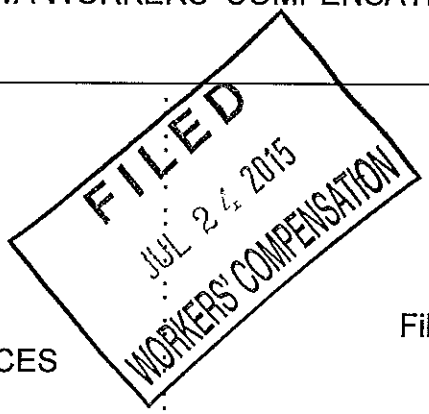
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



RANDALL L. LABUS,

Claimant,

vs.

IOWA DISTRIBUTION SERVICES CORP.,

Employer,

and

AMCO INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5048489

ARBITRATION

DECISION

Head Note: 1803

STATEMENT OF THE CASE

The claimant, Randall L. Labus, filed a petition for arbitration and seeks workers' compensation benefits from Iowa Distribution Services Corporation, employer, and Amco Insurance Company, insurance carrier. The claimant was represented by Mark Chipokas. The defendants were represented by Deb Stein.

The matter came on for hearing on November 26, 2014, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa. The record in the case consists of claimant's exhibits 1 through 8 and defendants' exhibits A through G. The claimant testified under oath at hearing as did witness, Ted Elson-Canfield on behalf of the employer. Roxann Rigby was appointed the official reporter and custodian of the notes of the proceeding. The matter was fully submitted on December 10, 2014 after helpful briefing by the parties.

ISSUES

The parties submitted the following issues for determination:

1. The nature and extent of the disability, including whether the claimant qualifies as an odd-lot employee.

2. The correct gross earnings for rate calculation purposes. The claimant alleges gross wages of $870.78 per week, while the defendants contend the appropriate gross earnings are $783.91 per week.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship at the time of his injury.

2. Claimant sustained an injury which arose out of and in the course of employment on December 19, 2012.

3. The injury is a cause of both temporary and permanent disability. The permanent disability is industrial and the commencement date for benefits, if any are owed, is November 21, 2013.

4. Temporary disability/healing period and medical benefits are no longer in dispute.

5. The claimant is single with one exemption for rate calculation purposes.

6. Affirmative defenses have been waived.

7. Medical care is not in dispute.

8. The defendants are entitled to a credit of 53 weeks of permanent partial disability.

FINDINGS OF FACT

Claimant, Randall Labus, was 58 years old at the time of hearing. He is right handed. He is single with an adult daughter. He attended East High School in Des Moines where he completed the 11th grade. He was a good student. He testified that his grades declined and he dropped out of school as a result of race riots at the time. Randall obtained his GED shortly before he joined the Navy in October 1973. He was a radioman. In 1975, he was discharged from the Navy and began working.

Randall's primary work history involved truck driving. His work history prior to driving a truck included driving a forklift for Pepsi and loading trucks and running a printing press. He attended an eight-week course through Kirkwood in 1992 and obtained his commercial driver's license (Class A CDL). He worked for five different trucking companies between 1992 and 2002. In 2002, he started working for Iowa Distribution Services Corporation (hereafter, IDS) in Cedar Rapids. The position involved shuttling trailers back and forth between Quaker Oats and Worley Warehousing. He performed the work successfully for ten years. He was a good

employee who came to work on time and did not require external motivation. (Transcript, page 62) On December 19, 2012, Randall was opening the rear trailer doors of the semi and the load inside fell out onto him. (Defendants' Exhibit C, Labus Depo, pp. 17-18) Randall sustained a right shoulder injury in the accident and was seen at the emergency room at St. Luke's.

After a period of unsuccessful conservative care, Gregory Hill, M.D. performed surgery on Randall on March 5, 2013. (Claimant's Ex. 1, p. 2) The surgery was described as arthroscopic rotator cuff and labral repair. He followed up with Dr. Hill for several months, and he was released from care on November 20, 2013. Following functional capacity testing, Dr. Hill assigned a 10 percent whole person impairment rating and significant permanent restrictions: maximum 30 pound lift, 20 pound occasional lifting and no overhead lifting. (Cl. Ex. 1, p. 2) He has had no followup treatment since being released.

The physical capacity testing was performed on November 15, 2013. (Cl. Ex. 2, p. 1) A job analysis was performed with the company manager, Ted Elson. (Cl. Ex. 2, p. 1) The conclusion of the report was as follows. "Patient's demonstrated strengths and capabilities with his right shoulder are well below what is required for return to work as a shuttle truck driver. His progression in work conditioning shows a plateau with respect to critical pull effort exerted with the right shoulder." (Cl. Ex. 2, p. 3)

In March 2014, David Tearse, M.D. performed an independent medical evaluation at the claimant's request. (Cl. Ex. 3) Dr. Tearse performed a review of Randall's records and an evaluation. At that time, Randall complained of a "constant pain 'all through' his shoulder." (Cl. Ex. 3, p. 2) Dr. Tearse diagnosed right shoulder limited motion, status post rotator cuff repair, and superior labral repair. He provided an 11 percent whole person rating and concurred with the medical restrictions from the functional capacity evaluation and Dr. Hill. (Cl. Ex. 3, p. 3) In a separate report, he also concurred with the assessment that Randall could not return to driving a shuttle truck. (Cl. Ex. 3, p. 6) Randall has allowed his CDL to expire as of April 2014. (Cl. Ex. 5, p. 3)

There are vocational opinions from two vocational experts in the file. Randall met with Kent Jayne, M.A., M.B.A, C.R.C., C.L.C.P., C.C.M., in July 2014. Mr. Jayne had Randall perform various testing to determine his current capacity. (Cl. Ex. 4, p. 6)

> Results of testing completed here found Mr. Labus to score in the below average range at the 20th percentile on nonverbal reasoning, with a valid score and net zero discrepancies indicating consistent effort. He performed in the superior range on a test of verbal reasoning at between the 90th and 95th percentile. In math computation he was again significantly above average at the 88th percentile, and in spelling at the 79th percentile. These scores deteriorated quickly to his scores in the below average to noncompetitive range on a test of clerical perception, at or below the 20th percentile on both protocols against norms for entry level clerical employees. Secondary to his upper extremity pain and loss of

> function, Mr. Labus was unable to perform adequately on a test of fine motor coordination and finger dexterity. He scored in the noncompetitive range while attempting to use the left upper extremity. He likewise scored quite poorly on a test of manual dexterity, in the significantly below average range on the right, and at approximately the 10th percentile on the left. These scores are significantly below those which would have been expected given his work history, training, and experience.

(Cl. Ex. 4, p. 8) Mr. Jayne ultimately concluded that "it is unlikely that any feasible vocational rehabilitation plan would have a reasonable likelihood of success in returning Mr. Labus to competitive employability absent a significant increase in his physical and vocational capacities, . . ." (Cl. Ex. 4, p. 15)

Randall was also evaluated by Alaris, by Candice Kaelber, MS, LPN, CRC, CCM. Ms. Kaelber reaffirmed that he will not be able to return to truck driving. (Cl. Ex. 5, p. 9) Ms. Kaelber did leave open the possibility that he could return to a "no touch freight" truck driving position which would involve no loading or unloading of freight. Ms. Kaelber opined that Randall could perform work in the competitive job market. She felt he is still qualified to perform work in the following areas: demonstrator and promoter, chauffeur, school bus monitor, valet/parking lot attendant and flagger, in addition to potentially working in "no touch freight" truck driving. (Cl. Ex. 5, p. 15) Whether Randall could reasonably perform any of these occupations is really the fighting dispute in the case.

For his part, the claimant's work search efforts are not particularly substantial or well documented. Randall believes he is unable to work. As a result, his job search efforts have not been as robust as they would likely be if he believed he was capable of working. He has signed up on three different job search sites. He testified he watches for postings. (Tr., p. 85) He has not completed any job applications. (Tr., p. 55) He has not worked with Iowa Workforce Development or Iowa Vocational Rehabilitation. (Tr., p. 56; Def. Ex. C; Labus Depo, p. 31) He has not worked at all since the date of his injury.

The defendants submitted video surveillance evidence which showed Randall smoking a cigarette in his truck and carrying a plastic sack of groceries in his right arm. (Def. Ex. G) The surveillance is not convincing of any material fact in the case. The greater weight of the evidence supports a finding that Randall could perform some work in the gainful employment market if he made an effort to do so but that he is, nevertheless, severely disabled as a result of his work injury.

In approximately 1990, IDS ceased providing health insurance for its employees. (Tr., p. 64) Instead, employees are provided a stipend, which is intended to pay for an employee's health insurance or expenses. The employee, however, is under no obligation to purchase insurance. It is simply an additional payment agreed between IDS and the union which represents its employees. It is specifically described in the agreement.

In lieu of payment of insurance contributions, the Company shall pay to each employee a monthly contribution. (Appendix A).

Payments are paid the last payday of each month and are intended to be the next month's premium payment.

If prearranged, IDS will make the pre-taxed payments directly to an employee's Health Insurance carrier, all other payments will be subject to taxes.

(See Def. Ex. F)

CONCLUSIONS OF LAW

The primary question submitted is the nature and extent of Randall's work-related disability. The situs of his condition is his right shoulder, and, as such, his disability is evaluated industrially.

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.

The defendants have conceded that Randall has some level of disability causally related to his stipulated work injury. Defendants contend the extent of disability is minimal, having paid 53 weeks of benefits (just over 10 percent of the body as a whole) prior to hearing. Randall has alleged entitlement to permanent total disability benefits as an odd-lot worker, or alternatively argues for a finding of a very high industrial 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 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.

Randall's diagnosis is right shoulder limited motion, status post rotator cuff repair, and superior labral tear. (Cl. Ex. 3, p. 3) The condition resulted in a 10 to 11 percent whole body functional disability rating pursuant to the AMA Guides. Following the injury he was off work for several months of recuperation prior to his surgery. Dr. Hill performed surgery in March 2013. Randall was then off work recuperating from the surgery. Dr. Hill released him to work after substantial work hardening efforts on November 20, 2013, a full 11 months after the injury. This was an 11-month period of recuperation where Randall was out of the labor market and unable to perform any work.

Randall did heal well. His treatment was successful and should be characterized as a good result. He is on no ongoing pain medications or pain management, including over-the-counter medications. His medical condition is stable, and this weighs in favor of his employability.

Randall's age and educational background undoubtedly hinder his employment opportunities. Randall dropped out of high school and now has a GED. He has been a

truck driver for the past 20 years. He served his country in the Navy, and outside of truck driving has performed manual labor jobs such as driving a forklift truck and loading trucks. He is now 58 years old with limited computer skills. He does not have a resume. None of this is to suggest Randall is not smart. On the vocational testing performed by Kent Jayne, he scored in the exceptional range on verbal reasoning and mathematics. He had other areas of difficulty, including a "test of clerical perception" which presumably measures his ability for office work in entry level positions.

The type of injury Randall has sustained is devastating for a truck driver. His restrictions are prohibitive. His restrictions are: maximum 30 pound lift, 20 pound occasional lifting and no overhead lifting. (Cl. Ex. 1, p. 2) These restrictions undoubtedly prevent him from continuing his 20 plus year career as a truck driver. This was confirmed in his functional capacity evaluation, which concluded Randall's "demonstrated strengths and capabilities with his right shoulder are well below what is required for return to work as a shuttle truck driver." (Cl. Ex. 2, p. 3) The medical providers collectively agreed that his truck driving days are over.

Randall's vocational expert concluded that "it is unlikely that any feasible vocational rehabilitation plan would have a reasonable likelihood of success in returning Mr. Labus to competitive employability absent a significant increase in his physical and vocational capacities, . . ." (Cl. Ex. 4, p. 15) Mr. Jayne's report was thorough and convincing. I find that Randall has met his initial burden under the odd-lot doctrine. Between his severe medical restrictions, which preclude him from returning to work as a truck driver, which he has performed for over 20 years, in addition to his vocational report, I find he has produced substantial evidence that he is not employable in the competitive labor market. Therefore, the burden to produce evidence showing availability of suitable employment shifts to the employer.

The employer did produce quality contrary vocational evidence. After performing her own assessment, Candice Kaelber provided an opinion of a number of jobs that Randall could perform that exist in the competitive job market in his region. (Cl. Ex. 5, p. 11) These positions, by far, represent the bottom end of the spectrum of the labor market, pizza delivery driver, valet, school bus monitor and flagger. I find, however, that these are real jobs in the competitive labor market. These are jobs which are available in the claimant's region. Mr. Jayne provided a rebuttal report which argued that none of these jobs were realistic for several reasons. I agree with Mr. Jayne's analysis regarding the position of "no touch freight" truck driver. I do not find that this would be suitable work for Randall. The other positions, however, are not entirely unreasonable. I also agree with Mr. Jayne that the chauffer position would likely require lifting and carrying for customers. The other positions, however, are quite plausible.

The primary factor working against Randall is his largely undocumented work search. It would be much easier to assess Randall's ability to work if he had evidence of a serious, well-documented work search. He testified that he is registered on a couple of job search websites, but he provided few details of what he is looking for. He conceded that he has made no actual applications for any jobs. This is his description

of searching for work.

> Q. What have you done as far as looking for a job?
>
> A. Not much. I mean, as far as – I mean, like I said, there's a thousand jobs on that – those websites, those three different websites, and every job I come across, I can do half of it, and the other half I can't.

(Tr., p. 47) Randall went on to describe receiving email alerts from three different job search sites which he looks at every day. (Tr., p. 48) He provided no specific jobs he has applied for or any type of coherent plan to get offered a job. He testified that he wants to work but he cannot live on minimum wage. (Tr., p. 49)

After reviewing all of the evidence in the file, I find that the defendants have successfully rebutted the claimant's evidence of total disability. The greater weight of evidence supports a finding that the claimant is capable of performing employment in the competitive job market. When considering all of the factors of industrial disability, I find that Randall has suffered an 80 percent loss of access to the competitive labor market. This finding entitles Randall to 400 weeks of benefits.

The only other issue is Randall's gross wages. The claimant contends the gross wages are $871.00 per week. (Cl. Ex. 6) The defendants contend the correct gross wages average out to $784.00 per week.

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 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).

The actual difference in the parties' calculation of gross wages revolves around a monthly payment made to Randall under a collective bargaining agreement. IDS characterizes the payment as a "health insurance payment" and correctly points out that Iowa Code section 85.61 excludes the "employer's contribution for welfare benefits" from the gross earnings. Randall argues that the payment is a cash payment that can be used for anything the employee wants.

I conclude that these payments are not contributions for welfare benefits which would be excluded under section 85.61. In fact, the agreement specifically states that these payments are made "in lieu of payment of insurance contributions" and can

specifically be used or not used for insurance payments. It is essentially a cash payment to workers instead of providing insurance. I find that these payments must be included in Randall's gross wages. Randall's gross wages at the time of injury are $870.78, as outlined in claimant's Exhibit 6. His correct rate of compensation is $535.95.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay the claimant four hundred (400) weeks of permanent partial disability benefits at the rate of five hundred thirty-five and 95/100 dollars ($535.95) per week commencing November 21, 2013.

Defendants shall pay accrued weekly benefits in a lump sum.

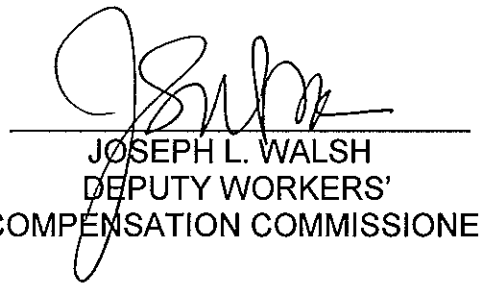
Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall be given credit for the weeks previously paid.

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

Costs are taxed to defendants.

Signed and filed this 24th day of July, 2015.



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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.