BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROBERT A. POPE,

Claimant,

vs.

CITY OF STRAWBERRY POINT,

Employer,

and

EMPLOYERS MUTUAL CASUALTY COMPANY,

Insurance Carrier,
Defendants.

File No. 5053571

ARBITRATION DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Robert A. Pope, has filed a petition in arbitration and seeks workers' compensation benefits from the City of Strawberry Point, employer, and Employers Mutual Casualty Company, insurance carrier, defendants.

Deputy workers' compensation commissioner, Stan McElderry, heard this matter in Waterloo, Iowa.

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 parties have submitted the following issues for determination:

1. Whether there is permanent disability from injury arising out of and in the course of employment on or about December 31, 2011, and if so, the extent; and

2. Commencement date.

FINDINGS OF FACT

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

The claimant was 51 years old at the time of hearing. He is a high school graduate. His previous work history includes construction laborer, truck driver, milk cow herdsman, salesman, and crane operator. He attended the Iowa Law Enforcement Academy and graduated in April of 2003. A few weeks later he accepted a position as the Chief of Police for the City of Strawberry Point. He continuously held that position until his termination on September 25, 2013.

The claimant has a relatively lengthy history of low back concerns. In 2001, the claimant underwent a discectomy at L5-S1 for a disc protrusion. (Exhibit B, page 3) On June 23, 2007, the claimant had a low back and left knee injury from an incident of apprehending a suspect. A recurrent L5-S1 disc extrusion resulted and a microdiscectomy was performed on October 11, 2007. (Ex. J, p. 50) A left knee meniscectomy was performed on March 27, 2008. (Ex. J, p. 48) A nine percent body as a whole (BAW) rating for the low back injury was issued by Chad Abernathey, M.D.

On or about December, 2011 the claimant suffered a stipulated injury arising out of and in the course of his employment when he slipped in mud putting a suspect in the back of his police car. He first sought treatment on January 6, 2012 with a report of an initial right calf injury that caused a change in gait (ambulation) with a resulting development of back pain. (Ex. L, p. 35) He had physical therapy from January 24 through February 21, 2013. (Ex. 2) He reported initial relief but returned for medical care for his low back on November 27, 2012. (Ex. 1, pp. 5-6) He reported he had been doing well until a recent fall. (Id.) On December 24, 2013, the claimant reported a new injury after a slip on ice shoveling snow. (Ex. F, p. 18) Multiple level injections were performed on January 30 and February 16, 2013. On March 5, 2013, after reporting chronic back pain he was referred for a neurosurgical evaluation. (Ex. 3, p. 42)

On March 26, 2013, the claimant was seen and evaluated by David Segal, M.D. (Ex. 4, p. 50) Dr. Segal's impression was L5 radiculopathy, which was a continuation of the pre-2007 surgery. (Ex. 4, p. 53) He recommended an exhaustion of conservative measures before a consideration of surgery could be made.

On April 11, 2013, Craig Thompson, M.D., noted that the claimant had had a good response to his surgeries until he had slipped on ice in December of 2012. Repeat injections were performed on July 11, 2013. (Ex. 3, pp. 45-46) A radiofrequency ablation to address pain issues was performed on September 5, 2013. (Ex. D, p. 8)

The claimant resigned from another job, school bus driver, on September 11, 2013, noting that it was interfering with his duties as a policeman. (Ex. P, p. 155) The claimant was terminated on September 25, 2013 for using a public cooperative buying system to buy tires for his personal vehicle, and thus avoid paying federal and state sales and excise taxes on the purchase. The decision to terminate was not unanimous by the city.

On October 10, 2013, the claimant told Dr. Segal that he had been laid off from the city due to back pain. (Ex. 4, p. 62) As noted above, that was not true. Dr. Segal advised that surgery was an option, but had only a 50/50 chance of success. (Ex. 4, p. 62) Surgery consisting of L3-4 laminectomy, decompressive L45-S1 laminectomy, transpendicular decompression L3-S1 on the left, L5-S1 laminectomy, and removal of extruded fragments was performed on November 18, 2013. (Ex. 4, pp. 78-79) The claimant was released to return to work without restrictions on December 26, 2013. (Ex. 4, p. 67)

On January 20, 2014, the claimant was hired as the Police Chief for the City of Monona (Iowa). On March 3, 2014, the claimant was completely taken off work by Dr. Segal. (Ex. 4, p. 94) On April 22, 2014, Dr. Segal recommended a spinal cord stimulator and referred the claimant to Dr. Miller for that to be addressed. (Ex. 4, pp. 75-77) The claimant resigned his position with the City of Monona on April 24, 2014. The claimant did not return to Dr. Segal.

The claimant resigned his high school baseball coaching position on May 9, 2014, citing his health. (Ex. M, p. 99) The claimant applied for Social Security Disability (SSD) in May of 2014 and it was approved effective November 18, 2013. A spinal cord stimulator trial was performed on July 14, 2014 by Dr. Miller. (Ex. 5, p. 89) Claimant was referred to Chandan Reddy, M.D., for continued pain management and spinal cord stimulator. The claimant first saw Dr. Reddy on August 18, 2014 and reported ongoing leg and back pain. (Ex. 7, p. 128) A spinal stimulator was installed on January 7, 2015. (Ex. 7, pp. 143-145)

On March 24, 2015, Dr. Reddy issued an impairment rating that seems to address all 3 surgeries (2 pre-injury). The rating was 13 percent of the body as a whole (BAW). (Ex. 7, p. 152A) A functional capacity evaluation (FCE) was performed on April 23, 2015. The results were found to be equivocal due to claimant's actions. (Ex. 8, pp. 155-156) An ability to work at the medium level was noted, however. (Ex. 8) Dr. Reddy added a 3 percent BAW impairment for pain on May 5, 2015. (Ex. 7, p. 154) He also recommended lifting no more than 25 pounds. (Id.)

On November 13, 2015, the claimant underwent anterior cervical discectomy and fusion at C5-7 by Dr. Reddy after reporting new neck pain symptoms in July. (Ex. H, p. 21)

On November 20, 2015, John Kuhnlein, D.O., issued an independent medical evaluation (IME) of the claimant. (Ex. 9) Dr. Kuhnlein opined a 29 percent BAW impairment for the totality of the back injuries. He also opined a 10 pound lifting limit and said that the claimant would not be able to work in the "field" as a law enforcement officer, but could perhaps perform administrative duties. (Ex. 9, pp. 180-181)

On March 2, 2016, Dr. Segal opined that the claimant's current conditions were a mere temporary flare-up of the pre-existing injury of 2007. (Ex. A, p. 1) Dr. Segal's theory of a 5-year temporary flare-up of a 9-year-old injury is not accepted. Dr. Segal also did not address how a temporary flare-up required surgery at multiple levels as opposed to the original L5-S1 disc protrusion from the 2007 injury. Drs. Reddy and Kuhnlein provide better and more rational opinions of why the current concerns date to the December 2011 injury. Their opinions are accepted.

Barbara Laughlin issued a vocation employability report on January 26, 2016. (Ex. 12) She opined that the claimant is precluded from competitive employment. (Ex. 12, p. 206) Laura Sellner issued a vocational market survey on June 15, 2016. (Ex. O) She opined that there were employment opportunities still available to the claimant. (Ex. O, p. 148) It is so found.

Claimant is unable to return to most, if any, relevant past employment. But the loss of industrial capacity is not yet total, but is very substantial. Considering the claimant's medical impairments, training, permanent restrictions, as well as all other factors of industrial disability, the claimant has suffered a 65 percent loss of earning capacity.

On the date of injury the claimant had gross weekly earnings of $805.00, was married, and entitled to 5 exemptions. As such, his weekly benefit rate is $556.67. The commencement date for permanent benefits is March 24, 2015, the date that the final treating physician, Dr. Reddy, selected.

REASONING AND CONCLUSIONS OF LAW

The first issue is extent of permanent disability for the injury.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the

injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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.

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961). 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).

Based on the finding that the claimant has suffered a 65 percent loss of earning capacity, he has sustained a 65 percent permanent partial industrial disability entitling him to 325 weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(u).

ORDER

THEREFORE IT IS ORDERED:

That the defendants pay claimant three hundred twenty-five (325) weeks of permanent partial disability at the weekly rate of five hundred fifty-six and 67/100 dollars ($556.67) commencing March 24, 2015.

Costs are taxed to the defendants pursuant to 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 17th day of May, 2017.

STAN MCELDERRY
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.