BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RICHARD M. DAGUE, Claimant, vs. UNISYS CORPORATION, Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	File No. 1645503.02 ARBITRATION DECISION Head Note Nos.: 1803, 2907

STATEMENT OF THE CASE

Richard Dague, claimant, filed a petition for arbitration against Unisys Corporation, as the employer and Indemnity Insurance Company of North America, as the insurance carrier. This case came before the undersigned for an arbitration hearing on November 15, 2021.

Pursuant to an order from the Iowa Workers' Compensation Commissioner, this case was heard via videoconference using CourtCall. All participants appeared remotely via CourtCall.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, 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. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 11, including supplemental exhibits to be included as Joint Exhibits 10, pages 117A and 117B. All exhibits were received without objection. Claimant testified on his own behalf. No other witnesses testified live at the hearing. The evidentiary record closed at the conclusion of the arbitration hearing.

However, counsel for the parties requested an opportunity to file post-hearing briefs. This request was granted and both parties filed briefs on or before December 17, 2021. The case was considered fully submitted to the undersigned on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant's recovery of permanent disability benefits is limited to the applicable permanent functional impairment rating or whether the injury should be compensated with industrial disability benefits.

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

3. Whether costs should be assessed against either party and, if so, in what amount.

FINDINGS OF FACT

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

Richard Dague was 62 years old at the time of hearing. He is a high school graduate and possesses additional college training. (Transcript, pp. 11-12) He studied agri-business at Iowa State University and English at the University of Iowa but did not receive a degree from either institution. (Joint Ex. 11, deposition p. 7)

Claimant worked most of his career setting up computer network systems. He described this as setting up the "back end" of the computer systems, including stringing and pulling cable, installing servers, and similar work. He is capable of assisting the end user on a personal computer or laptop, but most of his work throughout the years has been the "back end" hardware and cabling work. (Tr., pp. 13-14)

Mr. Dague started with this employer, Unisys Corporation, in 2014. He had no permanent work restrictions when he started with Unisys. (Tr., p. 18) On February 10, 2018, claimant experienced an admitted low back injury moving computer equipment while performing job duties for Unisys. He reported the injury and the employer provided necessary care.

Unfortunately, conservative care failed, and claimant was referred to a back surgeon, Todd J. Harbach, M.D. Dr. Harbach evaluated claimant on February 13, 2018. He noted that claimant had low back pain, which radiated to both thighs. (Joint Exhibit 3, p. 11)

Dr. Harbach opined that claimant had pre-existing stenosis and degenerative disc disease. However, he also opined that claimant sustained a new disc herniation in his lumbar spine as a result of the work injury. (Joint Ex. 3, p. 31, 33) He recommended surgical intervention after attempts at steroid injections failed to resolve claimant's symptoms on a long-standing basis. Dr. Harbach took claimant to surgery in November 2020. (Joint Ex. 3, p. 53) At his one-month post-operative follow-up, claimant reported he had no back or hip pain. However, Mr. Dague reported pain in his buttocks and hip pain continuing after surgery. (Joint Ex. 3, p. 53)

Dr. Harbach declared maximum medical improvement (MMI) on January 22, 2021. He released claimant to return to work without restrictions but assigned a 13 percent permanent functional impairment of the whole person as a result of the two-level lumbar decompression he performed on claimant. (Joint Ex. 3, p. 61)

Claimant sought an independent medical evaluation performed by John D. Kuhnlein, D.O., on April 21, 2020. (Joint Ex. 6) Dr. Kuhnlein agreed with the MMI date designated by Dr. Harbach. However, Dr. Kuhnlein opined that claimant sustained a 23 percent permanent functional impairment of the whole person as a result of the two-level lumbar decompression performed by Dr. Harbach. (Joint Ex. 6, p. 69) Dr. Kuhnlein also recommended permanent work restrictions as a result of the work injury. Specifically, Dr. Kuhnlein recommended claimant not lift more than 20 pounds on an occasional basis. He also recommended that claimant be permitted to sit, stand, and walk as needed for comfort, and recommended that he rarely stoop, squat, or bend. Dr. Kuhnlein also recommended that claimant only rarely crawl, kneel, or walk stairs. Finally, Dr. Kuhnlein recommended claimant never work at heights. (Joint Ex. 6, p. 80)

Following the initial conservative care, claimant returned to work for the employer in his usual job. Again, after the low back surgery, claimant returned to work without restrictions for Unisys. (Tr., pp. 41-42) Mr. Dague earned the same or more wages upon his return to work for Unisys after surgery. He continued to work for Unisys until he was involuntarily laid-off from his employment on September 3, 2018. (Joint Ex. 8, p. 90)

After his lay-off, claimant was off work for a period of time and performed some work through his own business until he could find new employment. Mr. Dague started new employment as a computer system administrator with Perfection Learning in April 2019. (Tr., p. 32) Mr. Dague worked for Perfection Learning without restrictions and earned the same or more in wages than he did at the time of his work injury in February 2018. He voluntarily resigned his employment with Perfection Learning on November 7, 2021, shortly before trial. (Tr., pp. 33-34; Joint Ex. 10, pp. 117A-117B)

Claimant testified that he has applied at approximately 100 different employers since quitting at Perfection Learning and that he has already received 30 virtual interviews and 5 in-person interviews. (Tr., p. 35) He anticipates returning to work as a computer system administrator and testified that he intends to work as long as possible and does not have an anticipated retirement date at this time. (Tr., p. 37) That being said, claimant is approaching the typical retirement age.

Mr. Dague testified that he has ongoing symptoms as a result of the February 10 2018 low back injury. He testified that he has difficulties transitioning from sitting to standing and walking. He testified that he often has to stand for a minute before he can actually start walking. He testified that he currently experiences symptoms into his leg and has difficulties walking great distances. He perceives weakness in his legs. (Tr, p. 27)

I found Mr. Dague to be a credible witness. I accept his testimony about his ongoing symptoms and find that claimant at least perceives weakness in his legs, has difficulties transitioning from sit to stand and walk, and that he has symptoms in his legs and difficulties walking great distances. Having found Mr. Dague credible on this issue, I find that the full duty release by Dr. Harbach is likely too optimistic. Claimant likely can perform most of his required job duties but will have difficulties if he attempts to return to network installations that require him to lift large computer equipment.

Instead, I find the restrictions offered by Dr. Kuhnlein to be more persuasive and accurate in this situation. Claimant likely can find jobs in the computer field within these restrictions, but these restrictions also preclude claimant from working in positions where he has to install and move larger computer equipment. These restrictions would preclude claimant from returning to some of his prior employment opportunities without accommodations by the employer. In fact, claimant credibly testified that he is avoiding applying for jobs that will require him to work on ladders, involve physical work stringing cable, or that require crawling or awkward positions. (Tr., pp. 35-36)

Both Dr. Harbach and Dr. Kuhnlein explain how and why they reach their opinion of permanent impairment. Both apply the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Dr. Kuhnlein adds additional impairment for loss of range of motion not considered by Dr. Harbach. In fact, Dr. Harbach's medical records document pain with active range of motion of the lumbar spine. (Joint Ex. 3, p. 55) The records do not provide specific measurements or declare the range of motion to be normal.

By contrast, Dr. Kuhnlein used an inclinometer to measure claimant's lumbar range of motion. Dr. Kuhnlein recorded specific lumbar flexion, extension, and side bending measurements. His evaluation, measurements, and impairment rating appear to be more thorough in this evidentiary record. (Joint Ex. 6, p. 77) I accept Dr. Kuhnlein's impairment rating as most convincing and find that claimant has proven he sustained a 23 percent permanent functional impairment of the whole person as a result of the February 10, 2018 low back injury.

Considering claimant's age, proximity to retirement, his educational and employment background, his ability to return to work, his permanent functional impairment, as well as his permanent restrictions, motivation, and all other factors of industrial disability identified by the Iowa Supreme Court, I find that claimant has proven he sustained a 35 percent loss of future earning capacity as a result of the February 10, 2018 work injury at Unisys.

CONCLUSIONS OF LAW

The initial dispute between the parties is whether claimant should be compensated with permanent disability benefits based upon the functional impairment methodology or via an industrial disability analysis. Claimant contends that he was involuntarily separated from the employer via a lay-off and that the separation of his employment from the employer triggers the industrial disability analysis. Defendants

contend that claimant does not qualify for the industrial disability analysis and that his compensation should be limited to permanent disability benefits utilizing the functional impairment methodology. Defendants assert that claimant found work for a subsequent employer and that he earns wages at the same or higher rate than what he earned on the date of injury.

The applicable statutory provision that governs this issue is Iowa Code section 85.35(2)(v) (2017). This statute was modified in 2017 and introduced a new concept into the worker's compensation analysis of unscheduled injuries. Section 85.34(2)(v) provides:

> If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based on upon the employee's functional impairment rating from the injury, and not in relation to the employee's earning capacity. Notwithstanding section 85.26, subsection 2, if an employee who is eligible for compensation under this paragraph returns to work with the same employer and is compensated based only upon the employee's functional impairment resulting from the injury as provided in this paragraph and is terminated from employment by that employer, the award or agreement for settlement for benefits under this chapter shall be reviewed upon commencement of reopening proceedings by the employee for a determination of any reduction in the employee's earning capacity caused by the employee's permanent partial disability.

In this case, the employee returned to work at the same or higher wages for the same employer. He was subsequently terminated by the employer. Claimant found subsequent employment again paying the same or more than he earned on the date of injury. The question argued by the parties is how the above statutory language should be applied in claimant's situation and whether he should be compensated with permanent disability benefits limited to the functional impairment rating or whether the permanent disability should be assessed through an industrial disability analysis.

The Iowa Workers' Compensation Commissioner has addressed this issue in a similar case. In Martinez v. Pavlich, Inc., File No. 5063900 (Appeal July 2020), at *5, the Commissioner held, "Thus, though claimant in this case was earning greater wages at the time of hearing than he was when he was injured, I conclude his earlier voluntary separation from defendant-employer removed claimant from the functional impairment analysis and triggered his entitlement to benefits using the industrial disability analysis."

Defendants point out that judicial review was taken from the Commissioner's Martinez decision. Defendants assert that the Iowa District Court disagreed with the Commissioner's interpretation of Iowa Code section 85.34(2)(v) and held that claimant should only be compensated under the functional impairment methodology because the claimant was earning the same or greater wages at the time of the arbitration hearing,

even if through a subsequent employer. The Iowa Supreme Court or Court of Appeals have not yet provided a definitive interpretation of this statutory provision.

Three other deputy commissioners have analyzed the issue with mixed results. In Carte v. Whirlpool, File Nos. 1643167.01, 1656980.01, and 19700417.01, the deputy commissioner accepted the Commissioner's interpretation in Martinez as the binding authority and applied the industrial disability analysis. In Raley v. Securitas Security Services of USA, File No. 5067169 (Arbitration March 2021), the deputy commissioner concluded that the industrial disability analysis applies in similar circumstances. However, in DeMoss v. Buesing & Associates, File No. 5068006 (Arbitration Decision (2020), the deputy commissioner concluded that the industrial disability analysis should not apply because the claimant was terminated after returning to work for the employer for reasons unrelated to the work injury.

The facts of this case seem to fit within the statutory framework set forth in Iowa Code section 85.34(2)(v). Claimant returned to work earning the same or greater wages for the employer and was subsequently terminated by the employer from that employment. Pursuant to the Commissioner's decision in Martinez, this is a situation in which claimant's permanent disability should be compensated with the industrial disability analysis. While I acknowledge the contrary authority of another deputy commissioner and the defendants' argument that the Iowa District Court disagreed with the Commissioner's analysis, until a definitive interpretation is provided by the Iowa appellate courts, I am bound by the precedent of this agency found in Martinez. I conclude that claimant's injury should be compensated using the industrial disability analysis because claimant was terminated by the employer after the injury and after he returned to work. Iowa Code section 85.34(2)(v); Martinez v. Pavlich, Inc., File No. 5063900 (Appeal July 30, 2020).

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 Ry. 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 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, proximity to retirement, educational background, employment history, ability to return to work or retrain, permanent impairment rating, permanent restrictions, motivation, and all other factors of industrial disability identified by the Iowa Supreme Court, I found that claimant proved a 35 percent loss of future earning capacity as a result of the February 10, 2018 work injury. This is equivalent to a 35 percent industrial disability. Industrial disability benefits are paid as a percentage of 500 weeks. Iowa code section 85.34(2)(v). Therefore, I conclude claimant is entitled to an award of 175 weeks of permanent partial disability benefits.

The final disputed issue is whether costs should be assessed against either party. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. In this case, claimant recovers an award of permanent disability benefits. Exercising the agency's discretion, I conclude that claimant's costs should be assessed. Claimant requests assessment of his filing fee ($100.00) and service fees ($6.80). Defendants conceded those were reasonable and paid at the commencement of the hearing. Tr., p. 8. Both expenses are assessed as costs against defendants pursuant to 876 IAC 4.33(3) and (7).

ORDER

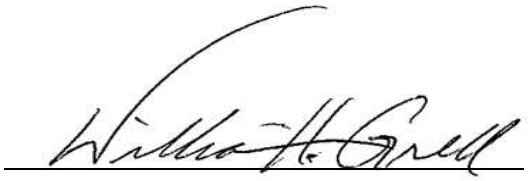
THEREFORE, IT IS ORDERED:

Defendant shall pay claimant one hundred seventy-five (175) weeks of permanent partial disability benefits commencing on January 26, 2021 at the stipulated weekly rate of six hundred fifty-four and 05/100 dollars ($654.05) per week.

Defendants shall reimburse claimant's costs in the amount of one hundred six and 80/100 dollars ($106.80).

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 __28th__ day of March, 2022.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Stephanie Techau (via WCES)

Jason Neifert (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.