

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOSE SANTELLAN,

FILED

Claimant,

OCT 27 2017

File No. 5053798

vs.

WORKERS COMPENSATION

ARBITRATION

TYSON FRESH MEATS, INC.,

DECISION

Employer,
Self-Insured,
Defendant.

Head Note No.: 1803

STATEMENT OF THE CASE

Jose Santellan, claimant, filed a petition in arbitration seeking workers' compensation benefits from Tyson Fresh Meats, Inc. (Tyson), self-insured defendant, as a result of an injury he sustained on January 27, 2015, that arose out of and in the course of his employment. This case was heard in Sioux City, Iowa and fully submitted on March 3, 2017. The evidence in this case consists of the testimony of claimant, William Sager, II, Claimant's Exhibits 1 – 12 and Defendant's Exhibits C – F. Both parties submitted briefs. The hearing was interpreted.

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

The extent of claimant's industrial disability.

Whether defendant shall pay for the independent medical examination (IME).

Assessment of costs.

FINDINGS OF FACT

The deputy workers' compensation commissioner, having heard the testimony and considered the evidence in the record, finds that:

Jose Santellan, claimant, was 50 years old at the time of the hearing. He was born in Mexico and his primary language is Spanish. Claimant has some, but limited

ability to speak and write English. He can understand English better than his ability to speak English. Claimant went through 9th grade in Mexico.

Claimant came to the United States in 1985. His first employment in the United States was in California. He worked in a factory making pants/jeans. Claimant came to Storm Lake, Iowa and worked for IBP (now Tyson) for almost a year in 1991. He returned to California for a short time and returned to work at Tyson in 1993. Claimant was employed at Tyson until he was terminated on November 13, 2015, for work-related misconduct. Claimant was terminated after he "keyed" the vehicle of a co-employee in the Tyson parking lot. (Exhibit D, pages 1, 2) Claimant was charged and pleaded to a misdemeanor criminal mischief charge. (Ex. F, p. 1) The claimant had no other serious discipline problems in over 20 years with Tyson.

Claimant injured his lower back on January 27, 2015. Claimant was lifting a box that weighed about 30 pounds. Claimant's job category was Trim Blood Shot at the time of his injury. Claimant reported his injury. Claimant was eventually referred to Ralph Reeder, M.D. Dr. Reeder performed back surgery on June 29, 2015. Claimant was off work for about one and one-half months. Claimant was returned to work light duty and on a schedule for two hours per day, gradually reaching full time. Claimant was returned to his job as Trim Blood Shot. Claimant had not received permanent restrictions at the time he was terminated. He received permanent restrictions by Dr. Reeder on June 10, 2016. (Ex. 4, p. 22) Claimant testified that he did not believe he could continue the Trim Blood Shot job due to bending and standing.

Claimant applied for a number of jobs after he was terminated. He was interviewed for one job at Harlan Monogram as a production operator making bacon. Claimant testified after he informed this employer of his restrictions he was not offered a job. Claimant applied for a number of other positions and did not receive any offers. Claimant testified that he provided information about his restrictions to some of these potential employers. Most of the jobs applied for were in production. Claimant did submit an application for paint/auto body and for general work for a car dealership.

Claimant found employment in June 2016 through a temporary employment agency and was working as a temporary employee at Midwest, assembling hydraulic parts. Claimant said that he can sit, stand or walk as needed in this job and the lifting is around 10 pounds. Claimant was making \$10.75 at Midwest at the time of the hearing. At Tyson, claimant was making \$14.35 at the time of his discharge. (Ex. D, p. 1) Claimant earned vacation and employer contribution to health insurance at Tyson. He does not have the same level of benefits at Midwest.

Claimant agreed that his termination from Tyson was not related to his work injury. He also agreed that but for his misconduct he would have been in his Trim Blood Shot job. However, he believed his restrictions in lifting, bending, and pulling would prevent him from performing this job.

William Sager, II, testified. Mr. Sager is the Complex Human Resources Manager for Tyson Storm Lake. Mr. Sager said that claimant owned the Trim Blood

Shot job. That means that claimant would spend the majority of his time at that job. If he was assigned to work at a lower grade job he would still receive his Trim Blood Shot grade pay. Mr. Sager said that if claimant had restrictions that would not allow him to perform the Trim Blood Shot job he would have been administratively disqualified for that job and Tyson would have tried to find him another position within his restrictions.

Claimant received treatment for his lower back before his admitted work injury of January 27, 2015. The independent medical evaluation by Sunil Bansal, M.D., of March 26, 2016, reflects that in March 1996 he was complaining of shoulder and back pain. (Ex. 7, p. 2) In January 2004, claimant had back pain due to repetitively reaching. (Ex. 7, p. 2) On November 22, 2011, claimant was still having back pain and was assessed with sacroiliac region sprain. (Ex. 2, p. 2) From January 2013 through October 4, 2013, claimant regularly received care for back pain. (Ex. 2, pp. 3, 4)

On January 27, 2015, claimant injured his back and reported it to Tyson on January 28, 2015. (Ex. 10, p. 1) On April 16, 2015, Ralph Reeder, M.D., examined claimant. Dr. Reeder noted that the onset of claimant's injury was January 27, 2015, when claimant was lifting boxes at work. (Ex. 4, p. 3) Dr. Reeder's assessment was "Backache with spinal stenosis noted at L4-5 with disk bulge at L4-5, L5-S1." (Ex. 4, p. 5) Dr. Reeder discussed back surgery with the claimant on June 16, 2015, as an option. (Ex. 4, p. 8) On June 29, 2015, Dr. Reeder performed surgery on the L4, L5, and S1 portions of the spine. His post-operative diagnosis was, "Herniated nucleus pulposus L4-5 central to left, spondylosis L5-S1." (Ex. 5, p. 1) On June 6, 2016, Dr. Reeder found claimant to be at maximum medical improvement. He found that claimant had a 13 percent permanent impairment. As for permanent restrictions he stated,

His permanent restrictions had been previously indicated as of 10/02/2015, and are unchanged. He can constantly sit, stand and walk; frequently bend, reach, push, pull, twist, climb; occasionally kneel and crawl. The patient is qualified for full time. He is to lift 50 pounds occasionally, 25 pounds frequently, and 10 pounds constantly.

(Ex. 4, p. 22) I find these to be claimant's permanent restrictions.

On March 28, 2016, Dr. Bansal performed an independent medical examination. Dr. Bansal assigned a 10 percent impairment rating to the whole body. (Ex. 7, p. 14) Dr. Bansal recommended restrictions of no lifting of over 25 pounds occasionally, and no lifting over 15 pounds frequently. He recommended sitting, standing, and walking as tolerated and to limit walking, sitting or standing to no more than 60 minutes at a time. (Ex. 7, p. 14) Dr. Bansal charged a total of \$2,782.00 for this IME. Of the total charge, \$412.00 was for the examination and \$2,370.00 was for the report. (Ex. 7, p. 18)

Claimant is limited by his English language abilities in his relevant labor market. He has a limited education. His vocational history shows that he has done factory/shop work and has not worked in sedentary or light jobs. He has permanent restrictions.

Claimant was working at the time of the hearing. I find that claimant has a 35 percent loss of earning capacity.

I find that based upon the rate table in effect at the time of the injury that claimant was single with 4 exemptions and his weekly workers' compensation rate is \$458.24. The parties stipulated commencement date for permanent partial disability is August 23, 2015.

CONCLUSIONS OF LAW

The parties have stipulated claimant has a permanent industrial disability as a result of an injury that arose out of and in the course of his employment at Tyson Fresh Meats.

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

Defendant asserts claimant's impairment is minimal. And claimant's criminal conviction and resulting discharge from Tyson is the primary reason for his loss of earning capacity. I have considered those facts as to what, if any, impact it has had on the general labor market for claimant. Claimant's actions ended his approximately 22 years of work with Tyson. I have no evidence that employers, in general, would consider a conviction for criminal mischief to be a substantial barrier to the types of work claimant can perform. Claimant was convicted under Iowa Code section 716.5, which is an aggravated misdemeanor.

Claimant does have restrictions and I have found the restrictions provided by Dr. Reeder to be claimant's restrictions. I considered claimant's loss of earning in the labor market, not just with his former employer in assessing his industrial disability.

I found claimant has a 35 percent loss of earning capacity. Claimant is not fluent in English. His education is limited. His vocational history does not include office or supervisory skills that he can perform. He was working at the time of the hearing making less than he made at Tyson Fresh Meats.

Based upon all of the factors of industrial disability, I find claimant has a 35 percent industrial disability. This entitles claimant to 175 weeks of permanent partial disability benefits.

Claimant has requested the payment of the IME performed by Dr. Bansal.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendant is responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133.

Dr. Bansal's report was issued before the defendant obtained a rating. Claimant has not shown entitlement to payment of the entire cost.

I do find that under rules 876 IAC 4.33(6) and (7) claimant is entitled to the cost of the report portion of the IME and the filing fee of \$100.00. I find the cost of the report to be reasonable and award the cost of \$2,370.00. Claimant is awarded total costs of \$2,470.00

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay claimant one hundred seventy-five (175) weeks of permanent partial disability benefits at the weekly rate of four hundred fifty-eight and 24/100 dollars (\$458.24) commencing on August 23, 2015.

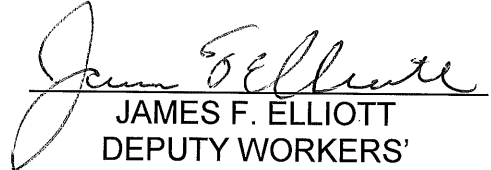
Defendant shall have credit for seventy-five (75) weeks of permanent partial benefits previously paid.

Defendant shall pay claimant costs in the amount of two thousand four hundred seventy and 00/100 dollars (\$2,470.00).

Defendant shall pay any past due amounts with interest and in a lump sum.

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

Signed and filed this 27th day of October, 2017.


JAMES F. ELLIOTT
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.