BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JAMES GERLACH, Claimant, vs. EAST SIDE JERSEY DAIRY, Employer, and FIDELITY AND GUARANTY, Insurance Carrier, Defendants.	FILED FEB 13 2019 WORKERS COMPENSATION	File No. 5065208 ARBITRATION DECISION Head Note No.: 1703, 1803

STATEMENT OF THE CASE

James Gerlach, claimant, filed a petition in arbitration seeking workers' compensation benefits from East Side Jersey Dairy, employer, and its insurer, Fidelity and Guaranty, as a result of an injury he sustained on December 23, 2009, that arose out of and in the course of his employment. This case was heard in Davenport, Iowa, and fully submitted on July 16, 2018. The evidence in this case consists of the testimony of claimant, and Joint Exhibits 1 through 8. Joint Exhibit 2 pages 15, 16, 17, 18 and 19 were excluded as being duplicative of material already part of the record. Both parties submitted briefs.

The parties filed hearing reports at the commencement of the arbitration hearing. On the hearing reports, 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 initially identified a medical expense of $166.00 dollars in dispute. The parties agreed during the hearing that claimant would withdraw this issue from the hearing and that the defendants would pay this expense if claimant could identify the charge relation to the 2009 injury or a later 2017 injury. (Transcript page 85)

ISSUES

1. The extent of claimant's disability.

2. Whether defendants are entitled to a credit for overpayment of permanent partial disability benefits.

3. Assessment of costs

FINDINGS OF FACT

The deputy workers' compensation commissioner, having heard the testimony and considered the evidence in the record, finds that:

Claimant was 53, years old at the time of the hearing. (Tr. p. 8) Claimant graduated from high school. He has no other post-secondary education. Claimant has a class A CDL that he needs for work. (Tr. p. 19) Claimant was working for East Side Jersey Dairy[1] (East Side) at the time of the hearing and has worked for this employer since 2005. Claimant has no formal restrictions by any medical provider.

Claimant's employment history is relevant to his claim. After high school claimant was a laborer building silos, worked in production, and moved 100-pound sacks of powdered milk. Claimant worked as an over-the-road trucker for about five years and stopped that work to be home more often. Claimant then worked a number of construction jobs and was a concrete finisher. Claimant was self-employed as a concrete contractor for about three years and then returned to work to be a foreman for construction for about six years. (Tr. pp. 10 – 17) Claimant testified that he did not believe he could return to his prior work day in and day out. (Tr. p. 52)

In 2005, claimant was hired to drive a semi-truck and deliver finished dairy products for East Side to stores and schools. Claimant worked full-time and would typically work 12 -16 hours per day. (Tr. p. 20) At the time of the hearing, he was working 12 to 13 hour days. (Tr. p. 50) The position is covered by a collective bargaining agreement and claimant bids for a job every year. (Tr. pp. 22, 46)

Claimant was working as a utility driver for East Side at the time of his injury. As a utility driver, claimant looks each week at routes that a regular driver is going to be absent and chooses which route he wants to perform for that week or days. (Tr. p. 55, 56) Claimant is able to limit his work to his preferred Monday through Friday runs as a utility driver. (Tr. p. 58, 80) Claimant receives a 10 percent pay premium as a utility driver, but stated that his union also collects more so he does not see an increase. (Tr. pp. 57, 80)

On December 23, 2009, claimant was making a delivery at a store. Claimant slipped on a side walk and fell and hit his head on the asphalt. At that time, claimant

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[1] Claimant's employer at the time of the injury was East Side Jersey Dairy. This company has been purchased by Swiss Valley at present and was also referred to as Prairie Farms or Roberts Dairy at different times. In the decision, the employer will be referred to as East Side. (Transcript page 76)

experienced a very severe headache. (Tr. p. 25) Claimant reported his fall and finished his shift. He then went to the hospital after he brought his truck back. (Tr. p. 26)

Claimant was seen by Michael Chapman, M.D., on March 4, 2010 for evaluation of neck and arm symptoms. (JEx. 2, p. 3) Dr. Chapman reviewed an MRI and noted claimant had signs of myelopathy. Dr. Chapman recommended an aggressive decompression, both anterior and posterior reconstruction. (JEx. 2, p. 4)

Claimant had surgery on April 2, 2010, and was released from the hospital on April 5, 2010. (Tr. p. 30; JEx. 5, pp 79 – 80) Dr. Chapman, performed, "Anterior cervical discectomy with foraminotomies at C3-4, C4-5, C5-6 and C6-7 and then fusion using Bengal cages with morselized local bone grafting and iliac crest bone marrow aspirate and Vitoss bone graft expander and then plating using Skyline anterior cervical plating system with SSEP monitoring." (JEx. 5, p.79) Claimant said that the results of the surgery was good and returned to restricted duty on June 24, 2010. (Tr. p. 30) Claimant was returned to work as a utility driver, with no restrictions, as of September 27, 2010. (Tr. pp. 31, 60; JEx 2, p. 7)

Claimant began experiencing neck pain, headaches and muscle fatiguing secondary to his headaches and saw Erin Kennedy, M.D., on October 25, 2010. (Tr. p. 60) Dr. Kennedy provided some lifting restrictions on October 25, 2010. (JEx. 2, p. 8; Tr. pp. 32, 61) Dr. Kennedy returned claimant to full duty on December 6, 2010. (JEx. 2, p. 11)

On April 21, 2011, Dr. Chapman wrote that an EMG and nerve conduction velocity studies showed findings consistent with myelopathy and some mild carpal tunnel syndrome. Dr. Chapman found that claimant was at maximum medical improvement (MMI) on this date and recommended claimant have an impairment rating performed. (JEx. 2, p. 14) On November 18, 2013, claimant reported to Dr. Chapman that in the last three months he had some worsening symptoms on the right side of the neck and the right periscapular region. Dr. Chapman did not think that additional surgery would help and provided claimant with a soft cervical collar. (JEx. 2, p. 38) Dr. Chapman returned claimant to full duty with no restrictions. (JEx. 2, p. 40)

On July 26, 2011, Michael Stenberg, M.D., performed an independent medical examination (IME). Dr. Stenberg provided a 43 percent whole body impairment rating and said that claimant did not need any restrictions. (Ex. 2, pp. 23, 24)

Claimant had a second IME on January 4, 2012 conducted by Robert Broghammer, M.D. Dr. Broghammer provided a 37 percent whole body impairment rating. (JEx. 6, p. 88)

On January 24, 2012, Preeti Joseph, M.D., examined claimant for his chronic headaches. (JEx. 2, p. 28; Tr. pp. 35, 65) Dr. Joseph's impression was, "The patient is a right-handed man with chronic migraine headaches, triggered by muscle tension and cervicogenic pain. He is now having daily headaches, especially when he is working

and driving. He has failed muscle relaxers because of sedation impairing his ability to feel safe operating a motor vehicle." (JEx. 2, p. 31) Dr. Joseph's plan was,

> 1. I counseled the patient on BOTOX therapy for migraine headaches to see if this will help improve his muscle tension and migraines. This would be done to various muscle groups surrounding his head and forehead as well as the neck. This may help release some of his tension and provide no systemic side effects of sedation.
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> 2. Physical therapy consult for possible TENS unit to see if this will help some of the patient's pain.
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> 3. Follow up in 2 to 3 months.

(JEx. 2, p. 31) Claimant receives Botox injections about every three months and said that Dr. Joseph told him he would need these injections for life. (JEx. 2, p. 35; Tr. p. 37) On August 21, 2014, claimant reported mild headache almost daily; however, the intense severe headaches are resolved with the Botox injections. (JEx. 2, p. 41)

Laurie Garms, M.D., assumed care of claimant for the Botox injections in November 2014. Dr. Garms noted claimant has daily headaches, but does not need to take medication for the headaches. (JEx. 2, p. 44) Dr. Garms has not provided any restrictions to the claimant. (Tr. p. 71)

Claimant was in a motor vehicle accident on October 12, 2015. Claimant was evaluated with cervical strain, received a prescription for Tramadol, and discharged. (JEx. 2, p. 48) Claimant was off work from October 23, 2015 through October 26, 2015. (JEx. 2, p. 49) On February 20, 2017, claimant was opening a trailer door at work and felt pain in his neck. (Tr. p. 40) Claimant was assessed with acute cervical myofascial strain and acute headache. (Tr. p. 41, JEx. 2, p. 54)

Claimant was seen by Timothy Miller, M.D., at a pain clinic in April through June 2017. (JEx. 8, pp. 101-107) Claimant testified that Dr. Miller said that if it were up to his (Dr. Miller's) decision, Dr. Miller would provide a 10-pound weight restriction. (Tr. p. 43) On May 11, 2017, Dr. Miller wrote,

> Given the lack of compression, this is an [sic] going radicular-type symptom with mechanical neck pain, superimposed acute injury on chronic. I think it would be best choice to move forward with obtaining a functional capacity evaluation to assess his full capabilities and move forward with that. I took some work restrictions for him. Quite honestly I think he would be better off doing jobs that did not require physical labor. Part of which may be visible and part of it is mentally, he just seems like he is concerned that he keep doing heavy work. He is going to permanently damage himself and it will be problem when he is 70 and so I think he wants to limit or curtail this kind of activity.

(JEx. 8, p. 104) On June 7, 2017, Dr. Miller opined that claimant does not have restrictions and does not need them at this time, but claimant might want to discuss with his employer whether there could be some mutually agreed changes which would make claimant more comfortable. Dr. Miller stated that claimant did not need restrictions. (JEx. 8, p. 106)

Claimant had a functional capacity examination (FCE) on May 31, 2017. The results were considered invalid. (JEx. 7, p. 90)

Claimant had another FCE on August 15, 2017. The results of the FCE were considered valid. The claimant was found capable of performing work up to the Medium level, as defined by the U.S. Department of Labor, and could perform all functions of his truck driving job at East Side. (JEx. 3, pp. 65, 67)

Claimant was being treated by Dr. Garms at the time of the hearing. (Tr. p. 45) Claimant was taking Tramadol and gabapentin at the time of the hearing. (Tr. p. 46) Claimant wears a cervical collar when he sleeps, he does not use it at work. (Tr. p. 47) Claimant testified that his current symptoms consist of pain in the arms, tension in the neck and headaches. Claimant also experiences tingling in his fingers, more in right than left. (Tr. p. 47) Claimant testified that he does not need any accommodations in his workplace and he is able to perform his job. (Tr. pp. 49, 50)

I find claimant has headache most days. He has mild carpal tunnel. Claimant has limited range of motion in his neck. Claimant cannot perform heavy work. Claimant will need Botox injections on an ongoing basis.

At the time of his injury, claimant's weekly gross earnings were $1,315.67 and he was married and entitled to two exemptions. Based upon the rate book in effect at the time of his injury, claimant's weekly workers' compensation rate is $819.20.

Claimant was previously paid 215 weeks of permanent partial disability at the rated of $851.63. (Hearing report) Defendants overpaid the claimant $32.43 per week for 215 weeks. The overpayment is $6,972.45.

Claimant has requested costs in the amount of $300.00. The claimant paid a $100.00 filing fee and $200.00 for a report from Dr. Miller.

RATIONAL AND CONCLUSIONS OF LAW

The parties have stipulated that James Gerlach, claimant, has an industrial disability as a result of a fall that arose out of and in the course of his employment with East Side Jersey Dairy on December 23, 2009. The claimant had a 4 level spinal fusion and 5 level decompression and currently receives periodic Botox injections because of migraines. The surgery and migraines are due to his December 23, 2009 injury. Defendants paid claimant 215 weeks of permanent partial disability, which is a 43 percent industrial disability rating.

Extent of disability

The parties have stipulated claimant has an industrial disability as a result of this injury at East Side. The primary dispute between the parties is the extent of claimant's industrial loss.

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.

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, 392 (Iowa 2009).

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, 528 N.W.2d 614, 617.

The Iowa Supreme Court held in Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824, (Iowa 1992) that the fact that a claimant did not have a loss of income is not dispositive as to whether the claimant has an industrial disability.

> Oscar Mayer, nevertheless, urges us to adopt a definition of disability that would require an actual diminution in earning capacity as of time of injury. As we have noted above, the Commissioner is entitled to draw reasonable inferences based upon the evidence presented and thus conclude that Tasler is currently foreclosed from full participation in manual labor of the sort she was accustomed

> to while in the employ of Oscar Mayer. Thus, it can be said that Tasler has suffered a loss of earning capacity even though she did not suffer an actual diminution in her earnings while in the employ of Oscar Mayer.
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> Requiring a claimant to also demonstrate an actual diminution in earnings would place a premium on missing work-often unnecessarily-merely to establish an actual diminution in earnings and thereby penalize devoted employees who faithfully perform job duties despite bodily discomfort and damage. *See* Bellwood Nursing Home, 106 Ill. Dec. at 237, 505 N.E.2d at 1028. This is not to say, however, that an actual diminution in earnings is unimportant in establishing an industrial disability; we only decide that in this age of insidious work place injuries, compensable disabilities will often be present despite the fact that the employee has not, as yet, suffered any actual diminution in earning capacity. Thus, a showing of actual diminution in earnings will not always be necessary to demonstrate an injury-induced reduction in earning capacity.

Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824, 831 (Iowa 1992).

Claimant has a high school degree. He has no additional formal education. Claimant's work history before coming to East Side was generally in construction and concrete finishing. Claimant cannot return to his prior work, with the exception of truck driving. The valid FCE found that claimant could work up to the Medium level of work. He cannot perform heavy work. Claimant underwent very significant spinal surgery. Given the levels of fusion and decompression involved in the surgery, claimant had a good surgical result. He has been able to perform his job as a utility driver for East Side. Claimant was provided 37 percent and 43 percent whole body ratings.

The record shows that claimant's treating physicians have not imposed any restrictions. Dr. Miller suggests that claimant find less physically taxing work, but does not impose restriction. Claimant has a well-paying union job that he wants to keep. He has continued to work with almost daily headaches and the need for Botox injections every three months. Claimant has mild carpal tunnel and some loss of range of motion in his neck.

I find claimant has a 45 percent loss of earning capacity. I find that claimant has a 45 percent industrial disability. This entitles claimant to 225 weeks of permanent partial industrial disability benefits.

Defendants have paid claimant the 43 percent impairment rating, 215 weeks of benefits. Defendants shall pay an additional 10 weeks of permanent partial benefits.

Credit

Iowa Code section 85.34(5) states:

> 5. Recovery of employee overpayment. If an employee is paid any weekly benefits in excess of that required by this chapter and chapters 85A, 85B, and 86, the excess paid by the employer shall be credited against the liability of the employer for any future weekly benefits due pursuant to subsection 2, for a current or a subsequent injury to the same employee.

In Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 136-137 (Iowa 2010), claimant was paid healing period benefits and permanent partial disability benefits at a higher weekly rate than was later awarded at hearing. The agency found defendants had a right to a credit against the current permanency award for the overpayment of healing period benefits.

On appeal, the Supreme Court noted the parties agreed that defendants should receive a credit for the overpayment of permanency benefits, but they disagreed as to what type of credit would be permitted under chapter 85.

In interpreting Iowa Code section 85.34(5), regarding the recovery of an employee overpayment, the Supreme Court noted:

> The plain language of section 85.34(5) directs the overpayment of any weekly benefits to be credited to payment of subsequent injuries. "Any" is commonly understood to have broad application. . . . By using a word with expansive import, we conclude that section 85.34(5) must be interpreted to apply to all overpayment of benefits. . . . As a result, Swiss Colony is only entitled to a credit for the overpayments against future benefits for a subsequent injury and not against future benefits for this injury. (Citations omitted).

Deutmeyer, 789 N.W.2d at 136-137.

Defendant overpaid claimant's permanent partial benefits at a rate higher than the rate stipulated to by the parties. As defendant overpaid due to a higher initial computation of rate, defendant is entitled to a credit for overpayment of those benefits against the liability of this employer for any future weekly benefits due for permanent benefits under the law in effect at the time of this injury, defendants may only collect a credit for a subsequent injury to his December 23, 2009 injury. The defendants are entitled to a credit of $6,972.45.

Claimant has requested assessment of costs. The cost of the filing fee and medical report are allowable under 876 IAC 4.33. In my discretion I award claimant these costs.

ORDER

Defendants shall pay unto claimant two hundred twenty-five (225) weeks of permanent partial disability benefits commencing September 10, 2010, at the weekly rate of eight hundred nineteen and 20/100 dollars ($819.20).

Defendants shall receive credit for two hundred fifteen (215) weeks of permanent partial benefits paid at the rate of eight hundred fifty-one and 63/100 dollars ($851.63).

Defendants shall have a credit against any new permanent injury indemnity benefits claimant is entitled to that is subsequent to the December 23, 2009 injury in the amount of six thousand nine hundred seventy-two and 45/100 dollars ($6,972.45).

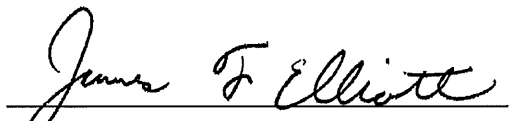
Defendants shall pay accrued weekly benefits in a lump sum.

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).

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 pursuant to 876 IAC 4.33 in the amount of three hundred dollars ($300.00).

Signed and filed this 13th day of February, 2019.



JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Nick Avgerinos
Attorney at Law
55 W. Monroe St., Ste. 900
Chicago, IL 60603
nja@capronlaw.com

James M. Peters
Attorney at Law
115 Third St., SE, Ste. 1200
Cedar Rapids, IA 52401-1266
jpeters@spmblaw.com

JFE/kjw

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.