BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

WARREN SHAFFER,

Claimant,

vs.

PETER JOSEPH, INC., d/b/a McDONALD'S, INC.,

Employer,

and

ACCIDENT FUND INSURANCE, COMPANY OF AMERICA,

Insurance Carrier,
Defendants.

File No. 5053525

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Warren Shaffer, the claimant, seeks workers' compensation benefits from defendants, Peter Joseph, Inc., d/b/a McDonalds, Inc., the alleged employer, and its insurer, Accident Fund Insurance Company of America, as a result of an alleged injury on May 5, 2014. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on May 18, 2016 and the matter was fully submitted at the close of that hearing. Oral testimony and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Claimant's exhibits were marked numerically. Defendants' exhibits were marked alphabetically. References in this decision to page numbers of an exhibit shall be made by citing the exhibit number or letter followed by a dash and then the page number(s). For example, a citation to claimant's exhibit 1, pages 2 through 4 will be cited as, "Ex 1-2:4".

The parties agreed to the following matters in a written hearing report submitted at hearing:

1. On May 5, 2014, claimant received an injury arising out of and in the course of employment with defendant employer. Defendants did not object to the change in the injury date from the one alleged in the petition.

2. Claimant is not seeking temporary total/healing period benefits.

3. If the injury is found to have caused permanent disability, the type of disability is an industrial disability to the body as a whole.

4. If I award permanent partial disability benefits, they shall begin on April 17, 2015.

5. At the time of the alleged injury, claimant's gross rate of weekly compensation was $251.15. Also, at that time, he was single and entitled to 1 exemption for income tax purposes. Therefore, claimant's weekly rate of compensation is $182.23 according to the workers' compensation commissioner's published rate booklet for this injury.

6. Medical benefits are not in dispute.

7. Defendants paid no weekly benefits for this injury prior to hearing.

ISSUES

The only issue submitted for determination is the extent of claimant's entitlement to permanent disability benefits.

FINDINGS OF FACT

In these findings, I will refer to the claimant by his first name, Warren, and to the defendant employer as McDonalds.

From my observation of his demeanor at hearing including body movements, vocal characteristics, eye contact and facial mannerisms while testifying in addition to consideration of the other evidence, I found Warren credible.

Warren was 30 years of age at the time of hearing. He is a high school graduate. He attended a community college off and on in the mid-1990s, but did not receive a degree or any certification. Warren testified that he had no physical problems before his work injury in this case. There is nothing in this record to suggest otherwise.

Warren worked for McDonalds from January 23, 2012 until he voluntarily left on September 15, 2015 after a dispute with the regional manager. His work generally involved maintenance/janitorial tasks both inside and outside of the restaurant facility. However, he also assisted in unloading trucks. This would involve lifting and carrying boxes of meat and other products weighing up to 25 pounds and stacking them to a height over his head. He states that loading his dumpster would involve lifting trash containers that can weigh up to 40 pounds. Warren worked 32 hours a week and earned minimum wages which at the time of injury was $7.25 per hour. None of Warren's testimony about his work is disputed in the record.

Warren said that he had already given his two week notice before September 15, 2015 due to his back condition caused by the stipulated work injury. Warren states that his leaving McDonalds was due to both the personality conflict with the manager and his back condition. Warren has not been employed since leaving McDonalds. He was rejected for one job at an auto service station. He states that he is able to work, but desired to wait until this proceeding ends before he obtains employment so he will not have to ask for time off for a hearing on his compensation claim.

The stipulated injury involves the back. Warren testified that while taking out the trash, the wind caught a door he was going through and slammed his back into a nearby gate to the trash area. He states that he initially refused an offer of medical treatment by his manager, thinking the pain would subside. However, after a week, the pain continued and he sought treatment. Defendants referred him for chiropractic care by Mark Bergthold, D.C.

Dr. Bergthold's office note dated May 10, 2014 indicates pain complaints to the left low back area and his assessment was a lumbar sprain/strain and he adjusted the lower lumbar vertebra and pelvic area. (Ex. B-1:2) Warren states this treatment did not improve his condition and he asked to be referred to a medical doctor. Defendants then referred Warren to Concentra, an occupational health clinic. Warren was seen at this clinic by Naomi Chelli, M.D., an occupational medicine specialist. Warren reported continued pain in the thoracic and lumbar area of the back. Dr. Chelli imposed work restrictions and sent Warren to physical therapy. (Ex. 1-1:2)

Warren returned to Dr. Chelli on May 28, 2014 after receiving physical therapy. Dr. Chelli's assessment then was back contusion and thoracolumbar strain. The doctor ordered more physical therapy and continued work restrictions. (Ex. B-9:10) Warren was seen again by Dr. Chelli on July 8, 2014 with continued complaints, but this time she returned Warren to regular activity. (Ex. B-12:13) On July 15, 2014, Warren was seen by Lester Kelly, M.D., at Concentra, and he released Warren from care finding him at maximum medical improvement (MMI).

Warren states that his low back pain subsided, but he continued to have mid back pain and he returned to Dr. Chelli on January 6, 2015. Dr. Chelli ordered an MRI and reinstated work restrictions along with a prescription for Tramadol.

Following the MRI which was negative except for a small lipoma in the mid back. (Ex. B-17) Warren was referred to Ryan Dunlay, M.D., an orthopedic surgeon. Dr. Dunlay did not believe that lipoma was related to the injury. Given the absence of findings in the MRI, Dr. Dunlay did not believe Warren was a candidate for surgery and he referred him back to Dr. Chelli for a possible functional capacity evaluation (FCE). (Ex. B-18:19)

Dr. Chelli saw Warren on April 17, 2015 and concluded he was at MMI and she then released him from her care and recommended defendants consider an FCE. (Ex B-20-21) On May 13, 2015, Warren sought treatment for the onset of low back pain from a local hospital ER. (Ex. B-45)

An FCE was performed on June 17, 2015. The FCE evaluator reports that Warren was found to be capable of only medium work with lifting 20-50 pounds occasionally; 10-25 pounds frequently, and up to 10 pounds continuously. (Ex. B-38) At hearing, Warren testified that he agreed with these results. Dr. Chelli also agrees that the FCE results should be Warren's permanent restrictions. (Ex. B-22)

No further care was offered by defendants after Dr. Chelli released Warren. When Warren qualified for government assisted health care, he sought further treatment from Joseph Brooks, D.O., at the Genesis Pain and Spine Clinic. Dr. Brooks assessed chronic thoracic back pain and referred Warren for additional physical therapy. (Ex. B-25) In November and December 2015, Warren attended physical therapy sessions (Ex. B-27:31), but ended them when family commitments prevented him from going to his appointments. He has had no further treatment since.

On February 25, 2016, at the request of his attorney, Warren was evaluated by John Kuhnlein, D.O., an occupational medicine physician. Dr. Kuhnlein's diagnoses were thoracic and lumbar contusions and chronic thoracic and lumbar pain without evidence of radiculopathy. (Ex. B-35) Dr. Kuhnlein opines that Warren has a 6 percent permanent partial impairment to the body as a whole under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Ex. B-35:36) The doctor recommends lifting restrictions of 25 pounds occasionally, floor to waist; 30 pounds occasionally, waist to shoulder; and 20 pounds occasionally over shoulder. Warren is to be able to change positions as needed for comfort; limit work on ladders to below shoulder height; only occasionally work over shoulder height; and limit tool use to below shoulder level. (Ex. B-36)

I find that the work injury of May 5, 2014 is a cause of a 6 percent permanent partial impairment to the body as a whole as evaluated by Dr. Kuhnlein. Defendants offered no other impairment rating. However, I find that the May 5, 2014 injury is a cause of the permanent restrictions of Dr. Chelli which was verified by a valid FCE. Claimant testified at hearing he agreed with these restrictions.

Warren testified that he had no permanent impairment or work restrictions before his injury in this case. As stated before, there is nothing in the record to suggest otherwise.

Given his permanent restrictions, Warren likely would not be qualified for his job at McDonald's given the lifting requirements to work continuously overhead when unloading trucks and lift up to 40 pounds loading his dumpster.

Warren's only work history consists of selling vacuum cleaners door-to-door and stockroom worker at a furniture store with some sales of electronic equipment. He likely can return to sales work, but manual labor jobs are restricted to those in the medium physical demand category. This is significant for an unskilled laborer in the current labor market.

I find that the work injury of May 5, 2014 is a cause of a 50 percent loss of earning capacity.

Due to accommodations for work restrictions, claimant did not lose any time off work during treatment of the injury.

CONCLUSIONS OF LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

A treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404.408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2)(a-t), the disability is considered a scheduled member disability and measured functionally. If it is found that

the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and measured industrially under Iowa Code subsection 85.34(2)(u). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133; 106 N.W.2d 95, 98 (1960).

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 worker's qualifications intellectually, emotionally and physically; the worker's earnings 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).

In this case, the parties agreed that if the work injury is a cause of permanent impairment to the body as a whole, the disability is industrial. Consequently, the agency had to determine the lost earning capacity from the injury.

A showing that claimant had no loss of his job or actual earnings does not preclude a finding of industrial disability. Loss of access to the labor market is often of paramount importance in determining loss of earning capacity, although income from continued employment should not be overlooked in assessing overall disability. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991); Collier v. Sioux City Community School District, File No. 953453 (App. February 25, 1994); Michael v. Harrison County, Thirty-fourth Biennial Rep. of the Industrial Comm'r, 218, 220 (App. January 30, 1979).

Although claimant is closer to a normal retirement age than younger workers, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). However, this agency does consider voluntary retirement or withdrawal from the work force unrelated to the injury. Copeland v. Boones Book and Bible Store, File No. 1059319 (App. November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

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, 617 (Iowa 1995).

In the case sub judice, I found that claimant suffered a 50 percent loss of his earning capacity as a result of the work injury. Such a finding entitles claimant to 250 weeks of permanent partial disability benefits as a matter of law under Iowa Code section 85.34(2)(u), which is 50 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection.

ORDER

1. Defendants shall pay to claimant two hundred fifty (250) weeks of permanent partial disability benefits at the stipulated rate of one hundred eighty-two and 23/100 dollars ($182.23) per week from the stipulated date of April 17, 2015.

2. Defendants shall pay accrued weekly benefits in a lump sum.

3. Defendants shall pay interest on unpaid weekly benefits awarded herein pursuant to Iowa Code section 85.30.

4. Defendants shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33, including reimbursement to claimant for any filing fee paid in this matter.

8. Defendants shall file subsequent reports of injury (SROI) as required by our administrative rule 876 IAC 3.1(2).

Signed and filed this 6th day of June, 2016.

LARRY WALSHIRE
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.