BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CLYDE PAUL GRAHAM, Claimant, vs. PIEPER, INC., Employer, and ACCIDENT FUND GENERAL INSURANCE COMPANY, Insurance Carrier, Defendants.	FILED JAN 09 2019 WORKERS COMPENSATION	File No. 5044226 ARBITRATION DECISION Head Note Nos.: 1803, 3701

STATEMENT OF THE CASE

Clyde Graham, claimant, filed a petition in arbitration seeking workers' compensation benefits from Pieper Inc., (Pieper), and its insurer, Accident Fund General Insurance Company, as a result of an injury he sustained on December 5, 2011, that arose out of and in the course of his employment. This case was heard in Des Moines, Iowa, and fully submitted on January 5, 2019. The evidence in this case consists of the testimony of claimant and Joint Exhibits 1 – 20.

The parties have stipulated that claimant has a low back injury that arose out of and in the course of his employment at Pieper. This injury occurred on December 5, 2011. Claimant has had two back surgeries and had a spinal stimulator implanted twice. As this is an admitted injury, I will not be detailing the medical evidence in the first few years after his injury. The extent of claimant's current impairment is the primary issue in this case.

ISSUES

1. The extent of claimant's permanent disability.

2. Assessment of costs.

STIPULATIONS

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.

FINDINGS OF FACT

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

Clyde Graham, claimant, was 29 years old at the time of the hearing. He has lived in southeast Iowa all his life. Claimant left high school in his senior year and did not graduate. Claimant testified that he was not very good at school. Claimant obtained a GED about a year and one half after he left high school after he enrolled in Job Corps. Claimant has no other post high school degrees or certificates. Claimant did attend vocational training for painting and carpenter work through a union. Claimant was in the National Guard for about two years and received a general discharge. Claimant was certified to operate a number of earth-moving machinery through the National Guard, such as backhoe, scraper and bull dozer.

Claimant left high school and worked for a number of companies, primarily doing construction work. (JEx. 15, pp. 3, 4) While claimant operated machines and excavation equipment much of the work claimant performed required heavy physical work. Claimant was generally a laborer who would operate some machinery. Claimant worked for some boring companies and would need to use a shovel, as well as operate machinery.

In claimant's 2014 deposition he said that on a Friday he was shoveling gravel at work and was sore. (JEx. 18, p. 8) On Monday, December 5, 2011, claimant was working for Pieper. Claimant was driving a backhoe and developed pain after running over pot holes which jerked him around. (JEx. 9, p. 1; JEx. 18, p. 8)

Claimant testified that he had his first back surgery in February 2012, a discectomy. Claimant went to physical therapy after that surgery. Claimant's condition did not improve. Claimant had back fusion surgery on May 26, 2012. Claimant was off work and never returned to Pieper after his back surgery.

Claimant testified that Robert Foster, M.D., his back surgeon, released him from medical care with no restrictions although claimant was still in pain. Claimant was referred to pain management. Claimant eventually had a dorsal stimulator implant. Claimant experienced a failure with the first implant and had a dorsal second implant. At the time of the hearing, claimant was having difficulty with his stimulator and had an appointment to discuss with his doctor at the University of Iowa Hospitals and Clinics (UIHC) as to whether the stimulator should be removed. (Claimant's testimony)

Claimant testified that he gets some relief with the stimulator. Claimant said it dulls some pain but causes pain in and of itself. Claimant testified that he will receive pain from the spinal cord stimulator when he changes position. He was going to have discussions with his physician about changing or removing the spinal cord stimulator.

Claimant obtained employment at Menard's on November 25, 2013. (JEx. 18, p.2) He worked as an assistant manager for about one and one half years. He was terminated due to an attendance issue on December 6, 2014. (JEx. 13, p.1) Claimant testified that there were times at Menards that he had to take breaks in the back of the store due to pain in his back. (JEx. 18, Depo. p. 24) He testified that he would have to do lifting in addition to customer service. Claimant said that customer service was better than 50 percent of his job. (JEx. 18, Depo p. 9) As an assistant manager claimant supervised about five to eight employees. Claimant worked 40 hours a week for Menards. In his deposition claimant said that he self-imposed lifting limitations while working at Menards. Claimant would not try to lift above 50 pounds and if he had to lift more than that, not to lift in excess of 50 pounds twice a day. (JEx. 18, Depo. p. 12) Claimant said that he would avoid bending, but would kneel instead. (JEx. 18, Depo. p. 13)

Claimant worked for KPI for a few months in the balsa department. Claimant would run balsa wood through a planer. The balsa wood was light, but the work involved bending and twisting that claimant said he could not do on a consistent basis, that he could not due the repetitive work. Claimant quit this job. (Claimant's testimony)

Claimant then stayed home to care for his two children. Claimant said that he has applied for over 40 jobs in the Burlington, Iowa, area and has not had any offers.

Claimant said he has pain in his legs that go all the way to his feet. Claimant said he has constant pain of about 5-6 on a 10-point scale. Claimant does not take pain medication. Claimant agreed that he could lift about 25 pounds as shown by an FCE, but does not believe he could do repetitive work. Claimant does not believe he could return to any of his prior construction jobs or Menards. Claimant has not explored additional education or training.

I found claimant to be a very credible witness at hearing based on his eye contact, rate of speech, and demeanor. Claimant was clearly uncomfortable while sitting and testifying at the hearing. I find that claimant's testimony about his limitation of repetitive work and lifting limitation to be supported by the medical evidence and claimant's credible testimony.

On February 20, 2012, Robert Foster, M.D., performed a right L5 hemilaminectomy and L5-S1 partial fascectomy and L5-S1 microdiskkectomy. (JEx. 12, p. 2)

On May 14, 2012, Dr. Foster performed surgery that included a fusion. The claimant received a, "Revision of the right S1 hemilaminectomy and revision of the right L5-S1 microdiskectomy." (JEx. 12, p. 3;JEx. 3, p. 4)

On January 24, 2013, Dr. Foster provided a 13 percent whole body impairment rating for the claimant. He did not recommend any restrictions. (JEx. 2, p. 1)

On April 6, 2013, Richard Neiman, M.D., provided an impairment rating of 26 percent to the whole body. Dr. Neiman recommended restrictions of:

> As far as functional restrictions, I think he is capable of repetitive lifting approximately 5 to 10 pounds, maximum up to 25 pounds, no more than 4 times an hour. Should avoid excessive flexion, extension, lateral flexion of LS spine; squatting, kneeling, bending. Need to be able to change position sitting, standing. I think he could operate a forklift, but certainly has major restrictions otherwise. Cannot return to construction. If we use the DRE lumbar category #4, he would qualify for 23%. I think the range of motion probably is better in this situation with the 2 operations. But he has a fair amount of impairment.

(JEx. 11, p. 6)

On March 12, 2014, a functional capacity evaluation (FCE) was performed. The results noted self-limiting behavior. The FCE reported that claimant had the capacity for a light range of work-20 pounds occasionally and 10 pounds frequently. (JEx. 4, p. 1)

On March 12, 2014, Robert Broghammer, M.D., performed an independent medical examination (IME) of the claimant. Dr. Broghammer opined that claimant experienced an aggravation of a preexisting herniated lumbar disk on December 5, 2011. (JEx. 12, p. 7) Dr. Broghammer provided a 17 percent whole body impairment rating to the claimant and agreed with Dr. Foster that claimant did not need restrictions. (JEx. 12, p. 8)

On May 27, 2014, Tim Miller, D.O., examined claimant. Dr. Miller's assessment was,

> Assessment: This patient is post laminectomy and far enough out that he is at maximum medical improvement. I read through Dr. Foster's impairment rating and quite honestly I would see no real reason to change that. I think it was done using the typical tables and I would see no reason to make any change in that rating and I did not go back through and really re-rate them. They are typically within the AMA Guidelines, Fifth Edition, some play and interplay. Generally I trust the surgeon as long as they follow the guides to make the best determination and so I would defer and state that I would not change the current standing regarding Mr. Graham's

> impairment rating that was set before which include the reoperation 1% kick up in this gentleman.

(JEx. 6, p. 2) Dr. Miller recommended adjusting claimant's medication and that possibly sometime in the future a dorsal column stimulation be considered.

On October 7, 2014, Dr. Miller of the Iowa Illinois Pain Consultants treated claimant for right leg, left leg and back pain. Dr. Miller noted that a recent EMG shows chronic S1 radiculopathy. (JEx. 5, p. 1)

On May 14, 2015, claimant was seen for increased back pain. Dr. Foster noted that claimant and his pain management provider were discussing about a dorsal column stimulator due to pain in his right buttock, thigh, and his calf. (JEx. 1, p. 6)

On June 27, 2016, Dr. Miller performed a dorsal column stimulator trial placement. (JEx. 7, p. 1)

Surveillance was conducted on the claimant in October 2015 and in October 2016. (JEx. 14, pp. 1 – 15) A short video of October 25, 2016 was submitted that showed claimant putting a child in a car seat and coming out of a convenience store and driving away. Claimant was also shown walking up the stairs to a house. (JEx. 14, pp. 12, 13 and DVD video) Claimant did not show signs of distress or pain in the video.

Claimant was seen at the University of Iowa Hospital and Clinics (UIHC) on May 8, 2017, for evaluation of his failed back syndrome. (JEx. 9, p. 1) The UIHC planned to perform a permanent spinal cord stimulator placement for May 26, 2017. (JEx. 9, p. 1) Claimant had a permanent placement of the spinal cord stimulator on May 26, 2017. (JEx. 9, p. 11) On September 12, 2017, claimant reported to UIHC that on a good day his pain was at 4 and on a poor day 7-8 on a 10-point scale. (JEx. 9, p. 20)

On December 14, 2017, Saul Wilson, M.D., at the UIHC provided claimant a 12 percent whole body impairment rating. (JEx. 10, p. 1)

On June 19, 2018, claimant was seen at the UIHC. Claimant's battery for the spinal cord stimulator was depleted and claimant was evaluated as to whether he should have battery replacement surgery. (JEx. 9, p. 26) On August 31, 2018, claimant had the spinal cord stimulator battery replaced via surgery. (JEx. 9, p. 31)

Claimant dropped out of high school and obtained a GED. Much of his work has been in construction. Claimant worked as an assistant manager at Menards, but had difficultly lifting and would take breaks due to his back pain. Claimant has failed back syndrome which eliminates most medium work and light work with repetitive motion that uses his back. I find claimant has a 45 percent loss of earning capacity.

I find that the claimants' gross pay for the relevant time before his injury was $423.80 per week. Claimant was single and entitled to two exemptions. Using the rate book in effect at the time of his injury, the claimant's weekly workers' compensation rated is $288.58.

RATIONAL AND CONCLUSIONS OF LAW

The parties have stipulated claimant has an industrial disability that arose out of and in the course of his employment with Pieper. The primary issue in this case is the extent of 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."

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 failed back syndrome. He had back surgery, back fusion surgery, and then received pain management. Claimant has a spinal cord stimulator that provides some relief. However, the spinal cord stimulator also causes claimant additional pain.

Claimant worked at Menards and KPI after his injury. At Menards, he was having some difficulty with some of the lifting. At KPI, claimant could not perform the repetitive work. Claimant was taking care of his two children at the time of the hearing. Claimant has a limited education. He has not attempted to obtain services for the Iowa

Department of Vocational Education or work with a community college to explore careers that he might be able to perform.

Claimant has significant barriers to returning to any construction, equipment operator, and work that requires more than occasional lifting over 25 pounds and jobs that require repetitive motion of the back.

Considering all of the factors of industrial disability, I find that claimant has a 45 percent industrial disability, which entitles claimant to 225 weeks of permanent partial disability benefits.

Claimant has requested cost of the filing fee of $100.00. In my discretion, pursuant to 876 IAC 4.33, I award claimant this cost.

ORDER

Defendants shall pay claimant two hundred twenty-five (225) weeks of permanent partial disability benefits at the weekly rate of two hundred eight-eight and 58/100 dollars ($288.58) commencing November 7, 2012.

Defendants shall pay claimant costs in the amount of one hundred dollars ($100.00).

Defendants shall have a 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 9th day of January, 2019.

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.