BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROGER NOURIE, Claimant, vs. ACH FOOD CO. INC. a/k/a TONE'S SPICES, Employer, and SENTRY INSURANCE, Insurance Carrier, Defendants.	File Nos. 5058447, 5058770 A P P E A L D E C I S I O N Head Notes: 1402.40; 1803; 5-9999

Claimant Roger Nourie appeals from an arbitration decision filed on September 27, 2019. Defendants ACH Food Co Inc a/k/a Tones Spices, employer, and its insurer, Sentry Insurance, cross-appeal. The case was heard on July 1, 2019, and it was considered fully submitted in front of the deputy workers' compensation commissioner on August 20, 2019.

The deputy commissioner found claimant had significant ongoing symptoms caused by his November 13, 2014, work-related left hip injury, which resulted in 35 percent industrial disability. The deputy commissioner also found claimant did not meet his burden to prove his low back complaints are related to his employment.

Claimant asserts on appeal that the industrial disability award was too low and that he did meet his burden of proof as it relates to his low back complaints.

Defendants assert on cross-appeal that the deputy commissioner erred in finding claimant sustained 35 percent industrial disability as a result of the work injury and that the evidence supports only a minimal award of industrial disability.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 86.24 and 17A.15, the arbitration decision filed on September 27, 2019, is affirmed in its entirety with the additional analysis set forth below.

Claimant was 60 years old at the time of the hearing. His post-secondary education consists of a couple semesters of college credits. His past work history is varied. He has worked in restaurant and hotel type positions such as a desk clerk, cook, bartending, housekeeping, and managing a fast food restaurant. He has worked in several factory positions which required manual labor and he has experience in roofing and as a stagehand.

In 2013, claimant worked as a stagehand for Wells Fargo Arena. He also obtained work at defendant-employer through a temporary agency. He applied for and then was directly hired by defendant-employer as a full-time employee. On November 13, 2014, claimant was pinned by a pallet jack between the pallet and bins. He was transported to the emergency room via ambulance and spent approximately three days in the hospital. His initial complaints were of left flank pain.

Initially, it appeared claimant would recover fully. He was released to full duty work with no restrictions as of February 26, 2015. However, claimant's symptoms did not abate. Eventually it was discovered claimant had degenerative changes and a labrum tear in his left hip. He underwent surgery on February 20, 2017, and by July 11, 2017, his orthopedic surgeon declared claimant was at maximum medical improvement. Claimant underwent a functional capacity evaluation on July 5, 2017. According to the FCE, claimant was able to lift 87 pounds occasionally from floor to waist, 46 pounds occasionally from waist to head level, and carry 53 pounds occasionally, as well as sit or walk stairs constantly. The FCE placed claimant's physical capabilities in the heavy demand vocation. Jason Sullivan, M.D., the orthopedic surgeon, adopted the FCE results and assessed seven percent body as a whole permanent impairment.

Claimant continued to have pain and discomfort in his left hip and he returned to Dr. Sullivan in November 2017. At that time, claimant was referred to Christopher D. Nelson, D.O., for further evaluation and recommendations. Dr. Nelson is a hip replacement specialist. Dr. Nelson evaluated claimant in January 2018 and diagnosed claimant with calcification of the left hip which had developed after the 2017 surgery. Dr. Nelson recommended surgical intervention to remove the calcification. That surgery was performed on July 26, 2018.

On May 14, 2019, Dr. Nelson noted claimant had ongoing left hip pain, but he returned claimant to work without permanent restrictions. In June 2019, Dr. Sullivan adopted Dr. Nelson's recommendations and released claimant to work without restrictions.

On February 22, 2018, claimant underwent an independent medical examination (IME) performed by Sunil Bansal, MD. Dr. Bansal opined claimant had sustained a left hip injury arising out of the November 13, 2014, work incident. Dr. Bansal also opined claimant had injured his low back. There are no other medical opinions diagnosing a back injury and claimant himself denied any back injury. Claimant argues there were several times when he complained of back pain to his medical providers, but that no treatment was provided. However, the lack of treating doctors' opinions regarding back pain, coupled with claimant's own admission he was not claiming a back injury, support a finding of no causation. Dr. Bansal also found claimant sustained a second injury on July 12, 2016, which Dr. Bansal believed aggravated the previous hip and back injuries.

For the November 13, 2014, injury, Dr. Bansal assessed three percent whole person impairment based on back issues, and eight percent whole person impairment based on the hip symptomatology. There was no separate impairment rating for the alleged July 12, 2016, injury. Dr. Bansal adopted the November 9, 2017, restrictions set forth by Dr. Sullivan, which Dr. Sullivan had subsequently changed after the FCE.

Defendants assert in their cross-appeal that the appropriate expert opinions to follow are those of Dr. Sullivan and Dr. Nelson who released claimant without restrictions in May 2019 and in June 2019. Both doctors recognize and document that claimant had ongoing left hip pain. The arbitration decision found the full release to be unrealistic, but it also found the restrictions recommended by Dr. Bansal were unduly restrictive.

Defendants also take issue with one reference on page five of the arbitration decision wherein the deputy states, "it is unlikely that he is able to work without any restrictions given his potential need for a future hip replacement and his ongoing symptoms." Defendants argue that reliance on claimant's potential future need for a hip replacement is inappropriate in determining the extent of claimant's industrial disability. I do not find the arbitration decision relied on a potential future need for a hip replacement, but rather the decision pointed out claimant's hip had not returned to its preinjury condition and the decision buttressed claimant's complaints of ongoing symptoms.

Claimant's FCE places him in the heavy vocation category, however, claimant is an aging worker and he does have ongoing hip pain. He does not have the type of background that would allow him to move into skilled labor or labor that would require fewer physical demands. Given his age, he is not likely to be a candidate for significant job retraining.

Based on claimant's age, his lack of motivation to return to work, the consistent ongoing complaints of pain in his left hip, his past work history which was primarily labor or manual labor, and the 2017 FCE results, I affirm the deputy commissioner's finding that the evidence supports a 35 percent industrial disability rating.

I affirm the deputy commissioner's finding claimant's low back injury was not casually related to the work injury. I further affirm the deputy commissioner's award of 35 percent industrial disability.

I affirm the deputy commissioner's findings, conclusions and analysis regarding those issues in their entirety.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on September 27, 2019, is affirmed in its entirety with the above-stated additional analysis.

Defendants shall pay claimant one hundred seventy-five (175) weeks of permanent partial disability benefits commencing and payable pursuant to the parties' stipulations in the hearing report.

All weekly benefits shall be payable at the stipulated weekly rate of five hundred thirty-six and 39/100 dollars ($536.39) per week.

Defendants shall receive the credit stipulated in the hearing report against this award of benefits.

Defendants shall pay accrued weekly benefits in a lump sum together with interest 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, as required by Iowa Code section 85.30.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding in the amount of two hundred twelve and 94/100 dollars ($212.94), and the parties shall split the costs of the appeal, including the cost of the hearing transcript.

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

Signed and filed this 2nd day of September, 2020.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Channing Dutton (via WCES)

Michael Roling (via WCES)