BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JEFFREY WOLF, Claimant, vs. PRAIRIE FARMS DAIRY, Employer, and INDEMNITY INSURANCE CO. OF NA, Insurance Carrier, Defendants.	:	File No. 1662827.01 ARBITRATION DECISION Head Note No. 1803.4

STATEMENT OF THE CASE

The claimant, Jeffrey Wolf, filed a petition for arbitration and seeks workers' compensation benefits from Prairie Farms Dairy, employer, and Indemnity Insurance Company of North America, insurance carrier. The claimant was represented by Matthew Dake. The defendants were represented by Thomas Wolle.

The matter came on for hearing on May 27, 2021, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa via Court Call videoconferencing system. The record in the case consists of Joint Exhibits 1 through 8; Claimant's Exhibits 1 through 10; and Defense Exhibits A through B. The parties did an outstanding job of narrowing the evidence to the disputed matter. The claimant testified at hearing. Karrie Truitt served as the court reporter for the proceeding. The matter was fully submitted on July 2, 2021 after helpful briefing by the parties. Both parties were well represented.

ISSUES

The parties submitted the following issues for determination:

1. The extent of claimant's permanent disability. The claimant has alleged permanent and total disability asserting odd-lot. Defendants contend that claimant has substantial permanent disability, however, assert he has failed to prove total disability.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship.

2. Claimant sustained an injury which arose out of and in the course of employment on March 12, 2019.

3. Temporary disability/healing period and medical benefits are no longer in dispute.

4. The weekly rate of compensation is $731.46.

5. Defendants have paid and are entitled to a credit as set forth in paragraph 9 of the Hearing Report.

6. Affirmative defenses have been waived.

7. Claimant is entitled to IME expenses under Section 85.39.

FINDINGS OF FACT

Jeffrey Wolf was 59 years old as of the date of hearing. He testified live and under oath during the video hearing. He is found to be a highly credible witness. He was a good historian. His testimony matches other portions of the record. His answers were straightforward and there was nothing unusual about his demeanor.

Mr. Wolf resides in Dubuque, Iowa. He was raised in Wisconsin. He developed a condition as a child called encephalopathy, which resulted in a learning disability. Joint Exhibit 1 is a number of medical records dating back to 1966, which document this serious health condition. He suffered a seizure disorder until he was approximately 30 years old. He had a right temporal lobectomy to address this issue. As a result, Mr. Wolf has sustained a significant loss of intellectual function.

In spite of this, Mr. Wolf completed high school in Neillsville, Wisconsin and attended technical school. A former teacher, Gladys Bartlett, prepared an affidavit for him, which outlined his learning difficulties. Specifically, while he is capable of learning, it takes him longer and he does best in a one-on-one environment with direct supervision. (Claimant's Exhibit 3, pages 52-53)

The record reflects Mr. Wolf is a hard worker and highly motivated. He has a strong work ethic and has maintained relatively consistent employment for his adult life. (Cl. Ex. 4, pp. 57-58) Prior to 1996, he worked in construction and manufacturing. Since 1996, he has been in the dairy business. On February 23, 2013, he was hired by Prairie Farms as a Case Room Operator. His job involved loading and unloading trailers and making milk. His job description is in the record. (Cl. Ex. 5, pp. 77-79) He was required to be able to lift 50 pounds, stand and walk for most of the workday and

bend, squat, climb and lift. (Cl. Ex. 5, p. 77) He worked full-time with significant overtime and earned $22.25 per hour.

On March 12, 2019, Mr. Wolf sustained what would turn out to be a catastrophic workplace accident. He was climbing a 12-foot ladder to clean a drip pan. The area was often wet and he slipped on a ladder step and fell on his left side onto a stationary ladder. He reported the injury immediately.

The employer directed medical care which is not really in dispute. He treated with several physicians and relevant portions of his medical file are in evidence. (Jt. Exs. 2 through 8) Matthew Howard, M.D., a neurosurgeon at the University of Iowa, assumed his care in August 2019. (Jt. Ex. 6, p. 49) Dr. Howard documented the following:

> Jeffrey Wolf is a 57-year-old male who was involved in a work-related injury on 3/12/2019. He works at Prairie Farms and had a fall from a ladder from 4-5 feet and hit his left hip and leg. Since that time he has had pain going down his left leg. He describes his left leg giving out and having bladder urgency. He underwent an epidural steroid injection under Dr. Miller at L3-4 on the left side on 5/30/2019 with only temporary improvement. He is currently participating in physical therapy. He denies any previous back surgery. He is also currently on gabapentin and ibuprofen for pain relief.

(Jt. Ex. 6, p. 49) On October 2, 2019, surgery was performed, described as spinal fusion posterior thoracic/lumbar at three levels. (Jt. Ex. 6, pp. 58-61)

Mr. Wolf had a relatively normal postoperative recovery for this type of surgery and was evaluated numerous times. He was admitted to Finley Hospital for a little over a week following the surgery. (Jt. Ex. 7) On April 16, 2020, Dr. Howard released him (effective April 7, 2020) with a 20 percent permanent impairment rating pursuant to the AMA Guides to the Evaluation of Permanent Impairment. (Jt. Ex. 6, p. 86)

> Mr. Wolf reached maximum medical improvement on 4/7/2020. The 40-pound lifting and 5-hour manual work restrictions are permanent. Based on the AMA guidelines, page 384, table 15-3, Mr. Wolf is entitled to 20% impairment of the whole person.

(Jt. Ex. 6, p. 86) Mr. Wolf had returned to work following his surgery, but never worked more than five hours per day. The work was highly accommodated and he had to take frequent breaks.

Shortly after the defendants received this letter, Prairie Farms terminated Mr. Wolf.

> The purpose of this letter is to inform you that based on the letter we received dated April 16, 2020, from Dr. Matthew A. Howard III MD at the

> University of Iowa stating that Jeffery Wolf has reached MMI with a permanent 40-pound lifting and 5-hour manual work restriction, Prairie Farms Dairy does not have work available to accommodate those restrictions.

(Cl. Ex. 7, p. 82) Thereafter, Mr. Wolf applied for and received Social Security Disability, effective March 22, 2019. The award letter was dated December 18, 2020. (Cl. Ex. 8, p. 88)

On February 22, 2021, Mark Taylor, M.D., examined Mr. Wolf for purposes of an independent medical examination (IME) under Iowa Code Section 85.39. Dr. Taylor took a history and reviewed appropriate medical records. (Cl. Ex. 1, pp. 6-8) He recorded Mr. Wolf's "current symptoms" at that time as follows:

> Mr. Wolf described constant low back pain. The pain is most intense in the morning, at which time he described it as a higher pain level, such as 7/10. At other times during the day, the pain may decreased to 4/10. He finds that his stretches [are] helpful, as well as hot showers. He noted that other than rare occurrences of leg symptoms, the pain and paresthesias in the legs resolved with surgery. The back pain improved, at least to some extent, but did not resolve. He is able to control his bowel and bladder function.

(Cl. Ex. 1, p. 8) Dr. Taylor also performed a thorough physical examination. (Cl. Ex. 1, p. 10) He diagnosed lumbar stenosis and radiculopathy due to a herniated disc at L3-L4. Dr. Taylor assigned a 26 percent impairment rating pursuant to the AMA Guides, Fifth Edition. (Cl. Ex. 1, p. 11) He agreed with Dr. Howard's recommended medical restrictions, however, added additional restrictions.

> Based upon the currently available information, especially the recommendation of the treating neurosurgical specialist, Mr. Wolf should continue with the five-hour work limitation. The 40-pound lifting limit is also reasonable, assuming that Mr. Wolf is able to maintain the item at or near waist level. I would estimate 30 to 35 pounds between knee and chest level, and 25 to 30 pounds or less below knee level or above shoulder level.
>
> He must have the ability to alternate sitting, standing and walking as needed for comfort. He mentioned on several occasions that he finds it difficult to remain in one position for very long, which is not an uncommon complaint among individuals with chronic back conditions. I recommend occasional squatting, bending, kneeling and twisting. He can climb stairs occasionally. He can travel occasionally to frequently, but must be afforded the ability to stop and get out of the vehicle whenever needed to stretch and move around.

(Cl. Ex. 1, p. 12) I find Dr. Taylor's report to be thorough and convincing.

In April 2021, defendants sought and attained a clarification report from Dr. Howard wherein he stated the following. "It is my opinion that Mr. Wolf is capable of working full days but should limit his physical labor to 5 hours." (Jt. Ex. 6, p. 87)

Both parties also sought and obtained expert vocational reports. The defendants obtained a report from Lana Sellner in April 2021. The claimant secured a report from Barbara Laughlin in the same month. Ms. Sellner opined that Mr. Wolf is employable, however, she doubted whether her services would be effective. "During our vocational discussion there was a focus on his SSDI award and his early years of encephalitis and lobectomy, which caused difficulties and self-reported limitations." (Def. Ex. A, p. 4) Mr. Wolf testified that Ms. Sellner eventually sent him job leads but that many were well outside of his restrictions or abilities. (Tr., pp. 54-58) Ms. Laughlin reviewed all of claimant's school records in addition to his medical file before she opined the following:

> It is my opinion Mr. Wolf has sustained a significant injury and resultant restrictions. He is unable to work a full day and must be accommodated in alternation of positions. He would require accommodation for his need to alternate positions, in most jobs. A loss of earning power/occupational analysis is based on the ability of an injured worker to secure employment by meeting the hiring qualifications (physical demands, education, work experience and skills) of employers in the labor market. It is not based on searching for accommodated jobs that would require the assistance of a job placement specialist, rare good fortune, or the goodwill of an employer.
>
> Mr. Wolf has looked for work online and has been looking at independent companies and has had a few phone interviews. He states that employers tend to shy away from him when they find out what his restrictions are. ….
>
> It is my opinion that Mr. Wolf will sustain difficulty in locating, obtaining and maintaining work he can perform.

(Cl. Ex. 2, p. 38) Ms. Laughlin also provided a rebuttal report criticizing Ms. Sellner's report in multiple respects. (Cl. Ex. 2, pp. 42-48)

CONCLUSIONS OF LAW

The only question submitted is the extent of Mr. Wolf's permanent disability.

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 Ry. Co. of Iowa, 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 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.

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City Ry. Co. of Iowa, 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the “odd-lot doctrine.” Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are “so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist.” Id., at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker’s reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker’s physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker’s burden of persuasion has been carried,

and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

The refusal of defendant-employer to return claimant to work in any capacity is, by itself, significant evidence of a lack of employability. Pierson v. O'Bryan Brothers, File No. 951206 (App. January 20, 1995). Meeks v. Firestone Tire & Rubber Co., File No. 876894, (App. January 22, 1993); See also, 10-84 Larson's Workers' Compensation Law, section 84.01; Sunbeam Corp. v. Bates, 271 Ark. 609 S.W.2d 102 (1980); Army & Air Force Exchange Service v. Neuman, 278 F. Supp. 865 (W.D. La. 1967); Leonardo v. Uncas Manufacturing Co., 77 R.I. 245, 75 A.2d 188 (1950). An employer who chooses to preclude an injured worker's re-entry into its workforce likely demonstrates by its own action that the worker has incurred a substantial loss of earning capacity. As has previously been explained in numerous decisions of this agency, if the employer in whose employ the disability occurred is unwilling to accommodate the disability, there is no reason to expect some other employer to have more incentive to do so. Estes v. Exide Technologies, File No. 5013809 (App. December 12, 2006).

Industrial disability is evaluated without respect to accommodations which are (or are not) made by an employer. The Iowa Supreme Court views "loss of earning capacity in terms of the injured worker's present ability to earn in the competitive job market without regard to the accommodation furnished by one's present employer." Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 617 (Iowa 1995).

The greater weight of the evidence supports a finding that Mr. Wolf is permanently and totally disabled as a result of his March 12, 2019, work injury.

Mr. Wolf underwent a significant fusion surgery which left him with significant permanent impairment. His permanent medical restrictions rendered the employer unable to offer him any work whatsoever. I find the restrictions of Dr. Taylor are the most appropriate, which include slightly more significant lifting restrictions and a requirement that he alternate standing and sitting. His most severe, limiting restriction is the five-hour manual labor restriction, which was recommended by his treating surgeon (and Dr. Taylor). Mr. Wolf has performed manual labor work for his entire adult life and really has no training or skills for sedentary employment. He testified credibly about his past employment and his inability to perform any of those jobs. Retraining is not an option at his age, particularly given his learning difficulties. The vocational opinion of Barbara Laughlin is found convincing. While there is a chance that Mr. Wolf could get lucky and find an employer willing to accommodate his significant restrictions, it is highly unlikely. I find it is unnecessary to apply the burden shifting standards of the odd-lot theory to reach this conclusion.

ORDER

THEREFORE IT IS ORDERED

Defendants shall pay permanent total disability benefits at the rate of seven

hundred thirty-one and 46/100 dollars ($731.46) per week commencing from April 8, 2020.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest as set forth in Iowa Code Section 85.30.

Defendants shall be given credit for the weeks previously paid.

Defendants shall reimburse IME expenses as agreed at hearing.

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

Costs are taxed to defendants as set forth in this decision in the amount of two hundred twelve and 80/100 dollars ($212.80) as set forth in Claimant's Exhibit 10.

Signed and filed this ___27th___ day of January, 2022.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Matthew Dake (via WCES)

Thomas Wolle (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.