BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ZIAD KARADSHEH, Claimant, vs. SEARS HOLDING CORPORATION, Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	FILED FEB - 1 2019 WORKERS' COMPENSATION File Nos. 5048050, 5048052 A P P E A L D E C I S I O N Head Note Nos: 1803; 1804; 4100

Defendants Sears Holding Corporation, employer, and Indemnity Insurance Company of North America, insurer, appeal from an arbitration decision filed on September 1, 2017. Claimant Ziad Karadsheh cross-appeals. The case was heard on October 28, 2016, and it was considered fully submitted in front of the deputy workers' compensation commissioner on February 27, 2017.

In the arbitration decision, the deputy commissioner found claimant's March 29, 2012, work injury, File Number 5048050, resulted in permanent disability. The deputy commissioner found claimant's October 16, 2013, work injury, File Number 5048052, caused only a temporary aggravation of claimant's March 29, 2012, injury. While the deputy commissioner ultimately determined claimant failed to prove he was permanently and totally disabled or an odd-lot employee, the deputy commissioner determined in File No. 5048050 that claimant proved he sustained 75 percent industrial disability due to the March 29, 2012, work injury. In File Number 5048050, the deputy commissioner found claimant is entitled to payment by defendants for the requested past medical expenses itemized in Exhibit 15 and the deputy commissioner ordered defendants to pay claimant's costs of the arbitration proceeding.

On appeal, defendants assert the deputy commissioner erred in File No. 5048050 in finding claimant sustained 75 percent industrial disability. Instead, defendants assert it should be found on appeal that claimant sustained no industrial disability as result of the March 29, 2012, work injury.

On cross-appeal, claimant asserts in File No. 5048050 that the deputy commissioner erred in failing to find claimant is permanently and totally disabled as a result of the March 29, 2012, work injury. Claimant alternatively argues he is an odd-lot employee as a result of the March 29, 2012, work injury.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision. Notably, after the arbitration hearing but prior to the submission of their post-hearing briefs, the parties entered into amended and substituted stipulations. One of those stipulations was that claimant sustained an injury to his back on October 16, 2013 "qualifying him for industrial disability." (See Amended and Substituted Stipulations of the Parties, p. 2, para. 3; Arbitration Decision, p. 2) As discussed above, however, the deputy commissioner in his arbitration decision found that claimant's October 16, 2013, injury was a temporary aggravation of claimant's March 29, 2012 injury. Neither party specifically challenged this finding in their briefs on appeal. As such, I conclude this issue was not raised on appeal. I will therefore only address whether the deputy commissioner properly assessed the extent of claimant's permanent disability in File No. 5048050 resulting from his March 29, 2012, work injury.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.15 and 86.24, the proposed arbitration decision filed on September 1, 2017 is affirmed in its entirety with the following additional findings and analysis:

FINDINGS OF FACT

While I ultimately agree with the deputy commissioner's fact findings, the following summary is warranted for purposes of clarity:

On March 29, 2012, claimant injured his shoulders while attempting to push a double oven. (Hearing Transcript, pp. 27-29) At the time of the injury, claimant was working as a home appliance repairman - a job he had performed for more than 30 years. (Hearing Transcript, p. 24)

After his injury, claimant was initially evaluated at Concentra. When claimant reported increased pain in his right shoulder in April of 2012, he was then referred to Suleman Hussain, M.D., at ORA Orthopedics. At his first appointment with Dr. Hussain, claimant was diagnosed with biceps tenosynovitis and impingement syndrome of the bilateral shoulders. (Exhibit A, pp. 41-42) At some point, an MRI was obtained of claimant's right shoulder which revealed a supra labral tear. (See Ex. A, p. 24)

By August of 2012, claimant was reporting symptoms consistent with carpal tunnel syndrome. (Ex. A, p. 34) Dr. Hussain instructed claimant undergo an EMG, though the doctor later opined it was unlikely claimant's carpal tunnel symptoms were related to a direct work incident. (Ex. A, pp. 32-34)

The EMG, performed on November 5, 2012, was consistent with mild carpal tunnel syndrome. (Ex. A, p. 68)

When claimant returned to Dr. Hussain after the EMG, he reported persistent and worsening right shoulder discomfort and numbness and tingling in the extremities. (Ex. A, p. 29) Because claimant had not responded to conservative measures, including injections and therapy, Dr. Hussain recommended surgery. (Ex. A, p. 29)

On September 16, 2014, Dr. Hussain performed a right shoulder arthroscopy with subacromial decompression, AC joint resection, and biceps tenodesis, along with right carpal tunnel release. (Ex. A, p. 8; Ex. 10; Ex. 11) While it appears this surgery was initially delayed due to a dispute with defendant-insurer (see Ex. A, pp. 24, 27), it is unclear why there was a subsequent extended delay.

Regardless, two to three weeks after surgery, claimant returned to defendant-employer in a modified-duty role. (Tr., p. 34) He was no longer servicing appliances at customers' homes; instead, he was working with the sales staff in defendant-employer's retail store. (Tr., p. 34) In this role, he was earning $11.20 per hour, compared to the $25.60 he was earning at the time of his work injury in March of 2012. (Tr., p. 36) This is consistent with claimant's tax documents, which show claimant earned roughly $20,000 in 2015 compared to more than $50,000 in 2011 before his injury. (Ex. 34, pp. 70, 74; Tr., pp. 59-60)

When claimant returned for his follow-up appointment with Dr. Hussain on June 10, 2015, roughly seven months after surgery, he felt he had plateaued. (Ex. A, p. 4) As a result, Dr. Hussain ordered a functional capacity evaluation (FCE) to determine claimant's permanent restrictions. (Ex. A, p. 4)

During the FCE, which was deemed valid, claimant showed the ability to work in the light-medium physical demand category. (Ex. 15, p. 28) Specifically, claimant was capable of carrying 20 to 35 pounds on an occasional basis, 10 to 20 pounds on a frequent basis, and 5 to 10 pounds on a continuous basis. (Ex. 15, p. 28)

On July 31, 2015, claimant returned to Dr. Hussain to discuss his FCE. (Ex. A, p. 3) Dr. Hussain placed claimant at maximum medical improvement (MMI) for his right shoulder and adopted the FCE for claimant's permanent restrictions. (Ex. A, p. 3) It does not appear from the record that claimant ever returned to Dr. Hussain for additional care.

On August 28, 2016, Dr. Hussain assigned claimant a four percent whole person impairment, all of which was based on range of motion deficits in claimant's shoulder. (Ex. A, p. 1)

A few days later, on August 31, 2016, claimant was evaluated by Richard Kreiter, M.D., for purposes of an independent medical examination (IME). (Ex 3) In his report,

Dr. Kreiter opined that claimant's injury on March 29, 2012, permanently aggravated and accelerated a pre-existing condition in claimant's right shoulder. (Ex. 4, p. 7) Dr. Kreiter assigned 16 percent whole person impairment for claimant's right upper extremity and shoulder. (Ex. 4, p. 7) Relying on the FCE, Dr. Kreiter assigned restrictions of carrying 20 to 30 pounds occasionally and 10 to 20 pounds frequently. (Ex. 4, p. 7) Dr. Kreiter also opined claimant should not perform overhead work with his right shoulder. (Ex. 4, p. 7) Dr. Kreiter suggested claimant could go into teaching or repair work at bench level with his technical knowledge. (Ex. 4, p. 8)

Claimant continued to work in his modified sales role until April 29, 2016, when claimant was informed the position was being eliminated. (Tr., pp. 37-39) Claimant was told someone from management would contact him to help him find a different job with defendant-employer consistent with his restrictions. (Tr., p. 39)

On August 10, 2016, a letter was sent to claimant from defendant-employer which identified open cashier and sales positions. (Ex. F, p. 215) The letter indicated claimant had until August 25, 2016, to express interest these positions. If claimant did not respond, defendant-employer planned to proceed with separation of employment, effective August 26, 2016. (Ex. F, p. 215) The letter also informed claimant that if he was re-employed with defendant-employer within 90 days he would receive service credit for his prior service and time off payroll. (Ex. F, p. 215)

Claimant testified he never received the August 10, 2016, letter. (Tr., p. 40) Notably, however, a copy of the letter was sent to claimant's attorney on August 17, 2016. (Ex. F, p. 214) The letter to claimant's attorney drew specific attention to the August 25, 2016, deadline. (Ex. F, p. 214)

Regardless, claimant did not contact defendant-employer to let them know he was interested in the open positions identified in the August 10, 2016, letter. As a result, he was terminated as of August 26, 2016. (Tr., pp. 42-43) As of the hearing, claimant had not obtained new employment.

In the months prior to the arbitration hearing, claimant applied for jobs with 14 companies. (Tr., p. 43) Claimant applied for several cashier and sales positions, several of which were with defendant-employer. (Tr. pp. 44-46) He also took a course with Iowa Works to update his resume and assist in his job search. (Tr., p. 47) Claimant's job search resulted in job offers from defendant-employer and a grocery store. (Tr., pp. 75, 79-80) Claimant testified he believed the jobs offered by defendant-employer were outside his restrictions, though he acknowledged this was his opinion and he never spoke to defendant-employer about any possible accommodations. (Tr., pp. 76-77)

In his deposition, claimant testified he would have no issues performing cashiering work even though he has never performed it before. (Ex. 18, Cl. deposition

tr., p. 23) Claimant also testified at hearing that Dr. Kreiter encouraged claimant to search for a light repair job that allowed him to work at a bench. (Tr., p. 50)

I find claimant's right shoulder restrictions, as set out in his FCE and adopted by both Dr. Hussain and Dr. Kreiter, prohibit him from returning to the home appliance repair work he was performing prior to his work-related injury in March of 2012. This work required moving heavy appliances, and claimant's restrictions only allow him to carry up to 35 pounds on an occasional basis. As mentioned, claimant performed this work for more than 30 years prior to his work-related injury.

Claimant, who was 61 years old at the time of the hearing, never obtained his high school diploma or GED. (Tr., p. 22) Given his longtime employment with defendant-employer, I find it unlikely claimant would be able to successfully retrain.

However, claimant acquired significant technical knowledge over the course of his 30-year career with defendant-employer. He also has a diploma from an HVAC technical school. (Tr,. p. 23) Consistent with Dr. Kreiter's suggestion, I find claimant has the knowledge and physical capabilities to perform light repair work.

Claimant also acknowledged he could perform cashier-type work, and other non-technical work, despite never having performed it in the past. I find claimant could perform light-medium non-technical jobs, such as the cashier work he identified.

Claimant attempted a brief job search from September to December while receiving unemployment benefits. (Tr. p. 47) During that search, he was offered work with defendant-employer and a grocery store (Tr., pp. 79-80), though he chose not to accept those jobs. Because claimant has obtained job offers and indicated there are categories of work he could physically perform, I affirm the deputy commissioner and I find claimant is not permanently and totally disabled.

Claimant also asserts he is an odd-lot employee. I find there is insufficient evidence to establish claimant is not employable in the competitive labor market. He offered no vocational expert opinion to establish this fact, he obtained job offers during his brief job search, and he admits he could perform non-technical jobs such as cashiering. I also find claimant failed to prove the only services he could perform are so limited in quality, dependability, or quantity that a stable job market does not exist.

However, I agree with the deputy commissioner that claimant demonstrated he sustained permanent disability as a result of the March 29, 2012, work injury. Both claimant's treating physician and his IME doctor opined claimant sustained permanent impairment due to his right shoulder injury. Further, claimant cannot return to the home appliance repair work he performed for more than 30 years. Claimant's age, educational level, and work experience limit his future opportunities. Therefore, considering all of the relevant industrial disability factors, I affirm the deputy

commissioner's finding that claimant has proven he sustained 75 percent industrial disability as a result of the March 29, 2012, work injury.

Defendants assert claimant sustained no industrial disability as a result of the March 29, 2012, work injury because that work injury caused no reduction in claimant's ability to be gainfully employed. This argument is without merit. Because of claimant's permanent work restrictions, claimant was precluded from returning to the same position he held for more than 30 years. Further, while defendants are correct that defendant-employer identified several jobs within the company that were consistent with claimant's permanent restrictions, these jobs paid significantly less money per hour than the job claimant held prior to the work injury. (See Ex. 17, Mutchler depo. tr., p. 50) Claimant's work injury and resulting permanent restrictions resulted in a reduction of job opportunities and actual earnings. Defendants' argument is therefore rejected.

CONCLUSIONS OF LAW

Defendants assert on appeal that claimant sustained no industrial disability, while claimant asserts on cross-appeal that he is permanently and totally disabled or an odd-lot employee. I will first address claimant's claim of permanent total disability.

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).

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).

I found claimant failed to prove he is permanently and totally disabled. I specifically found claimant was offered jobs after his separation with defendant-employer, and claimant admitted he is physically capable of performing certain categories of work. Thus, I conclude claimant has not proven by a preponderance of the evidence that he is permanently and totally disabled.

Claimant also assets he is an odd-lot employee. 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.

In this case, I found there was insufficient evidence to establish claimant is not employable in the competitive labor market. As discussed above, claimant had job offers after his separation from defendant-employer, and he acknowledged he could perform non-technical work such as cashiering. Therefore, I conclude claimant failed to make a prima facia case that he is an odd-lot employee. As such, I conclude that the burden of proof never shifted from claimant to defendants to refute the odd-lot claim.

Regardless, I also found there was insufficient evidence to show that the only jobs claimant can perform are so limited in quality, dependability, or quantity that a reasonable stable market for them does not exist. Thus, I conclude claimant failed to carry his burden of persuasion to establish a claim as an odd-lot employee. I therefore affirm the deputy commissioner and conclude claimant failed to prove he is an odd-lot employee.

Having rejected the permanent total disability and odd-lot claims, I must consider the extent of claimant'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 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. Iowa Code section 85.34.

Significantly, I found claimant is not capable of returning to the home appliance repair work he performed prior to his work injury - work he performed for more than 30 years. Having considered and weighed this fact and all of the relevant industrial disability factors, I found claimant proved he sustained 75 percent industrial disability. Thus, I affirm the deputy commissioner and I find claimant is entitled to receive 375 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u).

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on September 1, 2017, is affirmed in its entirety with my additional findings and analysis.

File No. 5048050 (March 29, 2012, date of injury)

Defendants shall pay claimant three hundred seventy-five (375) weeks of permanent partial disability benefits at the weekly rate of seven hundred sixty-seven and 74/100 dollars ($767.74) commencing on July 31, 2015.

Defendant shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable 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, See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Defendants shall pay the medical expenses itemized Exhibit 15.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding.

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

File No. 5048052 (October 16, 2013, date of injury)

Claimant shall take nothing further from these proceedings.

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

Both files:

Pursuant to rule 876 IAC 3.1(2), the parties shall split the costs of the appeal, including the cost of the hearing transcript.

Signed and filed on this 1st day of February, 2019.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

Copies to:

William J. Bribriesco
Attorney at Law
2407 – 18th St., Ste. 200
Bettendorf, IA 52722-3279
bill@bribriescolawfirm.com

Eric T. Lanham
Attorney at Law
10 E. Cambridge Cir. Dr., Ste. 300
Kansas City, IA 66103
elanham@mvplaw.com