

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARK CODY,	:	
	:	
Claimant,	:	
	:	
vs.	:	File No. 5066860
	:	
MCKEE CONTRACTING CO.,	:	ARBITRATION DECISION
	:	
Employer,	:	
	:	
and	:	
	:	
AUTO-OWNERS INS.,	:	
	:	
Insurance Carrier,	:	Head Note No.: 1803
Defendants.	:	

STATEMENT OF THE CASE

Mark Cody, claimant, filed a petition in arbitration seeking workers' compensation benefits from employer McKee Contracting Company (McKee) and Auto-Owners Insurance Company, insurance carrier, as a result of an injury he sustained on December 2, 2016 that arose out of and in the course of his employment. This case was heard in Des Moines, Iowa on January 17, 2020, with claimant and his attorney participating via CourtCall video conferencing. The matter was fully submitted on February 21, 2020, with submission of the briefs. The evidence in this case consists of the testimony of claimant, Joint Exhibits 1 - 6, Defendants' Exhibits A - C and Claimant's Exhibits 1 - 6.

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.

ISSUES

The extent of claimant's disability.

Assessment of costs.

## FINDINGS OF FACT

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

Mark Cody, claimant, was 57 years old at the time of the hearing. Claimant graduated from high school. He has no other formal education. For most of his working life he has worked in construction; from "frame to finish." (Transcript internal page 17) Claimant has worked in construction for over 35 years. A number of years ago claimant worked as a janitor while he was also working construction. (Exhibit A, Deposition p. 17) Claimant was self-employed in construction for over 20 years. (Ex. A. Depo. p. 21) Claimant testified he was generally healthy up until his work accident. Claimant started working for McKee on July 15, 2015 as an independent contractor. In November 2016 claimant became an employee of McKee. Claimant was earning \$30.00 per hour at McKee. (Ex. C, p. 17) Claimant never returned to work for McKee after his injury of December 2, 2016. (Ex. A, Depo. p. 26)

On December 2, 2016, claimant was on a job site for McKee. Claimant fell from scaffolding about 6 feet. Claimant was taken by air ambulance to Creighton University Medical Center. (Joint Ex. 1, pp. 1 -5) Claimant regained regular consciousness when he was in the MRI at Creighton University Medical Center. Claimant was admitted to the hospital overnight. A CT of his head did not show evidence of acute intracranial or calvarial fracture. Claimant had a larger posterior vertex scalp hematoma. (JE 2, p. 9) Claimant said his left elbow was broken, he had a fractured tailbone, and sprained left ankle.

Claimant received treatment for his left elbow and right ankle at Professional Medical Solutions from December 20, 2016 through January 24, 2018. (JE 3, pp. 10 – 27) Claimant reported to Annie Knierim, M.D. on January 24, 2017 that his ankle was healing and elbow was doing fairly well. Dr. Knierim noted claimant had a left elbow dislocation with small nondisplaced fracture type 1 of the coronoid process of the left ulna. (JE 3, p. 16) Claimant was complaining of fuzziness and difficulty in thinking due to his concussion. (JE 3, p. 14) On February 28, 2017, claimant was complaining of left hip and neck pain. (JE 3, p. 17)

On January 23, 2017, Jeremiah Ladd, M.D. of the Nebraska Spine + Pain Center began treating claimant for cervical pain. His impression was,

- Neck strain
- Cervical disc degeneration C5-C6 . . .
- Cervical disc degeneration C6-C7 . . .
- Cervical spondylosis without myelopathy or radiculopathy . . .
- Cervical spondylolisthesis . . .

Post-concussive syndrome

(JE 4, p. 34) An MRI of February 21, 2017 showed,

- 1) Severe bilateral foraminal stenosis at C3-4 and C5-6.
- 2) Moderate to severe bilateral foraminal stenosis at C6-7.
- 3) No significant central canal stenosis.
- 4) Multilevel degenerative disc disease as described levels above.

(JE 4, p. 42) On March 1, 2017, Dr. Ladd recommended facet injections which occurred on March 3, 2017. (JE 4, pp. 46, 48) On April 3, 2017, Dr. Ladd noted that due to the lack of significant relief from the facet injections claimant's pain could be coming from his stenosis. Dr. Ladd informed an adjuster for defendant insurance carrier that his treatment of the claimant was related to his work injury. (JE 4, p. 55) On April 19, 2017, Dr. Ladd performed a cervical interlaminar epidural injection. (JE 4, p. 57) On May 31, 2017, Dr. Ladd performed a second cervical interlaminar epidural injection. (JE 4, p. 62) On June 12, 2017, Dr. Ladd reported claimant continued to have coccydynia. (JE 4, p. 64) On November 13, 2017, Dr. Ladd reviewed the functional capacity evaluation (FCE) with claimant. Dr. Ladd stated claimant's work status would be consistent with the FCE. (JE 4, pp. 77, 78) Dr. Ladd clarified claimant's restrictions to occasional lifting above his head as set forth in the FCE. (JE 4, p. 79) On November 23, 2018, Dr. Ladd provided a 21 percent impairment rating to the whole body. (JE 4, p. 80)

On July 12, 2017, claimant was seen by neurologist Jonathan Moravek, M.D. Dr. Moravek's assessment was,

- 1) Post-concussive headaches, chronic
- 2) Vertigo
- 3) Cervical spine spondylosis

(JE 5, p. 99) On June 14, 2018, Dr. Moravek's assessment was "#1. Dysequilibrium #2. Chronic neck pain." (JE 5, p. 105) Dr. Moravek recommended an ENT evaluation for the short episodic vertigo. (JE 5, p. 105)

On January 24, 2018, Karl Bergmann, M.D. examined claimant for follow up on his left elbow, right ankle sprain and left hip pain. Claimant was also complaining of coccyx pain. (JE 3, p. 23) Dr. Bergmann's assessment was,

1. Fall from scaffold, subsequent encounter
2. Closed nondisplaced fracture of coronoid process of left ulna with routine healing, subsequent encounter
3. Arthritis of left hip
4. Coccyx pain

(JE 3, p. 27) Dr. Bergmann found claimant at MMI for his left elbow and assigned no restrictions. Dr. Bergmann noted claimant had chronic coccyx and left hip pain since his fall at work. (JE 3, p. 23) Claimant's left elbow and right ankle healed with physical therapy and without surgery. (JE 3, p. 28) Dr. Bergmann stated that claimant's hip,

ankle and elbow impairments were related to his fall at work. Dr. Bergman was not aware if claimant had reported his coccyx pain to other doctors. Dr. Bergmann provided a 10 percent whole body impairment for his hip and a 5 percent whole body for the coccyx. (JE 3, p. 29)

Claimant testified in his deposition that he had limitations of no lifting over 15 pounds, no frequent bending or twisting, no standing more than an hour and no repetitive bending of his neck. (Ex. A, Depo. p. 38) Claimant testified that he had injections in his neck that help some. Claimant has requested medical care for his neck, such as injections, and medical care for his tailbone (coccyx).

Claimant testified he did not believe he could work. Claimant said that due to pain he had difficulty standing for any length of time. Claimant said his neck is sometimes worse or the same since his injury.

Claimant acknowledged the functional capacity examination (FCE) of November 21, 2017 reported that he was capable of heavy work. The FCE was performed on November 21, 2017. The FCE was deemed valid with the effort used by claimant. Overall the FCE found claimant could perform HEAVY physical demand work with some limitations. The FCE reported,

Based on results obtained, the client demonstrates the ability to perform within the HEAVY Physical Demand Category. The client bilaterally lifted 102# 12-inches to waist height, 57# to shoulder height and 42# overhead. The client carried 37.5#. The client unilaterally lifted 35# per side. Push and pull strengths were measured at 58# and 58# respectively. Tasks listed here were demonstrated at an occasional frequency.

With respect to non-material handling, the client demonstrates an occasional tolerance for sustained overhead reaching, crawling ad [sic] stairs climbing. Sustained forward reaching, overhead reaching, bending, squatting, standing, and walking were performed on a frequent basis. Forward reaching, sitting, gripping, pinching and dexterity were demonstrated on a constant basis.

(JE 6, p. 109)

Claimant testified that he could safely lift 25 pounds and lifting more than 25 pounds causes him pain. Claimant testified that he cannot do overhead work, additionally that he is still fuzzy or foggy and should not be on ladders and complex actions are difficult. (Tr. int. p. 58) Claimant testified that his left elbow and right ankle injuries have resolved, as well as his vertigo. (Tr. int. pp. 26, 37) He acknowledged the only treatment for his coccyx has been the donut pillow and he was found to be at maximum medical improvement (MMI) for his neck on November 30, 2017 and hip on January 24, 2018.

Claimant is able to live at his home and can perform adult daily living tasks. Claimant has a driver's license and is currently able to drive.

Claimant had hip replacement surgery in April 2018. Claimant never returned to work for McKee after his injury of December 2, 2016. (Ex. A, Depo. p. 26) Claimant has not looked for work since his injury. Claimant filed for Social Security Disability Insurance (SSDI) in April 2017 and started receiving SSDI in July 2017. Claimant contacted the Iowa Department of Vocational Rehabilitation in April 2018 and was going to re-contact it after his hip surgery. (Ex. C, p. 26; Ex. 4, p. 2) There is no evidence of a follow up contact after his hip surgery.

On August 2, 2019, Sunil Bansal, M.D. performed an independent medical examination (IME). (Ex. 1, pp. 1 – 20) Dr. Bansal wrote claimant's left elbow had no ratable impairment under the AMA Guides. (Ex. 1, p. 16) Dr. Bansal opined that claimant had "Post concussive syndrome with headaches. Vertigo," and for his neck "Aggravation of cervical spondylosis." (Ex. 1, p. 17) Dr. Bansal stated that claimant had a constellation of neurological impairments classified as traumatic brain injury. Dr. Bansal assigned a three percent whole body impairment rating for the neurological injury. (Ex. 1, p. 17) Dr. Bansal assigned a 24 percent whole body impairment to the cervical spine. (Ex. 1, p. 18) Dr. Bansal assigned five percent whole body impairment rating for claimant's lumbar myofascial pain. (Ex. 1, p. 19) Dr. Bansal said that claimant's left hip had aggravation of degenerative joint disease as a result of his injury and assigned a 15 percent whole body impairment rating for claimant's status post left hip arthroplasty. Dr. Bansal recommended restrictions of,

No lifting over 25 pounds. No frequent bending or twisting. No prolonged standing greater than one hour at a time. He needs to avoid work or activities that require repeated neck motion, or that place his neck in a posturally flexed position for any appreciable duration of time (greater than 15 minutes).

(Ex. 1, p. 20) Claimant testified he agreed with Dr. Bansal's restrictions.

Charles Mooney performed an IME of the claimant on November 24, 2019. Dr. Mooney's assessment was,

1. Multiple traumas associated with date of injury of 12/2/2016 including aggravation of underlying degenerative disc and facet disease of the cervical spine.
2. Loss of consciousness with mild residual post-concussive symptoms and possible hearing loss.
3. Evidence of minor left elbow fracture without residual symptoms or functional loss.
4. Evidence of right ankle sprain without residual symptoms or functional loss.
5. Ongoing coccydynia diagnosed with a coccygeal fracture with persistent symptoms.

6. Temporary aggravation of underlying degenerative arthropathy of the left hip now status post left hip replacement.

(Ex. B, p. 10)

Dr. Mooney wrote that claimant's current complaints of neck pain and coccydynia were related to claimant's December 2, 2016 work injury. Dr. Mooney recommended a neuropsych and ENT exam before rating additional injuries due to the December 2, 2016 injury. (Ex. B, p. 11) Dr. Mooney provided an impairment rating for the spine of 20 percent to the whole person and an additional 5 percent for coccydynia pain. (Ex. B, p. 11) Dr. Mooney did not recommend any restrictions and stated that the functional capacity examination that found that claimant could do heavy work was accurate. (Ex. B, p. 12)

I find claimant is limited to lifting above his head no more than 25 pounds on a frequent basis. He should avoid frequent twisting or holding his neck in an awkward position. Claimant cannot sit for extended time periods. Claimant's most relevant vocational history shows that he has performed carpentry and sheetrock work. Much of that work involves overhead work and working on ladders. Claimant does not have a restriction of no work on ladders, however given his experience with vertigo and the fall from scaffolding, claimant has limited his work on ladders. I find that claimant has a 50 percent loss of earning capacity due to his December 2, 2016 injury.

Claimant has requested costs consisting of the \$100.00 filing fee and \$97.74 court reporter fee for claimant's deposition. (Ex. 6, p. 1)

I find claimant's weekly gross income to be \$1,200.00 and that he was single and entitled to one exemption at the time of his injury. I find claimant's weekly workers' compensation rate is \$688.76.

## RATIONALE AND CONCLUSIONS OF LAW

### **Extent of permanent disability**

The parties have stipulated claimant has a permanent disability due to an injury that arose out of and in the course of his employment. The parties stipulated claimant's injury is an industrial disability. The parties do not agree concerning the extent of claimant's 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, 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 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).

Claimant has worked as a carpenter for many years. While he did some janitor work while he lived in Arizona, it was many years ago. Claimant was self-employed as a carpenter for many years and became a working carpentry foreman at McKee Contracting within a year of his injury. Claimant's age and education are not positive factors concerning his industrial base. Claimant is limited to occasional lifting above his head of weight to around 50 pounds by the FCE. Considering claimant's neck pain, he is limited in frequent twisting of his neck. The coccyx pain limits the ability of claimant to be able to sit. The industrial disability ratings to the whole body by both Dr. Mooney and Dr. Bansal are relatively high. Claimant has been found eligible for SSDI.<sup>1</sup>

Claimant has been terminated by the employer. Claimant has not sought work after he was awarded SSDI. Claimant cannot return to his work as a carpenter. The FCE noted limitations in claimant's ability to work overhead. Dr. Mooney did not include those limitations when he opined claimant had no restrictions. Considering all of the factors of industrial disability, I find that claimant has a 50 percent industrial disability. This entitles claimant to 250 weeks of permanent partial disability benefits.

### **Costs**

As claimant has generally prevailed in this case, I award claimant costs for the filing fee of \$100.00 and for the deposition transcript of \$197.74.

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<sup>1</sup> A finding of total disability by the Social Security Administration is not binding on this agency, however is relevant evidence.

ORDER

Defendants shall pay claimant two hundred fifty (250) weeks of permanent partial disability benefits commencing on August 23, 2018 at the weekly rate of six hundred eighty-eight and 76/100 dollars (\$688.76).

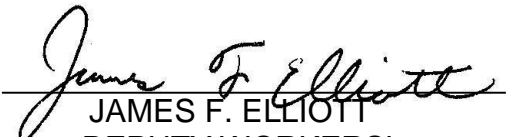
Defendants shall pay claimant costs of two hundred ninety-seven and 74/100 dollars (\$297.74).

Defendants shall have credit for benefits previously paid.

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).

Signed and filed this 6<sup>th</sup> day of March, 2020.

  
JAMES F. ELLIOTT  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Jacob J. Peters (via WCES)

Kent M. Smith (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.