BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

THEODORE J. MALGET, Claimant, vs. JOHN DEERE WATERLOO WORKS, Self-Insured Employer, Defendant.	File No. 5048441 REHEARING DECISION

Claimant filed a motion for rehearing (application). Defendant resists the application. The application is considered.

Claimant raises two grounds for rehearing. First, claimant requests this agency make a finding the work claimant performed after his injury was "make work". Second, claimant requests a more detailed finding as to why claimant failed to carry his burden of proof he is an odd-lot employee.

As noted in the hearing report, the parties stipulated claimant sustained a work-related injury on September 8, 2011. Claimant testified at hearing he lost no time from work because of the injury (Transcript page 14) Claimant continued to work at John Deere (Deere) in a light duty capacity as an electrician until May of 2014. In his light duty position, claimant performed a job called arc flash. This required claimant to go to machinery throughout the plant and turn off electricity so others could work on machines (Tr. pp. 18-19) Claimant testified light duty work as an electrician also required he work on small appliances. He also checked circuit breakers throughout the plant. Claimant testified that on heavy work days, he would respond to between 15 to 20 calls per shift. (Tr. pp 21-22)

Gil Schultz testified he was a safety manager at the Deere plant where claimant worked. He testified performing the arc flash duties required a qualified electrician. He said performing arc flash duties was a part of the normal job of an electrician at Deere. (Tr. p. 77) He testified that all the jobs claimant performed as a light duty electrician were duties all electricians at Deere performed. (Tr. p. 79) He testified that had claimant not decided to leave Deere on May 16, 2014, claimant would have still been employed. (Tr. 79)

Claimant worked for over two years in a light duty job as an electrician at Deere. He performed tasks that required a qualified electrician. On some days claimant would

answer 15 to 20 calls per shift. All the jobs claimant did at Deere were a part of the jobs all electricians at Deere performed. Claimant would have still been working at Deere had he not left his job. Given this record it is found claimant's job at Deere as an electrician was not a "make-work" position. Claimant's application is denied as to this ground.

Second, claimant requests a more detailed analysis of why claimant failed to carry his burden of proof he was not an odd-lot employee.

In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa Supreme Court formally adopted the "odd-lot doctrine". Under that doctrine, a worker becomes an odd-lot employee when 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 reasonable 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. When the worker makes a prima facie case of total disability by producing substantial evidence the worker is non-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 efforts to find steady employment, vocational or other expert evidence demonstrating that suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and the 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 facts is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried. 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.

Claimant was assessed as having an L4 burst fracture caused by his fall at work (Exhibit 2, page 8 ; Ex. 9, p. 2)

Robert Broghammer, M.D. found claimant has 21 percent permanent impairment. Dr. Broghammer gave restrictions allowing claimant to take breaks as needed and walking only five to ten minutes at a time (Ex. 6, pp. 13-15, 17)

Ray Miller, M.D., performed an independent medical evaluation (IME) of claimant. Dr. Miller found claimant has 23 percent permanent impairment. Dr. Miller limited claimant to standing up to five minutes. He also limited claimant to lifting up to 50 pounds waist to shoulder, and carrying up to 30-40 pounds (Ex 2, pp. 11-12)

Claimant had no surgery. No doctor restricted claimant from working.

Claimant lost no time from work due to his injury. (Tr. p. 14) He worked from the date of injury until May 16, 2014, when he voluntarily left Deere. (Ex. 7, p. 18)

Claimant applied for weekly indemnity disability benefits through John Deere. Those benefits are only provided for non-occupational illnesses or injuries. (Ex. A, p. 19) Claimant stated he was disabled due to "chronic back pain." Claimant specifically notified the John Deere nurse's station that on the form under the employee area, claimant wanted the section changed to indicate it was not caused by a post-work fall. (Ex. A, p. 20)

Claimant has not looked for work. Claimant has not applied for a job. (Ex. O, p. 7, deposition page 52). A loss of earning capacity due to voluntary choice or lack of motivation to return to work is not compensable. Rus v. Bradley Puhrmann, File No. 5037928 (Appeal Decision December 16, 2014); Gaffney v Nordstrom, File No. 5026533 (App. September 8, 2011); Snow v. Chevron Phillips Chemical Co., File No. 5016619 (App. October 25, 2007). Copeland v. Boone Book and Bible Store, File No. 1059319 (App. November 6, 1997). See also Brown v. Nissen Corp., 89-90 IAWC 56, 62 (App. 1989) (no prima facie showing that claimant is unemployable when claimant did not make an attempt for vocational rehabilitation).

Counsel for claimant obtained an employability study. Kent A. Jayne, M.A., M.B.A., C.R.C., issued both a preliminary vocational economic assessment and a supplemental report. (Exhibit 3) The preliminary report was issued on December 24, 2013. The supplemental report was issued on December 12, 2014.

At the time of the preliminary report, claimant was working at the Project Engineering Center in a position modified to accommodate claimant's work restrictions. Claimant had worked as a functional electrician performing essential tasks for two years and eight months after his work injury. He did perform vital duties. Additionally, claimant was earning higher wages post-injury than he was earning pre-injury.

Mr. Jayne initially opined claimant could perform sedentary work. Ex. 3, p. 13)

Mr. Jayne's supplemental vocational report is dated December 12, 2014. As noted in that report, claimant had ceased working and had applied for his Weekly Indemnity Disability and his Social Security disability benefits. Mr. Jayne opined claimant was "incapable of obtaining employment in any reasonably stable branch of the labor market." (Ex. 3, p. 20)

As indicated in prior agency decisions, it is noted a review of past agency decisions indicates in 2014, Mr. Jayne routinely opined in over a dozen cases that claimants were completely disabled. Kent v. Diamond Shine Management Services, Inc., File No. 5021501 (Review-Reopening February 18, 2014); Ruiz v. Revstone

Casting Industries, LLC, File No. 5041967, 5050063, 5050064 (Arb. September 9, 2014); Hoffman v. Linn County, Iowa, File No. 5038326, 5042802 (Arb. February 28, 2014) ("Mr. Jayne concludes that claimant is completely disabled in large part due to his chronic pain. Mr. Jayne's inclusion of the stock language that goes into nearly every report he provides does little to assist the deputy in ascertaining the claimant's true loss of access to employment").

In 2015, Mr. Jayne opined in another 15 cases that claimants were either completely disabled or precluded from the competitive labor market. Peterson v Conveyor Engineering, File No. 5050009 (Arb. July 7, 2015); Vest v Allegis Group, File No. 5043614 (Arb. April 8, 2015); Labus v Iowa Distribution Services, File No. 5048489 (Arb July 25, 2015)

In 2016 Mr. Jayne opined in another 11 cases that claimants were either completely disabled or precluded from the competitive labor market. Drake v. Cedar Rapids Community School District; File No. 5051095 (Arb. April 18, 2016) ("On August 10, 2015, Kent Jayne, M.A., provided a vocational report. The report included many cut and pasted articles on chronic pain, a topic on which Mr. Jayne has no medical training...His continued attempts to render medical opinions and conclusions convert him from unbiased expert to advocate, thus making it challenging to afford any of his opinions credibility and weight.") Fisher v Forest Nursey, File No. 5042813 (Arb June 3, 2016); Brown v Camanche Community Schools, File No. 5034722 (Arb. January 30, 2017) See also Hoffman v. Care Initiatives, Inc., File No. 5032353 (Arb. July 28, 2011) (". . . Mr. Jayne opined that . . . claimant is unable to perform any services except those which are so limited in quantity, dependability, and/or quality that there is no reasonably stable labor market for them . . . the above is stock language. . . in Mr. Jayne's reports.")

It appears Mr. Jayne routinely opines claimants are precluded from the competitive labor market. Given this record, and the findings of fact and conclusion of law made in the appeal decision, the arbitration and appeal decision were correct in finding Mr. Jayne's opinions are less than convincing.

Claimant has a functional impairment between 21 percent to 23 percent of the body as a whole. He has restrictions limiting his ability to walk and stand. Claimant is limited to carrying 30 pounds, and lifting 50 pounds waist to shoulder. Claimant had no surgery. No doctor has restricted claimant from working. Claimant did not miss work because of the injury. He worked in a light duty job as an electrician for over two years after the date of injury. Claimant voluntarily left his job at Deere. The record indicates claimant would still be working at Deere had he not voluntarily quit. Claimant's hourly wage increased from the date of the injury until he quit his employment at Deere. Since leaving Deere, claimant has not applied for a job or looked for work. The opinions of Mr. Jayne regarding vocational opportunities are found not credible.

Given this record, claimant has failed to make a prima facie case of total disability and he has failed to carry his burden of proof he is not employable in the

competitive labor market. As a result, the burden to provide evidence of available and suitable employment does not shift to defendant in this case.

Claimant has failed to carry his burden of proof he is an odd-lot employee. Claimant would also not be found to be permanently and totally disabled applying the same factors of industrial disability was used in the odd-lot analysis. Claimant's application is denied as to this ground.

ORDER

Claimant's application for rehearing is denied. The appeal decision is supplemented with the findings of fact and conclusions of law made in this ruling.

Signed and filed this 24th day of March, 2017.

Joseph S. Cortese II

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