BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
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WORKERS' COMPENSATION

DALE D. WULF, Claimant, vs. KRAJICEK, d/b/a KRAJICEK PALLET INC., Employer, and QBE SPECIALTY MIDDLE MARKET, Insurance Carrier, Defendants.	File No. 5041729 ARBITRATION DECISION Head Notes: 1803, 1804

STATEMENT OF THE CASE

Claimant, Dale Wulf, filed a petition in arbitration seeking workers' compensation benefits from Krajicek, d/b/a Krajicek Pallet Inc. (Krajicek), employer, and QBE Specialty Middle Market, insurer, both as defendants. This case was heard in Council Bluffs, Iowa on November 7, 2017 with a final submission date of December 1, 2017.

The record in this case consists of Joint Exhibits 1 through 15, Claimant's Exhibits 16 through 18, Defendants' Exhibits A through B, and the testimony of claimant and Rene Haigh, M.S., C.R.S.

References to the "arbitration decision" in this decision, refer to the underlying arbitration decision filed on April 9, 2014.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

ISSUE

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

FINDINGS OF FACT

Claimant was 40 years old at the time of hearing. Claimant has a GED. Claimant has worked cutting scrap metal, building homes and car washes and doing roofing.

Claimant worked for Krajicek at different times in 2000. Krajicek is a trucking company. Krajicek Pallet is a company that builds pallets. (Arbitration decision, page 2) Claimant said three days after he began working for Krajicek he was appointed to be a supervisor assistant on the job. He said on the date of injury he was a pallet shop supervisor. (Transcript pages 13-15)

On July 5, 2011 claimant and a coworker were lifting a metal dock plate. While lifting the plate, claimant felt a pop and felt pain in his back. (Arb. decision, p. 3)

Claimant underwent conservative treatment for his lower back condition from 2011 through 2013 with Donald Anderson, D.C. and Huy Trinh, M.D. (Arb. decision, p. 3; Joint Exhibit 11, pp. 20-21) When conservative treatment failed to offer significant relief, claimant underwent an L3-L5 fusion on March 13, 2015. Surgery was performed by Dr. Trinh. (Arb. decision, p. 3; Jt. Ex. 11, p. 21)

Sometime on September 13, 2011 or September 14, 2011 claimant complained to his employer regarding his back injury, and his employment ended on that day. (Arb. decision, p. 5)

On October 8, 2013 an arbitration hearing was initially held in this case to determine, in part, the extent of claimant's entitlement to temporary benefits. In an April 9, 2014 decision claimant was found to be entitled to a running award of temporary total disability benefits beginning on September 15, 2011. (Arb. decision, pp. 6, 12)

Claimant was evaluated by Dr. Trinh on March 21, 2014. Claimant was one year out from the L3-L5 fusion. Claimant had a nonunion at the L3-4 levels. (Jt. Ex. 5, p. 12)

On August 1, 2014 claimant was found to be disabled under the Social Security Act. At the time of the Social Security Disability decision, claimant's fusion was still in the nonunion status. (Ex. 17, p. 47) The decision found claimant could only do sedentary work, lift up to 10 pounds and had to recline/rest/and nap as needed. (Ex. 17, p. 48)

Claimant was seen by Dr. Trinh on February 23, 2015. Claimant still had nonunion at the L3-4 levels. An MRI was recommended. (Jt. Ex. 7, p. 14)

On April 16, 2015 claimant was evaluated for rib pain after being "bucked" off a horse. (Jt. Ex. 15, pp. 34, 36)

On August 11, 2015 claimant underwent an independent medical evaluation (IME) with Timothy Burd, M.D. Claimant had lower back pain with pain in the right thigh and calf. A CT scan of the lumbar spine was recommended. (Jt. Ex. 11)

Claimant was seen by Dr. Trinh on October 2, 2015 for lower back pain. Pain began after claimant was loading heavy equipment in his truck. X-rays showed a bone bridge occurring at the L3-L4 levels. Use of a TENS unit was discussed. (Jt. Ex. 8)

Claimant returned to Dr. Trinh on October 26, 2015. Claimant indicated the TENS unit partially helped his symptoms. Claimant was given a lumbar injection. (Jt. Ex. 9)

In a February 22, 2016 note, Dr. Trinh assessed claimant as having chronic lower back pain. He found claimant was at maximum medical improvement (MMI) as of October 26, 2015. He found claimant had 23 percent permanent impairment to the body as a whole. He restricted claimant to frequent lifting up to 20 pounds and occasionally lifting up to 40 pounds. (Jt. Ex. 10)

Claimant was seen by David Tan Creti, M.D. on September 20, 2016. Claimant had lower back pain after throwing a bale of hay. Claimant was assessed as having a left-sided lumbar sprain. (Jt. Ex. 3)

Claimant was evaluated by Clifford Boese, M.D. on December 14, 2016. Claimant had right shoulder pain. Claimant had been doing chores with the left arm, such as delivering feed to animals with a feed bucket. Claimant was assessed as having degenerative arthritis in the right shoulder. (Jt. Ex. 12)

Claimant was evaluated by Theresa Gallo, PA-C on March 22, 2017 three weeks after a right shoulder distal clavicle resection. Claimant had increased pain when a horse got away, while taking care of the horse, and pulled claimant's right arm. Physical therapy was recommended. (Jt. Ex. 14)

Claimant returned in followup with Dr. Boese on April 26, 2017 for right shoulder pain. Claimant was digging a grave for a dog and fell on the right shoulder. Claimant noted loss of right arm strength. (Jt. Ex. 13)

Claimant testified at hearing that he lives on a six-acre property with some livestock. Claimant testified he has not done any work on the acreage. He testified his kids do the household chores and take care of the horses. Claimant said he has not ridden for more than two years, although he did ride a horse three months before hearing to show a buyer the horse was broken to ride. Claimant said he can carry a five-gallon bucket of water. He said he tried to do farm work, but the bouncing on the tractor hurt his back. He said he tried to bale hay, but he hurt his lower back.

Claimant said he uses the TENS unit every day. He said his lower back is stiff. He says he has radiculopathy down his buttocks and his right leg. He said since

surgery his left buttock has been numb. Claimant said he has difficulty sleeping due to back and leg symptoms.

Claimant said he can sit for 30 minutes at a time. He said he can walk approximately 700 yards. He said he can take one to two-hour car rides but has to stop every 40 minutes during driving. Claimant said he has difficulty bending over and picking up items.

Claimant said for the last year and a half he has been looking for a lot of jobs. He described his job search for the last one and a half years as "hardcore." (Tr. p. 31)

Claimant said Ms. Haigh helped him write resumes, sent him lists of jobs in his areas, gave him articles regarding returning to the job market, and counseled him on how to discuss his injury with potential employers.

He says of all the jobs he has applied for, he has only gotten a response from one security company. At the time of hearing claimant was still looking for work. Claimant said he wanted to return to work.

Claimant says he believes he can work, but is unsure if his body will allow him to return to work.

Ms. Haigh testified she works for Encore Unlimited as a vocational consultant. Ms. Haigh began contacting claimant in July of 2016. She says she provided claimant with a list of potential jobs, workshop calendars at Iowa Workforce Development offices, and meet and greet opportunities with potential employers for almost every month since that time. (Tr. p. 56; Ex. A) She said she received no response from claimant from approximately February of 2017 until September of 2017. Claimant resumed contact with Ms. Haigh in approximately September of 2017. (Tr. pp. 56-57)

Ms. Haigh found claimant employable. She says claimant is very personable. She said claimant's job history with Krajicek indicated claimant was hired and shortly thereafter became a supervisor.

Ms. Haigh said the last time she contacted claimant, she called him at home and was told claimant was not available. She said she was told claimant had a flooded area and was digging a trench to run water out of a lane. (Tr. pp. 60-61)

Ms. Haigh said when a person is looking for employment, they should spend 20-30 hours a week on a job search.

On rebuttal, claimant testified that regarding digging a ditch, he said he had a large puddle that had flooded his lane. Claimant said the trench was only six inches deep and approximately three feet long.

CONCLUSIONS OF LAW

The only issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits. Claimant contends he is permanently and totally disabled. Defendants contend that while claimant may have a loss of earning capacity, claimant is not permanently and totally disabled.

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 R. 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 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.

A loss of earning capacity due to voluntary choice or lack of motivation to return to work is not compensable. Rus v. Bradley Puhrmann, File No. 5037928 (Appeal Decision December 16, 2014); Gaffney v. Nordstrom, File No. 5026533 (App. September 8, 2011); Snow v. Chevron Phillips Chemical Co., File No. 5016619 (App. October 25, 2007). Copeland v. Boone Book and Bible Store, File No. 1059319 (App. November 6, 1997). See also Brown v. Nissen Corp., 89-90 IAWC 56, 62 (App. 1989) (no prima facie showing that claimant is unemployable when claimant did not make an attempt for vocational rehabilitation).

Claimant was 40 years old at the time of hearing. Claimant has a GED. Claimant has worked cutting scrap metal, building homes and car washes and has done roofing.

Dr. Trinh found claimant had a 22 percent permanent impairment to the body as a whole due to his back injury. (Jt. Ex. 10)

Dr. Tan Creti limited claimant to lifting up to 10 pounds occasionally, working less than two hours in an eight-hour day, and limited claimant to standing no more than 30 minutes at a time. (Jt. Ex. 2)

Dr. Trinh performed claimant's surgery. Dr. Trinh only limited claimant to lifting up to 20 pounds frequently and 40 pounds occasionally. (Jt. Ex. 10, p. 19)

Dr. Trinh is an orthopedic surgeon. Dr. Tan Creti specializes in family medicine.

The record indicates that since 2014 claimant has fallen from a bucking horse (Ex. 15, p. 36); moved heavy equipment onto his truck (Jt. Ex. 8, p. 15); thrown bales of hay (Jt. Ex. 3, p. 10); carried feed buckets for livestock (Jt. Ex. 12, p. 30); and dug holes and trenches with a shovel. (Jt. Ex. 13, p. 31; Tr. pp. 61, 69; Ex. A, p. 1)

The record indicates Dr. Trinh, as an orthopedic surgeon, has more experience in setting restrictions than does Dr. Tan Creti. The record also suggests that based on claimant's activity level, Dr. Trinh's work restrictions are more realistic. Given this record, it is found Dr. Trinh's work restrictions are more convincing than those of Dr. Tan Creti.

Claimant was found to be disabled under the Social Security Act. (Ex. 17) That decision was based, in part, on Dr. Tan Creti's lifting restrictions of no lifting over 10 pounds. As indicated, the restrictions of Dr. Trinh are found to be more convincing. The Social Security decision was also based, in part, on claimant's fusion still being in a non-union status. That was not the status of claimant's fusion at the time of hearing. (Ex. 9; Ex. 10) The law of the Social Security Administration Act regarding disability is different from that of the Iowa Workers' Compensation chapters. Findings regarding claimant's disability under the Social Security Act are helpful in understanding claimant's disability. However, for the reasons discussed above, the Social Security decision is not precedential or binding on this case.

Ms. Haigh is a vocational expert. Her unrebutted testimony is that given Dr. Trinh's restrictions, claimant's work history, and his supervisory experience, claimant has a number of employment opportunities. (Ex. A, pp. 7-77; Tr. p. 65)

The record does indicate claimant has looked for work. However, the record also indicates from February of 2017 through September of 2017 claimant did not respond to Ms. Haigh's monthly emails regarding finding work. Claimant lists, since September of 2016, approximately 19 applications, four job contacts, and posting two resumes on job sites. He also approached one employer, Rutgers, and visited a Workforce Development office once since 2015. (Tr. p. 68) In total, claimant has made approximately 25-30 attempts to find work over the past 14-16 months.

Ms. Haigh's unrebutted testimony is that a person needs to actively engage in a job search 20-30 hours per week. (Tr. p. 64)

The record suggests claimant has made some efforts to find work. However, the record also suggests claimant has made approximately two attempts per month, over the last 14 months, to find work, when he should be spending 20-30 hours a week in his job search.

When all relevant factors are considered, it is found claimant has a 60 percent loss of earning capacity or industrial disability.

Based on the same criteria as detailed above, claimant would not be found to be an odd-lot employee. This is due, in part, to the unrebutted testimony of Ms. Haigh that claimant has a number of good opportunities for finding employment. This is also based on the record that suggests claimant is not overly motivated to find employment.

ORDER

Therefore it is ordered:

That defendants shall pay claimant three hundred (300) weeks of permanent partial disability benefits at the rate of four hundred fifty-three and 41/100 dollars ($453.41) per week commencing on October 26, 2015.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits as ordered above and as set forth in Iowa Code section 85.30.

That defendants shall receive a credit for benefits previously paid.

That defendants shall pay costs.

That defendants shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

Signed and filed this 8th day of February, 2018.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Richard C. Schenck
Attorney at Law
711 Court St., PO Box 509
Harlan, IA 51537-0509
rschenck@sdsllaw.com

Donna R. Miller
Attorney at Law
PO Box 10434
Des Moines, IA 50306-0434
dmiller@grefesidney.com

JFC/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.