BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RODNEY HOLMES,

Claimant,

vs.

IOWA SELECT FARMS, LLP,

Employer,

and

AMERICAN ZURICH INSURANCE COMPANY,

Insurance Carrier,
Defendants.

FILED
AUG 20 2015
WORKERS COMPENSATION

File No. 5048554

ARBITRATION DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Rodney Holmes, claimant, filed a petition in arbitration seeking workers' compensation benefits from Iowa Select Farms and its insurer American Zurich Insurance Company, as a result of an injury he sustained on April 27, 2012 that arose out of and in the course of his employment. This case was heard in Des Moines, Iowa and fully submitted on August 15, 2015. The evidence in this case consists of the testimony of claimant and William Foley and claimant's exhibits 1 through 12 and defendants' exhibits A through R. Both parties submitted briefs.

The defendants did not obtain a court reporter for the hearing as required by the hearing assignment order. The parties agreed that the matter could be digitally recorded and the recording is the official record of this proceeding.

ISSUES

Whether the alleged injury is a cause of permanent disability and, if so;

The extent of claimant's disability.

Whether claimant is entitled to payment of an independent medical examination.

Assessment of costs.

STIPULATIONS

The stipulations contained in the hearing report are accepted and incorporated into this decision as if fully set forth. The weekly rate of $387.35 is accepted as being the correct rate. Healing period benefits were not in dispute. The parties agreed that defendants were entitled to a credit for payment of 25 weeks of permanent partial disability benefits at the rate of $387.35.

FINDINGS OF FACT

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

Rodney Holmes, claimant, was 55 years old at the time of the hearing. He graduated from high school in 1978. Claimant's post-high school work history is set forth in Exhibit 7, pages 3 – 5. Claimant's past work generally required him to lift heavy weights on a regular basis.

Claimant ran a floor covering business starting in 1992 and continued to operate this business until his work injury on April 27, 2012. Claimant had reduced the amount of floor work he was doing before his accident due to knee conditions.

Claimant started work for Iowa Select Farms on November 28, 2011. He was hired as a Wean Truck Driver. Claimant was required to pick up his truck and trailer and drive to some farms to pick up pigs and deliver them to other farms. As part of this job claimant was driving on Interstate 80 in Des Moines when he was hit by another driver. The other driver hit the trailer claimant was pulling. Claimant felt an immediate pain in his lower back at the time he was hit. The police and an ambulance showed up at the accident scene. The other driver, Mr. Rodrigues was ticketed. (Exhibit D, page 1) Claimant, on that day, filled out an accident form that noted back and possible neck injury. (Ex. C, p. 1) Claimant declined to take the ambulance and drove the truck and trailer back and went to the Decatur County emergency room. Claimant was complaining of lower back pain. Barbara White, D.O., diagnosed "Low back spasm" and informed clamant that tomorrow every bone in his body would ache. (Ex. 1, p. 1)

Claimant went to his family physician, Larry Richards, M.D., on April 30, 2012. Claimant had developed a stiff neck and low back pain. Dr. Richards' analysis was "Musculoskeletal aggravated on top of DJD." (Ex. 2, p. 1)

Claimant was referred by defendants to see Daniel Miller, D.O. Dr. Miller provided a 10-pound lifting restriction. (Ex. E, p. 1; Ex. 3, pp. 1 – 2) Iowa Select Farms did not have work available with that restriction. Claimant was off work for about 100 days and received workers' compensation benefits during this time. Claimant testified that Cathy Reiken, a case manager, asked him if he wanted to return to work.

Claimant agreed. It appears that Ms. Reiken contacted Dr. Miller and obtained permission for claimant to return to modified duty work.

On July 11, 2012, Dr. Miller modified claimant's restrictions to no lifting over 30 pounds or pushing or pulling more than 60 pounds. (Ex. 3, p. 7) Dr. Miller stated on July 25, 2012, he felt claimant's pain from degenerative back disease and that he was surprised that claimant had not had real improvement. (Ex. 3, pp. 7, 11)

On August 16, 2012, Cassim Igram, M.D., examined claimant. He reviewed the results of the MRI. Dr. Igram did not believe clamant was a surgical candidate. (Ex. 5, p. 3)

On August 23, 2012, Dr. Miller noted that claimant had returned to modified duty at work and was still sore. He returned claimant to full duty. (Ex. 3, p. 14) On September 20, 2012, claimant reported to Dr. Miller he was sore at work, that his back pain was greater than his hip pain, and that he was having trouble sleeping at night due to his pain. (Ex. 3, p. 16) On October 18, 2012, Dr. Miller found claimant at maximum medical improvement (MMI) and, discharged claimant form his care. He also provided a five percent impairment rating for the lumbar spine injury. (Ex. F, p. 2; Ex. M, p. 2)

Claimant was working for Iowa Select Farms in his same position as a Wean Truck Driver at the time of the hearing. Claimant testified that he had difficulty with a two-deck trailer and had been assigned a single deck trailer. Claimant had increased back pain when he had to move the second deck. The week of the hearing claimant was assigned a two-deck trailer. He requested he be assigned a single deck trailer due to back pain.

William Foley, chief financial officer for Iowa Select Farms, testified at the hearing. Mr. Foley stated that new employees are instructed to report injuries. Mr. Foley, whose responsibilities include workers' compensation, did not learn of claimant's injury until he was contacted by State Farm Insurance in May 2012. Mr. Foley reported that claimant returned to work without restrictions on August 12, 2014. Iowa Select Farms paid claimant a five percent industrial disability payment.

On May 31, 2013, Robert Jones, M.D., performed an independent medical examination. His impression was,

> IMPRESSION:
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> 1. Cervical strain.
> 2. Lumbar strain.
> 3. Hearing loss of the right ear.

(Ex. N, p. 2) (Claimant is not claiming a hearing loss in this proceeding.) Dr. Jones recommended restrictions of lifting 50 to 60 pounds occasionally and 30 pounds

frequently. I find that these are the claimant's lifting restrictions. Dr. Jones provided a 5 percent impairment rating. (Ex. N, p. 2)

Claimant's work history prior to his current employment shows that he has had a significant amount of lifting as part of his work. Currently claimant is back at work as a Wean Truck Drive. Claimant credibly testified that he has difficulty with aspects of doing his work, when he has to use a trailer with two decks. Dr. Miller returned claimant to work without restrictions. Dr. Jones recommended a lifting restriction of 50 to 60 pounds occasionally and 30 pounds frequently. Most of claimant prior work is precluded. His work injury has adversely affected his ability to perform his prior self-employment in installing floors. While claimant's knee conditions also have reduced his ability to do flooring, his back condition has also contributed to his inability to engage in this type of work. Claimant has a long work history and has shown strong motivation to work both before and after his injury. He is 55 years old, which is not a positive factor in the labor market. He is not a surgical candidate. Claimant is current taking prescriptions for his back. I find that claimant has suffered a 25 percent loss in earning capacity.

REASONING AND CONCLUSIONS OF LAW

The parties have stipulated claimant had an injury that arose out of and in the course of his employment. The parties did not agree as to the extent of his permanent impairment. I find that claimant has suffered a permanent impairment as a result of his April 27, 2012 motor vehicle accident. The claimant's injury is to the whole body under Iowa Code section 85.34(2)(u).

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.

I found previously that claimant had a 25 percent loss of earning capacity. This entitles claimant to 125 weeks of permanent partial disability benefits. This finding specifically acknowledges that claimant is currently working for Iowa Select Farms and the award of permanent partial disability would have been higher if he was not working at Iowa Select Farms.

The next issue is whether the claimant is entitled to payment of the independent medical evaluation with Dr. Jones.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

The defendants had obtained an evaluation of the claimant's permanent impairment from Dr. Miller, with which the claimant did not agree. The claimant is entitled to an independent medical evaluation pursuant to Iowa Code section 85.39. The charges from Dr. Jones are well within the typical charges for an independent medical evaluation, and the claimant is entitled to reimbursement of $1,000.00 for his independent medical evaluation with Dr. Jones.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant one hundred twenty-five (125) weeks of permanent partial disability benefits at the weekly rate of three hundred eighty-seven and 35/100 dollars ($387.35) per week commencing October 18, 2012.

Defendants shall have a credit for indemnity benefits previously paid.

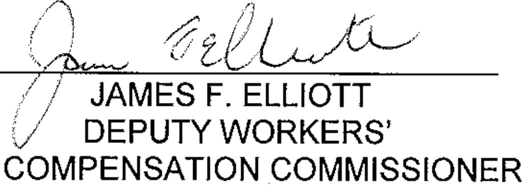
Defendants shall pay the one thousand and 00/100 dollar ($1,000.00) fee for the independent medical examination.

Defendants shall pay the cost of the filing fee in the amount of one hundred dollars ($100.00).

All past due amounts shall be paid in a lump sum with interest as provided by law.

Defendants shall file subsequent reports of injury (SROI) as required by this agency.

Signed and filed this 20th day of August, 2015.



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DEPUTY WORKERS'
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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.