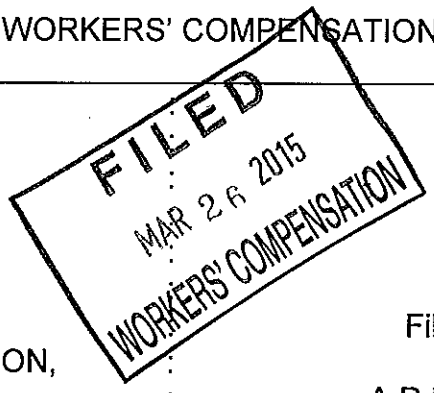
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



ENRIQUE JUAREZ,

Claimant,

vs.

SIVYER STEEL CORPORATION,

Employer,

and

WESTERN NATIONAL MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5042685

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Enrique Juarez, claimant, filed a petition in arbitration seeking workers' compensation benefits from Sivyer Steel Corporation (Sivyer) and its insurer, Western National Mutual Insurance Company, as a result of an injury he sustained on October 29, 2012 that arose out of and in the course of his employment. This case was heard in Des Moines, Iowa and fully submitted on October 1, 2014. The evidence in this case consists of the testimony of claimant, Cecilia Patlan, Corwyn Sperry, Jennifer Collins, joint exhibits 1A through 5E, claimant's exhibits 1 through 5 and 7 through 12, and defendants' exhibits A through M.

ISSUES

1. The extent of claimant's permanent disability.
2. Whether claimant is an odd-lot worker.
3. The claimant's gross earnings for calculation of his weekly rate.
4. Claimant's weekly rate.
5. Whether there has been an underpayment of permanent partial disability benefits.

6. Assessment of costs.

The parties stipulated claimant suffered an injury that arose out of and in the course of his employment on October 29, 2012. Temporary benefits are not in dispute. The defendants had been paying permanent partial benefits since July 15, 2013 up to the time of the hearing at the weekly rate of $424.70. The parties agree that they should receive credit for these payments and any subsequent payments. The parties also agreed that the commencement date for permanent benefits is July 15, 2013.

FINDINGS OF FACT

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

Enrique Juarez, claimant, was 29 years old at the time of hearing. He was born and raised in Mexico. Claimant went to the sixth grade in Mexico and has no additional education. Claimant speaks only a little English. He can read and write in Spanish. He has been in the United Stated since 1999. At the time of his deposition in July 2014 claimant did not have a driver's license. (Exhibit 10, page 9)

Claimant's work history in the United States consists of working as a meat cutter at Tyson from 2002 – 2003 and working for a temp agency for approximately six months packing shampoo. He began his employment with Sivyer in 2003. (Ex. 7, p. 75) Claimant was about 19 years old when he started working for Sivyer. (Transcript p.19)

Sivyer is a steel foundry. On October 29, 2012 claimant was working as a mold closer. On that day claimant was hit by a steel frame that weighed 500-600 pounds. He was hit in the left upper back before the frame hit his ankle. (Ex. 1A, p. 11) Claimant was taken by ambulance to a local hospital and then flown to the University of Iowa Hospitals and Clinics (UIHC). Claimant had an amputation on his left leg below the knee on October 29, 2012. (Ex. 1A, p. 8) Claimant was discharged from the hospital on October 31, 2012.

Claimant was allowed to return to work in a sedentary position as of January 22, 2013. (Ex. 1A, p. 28) A physical therapy note of April 9, 2012 from the UIHC noted that claimant complained about left-sided lower back and buttock pain since his injury. (Ex. 1A, p. 34) On July 2, 2013 Matthew Karam, M.D. released claimant from formal physical therapy. (Ex. 1A, p. 40) Dr. Karam provided restrictions of being off his feet every two hours for one hour. He was allowed to work eight hours. (Ex. 1A, p. 42) On October 18, 2013 Dr. Karam determined claimant to be at maximum medical improvement. He gave claimant a rating of 70 percent for the lower extremity and 28 percent to the whole body. He provided restrictions of "...no ladders, no uneven ground." (Ex. 1A, p. 43) On April 14, 2014 Dr. Karam wrote that he agreed with the restrictions provided by Robin Sassman, M.D. on February 7, 2013. (Ex. 2, p.12) On June 3, 2014 Dr. Karam examined claimant. He also reviewed a functional capacity examination (FCE) and adopted those restrictions for the claimant. (Ex. 1A, p. 53)

The FCE Dr. Karam was referring to was performed on May 19, 2014. This FCE noted claimant could return to activities in the Medium Duty, as classified by the U.S. Dept. of Labor. He noted claimant would have difficulty with balance and squatting. He also reported claimant was feeling phantom pain after the FCE and that his back and waist were tired. (Ex. 3, pp. 15 – 17) On May 30, 2014 Curtis Witt, PT wrote a note that other than being exposed to heat, he felt claimant could return to work at Sivyer. (Ex. 3, p. 18) He specifically identified work in the following areas he could perform,

1. Core Room
2. Molding 256
3. 220 Reporting
4. Fork Truck Driver
5. Brinnel
6. Tool Room – which is the current position that he is performing

(Ex. 3, p. 19)

Claimant received continuing care from physicians at the UIHC for his amputation. Initially claimant received mental health counseling from John Brooke, Ph.D. in the first months following his accident. (Ex. 3, pp. 1 -7) Defendants provided a counselor who spoke Spanish in April 2013. On April 19, 2013 Maria Buendia-Lobato, LMHC saw claimant, and her impression was claimant had Posttraumatic Stress Disorder (PTSD) and Major Depressive Disorder (MDD). (Ex. 4D, p. 2) At the time of the hearing claimant was receiving mental health counseling with a bilingual counselor. Claimant also received psychiatric care at the UIHC. (Ex. 5E, pp. 1 – 40) In June 2014 Deborah Mahoney, ARNP noted that claimant reported mild improvement but continued to have worries and depression. (Ex. 5E, p. 35) On July 7, 2014 ARNP Mahoney agreed that claimant was medically stable and his current psychiatric treatment was in a maintenance phase. She did not place any work limitations on claimant from a mental health perspective. (Ex. 5E, p. 39)

At the time of the hearing claimant had a prosthetic leg and foot. He was going to receive a new prosthetic shortly after the hearing. The new prosthetic has some movement in the ankle. (Tr. p. 28)

Claimant applied for Social Security disability and was denied on February 28, 2013. (Ex. L, pp. 1 – 3)

The parties dispute whether the week of August 11, 2012 should be used in calculating claimant's average weekly rate. [Compare Ex. 7, p. 79 and Ex. G, p. 5] Claimant testified most of the time he worked more than 40 hours per week. When

questioned by his attorney he agreed that it was unusual for him to work less than 40 hours a week. (Tr. p. 31; Ex. 10, p. 13) Claimant testified that since his injury he rarely works more than 40 hours per week, but before his injury he commonly worked more than 40 hours per week. (Tr. pp. 41, 48; Ex. 10, p. 18) Claimant could not remember why he worked less than 40 hours in the week of August 11, 2012. (Tr. p. 49) The defendants put on no testimony to counter claimant's testimony, and the wage records submitted do not show that claimant customarily worked less than 40 hours per week. There is only one week shown with less than 40 hours. (Ex. G, p. 5; Ex. 7, p. 79) Based upon the evidence presented at the hearing and in evidence, I find claimant customarily worked more than 40 hours per week. Claimant's average weekly wage is $668.81, and his weekly workers' compensation rate is $434.10 per week.

Claimant testified that he currently has ghost [phantom] pain in his left foot. He can feel tingling and cramping in his amputated limb. (Tr. p. 33) Claimant also described pain in his back after standing for a couple of hours and a skin condition where the prosthesis and his leg meet. Clamant also is receiving treatment for anxiety and depression. (Tr. p. 36)

When claimant came back to work at Sivyer he was assigned light duty. Claimant began working in the tool room at Sivyer in June 2013. Claimant works as an assistant to Steve Meana. His work in the tool room is to fix tools that are used for grinding and handing out tools and grinding wheels. He is able to sit or stand in this job. In his job in the tool room claimant is not exposed to extremely hot temperatures. Since his accident he is not to be exposed to such heat. (Tr. p. 39) Claimant testified that his position in the tool room is not permanent. Sivyer is a union shop, and permanent positions need to be bid on. Claimant has not bid for his position in the tool room. (Tr. p. 41)

Steve Meana's deposition is part of the record. His position with Sivyer is powerhouse mechanic. (Ex. 11, p. 86) Mr. Meana is also the union president. Mr. Meana said claimant started working with him in the tool room in June 2013. Mr. Meana said that the claimant was his assistant. He said that claimant would leave work for medical appointments once or twice a week. (Ex. 11, p. 6) Mr. Meana said that it was his understanding that claimant's position as his assistant was not a permanent position and if the claimant leaves the position it would not be filled. (Ex. 11, p. 6) Mr. Meana stated that he believes that the job of his assistant, which was filled by the claimant, was created specifically for the claimant. (Ex. 11, p. 10) Mr. Meana thought that claimant might be able to perform some jobs at Sivyer such as in the core room, sweeping and Brinnel testing. (Ex. 11, p. 13)

Claimant admitted on cross examination that the vocational counselor he was sent to by his attorney did not work with him to find different jobs. (Tr. pp. 47, 48) Claimant from time to time works alone in the tool room when Mr. Meana is off doing union business. He agreed that he has learned new skills while working in the tool room. Claimant testified that he was aware there was a job posting in the core room

that he did not apply for. He thought there were some jobs in the core room he could do and some he could not. Claimant talked to Mr. Meana, the union president, about whether he could apply for the position. Claimant said Mr. Meana talked to HR and was told that HR was not sure if he could apply at that time. (Tr. p. 56) Claimant stated that he thought he might be able to do the sweeper job or Department 236 molding at Sivyer. (Tr. p. 59) Claimant said he did do a trial in the core room for about seven hours and afterword was tired and felt pain in his left foot. (Tr. p. 68) He also worked for less than a day in Department 256. I find that there are positions claimant can perform that are within the restrictions adopted by Dr. Karam in June 2014 and identified by his physical therapist.

Corwyn Sperry, Safety Manager, testified. He said that he has been working with claimant to get him back at work. (Tr. p. 78) He testified that as soon as Sivyer received restrictions he was working on placement of the claimant.

Jennifer Collins, the human resources manager, was the last witness to testify. She said that claimant can bid on any job in the plant and that claimant had not done so to her knowledge. She was not aware of anyone in her department that would have told Mr. Meana or claimant that he should not bid on a job. Ms. Collins testified that claimant's job in the tool room was a permanent job at Sivyer.

On January 14, 2014 Dr. Sassman performed an independent medical examination (IME) of claimant. Claimant reported to Dr. Sassman he worked 50+ hours. (Ex. 1, p. 2) Her diagnoses were,

1. Left lower extremity below-knee amputation with continued stump pain and phantom pain.

2. Left knee pain and instability, concern for internal derangement.

3. Left SI joint pain secondary to gait change as a result of #1.

4. Left lower extremity contact dermatitis from the prosthetic sleeve.

(Ex.1, p. 6) Dr. Sassman recommended an MRI of the left knee[1]. She also recommended a second opinion concerning the pain at the amputation site and suggested he may want to increase his gabapentin medication. She recommended followup with the prosthetic supplier to use a different sleeve. She also recommended some physical therapy and continued mental health care. (Ex.1, p. 7) She did not believe claimant was at MMI. She provided a rating of 36 percent to the whole body. (Ex. 1, p. 8)

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[1] This was completed on March 30, 2014 and showed mild to moderate tricompartmental osteoarthritis. (Ex. 1A, p. 48; Ex. B, p. 1)

Camilla Frederick, M.D. examined claimant on February 14, 2014. She recommended an articulating prosthetic for claimant, suitable to his work environment. On March 13, 2014 Dr. Frederick recommended additional physical therapy. On May 2, 2014 she noted that claimant was walking with a more normal gait and that PT was going to evaluate work claimant might perform. (Ex. 2B, p. 22)

Lewis Vierling, MS, NCC, NCCC, CRC, CCM provided a vocational evaluation of claimant on July 6, 2014. He opined claimant has a loss of access to 90 percent of the Specific Occupational Categories he was qualified for and was part of his pre-injury profile. (Ex. 4, p. 22) Mr. Vierling assumed for his report that claimant is limited to light work, based upon Dr. Sassman's IME and an earlier opinion of Dr. Karam. Dr. Karam modified his opinion after reviewing the May 9, 2014 FCE that found claimant could perform medium work. This May 9, 2014 FCE appears valid, and I find that the restrictions listed in this FCE are claimant's physical restriction. Because Mr. Vierling used restrictions that I do not find are the claimant's restrictions, I cannot agree with his ultimate conclusion about the loss of 90 percent of his Specific Occupational Categories. While I cannot adopt his ultimate conclusions, his report does illuminate the employment difficulties the claimant is facing.

Claimant's work in the tool room is more than just "make work", but it is less than a permanent position that has been reviewed and accepted by the union as a permanent position. It is not likely to exist as a position after claimant leaves that position. A number of jobs have been identified that claimant may be able to perform at Sivyer by the claimant, the employer, Mr. Meana and the physical therapist. Claimant was being fitted with a new prosthetic device at the time of the hearing. Claimant attempted a couple of brief periods at work to see if he could perform different jobs. Claimant testified that he had pain afterword, but it was not clear that the pain would keep claimant from performing the position or if the pain was partially a matter of work conditioning.

Claimant appears bright and well-motivated to support himself and his family. His limited English and education are negative factors for his ability to work.

From examination of all of the factors of industrial disability, I find the work injury of October 29, 2010 to be a cause of a 75 percent loss of earning capacity at this time.

CONCLUSIONS OF LAW

Claimant has asserted he is an odd-lot employee. In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id. at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

In this case, I found that claimant failed to establish that he is unemployable in the competitive labor market.

With respect to claimant's burden of persuasion on this issue, I found the vocational expert report in this case relied upon restrictions that were not the claimant's restrictions at the time of the hearing. Claimant, Mr. Meana and his physical therapist have identified positions he may be able to perform at Sivyer. There may also be similar work, not in a foundry that would not expose claimant to heat, climbing and uneven floors that he could perform. I find that these employment opportunities are not so limited in quality, dependability, or quantity to establish that a reasonably stable market for those positions does not exist. Therefore, I conclude that claimant failed to carry his burden of persuasion to establish that he is an odd-lot employee.

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.

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

I found earlier that claimant had a 75 percent loss of earning capacity. The claimant has an industrial disability of 75 percent. This entitles claimant to 400 weeks of permanent partial disability benefits.

In making this award I considered the fact that claimant was still employed at Sivyer and that if he had not been employed his award would have been greater.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6).

I found that the claimant's average weekly wage was $668.81, which resulted in a finding that claimant, as single with two dependents, is entitled to $434.10 per week in permanent partial compensation benefits.

Claimant has requested costs of $3,326.65. I find claimant is entitled to reimbursement of the filing fee ($100.00), service costs ($11.50) and deposition costs ($469.30). Using my discretion I award these costs.

Defendants have objected to payment of the cost of Mr. Vierling's report of $2,745.85. This agency has recognized that vocational reports are practitioners reports

that can be ordered paid under 876 IAC 4.33(6). While I did not adopt all of the findings of the report I find that the report was useful in determining claimant's industrial abilities. The claimant raised legitimate issues as to whether claimant was an odd-lot employee. I find that the costs are reasonable and award them to the claimant.

I do wish to comment and recognize how the employer, insurance carrier, claimant and union have worked together in assisting claimant after his traumatic accident. All parties have shown a high degree of flexibility. The parties are to be commended for their efforts.

ORDER

Defendants shall pay claimant three-hundred seventy-five (375) weeks of permanent partial disability benefits of four-hundred thirty-four and 10/100 dollars ($434.10) commencing July 15, 2013.

Defendants shall be credited for the payments they have made since July 15, 2013 at the rate of four-hundred twenty-four and 70/100 dollars ($424.70) per week.

Defendants shall make a corrective payment for the underpayment of the weekly rate.

Defendants shall pay claimant costs of three-thousand three-hundred twenty-six and 65/100 dollars ($3,326.65).

Defendants shall pay any past due amount in a lump sum with interest.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Signed and filed this 26th day of March, 2015.

JAMES F. ELLIOTT
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.