BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
JUN 1 2015
WORKERS' COMPENSATION

JOHN YAW,

Claimant,

vs.

WESTSIDE AUTO BODY OF DES MOINES,

Employer,

and

AUTO-OWNERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5043051

REHEARING DECISION

On May 13, 2015, claimant filed a motion for rehearing/reconsideration (application). Defendants filed a resistance to the application on May 19, 2015. The application is considered.

In the first paragraph of the April 27, 2015, appeal decision filed in this matter, it is noted claimant failed to file a notice of cross appeal. The decision indicates that claimant did assert a cross-appeal in his brief. Claimant indicates in his application, that rehearing is required in this matter, as the appeal failed to consider the cross-appeal. Along with the application, claimant has attached a copy of a notice of cross-appeal showing that the cross-appeal was timely filed.

As indicated in the appeal decision, the only issue raised by the parties is the nature and extent of claimant's industrial disability.

As noted in the arbitration and appeal decision, claimant was 65 years old. He does not have a GED. The record indicates claimant worked his entire career doing auto body work. Claimant began working for Westside Auto Body of Des Moines (Westside) in 2006 as an auto body repairman.

Claimant had a work-related hernia occurring on December 22, 2010. He had a repair of an inguinal hernia in April of 2011. Surgery was performed by

Praveen Prasad, M.D. Dr. Prasad released claimant to return to work at full duty on June 19, 2011. (Exhibit 9, pages 14-15; Ex. A, pp. 1-2)

Claimant returned to full duty but still had difficulty with pain. He was seen by Daniel Miller, D.O., an occupational medicine physician. He was also seen by Kenneth Pollack, M.D., a pain specialist. The record indicates claimant had continued complaints of pain. Neither Dr. Miller nor Dr. Pollack took claimant off work. Neither Dr. Miller nor Dr. Pollack imposed work restrictions on claimant. (Ex. 10, pp. 16-17; Ex. B, pp. 3-4; Transcript pp. 31-37)

Dr. Miller found claimant at maximum medical improvement (MMI) on January 15, 2012. (Ex. 14, pp. 24-25) Dr. Miller found claimant had a five percent permanent impairment to the body as a whole. Dr. Miller did not give claimant any permanent restrictions. Defendants paid claimant 25 weeks of permanent partial disability benefits based on this rating. (Ex. 16, p. 28; Ex. H, pp. 26-27)

Claimant was sent by his attorney for an evaluation with Karen Kienker, M.D. In a July of 2012 independent medical evaluation (IME) report Dr. Kienker agreed with Dr. Miller's five percent rating. She did not impose restrictions on claimant, as he was already ". . . self-limiting his lifting." (Ex. 19, pp. 32-35)

Claimant testified he returned to work at full-time duty at West Side. Claimant worked full duty from July of 2011 through December 30, 2013. On December 30, 2013, claimant was fired by his manager at Westside. (Tr. pp. 95-100) The hearing deputy and the appeal decision both found claimant's work injury did not contribute to claimant's termination from Westside. There is no evidence in the record that changes that finding of fact.

Claimant contends, in his post-hearing brief, that Westside was an accommodating employer, and that claimant had accommodations with Westside not available to him in the competitive job market. (Claimant's responsive and cross-appeal brief, pp. 16-17) Claimant had no restrictions from any doctor while he was employed with Westside. The record indicates he worked at Westside for two and a half years without restrictions after his return from his hernia repair. (Ex. 6, 8, 10, 14, 16, 21; Ex. A, B, and D) Claimant had no restrictions, and as such, there were no restrictions for Westside to accommodate. Based on this record, it is found Westside was not an accommodating employer as suggested in claimant's brief.

Following his termination from Westside, claimant was sent by his attorney in a followup IME with Dr. Kienker in January of 2014. Dr. Kienker did not increase claimant's permanent impairment rating. She did recommend permanent restrictions limiting claimant to lifting 20 pounds four times per hour, bending or squatting six times per hour, and limiting claimant to walking 15 minutes every hour. (Ex. 24, p. 44)

Claimant was also reevaluated by Dr. Miller. Dr. Miller did not increase claimant's permanent impairment rating. He also did not give claimant any permanent restrictions. (Ex. D, p. 11)

Dr. Miller treated claimant for an extended period of time while Dr. Kienker only saw claimant on two occasions for IMEs. As noted in the appeal decision, the history given to Dr. Kienker in January of 2014 suggests Dr. Kienker mistakenly believed claimant needed help at Westside due to his hernia. (Ex. 24, p. 43) The record in this case indicates that is not the situation. In addition, the record indicates claimant worked at Westside for two and a half years without restrictions. Based on these facts, I find Dr. Kienker's opinions, in her January of 2014 report regarding claimant's need for permanent restrictions, unconvincing.

Claimant has been found by all experts to have a five percent permanent impairment to the body as a whole. Three treating physicians, Dr. Miller, Dr. Pollack, and Dr. Prasad, returned claimant to work with no permanent restrictions. Claimant worked at Westside for two and a half years after his surgery with no permanent restrictions. Claimant was terminated from Westside for reasons unrelated to his work injury. The opinions of Dr. Kienker regarding permanent restrictions are found not convincing. Based on these facts, and the others detailed above and in the appeal decision, I find claimant's injury of December 22, 2010, resulted in a 30 percent loss of earning capacity or industrial disability.

I recognize the April 27, 2015, appeal decision indicates claimant did not file a notice of cross-appeal. The appeal decision is incorrect only in this recitation of the statement of the case. I reviewed the record, including the transcript, before the presiding deputy and all exhibits de novo both on appeal and on the application for rehearing. A scrivener's error in the appeal decision on the first page regarding the filing of a notice of cross-appeal, does not change the April 27, 2015, appeal decision that claimant had a 30 percent industrial disability.

ORDER

It is therefore ordered:

That the first paragraph of the April 27, 2015 appeal decision is changed to reflect that claimant filed a notice of cross-appeal.

Defendants' application for rehearing is denied on all other grounds, and the appeal decision filed April 27, 2015, finding claimant had a 30 percent industrial disability, remains unchanged.

Signed and filed this 1st day of June, 2015.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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