

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHAEL FINNEGAN,

Claimant,

vs.

N & M TRANSFER CO., INC.,

Employer,

and

TRAVELERS INDEMNITY CO. OF CT,

Insurance Carrier,
Defendants.

File No. 20005080.01

ARBITRATION DECISION

Head Note Nos: 1803.1, 2502

STATEMENT OF THE CASE

Claimant, Michael Finnegan, filed a petition in arbitration seeking workers' compensation benefits from N & M Transfer Co., Inc. (N & M), employer, and Travelers Indemnity Company of CT, insurer, both as defendants. This matter was heard on May 22, 2023, with a final submission date of August 1, 2023.

The record in this case consists of Joint Exhibit 1, Claimant's Exhibits 1-6, Defendants' Exhibits A-B, and the testimony of claimant.

STIPULATIONS

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.

ISSUES

1. The extent of claimant's entitlement to permanent partial disability benefits.
2. Whether claimant is entitled to reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39.

FINDINGS OF FACT

Claimant was 63 years old at the time of hearing. Claimant graduated from high school. He completed a truck driving course at a community college. At the time of hearing claimant still had a valid CDL. (Hearing Transcript, pages 10-13)

Claimant has driven cement trucks and dump trucks. He has worked as an over-the-road truck driver. At the time of hearing, claimant had been working for N & M for approximately 13 years. (Tr., p. 11)

On April 20, 2020, claimant was making a delivery for N & M. At the delivery, claimant went to pull out the lift gate on his truck and felt a pop in his lower back. (Tr., p. 13)

Claimant was evaluated at Genesis Occupational Health on April 20, 2020. Claimant had back pain with radicular pain into both legs. He was assessed as having lower back pain with radiculopathy. (Claimant's Exhibit 1, page 2)

On May 18, 2020, claimant had an MRI of the lumbar spine. It showed multi-level degenerative changes with mild to moderate stenosis and foraminal narrowing. (Ex. 1, pp. 3, 5)

On June 8, 2020, claimant was evaluated by Sanjay Sundar, M.D., an orthopedic specialist. A left sacroiliac joint injection was recommended. (Ex. 1, p. 6) On June 22, 2020, claimant had that injection. (Ex. 1, p. 8) On July 21, 2020, claimant had bilateral sacroiliac joint injections. (Ex. 1, p. 8)

On December 10, 2021, claimant underwent a diagnostic lumbar medial branch block. (Ex. 1, p. 6)

On January 6, 2022, claimant was evaluated by Myles Luszczyk, D.O. Claimant had back pain for approximately 2 years. Dr. Luszczyk recommended against surgery. (Ex. 1, pp. 6-7)

On January 12, 2022, claimant discussed implantation of a temporary spinal cord stimulator (SCS) with Dr. Sundar. (Ex. 1, p. 7)

On April 28, 2022, claimant had the temporary spinal cord stimulator placed. (Ex. 1, p. 9)

Claimant said that in January 2021 he slipped on ice at an N & M terminal and dislocated his shoulder. Claimant had rotator cuff surgery for the injury. He said he was off work for approximately 8 months for the injury. The January 2021 slip and fall is not at issue regarding the April 20, 2020, back injury. (Tr., pp. 19-20)

On July 21, 2022, claimant had a permanent SCS placed. (Ex. 1, p. 9)

On October 27, 2022, claimant underwent a functional capacity evaluation (FCE). It found claimant gave a valid effort in testing. Claimant was found to be able to work in the heavy demand vocational category. He was limited to lifting up to approximately 65 pounds occasionally floor to waist, and pushing and pulling up to 77 pounds occasionally. He was also limited to bilaterally carrying 53 pounds occasionally. (Ex. 4)

In a November 30, 2022 letter, Dr. Sundar opined claimant could work full time. He limited claimant to floor to waist lifting of 50 pounds occasionally and carrying 40 pounds occasionally. (Ex. 3)

Claimant testified he returned to work in approximately October or November of 2022. (Tr., p. 20)

In a May 4, 2023 report, Sunil Bansal, M.D., gave his opinions of claimant's condition following an IME. Dr. Bansal found that claimant had a 12 percent permanent impairment and fell into the DRE lumbar category III under the AMA Guides to the Evaluation of Permanent Impairment (Fifth Edition). He agreed with the permanent restrictions advised by Dr. Sundar. Dr. Bansal noted claimant would require maintenance for the SCS. (Ex. 1, pp. 13-14)

In an April 26, 2023 report, Camilla Frederick, M.D., gave her opinion of claimant's condition. She found claimant had a 10 percent permanent impairment to the body as a whole. Dr. Frederick noted claimant's radicular complaints were dramatically reduced with the use of the SCS. (Joint Exhibit 1, page 8)

Claimant testified that before his April 2020 back injury he worked days. (Tr., p. 22) He testified that since returning to work he has been placed on a job where he drives at night. (Tr., p. 25) Claimant testified he would like to return to working days, but his employer has not given him any reason why he continues to work at night. (Tr., pp. 27-28)

Claimant was released to return to work at full duty in October 2022. (Tr., p. 30) Claimant began a new line driving job beginning on November 8, 2022. (Tr., pp. 30-31; Defendants' Exhibit A, page 3)

Claimant testified that before he returned to work he went to his employer regarding finding a job within his work restrictions. (Tr., p. 21) Prior to his injury, claimant worked for N & M as a "peddle driver." As a peddle driver, claimant was required to lift. Claimant testified he did not have to lift at every stop, but he was required to lift occasionally as a peddle driver. (Tr., p. 30) Claimant worked days as a peddle driver.

When claimant returned to work full time after his injury he was moved to a job as a line driver. The job requires claimant to drive a truck at night from N & M's docks in Eldridge, Iowa, to Neenah, Wisconsin. Claimant said that as a line driver he is paid \$280.00 per night and was no longer paid per stop. (Tr., pp. 28-29) Claimant said the line driver position does not require any lifting. (Tr., pp. 30-31)

Claimant testified he was making more income before his injury than at the time of hearing (because of the cost of living). (Tr., p. 28) He also testified at hearing that his "... wages from when I got hurt have gone up." (Tr., p. 32)

As noted above, claimant began his line driving job on November 8, 2022. His first check for that period is dated November 18, 2022. (Ex. A, p. 3) From November 8, 2022, through March 31, 2023, claimant had the following earnings:

	PAY DATE	GROSS WAGES
1	11/18/2022	\$1,147.44
2	11/25/2022	\$1,463.83
3	12/2/2022	\$1,399.36
4	12/9/2022	\$1,424.66
5	12/16/2022	\$1,420.45
6	12/23/2022	\$1,501.19
7	12/30/2022	\$1,433.10
8	1/6/2023	\$583.66
9	1/13/2023	\$1,519.88
10	1/20/2023	\$1,476.49
11	1/27/2023	\$590.59
12	2/3/2023	\$1,164.31
13	2/10/2023	\$864.80
14	2/17/2023	\$1,176.97
15	2/24/2023	\$1,151.66
16	3/10/2023	\$894.33
17	3/17/2023	\$1,147.44
18	3/24/2023	\$1,472.27
19	3/31/2023	\$1,155.88
	TOTAL	\$22,988.31

CONCLUSIONS OF LAW

The first issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3).

Iowa Code section 85.34(2)(v)(2017) provides, in relevant part:

If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity.

One of the central issues in this case is whether claimant is to be awarded permanent partial disability benefits for his neck injury as an industrial disability or as a functional injury. The parties agree claimant sustained a permanent disability from the April 20, 2020, work injury. Claimant contends he is not making the same or greater wages than he was at the time of injury, and therefore should be compensated under an industrial disability analysis. Defendants contend claimant's salary after the date of

injury is greater or equal to that before his injury, and therefore, claimant is to be compensated under a functional analysis.

The parties stipulate that claimant's average weekly wages prior to the date of injury were \$1,114.00 per week. (Hearing Report) Claimant's average weekly wages between November 13, 2022 through March 31, 2023, were approximately \$1,209.91 (\$22,988.31 divided by 19). (Ex. A, pp. 3-21)

Claimant's testimony regarding his post-injury earnings is ambiguous. At hearing claimant testified his wages since his injury have increased. Given this record, claimant has failed to carry his burden of proof that his earnings have decreased since his return to work. As a result, claimant's injury is assessed as a functional loss under Iowa Code section 85.34(2)(v).

Two experts have opined regarding claimant's functional impairment. Both experts placed claimant in the DRE category III of the Guides. Dr. Bansal evaluated claimant once for an IME. He found that claimant had a 12 percent permanent impairment to the body as a whole due to his lumbar injury. (Ex. 1, p. 13)

Dr. Frederick treated claimant for a period of time. She opined that claimant had a 10 percent permanent impairment to the body as a whole. (JE 1, p. 8)

Table 15-3 of the Guides allows for a finding of 10-13 percent permanent impairment under the lumbar category DRE III. Claimant's credible testimony is that he still has radicular symptoms due to his lower back condition. Claimant had several injections for his back condition. He has an implanted spinal cord stimulator. He has lifting and carrying restrictions that have required him to work a night shift. Given these facts, it is found that Dr. Bansal's functional rating is more convincing than that of Dr. Frederick's. Claimant is due 60 weeks of permanent partial disability benefits (12 percent x 500 weeks).

The final issue to be determined is whether claimant is entitled to reimbursement for the costs associated with Dr. Bansal's IME. Defendants indicated at hearing that they believed that the IME had been paid. (Tr., pp. 5-6) Defendants did not dispute liability for the IME. Given this record, defendants shall reimburse claimant for costs associated with Dr. Bansal's IME.

ORDER

THEREFORE IT IS ORDERED:

That defendants shall pay claimant sixty (60) weeks of permanent partial disability benefits at the rate of six hundred seventy-six and 37/100 dollars (\$676.37) per week commencing on October 6, 2022.

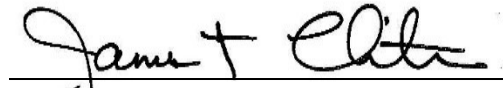
That defendants shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

That defendants shall be given credit for benefits previously paid.

That defendants shall reimburse claimant for costs associated with Dr. Bansal's IME.

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

Signed and filed this 4th day of December, 2023.


JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

William Bribriesco (via WCES)

Kevin Rutan (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.