

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

NICHOLAS OXLEY,

Claimant,

vs.

TOWNE PARK,

Employer,

Defendant.

FILED
FEB 08 2019
WORKERS' COMPENSATION

File No. 5064688

ARBITRATION DECISION

Head Note: 1803

STATEMENT OF THE CASE

Nicholas Oxley, claimant, filed a petition for arbitration against Towne Park, as the employer, on August 9, 2018. Claimant filed an amended petition on September 7, 2018. Claimant's counsel certified proof of service through his assistant's affidavit.

To date, the employer has not filed an appearance or an answer in these proceedings. On December 10, 2018, claimant filed a motion for default against the employer. On December 27, 2018, the undersigned entered a ruling on the motion for default. Default was entered against the employer and the evidentiary record was closed to further activity by the employer.

A telephonic default hearing was scheduled for February 1, 2019. Claimant appeared personally and through counsel of record for the default hearing. The hearing was recorded via digital recording and that recording will constitute the official record.

Claimant conceded that defendant has paid healing period benefits and all authorized medical expenses. However, claimant requested award of permanent partial disability benefits at the default hearing.

Pursuant to the December 27, 2018 ruling, claimant submitted medical records as written evidentiary evidence in advance of the default hearing. Those medical records were submitted on a CD and are accepted into the evidentiary record of this default proceeding. Claimant submitted 412 pages of medical records. Claimant also testified on his own behalf. No other evidence was received and the evidentiary record closed at the conclusion of the default hearing.

ISSUE

Claimant submitted the following disputed issue for resolution:

The extent of claimant's permanent partial disability benefits as a result of the August 17, 2016 work injury at Towne Park.

FINDINGS OF FACT

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

Nicholas Oxley, claimant, is a 33-year-old gentleman. On August 17, 2016, he worked as a supervisor for Towne Park parking cars at the Double Tree Hotel. He was involved in a motor vehicle accident while performing his work duties.

As a result of the motor vehicle accident, Mr. Oxley was transported to the emergency room via ambulance. He was evaluated at St. Luke's Hospital in Cedar Rapids, Iowa. The emergency room provider diagnosed claimant with a right hand laceration and left scapular pain. The emergency room records also document that claimant had swelling to the right forehead above his right eye. Those same records document no history of similar symptoms prior to August 17, 2016. Mr. Oxley's right hand laceration was repaired and he was released from the emergency room on the same date.

Medical records demonstrate that claimant was evaluated by Tina M. Stec, M.D., on September 9, 2016 and on October 12, 2016. Dr. Stec noted symptoms in the right shoulder, scapular border, at approximately T8 of the thoracic spine, the left knee, right wrist laceration, and in the neck.

Claimant submitted to evaluation by Dr. Stec again on November 1, 2016. Dr. Stec diagnosed claimant with a thoracic and cervical strain as a result of a whiplash type injury. She referred claimant for evaluation by a pain specialist.

Tork J. Harman, M.D., a pain specialist, evaluated claimant on November 7, 2016. Dr. Harman noted that claimant had widespread pain syndrome after the motor vehicle accident and had been in physical therapy for two months. At the time of the November 7, 2016 evaluation, claimant complained of right side neck pain greater than left with radiation toward the right superior trapezius and right rhomboid muscle.

Dr. Harman also noted that claimant had an MRI performed on September 21, 2016, which demonstrated a compression fracture at T3-4 of claimant's thoracic spine. The MRI report of that same date suggests compression fractures at T4 and T5. Dr. Harman performed some trigger point injections for claimant.

In March 2017, claimant continued to report symptoms in his right shoulder. Dr. Stec ordered imaging of his right shoulder, and a CT scan was performed on March 8, 2017. The CT was unremarkable, however.

Throughout this period of time, claimant continued attending physical therapy and was not discharged from physical therapy until April 25, 2017. Unfortunately, claimant continued to complain of right side upper trapezius pain down to his mid-back area upon discharge. Given the discharge from formal treatment, coupled with the lengthy gap between treatment and the date of the default hearing, I conclude that Mr. Oxley obtained maximum medical improvement on April 25, 2017.

The medical records supplied provide no further medical treatment. I perceive no specific medical restrictions being assigned on a permanent basis. There is no permanent impairment rating within this evidentiary record.

However, claimant testified that he continues to experience sleep difficulties after the injury date. He testified that he requires medication, and if he sleeps on his right side, his symptoms increase. He also testified that it remains difficult for him to lift his right arm fully. Finally, Mr. Oxley testified that he cannot walk more than three hours or his back swells. All of these symptoms are credible and accepted.

Mr. Oxley testified that he was off work from August 2017 through March 2018. He estimated that he returned to work on March 15, 2018. He conceded that he received healing period benefits during the period of time he was off work. I accept claimant's testimony and find that claimant returned to work March 15, 2018 and has been paid for his healing period.

Considering the evidence available, including claimant's testimony about ongoing symptoms, his testimony that he is not currently working, as well as the fact that claimant had objective documented thoracic compression fractures, I find that Mr. Oxley has proven he sustained permanent disability as a result of the August 17, 2016 work injury. Without permanent restrictions, it is difficult to find that Mr. Oxley sustained a significant loss of future earning capacity. However, considering his sleep difficulties, inability to fully lift his arm, and difficulties with walking more than three hours, as well as claimant's age, situs and severity of the injury, lack of formal medical restrictions or impairment, as well as other industrial disability factors available in this record, I find that Mr. Oxley has proven he sustained a 15 percent loss of future earning capacity.

Claimant testified that he previously received weekly benefits approximating \$400.00 per week. Claimant's counsel stipulated that an award in this range would be reasonable. Claimant is single and has no dependents. Claimant also testified that he received net pay of approximately \$400.00 per week. However, claimant also testified that he received an unspecified amount of tips in his position with Towne Park. Considering this evidence, I find a reasonable estimate of Mr. Oxley's average gross weekly earnings is \$646.00.

CONCLUSIONS OF LAW

Defendants are in default. All activity has been cut off for defendants. Claimant testified to a work injury on August 17, 2016. Therefore, it is concluded that claimant has established an injury that arose out of and in the course of employment with Towne Park on August 17, 2016.

Claimant's sole claim in this default proceeding is for permanent partial disability benefits. Mr. Oxley has established objective findings that he sustained compression fractures in his thoracic spine. I conclude he has established entitlement to permanent disability benefits in some amount.

Claimant asserts injuries to his spine, which is not a scheduled member pursuant to Iowa Code section 85.34(2). Therefore, claimant has established an unscheduled injury and entitlement to industrial disability benefits. 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.

Having considered claimant's age, the situs and severity of his injury, his lack of permanent work restrictions or permanent impairment, his lack of current employment, as well as his ongoing symptoms, as well as all other factors of industrial disability identified by the Iowa Supreme Court and contained within this evidentiary record, I found that Mr. Oxley proved he sustained a 15% loss of future earning capacity. This is equivalent to a 15% industrial disability and entitles claimant to 75 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u).

Permanent partial disability benefits commence upon the termination of the healing period. The factors that terminate a healing period are a return to work, ability

to perform substantially similar employment, or achieving maximum medical improvement. Iowa Code section 85.34(1). Permanent disability benefits commence upon the earliest of the three factors. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360 (Iowa 2016). In this instance, claimant was not capable of performing substantially similar work due to a seizure disorder. He achieved maximum medical improvement on April 25, 2017. He did not return to work until March 15, 2018. Achieving maximum medical improvement is the earliest of these factors on April 25, 2017. Therefore, I conclude that permanent partial disability benefits should commence in this case on April 26, 2017.

Having found that claimant's average weekly wage prior to the work injury was \$646.00 and that claimant was single and had no dependents on the date of injury, I conclude that claimant is entitled to weekly benefits in the amount of \$400.10 per week. Iowa Code section 85.36; Iowa Code section 85.37.

ORDER

THEREFORE, IT IS ORDERED:

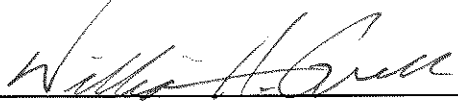
Defendants shall pay claimant seventy-five (75) weeks of permanent partial disability benefits commencing on April 26, 2017.

All weekly benefits shall be paid at the stipulated rate of four hundred and 10/100 dollars (\$400.10) per week.

The employer and insurance carrier 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 employer and insurance carrier shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 8th day of February, 2019.


WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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WHG/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.