

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KELLY WARD,

Claimant,

vs.

SEARS MANUFACTURING CO.,

Employer,

and

TRAVELERS PROPERTY AND
CASUALTY COMPANY OF AMERICA,

Insurance Carrier,
Defendants.

File No. 1632021.01

ARBITRATION DECISION

Head Note Nos.: 1803, 2907

STATEMENT OF THE CASE

Kelly Ward, claimant, filed a petition for arbitration against Sears Manufacturing Company, as the employer and Travelers Property and Casualty Company of America, as the insurance carrier. This case came before the undersigned for an arbitration hearing on November 2, 2021.

Pursuant to an order from the Iowa Workers' Compensation Commissioner, this case was heard via videoconference using CourtCall. All participants appeared remotely via CourtCall.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 6, Claimant's Exhibits 7 through 12, as well as Defendants Exhibit A. All exhibits were received without objection. Claimant testified on his own behalf. No other witnesses testified live at the hearing. The evidentiary record closed at the conclusion of the arbitration hearing.

However, counsel for the parties requested an opportunity to file post-hearing briefs. This request was granted and both parties filed briefs simultaneously on November 17, 2021. The case was considered fully submitted to the undersigned on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. The extent of claimant's entitlement to permanent partial disability benefits.
2. Whether costs should be assessed against either party and, if so, in what amount.

FINDINGS OF FACT

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

Kelly Ward, claimant, is a 57-year-old woman, who lives in Silvis, Illinois. She is a high school graduate, who also obtained a certified nursing assistant (CNA) certificate after an eight-week course. (Claimant's testimony; Claimant's Exhibit 9) Ms. Ward worked as a CNA for 10 years but has not worked in this capacity for the past 20 years.

Subsequent to her employment as a CNA, Ms. Ward worked at Hardee's performing cashiering and customer service duties. She also worked as a cashier for another business on a part-time basis. Prior to commencing her employment with the employer involved in this case, claimant also worked in a manufacturing facility with a machine and as a fork truck driver. (Claimant's Ex. 10)

Claimant began working for the employer, Sears Manufacturing Company, in October 1997. During her employment with Sears, Ms. Ward performed assembly work, paint line work, spot welding, and has driven a fork truck. She initially worked as a spot welder for the company for eight or nine years when she started. On February 10, 2017, Ms. Ward was performing a spot-welding job when she injured her right shoulder. She experienced immediate pain while pulling on a pan. The employer admitted the right shoulder injury and provided claimant treatment.

Unfortunately, the injury required surgical intervention. On May 23, 2017, Suleman Hussain, M.D., took claimant to surgery and performed an arthroscopic surgical repair of three rotator cuff tendons in claimant's right shoulder. Dr. Hussain also performed a biceps tenodesis, a subacromial bursectomy and acromioplasty, as well as debridement of the superior labrum in the right shoulder. (Joint Ex. 5, p. 28) Claimant's symptoms continued and Dr. Hussain performed an injection in claimant's right shoulder on November 3, 2017. (Joint Ex. 5, p. 35)

Claimant had a reasonably good recovery from the right shoulder surgery. Dr. Hussain documents in his notes that claimant achieved full range of motion of the right shoulder, as well as five out of five strength in the right shoulder by March 5, 2018. (Joint Ex. 5, p. 41) Similarly, Dr. Hussain documented that claimant required no ongoing pain medications as of April 6, 2018. (Joint Ex. 5, p. 42) Ms. Ward achieved maximum medical improvement (MMI) for the right shoulder on June 29, 2018. (Joint Ex. 5, p. 44)

However, during her recovery from the right shoulder injury, claimant also injured her left shoulder. Defendants admitted liability for the left shoulder injury. Once again, conservative measures failed, and claimant required surgery on her left shoulder. Dr. Hussain performed a left shoulder arthroscopic repair of three rotator cuff tendon tears in the left shoulder on January 30, 2018. At that same time, Dr. Hussain also performed a biceps tenodesis and a subacromial bursectomy and acromioplasty in the left shoulder. (Joint Ex. 5, p. 38)

Following a period of recovery, Dr. Hussain declared claimant at MMI for the left shoulder on November 28, 2018. (Joint Ex. 5, p. 48) Dr. Hussain opined that Ms. Ward sustained a five percent permanent functional impairment of the whole person as a result of the right shoulder injury and an additional eight percent permanent functional impairment of the whole person as a result of the left shoulder injury. (Joint Ex. 5, pp. 50-51) Dr. Hussain recommended a functional capacity evaluation (FCE) to assess claimant's permanent residual work abilities. Claimant submitted to the FCE on November 14, 2018, which was deemed valid. (Joint Ex. 6)

The FCE recommended claimant limit work activities to the light to medium work category and that she lift up to 20 to 25 pounds on an occasional basis. (Joint Ex. 6, p. 52) After review of the FCE, Dr. Hussain generally agreed with the findings and recommendations of the FCE. He recommended permanent work restrictions for Ms. Ward, which include work in the light to medium work category, lifting occasionally from floor to chest level at no more than 19 pounds. (Joint Ex. 5, p. 48)

Ms. Ward obtained an independent medical evaluation performed by Mark Taylor, M.D. on July 19, 2021. Dr. Taylor concurred with Dr. Hussain that claimant achieved MMI for the right shoulder on June 29, 2018 and for the left shoulder on November 28, 2018. Dr. Taylor also concurred that no additional treatment was needed for either shoulder. (Claimant's Ex. 7, p. 64) Dr. Taylor also agreed with the FCE recommendations for permanent work restrictions. (Claimant's Ex. 7, p. 65)

With respect to permanent impairment, Dr. Taylor offered slightly varying impairment ratings from those offered by Dr. Hussain. Dr. Taylor opined that claimant sustained a 10 permanent functional impairment of the right shoulder and an 11 percent permanent functional impairment of the left shoulder as a result of the admitted work injuries. (Claimant's Ex. 7, p. 64)

Claimant testified that she continues to experience significant pain in the biceps areas, that fork truck driving causes her soreness in her arms, shoulders, and biceps areas. Ms. Ward testified she has difficulties with daily activities as a result of her shoulder injuries, explaining she has difficulties doing her hair, getting dressed if her clothing is tight, difficulties washing walls or moving furniture, vacuuming, and performing lawn care (which her neighbors now perform). She also testified that she has never been pain-free since the date of injury.

Nevertheless, Ms. Ward was able to return to her position as a spot welder after the injury and recovery. However, claimant testified she had to be careful performing that job. She also explained that she only worked a few months in that position before bidding into a fork truck driver position. She bid to a new position out of concern for reinjury of her shoulders.

Claimant testified that she could not return to her prior jobs at Sears or her prior jobs as a cashier or as a CNA. She testified that each of her prior jobs required lifting that would exceed her current restrictions. Ms. Ward has not looked for alternate employment and testified that she desires to retire from her fork truck driving position with Sears. However, claimant acknowledges that she is employable for employers other than just Sears and testified that she would look for a fork truck job elsewhere if she lost her position with Sears for some reason. (Claimant's testimony)

The employer called its human resources director, Trisha Taylor, to testify. Ms. Taylor explained the union bid process at Sears, as well as claimant's wage situation both as a spot welder and in her current position as a fork truck driver. Prior to the injury date, Ms. Ward earned \$23.12 per hour. She is currently earning at the rate of \$23.01 per hour as a fork truck driver. However, Ms. Taylor provided candid testimony that the average spot welder currently earns \$25.34 per hour with incentive pay.

Claimant testified that she is currently working many more hours than she worked prior to the injury date. Ms. Taylor testified that she has no reason to doubt claimant's testimony that she is currently working 54 to 58 hours per week. With the increase in number of hours worked, claimant currently earns more than she did at the time of the injury. As far as her earnings history, claimant earned \$41,929.00 in 2016, \$37,724.00 in 2017, \$41,092 in 2018, \$39,448.00 in 2019, \$44,539.00 in 2020, and had earned \$53,327.80 through October 21, 2021.

Considering the medical opinions, I accept the opinions of Drs. Hussain and Taylor that Ms. Ward has achieved MMI for both the right and left shoulder injuries. I accept the restrictions offered by Dr. Hussain, as documented in the FCE and accepted by Dr. Taylor. With respect to permanent impairment, I do not find the difference in ratings to be significant or make a big difference in the outcome of this case. However, I accept the opinions of the treating surgeon, Dr. Hussain, and find that claimant sustained five percent permanent functional impairment of the whole person as a result of the right shoulder injury and eight percent permanent functional impairment of the whole person as a result of the left shoulder injury.

I find it is improbable claimant could return to work as a CNA, in her prior cashier positions, and that it may have been difficult or painful for her to continue working in her position as a spot welder for the employer. Nevertheless, I find that she bid to a legitimate and meaningful position as a fork truck driver. I find that she is capable of continuing to perform that position and would be qualified and capable of performing a similar position for a different employer should her employment with Sears end for any reason. Claimant remains employable in the general labor market.

Ms. Ward earns more now than she did at the time of the injury. However, she earns less than she would if she continued working as a spot welder for Sears. She is not capable of returning to prior employment with other companies. She has proven she sustained permanent disability and that it has a moderate effect on her future earning capacity.

Considering claimant's age, the situs and severity of the injuries, claimant's permanent functional impairment, permanent restrictions, claimant's ability to return to work and motivation to continue working, claimant's educational background, employment history, inability to return to numerous prior positions, as well as all other factors of industrial disability detailed by the Iowa Supreme Court, I find that claimant has proven a 35 percent loss of future earning capacity as a result of the February 10, 2017 work injuries to her right and left shoulders.

CONCLUSIONS OF LAW

This injury occurred in February 2017, prior to a significant statutory change that affected how shoulder injuries are compensated. Prior to the statutory change in 2017, a shoulder injury was not included within the scheduled member injuries contained in Iowa Code section 85.34(2). As such, when a disability occurred in the shoulder prior to the 2017 statutory change, a shoulder injury was compensated with industrial disability benefits. Iowa Code section 85.34(2)(u); Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949); Nazareus v. Oscar Mayer & Co., II Iowa Industrial Commissioner Report 281 (Appeal 1982).

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 considered all of the relevant factors of industrial disability, I found that claimant proved a 35 percent loss of future earning capacity as a result of the work injury. A 35 percent loss of future earning capacity is equivalent to 35 percent industrial disability and entitles claimant to 175 weeks of permanent partial disability benefits Iowa Code section 85.34(2)(u) (2016).

The only other disputed issue is whether costs should be assessed against either party. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. In this case, claimant recovers an industrial disability award. It is reasonable to assess claimant's filing fee (\$100.00). No other costs are specifically sought or awarded.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant one hundred seventy-five (175) weeks of permanent partial disability benefits commencing on November 26, 2018.

All weekly benefits shall be payable at the stipulated weekly rate of six hundred thirty-four and 71/100 dollars (\$634.71) per week.

Defendants are entitled to the stipulated credit for weekly benefits paid to claimant.

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 reimburse claimant's filing fee of one hundred and 00/100 dollars (\$100.00) as a cost.

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 10th day of March, 2022.

A handwritten signature in black ink, reading "William H. Grell", is written over a horizontal line.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Corey Walker (via WCES)

James Bryan (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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.