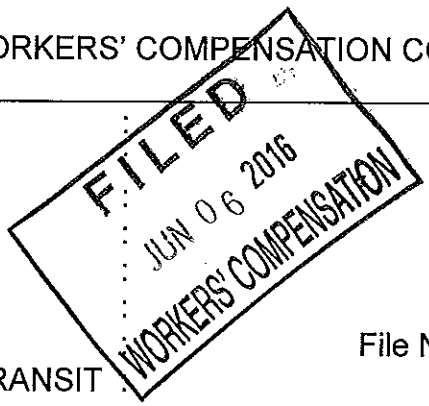
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



CARROL WHEATCRAFT,

Claimant,

vs.

HEART OF IOWA REGIONAL TRANSIT AGENCY,

Employer,

and

ACCIDENT FUND GENERAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5049970

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Carrol Wheatcraft, has filed a petition in arbitration and seeks workers' compensation benefits from Heart of Iowa Regional Transit Agency (a/k/a HIRTA), employer, and Accident Fund General Insurance Company, insurance carrier, defendants. This matter was heard in Des Moines, Iowa and fully submitted on June 1, 2016. Proffered exhibits 1 through 9 and A through J were accepted into the record. Administrative notice was taken of the administrative file. Claimant and David Hansen testified at the hearing. The stipulations contained in the hearing report are accepted. Both parties submitted briefs.

ISSUES

The parties have submitted the following issues for determination:

1. Whether the alleged injury is the cause of any permanent disability and if so, the extent;

2. Whether claimant is entitled to the costs of a functional capacity examination, a vocational report, filing fees and services fees.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

The claimant, Carrol Wheatcraft, was 65 years old at the time of hearing. The claimant graduated high school. He has no other formal education. Claimant was in the National Guard from1969 through 1973 and was honorably discharged. (Exhibit 8, page 58) Claimant was a state-wide director of the Iowa Good Sams Club for a while after retirement. Claimant has a recreational vehicle, a fifth wheel, which he currently uses. Claimant testified that he is not computer literate and that he is very limited in his use of computers.

From 1973 through 1979 claimant worked the following jobs:

- Montgomery Ward – (Department Manager – flooring installation & furniture sales)
- Hiland Potato Chips, located in Des Moines, IA (Route Sales)
- Laurel Coop Gas Station (Service Station Attendant)
- Van Dusseldorp Sand and Gravel (Truck Driver – Operating Gravel Truck)

Hansen Electric/Plumbing & Heating (Service and Installation work)

(Ex. 8, p. 59)

From 1979 through 2009 claimant worked for Anderson Erickson Dairy. While he worked a number of jobs for this company, he primarily was a route driver using a semi-truck. He retired from this position.

After retirement claimant decided to get back in the workforce and worked for RANDS trucking. In this position he drove a truck delivering windows. (Ex. 8, p. 59) Claimant left this job when his employer assigned him to be on the road overnight more often than he wanted to be away from home and also to ensure his wages were under the maximum he could earn and not lose Social Security retirement income.

Claimant started working for the Heart of Iowa Regional Transit Agency in September 2012. At the time of the hearing claimant was still working for Heart of Iowa Regional Transit Agency. Claimant is a para-transit driver. He provides transportation to adults with disabilities and the elderly. He works part-time. Until recently he was working 22 - 25 hours a week. Due to a decline in ridership, claimant was working 18 - 19 hours per week. He is earning $10.25 per hour.

Claimant has had some prior workers' compensation claims. He had right shoulder surgery in 1999 due to an alleged work injury and settled this claim in 2002. In 2003 claimant had left total shoulder surgery due to an alleged work injury and settled the claim in 2004. In 2006 claimant had total right shoulder surgery due to an alleged work injury and settled this claim in 2009. (Testimony of claimant and Exhibits A and B)

In January claimant was at work, slipped on some ice and fell face down. Claimant testified he reported the injury on that date at his work site to Melissa Hansen. David Hansen, Safety Director and claimant's supervisor testified that claimant reported the injury on January 27, 2015. As notice is not a legal issue in this case, I do not find this difference material to any issue in dispute in this case.

Claimant went to his chiropractor after his fall complaining of pain in the left and right side of his neck. (Ex. 1, p. 1) Claimant also went to Kyle Galles, M.D. on February 12, 2015. Dr. Galles was the surgeon who had performed claimant's shoulder replacement surgeries. No shoulder injury was discovered due to the fall, but some neck related changes were noted. (Ex. 2, p. 5) On March 17, 2016 Dr. Galles wrote to defendants' attorney. He stated that claimant's fall of January 2015 did not cause any additional damage or limitations to his shoulder. He was concerned that he may have an irritation of his neck, a condition he did not evaluate, and recommended that if claimant's symptoms persist he should seek additional care. (Ex. G, p. 1)

On March 23, 2015 Todd Harbach, M.D. examined claimant. Dr. Harbach wrote,

> The patient's EMG/nerve conduction velocity test demonstrated not only acute LEFT C6 radiculopathy but also LEFT carpal tunnel syndrome. There is a 5 ms motor delay across the LEFT carpal canal. Therefore, he has a double crunch-type injury. I offered him a cervical decompression and fusion as well as another option for treatment in the pain clinic with injections or lastly trying cervical traction/physical therapy. He has opted to have the cervical surgery, including decompression and fusion with anterior plating and allograft bone. This is a reasonable request and we will work on getting him cleared medically and scheduled after approval from Worker's Comp. I gave him a note for work that states he can continue his full duties as he has been doing all along. I will see him back after surgery.

(Ex. 3, p. 10) On May 7, 2015 Dr. Harbach responded to an inquiry from the defendants.

He wrote,

> Therefore, based on the review of records that I have available and with a reasonable degree of medical certainty, I believe that his fall on January 6, 2015, exacerbated a preexisting cervical complaint and also caused a disk herniation that is causing his radicular right arm pain. I still

> stand by recommendation for surgery because of his radicular component of his pain and the documented changes on EMG. These were not present at his treatment for his neck pain prior to his fall on January 6, 2015.

(Ex. 3, p. 11)

On June 2, 2015 Dr. Harbach performed a C5-C6 anterior cervical decompression and fusion and used a tricortical allograft. (Ex, 3, pp. 12 - 16) On July 1, 2015 Dr. Harbach released claimant to return to work full duty. (Ex. F, pp. 2, 3) On November 6, 2015 Dr. Harbach provided a 25 percent permanent partial impairment to the whole person. (Ex. 3, p. 20)

On December 18, 2015 claimant was complaining about his continuing pain to Dr. Harbach. Dr. Harbach wrote,

> The patient continues to do well but as I told him before the surgery, he had lots of cervical facet disease and still has the pain (illegible) to that. I think that was all part of his aggravating injury and should still be covered with his worker's comp insurance. Because he does not have resolution of the symptoms, I recommend him going to the pain clinic to see Dr. Rayburn for consideration of cervical facet blocks and possible facet denervation. He has failed multiple nonsteroidals and therapy.

(Ex. 3, p. 22)

On April 8, 2016 Dr. Harbach wrote that he believed the restrictions that were identified in the February 22, 2015 functional capacity examination (FCE) were due to the claimant's shoulder injuries. He wrote, "The patient also could still have some mild discomfort in his neck, but his neck is stable and should not require any permanent restrictions." (Ex. H, p. 1)

An FCE was conducted on February 22, 2015. The FCE was deemed valid and Marc Vander Velden, DPT recommended restrictions on frequent lifting to shoulder height 9 pounds and 5 pounds overhead. He was able to work up to 10 hours per day and stand up to 4 hours. (Ex. 5, p. 27) Claimant was billed $1,100.00 for this report. (Ex. 5, p. 40)

I find that the restrictions in this FCE are claimant's restrictions due to his injury of January 6, 2015.

On March 10, 2016 claimant was seen by John Rayburn, M.D. for neck pain. Claimant was having constant neck pain. (Ex. 6, p. 41) Dr. Rayburn recommended nerve blocks. (Ex. 6, p. 43)

On February 18, 2016 Sunil Bansal, M.D. examined claimant. March 22, 2016 Dr. Bansal issued an IME report. (Ex. 7, pp. 45 – 56) Dr. Bansal diagnosed claimant

with aggravation of the cervical spondylosis with C5 - C6 herniation and status post C5 – C6 anterior cervical decompression discectomy and fusion. He stated that claimant's left shoulder pain was from the C5 – C6 disk. (Ex. 7, p. 52) Dr. Bansal assigned a 26 percent whole person impairment rating. He agreed with the restrictions of the FCE on February 22, 2016. (Ex. 7, p. 55)

On March 23, 2016 Phil Davis, M.S. issued a vocational assessment report. Mr. Davis concluded that claimant was not able to perform the majority of his past work. (Ex. 8, p. 62) Mr. Davis opined that claimant has lost the ability to perform full time competitive employment equivalent to the quality and quantity of work prior to his January 6, 2015 injury. (Ex. 8, p. 63) Claimant was billed $1,450.00 for this report. (Ex. 8, p. 64)

On March 29, 2016 Rene Haigh, M.S., C.R.C., issued a vocational assessment. (Ex. I, pp. 1 – 24[1]) She did not interview claimant. She opined that using the functional restriction of Dr. Harbach claimant suffered no vocational loss. Using the restriction of the FCE and Dr. Bansal Ms. Haigh opined that there were positions claimant could perform such as security guard, taxi/chauffer or customer service. (Ex. I, pp. 13, 14) Using the restrictions from Dr. Galles, she opined claimant could perform jobs such as over-the-road and local truck driving, food preparation, driver, and sales. (Ex. I, p. 18)

David Hansen testified at the hearing. He is the security director at HIRTA and is claimant's supervisor. He testified that claimant reported the injury to him on January 27, 2015 and at that time a report of injury was filed. He said that claimant was able to perform his job and does not appear to have any difficulty performing his work.

On the date of injury the claimant was married, entitled to two exemptions. The parties stipulated that claimant's weekly rate is $206.75. That rate is consistent with the rate book in effect at the time of the injury and is accepted. The commencement date for permanent partial disability is July 2, 2015.

REASONING AND CONCLUSIONS OF LAW

The parties stipulated that claimant has a permanent partial disability to the whole body as a result of the January 6, 2015 fall at work. They dispute the extent of his 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 the terms of percentages of the total physical and mental ability of a normal man."

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[1] Page 11 from the original report is missing.

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.

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 the work injury is a cause of some degree of permanent industrial disability. Consequently, this agency must measure claimant's loss of earning capacity as a result of this impairment.

In 2004, Iowa Code section 85.34(2)(u) was amended to read as follows:

> In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs "a" through "t" hereof, the compensation shall be paid during the number of weeks in relation to five hundred weeks as reduction in the employee's earning capacity caused by the disability bears in relation to the earning capacity that the employee possessed when the injury occurred.

This change adopts the so-called "fresh start rule." The fresh start rule is based upon the premise that a worker's earnings in the competitive labor market at the time of a work injury are reflective of that worker's earning capacity. If that worker had any physical or mental impairment or any other socio-economic impediment limiting his or her employment prior to a work injury, the impact of that impairment or impediment upon that worker's earning capacity, absent evidence to the contrary, has already occurred and is reflected in his earnings at the time of injury.

Industrial loss now is no longer a measure of claimant's disability from all causes after which we then apportion out non-work causes and leave in work-related causes under the full responsibility rule. The percentage of industrial loss now is the loss of earnings capacity from what existed immediately prior to the work injury. This means that an already severely disabled person before a work injury can have a high industrial loss because the loss is calculated in all cases from whatever his earning capacity was just before the injury and what it was after the injury, not the loss as compared to a healthy non-disabled person. In other words, all persons start with a 100 percent earning capacity, regardless of any prior health conditions.

The rationale for this approach is that in Iowa as well as other states, the employer's liability for workers' compensation benefits is dependent upon that person's weekly rate of compensation, which is a portion of the person's weekly earnings at the time of injury. Consequently, the impact, if any, of any prior mental or physical disability upon earning capacity is automatically factored into any award of compensation for a work injury and there is no need to further apportion out that impact from any workers' compensation award. If the injured worker's wages are high, despite his prior condition, then the condition apparently has not negatively impacted his earning capacity. If they are low, it is likely they are low because of his prior condition and consequently, the employer's liability is low because of the resulting low rate of compensation.

Apportionment of a permanent partial disability claim is improper under current law due to Iowa's adoption of the fresh start rule and modified full responsibility rule in successive disability cases. Roberts Dairy v. Billick, 861 N.W.2d 814 at 822 (Iowa 2015) (analyzing method of apportionment under section 85.34(7)(a) for successive employers); Steffan v. Hawkeye Truck & Trailer, File No. 5022821 (App. September 9, 2009). See also; Warren Properties v. Stewart, 864 N.W.2d 307 (Iowa 2015) (analyzing method of apportionment under section 85.34(7)(a) for concurrent employers).

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.

As I found that claimant has restrictions as set forth in the FCE there is a significant reduction in the claimant's earning capacity.

Dr. Harbach provided a 25 percent rating based upon the AMA Guides to the Evaluation of Permanent Impairments, Fifth Edition. Dr. Bansal provided a 26 percent rating based upon the Guides. At the time of the hearing claimant was still receiving injections for his neck pain.

He is currently employed in a part-time job, the same job he had when he was injured. His work is not accommodated, he enjoys his work and his employer is satisfied with his work. Given his current limitations he cannot perform over-the-road trucking. Unless he has no-touch loads and did not have to crank a dolly or pull a tarp he cannot do his previous driving work. I find that due to the January 6, 2016 work injury claimant has a 35 percent loss of earning capacity. Claimant is found to have a 35 percent industrial disability entitling him to 175 weeks permanent partial disability benefits.

As claimant has prevailed in this claim, in my discretion I find that he is entitled to be awarded the filing fee and certified mailing cost for serving the original notice and petition pursuant to 876 IAC 4.33 (3) and (7).

Claimant has requested reimbursement for the FCE and vocational report. I find that the costs are reasonable. 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. Dec. 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. Dec. July 21, 2009).

I award the cost of the FCE of $1,100.00 and the cost of the vocational report of $1,450.00 to the claimant.

ORDER

THEREFORE IT IS ORDERED:

That the defendants shall pay the claimant one hundred seventy-five (175) weeks of permanent partial disability commencing July 2, 2015 at the weekly rate of two hundred six and 75/100 dollars ($206.75).

Defendants shall pay costs as set forth in this decision pursuant to rule 876 IAC 4.33.

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30 with subsequent reports of injury pursuant to rule 876 IAC 3.1.

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

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFE/sam

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.