BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KEVIN GRISSO,

Claimant,

vs.

MENARD, INC.,

Employer,

and

ZURICH AMERICAN INSURANCE COMPANY,

Insurance Carrier,
Defendants.



File No. 5042804

APPEAL

DECISION

Head Note No.: 1803, 3001

Defendants, Menard's, employer, and Zurich American Insurance Company, insurer, filed a Notice of Appeal on August 29, 2014.

The case was heard on February 24, 2014, in front of the deputy workers' compensation commissioner and considered fully submitted on March 20, 2014. An arbitration decision was rendered on August 19, 2014, finding the claimant had sustained a 65 percent industrial disability due to his significant learning disabilities, past work experience in manual labor jobs, and his work restrictions. The deputy commissioner also determined that the claimant's bonuses were regular and should be included in the calculation of his rate.

The defendants appealed arguing that the industrial award was too high and that the instant profit-sharing bonus was not a regular one and should be excluded from a rate calculation.

The detailed arguments of the parties have been considered and the record of evidence has been reviewed de novo.

Pursuant to Iowa Code sections 86.24 and 17A.5, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on August 19, 2014, that relate to the issue of the rate calculation but reverse and enter a modified order pertaining to the industrial loss of the claimant.

At the time of the hearing claimant was 25 years of age. He was a high school graduate who spent most of his time in special education classes due to learning disabilities in reading, writing, and math. The claimant testified that he read at the level of a sixth grader. Expert witness Carolyn Sedlacek opined that claimant's current cognitive ability was within the lower limits of the low average range of intellectual functioning.

Claimant does, however, play a computer game called World of Warcraft for a period of time significant enough to cause pain. (Transcript, p. 72)

At the time of his injury claimant was working at a distribution center owned by defendant-employer. He was a picker and assigned to "cage land" where he was required to move around the plant and pull items off the shelf that would be delivered to other locations. Approximately 50 percent of his job involved lifting and stacking and the other 50 percent involved driving a forklift.

On March 4, 2011, claimant suffered a shoulder injury when he tripped and fell striking an upright post of a fork lift cage. He was transported by ambulance to the emergency room in Council Bluffs and an initial MRI performed om May 6, 2011, revealed some tearing but not a full thickness or labral tear.

Claimant had ongoing pain and was initially treated by Charles Rosipal, M.D. At the beginning, treatment was conservative but the pain continued and eventually claimant was diagnosed with a 50 percent rotator cuff tear. He underwent surgery on November 3, 2011, to repair the tear and an injured tendon.

Claimant testified that after surgery the stabbing pain in his shoulder was resolved but that he still had deficits in strength and range of motion. (Tr., p. 32)

After approximately two weeks he was returned to light duty work driving a forklift. There was some conflicting testimony about claimant's light duty work. At hearing he testified that the forklift job did not adversely affect him (Tr., p. 59) but during his deposition he claimed that the forklift caused a jolting of his left side that caused pain. (Exhibit A, p. 6)

On April 4, 2012 claimant returned to Dr. Rosipal. During examination, he exhibited nearly normal range of motion. Claimant reported he was doing quite well but still had a little discomfort with increased activity.

He was released in April 2012 by Dr. Rosipal. Dr. Rosipal told him that he had healed perfectly and released him to full duty work. Dr. Rosipal found him at maximum medical improvement. (Ex. 5, p. 14)

When claimant returned to work he was placed back in cage land. In cage land he had to move extremely fast pulling the product off of the shelves, throwing it in the cart, and repeating that process. (Tr., pp. 33-34) He testified that he would pick approximately 90 items per hour, although it varied according to product picked. The constant picking resulted in increased shoulder pain according to the claimant and he was unable to meet his quota. He testified that he reported having problems to his employer.

Conversely, Daniel Gerovac, manager of the Shelby Distribution Center, testified that the claimant never reported any problems after he had been released to return to work. (Tr., p. 93)

Claimant was terminated in July 2012 for too many absences. Claimant maintained at hearing that he sought medical attention and had a medical excuse but there was no evidence of it presented either to his employer or at hearing.

In his testimony, he claims he told his supervisor that his arm froze in the latter part of July 2012 and that he needed additional medical attention. (Tr., p. 35) According to the claimant, he was told by his supervisor that he should leave and go see his own personal doctor. (Tr., p. 35)

Claimant testified that he did so and consulted with Todd Bean, M.D. in Atlantic. According to the transcript, Dr. Bean examined the claimant and wanted to do more testing such as x-rays and MRI. Dr. Bean then told claimant that he should not return to work and that he, Dr. Bean, would write a note excusing the claimant for the previous day as well as the day of the medical visit. (Tr., p. 36) Dr. Bean's note never arrived at claimant's place of employment.

Claimant maintained that he reported the visit with Dr. Bean to his employer and that Dr. Bean's office faxed the work release. When no note was located, claimant called Dr. Bean's office and said that they had already sent it and that they would send it again. (Tr., p. 37) But still, no note appeared.

The claimant did not produce any medical records pertaining to Dr. Bean. Even in the medical record summary section of Sunil Bansal, M.D.'s report, there is only one reference to Dr. Bean and that is an October 27, 2011, preoperative history and physical conducted prior to claimant's left shoulder surgery. (Ex. 9, p. 7) The claimant's brief refers to Dr. Bean but cites to no exhibit in the record.

Claimant returned to Dr. Rosipal on August 22, 2012, with lots of strength and shoulder pain complaints. He complained that he could hardly get out of bed because of the discomfort in the shoulder. (Ex. 5, p. 7) Dean Wampler, MD, hired by the defendants, characterized claimant's reports of pain and discomfort as dramatic. (Ex. B, page 2)

Dr. Rosipal ordered another MRI and placed claimant on new work restrictions of no lifting greater than 20 pounds at waist level and no lifting greater than 10 pounds at shoulder level. (Ex. 5, p. 19) Claimant was not working at this time having been terminated by the defendant employer.

The MRI revealed a small partial thickness tear of the supraspinatus tendon along the personal surface. Dr. Rosipal told claimant that the MRI results showed not a new tear but a dimpling of the tendon where the knot was tied. Therefore there was no reason for the claimant's continuing discomfort. (Ex. 5, p. 20) Dr. Rosipal told claimant to obtain a second opinion.

Claimant obtained a second opinion from Stephen Ash, M.D. at Iowa Ortho, who evaluated Claimant on November 1, 2012. (Ex. G, p. 1) At that evaluation, Claimant exhibited good range of motion on the left side. Dr. Ash reviewed the diagnostic images and did not recommend any further surgery. (Ex. G, p. 3)

On December 7, 2012, claimant underwent a functional capacity evaluation which was deemed valid. (Ex. 8, p. 2) Based upon the functional capacity evaluation, claimant demonstrated the ability to lift and carry 75 pounds on an occasional basis and 35 pounds on a frequent basis. He was placed in the medium to heavy physical demand level. The evaluator recommended restrictions as follows:

1. Lifting of objects to shoulder level should be restricted to 50 pounds on an occasional basis and 25 pounds on a frequent basis

2. Overhead lifting should be restricted to 35 pounds on an occasional basis and 15 pounds on a frequent basis.

(Ex. 8, p. 2-3)

There were no significant limitations on claimant's ability to perform nonmaterial handling activities such as squatting, bending, forward reaching, overhead reaching and so forth. He had good cardiovascular endurance, good flexibility and his upper extremity joints were within normal range except for a mild limitation in his left shoulder for flexion and abduction during specific tasks.

Dr. Ash and Dr. Wampler adopted those work restrictions. (Ex. G, p. 4; Ex. B, p. 8) Dr. Bansal also adopted those work restrictions, but with the following additional limitations:

1. Overhead lifting should be restricted to 25 pounds occasionally

2. No frequent overhead work.

3. No pushing or pulling with the left arm greater than 20 pounds

4. No frequent pushing or pulling.

(Ex. 9, p. 14)

Dr. Bansal assigned a 9 percent left upper extremity impairment based upon very mild range of motion deficits. (Ex. 9, p. 14) Dr. Wampler's impairment rating was 6 percent of the left upper extremity. (Ex. B, p. 7)

Following his release by Dr. Rosipal and since being seen by Dr. Ash in November 2012, claimant had not seen any other medical professional for his shoulder. (Tr., p. 46)

At hearing claimant stated he still has stabbing pain in his left shoulder. If he were to fall, he believed he would cry. He stated he could not pick up a gallon of milk off the counter with his left hand.

Claimant currently works at a fast food place owned by his uncle. He testified he looked for jobs, but there was no concrete evidence of that other than his own testimony. He did not name any companies nor did he indicate he had filled out any applications. He further testified that his uncle has seriously modified his position as a fast food cook in order to avoid aggravating claimant's left shoulder.

In his deposition, claimant testified he can no longer do certain activities like shoot a gun or play softball. During his examination with Dr. Bansal he also indicated he previously enjoyed playing football and softball but now avoids any contact sports and that he likes to hunt and shoot his gun held against his right shoulder. (Ex. 9, p. 12)

At the hearing, however, claimant admitted he has never hunted and he has not played softball or baseball or football within the last two or three years. In fact, playing football with his buddies on a Saturday was not the type of activity he'd ever done. (Tr., p. 71)

A vocational study was performed by Michael Newman who estimated the claimant's loss of access to the labor market was about 83 percent. Mr. Newman's report was not clear as to what work restrictions he relied upon in forming his conclusions. He noted that the restrictions set by Dr. Rosipal included no lifting greater than 20 pounds at waist level and no lifting greater than 10 pounds above shoulder height, but Mr. Newman did not reference the greater numbers adopted by Drs. Ash and Wampler, or those of Dr. Bansal.

On page 13 of the vocational report Mr. Newman appeared to include job matches that were light work rather than for either medium to heavy work. (Ex., 12, p. 13) Mr. Newman's opinions are given less value due to the unclear nature of his report and the apparent reliance on work restrictions that were not adopted by Drs. Ash, Wampler and Bansal.

Based on the medical records, the work restrictions imposed by the functional capacity evaluator, and the inconsistent statements of the claimant, a 45 percent industrial disability is supported by the evidence.

As it relates to the bonus, the claimant testified at hearing that the bonus check was paid on an annual basis as long as the company was profitable. The manager also testified that the bonus payment was made every year so long as the department was profitable, the department met quota, the employee worked 1,000 hours in the previous year and the employee was employed in the week ending December 15 of the prior year. Past findings of the Iowa Supreme Court would find that this bonus was regular.

Iowa Code section 85.36 states:

> The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee's employer for the work or employment for which the employee was employed, computed or determined as follows and then rounded to the nearest dollar:
>
> "Gross earnings" is defined as
>
> Recurring payments by employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits.

Iowa Code section 85.61(3) (emphasis added)

In Burton v. Hilltop Care Center, 813 N.W.2d 250, 258 (Iowa 2012), the Iowa Supreme Court determined that the Noel v. Rolscreen Co., 475 N.W.2d 666 (Iowa Ct. App.1991) case did not contain an exclusive and exhaustive list of factors for determining whether a bonus is regular. Whether a bonus should be included in the rate calculation is determined on a fact by fact basis and any conclusion reached by the commissioner will be overturned by the Supreme Court only if the finding is "irrational, illogical, or wholly unjustified." Burton at p. 266. In Burton, the Supreme Court stated:

> In light of the applicable standard of review, we do not feel a strict reading of Noel is appropriate. The question before the district court was whether the commissioner's decision that Burton's bonus was "regular" was irrational, illogical, or wholly unjustified. (Iowa Code section 17A.19(10)(m)) The factors listed in Noel were relevant to the commissioner's conclusion in that case. However, their relevance to any other case depends solely on the facts of that case. The true nature of the inquiry requires a reviewing court to look at those facts that were and were not considered by the agency in applying law to fact and then to determine whether, on the whole, the agency's application of law to fact was irrational, illogical, or wholly unjustified. Since no two cases present the same set of facts, we will not handcuff the agency by limiting its inquiry. So long as the application of law to fact is not illogical, irrational, or wholly unjustified, the agency's decision will be upheld on judicial review. Id. at 266

A condition precedent of being an active employee by a certain date does not render a bonus irregular. Pella Corp. v. Minar, File No. 13-1616 (August 13, 2014).

In the present case, the manager testified that the bonus payment was made every year so long as the department was profitable, the department met quota, the employee worked 1000 hours in the previous year and that the employee was employed in the week ending December 15 of the prior year. That is sufficient to support a finding that the bonus was a regular payment and therefore should be included in the rate calculation.

## O R D E R

IT IS THEREFORE ORDERED that the arbitration decision of August 19, 2014, is AFFIRMED as to the rate calculation and MODIFIED as set forth herein and that:

Defendants shall pay unto the claimant two hundred twenty-five (225) weeks of permanent partial disability benefits commencing April 4, 2012, at the weekly rate of three-hundred fifty-six and 20/100 ($356.20) dollars.

The parties shall each pay one half of the costs of the appeal, including the preparation of the hearing transcript.

Signed and filed this 17th day of July, 2015.

Joseph S. Cortese II

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WORKERS' COMPENSATION
COMMISSIONER

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