BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| VICTOR MENDOZA,<br><br>Claimant,<br><br>vs.<br><br>PLUMROSE, USA,<br><br>Employer,<br><br>and<br><br>TRAVELERS,<br><br>Insurance Carrier,<br>Defendants. | File No. 5057333.01<br><br>REVIEW-REOPENING DECISION<br><br>File No. 5065369.01<br><br>ARBITRATION DECISION<br><br>Head Note Nos.: 1803, 4000.2, 4100 |

## STATEMENT OF THE CASE

Victor Mendoza filed a two petitions seeking workers' compensation benefits from Plumrose USA, employer, and Travelers, the insurance carrier.

The matter came on for hearing on May 14, 2020, before deputy workers' compensation commissioner, Joseph L. Walsh, in Des Moines, Iowa. The record in the case consists of Joint Exhibits 1 through 12; Claimant's Exhibits 1 through 5; and Defense Exhibits A through I; as well the sworn testimony of claimant. Chris Quinlan served as the court reporter. The parties argued this case and the matter was fully submitted on June 15, 2020.

## ISSUES AND STIPULATIONS

A number of issues have been stipulated by the parties through the hearing report and order. The stipulations submitted by the parties in that order are hereby accepted and are deemed binding upon the parties at this time.

File No. 5057333.01, (Date of Injury October 30, 2014):

This claim was filed as a review-reopening petition. In reality permanency was never established in the original agreement for settlement. The parties have stipulated that claimant sustained a work injury to his right shoulder on October 30, 2014. This injury caused both temporary and permanent disability. The primary issue is the extent of claimant's industrial disability resulting from this injury. The defendants have paid just over 57 weeks of compensation prior to hearing. The appropriate commencement date for benefits is August 19, 2019. Defendants have paid medical expenses in the amount of $44,923.21. For this file, medical expenses are not in dispute.

The parties have stipulated to all of the elements that comprise the rate of compensation and contend the appropriate rate is $565.89. All affirmative defenses have been waived. The claimant is seeking payment of independent medical examination (IME). Claimant is seeking costs.

File No. 5065369.01, (Date of Injury March 2, 2015):

The parties stipulated that claimant sustained a work injury to his right leg on March 2, 2015. This injury caused both temporary and permanent disability. The primary issue for this file number is the extent of claimant's functional disability to his right leg. The defendants paid 8.8 weeks of compensation. The appropriate commencement date for permanency benefits is stipulated. Defendants have paid $21,931.94 in medical expenses.

The parties have stipulated to all of the elements comprising the rate of compensation and contend the correct rate is $664.86 per week. All affirmative defenses have been waived. The claimant is seeking independent medical evaluation expenses. Claimant is seeking costs.

## FINDINGS OF FACT

The majority of the facts of this case are not disputed. At the time of hearing, Victor Mendoza was 39 years old. He was born in Mexico and immigrated to the United States when he was a child. He went to high school in California. He did not complete high school or attain a GED. He has no further education and has no special skills or training.

Mr. Mendoza's work history is primarily in the field of manufacturing. He has also performed security work and lawn care. He began working for Plumrose USA in 2006. Plumrose processes ham, bacon and deli meats. Mr. Mendoza began working as a general production worker removing hams from molds. He testified this was physical work which required him to lift logs of hams which weighed 25 to 45 pounds. He suffered a work injury to his right shoulder in this job in 2007. He testified that he had shoulder surgery and quickly made a complete recovery. Mr. Mendoza continued to work without restrictions. In fact, a short time later, he was promoted and became a working supervisor in the bacon department.

He sustained an injury to his right shoulder which arose out of and in the course of his employment on October 30, 2014. He was initially treated conservatively, consisting of light-duty, medications and physical therapy. This treatment did not resolve his symptoms.

On March 2, 2015, he sustained a new injury to his right knee. This injury also arose out of and in the course of his employment with Plumrose. Mr. Mendoza was referred to the same clinic. An MRI of the knee was performed on April 28, 2015 and he was referred to a specialist, Kimberly Turman, M.D. Dr. Turman recommended surgery.

Mr. Mendoza testified that his shoulder treatment was placed on hold as a result of the knee treatment.

Dr. Turman performed surgery on Mr. Mendoza's right knee on October 2, 2015. He remained off work for a period of recuperation and eventually returned to light-duty. Mr. Mendoza testified that even after he was released in January 2016, he continued to experience significant pain and weakness in his right knee. The record documents that Mr. Mendoza continued to return to Dr. Turman through 2016 and 2017. He attempted numerous other treatment modalities including a brace, physical therapy and injections. He underwent a second knee surgery on April 19, 2018. She released him from care on July 16, 2018, indicating no further surgery would be helpful. (Jt. Ex. 10, p. 87)

Mr. Mendoza sought further care for his right shoulder after being released for his knee injury. He was referred to shoulder specialist, Daniel LaRose, M.D. Dr. LaRose ordered an MRI and advised Mr. Mendoza that he needed shoulder surgery for a rotator cuff tear. (Jt. Ex. 3, pp. 19-20) Dr. LaRose performed two surgeries in total; the first on January 3, 2017. He underwent unsuccessful postoperative care and ended up having a second surgery on November 7, 2017. Neither surgery was particularly helpful. Dr. LaRose formally released Mr. Mendoza from care on July 11, 2018. (Jt. Ex. 3, p. 35)

Both physicians released Mr. Mendoza with no restrictions, however, both documented his significant loss of function with both his right shoulder and right leg. He had ongoing chronic pain in both areas. Dr. LaRose assigned a 7 percent loss of function to the right upper extremity for the shoulder condition. Dr. Turman assigned a 2 percent right leg impairment for the knee condition. Mr. Mendoza had lost significant strength in his shoulder and could no longer perform overhead work. With regard to his knee, he had substantial difficulty kneeling, squatting and climbing.

Sunil Bansal, M.D., performed an independent medical evaluation of the claimant's right shoulder and right leg and prepared a report dated January 24, 2020. (Cl. Ex. 2) He reviewed records, examined the claimant and rendered expert medical opinions. His opinions were actually quite similar to those of the treating physicians. He assigned an 8 percent right upper extremity rating for the right shoulder and a 4 percent right lower extremity rating for the right leg condition. He recommended rather severe restrictions for the shoulder condition, which claimant does not strictly follow.

At the time of hearing, he is still employed with Plumrose as a working supervisor. His employment appears to be appropriately secure, however, it is unlikely he could perform much of his past employment. His current employment is only viable because his employer does not require him to perform overhead work as a supervisor.

## CONCLUSIONS OF LAW

File No. 5057333.01, (Date of Injury October 30, 2014):

The primary fighting issues in this case revolve around the nature and extent of claimant's permanent partial disability. The claimant alleges he has suffered a

substantial permanent partial disability and seeks an award of 35 percent. The defendants have conceded that claimant has suffered a minor industrial disability, however, contend it is quite limited.

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.

The parties have stipulated claimant suffered an injury which arose out of and in the course of his employment and that the injury is a cause of permanent disability. Having reviewed all of the evidence in the file, I find that the claimant has suffered a 35 percent loss of earning capacity as a result of his 2014 right shoulder injury.

The claimant is young, otherwise healthy and appropriately employed in the best job of his working life. If, however, the claimant were thrust into the competitive job market, given his right shoulder condition, he would be substantially disadvantaged. He has limited education and limited transferrable skills. While he has worked as a “working supervisor” he is unlikely to commence a new career in the field of management. Due to his right shoulder limitations, he cannot engage in most or all of his past employment. While he has no formal restrictions, it is evident that overhead work is unwise and unlikely for him. I find that Mr. Mendoza is highly motivated and this is to the advantage of both parties. Plumrose has been a relatively good employer and maintained claimant’s employment utilizing his skills as a working supervisor. Were the claimant unable to continue in his employment with Plumrose, his disability would likely be much greater. Considering all of the relevant factors of industrial disability, I find claimant to have suffered a 35 percent industrial disability.

Therefore, I conclude the claimant is entitled to 175 weeks of benefits commencing on the stipulated date August 19, 2019.

The next issue is medical expenses under Section 85.27.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Claimant seeks payment of the medical expense set forth in Claimant's Exhibit 1. It appears this was not paid in error; likely an oversight. The defendants are responsible for this expense.

The final issue is IME expenses and costs.

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.

Defendants are 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, 140 (Iowa App. 2008).

Iowa Code section 86.40 states:

> **Costs.** All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

> **Costs.** Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons

> reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010) The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

I find claimant is entitled to IME expenses in the amount of $3,290.00 set forth in Claimant's Exhibit 2. He is also entitled to taxable costs set forth in Claimant's Exhibit 5; the filing fee in the amount of $100.00.

File No. 5065369.01:

The primary fighting issue as it relates to claimant's right leg is the extent of functional disability. The defendants contend that claimant suffered a 2 percent functional impairment as a result of his right knee condition. Claimant contends the disability is 4 percent.

Where an injury is limited to a scheduled member the loss is measured functionally, not industrially. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983).

The courts have repeatedly stated that for those injuries limited to the schedules in Iowa Code section 85.34(2)(a)-(t), this agency must only consider the functional loss of the particular scheduled member involved and not the other factors which constitute an "industrial disability." Iowa Supreme Court decisions over the years have repeatedly cited favorably the following language in the case of Soukup v. Shores Co., 222 Iowa 272, 277; 268 N.W. 598, 601 (1936):

> The Legislature has definitely fixed the amount of compensation that shall be paid for the specific injuries . . . and that, regardless of the education or

> qualifications or nature of the particular individual, or of his inability . . . to engage in employment . . . the compensation payable . . . is limited to the amount therein fixed.

Our court has even specifically upheld the constitutionality of the scheduled member compensation scheme. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404 (Iowa 1994). Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Graves, 331 N.W.2d 116; Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

Thus, when the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C. M. Co., 194 Iowa 819, 184 N.W. 746 (1921).

The parties have stipulated that any disability is calculated to the right leg under Iowa Code section 85.34(2)(o) (2015).

I find the rating provided by Dr. Turman to be the most convincing medical evidence in this record. All benefits owed to the claimant for this injury have been paid. Claimant shall take nothing further.

ORDER

THEREFORE, IT IS ORDERED

File No. 5057333.01, (Date of Injury October 30, 2014):

Defendants shall pay the claimant one hundred and seventy-five (175) weeks of permanent partial disability benefits at the rate of five hundred and sixty-five and 89/100 dollars ($565.89) per week from August 19, 2019.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall be given credit for the weeks previously paid.

Defendants shall reimburse claimant for the IME expenses of Dr. Bansal in the amount of three thousand two hundred ninety and no/100 dollars ($3,290.00).

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 for the filing fee.

File No. 5065369.01, (Date of Injury March 2, 2015):

Claimant shall take nothing further.

Signed and filed this 19th day of February, 2021.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Jacob Peters (via WCES)

Tiernan Siems (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.