BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOHN YAW,

Claimant,

vs.

WESTSIDE AUTO BODY OF DES MOINES,

Employer,

and

AUTO-OWNERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File Nos. 5043051, 5043052

APPEAL

DECISION

FILED

APR 27 2015

WORKERS' COMPENSATION

Head Note No.: 1803

Defendants Westside Auto Body of Des Moines and Auto-Owners Insurance Company appeal from an arbitration decision filed on May 29, 2014. The case was heard on February 28, 2014, and it was considered fully submitted on March 14, 2014, in front of the deputy workers' compensation commissioner. The deputy commissioner awarded claimant a 60 percent industrial disability as a result of a stipulated inguinal hernia injury on December 22, 2010 (file number 5043051). Medical benefits were awarded for a carpal tunnel syndrome injury on November 9, 2011 (file no. 5043052), but no permanency benefits were awarded for this injury. Defendants assert on appeal that the deputy commissioner erred in determining that claimant proved entitlement to industrial disability benefits. Defendants alternatively assert that if claimant is deemed to have sustained industrial disability, the deputy commissioner's award of 60 percent industrial disability is not supported by the evidence. Claimant asserts a cross-appeal in his appeal brief, but claimant failed to file a notice of cross-appeal. The detailed arguments of the parties have been considered and the record of evidence has been reviewed de novo. The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal.

Claimant's exhibits were marked numerically. Defendants' exhibits were marked alphabetically. References in this decision to the hearing transcript shall be cited as "Tr." followed by the page number in the original transcript. The pages of each exhibit submitted by both parties are not numbered separately. Their entire exhibit packages are numbered consecutively.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

ISSUES ON APPEAL

The only issue raised by the parties in this appeal is the extent, if any, of claimant's industrial disability caused by the December 22, 2010, injury.

STIPULATIONS AT HEARING RELEVENT TO THIS APPEAL

The parties agreed to the following matters in a written hearing report submitted at hearing:

1. On December 22, 2010, claimant received an injury arising out of and in the course of employment with defendant employer.

2. If the December 22, 2010, injury is found to have caused permanent disability, the type of disability is an industrial disability to the body as a whole.

3. At the time of the December 22, 2010, injury, claimant's gross rate of weekly compensation was $800.00. Also, at that time, he was married and entitled to two exemptions for income tax purposes. Therefore, claimant's weekly rate of compensation is $524.16 according to this agency's published rate booklet for this date of injury.

Finally, there is no dispute that defendants voluntarily paid 25 weeks of permanent disability benefits for the December 22, 2010, injury.

FINDINGS OF FACT

The following findings concern the hernia injury only. As they are not at issue in this appeal, the findings of the deputy commissioner concerning the carpal tunnel injury in the arbitration decision remain unchanged.

Claimant, John Yaw, lives in Des Moines, Iowa. He is 65 years old. His education consists of attending through the eleventh grade at the State Juvenile Home in Toledo, Iowa, and then moving to Des Moines to complete high school. However, he did not graduate and does not have a GED. He has no college or trade certifications, and no military training. (Tr. pp. 11-12)

Claimant's medical history begins with a leg injury as an infant. In a 1970 motor vehicle accident, claimant suffered a broken leg, jaw and nose. In March 1993, he sustained broken ribs and a punctured lung after being struck by a car. He was stabbed in the right cheek in 1994. He underwent a naval hernia surgery in 2000. In May 2002, claimant injured his right wrist in a racing incident. He stated he suffered a broken nose approximately 9 times during his lifetime from numerous altercations. (Exhibit K, pp. 35-36) Claimant asserts he suffered no permanent conditions from these injuries. (Id.)

Claimant stated he has worked his entire career as an automobile body man, which is the only trade he knows. He stated one has to have a good physical condition

to do this work, as the work involves bending, lifting, twisting, stooping, squatting, kneeling, and working with heavy body parts such as hoods, metal bumpers and doors. (Tr. pp. 13-14)

Claimant stated that after high school, he drifted around the country, doing body work, until he returned to Iowa and began working for Wilson Auto Body, doing body work. From 1992 to 2002, he worked at Howard Martin Auto Body, installing quarter panels, fenders, and doors, but not frame work . From 2002 to 2005, he worked for a body shop in Altoona, doing normal auto body repair. He then worked about 3 weeks in 2005 for TMC Auto Body, a temporary position, performing auto body work. From 2005 to 2006, he worked at Streamline Auto where he rebuilt "totals", putting frames together and sectioning frames, as well as putting front panels on cars. (Ex. A, p. 2, Tr. pp16-19) The record does not show any major gaps in his employment after returning to Iowa in 1990.

Claimant began working for defendant employer, Westside, on July 6, 2006, as an auto body repairman. Claimant testified that he had no physical limitations or restrictions prior to his employment with Westside. (Id., Tr. pp. 19-20). The record does not show otherwise. Claimant asserts that he intended to work at Westside for the rest of his life. Claimant met with Karen Kienker, M.D., in 2012, and he told her he would have to work until he died or was unable to work anymore, as Social Security would not be enough to support him. (Tr. pp. 19-21, Ex. 19. p. 34) Defendants point out that claimant lied in his application to Westside stating that he was a high school graduate. (Ex. E. p. 12, Tr. p. 66)

While at Westside, claimant stated that he was required to move heavy objects at times such as hoods, doors, bumpers and 55 gallon barrels, weighing up to 75 or 80 pounds. This was especially true when working with a "loaded door" which he explains is a door from a salvage yard containing all of the door hardware. He also had to do priming work, which was easier than the body work. He repaired sheet metal, which involved straightening metal to get it ready for primer and paint. He had to climb, at times, onto a frame machine which was a few feet off the floor. He was required to walk throughout the work day, back and forth across the shop. He was expected to bend, squat and stoop in the process of putting parts together and putting them onto a car. He worked underneath cars as well. A healthy body was required for the job. (Tr. pp. 11-17, 22)

On December 22, 2010, claimant was working on the frame machine, pulling a cowl panel off a door. He stated he asked a co-worker to help, but the co-worker had been drinking, so claimant did it alone. Claimant bent over to lift a loaded door and he felt a pull in his groin. The door weighed about 80 pounds. He was twisting and lifting, and he felt a sharp, popping pain. He sat down and took it easy, thinking he had pulled a muscle. He did not report the injury that day believing it was only a pulled muscle. (Tr. pp 22-23)

The next day, claimant reported for work. He still had discomfort. On December 31, 2010, he was twisting again, putting a loaded door on and he coughed at the same time, and again felt a pop and pain in the same area. He did not report that incident either. (Tr. pp 23-24)

On January 25, 2011, claimant sought medical treatment for his groin pain from a family medical provider, Aaron Anderson, P.A. Claimant reported a muscle pull, but he was checked for a hernia. He was referred to Walter Riley, M.D., a surgeon claimant had been treated by before. (Ex. 4 pp. 4-5) Claimant saw Dr. Riley on February 14, 2014. Claimant gave the same history to Dr. Riley, who diagnosed a left inguinal hernia, and recommended surgery. Claimant reported the hernia the next day at work, to his supervisor at Westside, Greg Hower. (Ex. 5, p. 6, Tr. pp. 26-28)

Defendants referred clamant to Daniel Miller, D.O., an occupational medicine physician, for further medical care. Claimant first saw Dr. Miller on March 28, 2011. Dr. Miller confirmed claimant suffered an injury on December 22, 2010, which was aggravated on December 31, 2010. A CT scan confirmed the diagnosis of an inguinal hernia. Dr. Miller recommended hernia repair surgery. (Ex. 6 & 7, Tr. pp. 7-11) The repair surgery occurred on April 26, 2011, by a surgeon, Praveen Prasad, M.D. The surgery report shows a repair of the inguinal hernia, with the insertion of mesh. Dr. Prasad released claimant to return to full duty work on June 19, 2011 and claimant did so. (Ex. 9, pp. 14-15, Ex. A. pp. 1-2)

Despite his return to work, claimant did not recover well from the surgery. Claimant returned to Dr. Miller in July and October 2011, because he was still having a burning sensation, numbness in his groin, and radiation of pain. Dr. Miller concluded that the inguinal nerve was irritated and referred claimant to Kenneth Pollack, M.D., for pain management on August 17, 2011. At that time, claimant still had a constant ache and throbbing, and the feeling of electrical surges throughout his groin area. (Ex. 10, pp. 16-17, Ex. B, pp. 3-4, Tr. pp. 31-33)

Dr. Pollack agreed with Dr. Miller that claimant suffered a damaged nerve from the surgery. Dr. Pollack stated if the medication did not relieve the pain, he would deaden the nerve and kill it. The medication initially prescribed by Dr. Pollack upset claimant's stomach and a second drug gave him anxiety, so both medications were cancelled. A nerve block was suggested by Dr. Pollack in January 2012 if symptoms persisted, but Dr. Miller recommended against it and defendants refused to authorize this treatment modality. (Ex. 11, pp.18-20, Tr. pp. 34-35)

Neither Dr. Miller nor Dr. Pollack took claimant off work or imposed work restrictions for claimant's hernia condition after the release to full duty by Dr. Prasad. Claimant testified that he continued to have severe pain after his last visit with Dr. Pollack. This consisted of sharp pains like he was "kicked" in the stomach and they occurred three times a week, especially after working hard. Claimant stated this pain affected his ability to carry things, but this hadn't done much to his work because he minimized his lifting and always asked for help in lifting from co-workers. (Tr. p. 36-37)

On January 5, 2012, Dr. Miller's notes reflect some continued complaints by claimant of a burning sensation and numbness with shooting pains in the groin area, but the radiation of the pain down to the scrotum and urinary urgency had resolved. Dr. Miller then placed claimant at maximum medical improvement (MMI). (Ex. 14, pp. 24-25) At this time, defendants ended their authorization for further treatment. Dr. Miller opined that claimant suffered a 5% permanent partial impairment to the body as a whole from his hernia injury and defendants paid claimant 25 weeks of disability benefits to claimant based on this rating. (Ex. 16, p. 28, Ex. H, pp. 26-27))

About this time, claimant was diagnosed with work-related carpal tunnel syndrome. He was taken off work for about six weeks following carpal tunnel repair surgery by Michael Gainer, M.D. on February 4, 2013. Dr. Gainer provided a zero impairment rating and released claimant to full duty after recovery from this surgery. (Ex. 15-18, pp. 26-31, Ex. 20-23, pp. 36-42)

Claimant stated after his hernia surgery, it was more difficult to do his job. He had to be more careful and, to continue working, he had to make adjustments in how he performed his job. Claimant stated before his hernia injury he could lift hoods, bumpers, doors, and 55 gallon barrels of trash by himself, but he stated after his injury he could no longer do that and needed to seek assistance from co-workers in lifting these items. Claimant stated that when he worked on the floor, he would make sure he had the tools and parts he needed so he did not have to get up and down. He was able to work full time, but he felt weaker. He had been working there many years, without any complaints about his work, before his work injury. (Ex. K, Tr. pp. 51-54)

At the request of his attorney, claimant's hernia condition was evaluated in July 2012, by Karen Kienker, M.D., a specialist in physical medicine and rehabilitation. Claimant reported his continued symptoms described above and the adjustments to his work activity such as limiting his lifting and asking for assistant from co-workers in handling hoods, doors, bumpers and barrels. (Ex. 19, p.33, Tr. p. 39) Dr. Kienker concurred with Dr. Miller's 5% impairment rating and stated as follows concerning the need for work activity restrictions:

> "I do not recommend any specific restrictions since he is able to handle his job and plans to continue. He is already self-limiting his lifting." (Ex. 19, p. 35)

Claimant admits that he returned to full time duty and except for the six weeks he was off work following the carpal tunnel surgery, he worked full duty continuously from June 2011 until December 30, 2013, over two years, when he was fired by managers at Westside. (Tr. pp. 72-74) He was earning $20.00 per hour before and after the work injuries in this case.

Claimant's testimony about the events on the day of his termination differed from the testimony of his supervisor. Claimant testified that after he arrived at work, on December 30, 2012, his supervisor, Greg Hower, assigned him a car to work on, and

claimant got it ready to be painted. Claimant finished that task and asked what he should do next. He stated Hower told claimant he would think about it. Claimant worked on some other things, and again asked Hower what he should do. Claimant stated Hower finally went back to the office, and claimant followed him. Hower had him sit down and told him it was not working out and they were letting him go. Claimant stated he then said goodbye to the owner, shaking his hand and telling him it was a pleasure to work for him. A new employee had been hired in November 2013, and another new employee began the day claimant was terminated. Claimant stated he was never told why he was terminated. The new employee hired in November was able to help with estimates, something claimant could not do. Claimant stated he did see a Craig's List ad for a job with defendant-employer about three weeks earlier. (Tr. pp 55-58) Claimant stated he did learn from co-workers, not from any manager, that three cars had been returned with defects in workmanship and the manger blamed claimant for this. Claimant denied these defects were caused by him. (Tr. pp 76-77) In reply to a question asking whether he was physically capable of doing his job at the time of his termination, claimant stated, "I did it." (Tr. p. 77)

Claimant's supervisor, Greg Hower, testified that he has worked at Westside Auto Body the last 13 or 14 years and as manager for the last 10 years. He stated he is involved in hiring and firing of employees. He stated he also does hands-on work with cars to a limited extent. He stated he also inspects the cars that have been worked on. Hower stated that after claimant's hernia and carpal tunnel surgeries, claimant returned to full duty work with the same hours and pay. He stated he did not receive any complaints from claimant about an inability to perform his work tasks. (Tr. 87-94)

Hower testified that claimant was terminated as a result of three "comebacks" in a week and a half. He stated he told claimant he had a problem with the quality of his work and it was not working out. He states he discussed with claimant the specific problems with the three vehicles. One was a Dodge van where a hose was not functioning. Another car came back with a tail light issue and it was discovered there were bolts missing from the back bumper claimant had put on. Another car was not allowed to leave the shop because of problems with claimant's work. Hower asserts that these problems would not have been related to claimant's work injuries, but were related to workmanship issues. Hower stated he believes claimant was physically able to do those tasks properly from his observation of claimant since returning from surgery and the termination had nothing to do with claimant's injuries or his need to limit his lifting. Hower denied replacing claimant. (Tr. pp. 96-97) Hower could not recall providing clamant with any prior warnings of performance problems and stated claimant was a good, hard-working, and honest employee. (Tr. pp. 106, 108, 113)

Hower also testified he did not notice any decrease in claimant's physical abilities before his termination, and claimant was able to perform the duties of his job. Hower did not observe clamant struggling to perform his work. Hower stated that but for the problems with claimant's work, he would still be employed as a body man. (Tr. p. 100, 114-115)

However, Hower admitted he did observe a change in how claimant lifts by asking for help more often. Hower explained that claimant was just working "smarter" which anyone would do if they thought lifting would cause injury. (Tr. p. 89) Hower also admitted that claimant complained of soreness after the hernia surgery. (Tr. p. 93) Hower asserted that his employees, as well as other auto body workers in the industry, usually obtain assistance when handling heavy auto parts. (Tr. pp 89-91)

Hower testified he could count on one hand the doors he has lifted by himself. He has seen workers do it, but not many. He understood claimant incurred his hernia lifting a door by himself. He was not aware of an intoxicated employee, and if he had, he would have terminated that employee. Hower stated he does not have light duty work at the shop. He stated he is not aware of any prior quality problems on claimant's part. Hower stated he would hire someone limited to lifting 20 pounds, but he did not know if he would or would not hire someone limited to lifting 20 pounds four times per hour, or someone limited in bending, twisting, or squatting. (Tr. pp. 102-103, 109)

Claimant returned to Dr. Kienker in January, 2014, for another evaluation. Dr. Kienker noted claimant's groin pain had not gotten any better, and lifting, squatting and bending aggravated the pain, as well as extensive walking. Dr. Kienker causally related those symptoms to the hernia injury and the repair surgery. She stated claimant told her the following:

> "I had seen him for an Independent Medical Examination on 07/24/2012. At that time, he was working without restrictions, but was limiting himself to what he could comfortably do at work. I did not outline work restrictions at that point. He subsequently has been let go from his employment. He is not sure why, but said he had been limiting his lifting. He would have other workers help him if he had to carry a car door. He would not empty the garbage without help. They have 55 gallon plastic drums full of garbage, which might weigh 100-150 pounds." (Ex. 24, p. 43)

Dr. Kienker did not change her prior impairment rating, but recommended physical activity restrictions consisting of lifting limited to 20 pounds, up to four times per hour; bending and/or squatting up to six times per hour; avoid bending and twisting simultaneously; and walking limited to 15 minutes at a time up to 1 hour per day. (Ex. 24, p. 44) Claimant stated he agrees with those limitations. (Tr. p. 42) Claimant testified that with those restrictions, he could not return to auto body work with Westside or any other body repair shop or general auto maintenance and repair work. (Tr. pp. 59-60) He stated he does not believe there is any other branch of the labor market he could successfully be employed in and he stated he does not believe he can be re-trained. (Tr. 60-61)

At the request of defendants, Dr. Miller also re-evaluated claimant in January 2014. Like Dr. Kienker, Dr. Miller did not change his impairment rating. Despite noting claimant's continued complaints with activity, Dr. Miller opined that claimant's condition had not changed such that he currently requires any permanent restrictions. (Ex. D, p.

11) Dr. Miller did err in stating that Dr. Kienker's last evaluation noted that claimant was still doing his full duty work. This was not the case. I don't believe this error significantly impacts the weight that should be given to Dr. Miller's opinion.

Claimant has been unemployed since leaving Westside. He has filed for unemployment benefits, and has made many unsuccessful job searches. Exhibit 26 shows his log of job applications to potential employers. He claims he is seeking any type of job to pay the bills. (Tr. p. 61) However, except for a single application to an auto salvage job, the list includes only auto body repair or general auto repair shops, the type of work he does not believe he can do. (Ex. 26, pp. 47-48) Claimant stated he continues to look for work using his computer which is primarily operated by his wife and he stated he reviews advertisements in Craig's List. Claimant stated he has had a professional resume prepared by the staff at the Iowa Department of Workforce Development. (Tr. pp. 62-64)

First, I agree with the hearing deputy's finding that claimant's work injury of December 22, 2010, did not contribute to claimant's termination from Westside. Admittedly, certain facts surrounding the termination such as the lack of any prior warning and any prior instances of shoddy workmanship by claimant renders the alleged reasons for the termination suspect. However, given the conflicting testimonies as to the reasons for claimant's termination, the question largely rests on a credibility assessment of claimant and the supervisor. The hearing deputy specifically found the supervisor credible. I give considerable deference to findings of fact that are impacted by the credibility findings, expressly or implied, made by the deputy who presided at the hearing. The deputy who presided at the hearing had the best opportunity to evaluate the demeanor of the persons who testified at the hearing.

Secondly, I do not agree with the hearing deputy that a preponderance of the evidence shows the December 22, 2010, injury to be a cause of the extensive permanent activity restrictions recommended by Dr. Kienker. Her opinions are rebutted by Dr. Miller. Given the history presented to Dr, Kienker in January 2014, she likely mistakenly believed that claimant lost his job due to his need for assistance as a result of the hernia injury. Claimant's continued full duty work at Westside for well over two years after the hernia injury is inconsistent with such restrictions. Also, the deputy found the supervisor credible on the termination issue, but did not given any weight to his observations of claimant's full duty work activity without complaints, and claimant did not appear to have struggled to continue his work. There should be a clear showing by the evidence that the work injury impacted claimant's performance to the extent that he lost or endangered his job. This was not shown.

On the other hand, there is no dispute that the work injury is a cause of a permanent 5% loss of function. There is little dispute among the medical experts that claimant continued to have significant symptoms after reaching MMI that are aggravated by work activity and will likely continue to have these problems in the future. Also, there is ample evidence that claimant modified his work activity after the injury to accommodate for his pain, just not the extent opined by Dr. Kienker. Claimant is having

trouble finding replacement employment, but being fired for poor workmanship, unrelated to the hernia injury, also deters from his re-employment. Combining these factors with claimant's advanced age and lack of formal education, I find that the work injury of December 22, 2010, is a cause of a permanent 30% loss of earning capacity or industrial disability.

CONCLUSIONS OF LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

A treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404.408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192.

The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2)(a-t), the disability is considered a scheduled member disability and measured functionally. If it is found that the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and measured industrially under Code subsection 85.34(2)(u). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. Delong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

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. However, consideration must also be given to the injured workers' medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured worker's qualifications intellectually, emotionally and physically; the worker's earnings before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616, (Iowa 1995); 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).

The parties agreed in this case that if the work injury is a cause of permanent disability, that disability is an industrial disability. Consequently, this agency must measure claimant's loss of earning capacity as a result of this impairment.

A showing that claimant had no loss of his job or actual earnings as a result of a work injury does not preclude a finding of industrial disability. Loss of access to the labor market is often of paramount importance in determining loss of earning capacity, although income from continued employment should not be overlooked in assessing overall disability. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991); Collier v. Sioux City Comm. Sch. Dist., File No. 953453 (App. February 25, 1994); Michael v. Harrison County, Thirty-fourth Biennial Rep. of the Industrial Comm'r, 218, 220 (App. January 30, 1979).

Although claimant is closer to a normal retirement age than younger workers, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund v. Nelson, 544 N.W.2d 258 (Iowa 1995). However, this agency does consider voluntary retirement or withdrawal from the work force unrelated to the injury. Copeland v. Boones Book and Bible Store, File No. 1059319 (App. November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

A release to return to full duty work by a physician is not always evidence that an injured worker has no permanent industrial disability, especially if that physician has also opined that the worker has permanent impairment under the AMA Guides. Such a rating means that the worker is limited in the activities of daily living. See AMA Guides

to Permanent Impairment, Fifth Edition, Chapter 1.2, p. 2. Work activity is commonly an activity of daily living. This agency has seen countless examples where physicians have returned a worker to full duty, even when the evidence is clear that the worker continues to have physical or mental symptoms that limit work activity, e.g. the worker in a particular job will not be engaging in a type of activity that would cause additional problems, or risk further injury; the physician may be reluctant to endanger the workers' future livelihood, especially if the worker strongly desires a return to work and where the risk of re-injury is low; or, a physician, who has been retained by the employer, has succumbed to pressure by the employer to return an injured worker to work. Consequently, the impact of a release to full duty must be determined by the facts of each case.

In this case, I find that claimant suffered a 30% loss of his earning capacity as a result of the work injury. Such a finding entitles claimant to 150 weeks of permanent partial disability benefits as a matter of law under Iowa Code section 85.34(2)(u), which is 30% of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection.

ORDER

IT IS THEREFORE ORDERED paragraph 1 of the Order portion if the arbitration decision of May 29, 2014, is modified as follows:

1. In File No. 5043051, defendants shall pay to claimant 150 weeks of permanent partial disability benefits at the stipulated weekly rate of $524.16 per week from June 19, 2011. Defendants shall receive credit for the 25 weeks of permanent disability benefits previously paid to claimant.

2. The costs of this appeal are assessed to claimant.

The remaining orders in the arbitration decision are unchanged.

Signed and filed this 27th day of April, 2015.

Joseph S. Cortese II

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