BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHAEL DOMINY,

Claimant,

vs.

EAGLE WINDOW & DOOR,

Employer,

and

OLD REPUBLIC INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File Nos. 5044095, 5044333

APPEAL

DECISION

Head Note Nos.: 1402.30, 1803, 2501

Defendants, Eagle Window & Door and Old Republic Insurance Company, appeal from an arbitration decision filed on July 22, 2014. The case was heard on April 10, 2014, and it was considered fully submitted on May 12, 2014, in front of the deputy workers' compensation commissioner. The deputy commissioner awarded claimant 50 percent industrial disability. Defendants assert on appeal that the deputy commissioner erred because the evidence does not support an award of 50 percent industrial disability and the award of industrial disability should be reduced. Claimant asserts that the findings of the deputy commissioner should be affirmed.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, I reach the same analysis, findings and conclusions as those reached by the deputy commissioner.

Pursuant to Iowa Code sections 86.24 and 17A.15, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on July 22, 2014, that relate to issues properly raised on intra-agency appeal with the following additional analysis:

It is unclear whether or not defendants are disputing the causation of claimant's current low back and radicular complaints to the injury. The appeal brief states only an issue that the 50 percent industrial award is unsupported by the evidence. Defendants' arguments assert that the current FCE and a 10 percent impairment rating by the treating orthopedist, David Field M.D., were correct. They dispute the deputy's finding that claimant has loss of income from the injury. The defendants do, however, point to Dr. Fields' opinion as to the lack of any relationship of the new annular tears at the L3-L5 levels to any new injury. I find that the appeal does include an issue that any portion

of claimant's current complaints which were caused by the annular tears in claimant's lower spine found in the 2013 MRI are unrelated to the 2008 work injury. The presiding deputy did not find a new injury in 2013, but causally related the current symptoms to the 2008 injury.

Claimant had a prior back issue in 2005 for which he received injections, but his testimony that it resolved long before the injury in this case is not disputed and is consistent with the record. Claimant's assertion that he had no permanent impairment or permanent activity restrictions prior to the 2008 injury is not disputed and is consistent with the medical records in this case.

Although I agree there is insufficient evidence to show a new injury, neither party has appealed that finding.

I also find that a preponderance of the evidence supports the deputy's finding of a causal relationship of claimant's current low back and radicular complaints to the 2008 injury. As did the deputy, I also find convincing Dr. Kuhnlein's analysis that Dr. Field was not asked the proper question regarding causation of claimant' s 2013 symptoms. This is supported by the fact that Dr. Field referred claimant to Tim Miller, M.D., the pain management specialist, for continued treatment of a recurrent herniated disc at the L4-5 vertebral level, the same level treated by Dr. Field in his 2009 surgery.

I agree with the analysis of the presiding deputy that found Dr. Kuhnlein's, impairment rating more convincing because he considered radicular symptoms making a range of motion evaluation more appropriate than a DRE Method in the Guides.

I agree that the FCE is the more accurate measure of claimant's physical limitations. Despite claimant's testimony that he is doing well in his current job at Eagle with his current 40-pound lifting restriction, the FCE is much more restrictive by limiting such lifting to only occasionally and it also prohibits lifting more than 25 pounds from waist to head level and only occasional squatting and bending. As pointed out by the deputy, should claimant be compelled to leave his employment with Eagle, he would have significant difficulty finding replacement employment with these formal limitations.

Defendants' attack on the deputy's finding that claimant's earnings since the injury in 2008 have decreased is not convincing. Defendants attribute any loss of income in subsequent years to layoffs unrelated to the work injury. Claimant testified without contradiction that Eagle gave claimant a voluntary layoff after the 2008 injury due to his symptoms following his injury. Claimant generally admits to some layoffs, but there was no evidence offered by defendants to specifically show the nature and extent of the layoffs. The evidence that claimant bid on and received two desk jobs after the injury in a continuing effort to seek lighter duty work after his injury was not disputed. Claimant also testified without contradiction that he lost overtime work due to this injury.

Many of the findings by the presiding deputy were based on claimant's testimony which the deputy apparently found convincing. While I performed a de novo review, I give considerable deference to findings of fact that are impacted by the credibility findings, expressly or impliedly, made by the deputy who presided at the hearing.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of July 22, 2014, is AFFIRMED in all respects.

Defendants shall pay the costs of the appeal, including the preparation of the hearing transcript.

Signed and filed this 5th day of August, 2015.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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