

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DUSTIN PANSEGRAU,

Claimant,

vs.

EAST SIDE JERSEY DAIRY,

Employer,

and

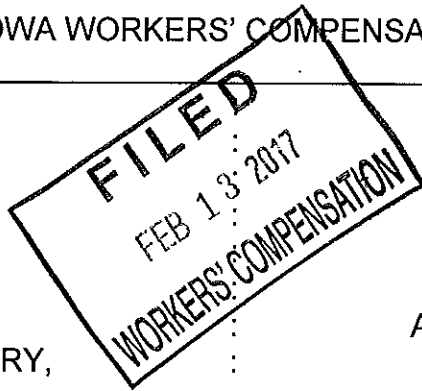
TRAVELERS INDEMNITY COMPANY
OF CONNECTICUT,

Insurance Carrier,
Defendants.

File No. 5055102

ARBITRATION
DECISION

Head Note No.: 1803



STATEMENT OF THE CASE

Dustin Pansegrau, claimant, filed a petition for arbitration against East Side Jersey Dairy, as the employer and Travelers Indemnity Company of Connecticut as the insurance carrier. An in-person hearing occurred on December 15, 2016.

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.

The evidentiary record includes joint exhibits 1 through 7 and defendants' exhibit B. All exhibits were admitted without objection. Claimant testified on his own behalf. No other witnesses were called to testify. The evidentiary record closed at the end of the December 15, 2016 hearing and the case was considered fully submitted to the undersigned.

ISSUES

The parties submitted the following disputed issues for resolution:

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

2. Whether costs should be assessed against either party.

FINDINGS OF FACTS

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

Dustin Pansegrau, claimant, is a 32-year-old gentleman, who sustained a stipulated work injury to his left shoulder on May 2, 2011. Mr. Pansegrau is a high school graduate, but has no advanced studies or degrees. He has worked in a sale barn in a livestock auction, in customer service as a laborer at CT Farm & Country, and in a production position in a tool and die shop. Mr. Pansegrau has also worked as a laborer at Tama Paperboard, as a crew foreman at a nursery, in landscaping as a laborer, for a local farm cooperative receiving grain and spraying fields, and as a route driver for East Side Jersey Dairy before the May 2, 2011 injury. (Joint Exhibit 7; Claimant's testimony)

In 2007, claimant was also self-employed and described his work as building houses, performing dirt work, landscaping, and roofing houses. Since the injury, Mr. Pansegrau has left his employment with East Side Jersey Dairy and has taken employment with Tama Paperboard as an electrician or instrumentation technician. All of claimant's employment appears to have involved relatively physical activity. (Joint Exhibit 7; Claimant's testimony)

On May 2, 2011, claimant was employed as a route driver for East Side Jersey Dairy. In this position, he drove a truck and delivered milk and dairy products to various stores. In this position, claimant would drive from Cedar Rapids to the Davenport area and then deliver to stores, schools, and other vendors throughout the Davenport area. (Claimant's testimony)

Claimant was required to lift crates of milk on and off dollies, move the dollies and crates off the truck and into the various stores, schools, and vendors' locations. After East Side Jersey took over as the owner of the business where claimant worked (it had previously been known as Prairie Farms Dairy), claimant was required to lift, sort, and load various crates each day to load his own truck before making his deliveries. He described each crate as containing up to four gallons of milk or other dairy products.

In some locations, claimant would have to physically manipulate, lift, and pass each crate into a store location for delivery. Other locations, he loaded several crates onto a dolly and wheeled the product into the store. Crates were stacked six high in the truck and claimant had to lift and place crates up to six or seven feet off the ground. Claimant worked from approximately 10 p.m. until 8 a.m. performing his deliveries. (Claimant's testimony)

Mr. Pansegrau was physically able to perform these job duties without difficulties and specifically testified that he had no prior left shoulder symptoms or injuries before

the date of injury. However, on May 2, 2011, claimant grabbed three crates of milk, the equivalent of 12 gallons of milk, stepped off of a curb and felt a pop and burning sensation in his left shoulder. He called his supervisor to report the injury, but was instructed to finish the route, which he did. (Claimant's testimony)

The employer directed claimant to Mercy Occupational Health in Cedar Rapids, Iowa for medical evaluation. Thomas R. Dean, PA-C, evaluated claimant on March 2, 2011. Mr. Dean's office note of that date documents the injury and notes claimant was experiencing pain ranging from 6-8 on a 1-10 pain scale that day. (Ex. 1, p. 2) Mr. Dean attempted conservative measures, including physical therapy and obtaining an MRI arthrogram of the left shoulder, ordering some injections in the left shoulder, but ultimately recommended and made a referral to an orthopaedic surgeon, John C. Langland, M.D. (Ex. 1; Ex. 2)

Dr. Langland initially evaluated Mr. Pansegrau on July 14, 2011. Similar to Mr. Dean, Dr. Langland attempted conservative measures, including injections in claimant's left shoulder. (Ex. 3, pp. 39-41) Unfortunately, the conservative measures were not successful. Dr. Langland recommended and ultimately performed a distal clavical excision surgical procedure on claimant's left shoulder on December 14, 2011. (Ex. 3, p. 42; Ex. 4, p. 56)

Following post-operative care and recovery, Dr. Langland declared Mr. Pansegrau to be at maximum medical improvement on August 7, 2012 and released claimant from further medical care. (Ex. 3, pp. 49, 53J) Dr. Langland released claimant to return to work without permanent restrictions at that time. (Ex. 3, pp. 49, 53J) Dr. Langland noted claimant had excellent strength in his shoulder, that his range of motion was smooth, and that he had negative impingement sign when released on August 7, 2012. (Ex. 3, p. 49) Nevertheless, as a result of the distal clavicle excision surgery, Dr. Langland opined that claimant was entitled to a six percent permanent impairment of the body as a whole pursuant to the AMA Guides. (Ex. 3, p. 50)

Mr. Pansegrau was off work from December 11, 2011 through August 7, 2012. However, after he was released by Dr. Langland, claimant returned to work for the employer with restrictions and performed the same job duties as before the date of injury. Claimant concedes that he progressed very well after surgery. He testified that he was able to work through physical therapy and experienced only slight pain while performing work hardening. Claimant testified that he was concerned about having permanent work restrictions and that he requested Dr. Langland remove all restrictions so he could return to work for East Side Jersey Dairy. (Claimant's testimony)

Mr. Pansegrau returned to full-duty work and performed his same job duties at East Side Jersey Dairy from August 7, 2012 through May 2013. In fact, after claimant returned to his job on August 7, 2012, he was required to make even more stops on his route than he had prior to the date of injury and his work days were even longer than prior to his injury.

On November 19, 2012, Mr. Pansegrau was performing his typical route duties for the employer. As he was attempting to take a dolly full of milk down some stairs to deliver at a school, he stepped on some wet leaves, slipped, and grabbed the hand rail with his left hand. He felt pulling and burning, as well as an increase in his pain level, in the left shoulder. He reported this new injury, received treatment, an assistant in his truck to perform the physical labor, and ultimately returned his symptoms to baseline after the November 2012 incident. (Claimant's testimony; Ex. 1, p. 33) He was again released to return to work without restrictions and again testified he asked to be released without permanent restrictions. (Ex. 1, p. 36; Claimant's testimony)

Claimant testified that his surgery and physical therapy improved his symptoms in the left shoulder. However, he testified that the symptoms never completely resolved after the date of injury. After returning to work in August 2012, claimant testified that he continued to experience a constant pain in his left shoulder that was 3-4 out of 10 on the pain scale. He also testified that his range of motion was not as good and that he worked better if he could keep his arms close to his body after the injury. He specifically testified that his symptoms would increase after the injury date if he worked out in front of his body, to the side of his body with his left arm extended or above his shoulder height. (Claimant's testimony)

Mr. Pansegrau testified he made between \$34,000.00 and \$35,000.00 during the last four months of 2012 driving for East Side Jersey Dairy from August 2012 through December 2012. Mr. Pansegrau estimated that he earned approximately \$1,200.00 per week working for the employer. However, he was concerned about suffering additional injuries if he continued working for the employer. He also acknowledges that he was tired of driving an hour to get to work and then driving his entire route before driving an hour back home. (Claimant's testimony)

Claimant testified he performed all of his typical job duties at East Side Jersey Dairy after being released following the November 2012 incident. However, he testified he had to "baby" his left shoulder because of his concerns of additional injury. Therefore, in May 2013, claimant left his employment with the dairy and began working for Tama Paperboard. (Claimant's testimony)

Mr. Pansegrau passed a pre-employment physical that found him capable of lifting up to 100 pounds on an occasional basis and up to 50 pounds frequently. (Ex. 5) Claimant began working for Tama Paperboard as a laborer in May 2013. He was subsequently promoted and worked as a fork truck driver. He testified that he did not have to do heavy lifting with the left arm, other than to pull himself into the fork truck. He was able to drive the fork truck with his left hand eight hours per shift, however. (Claimant's testimony)

Claimant has subsequently bid into a new position with Tama Paperboard in its electrical department. He is now attending monthly classes to learn about electrical equipment. Basically, claimant now installs, runs and programs equipment for Tama Paperboard. He anticipates an opportunity to advance in this career with Tama

Paperboard. Claimant earns comparable wages at Tama Paperboard to those he earned with East Side Jersey Dairy. Specifically, claimant now earns \$23.54 per hour and works under a union contract and union contract rate. He also gets overtime in his new position and estimates he now earns between \$1,000.00 and \$1,600.00 per week with Tama Paperboard. (Claimant's testimony)

Claimant does have to perform overhead work in his current position. He has to lift and move parts and motors for equipment. He estimated his lifting to be approximately 50 pounds in his current position, but also acknowledges that he has to use both hands and shoulders in his current position. He testified that he continues to favor his left shoulder as much as possible but does have to use the shoulder to perform his job duties. Fortunately, Mr. Pansegrau is a right hand dominant gentleman. (Claimant's testimony)

In 2014, claimant did return for additional treatment with Dr. Langland. Dr. Langland opined that the symptoms claimant experienced in 2014 were more related to his rotator cuff, and he described the symptoms as being from overuse due to claimant's new job with Tama Paperboard. (Ex. 3, p. 53) Claimant has not returned for any additional medical treatment for his left shoulder since the October 2014 appointment with Dr. Langland. (Claimant's testimony)

Mr. Pansegrau testified that his left shoulder injury prevents him from participating in some of his prior hobbies; including racing ATVs, riding snowmobiles, and bow hunting (he now uses his right arm but used to pull the bow with his left arm). (Claimant's testimony)

Mr. Pansegrau also sought an independent medical evaluation, which was performed by Mark B. Kirkland, D.O. on December 23, 2014. (Ex. 6) Dr. Kirkland is a board-certified orthopaedic surgeon. (Ex. 6, pp. 72-74) He appears to have performed a thorough examination of claimant and have had access to claimant's relevant past medical records. (Ex. 6)

Claimant reported to Dr. Kirkland that he had always had ongoing symptoms in his left shoulder after the initial injury in May 2011. (Ex. 6, p. 67) He also reported that he did not require even over-the-counter medications for his left shoulder symptoms. (Ex. 6, p. 68)

Dr. Kirkland identified some decreased range of motion in claimant's left shoulder, but otherwise, did not find any significant abnormalities during his evaluation. Ultimately, Dr. Kirkland opined that claimant qualifies for the 6 percent whole person impairment rating identified by Dr. Langland for the distal clavicle excision, but also identified an additional 2 percent of the whole person impairment due to decreased ranges of motion in claimant's left shoulder. (Ex. 6, pp. 69-70)

Similar to Dr. Langland, Dr. Kirkland imposed no permanent work restrictions. He indicated that claimant's prognosis was good and recommended only a home exercise program that included wall walking and stretching.

At present, claimant continues to be employed. He requires no ongoing medical treatment or medications for control of his left shoulder symptoms. Although he continues to experience a low, baseline set of symptoms, he carries no permanent restrictions. I find Dr. Kirkland's impairment rating to be convincing and accept it as accurate. Therefore, claimant has proven he sustained 8 percent permanent impairment of the whole person as a result of this injury.

On the other hand, claimant was able to return to his full duties with East Side Jersey Dairy. He was able to identify and obtain employment with another employer. He earns at approximately the same rate of pay as he did with this employer. Claimant has the potential for advancement in his new employment.

Ultimately, I find that claimant has proven only a minor loss of future earning capacity as a result of this injury. Considering the situs of claimant's injury, his need for surgical intervention, his age, the length of healing period, his permanent impairment, his lack of permanent work restrictions, his ability to return to work and find subsequent employment, as well as his post-injury demonstrated earnings, his motivation, and all other factors of industrial disability outlined by the Iowa Supreme Court, I find that Mr. Pansegrau has proven a 10 percent loss of future earning capacity.

CONCLUSIONS OF LAW

The parties stipulated that claimant sustained a work related left shoulder injury on May 2, 2011. The parties further stipulate that the injury caused permanent disability and should be compensated industrially pursuant to Iowa Code section 85.34(2)(u). (Hearing Report)

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.

Having considered all of the relevant industrial disability factors outlined by the Iowa Supreme Court, I found that claimant has proven a 10 percent loss of future earning capacity. This is equivalent to a 10 percent industrial disability and entitles claimant to an award of 50 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u).

Claimant also seeks assessment of his costs and specifically his \$100.00 filing fee. (Statement of Costs) Costs are assessed at the discretion of the agency. Iowa Code section 85.40. Exercising the agency's discretion and recognizing that claimant has received an industrial disability award in this case, claimant's filing fee of \$100.00 in each file shall be assessed pursuant to 876 IAC 4.33(7).

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant fifty (50) weeks of permanent partial disability benefits commencing on August 7, 2012 at the stipulated weekly rate of eight hundred one and 46/100 dollars (\$801.46).

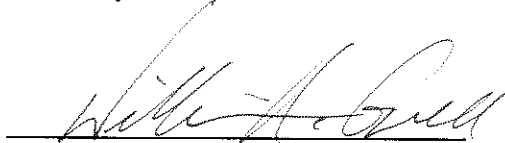
Defendants shall be entitled to a credit in the amount stipulated to on the hearing report against this award.

Defendants shall pay all accrued weekly benefits in lump sum, along with applicable interest calculated pursuant to Iowa Code section 85.30.

Defendants shall reimburse claimant's filing fee totaling one hundred dollars (\$100.00) as a cost of this contested case proceeding.

Defendants 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 13th day of February, 2017.


WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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WHG/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.