BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

NIJAZ IKELJIC, Claimant, vs. JOHNSTON COMMUNITY SCHOOL DISTRICT, Self-Insured Employer, Defendant.	File No. 1634044.01 ARBITRATION DECISION Headnote No. 1803

STATEMENT OF THE CASE

The claimant, Nijaz Ikeljic, filed a petition for arbitration and seeks workers' compensation benefits from Johnston Community School District, a self-insured employer. The claimant was represented by Joseph Powell. The defendant was represented by Andrew Tice.

The matter came on for hearing on March 22, 2023, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa via Zoom video conferencing system. The record in the case consists of Joint Exhibits 1 through 8; Claimant's Exhibit 1 through 10; and Defense Exhibits A through I. The claimant testified at hearing through a Bosnian language interpreter Zorana Vojnovic. Chris Quinlan served as the court reporter. The matter was fully submitted on April 27, 2023.

ISSUES

The parties submitted the following issues for determination:

1. The extent of industrial disability resulting from claimant's June 4, 2017 work injury.

2. Whether claimant is entitled to medical expenses set forth in Claimant's Exhibit 9.

3. Penalty.

4. Costs.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship.

2. Claimant sustained an injury, which arose out of and in the course of employment, on June 4, 2017.

3. The injury is a cause of both temporary and permanent disability.

4. Temporary disability/healing period and medical benefits are no longer in dispute.

5. The parties have stipulated that claimant's permanent disability is industrial, and the commencement date for permanency is August 11, 2017.

6. The weekly rate of compensation is $519.14.

7. There is no issue involving credit.

8. Affirmative defenses have been waived.

FINDINGS OF FACT

Claimant, Nijaz Ikeljic, was 64 years old as of the date of hearing. He testified live and under oath at the video hearing. I find his testimony to be highly credible. He was a decent historian and his testimony matches other portions of the record. There was nothing about his demeanor that caused the undersigned any concern regarding his truthfulness. On the contrary, he was highly credible.

Mr. Ikeljic was born in Bosnia and his primary language is Bosnian. He is able to speak and understand some English. However, he requested and utilized an interpreter for this hearing. He was educated in Bosnia. His education focused on installation of electrical lines. He graduated in 1977. He began installing and repairing power lines in Croatia. He performed this work for approximately 13 years, and then the same type of work in Germany for another two years. (Transcript, pp. 14-15) The work was physically taxing. He worked at significant heights and much of the work was overhead.

In 1994, Mr. Ikeljic immigrated to the United States, where he became employed in agricultural construction work. He primarily performed carpentry work on agricultural buildings, and installing various types of wooden frames. This work was also physically demanding. (Tr., pp. 15-16) He left this position in approximately 2012, and then worked for approximately a year performing remodeling work and carpentry on homes.

In 2014, Mr. Ikeljic became employed with Johnston Community School District (JCSD). He was hired as a night custodian. He cleaned classrooms. There was no maintenance work involved. He described his work activities in some detail at hearing. (Tr., pp. 18-20) This work was comparatively light in contrast with his previous employment.

Mr. Ikeljic sustained a stipulated work injury on June 4, 2017. He testified credibly on that date that he was moving furniture when he heard and felt a pop in his left arm. (Tr., p. 21; Joint Exhibit 1, page 1) He received authorized medical treatment for this condition, promptly resulting in surgery to repair a ruptured bicep tendon on June 20, 2017. (Jt. Ex. 2, p. 13) Thereafter he developed symptoms in his left hand and forearm, including cramping, numbness and tingling. His authorized physician continued to primarily focus on the biceps repair; however, his other symptoms were well documented and monitored. In June 2018, he was placed at maximum medical improvement for the biceps tear; however, abnormalities were noted on his EMG and MRI. On July 9, 2018, his authorized physician documented significant spinal stenosis and radiculopathy and recommended referral to a specialist. In November 2018, Lynn Nelson, M.D., examined Mr. Ikeljic. Dr. Nelson reviewed all available documents and ultimately diagnosed multi-level cervical spinal stenosis. He recommended a three level cervical fusion and opined that other treatment modalities would likely not help much. (Jt. Ex. 5, p. 35) Dr. Nelson confirmed that this condition was causally connected to the stipulated work injury.

Mr. Ikeljic chose not to proceed with surgery. (Jt. Ex. 5, p. 36) He testified that he was afraid of such surgery. In April 2019, Dr. Nelson opined that Mr. Ikeljic had sustained a 16 percent whole person impairment as a result of the work injury. (Jt. Ex. 5, p. 38) He was silent on restrictions.

After being released by Dr. Nelson, Mr. Ikeljic testified that he continued to be highly symptomatic. He sought treatment on his own from Carlos Schroder, M.D., who recommended physical therapy. (Jt. Ex. 6, p. 42) Mr. Ikeljic had physical therapy for neck and left shoulder pain on several occasions. (Jt. Ex. 7) He was also examined by Ai Phu, D.O. for pain management beginning in January 2021. Dr. Phu prescribed various medicines that did not provide much relief. David Berg, D.O., later examined Mr. Ikeljic for his left shoulder symptoms, providing an injection. He diagnosed Mr. Ikeljic with left levator scapulae syndrome. (Jt. Ex. 8, p. 88)

Sunil Bansal M.D. performed an independent medical examination of Mr. Ikeljic on June 9, 2021. He reviewed all appropriate medical documentation and thoroughly examined him. (Cl. Ex. 1) Dr. Bansal documented Mr. Ikeljic's symptoms at the time of the evaluation.

> Mr. Ikeljic has been left with significant weakness of his left arm, and muscle wasting. There is an indentation that formed in his lower arm due to muscle wasting. His muscle twitches.
>
> He also continues to have neck pain, which radiates down into his shoulder

> blades. There is numbness and tingling radiating down to this left hand. Looking down increases his pain, and he has to turn his neck slowly. He has difficulty with sleeping and driving. He is only able to lift a gallon of milk with his left hand for a few seconds before using his right hand to assist. He can raise his arm overhead and can reach behind his back. He does not use his left hand for anything heavy because he will rapidly lose strength and his upper arm muscle will throb and cramp. His arm also shakes when he extends it. He does not have any issues with his right arm.

(Cl. Ex. 1, p. 7)

I find this is an excellent description of Mr. Ikeljic's permanent symptoms related to his work-related condition. Dr. Bansal assigned an 8 percent left upper extremity rating for the bicep rupture, and a 17 percent whole body rating for the cervical stenosis. (Cl. Ex. 1, pp. 9-10) He recommended no lifting over 10 pounds with the left arm, no overhead work with the left arm, and no lifting over 25 pounds with both arms. He also recommended avoidance of activities which require prolonged flexion of the neck or repetitive neck movements. (Cl. Ex. 1, p. 10) I find this rating accurately encapsulates his work-connected impairment.

Mr. Ikeljic credibly testified that he continues to experience significant neck, shoulder, arm, and hand symptoms. He has significant loss of strength in his left arm and hand, and constant pain in his neck. He takes ibuprofen on a daily basis. He has continued to work for the defendant employer. He testified that his job is actually quite light, and he is able to receive assistance from his co-workers for any heavier activities such as moving furniture. He testified that even though his work is relatively light, he still misses work frequently when his symptoms mount over time. (Tr., pp. 31-32)

CONCLUSIONS OF LAW

The first question submitted is the extent of Mr. Ikeljic's industrial disability. The injury at issue in this case occurred on June 4, 2017, prior to the legislative changes. Therefore Iowa Code section 85.34(2)(u) (2015) is applicable.

Since the disability is to Mr. Ikeljic's body as a whole, his disability is evaluated for loss of earning capacity.

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 Ry. Co. of Iowa, 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 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).

The refusal of defendant-employer to return claimant to work in any capacity is, by itself, significant evidence of a lack of employability. Pierson v. O'Bryan Brothers, File No. 951206, (App. January 20, 1995). Meeks v. Firestone Tire & Rubber Co., File No. 876894, (App. January 22, 1993); See also 10-84 Larson's Workers' Compensation Law, section 84.01; Sunbeam Corp. v. Bates, 271 Ark. 609 S.W.2d 102 (1980); Army & Air Force Exchange Service v. Neuman, 278 F. Supp. 865 (W.D. La. 1967); Leonardo v. Uncas Manufacturing Co., 77 R.I. 245, 75 A.2d 188 (1950). An employer who chooses to preclude an injured worker's re-entry into its workforce likely demonstrates, by its own action, that the worker has incurred a substantial loss of earning capacity. As has previously been explained in numerous decisions of this agency, if the employer in whose employ the disability occurred is unwilling to accommodate the disability, there is no reason to expect some other employer to have more incentive to do so. Estes v. Exide Technologies, File No. 5013809 (App. December 12, 2006).

It is important to note, industrial disability is evaluated without respect to accommodations which are (or are not) made by an employer. The Iowa Supreme Court views "loss of earning capacity in terms of the injured worker's present ability to earn in the competitive job market without regard to the accommodation furnished by one's present employer." Thilges v. Snap-On Tools, 528 N.W.2d 614, 617 (Iowa 1995).

Although claimant is close to a normal retirement age, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund v. Nelson, 544 N.W. 2d 258 (Iowa 1995). However, this agency does consider voluntary retirement or withdrawal from the workforce unrelated to the injury. Copeland v. Boones Book and Bible Store, File No. 1059319, Appeal Decision (November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

Considering all of the relevant factors of industrial disability, I find that Mr. Ikeljic has sustained a loss of earning capacity of 50 percent. He is an older worker with a history of heavy work for which he is no longer suited. He has educational and language barriers to securing new employment and is not a good candidate for retraining. His continued light employment weighs against a finding of higher disability. While it would undoubtedly be difficult for him to secure a new position in custodial work, I find the work he is performing, while accommodated, is gainful work. It is also undoubtedly true that his industrial disability would be greater if he were not in his current position.

The next issue is whether Mr. Ikeljic is entitled to the medical expenses set forth in Claimant's Exhibit 9.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

In Bell Brothers v. Gwinn, 779 N.W.2d 193 (Iowa 2010), the Iowa Supreme Court held that, when an injured worker seeks unauthorized care, he or she must prove that the care was reasonable and beneficial.

Claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, to an order directing the responsible defendant(s) to make payments directly to the provider. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988). The defendant(s) should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc., File No. 1020226 (App., February 27, 1995).

The defendant's primary defense herein is authorization. The defendant authorized treatment with Dr. Nelson, who specifically opined early on that treatment modalities other than surgery would be largely ineffective in the treatment of Mr. Ikeljic's condition. The claimant sought unauthorized treatment on his own through his own physician, which was, in fact, ineffective. Mr. Ikeljic himself testified the care was ineffective. While he may be entitled to further treatment to aid with his symptoms, he is not entitled to seek ineffective, unauthorized care at the employer's expense. I find the claimant has failed to meet the requisite legal standard of the beneficial care rule set forth in Bell Brothers. Medical expenses are therefore disallowed.

The final substantive issue is penalty. Mr. Ikeljic seeks an award of penalty benefits pursuant to Iowa Code section 86.13.

Iowa Code section 86.13(4) provides:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
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> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
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> (1) The employee has demonstrated a denial, delay in payment, or termination in benefits.

(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

c. In order to be considered a reasonable or probable cause or excuse under paragraph "b," an excuse shall satisfy all of the following criteria:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

The parties have stipulated that the commencement date for permanency is August 11, 2017. Dr. Rodgers assigned permanent impairment on December 20, 2018. Defendant made no payments until February 22, 2019. The defendant provided no explanation at hearing for this delay. I find a penalty is mandatory. Considering the appropriate factors, I assess a penalty of $500.00 is appropriate to deter defendant from such claims handling practice in the future.

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay the claimant two hundred and fifty (250) weeks of permanent partial disability benefits at the rate of five hundred and nineteen and 14/100 dollars ($519.14) per week commencing August 11, 2017.

Defendant shall pay accrued weekly benefits in a lump sum.

Defendant shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendant shall be given credit for the weeks previously paid as set forth in paragraph 9 of the Hearing Report.

Defendant shall pay a penalty of $500.00.

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

Costs are taxed to defendant.

Signed and filed this 18th day of September, 2023.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Joseph Powell (via WCES)

Andrew Tice (via WCES)

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, 10A) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.