BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CRAIG SCHMINKE,

Claimant,

vs.

GENERAL PARTS INTERNATIONAL, INC.,

Employer,

and

NEW HAMPSHIRE INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 5050081

ARBITRATION

DECISION

Head Note Nos.: 1703; 1803; 2907

STATEMENT OF THE CASE

Craig Schminke, claimant, filed a petition in arbitration seeking workers' compensation benefits from General Parts International, Inc.(a/k/a Car Quest) and its insurer, New Hampshire Insurance Company as a result of an injury he sustained on June 19, 2012 that arose out of and in the course of his employment. This case was heard in Cedar Rapids, Iowa and fully submitted on May 21, 2016. The evidence in this case consists of the testimony of claimant, Claimant's Exhibits 1 – 9 and Defendants' Exhibit A. Both parties submitted briefs.

ISSUES

1. The extent of claimant's disability.
2. Commencement date of permanent benefits.
3. Whether the credit that defendant is entitled to for overpayment of benefits should be realized or applied in this case or against a future potential injury pursuant to Iowa Code section 85.34(4) and/or Iowa Code section 85.34(5).

STIPULATIONS

The parties entered into stipulations contained in the hearing report. All of the stipulations are accepted. The parties are bound by those stipulations. The parties agree defendants are entitled to credit for permanent partial benefits previously paid. As

the parties did not agree as to the date of commencement of permanent benefits they were not able to agree on the number of weeks for the credit. The parties stipulated that defendant was entitled to a credit for overpayment of weekly rate in the amount of $4,992.75.

FINDINGS OF FACT

The deputy workers' compensation commissioner having heard the testimony and considered the evidence in the record finds that:

Craig Schminke, claimant, was 61 years old as of the date of the hearing. He currently resides in Belle Plaine, Iowa. He graduated from high school. He has no additional formal education. Claimant has a basic understanding of how to use a computer- web searches and email. Claimant has a commercial driver's license, CDL, and has had a CDL for about 30 years. (Transcript, page 7) While claimant has a CDL he has not driven semi-trailer truck. (Tr. p. 7)

Claimant has worked for General Parts International, (General Parts), for 28 years. (Tr. p. 10) Claimant has been a truck driver for his career with General Parts, except for a brief time he was performing light duty in the warehouse after his work injury. Claimant drove a straight truck. (Tr. p. 10)

Claimant would deliver and pick up parts and supplies for an auto part store. He would deliver heavy items such as engines or 55-gallon drums, car and truck batteries and other items. He would use a two-wheeled cart and loading hook. Claimant described the position as requiring very physical work. (Tr. p. 12)

Claimant was unloading freight in the evening of June 19, 2012 when he felt a pinch in the back of his neck. (Tr. p. 13) Claimant rested for a while, called and left a phone message with his employer about his injury, completed the rest of his job and drove back to the employer's warehouse. Claimant went to the University of Iowa Hospital and Clinics (UIHC) on June 19, 2012. He was referred to Chad Abernathey, M.D. and Loren Mouw, M.D., as they had previously provided surgery for an anterior cervical discectomy and fusion (ACDF), (Ex, 3, pp. 1, 2), and care to claimant in 2007 and 2008 for a neck injury. (Ex. 2, pp. 1 – 3)

Claimant was seen by Dr. Mouw on July 24 and July 26, 2016. On July 26, 2012 Dr. Mouw reviewed the MRI and recommended surgery due to a large central protrusion at C4-5. He and the claimant agreed that he was going to perform an ACDF at C4-5 and C6-7 and removal of hardware at C5-6. On August 8, 2012, Dr. Mouw noted the he could not come to financial terms with the insurance carrier for the surgery and referred claimant back to UIHC. (Ex. 2, p. 7)

Claimant was seen by Sergio Mendoza, M.D., at UIHC on August 29, 2012. (Ex. 1, pp. 16 – 18) Dr. Mendoza discussed different surgical options and ordered a CT scan. On September 12, 2012, Dr. Mendoza met with claimant and went over the CT

scan results. His assessment was "Cervical radiculopathy. Adjacent segment disease at C4-C5 and C6-C7." (Ex. 1, p. 21) On September 26, 2012, Dr. Mendoza wrote:

> Craig Schminke is a 57-year-old male who presents today in followup to the Work Injury Recovery Center for an injury that occurred on 06/19/2012. He has a previous C5-C6 ACDF with adjacent segment disease at C4-C5 and C6-C7. He had a right selective neural foraminal injection at C6-C7 this morning, which he states has resolved his symptoms in the exact distribution that was causing his pain and numbness. Based on this assessment, we will proceed with the right C6-C7 foraminotomy.

(Ex. 1, p. 25) On November 8, 2012, Dr. Mendoza performed a cervical laminectomy. (Ex. 1, pp. 139 - 145) Claimant was referred to physical therapy for several months. (Tr. p. 18)

On May 22, 2013, claimant was seen at UIHC by James Nepola, M.D., for right shoulder pain. (Ex. 1, p. 52) On June 25, 2013, claimant received a diagnostic/therapeutic injection in the AC joint which provided significant temporary relief. (Ex. 1, p. 56) On August 27, 2013, Dr. Nepola diagnosed claimant with a "Work injury 06/19/2012 right shoulder" and "AC joint arthropathy." (Ex. 1, p. 70) On September 25, 2013, Dr. Nepola performed right shoulder surgery which included a shoulder arthroscopy, subacrominal decompression and resection of the distal clavicle. (Ex. 1, p. 147) On May 13, 2014, Dr. Nepola wrote:

> Craig A. Schminke is released to work with the following restrictions: 7.5 pound lift with his right arm while his elbow is close to his side. No repetitive reaching away from the body or above shoulder height with right arm. He can lift 25 pounds, from floor to chest using both hands.
>
> Mr. Schminke is advised not to drive or undertake any activity requiring alertness if taking sedating medication.
>
> Work restrictions are valid only up to the next appointment date. If the employee fails t,o [sic] keep an appointment, the employe, e [sic] will be assumed to be fully recovered, at full duty and at MMI with no impairment.
>
> These restrictions apply to work and non-work activities.
>
> If the employer has no work available within these restrictions, , [sic] then it is up to the employer to remove the employee from work.

(Ex. 1. p. 137)

On September 30, 2014, claimant underwent a functional capacity examination (FCE). (Ex. 5, p. 1 – 8) The FCE was valid and identified claimant as having the

general ability to perform medium work. (Ex. 5, p. 2) Claimant testified that he tries not to lift anything over 30 pounds. (Tr. p. 22)

On December 23, 2014, Dr. Mendoza provided an impairment rating and adopted the restriction of the FCE. Dr. Mendoza provided a 25 percent whole body rating for the claimant's neck injury. (Ex. 1, p. 151) He noted that claimant's future treatment may include non-steroidal anti-inflammatory medication, corticosteroid injection, physical therapy, and possible revision surgery. (Ex. 1. p. 151)

Dr. Nepola provided a rating to claimant on December 23, 2014 as well. (Ex. 1, p. 152) He said that claimant was at maximum medical improvement (MMI) as of May 13, 2014. (Ex.1, p. 152) He provided a 16 percent impairment to the upper extremity, 9 percent to the whole body, for claimant's shoulder injury. (Ex. 6, p. 7)

He adopted the restriction of the FCE as well.

Those restrictions are:

> Per the FCE, he should have permanent restrictions for the right shoulder including waist to waist lift of up to 75 pounds rarely, 37-75 pounds occasionally, 22-37 pounds frequently, and 11-22 pounds constantly, floor to waist lift of up to 45 pounds rarely, 22-45 pounds occasionally, 13-22 pounds frequently, and 6-13 pounds constantly, waist to above shoulder height lift of up to 35 pounds rarely, 17-35 pounds occasionally, 10-17 pounds frequently, and 5-10 pounds constantly, bilateral carrying of up to 60 pounds rarely, 30-60 pounds occasionally, 18-30 pounds frequently, and 9-18 pounds constantly, unilateral carrying with the right arm of up to 50 pounds rarely, 25-50 pounds occasionally, 15-25 pounds frequently, and 7-15 pounds constantly, pushing at 48 inches of up to 50 pounds rarely, 25-50 pounds occasionally, 15-25 pounds frequently, and 7-15 pounds constantly, pull at 45 inches of up to 65 pounds rarely, 32-65 pounds occasionally, 19-32 pounds frequently, and 9-19 pounds constantly, frequent crawling, constant sustained mid-level reach at 45 inches, and frequent sustained elevated reaching at 70 inches.

(Ex. 1, pp. 152, 153) He noted that claimant's future treatment may include non-steroidal anti-inflammatory medication, corticosteroid injection, physical therapy, and possible revision surgery. (Ex. 1, p. 153)

On December 7, 2015, Robin Sassman, M.D., issued an independent medical examination (IME) report. Dr. Sassman opined that claimant's neck and shoulder injuries were work related and occurred June 19, 2012. (Ex. 6, p. 10) She placed claimant at MMI for his neck injury as November 8, 2013 and September 25, 2014 for his shoulder injury. (Ex. 6, p. 10) Dr. Sassman assigned a whole body impairment rating of 23 percent for the cervical spine injury. She provided a 10 percent whole body for the right shoulder. Using the combined values chart in the AMA Guides to the

Evaluation of Permanent Impairment, Fifth Edition, she assigned a 35 percent impairment to the whole person. (Ex. 6, p. 11) Dr. Sassman provided restrictions of lifting 20 pounds floor to waist rarely, 30 pounds occasionally from waist to shoulder and 20 pounds rarely above shoulder height. Claimant was not to use ladders due to his reduced grip strength on the right and should not use vibratory tools. (Ex. 6, p. 11) Dr. Sassman's training and certification in occupational medicine is extensive. (See Ex. 6, pp. 15 – 17) Based upon the fact that claimant may have to have revision surgery and his less grip strength in his dominant arm, I find the Dr. Sassman's restrictions are claimant's restrictions. Neither Dr. Mendoza nor Dr. Nepola conducted their own determination of claimant's functional abilities.

Claimant last worked for General Parts in May of 2014. Claimant decided that upon his release by his doctors he could not perform the work as truck driver for General Parts due to the heavy nature of that work. (Tr. p. 24) Claimant did not ask for an accommodated position at General Parts and there is no evidence that General Parts would have offered him a position within his limitations. Claimant has applied for a number of jobs since he left General Parts. Claimant testified he has applied for over 200 jobs and has not been hired. (Tr. p. 30) He had the assistance of Rene Haigh, a vocational case manager. (Tr. p. 26; Ex 7, pp. 11 – 4; Ex. A, pp. 1 – 42) Ms. Haigh helped with claimant's résumé, cover letters and suggested job leads and job fairs. Claimant admitted that he did not apply for every job suggested by Ms. Haigh explaining that the wages and distance from his home was not economically practicable and some of the jobs weight requirements exceeded his limitations. (Tr. p.30) (See also Exhibit A, p. 4- 50 lbs, Ex. A, p. 10- 70 lbs, Ex. A, p. 14- 50 lbs, Ex. A, p.15- frequently lift 30 lbs). Claimant has had about seven interviews but has not been hired. Claimant attributed this to his age and restrictions. (Tr. p. 31) Ms. Haigh recorded that claimant on his own contacted 47 employers between April 2015 and November 2015 and between October 2015 and February 2016 claimant contacted 162 employers and 8 employment agencies that she provided leads. (Ex. A, p. 40)

Claimant testified that he would not apply for jobs driving a tractor trailer based upon his belief that there was too much bouncing and that was the cause of his neck injury in 2007. (Tr. p. 35) Claimant was able to maintain his home, drive a motor cycle and use a riding lawn mower. Claimant was taking over-the-counter medication for his neck at the time of the hearing. He was on no other medications for his work injuries.

On July 22, 2015, Krista Diehl, M.S, CRC, performed a labor market survey report. Using the restriction from the FCE and transferable skills Ms. Diehl identified occupations she believed claimant could perform. (Ex. 7, p. 2) Ms. Diehl did not consider the less grip strength and claimant's right hand or Dr. Sassman's restrictions. She identified a number of potential employers. (Ex. 7, pp. 2 – 9) The duties/physical demands of many of the jobs identified are not well suited to claimant. The Marion Brush Company job does not specifically identify weights required. The use of power tool and grinders are mentioned. Based upon Dr. Sassman's restriction of not using vibratory tools, this position would not be appropriate. The MetoKote Corporation job requires the occasional lifting of up to 50 pounds. The TMC job preference was the

individual needed to be bilingual in English/Spanish. Other positions such as dietary aid, pizza delivery driver transporter and courier pay at or near minimum wage and/or are not located in claimant's home town. I did not find this labor survey to be accurate in determining claimant's opportunity for work consistent with his abilities.

On February 8, 2016, Scott Mailey, M.S., CDMS provided a vocational evaluation report. (Ex. 7, pp. 138 – 142) Mr. Mailey found claimant had lost 100 percent to directly transferable occupations using the FCE or Dr. Sassman's restriction. Using the FCE, he found claimant has lost 50 percent of the labor market which claimant was qualified before the injury. Using Dr. Sassman's restrictions, he found claimant has lost 75 percent of the labor market which claimant was qualified before the injury. (Ex. 7, p. 142)

Claimant has engaged in a very extensive job search, one of the most extensive this deputy has seen. He has restrictions that prevent him from his prior work and significantly limits his access to the labor market. I find that claimant has suffered a 75 percent loss of earning capacity.

Defendants state that claimant was at MMI on May 13, 2014 based upon Dr. Nepola's December 23, 2014 rating report. (Ex. 1, p. 152) A review of the May 13, 2014 records show Dr. Nepola continued restrictions were substantially greater restrictions than the September 2014 FCE or Dr. Sassman's restrictions. Claimant's condition improved between May 2014 and September 2014. (Ex. 1, p. 137) The restrictions adopted by Dr. Nepola and Dr. Mendoza were issued on September 30, 2014. I agree with Dr. Sassman and find claimant was at MMI as of September 25, 2014.

Defendants are entitled to a credit of 79.857 weeks of benefits for payment of permanent partial disability benefits.

Claimant has requested costs of the filing fee of $100.00 and the IME expense of Dr. Sassman of $3,905.00. (Attachment to hearing report) I find these costs reasonable and that claimant is entitled to these costs under 876 IAC 4.33 and Iowa Code section 85.39

Claimant's weekly workers' compensation rate is $630.68 based upon gross weekly earnings of $1,061.00 with claimant being single and entitled to one exemption.

RATIONALE AND CONCLUSIONS OF LAW

Extent of 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. Section 85.34.

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).

Defendants have argued claimant has voluntarily left the labor market and has not "mitigated" his job loss. On the contrary, I find claimant credible and that he has sincerely attempted to obtain work and continued to do so up until the time of the hearing. Claimant drove a straight truck for 30 years and vocational adjustments at age 61 and a high school education is extremely difficult. He has had two neck fusions and shoulder surgery. Additional revision surgeries are possible for claimant.

Based upon the limitations recommend by Dr. Sassman, his education, training motivation and severity of the injury I find that claimant has a 75 percent industrial disability. Claimant still has some ability to engage in productive work, but he is significantly limited.

Credit

The parties dispute as to how the credit for overpayment of benefits should be applied in this case. Claimant asserts that defendant is entitled to a credit for overpayment as set forth in 85.34(5) — a credit if claimant has a subsequent injury with

the same employer. Defendants assert that they are entitled to a credit of all healing period overpaid benefits against the award of permanent benefits as set forth in 85.34(4).

Iowa Code section 85.34(4) provides:

> Credits for excess payments. If an employee is paid weekly compensation benefits for temporary total disability under section 85.33, subsection 1, for a healing period under section 85.34, subsection 1, or for temporary partial disability under section 85.33, subsection 2, in excess of that required by this chapter and chapters 85A, 85B, and 86, the excess shall be credited against the liability of the employer for permanent partial disability under section 85.34, subsection 2, provided that the employer or the employer's representative has acted in good faith in determining and notifying an employee when the temporary total disability, healing period, or temporary partial disability benefits are terminated.

Iowa Code section 85.34(5) provides:

> Recovery of employee overpayment. If an employee is paid any weekly benefits in excess of that required by this chapter and chapters 85A, 85B, and 86, the excess paid by the employer shall be credited against the liability of the employer for any future weekly benefits due pursuant to subsection 2, for a subsequent injury to the same employee. An overpayment can be established only when the overpayment is recognized in a settlement agreement approved under section 86.13, pursuant to final agency action in a contested case which was commenced within three years from the date that weekly benefits were last paid for the claim for which the benefits were overpaid, or pursuant to final agency action in a contested case for a prior injury to the same employee. The credit shall remain available for eight years after the date the overpayment was established. If an overpayment is established pursuant to this subsection, the employee and employer may enter into a written settlement agreement providing for the repayment by the employee of the overpayment. The agreement is subject to the approval of the workers' compensation commissioner. The employer shall not take any adverse action against the employee for failing to agree to such a written settlement agreement.

This agency has issued decisions supporting both parties' positions. This agency has held that under Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129 (Iowa 2010) the Court interpreted 85.34(5) to include all overpayments and that the credit can only be credited against a future claim against the same employer. See Boddicker v. UnityPoint Health Systems-St Luke's, File No. 5052922 (Arb. November 15, 2016).

In Love v. Agri Zone, File No. 5048382 (Arb. January 26, 2016) this agency held that defendants are entitled to a credit of overpayment of temporary benefits against an award of permanent benefits relying upon McBride v. Casey's Marketing Co., File No. 5037617 (Remand February 9, 2015).

The Iowa Supreme Court noted in Deutmeyer "the deputy granted the employer a credit for the healing period overpayments, he denied Swiss Colony a credit for the excess permanent disability payments for this injury. The deputy determined that a credit can only be taken against any future entitlement to permanency benefits for a subsequent injury should claimant return to employment at Swiss Colony." Id. at 132

Based upon that fact and that lack of any discussion of section 85.34(4) in the Deutmeyer decision, I believe the court did not preclude defendants from receiving the statutory credit under section 85.34(4).

I find that defendants are entitled for a credit for overpayment of any healing period benefits against the award of permanent benefits in this case. If the defendant overpaid permanency benefits defendants are entitled to a credit under 85.34(5) — if claimant has a subsequent injury with the same employer.

ORDER

THEREFORE, IT IS ORDERED:

The parties are ordered to comply with all stipulations that have been accepted by this agency.

Defendants shall pay claimant three hundred seventy-five (375) weeks of permanent partial disability benefits commencing on September 26, 2014 at the weekly rate of six hundred thirty and 68/100 dollars ($630.68).

Defendants are entitled to a credit of four thousand nine hundred ninety-two and 75 dollars ($4,992.75) for overpayment of claimant's rate. For this credit, defendants are entitled to a credit of any healing period benefits paid against an award of permanency. Any credit for overpayment of permanency can only be credited against a future award.

Defendants are entitled to a credit of seventy nine point eight five seven (79.857) weeks of benefits for payment of permanent partial disability benefits.

Defendants shall pay claimant filing fee of one hundred dollars ($100.00) and the IME expense of Dr. Sassman of three thousand nine hundred five dollars ($3,905.00).

Any past due amounts shall be paid with interest and in a lump sum.

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

Signed and filed this 30th day of January, 2017.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.