BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CHARLES A. JOELSON,

Claimant,

vs.

IOWA STATE FAIR AUTHORITY,

STATE OF IOWA,

Self-Insured,
Employer,
Defendant.

FILED

JAN 19 2016

WORKERS COMPENSATION

File No. 5048438

ARBITRATION DECISION

Head Note No: 1803

STATEMENT OF THE CASE

Charles A. Joelson, the claimant, seeks workers' compensation benefits from defendant, the Iowa State Fair Authority, an agency of the State of Iowa, a self-insured employer, as a result of an alleged injury on July 10, 2013. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on December 2, 2015, but the matter was not fully submitted until the receipt of the parties' briefs and argument on December 11, 2015. Oral testimony and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Claimant's exhibits were marked numerically. Defendant's 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, "Ex. 1-2:4."

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

1. On July 10, 2013, claimant received an injury to his left shoulder arising out of and in the course of employment with defendant employer.

2. Claimant is seeking a higher weekly rate of healing period benefits already paid at a lower rate and additional permanent partial disability benefits.

3. The stipulated injury is a cause of some degree of permanent, industrial disability to the body as a whole.

4. At the time of the stipulated injury, claimant was single and entitled to only one exemption for income tax purposes.

5. Prior to hearing, defendant voluntarily paid 25 weeks of permanent disability benefits for this work injury at the weekly rate of $203.75.

ISSUES

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

I. The proper weekly rate of compensation for healing period and permanent disability benefits.

II. The extent of claimant's entitlement to permanent disability benefits and the extent of defendant's entitlement to a credit against such an award for overpayment of healing period benefits; and,

III. The extent of claimant's entitlement to penalty benefits for an unreasonable delay or denial of weekly benefits pursuant to Iowa Code section 86.13.

IV. Claimant's entitlement to reimbursement for transportation expenses (mileage) to and from the evaluation by Dr. Stoken.

FINDINGS OF FACT

In these findings, I will refer to the claimant by his first name, Charles, and to the defendant employer as the Fair Authority.

At the time of his injury, Charles was also employed by the Des Moines Public School System as full time Special Education Teacher Associate/Building Associate who assists teaches in the instruction, supervision and care of special needs high school students. He began this job in 1995. He worked 37.5 hours a week and earned $14.50 per hour. This job not only involved teaching tasks, but physical labor in assisting physically disabled high school students in ambulating or adjusting positions and moving their wheelchairs. The job also required changing diapers for incontinent students. (Exhibit D-36:38) This employment only occurred during a school year; however, Charles was paid by the district for his teaching associate job over a 12-month period.

During the summer break from his teaching associate job, Charles was employed as a maintenance worker for the Fair Authority. This job involved mowing grass; trimming; setting fence; collecting trash; cleaning up debris and spills; setting up tables, chairs and other items for lessees; other building and ground maintenance tasks;

operating, loading and unloading tractors, skid steers, forklifts and mowing equipment; and, providing labor assistance to contractors for construction tasks such as ditching, forming concrete, and laying pipe. (Ex. C-33:35) The official job description did not provide specifics as to the weights involved. This job ended after each summer and claimant had to be re-hired by the Fair Authority to work the following summer.

The stipulated work injury of July 10, 2013, occurred while performing his maintenance duties for the Fair Authority. At that time, Charles earned $8.50 per hour and worked 40 hours a week. He worked for the Fair Authority less than 13 weeks before his injury. He testified that he worked a lot of overtime during the time of the State Fair, but he was injured and taken off work as a result of his injury before the Fair began in 2013. Both parties submitted calculations of Charles' gross weekly rate, improperly taking into account his combined salary from the school district and the Fair Authority. The evidence presented did not show Charles' actual, average representative wages for the time period he worked for the Fair Authority during the summer of 2013. Both parties in their calculations used a total gross earnings amount for the Fair Authority job without providing the number of weeks or pay periods in which those earnings were paid. Therefore, I find the best evidence of his customary earnings at the Fair Authority before the injury was $340.00, given his uncontroverted testimony that he typically worked 40 hours a week at $8.50 per hour.

The stipulated work injury was a torn rotator cuff in the left shoulder. An orthopedist, Kyle Galles, M.D., treated claimant with repair surgery and follow-up physical therapy, work activity restrictions and medications. Dr. Galles opined that Charles reached maximum medial improvement (MMI) on May 27, 2014 and suffered a nine percent permanent partial impairment to the body as a whole from his injury pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, as a result of limited range of motion and weakness. (Ex. 2-44) Claimant states that due to overcompensation he also injured his right shoulder from the injury, but Dr. Galles opined that the work injury only temporarily aggravated the right shoulder. (Ex. 2-40) Dr. Galles requested and obtained a valid functional capacity evaluation (FCE), which he later adopted as Charles' permanent restrictions from his injury. (Ex. 2-43) The results of this FCE found Charles capable of a medium to heavy demand vocation and specifically states as follows;

The client is able to safely perform the following activities on the job:

Waist to floor lifting – 75 lbs., occasionally

Waist to crown lifting – 40 lbs., occasionally

Bilateral carry – 50 lbs., occasionally

Ladder climbing – Occasionally

Overhead work -- Occasionally

(Ex. 4-1)

At the request of his attorney, Charles was evaluated by Jacqueline Stoken, D.O., a specialist in physical medicine and rehabilitation. Dr. Stoken opines that Charles reached MMI on May 8, 2014 and suffered an 8 percent permanent partial impairment to the whole body under the AMA Guides. Dr. Stoken recommended limiting work to the medium physical demand level of only 10 pounds constantly, 25 pounds frequently, and 50 pounds occasionally. (Ex. 5-22:23)

Given Dr. Galles' greater knowledge and experience in orthopedics and his greater familiarity with Charles' clinical presentations over many months and the fact that his restrictions were supported by a valid FCE, I find his views as to the extent of Charles' physical limitations more convincing.

Charles has an extensive medical history before and after the work injury in this case. He had prior left shoulder problems; but none since 1994. He had prior right shoulder problems. He has had prior bilateral carpal tunnel syndrome surgery. In 1996 he suffered a flesh eating disease, but recovered. This has recently reoccurred. He is currently scheduled for a two-level fusion in the lumbar spine.

Charles complains that he still has a lot of soreness and aching in the left shoulder and cannot lift more than 25-30 pounds. He avoids heavy lifting because he is fearful of re-injury.

Charles lost his job at the school district because of his absences from his job while under work restrictions from Dr. Galles. Charles said that he returned to his teaching job on December 9, 2013 and worked only four days before being called into the office and fired. The termination letter in evidence states that the termination was on December 16, 2013 for failing to appear at work and failure to provide a doctor's statement indicating an inability to work, not modified duty and not being able to drive is not an excuse for missing work. (Ex. 14-3) The letter refers to a status report from Dr. Galles. However, the most recent status report from Dr. Galles before this termination is dated December 4, 2015. In that report, the only restriction is no use of the left arm. (Ex. 2-28) A prior status report dated October 31, 2013, restricted both driving and use of the left arm. (Ex. 2-25) Unless the school district was planning on accommodating Charles, I do not see how Charles would be able to safely lift or physically assist disabled high school students, or change their diapers, using only one arm. At any rate, it is quite clear that Charles would not be able to return to his maintenance position for the Fair Authority with these restrictions.

Charles has not been employed in any capacity since his termination by the school district. He also states he had not applied for any kind of employment since his unemployment benefits ended. Apparently, the school district did not contest his

application for unemployment benefits. However, Charles testified that had he not been fired, he would still be working for the school district. Consequently, he apparently believes he is physically capable of doing that or similar work. He admits he has not re-applied to the school district for any other teaching associate job because of his upcoming back surgery. He also does not want to be employed at the present time because he is applying for social security disability benefits.

At the request of his attorney, Charles' vocational status was evaluated by Carma Mitchell, M.S., a vocational consultant. Mitchell opines using Dr. Stoken's restrictions that Charles has lost only 9.8 percent of his access to the labor market. (Ex. 6-4)

At the request of defendant's counsel, Rene Haigh, M.S, another vocational expert, opined that using Stoken's restrictions, Charles is able to perform occupations such as home health aide, social work, customer service representative and production worker earning wages from $8.55 to $36.56 per hour. (Ex. A-20) Using Dr. Galles' restrictions, Haigh opines available jobs are in social work, production work and teaching assistant paying $8.03 to $36.56 per hour. (Ex. A-27) She identified available jobs in the Des Moines area for each category.

Charles is 51 years of age. He has lived with his mother since birth and continues to do so at the present time. He is not only a high school graduate, but has a Building and Trades diploma from the Des Moines Area Community College (DMACC); a liberal arts degree from DMACC; and a Bachelor of Science Degree from Iowa State University in history and African-American Studies. He states that he is unable to obtain a teaching certificate because of his low college grades. He states he has a substitute teacher license for 6-12 grades.

I find that as a result of the work injury of July 10, 2013 and restrictions recommended by Dr. Galles, Charles cannot return to his maintenance work at the Fair Authority without significant accommodations. He likely would be able to mow grass, occasionally collect trash, perform ground maintenance and operate equipment, but he is unlikely able to set fences, set up large tables, or help in ditching, forming cement and laying pipe. Such work would likely involve frequent lifting and carrying of items for a period of time in excess of 50 pounds.

Charles' work history includes manual labor for a masonry contractor, housekeeper at a hospital, carpentry, teaching associate, and part-time security work. He likely would have difficulty returning to heavy construction labor work with his current restrictions. However, he has not been employed in heavy construction since the early 1990s.

I find that the work injury of July 10, 2013 is not a cause of any inability to return to his former teaching associate job or similar work. The temporary restrictions of

Dr. Galles that prevented a return to that job ended with his achievement of MMI on May 27, 2014. Defendant paid healing period benefits until January 28, 2014.

Charles states he has a learning disability and would have difficulty with additional schooling. However, his education record shows otherwise.

In 2013, Charles earned $3,225.00 in wages from the Fair Authority. His total earnings that year was $22,940.00. (Ex. 12) The Fair Authority earnings were about 14 percent of his total earnings in 2013.

From examination of all of the factors of industrial disability, it is found that the work injury of July 10, 2013 is a cause of a 20 percent loss of earning capacity. He is precluded from heavy manual labor, work he has not performed for many years due primarily to personal health problems.

Charles incurred $11.98 in mileage expenses in traveling to and from the disability evaluation by Dr. Stoken. (Ex. 5-28)

CONCLUSIONS OF LAW

I. Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Iowa Code section 85.36(6). In calculating gross weekly earrings over the previous 13 weeks, weeks should be excluded from the calculation which are not representative of hours typically or customarily worked during a typical or customary full week of work, not whether a particular absence from work was anticipated. Exclusion of weeks during an expected plant shutdown was appropriate. Jacobson Transp. Co. v. Harris, 778 N.W.2d 192 (Iowa 2010); Griffin Pipe Products Co. v. Guarino, 663 N.W.2d 862 (Iowa 2003).

In this case, I found that claimant's customary work week schedule consisted of 40 hours at the hourly rate of $8.50 per hour and this should be used to calculate the average weekly gross earnings. Thilges v. Snap-On Tools Corp., 528 N.W. 2d 614, 619 (Iowa 1995). This customary work schedule rule takes precedence over any averaging of earnings over the 13 weeks prior to the injury set forth in Iowa Code section 85.36(6), especially when the evidence presented fails to show sufficient information to calculate

the actual average earnings. Weishaar v. Snap-On Tools Corp., 582 N.W.2d 177 (Iowa 1998).

Both parties attempted to use Iowa Code subsection 85.36(9) and averaged claimant's total earnings from all of his employment for the previous 12 months before his work injury to arrive at an average gross rate of weekly earnings. Claimant correctly cited the controlling legal precedent in applying this subsection. Before this section can be used to calculate average gross weekly earnings, there must be sufficient evidence presented to show that the claimant either earned no wages or earned less than the usual weekly earnings of the regular full-time adjust laborer in the line of industry in which the employee is injured in that locality. Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 134 (Iowa 2010). Claimant then points to a report prepared by defendant's vocational expert, Haigh, that earnings from "Production workers, All Others" in claimant's labor market earned more than $8.55 per hour, $0.05 per hour less than claimant receive in his Fair Authority job. (Ex. A-20) However, Haigh in the report was referring to available occupations that are still available to claimant within his restrictions. The problem is that claimant was many things in his job at the Fair Authority such as lawn caretaker, groundskeeper, maintenance worker, janitor, custodian, and equipment operator, according to his job description and at no time performed the duties of a production worker. Haigh did not explain the term "All others." Therefore, the required showing to use Iowa Code section 85.36(9) was not made.

Given the parties stipulation as to single status and entitlement to one exemption, average gross weekly earnings of $340 per week yields a weekly compensation rate of $223.38 according to the published Workers' Compensation Manual for a date of injury on July 10, 2013. Both healing period and permanency benefits shall be paid at this rate.

II. 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 the work injury is a cause of some degree of permanent industrial disability. Consequently, this agency must measure claimant's loss of earning capacity due to the permanent physical impairment and restrictions caused by his work injury.

As claimant was re-hired competitively before his work injury earlier in the summer of 2013 by the Fair Authority, any prior physical impairment or disability is not to be considered in this industrial assessment. Pursuant to Iowa Code section 85.34(2)(u), Iowa has adopted the so-called "fresh start rule." Industrial loss now is no longer a measure of claimant's disability from all causes after which we then apportion out non-work causes and leave in work related causes under the full responsibility rule. The percentage of industrial loss now is the loss of earning capacity from what existed immediately prior to the work injury. This means that an already severely disabled person before a work injury can have a high industrial loss because the loss is calculated in all cases from whatever his earning capacity was just before the injury and what it was after the injury, not the loss as compared to a healthy non-disabled person. In other words, all persons start with a 100 percent earning capacity regardless of any prior health or disability conditions. The rationale for this approach is that an employer's liability for workers' compensation benefits is dependent upon that person's wages or salary. Consequently, the impact, if any, of any prior mental or physical disability upon earning capacity is automatically factored into a person's wages or salary by operation of the competitive labor market and there is no need to further apportion out that impact from any workers' compensation award. Roberts Dairy v. Billick, 861 N.W.2d 814 (Iowa 2015); Steffan v. Hawkeye Truck & Trailer, File No. 5022821 (App. September 9, 2009).

Although claimant is closer to a normal retirement age than younger workers, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). However, this agency does consider voluntary retirement or withdrawal from the work force unrelated to the injury. Copeland v. Boones Book and Bible Store, File No.

1059319 (App. November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

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 20 percent loss of his earning capacity as a result of the work injury. Such a finding entitles claimant to 100 weeks of permanent partial disability benefits as a matter of law under Iowa Code section 85.34(2)(u), which is 20 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection.

Defendant seeks a credit against the award of permanent disability benefits beyond the 25 weeks paid prior to hearing. Defendant asserts that claimant's entitlement to healing period benefits ended when he returned to his teaching associate job in early December 2013, but it paid him healing period benefits through January 28, 2014 and it is entitled to a credit for this overpayment of healing period benefits pursuant to Iowa Code section 85.34(4).

However, healing period benefits under Iowa Code section 85.34(1) end only upon a return to the work or similar work to the work he was performing at the time of the injury, not to some other job. Also, the supposed return to work was only temporary in that claimant was fired a few days later due to the work injury. In any event, benefits should have been restarted and continued until he reached MMI. A temporary return of work following a work injury does not preclude the reinstitution of temporary total disability or healing period benefits when an employee is compelled to leave work a second time as a result of the same injury. It has long been held that a healing period may be intermittent. Waldinger Corp. v. Mettler, 817 N.W.2d 1 (Iowa 2012); Teel v. McCord, 394 N.W.2d 405 (Iowa 1986); Willis v. Lehigh Portland Cement Co., I-2 Iowa Ind. Comm'r Decisions 485 (RR 1984); Clemens v. Iowa Veterans Home, I-1 Iowa Industrial Comm'r Decisions 35 (RR 1984); Riesselman v. Carroll Health Center, III Iowa Ind. Comm'r Report 209 (App. 1982); Junge v. Century Engineering Corp., II Iowa Industrial Comm'r Report 219 (App. 1981).

Defendant improperly terminated healing period benefits on January 28, 2014 and these payments should have continued until claimant reached maximum healing on May 27, 2014. I cannot award such benefits as claimant did not seek additional healing period benefits on this basis. He only sought a higher rate for these benefits. A new issue cannot be raised in my decision. However, I can deny any credit against the permanency award in this case beyond the 25 weeks previously paid.

III. Claimant seeks additional weekly benefits under Iowa Code section 86.13(4). That provision states that if a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the industrial commissioner shall award extra weekly benefits in an amount not to exceed 50 percent of the amount of benefits that were unreasonably delayed or denied if the employee demonstrates a denial or delay in payment or termination of benefits and the employer has failed to prove a reasonable or probable cause or excuse for the denial, delay or termination of benefits. (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." City of Madrid v. Blasnitz, 742 N.W.2d 77, 83 (Iowa 2007); 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, the only basis asserted by claimant for penalty benefits is an unreasonable calculation of his weekly rate of compensation in failing to use Iowa Code section 85.36(9). I have ruled that use of that section is not proper in this case.

Penalty benefits are denied.

IV. As Dr. Stoken's evaluation occurred after the evaluation of disability by Dr. Galles, an employer-retained physician, claimant is entitled to reimbursement for the cost of that exam pursuant to Iowa Code section 85.39, including transportation expenses to and from that examination at the requested mileage rate. Rule 876 IAC 8.1.

ORDER

1. Defendant shall pay to claimant one hundred (100) weeks of permanent partial disability benefits at a rate of two hundred twenty-three and 38/100 dollars ($223.38) per week from May 28, 2014. Defendant shall pay accrued weekly benefits in a lump sum and receive a credit against this award for the twenty-five (25) weeks previously paid at the rate of two hundred three and 75/100 dollars ($203.75).

2. Defendant shall pay to claimant healing period benefits from July 10, 2013 through January 28, 2014 at the rate of two hundred twenty-three and 38/100 dollars ($223.38), but shall receive a credit for the benefits previously paid at the weekly rate of two hundred three and 75/100 dollars ($203.75).

3. Defendant shall pay claimant the sum of eleven and 98/100 dollars ($11.98) for transportation costs to and from the IME evaluation by Dr. Stoken.

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

5. Defendant shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33, including one hundred and 00/100 dollars ($100.00) as reimbursement to claimant for the filing fee paid in this matter.

6. Defendant shall file subsequent reports of injury (SROI) as required by our administrative rule 876 IAC 3.1(2).

Signed and filed this 19th day of January, 2016.

LARRY WALSHIRE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.