

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RANDEL FOSTER,

Claimant,

vs.

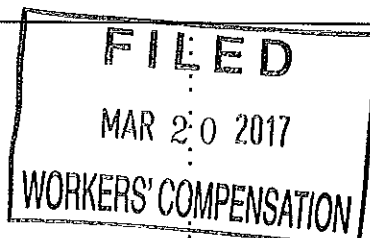
BEISSER'S INC.,

Employer,

and

FEDERATED MUTUAL INSURANCE,

Insurance Carrier,
Defendants.



File Nos. 5054854, 5054855

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Randel Foster, has filed petitions in arbitration and seeks worker's compensation benefits from, Beisser's, Inc., employer, and Federated Mutual Insurance, insurance carrier, defendants.

Deputy Workers' Compensation Commissioner, Stan McElderry, heard this matter in Des Moines, Iowa.

ISSUES

The parties have submitted the following issues for determination:

For File No. 5054854:

1. The extent of permanent disability from the right shoulder injury arising out of and in the course of employment on April 19, 2014; and
2. Independent medical evaluation (IME) pursuant to Iowa Code section 85.39.

For File No. 5054855:

1. The extent of permanent disability from the left shoulder injury arising out of and in the course of employment on November 11, 2014; and

2. Independent medical evaluation (IME) pursuant to Iowa Code section 85.39.

FINDINGS OF FACT

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

The claimant was 54 years old at the time of hearing. He is not a high school graduate, but has a GED. For most of his adult life the claimant has been a truck driver. He began working for Beisser's as a driver on May 1, 2013.

On April 9, 2014 the claimant was walking out of the warehouse when he rolled his ankle and fell landing on his knees, left hand and left shoulder. He was seen by an occupational doctor on May 1, 2014 with right shoulder pain complaints. An MRI was ordered on June 9, 2014. The MRI was positive for rim-vent tears along the mid-supraspinatus and posterior infraspinatus tendons. He was referred to Nicholas J. Honkamp, M.D., who he first saw on June 24, 2014. Dr. Honkamp believed that surgery was necessary and on July 14, 2014 performed an acromioplasty and debridement. The claimant was released to work with restrictions on August 27, 2014. After declining at least two steroid injections over the next few months, the claimant was released to full duty work on November 4, 2014. He was released without restrictions on December 16, 2014. On January 20, 2015, Dr. Honkamp opined a 2 percent permanent impairment of the right upper extremity (RUE) from the work injury of April 9, 2014. (Exhibit A, page 4)

On November 11, 2014 the claimant suffered an injury arising out of and in the course of his employment when he stepped into a trench and injured his left shoulder. He was again treated by Dr. Honkamp who had been treating the right shoulder. Dr. Honkamp performed surgery for a left rotator cuff tear on March 2, 2015. Physical therapy was ordered and provided post-surgery. The claimant was returned to work in September of 2015. The parties stipulated a commencement date for permanent disability of September 10, 2015. The claimant was discharged by the employer on December 3, 2015 after returning from jury duty.

The claimant was seen by Jacqueline Stoken, D.O., for an independent medical evaluation on March 15, 2016. (Ex. 5) Dr. Stoken opined permanent work restrictions of avoiding work above shoulder level, to avoid lifting more than 10 pounds constantly, 25 pounds frequently, and 50 pounds on an occasional basis. (Ex. 5, pp. 38-40) Dr. Stoken opined a 6 percent body as a whole (BAW) for the right shoulder and 7 percent BAW for the left. (Ex. 5, pp. 38-39)

The claimant also saw a vocational specialist at claimant's counsel's request. (Ex. 6) Phil Davis, M.S., found that the claimant had lost access to 89 percent of all occupations and 100 percent of past relevant employment. (Ex. 6, pp. 63-64) Rene

Haigh, M.S., did a vocational report for the defendants. Ms. Haigh identified some jobs that the claimant could still perform including truck driver. (Ex. C)

The claimant's restrictions prohibit the return to most relevant employment. He is a 54-year-old man with severe restrictions. He is not precluded from all of the job market, but is restricted from the majority based on the two injuries. He is not an odd-lot employee. He has some remaining industrial capacity. Considering the claimant's medical impairments, training, permanent restrictions, daily pain, as well as all other factors of industrial disability, the claimant has suffered a 30 percent loss of industrial earnings capacity from the April 9, 2014 right shoulder injury. A 40 percent independently lost earnings capacity from the left shoulder injury of November 11, 2014 is also found.

On the April 9, 2014 date of injury the claimant had gross weekly earnings of \$751.24, was single, and entitled to one exemption. As such, his weekly benefit rate is \$459.52. The commencement date for permanent disability was stipulated as November 18, 2014. On the November 11, 2014 date of injury the claimant had gross weekly earnings of \$888.24, was single, and entitled to one exemption. As such, his weekly benefit rate is \$533.90. The commencement date for permanent disability was stipulated as September 10, 2015. Claimant also seeks payment/reimbursement of the Dr. Stoken IME fee of \$3,700.00.

REASONING AND CONCLUSIONS OF LAW

The first issue is the extent of permanent disability for the April 9, 2014 injury.

Since claimant has 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.2d 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.

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961). Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

Based on the finding that the claimant has suffered 30 percent loss of earnings capacity, he has sustained a 30 percent permanent partial industrial disability entitling him to 150 weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(u).

The next issue is the extent of permanent disability for the November 11, 2014 injury.

Since claimant has 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.2d 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."

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Based on the finding that the claimant has suffered 40 percent loss of earnings capacity, he has sustained a 40 percent permanent partial industrial disability entitling him to 200 weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(u).

IME

Iowa Code section 85.39 provides, in relevant part, as follows:

If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa-App. 2008).

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Dr. Stoken provided an IME after the defendants got a rating from a defense selected doctor which claimant believed was too low. The defendants shall pay/reimburse the \$3,700.00 IME fee of Dr. Stoken.

ORDER

Therefore it is ordered:

That the defendants pay claimant one hundred fifty (150) weeks of permanent partial disability benefits commencing November 18, 2014 at the weekly rate of four hundred fifty-nine and 52/100 dollars (\$459.52).

That the defendants pay claimant two hundred (200) weeks of permanent partial disability benefits commencing September 10, 2015 at the weekly rate of five hundred thirty-three and 90/100 dollars (\$533.90).

That defendants shall pay/reimburse as appropriate the Dr. Stoken's IME fee of three thousand seven hundred and 00/100 dollars (\$3,700.00).

Costs are taxed to the defendants pursuant to 876 IAC 4.33.

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30 with subsequent reports of injury pursuant to rule 876 IAC 3.1.

Signed and filed this 20th day of March, 2017.



STAN MCELDERRY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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SRM/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.