

## BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DON A. ELLIS,

Claimant,

vs.

GILCREST/JEWETT LUMBER  
COMPANY,

Employer,

and

ACUITY INSURANCE

Insurance Carrier,  
Defendants.

File No. 5058934

ARBITRATION  
DECISION

Head Note No.: 1803

## STATEMENT OF THE CASE

The claimant, Don A. Ellis, filed a petition for arbitration and seeks workers' compensation benefits from Gilcrest/Jewett Lumber Company, employer, and Acuity Insurance, insurance carrier. The claimant was represented by Matthew Petrzelka. The defendants were represented by Matthew Novak.

The matter came on for hearing on September 12, 2018, before deputy workers' compensation commissioner Joe Walsh in Des Moines, Iowa. The record in the case consists of claimant's exhibit 1 and defense exhibits A through E and joint exhibits 1 through 5. The claimant testified under oath at hearing, in addition to his wife, Toni Ellis. Randy Rothmeyer attended the hearing on behalf of Gilcrest. Jill Blake was appointed the official reporter for the proceedings. The matter was fully submitted.

## ISSUES

The parties submitted the following issues for determination:

1. The extent of claimant's industrial disability.

## STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship.

2. Claimant sustained an injury which arose out of and in the course of employment on November 25, 2015.
3. Temporary disability/healing period and medical benefits are no longer in dispute.
4. The commencement date for any permanent disability benefits is May 12, 2017.
5. The elements comprising the rate of compensation lead to a weekly rate of compensation is \$457.01.
6. Defendants have paid and are entitled to a credit of 25 weeks of compensation (permanent partial disability).
7. Affirmative defenses have been waived.

#### FINDINGS OF FACT

Claimant, Don Ellis, was born in June 1976, making him 42 years old as of the date of hearing. He testified live and under oath at hearing. His testimony is highly credible. Mr. Ellis was not a particularly talkative witness but I believe all the words he did speak were true. His hearing testimony was highly consistent with his deposition testimony, as well as the medical records in evidence. He was an accurate historian. There was certainly nothing about his demeanor which caused me any concern about his truthfulness.

Mr. Ellis graduated high school in Cedar Rapids, Iowa, (Jefferson High School) in 1995. He is married to Toni Ellis and they have two children. After high school, he served in the United States Navy and was honorably discharged. He served for a little over a year in the Navy reserves also. He had EMT training and served as a firefighter. He took some courses through Kirkwood Community College and eventually earned a coaching certificate.

Prior to working at Gilcrest, Mr. Ellis had a varied and interesting employment history. He had worked for the State of Iowa, Department of Corrections from approximately 2007 to 2014, as a correctional officer. He left that work and went to work for Stewart Dell as a milk truck driver. Thereafter, he held a series of jobs driving a milk truck or cement truck. In April 2015, he began working at Gilcrest. His job was pulling and loading material on a truck and delivering it.

On November 25, 2015, he was delivering a steel door to a work site. He had to carry it a distance by himself, walking through a muddy terrain when he felt a pop in his shoulder. (Defendants' Exhibit A, Ellis Depo, pages 32-33) Mr. Ellis had never had previous right shoulder problems. He drove back to Gilcrest and reported the injury. Treatment began shortly thereafter.

On November 30, 2015, he was seen at Mercy Care North and the injury was documented. (Jt. Ex. 1) He was diagnosed with a rotator cuff injury, provided a sling and restrictions of no use of his right arm. (Jt. Ex. 1, p. 1) He was referred for orthopedic treatment. On December 9, 2015, he saw Kyle Switzer, D.O. (Jt. Ex. 2) The injury was, again, accurately documented and he was diagnosed with rotator cuff tendinitis. Conservative treatment was recommended (medications, physical therapy and injections). (Jt. Ex. 2, p. 2) He had an MRI in January 2016. (Jt. Ex. 3) By late January 2016, Dr. Switzer was discussing surgery with Mr. Ellis. (Jt. Ex. 2, p. 4) Surgery was performed by Dr. Switzer on February 19, 2016. (Jt. Ex. 3, p. 3) Thereafter, he continued to treat conservatively for a period and received another injection in April 2016.

In April 2016, Mr. Ellis quit his job for Gilcrest. (Def. Ex. D) Dr. Switzer's notes document that Mr. Ellis had some difficulty at work in January 2016. (Jt. Ex. 2, p. 4) Mr. Ellis testified that he had some tension with his supervisor, Randy Rothmeyer, following his injury. He referenced the fact that he did not feel it was right to have "one guy in a truck carrying doors and windows." (Def. Ex. A, Ellis Depo, p. 17)

In July 2016, Dr. Switzer documented that Mr. Ellis continued to complain of right shoulder pain. "He feels like he is doing worse. He describes an aching, stabbing pain that is constant. The flexor weakness and catching in the shoulder. He points to the anterior portion essentially over the biceps tendon." (Jt. Ex. 2, p. 11) Another injection was performed. He had another MRI in August 2016. (Jt. Ex. 3, p. 7)

In October 2016, Mr. Ellis was seen by Matthew Bollier, M.D, at the university of Iowa Hospitals and Clinics.

As Mr. Ellis has not had any relief of symptoms following physical therapy and subacromial injection, it is unlikely his symptoms will improve without surgery. The AC joint, biceps tendon and rot cuff tear (all pain generators were not addressed at his last surgery and he still has significant pain. We discussed more surgery to address this. He wants to proceed with right shoulder rotator cuff repair, biceps tenodesis, distal clavicle excision and debridement.

(Jt. Ex. 4, p. 3)

Dr. Bollier performed surgery on October 25, 2016. (Jt. Ex. 4, pp. 14-15) He completed a fairly normal post-operative course of treatment and was released from care on May 12, 2017 with no restrictions. (Jt. Ex. 4, p. 24) Dr. Bollier apparently assigned a 4 percent whole body impairment rating.

In January 2018, Mark Taylor, M.D., prepared a report for claimant which contained expert medical opinions. (Cl. Ex. 1) Dr. Taylor reviewed appropriate records and took a thorough and accurate history from Mr. Ellis. He examined claimant's right shoulder. (Cl. Ex. 1, p. 5) He diagnosed rotator cuff tear, right shoulder arthralgia and

decreased range of motion. Dr. Taylor assigned a 10 percent whole body impairment rating based primarily upon the decreased range of motion. (Jt. Ex. 1, p. 7) He also recommended restrictions to avoid lifting more than 25 pounds above shoulder level. He was directed to keep his right arm as close to the body as possible. He also advised against repetitive overhead reaching or repetitive activity above the shoulder/head level. (Jt. Ex. 1, p. 7) I find these are very reasonable restriction recommendations.

Since quitting his employment with Gilcrest, Mr. Ellis has worked several jobs, beginning with the Iowa Department of Natural Resources, before returning to Stewart Dell to drive a milk truck and perform various other tasks. He passed a DOT physical. Mr. Ellis does not have significantly decreased earnings. He also coaches wrestling locally. This is unpaid volunteer work, however, he has a coaching certificate.

Toni Ellis testified that her husband is not a complainer by nature. I believe this. It is stipulated that Mr. Ellis has some residual permanent functional loss as a result of his injury. Ms. Ellis testified credibly that his shoulder condition does adversely impact his activities of daily living and leisure activities.

#### CONCLUSIONS OF LAW

The only question submitted is the extent of claimant's permanent partial disability. It is stipulated that the disability is industrial and the commencement date is May 12, 2017. The only question is the impact of his functional loss on his earning capacity.

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 Ry. Co. of Iowa, 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.

Having reviewed the entire file and listened to the testimony of the witnesses, I find the claimant has suffered a 30 percent loss of earning capacity. At age 42, Mr. Ellis is relatively young man. Mr. Ellis graduated from high school and has some skills obtained from his military service and Kirkwood. He has not experienced a significant loss of earnings, as his position at Gilcrest was not high paying (under \$11 per hour). Claimant's work opportunities are somewhat limited in Anamosa, Iowa.

Claimant has a stipulated shoulder injury which caused damage to his rotator cuff and resulted in two surgeries. His period of recuperation lasted from November 2015 through May 2017, nearly 18 months. During this time, Mr. Ellis was at a significant disadvantage in finding and securing permanent full-time employment to help support his family. I find the impairment rating of Dr. Taylor to be compelling (10 percent whole body). Dr. Bollier's impairment rating is not well-explained in the record. Dr. Taylor carefully documented claimant's loss of range of motion. He recommended reasonable permanent restrictions to avoid lifting more than 25 pounds above shoulder level. He was directed to keep his right arm as close to the body as possible. He also advised against repetitive overhead reaching or repetitive activity above the shoulder/head level. (Jt. Ex. 1, p. 7) While claimant is formally working without any restrictions, I find the restrictions recommended by Dr. Taylor are quite reasonable and accurately reflect the type of work Mr. Ellis should avoid. This would likely preclude the claimant from pursuing a host of jobs for which he would otherwise be eligible.

Considering all of the factors of industrial disability, I find his loss of earning capacity resulting from his work injury is 30 percent. This entitles claimant to one-hundred and fifty weeks of benefits commencing May 12, 2017.

#### ORDER

#### THEREFORE IT IS ORDERED:

Defendants shall pay the claimant one-hundred fifty (150) weeks of permanent partial disability benefits at the rate of four hundred and fifty-seven and 01/100 (\$457.01) per week from May 12, 2017.

Defendants shall pay accrued weekly benefits in a lump sum.


Defendants 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 be given credit for the twenty-five (25) weeks previously paid.

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

Costs are taxed to defendants.

Signed and filed this 20<sup>th</sup> day of December, 2019.

  
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JOSEPH L. WALSH  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Matthew Petrzelka (via WCES)

Matthew Novak (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 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.