BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROBERT THOMAS,

Claimant,

vs.

FARNER-BOCKEN COMPANY,

Employer,

and

AMERICAN ZURICH INSURANCE COMPANY,

Insurance Carrier,
Defendants.

FILED

MAR 13 2015

WORKERS COMPENSATION

File No. 5046782

ARBITRATION DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Robert Thomas, the claimant, seeks workers' compensation benefits from defendants, Farner-Bocken Company, the alleged employer, and its insurer, American Zurich Insurance Company, as a result of an alleged injury on December 29, 2012. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on February 16, 2015, but the matter was not fully submitted until the receipt of the parties' briefs and argument on February 27, 2015. Oral testimonies and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Claimant's exhibits were marked numerically. Defendants' exhibits were marked alphabetically. References in this decision to page numbers of an exhibit shall be made by citing the exhibit number or letter followed by a dash and then the page number(s). For example, a citation to claimant's exhibit 1, pages 2 through 4 will be cited as, "Exhibit 1-2:4." References to a page of a transcript shall be to the actual page number of the original transcript, not to the page number of a copy containing multiple pages of the original transcript.

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

1. On December 29, 2012, claimant received an injury arising out of and in the course of employment with defendant employer.

2. Claimant is not seeking additional temporary total or healing period benefits.

3. If the stipulated injury is found to have caused permanent disability, the type of disability is an industrial disability to the body as a whole.

4. If I award permanent partial disability benefits, they shall begin on April 28, 2014.

5. At the time of the alleged injury, claimant's gross rate of weekly compensation was $745.00. Also, at that time, he was single and entitled to 2 exemptions for income tax purposes. Therefore, claimant's weekly rate of compensation is $478.84 according to the workers' compensation commissioner's published rate booklet for this date of injury.

6. Medical benefits are not in dispute.

7. Prior to hearing, defendants paid no permanent disability benefits for this work injury.

ISSUES

At hearing, the parties submitted the following issues for determination:

I. The extent of claimant's entitlement to permanent disability benefits; and,

II. The extent of claimant's entitlement to penalty benefits for an unreasonable denial of permanency benefits pursuant to Iowa Code section 86.13.

FINDINGS OF FACT

In these findings, I will refer to the claimant by his first name, Robert, and to the defendant employer as FB.

Robert has worked for FB as a warehouseman and delivery truck driver since April 5, 2010 and continues to do so at the present time. (Exhibit C-3) As a prerequisite of his employment, Robert underwent a pre-employment physical, which he passed. (Transcript-9) According to FB's job description, Robert's job required frequent lifting of up to 50 pounds and occasional lifting up to 130 pounds. (Ex. C-1) At the time of his injury, Robert's job duties consisted of driving a semi-tractor trailer truck to deliver food and beverage products to convenience stores, restaurants and bars. (Tr-13) Robert did not load his truck. However, when making deliveries, Robert unloaded the truck by hand. This requires opening large trailer doors when necessary and to pull a ramp out of the rear of the trailer. Then, Robert climbs into the trailer and removes items of produce stacked on pallets to fill the order. At times, this required moving the pallets to access the one needed to fill the order. Robert also was required to collect payment for the delivered product and load rejected or unsold products back into the trailer.

(Ex. C-1:2; Tr-11:13) At the present time, Robert is also required to load pallets of products onto the trailers in the early morning before making the deliveries. Typically, this is done with a forklift. At the time of his work injury, Robert was earning $13.48 per hour and working 50-55 hours a week. At the present time, he is earning $14.36 per hour and working about the same number of hours. (Tr-12) FB management considers Robert a good employee. (Ex. C-4)

Robert's medical history includes the removal of a tumor from his left elbow at the age of 12. (Ex B-1) He also has a history of smoking. (Ex. B-5) He denies any other prior left shoulder issues or prior physical impairment. The record in this case contains no evidence to suggest otherwise.

On December 29, 2012, Robert sustained the stipulated work injury to his left shoulder. Robert testified that he was making a delivery to a Kum & Go convenience store on the day of his injury. (Tr-15) To unload the trailer, Robert had to open a door on the side of the truck trailer to access the trailer's cooler. As he began to push the door open, Robert states that the door swung outwards towards a customer who was walking by. In order to prevent the door from striking the customer, Robert states that he grabbed the door, and then felt a pop in his left shoulder. (Tr-15-17) Robert was asked about the weight of this door at hearing. He replied "3- to 500 [pounds]. I don't know." (Tr-16) He estimated that the door was 12 feet tall. (Tr-15) An investigation conducted by FB indicated that the dimensions of the door in question were 48 x 104 inches and weighed 95 pounds. (Tr-66) After the incident, Robert reported his injury to his route supervisor, Lonny Lehrkamp, and continued making deliveries. An incident report was completed when he returned to FB, but Robert did not seek medical treatment. Robert testified that a couple of weeks later, while pulling a ramp out of his trailer, his left shoulder "seized up" and he felt pain in his whole shoulder. Robert then notified FB that he wanted to see a doctor. (Tr-18)

Upon referral by FB, Robert was initially treated for a left shoulder injury by Tracey A. Pick, ARNP, at St. Luke's Occupational Medicine on January 8, 2013. Robert's treatment at this time consisted of anti-inflammatory medications, physical therapy and injections. (Ex. B) When symptoms persisted, he was referred to Raymond Sherman, M.D., an orthopedic surgeon, in March 2013. After additional imaging, Dr. Sherman diagnosed a left shoulder sprain, but opined that Robert may have a partial subscapularis tear. Dr. Sherman administered an injection for diagnostic and therapeutic purposes. In April 2013, Dr. Sherman noted that his treatment improved Robert's condition by about 75 percent. Dr. Sherman further reported that Robert still has some ache if he reaches out at an arm's length and has to carry things or lift or push, but he is dramatically better and his left shoulder is not as irritable. Robert was allowed to remain on full duty. In May 2013, the doctor reported that Robert had been on full duty without restrictions and continued to do well. He can do his normal job. He states he still had some pain with lifting with his arm at shoulder level, but the pain did not limit his every day activity. Robert was again released to full duty. (Ex. B-1:9)

On July 18, 2013, Dr. Sherman noted that Robert had been doing well until a week before his appointment when he developed a spontaneous onset of pain in his left shoulder, and a new stinging, shooting pain that went down to the elbow. Dr. Sherman suspected acute impingement syndrome of the left shoulder. The doctor provided another injection, but this time the injection did not result in any appreciable relief. Robert was then referred for a cortisone injection. (Ex. B-10:12) In September 2013, Dr. Sherman reported that he did believe Robert was legitimate, but suspected some exaggerated pain response. He noted that Robert continued working full duty and was tolerating the pain. The doctor provided two options, either change his job or undergo a diagnostic left shoulder arthroscopy. Robert chose to undergo the surgery, but was to remain on full duty in the meantime. (Ex. B-16)

On October 18, 2013, Dr. Sherman performed a left rotator cuff arthroscopy which included subscapularis repair, debridement of the supraspinatus, and biceps tenotomy. (Ex. 1-4:6) Following surgery, Robert was provided extensive physical therapy and restricted to one-handed duty, right side only for a few months. (Ex. B-18:70) He was off work because FB would not take him back without a release to full duty. On February 6, 2014, the work restrictions were changed to allow 2-handed duty, occasional over-chest reach, no over-chest lifting, maximum 10 pounds lift to waist level with left hand. Id. (B-71) On March 6, 2014, Robert told Dr. Sherman that he continues to have discomfort and restricted range of motion, but stated that "he could not go back to work unless he was full-duty." The doctor continued with restrictions and administered another injection. (Ex. B-85) On April 7, 2014, Robert reported that he was "dramatically better" and wanted to return to work. The restrictions were then modified to allow 30 pounds waist-level work, occasional over chest. (Ex. B-89) On April 28, 2014, Robert told Dr. Sherman that he was working, but despite the restrictions, he was mostly doing his normal job and that he was pleased with the result of his shoulder treatment. The doctor's assessment at this time was "left shoulder post rotator cuff repair with some mild impingement and deconditioning which is resolved." The doctor then placed claimant at maximum medical improvement and released Robert to full-duty without restrictions. (Ex. B-92)

At hearing, Robert testified that he was told by Dr. Sherman in April 2014 that after six months following surgery, he must go back to work or he will lose his workers' compensation benefits. Robert stated that he told Dr. Sherman he wanted to return to work, but the doctor was reluctant to allow a return to full duty work, but then agreed to do so. (Tr-49) Dr. Sherman's office notes do not confirm this conversation. (Ex. 92)

On July 24, 2014, Dr. Sherman opined that, according to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Robert has a five percent permanent partial impairment of the left upper extremity. (Ex. B-119) Using Table 16-3, at page 439 of the AMA Guides, Dr. Sherman's rating converts to a two percent impairment to the body as a whole.

Robert testified that although he improved after Dr. Sherman's treatment, he continues to have left shoulder pain and has trouble with lifting and over shoulder work. He states that he is only able to do his job at FB by primarily using his right arm to lift. He states that he continues to have problems sleeping due to pain. Robert did receive a subsequent left shoulder injection on September 30, 2014 at Unity Point. (Ex. 4-7)

At the request of his attorney, Robert's left shoulder condition was evaluated by Sunil Bansal, M.D., an occupational medicine physician, on December 1, 2014. Robert reported to Dr. Bansal that he continued to have left shoulder pain. He also reported to have experienced numbness and tingling a couple of times when he was lifting something. Dr. Bansal noted that Robert performs job duties identical to those prior to his injury. Robert told the doctor that his employer would not accommodate restrictions and thus did not want them. Robert said that he was "doing okay with it at this point." Dr. Bansal opined that Robert suffered a five percent impairment to the body as a whole as a result of the left shoulder injury and did not recommend restrictions. (Ex. 4-9:11) However, Dr. Bansal stated as follows with reference to activity restrictions:

> I feel that Mr. Thomas would benefit from and should have restrictions. However, he [Robert] feels that if he has permanent restrictions it could jeopardize his employment, and would be detrimental to his employment situation. He [Robert] reports that he has returned to work and is able to do his job, and therefore I do not feel permanent restrictions are necessary at this juncture. However, if he changes employers, I would suggest the following restrictions:
>
> No lifting greater than 20 pounds over shoulder level, and no frequent over shoulder lifting with the left arm.

(Ex. 4-12)

I find the work injury of December 29, 2012 is a cause of a two to five percent permanent impairment to the body as a whole. I am unable to find that Robert has permanent work restrictions as a result of this injury as long as he is able to perform work without accommodations from his employer. I believe Robert continues to have pain with activity, but this does not appear to be disabling at this time. His work history consists of not only truck driving and delivery of materials, but extensive experience in management at food stores and at a restaurant. Robert states that he cannot return to any of the physical labor jobs, but such work does not appear to be more demanding than his current job.

Although Robert has no formal restrictions, he does now have a history of a work injury to his upper extremity, a history of permanent impairment to that extremity and a history of continued pain with work activity using his left arm. One physician actually recommends restrictions should Robert lose his current job. Such a medical history reduces Robert's ability to compete with younger, healthier persons in the labor market.

Fortunately, Robert remains employed by FB in a job that Robert believes provides him with adequate pay.

From examination of all of the factors of industrial disability, I find the work injury of December 29, 2012 to be a cause of a mild 15 percent loss of earning capacity at this time.

CONCLUSIONS OF LAW

I 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 (Iowa 1985).

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 Iowa 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, 593; 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. However, consideration must also be given to the injured worker's 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 found to be a cause of permanent disability, the disability is to the body as a whole, a nonscheduled loss of use or an industrial disability. Consequently, this agency must measure claimant's loss of earning capacity as a result of this impairment.

Assessments of industrial disability involve a viewing of loss of earning capacity in terms of the injured worker's present ability to earn in the competitive labor market without regard to any accommodation furnished by one's present employer. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996); Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 617 (Iowa 1995). Ending a prior accommodation is not a change of condition warranting a review-reopening of a past settlement or award. U.S. West v. Overholser, 566 N.W.2d 873 (Iowa 1997). However, an employer's special accommodation for an injured worker can be factored into an award determination to the limited extent the work in the newly created job discloses that the worker has a discerned earning capacity. To qualify as discernible, employers must show that the new job is not just "make work" but is also available to the injured worker in the competitive market. Murillo v. Blackhawk Foundry, 571 N.W.2d 16 (Iowa 1997).

A change or expected change in an employee's actual earnings is strong evidence of the extent of the change in earning capacity. The factor should be considered and discussed in cases where the extent of industrial disability is adjudicated. Webber v. West Side Transport, Inc., File No. 1278549 (App. December 20, 2002).

In the case sub judice, I found that claimant suffered a 15 percent loss of his earning capacity as a result of the work injury. Such a finding entitles claimant to 75 weeks of permanent partial disability benefits as a matter of law under Iowa Code section 85.34(2)(u), which is 15 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection.

II. Claimant seeks additional weekly benefits under Iowa Code section 86.13(4). That section of the Code provides a penalty to employer for either a delay in commencement or when termination of benefits occurs without reasonable or probable cause or excuse. The penalty is an award of extra weekly benefits to claimants in an amount not to exceed 50 percent of the amount of benefits that were unreasonably delayed or denied (Iowa Code section 85.13(4)(b). A reasonable or probable cause or excuse must satisfy the following requirements:

> (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.
>
> (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.
>
> (3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

(Iowa Code section 86.13(4)(c)).

The employer has the burden to show a reasonable and probable cause or excuse. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable." Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996); Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

In this case, claimant asserts that it was unreasonable for defendants to assert that he had no loss of earning capacity. I disagree. A return to full duty with no restrictions by the treating physician, no loss of income, and a very small impairment rating, is sufficient for defendants to reasonably assert that claimant has not suffered any loss of earning capacity.

Penalty benefits are denied.

ORDER

1. Defendants shall pay to claimant seventy-five (75) weeks of permanent partial disability benefits at the stipulated rate of four hundred seventy-eight and 84/100 dollars ($478.84) per week from the stipulated date of April 28, 2014.

2. Defendants shall pay accrued weekly benefits in a lump sum.

3. Defendants shall pay interest on unpaid weekly benefits awarded herein pursuant to Iowa Code section 85.30.

4. Defendants shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33, including reimbursement to claimant for any filing fee paid in this matter.

5. Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Signed and filed this 13th day of March, 2015.

LARRY WALSHIRE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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LPW/srs

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.