BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
MAR 14 2016
WORKERS' COMPENSATION

DAVID SOAT, Claimant, vs. FLEXSTEEL INDUSTRIES, INC., Employer, Self-Insured, Defendant.	File Nos. 5050596, 5050597 ARBITRATION DECISION Head Note Nos. 1703, 1803, 2505, 2907

STATEMENT OF THE CASE

David Soat, claimant, filed two petitions for arbitration against the self-insured employer, Flexsteel Industries, Incorporated. An in-person hearing occurred on December 4, 2015.

The evidentiary record includes claimant's exhibits 1 through 14 and defendant's exhibits D through H. Claimant was the only witness called to testify at the hearing.

The evidentiary record closed on November 20, 2015 at the end of the live hearing. However, counsel for the parties requested the opportunity to file post-hearing briefs. The parties were given until January 8, 2016 to file their post-hearing briefs, at which time the case was considered fully submitted to the undersigned.

ISSUES

The parties filed separate hearing reports for each of the alleged injury dates. On those hearing reports, the parties entered into numerous stipulations. Those stipulations were accepted, and no factual or legal issues relative to the parties' stipulations will be made or discussed in either file.

File No. 5050596:

The parties submitted the following disputed issues for resolution in File No. 5050596:

1. The extent of claimant's entitlement to permanent disability benefits.

2. Whether claimant is entitled to reimbursement of medical mileage.

3. Whether costs should be assessed against either party.

File No. 5050597:

The parties submitted the following disputed issues for resolution in File No. 5050597:

1. The extent of claimant's entitlement to permanent disability benefits.
2. Whether claimant is entitled to reimbursement of medical mileage.
3. Whether defendants are entitled to credit for permanent partial disability benefits paid and awarded in File No. 5050596.
4. Whether costs should be assessed against either party.

FINDINGS OF FACTS

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

David Soat, claimant, sustained a stipulated left shoulder injury as a result of his work activities at Flexsteel on October 22, 2010. He sustained a stipulated right shoulder injury as a result of his work activities at Flexsteel on June 21, 2013. Both injuries caused permanent disability. (Hearing Report) Mr. Soat testified credibly that he did not have any shoulder problems prior to starting his employment with Flexsteel. (Claimant's testimony) I am asked to determine the extent of claimant's entitlement to permanent disability in each file.

Mr. Soat is a 61-year-old gentleman, who resides in Dubuque, Iowa. (Claimant's testimony; Exhibit H, page 1 (deposition transcript, pp. 3-4)). He graduated from high school in 1972. In the late 1970's, Mr. Soat took two computer science classes at the college level. He did not obtain a certificate or degree as a result of those classes and has no additional education above the high school level.

Claimant worked a part-time job in high school, which has minimal significance or application to the present date. He worked as a ski instructor part-time (approximately eight to ten hours per week) from 1975 through 1990. Otherwise, his employment since high school has been at Flexsteel.

Mr. Soat began working at Flexsteel in the repair department in June 1972. He worked in the repair department for approximately two years. He would remove the cover off furniture to then be repaired by someone else. He was required to lift and manipulate large pieces of furniture weighing up to 200 pounds in this position.

From approximately 1973 through 1975, claimant worked in the shipping department at Flexsteel, where he unloaded fabric rolls from semis. He used a hand cart for this work but was required to lift up to 150 pounds to complete his work.

His next position with Flexsteel was performing repairs in the cutting room. Again, this required physical and manual work, lifting up to 150 pounds. Claimant worked four to five years in the cutting room.

In approximately 1982 or 1983, claimant moved to the metal division in the rivet department. In that position, claimant riveted linkages together on sofas and chairs. He used a hydraulic rivet press. He was not required to lift nearly as much, but did much more bending and twisting in this position.

In 1984, claimant transferred to the RV department at Flexsteel. Claimant has worked this job since 1984 and continues to perform in this position. Mr. Soat is part of the manufacturing process for seating in RVs manufactured through Flexsteel. He assembles sofa beds. In this position, claimant is required to lift frames and attach foam to those frames. He is required to lift products weighing between 15-65 pounds and estimated that he processes approximately 70 units per each eight-hour shift. He must lift the units twice each. Therefore, he estimated he lifts the above amounts approximately 140 times per shift.

Claimant now earns approximately $25.00 per hour in his incentive-based job, which is significantly more than he earned (approximately $1.60 per hour) when he started with Flexsteel. Claimant earns more now per hour than he did at the time of either work injury.

Following his October 22, 2010 left shoulder injury, the employer authorized medical care through Erin J. Kennedy, M.D. (Ex. 2) Unfortunately, the conservative care offered was not successful in resolving claimant's symptoms. Dr. Kennedy referred claimant to an orthopaedic surgeon, Scott Schemmel, M.D. (Ex. 2, p. 26; Ex. 4, p. 1)

Dr. Schemmel evaluated claimant and recommended surgical intervention. On March 21, 2011, Dr. Schemmel performed an arthroscopic rotator cuff debridement in multiple locations, an arthroscopic acromioplasty as well as an arthroscopic distal clavicle excision. (Ex. 5, p. 1) Following an appropriate course of post-operative therapy and recuperation, Dr. Schemmel released claimant to return to work without restrictions on August 9, 2011. (Ex. 4, p. 20)

On November 1, 2011, claimant participated in a functional capacity evaluation (FCE), which was deemed valid. That FCE demonstrated that claimant was capable of lifting 80 pounds occasionally from floor to waist as well as 45 pounds occasionally from waist to shoulder level. (Ex. 2, p. 63) This corresponds well with a prior therapy record on June 1, 2011, which noted claimant was able to lift 80 pounds from floor to waist and a therapy record that indicates claimant was capable of lifting within the confines of his

job (an amount that would be less than 80 pounds, according to claimant's testimony). (Ex. 3, pp. 50, 59)

The therapist performing the FCE noted:

> The patient is currently working full duty without restriction for Flexsteel Industries. He states that he has no encumbrances at this point and performs all aspects and essential functions of the job without difficulty. This situation should not be altered.
>
> The patient states that he does experience some intermittent bouts of left shoulder pain but these episodes are transient and not debilitating.

(Ex. 3, p. 64)

Flexsteel scheduled claimant to be evaluated by Michael Stenberg, M.D. for purposes of obtaining a permanent impairment rating on his left shoulder. Dr. Stenberg evaluated claimant on November 9, 2011 and opined that claimant sustained an eight percent (8%) permanent impairment of the whole person as a result of the left shoulder injury. (Ex. 2, p. 37)

Claimant ultimately obtained an independent medical evaluation, performed by Mark C. Taylor, M.D. on December 8, 2014. With respect to the left shoulder, Dr. Taylor opined that claimant sustained a ten percent (10%) impairment of the whole person related to the left shoulder injury. Dr. Taylor also recommended that claimant be limited to a 60-70 pound occasional lifting restriction and that claimant avoid repetitive or sustained overhead activities. (Ex. 7, p. 8)

Mr. Soat returned to work in his same position in the RV department after the left shoulder injury and continued working in that position until he sustained his right shoulder injury on June 21, 2013. Considering claimant's demonstrated lifting abilities in physical therapy, in the functional capacity evaluation, and upon his return to work, I find that the restrictions imposed by Dr. Taylor are likely too restrictive. On the other hand, I find it unlikely that claimant was capable of truly unrestricted work as noted by Dr. Schemmel given that his shoulder had been operated upon and continued to have some symptoms. I find that the FCE estimate of an 80-pound lifting capability on an occasional basis is likely accurate, permitted claimant to continue to work full duty "without restrictions" in his RV job at Flexsteel, but that it is unlikely claimant would have been physically capable of returning to prior jobs at Flexsteel with even higher lifting requirements.

Following the right shoulder injury, the employer authorized claimant to treat with Joseph Garrity, M.D. Unfortunately, once again, the conservative medical measures failed and Dr. Garrity's office referred claimant back to Dr. Schemmel for orthopaedic evaluation of the right shoulder. (Ex. 9, p. 28; Ex. 12, p. 2)

Dr. Schemmel evaluated claimant's right shoulder on June 21, 2013 and recommended surgical intervention. (Ex. 12, pp. 2-3) Dr. Schemmel took claimant to surgery a second time on November 11, 2013 and performed a right shoulder arthroscopic bursal side rotator cuff debridement as well as an arthroscopic acromioplasty. (Ex. 13, p. 9) Once again, following conservative care and post-operative therapy, Dr. Schemmel released claimant to return to work without restrictions on March 10, 2014. Dr. Schemmel noted claimant achieved maximum medical improvement by that date and noted that claimant had excellent range of motion, that his strength was well-maintained and that he had achieved a good recovery from his right shoulder injury. (Ex. 12, pp. 16-17)

Flexsteel scheduled claimant to be evaluated by Dr. Kennedy for purposes of determining if claimant sustained permanent impairment as a result of the right shoulder injury. Dr. Kennedy evaluated claimant on May 8, 2014. She opined that claimant had been working full-duty since March 10, 2014. She evaluated claimant's right shoulder and opined that claimant sustained a five percent (5%) permanent impairment to the whole person as a result of his right shoulder injury. (Ex. 9, pp. 50-52)

As noted above, claimant sought an independent medical evaluation performed by Dr. Taylor. Dr. Taylor also considered the right shoulder and concurred with the five percent (5%) permanent impairment rating offered by Dr. Kennedy. Dr. Taylor imposed no additional restrictions for the right shoulder above and beyond those already recommended for the left shoulder. (Ex. 9)

Claimant again returned to work full-time and without medical restrictions after a period of recuperation after the right shoulder surgery. (Claimant's testimony) Mr. Soat testified that he sustained another left shoulder injury on September 25, 2015. That injury is not part of this contested case proceeding, and any ramifications of that injury will not be considered as part of this proceeding or award.

Prior to the September 25, 2015 left shoulder injury, claimant admits that he was working in his pre-injury job without accommodation or medical restriction and that he performed all the same job duties he performed prior to his injuries. Prior to the September 25, 2015 injury, claimant earned more than he did at the time of either of these alleged injuries. He also admits that prior to the September 25, 2015 left shoulder injury, he had not missed any time from work as a result of the shoulder injuries since his full duty release on March 10, 2014. (Ex. H, p. 4 (deposition transcript pages 13-15)) He also admits that there was no change in his productivity at work following these work injuries. (Ex. H, p. 5 (depo. tr., p. 17))

I find that Mr. Soat is motivated to continue working. In spite of two shoulder injuries and two shoulder surgeries, he has returned to work full duty at the employer and continues to perform his pre-injury job duties. He missed essentially no time from work after being released to full duty following the second surgery and before the most recent left shoulder injury in spite of ongoing symptoms in his shoulders.

Mr. Soat is a right-hand dominant gentleman. Realistically, with no change in his permanent restrictions from Dr. Taylor or Dr. Schemmel after the right shoulder surgery, given the minor impairment ratings offered by Dr. Taylor and Dr. Kennedy, and considering that claimant returned to the exact same job duties after recuperating from the right shoulder surgery, I find that claimant has proven very little additional industrial disability occurred as a result of the right shoulder injury on June 21, 2013. However, claimant is a right-hand dominant gentleman. An injury to the right shoulder, which a right-hand dominant person generally would use more, likely would have some additional, minor impact upon claimant's future earning capacity.

Realistically, I do not anticipate that Mr. Soat is likely to retrain to another line of work. He has worked essentially his entire career for Flexsteel and is at an age where further education and retraining are unlikely. Mr. Soat testified that he did not believe he could return to some of the earlier positions he held at Flexsteel. Certainly, his medical release suggests he is not limited but claimant's testimony is accepted as realistic that he is probably not able to return to jobs that require 150-200 pounds of lifting and manipulation given his ongoing symptoms.

Having previously found that the left shoulder injury of October 22, 2010 likely precluded the return to prior positions at Flexsteel, I find that the June 21, 2013 right shoulder injury did not significantly increase the claimant's restrictions or significantly reduce his ability to return to prior or other lines of work. He has the same restrictions for both injuries.

Considering Mr. Soat's age, educational background, employment history, permanent impairment ratings, permanent work restrictions from Dr. Taylor, his demonstrated ability to return to work without medical restrictions at his pre-injury job, his motivation level, the unlikelihood that he can obtain further education or retraining, as well as all other factors of industrial disability outlined by the Iowa Supreme Court, I find that Mr. Soat has proven he sustained a fifteen percent (15%) loss of future earning capacity as a result of the October 22, 2010 left shoulder injury. Considering the same factors, I conclude that claimant has proven he sustained a twenty percent (20%) loss of future earning capacity when the effects of the October 22, 2010 left shoulder injury and the June 21, 2013 right shoulder injury are considered.

Claimant also seeks an award of medical mileage for past medical treatment. Claimant attaches itemized medical mileage statements to the hearing reports. Defendant disputed these claims on the hearing reports but offered no contrary evidence or argument about the medical mileage issues. Review of the medical mileage statements demonstrates that they are thorough and accurate. I find that claimant has proven he traveled the medical mileage now claimed and itemized in the medical mileage statements attached to the hearing reports to seek medical treatment related to the alleged work injuries at issue in this case.

CONCLUSIONS OF LAW

The parties have stipulated that claimant sustained work-related injuries on each of the alleged injury dates, that the injuries resulted in permanent disability, and that the injuries should be compensated industrially pursuant to Iowa Code section 85.34(2)(u). (Hearing Reports)

When disability is found in the shoulder, a body as a whole situation may exist. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949). In Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Commissioner Report 281 (App. 1982), a torn rotator cuff was found to cause disability to the body as a whole.

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.

With respect to claimant's left shoulder injury on October 22, 2010 (File No. 5050596), upon consideration of all of the relevant factors of industrial disability, I found that claimant proved he sustained a fifteen percent (15%) loss of future earning capacity. Therefore, I conclude claimant has proven entitlement to 75 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u).

With respect to claimant's right shoulder injury on June 21, 2013 (File No. 5050597), upon consideration of all of the relevant factors of industrial disability and considering the effects of both alleged work injuries, I found that claimant proved he sustained a twenty percent (20%) loss of future earning capacity. Therefore, I conclude claimant has proven entitlement to 100 weeks of permanent partial disability benefits following the June 21, 2013 right shoulder injury. Iowa Code section 85.34(2)(u).

Defendant asserts a credit for all permanent partial disability benefits payable in File No. 5050596 against any award of permanent partial disability benefits in File No. 5050597. Defendant relies upon Iowa Code section 85.34(7)(b)(2) for their claimed credit. Claimant disputes entitlement to the credit but offers no legal analysis of the statute or argument in his post-hearing brief why this statutory credit should not be granted.

Iowa Code section 85.34(7)(a) provides that "An employer is fully liable for compensating all of an employee's disability that arises out of and in the course of the employee's employment with the employer."

However, Iowa Code section 85.34(7)(b)(2) states:

> If ... an employer is liable to an employee for a combined disability that is payable under subsection 2, paragraph "u," and the employee has a preexisting disability that caused the employee's earnings to be less at the time of the present injury than if the prior injury had not occurred, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer minus the percentage that the employee's earnings are less at the time of the present injury than if the prior injury had not occurred.

The legislative history relevant to the above statutory provision indicates, "The general assembly intends that an employer shall fully compensate all of an injured employee's disability that is caused by work-related injuries with the employer without compensating the same disability more than once." 15 Iowa Practice, Workers' Compensation, § 13.6, page 164 (2014-2015) (citation omitted).

In this instance, defendant should fully compensate claimant for the entire disability caused by his shoulder injuries, but should only be required to compensate claimant once for that disability pursuant to Iowa Code section 85.34(7)(2)(b). Therefore, I conclude that defendant has proven entitlement to a credit against the permanent partial disability award in File No. 5050597 for all permanent partial disability benefits awarded and payable in File No. 5050596. Iowa Code section 85.34(7)(b)(2).

Having found that claimant sustained a 20 percent industrial disability as a result of the effects of both injuries and having found that claimant sustained a 15 percent industrial disability as a result of the initial October 22, 2010 left shoulder injury, I conclude that defendant is entitled to a credit of 75 weeks against the 100-week award in File No. 5050597. Accordingly, defendant will only be ordered to pay an additional 25 weeks of permanent partial disability benefits in File No. 5050597.

Mr. Soat also seeks an award of medical mileage in both files. The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all

conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Agency rule 876 IAC 8.1(2) provides that claimant is entitled to be reimbursed for "All mileage incident to the use of a private auto." Medical mileage is to be reimbursed at the applicable business standard mileage rate established by the Internal Revenue Service and in effect on July 1 of each calendar year. 876 IAC 8.1(2).

Claimant attached a detailed summary and itemization of each medical visit and the mileage and rate for each visit to the hearing report in each file. Defendant provides no contrary evidence and offers no evidence or argument why the medical mileage should not be awarded or that the mileage summaries and itemizations are inaccurate. I conclude that claimant has established entitlement to reimbursement of his medical mileage as summarized and itemized on the attachments to the hearing reports. Iowa Code section 85.27; 876 IC 8.1(2).

Finally, claimant seeks an assessment of his costs. Costs are assessed at the discretion of the agency. Iowa Code section 85.40. Exercising the agency's discretion and recognizing that claimant has prevailed on the majority of issues, claimant's filing fee of $100.00 in each file shall be assessed pursuant to 876 IAC 4.33(7). Claimant also seeks assessment of the cost of obtaining a copy of his deposition transcript. Claimant's deposition was introduced into evidence at Exhibit H. I conclude it is appropriate to assess claimant's deposition transcript expense totaling $32.50 pursuant to 876 IAC 4.33(2). Therefore, exercising the agency's discretion, I conclude that claimant's costs totaling $232.50 should be assessed against defendants.

ORDER

THEREFORE, IT IS ORDERED:

In File No. 5050596:

Defendant shall pay claimant seventy-five (75) weeks of permanent partial disability benefits commencing on August 10, 2011 at the stipulated weekly rate of seven hundred nine and 58/100 dollars ($709.58).

In File No. 5050597:

After credit for benefits paid in File No. 5050596, defendant shall pay claimant an additional twenty-five (25) weeks of permanent partial disability benefits commencing on March 10, 2014 at the stipulated weekly rate of nine hundred thirty-four and 26/100 dollars ($934.26).

In both files:

Defendant shall pay interest on all accrued weekly benefits pursuant to Iowa Code section 85.30.

Defendant shall reimburse claimant's medical mileage as summarized and itemized on the attachments to the hearing reports in a total amount of eight hundred seventy-nine and 48/100 dollars ($879.48)

Defendant shall reimburse claimant's costs totaling two hundred thirty-two and 50/100 dollars ($232.50).

Defendant 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 14th day of March, 2016.

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.