BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARK FEGENBUSH,

Claimant,

vs.

HAWKEYE DISTRIBUTION, LLC,

Employer,

and

SFM INSURANCE COMPANY,

Insurance Carrier,
Defendants.

FILED

APR 17 2017

WORKERS COMPENSATION

File No. 5054670

ARBITRATION DECISION

Head Note Nos.: 1803, 2907

STATEMENT OF THE CASE

Mark Fegenbush, claimant, filed a petition for arbitration against Hawkeye Distribution, L.L.C., as the employer and SFM Mutual Insurance Company as the insurance carrier. An in-person hearing occurred in Des Moines, Iowa on December 9, 2016.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

Claimant testified on his own behalf. Defendants called John Lindberg to testify.

The evidentiary record includes claimant's exhibits 1 through 14 and defendants' exhibits A through F, and I. All exhibits were received without objection.

The evidentiary record closed upon completion of the hearing on December 9, 2016. However, counsel for the parties requested the opportunity to file post-hearing briefs. The parties were given until January 9, 2017 to serve their post-hearing briefs, at which time the case was considered fully submitted to the undersigned.

ISSUES

The parties submitted the following disputed issues for resolution:

1. The extent of claimant's entitlement to permanent disability benefits.

2. The proper commencement date for permanent disability benefits.

3. Whether claimant's vocational report should be assessed as a cost.

FINDINGS OF FACTS

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

Mark Fegenbush, claimant, was 67 years of age at the time of the arbitration hearing. He lives in Whiting, Iowa. Mr. Fegenbush is a high school graduate. He has no further educational training beyond high school.

Mr. Fegenbush has a long and very impressive work history. He began farming after graduating from high school, working for his father and a neighbor. He continued farming until the mid-1990s when he was financially forced to stop farming. He began working as a hired hand on a neighbor's farm and eventually transitioned himself into truck driving. In 1995, he began working for Guardian Building Products as a truck driver, delivering lumber and products necessary for the construction of residential homes.

In the early 2000's, Mr. Fegenbush left Guardian Building Products and took employment with Hawkeye Distribution. Mr. Fegenbush worked as a truck driver for Hawkeye Distribution until February 12, 2016, when he resigned his employment.

Mr. Fegenbush sustained a broken leg in eighth grade, but otherwise had never suffered any major illnesses or injuries before taking employment with Hawkeye Distribution. Unfortunately, on April 16, 2014, Mr. Fegenbush was injured while performing his duties for Hawkeye Distribution. Specifically, he was attempting to open a curtain on his trailer. The wind caught the curtain and threw claimant off the trailer. He hit the rim of a tire on his trailer and fell to the ground.

As a result of the April 16, 2014 accident, Mr. Fegenbush sustained injuries to his neck and left knee. Defendants selected and provided necessary medical care for claimant's neck and left knee injuries. Conservative care was initially attempted but did not resolve claimant's neck symptoms. The treating physician assistant referred Mr. Fegenbush for a surgical evaluation. (Ex. D, p. 10)

William O. Samuelson, M.D. is an orthopaedic surgeon. Dr. Samuelson initially evaluated Mr. Fegenbush's neck on June 23, 2014. (Ex. 3, p. 1) Dr. Samuelson attempted additional conservative measures, including medication management, traction, home exercises, physical therapy, and aquatic therapy. Unfortunately, claimant's neck symptoms did not resolve. Dr. Samuelson recommended surgical intervention. (Ex. 3)

On November 12, 2014, Dr. Samuelson took claimant to surgery and performed an anterior cervical discectomy with fusion at the C6-C7 level. (Ex. 6, pp. 2-5) Surgery

was beneficial and improved claimant's symptoms. He experienced a reasonable recovery after surgery. Dr. Samuelson declared Mr. Fegenbush to be at maximum medical improvement for his neck as of November 19, 2015. Dr. Samuelson assigned a 25 percent permanent impairment rating of the whole person for claimant's neck injury and assigned permanent restrictions that precluded lifting more than 70 pounds occasionally. (Ex. 3, p. 45)

Claimant's left knee symptoms also continued and he was ultimately referred to Dr. Samuelson for definitive treatment of his left knee. Dr. Samuelson initially evaluated Mr. Fegenbush's left knee on October 19, 2015. He diagnosed claimant with a probable medial meniscal tear of the left knee and ordered an MRI. (Ex. F, pp. 1-2) The knee MRI demonstrated an extrusion of the medial meniscus as well as a tear at the anterior horn of the lateral meniscus in claimant's left knee. (Ex. 3, p. 42)

After review of the MRI, Dr. Samuelson recommended surgical intervention for the left knee and opined that the left knee symptoms and need for surgery were causally related to the April 16, 2014 work injury. (Ex. F, pp. 4-5) Dr. Samuelson took claimant to surgery on January 27, 2016 and performed a left knee arthroscopic partial medial meniscectomy as well as a partial lateral meniscectomy and a partial synovectomy. (Ex. F, p. 6)

After an appropriate recovery period, Dr. Samuelson declared Mr. Fegenbush to have achieved maximum medical improvement on March 7, 2016. Dr. Samuelson released claimant to full duty work and activities without any permanent restrictions as of that date. (Ex. 3, p. 47; Ex. F, pp. 6, 13) Dr. Samuelson assigned a 10 percent permanent impairment of the left leg for claimant's injury. (Ex. 3, p. 47)

Defendants scheduled Mr. Fegenbush to be evaluated by an occupational medicine physician, Douglas W. Martin, M.D. Dr. Martin reviewed claimant's past medical records, examined claimant, and ultimately opined that claimant sustained only a neck strain and a left knee contusion. (Ex. D, p. 23) Dr. Martin's explanation for these diagnoses is not convincing to me. Mr. Fegenbush was working full duty as a truck driver, manipulating product, curtains, and strapping loads, in addition to his operation of a semi prior to April 16, 2014. He had no prior major illnesses or injuries and certainly no work restrictions prior to April 16, 2014.

He sustained an admitted injury to his neck and his left knee on April 16, 2014 as a result of his work injuries. Thereafter, claimant had ongoing symptoms that necessitated surgical intervention on his neck and his left knee. I am not convinced that claimant sustained only a cervical strain or a left knee contusion. Rather, I find Dr. Samuelson's opinions to be much more accurate and convincing.

As the treating surgeon, I find all of Dr. Samuelson's opinions to be reasonable and credible. I accept Dr. Samuelson's diagnoses and opinions pertaining to restrictions, maximum medical improvement, and permanent impairment to be accurate in this case.

Claimant did submit to a functional capacity evaluation (FCE), which was considered valid and demonstrated an ability to lift 30-60 pounds occasionally from the floor to waist. This is similar to the 70 pound restriction offered by Dr. Samuelson. However, the FCE did also identify some other realistic limitations, including difficulties or inability to perform a deep squat due to the left knee injury as well as an antalgic gait that favored claimant's left leg. (Ex. E)

Both parties offered vocational expert reports. Claimant's vocational expert appears to have accepted claimant's subjective complaints and estimates of his current abilities, rather than applying the limitations and restrictions imposed by either the FCE or Dr. Samuelson. Nevertheless, claimant's vocational expert opines that Mr. Fegenbush has sustained a 47 percent loss of employability and a 45 percent loss of access to the labor market. (Ex. 10, p. 5)

Claimant's vocational expert concedes that claimant is likely still capable of performing less onerous employment, including such things as a short haul driver position, a parts delivery position, or a school bus driver position. (Ex. 10, pp. 5-6) Claimant's vocational expert opines that, if claimant returned to work in one of the identified positions, he could expect an actual future loss of earnings ranging from 35-39 percent from his pre-injury earnings level. (Ex. 10, p. 6)

Defendants' vocational expert relies upon the restrictions offered by Dr. Samuelson and opines that claimant has no loss of pre-injury access to employment nor any loss of future earning capacity. Defendants' vocational expert opines that claimant remains capable of returning to work in his usual and customary line of employment. (Ex. C)

Quite honestly, neither of the vocational reports are terribly helpful. Claimant's vocational expert offers a flawed analysis because he utilizes subjective limitations that are not medically mandated or supported by the objective evidence in this case. Defendants' expert offers a flawed analysis because claimant's vocational expert is accurate that claimant would not be able to work for employers such as FedEx or UPS with permanent lifting restrictions below 75 pounds. Both vocational experts make assumptions that are not entirely accurate or supportable. Both vocational experts' opinions are tainted by those assumptions. I rely upon neither of the vocational opinions to formulate an industrial disability award in this case.

Nevertheless, I must make a reasonable assessment and findings related to claimant's loss of future earning capacity related to this work accident. At claimant's age, it will be harder to find alternate employment opportunities. With some work restrictions, claimant will be foreclosed to some employment opportunities that would have been open to him prior to this work injury. Realistically, with a cervical fusion, some jobs will be more difficult if they require significant use of the neck or awkward neck positions. Realistically, claimant is not likely to be able to perform jobs that require deep knee squatting.

On the other hand, claimant voluntarily terminated his own employment. The undisputed evidence is that he could have continued working for Hawkeye Distribution. (John Lindberg testimony) Claimant has identified other potential employment opportunities, such as driving a grain truck during harvest. Claimant declined vocational assistance offered by defendants' vocational expert. I find that claimant likely could find alternate employment, if he chose to do so. I find that he likely could perform the jobs identified by claimant's vocational expert, as well as others that claimant has already begun identifying on his own.

Mr. Fegenbush required two surgeries, including a significant cervical fusion and a knee surgery. Mr. Fegenbush has significant permanent impairment related to these injuries. He is not likely to enter or participate in new educational pursuits or significant retraining efforts. He is likely to experience a loss of future earning capacity even if he elects to reenter the work force.

Considering claimant's age, educational background, employment history, ability to return to work, ability to retrain or find alternate employment, permanent impairment, lack of significant permanent work restrictions, motivation, as well as all other relevant industrial disability factors outlined by the Iowa Supreme Court, I find that claimant has proven he sustained a thirty percent (30%) loss of future earning capacity as a result of the April 16, 2014 work injury.

The parties dispute the proper date for commencement of permanent disability benefits. In this respect, I find that Mr. Fegenbush achieved maximum medical improvement before he was capable of performing substantially similar work because claimant was provided ongoing assistance through the date of his resignation. However, Mr. Fegenbush concedes that he returned to work for the employer after his neck surgery. (Transcript, p. 35)

The parties do not offer any direct testimony or written document of the date of claimant's return to work. However, defendants offered indemnity payment records that correspond with claimant's testimony about return to work. It appears from the indemnity payment records that claimant returned to light duty work on December 15, 2014. (Ex. A, p. 1) Therefore, I find that claimant returned to work in some capacity on December 15, 2014.

CONCLUSIONS OF LAW

The parties stipulate that Mr. Fegenbush sustained permanent disability and that the permanent disability should be compensated as an industrial disability pursuant to Iowa Code section 85.34(2)(u). (Hearing Report)

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.

Having found that claimant proved he sustained a 30 percent loss of future earning capacity as a result of the April 16, 2014 work injury, I conclude that claimant is entitled to a 30 percent industrial disability award, or 150 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u). Permanent partial disability benefits will be awarded at the stipulated weekly rate of $526.69 per week. (Hearing Report)

However, the parties dispute the proper commencement date for the permanent partial disability benefits. Claimant contends that the proper commencement date for permanent disability benefits is November 19, 2015, upon his achieving maximum medical improvement after his neck surgery. Defendants contend that the proper date for commencement of permanent disability benefits is February 14, 2015. (Hearing Report)

Permanent partial disability benefits commence upon the earliest of the three factors outlined in Iowa Code section 85.34(1). Specifically, permanent disability benefits commence upon the earliest of the claimant's return to work, medical ability to return to substantially similar employment, or achieving maximum medical improvement. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 372-374 (Iowa 2016). In this case, claimant returned to work in some capacity on December 15, 2014 and this represents the first of the factors outlined in Iowa Code section 85.34(1). Therefore, I conclude that permanent disability benefits commence on December 15, 2014.

Finally, claimant seeks assessment of his costs. Specifically, claimant seeks assessment of the cost of his vocational expert's report. Costs are assessed at the discretion of the agency. Iowa Code section 85.40.

In this instance, I did not rely upon claimant's vocational expert in formulating my findings or conclusions. Claimant's vocational expert utilized some assumptions that I did not find convincing and did not prove helpful to my analysis. Therefore, exercising

the agency's discretion, I decline to assess claimant's vocational expert expense as a cost.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant one hundred fifty (150) weeks of permanent partial disability benefits commencing on December 15, 2014, at the rate of five hundred twenty-six and 69/100 dollars ($526.69) per week.

Defendants shall pay interest on all accrued benefits pursuant to Iowa Code section 85.30.

Defendants shall be entitled to the stipulated credit for all permanent partial disability benefits paid to date.

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 17th day of April, 2017.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Willis J. Hamilton
Attorney at Law
PO Box 188
Storm Lake, IA 50588-0188
steve@hamiltonlawfirmpc.com

Lee P. Hook
Attorney at Law
6800 Lake Dr., Ste. 125
West Des Moines, IA 50266-2504
lee.hook@peddicord-law.com

WHG/srs

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.