BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHAEL J. JOHNSTON,

Claimant,

vs.

MOHAWK INDUSTRIES, INC.,

Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5052017

ARBITRATION DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Michael Johnston, has filed a petition in arbitration and seeks workers' compensation benefits from Mohawk Industries, Inc., employer, Liberty Mutual Insurance Company, insurance carrier, defendants.

Deputy workers' compensation commissioner, James Elliott, heard this matter in Des Moines, Iowa.

Joint Exhibits 1 through 21 and defendant's Exhibits A through E were admitted into the record. Claimant testified at the hearing. Both parties submitted briefs.

ISSUES

The parties have submitted the following issues for determination:

1. The extent of permanent disability from the injury arising out of and in the course of employment on November 6, 2012;

2. Assessment of costs.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

The claimant was 61 years old at the time of hearing. He is a high school graduate and had no post-high school education.

On November 6, 2012, claimant was delivering carpet for Mohawk Industries, Inc. (Mohawk) in Waverly, Iowa. He was on a pile of rolled carpet in the back of his trailer when he slipped, fell out of the trailer, hit a carpet cart and then the street. (Transcript page 11; Exhibit D, page 2) Claimant made that delivery. He called Mohawk due to pain in his right shoulder and made a delivery in Oelwein and was sent to the emergency department in Oelwein Iowa. At that visit, his primary diagnoses were right shoulder strain and painful elbow joint movement. (Joint Ex. 2, p. 3) Claimant's elbow pain has subsided and is not part of his current claim. (Tr. p. 15)

Claimant was referred to Concentra for his injury and saw Terrance Kurtz, M.D., on November 12, 2012. His assessment was shoulder impingement and shoulder strain. He ordered physical therapy and provided restrictions. (Jt. Ex. 3, p. 2) On November 6, 2012 an MRI was ordered. (Jt. Ex. 3, p. 8) The MRI of December 31, 2012 showed:

Impression:

1. Bulky spurring is seen in the acromioclavicular joint, which impinges upon the supraspinatus. This may predispose the patient to impingement symptomatology.

2. No definite evidence of a labral injury. The rotator cuff appears intact.

(Jt. Ex.5, p. 2)

Claimant was referred to an orthopedic surgeon and saw Barron Bremner, D.O., on January 17, 2013. (Tr. p. 16: Jt. Ex. 6, p. 1) Dr. Bremner provided a subacrominal injection on that visit and provided restrictions. (Jt. Ex. 6, p. 3) On February 21, 2013, Dr. Bremner released claimant to return to work without restrictions. (Jt. Ex. 6, p. 4) The return to work flared-up claimant's shoulder. On March 28, 2013, Dr. Bremner recommended right shoulder arthroscopy with subacrominal decompression and distal clavicle excision. (Jt. Ex. 6, p. 6) On April 15, 2013, Dr. Bremner performed surgery. His postoperative diagnosis was:

POSTOPERATIVE DIAGNOSES:

1. Right shoulder acromioclavicular joint arthritis.

2. Right shoulder subacromial impingement.

3. Right shoulder degenerative labral tearing.

(Jt. Ex. 8, p. 1)

On November 12, 2013, claimant was doing somewhat better. He still had a hard time reaching his head and low back. Claimant did not want to undergo

manipulation. Dr. Bremner did not believe claimant was at maximum medical improvement. He provided work restrictions. (Jt. Ex. 6, p. 20)

On December 23, 2013, Mark Kirkland, D.O., examined claimant. His impression was:

IMPRESSION:

1. Right shoulder acromioclavicular joint internal derangement/osteoarthritis.

2. Impingement.

3. Status post right shoulder arthroscopic subacromial decompression, arthroscopic excision of the distal clavicle, and arthroscopic rotator cuff debridement.

(Jt. Ex. 4, p. 3) Dr. Kirkland ordered a functional capacity evaluation (FCE). (Jt. Ex. 4, p. 12)

On March 11 and 12, 2014, claimant underwent a two-day FCE. The results were deemed valid. (Ex. 7, p. 1) The FCE identified the following restrictions:

Floor to waist lifting 50 pounds max, 40 pounds occasional, 20 pounds frequent

Waist to crown lifts 25 pounds max, 20 pounds occasional, 10 pounds frequent

Waist to Overhead 15 pounds max, 10 pounds occasional, 5 pounds frequent

Front carry 40 pounds max, 30 pounds occasional, 20 pounds frequent

Right arm carry 40 pounds max, 30 pounds occasional, 20 pounds frequent

Left arm carry 60 pounds max, 50 pounds occasional, 30 pounds frequent

Prolonged overhead activities rarely

Sitting/standing/walking/prolonged forward bend no limitations

Grip and hand coordination activities no limitations

(Jt. Ex. 7, p. 2)

On March 19, 2014, Dr. Kirkland agreed that the restrictions in the FCE were claimant's restrictions. Claimant was placed at the light physical demand level. (Jt. Ex. 4, pp. 15, 16) Dr. Kirkland provided a 13 percent impairment of the whole person rating. (Jt. Ex. 4, p. 16) I find that the restrictions recommended by Dr. Kirkland are claimant's restrictions.

On April 12, 2014, Mohawk wrote to claimant offering a position as a shuttle driver if he could provide medical certification he could perform certain physical requirements. (Jt. Ex. 11, p. 1) As a number of the physical requirements for shuttle driver exceeded his permanent restrictions, claimant was not able to work for Mohawk. No work was offered to claimant and he was placed on a leave of absence on May 5, 2014. (Jt. Ex. 12, p. 1) Claimant never returned to work at Mohawk. He was terminated on April 14, 2015. (Ex. D, p. 5)

Claimant had a number of jobs after high school including recapping tires, building gravity-flow wagons. Due to his lifting restriction claimant did not believe he could perform those jobs now. He worked for his father driving a semi to California for about 12 years and for anther trucking company for two years. Claimant did not think he could be an over-the road semi driver due to the vibration in the truck, difficulties sleeping in the cab and unloading the truck. (Tr. pp.32, 33)

Claimant had some jobs delivering freight that required him to unload and deliver. Claimant did not believe he could work in those positions with his current limitations.

The record shows that in February 2005 claimant misled an employer by submitting information about a medical visit, which he did not attend. Claimant was terminated for this action. (Tr. pp. 8, 41; Ex. A, p. 3)

Claimant also worked in trucking that just involved hook and dropping trailers, with no loading or unloading. Claimant stated he did not think he could perform that work due to the sleeping in a cab.

At the time of the hearing, claimant was working for Magnum Trucking since February 2015. (Tr. p. 68) Claimant is driving a truck making day deliveries based in Des Moines, Iowa. Claimant has applied for additional work while working for Magnum, expressing a desire for more hours in his application. (Jt. Ex. 10)

Claimant admitted he could perform the physical tasks of his past driving job with Air- Land Transport and for Wilcox. (Tr. pp 42, 46, 56, 57)

On February 21, 2013, claimant passed a physical required to maintain his commercial driver's license. No restriction of the shoulder was noted. (Jt. Ex. 3, pp. 11 – 13) Claimant is taking over-the counter medication for his shoulder and is not receiving any ongoing medical care. (Tr. p. 70)

Claimant has worked about 30 years as a truck driver. He currently is working as a truck driver and is looking for a driver job that will give him more hours. While he has

applied for dispatcher jobs, he has not been offered one. The claimant is limited to light work.

That is a significant limitation to someone with just a high school diploma. Claimant's labor market has been reduced with the permanent restriction provided by Dr. Kirkland.

Given the claimant's age, limitations and work history he faces major barriers in his labor market, it is at best speculative to consider whether he will further his education. In his present state, considering the claimant's medical impairments, training, permanent restrictions, daily pain, as well as all other factors of industrial disability, the claimant has suffered a 35 percent loss of earning capacity.

On the date of injury, the claimant had gross weekly earnings of $1,006.00, was single, and entitled to one exemption. As such, his weekly benefit rate is $604.65. The commencement date for permanent disability was stipulated as April 13, 2004. The stipulations contained in the hearing report are accepted and made part of this decision as if fully set forth.

REASONING AND CONCLUSIONS OF LAW

The first issue is the extent of permanent disability.

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 Rule of Appellate Procedure 6.14(6).

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.

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961). 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 R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

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).

As detailed above, claimant is limited to light work. He has obtained work and is still driving a truck. Mohawk was not able to keep him employed with his restrictions. Based on the finding that the claimant has suffered a 35 percent loss of earning capacity, he has sustained a 35 percent permanent partial industrial disability entitling him to 175 weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(u).

Claimant has requested costs of $112.96. (Attachment to Hearing Report) The costs, filing fee and service cost, are permitted by 876 IAC 4.33. I award these costs to claimant.

ORDER

THEREFORE IT IS ORDERED:

That the defendants shall pay the claimant one hundred seventy five (175) weeks of permanent partial disability benefits commencing April 13, 2014 at the weekly rate of six hundred four and 65/100 dollars ($604.65).

Defendants shall receive a credit of sixty eight (68) weeks of permanent partial disability benefits at the rate of six hundred four and 65/100 dollars ($604.65) for prior payment of permanent partial disability benefits.

Costs are taxed to the defendants pursuant to rule 876 IAC 4.33 in the amount of one hundred twelve and 96/100 dollars ($112.96).

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30 with subsequent reports of injury pursuant to rule 876 IAC 3.1.

Signed and filed this 27th day of October, 2016.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Jim Lawyer
Attorney at Law
1415 Grand Ave.
West Des Moines, IA 50265
jlawyer@lldd.net

Nathan R. McConkey
Attorney at Law
2700 Westown Pkwy., Ste. 170
West Des Moines, IA 50266-1411
nmcconkey@desmoineslaw.com

JFE/kjw

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.