

The parties also secured and submitted expert vocational reports. The claimant retained Karen Stricklett. (Cl. Ex. 5-d) Defendants retained Lana Sellner. (Def. Ex. A) Ms. Stricklett provided various opinions regarding employability based upon which medical restrictions are utilized. Using the FCE restrictions, Ms. Stricklett assessed a 35 percent loss of earning capacity, while using Dr. Sassman's restrictions, she opined his loss of earning capacity was 50 percent. (Cl. Ex. 5d-10 through 14) Ms. Sellner opined that Mr. Davis is capable of a wide range of jobs, but did not provide a specific assessment regarding his loss of earning capacity. (Def. Ex. A, pp. 1 through 10)

CONCLUSIONS OF LAW

The primary fighting issue is the extent of claimant's industrial disability. Claimant contends he has a significant industrial disability. Defendants admit there is some industrial disability, however, contend it is not significant.

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 Ry. Co. of Iowa, 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.

It is important to note, industrial disability is evaluated without respect to accommodations which are (or are not) made by an employer. The Iowa Supreme Court views "loss of earning capacity in terms of the injured worker's present ability to earn in the competitive job market without regard to the accommodation furnished by one's present employer." Thilges v. Snap-On Tools, 528 N.W.2d 614, 617 (Iowa 1995).

Having reviewed all of the evidence and considering all relevant factors of industrial disability, I find that the claimant has suffered a 50 percent loss of earning capacity as a result of his February 17, 2011, work injury. Mr. Davis was only 44 years old as of the date of hearing. He is relatively young and in his prime earning years. He is bright and articulate and highly motivated. These are factors which tend to lessen his disability. Nevertheless, his physical impairment is significant. He had an anterior cervical fusion and continues to experience rather significant symptoms associated with his condition. Dr. Sassman and Dr. Phillips have both provided significant whole body impairment ratings (28 and 26 percent) medical restrictions associated with his condition. Claimant's treatment with Dr. Phillips has documented his ongoing severe functional limitations and symptoms, including burning, throbbing pain, and numbness and tingling. He drops things. The pain extends into his right arm, elbow and hand. It causes weakness. He also experiences headaches and dizziness.

While the FCE provided far less drastic restrictions, I find this is likely attributable to the high motivation on the part of Mr. Davis. The evidence demonstrates he wants and needs to work and gave high effort at the FCE. Whether Dr. Sassman's restrictions are utilized or the FCE restrictions, claimant has proven that he is not suited for much of his past employment for which he is qualified through his education, training and experience. This drastically limits his employment opportunities in the competitive job market, particularly in rural Missouri where he lives at the time of hearing. Through his efforts, he secured a good job with the City of St. Joseph, which started at a little over $15.00 per hour. (Tr., p. 60) This job is within his capabilities and appears to be secure. He is not required to do any significant lifting or ladder climbing.

The next issue involves the claimant's rate of compensation.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings that fairly represent the employee's customary earnings, however. Section 85.36(6).

The parties have provided competing rate exhibits. Claimant offered Claimant's Exhibit 1. Defendants offered Defendants' Exhibit B. The primary difference between the rate calculations is the claimant's allegation that he is entitled to claim his child as a dependent.

In calculating the rate of compensation, the injured worker's marital status and number of dependents entitled to be claimed are necessary. "The weekly benefit amount payable to any employee for any one week shall be upon the basis of eighty percent of the employee's weekly spendable earnings, . . ." Iowa Code section 85.37 (2015) Weekly spendable earnings is defined as the amount remaining after payroll taxes are deducted from gross weekly earnings. Iowa Code section 85.61(9) (2015).

Iowa Code section 85.61(6) defines payroll taxes:

> "Payroll taxes" means an amount, determined by tables adopted by the workers' compensation commissioner pursuant to chapter 17A, equal to the sum of the following:

a. An amount equal to the amount which would be withheld pursuant to

> withholding tables in effect on July 1 preceding the injury under the Internal Revenue Code, and regulations pursuant thereto, as amended, as though the employee had elected to claim the maximum number of exemptions for actual dependency, blindness and old age to which the employee is entitled on the date on which the employee was injured.

Iowa Code section 85.61(6) (2015).

The agency "has long held that actual exemptions claimed on the income tax return controls. . . . A claimant is typically limited to those exemptions claimed on his tax returns." Kayser v. Farmers Cooperative Society, File No. 5034699 (Arb. March 13, 2012) *citing* DeRaad v. Fred's Plumbing & Heating, File No. 1134532 (App. January 16, 2002) *and* Webber v. West Side Transport, File No. 1278549 (App. December 20, 2002). In essence, the agency recognizes a presumption that the claimant is entitled to the number of exemptions which were actually claimed on their tax returns. The agency presumes that a rational individual will claim every exemption to which he or she is entitled. The party seeking to overcome that presumption must present sufficient evidence at hearing to rebut the presumption.

In this case, the claimant did not claim his child as an exemption in 2011, although he proved he was legally entitled to do so. I find that he is entitled to this exemption for purposes of rate calculation. The claimant is therefore classified as S2 for wage rate calculation purposes. I find further that claimant has provided a more reliable basis for gross wages, as set forth in Claimant's Exhibit 1. His gross wages as of the date of injury, were $760.55 per week, which rounds up to $761.00 per week. Therefore, I conclude the appropriate rate of compensation is $480.69.

The final issue is costs.

Iowa Code section 86.40 states:

> **Costs.** All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

> **Costs.** 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. Costs of service of notice and

> subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010) The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

Using the discretion set forth in Section 86.40, I award costs to the claimant in the amount of $2,412.50.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay the claimant two hundred and fifty (250) weeks of permanent partial disability benefits at the rate of four hundred eighty and 69/100 dollars ($480.60) per week commencing July 5, 2011.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall be given credit for the weeks previously paid at the lower rate of compensation. Defendants are ordered to pay the correct rate of compensation on all past benefits.

Defendants shall pay interest on all past due benefits under Iowa Code section 85.30 (2015).

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Costs are taxed to defendants in the amount of two thousand four hundred twelve and 50/100 dollars ($2,412.50).

Signed and filed this 29th day of January, 2020.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Richard Maher (via WCES)

Jon H. Johnson via email)
johnsonlaw@iowatelecom.net

Lori Scardina Utsinger (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.