BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GARY CARLSON,

Claimant,

vs.

PATTISON SAND COMPANY, LLC,

Employer,

and

ZURICH AMERICAN INSURANCE COMPANY,

Insurance Carriers,
Defendants.

File No. 5051757

ARBITRATION DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Gary Carlson, the claimant, seeks workers' compensation benefits from defendants, Pattison Sand Company, LLC, the alleged employer, and its insurer, Zurich American Insurance Company, as a result of an alleged injury on December 13, 2012. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on February 10, 2016, but the matter was not fully submitted until February 17, 2016 upon the receipt of the parties' briefs and argument on February 12, 2016 and receipt of the hearing transcript on February 17, 2016. Oral testimony and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Claimant's exhibits were marked numerically. Defendants' exhibits were marked alphabetically. References in this decision to page numbers of an exhibit shall be made by citing the exhibit number or letter followed by a dash and then the page number(s). For example, a citation to claimant's exhibit 1, pages 2 through 4 will be cited as, "Ex. 1-2:4." Citations to a transcript of testimony such as "Tr-4:5," either in a deposition or at hearing, shall be to the actual page number(s) of the original transcript, not to page numbers of a copy of the transcript containing multiple pages.

The parties agreed to the following matters in a written hearing report submitted at hearing:

1. On December 13, 2012, claimant received an injury arising out of and in the course of employment with defendant employer.

2. Claimant is not seeking additional healing period benefits.

3. The stipulated work injury is a cause of some degree of permanent industrial disability.

4. If I award permanent partial disability benefits, they shall begin on October 23, 2014.

5. At the time of the alleged injury, claimant's gross rate of weekly compensation was $615.27. Also, at that time, he was single and entitled to 2 exemptions for income tax purposes. Therefore, claimant's weekly rate of compensation is $402.27 according to the workers' compensation commissioner's published rate booklet for this injury.

6. Medical benefits are not in dispute.

7. Prior to hearing, defendants voluntarily paid 66 weeks of compensation for this work injury. The parties did not specify what type of weekly benefits were paid.

ISSUES

At hearing, the parties submitted the following issues for determination:

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

II. Claimant's entitlement to reimbursement for the cost of an independent medical disability evaluation pursuant to Iowa Code section 85.39; and,

III. The extent of claimant's entitlement to reimbursement for the cost of an evaluation of his employability by a vocational expert pursuant to rule 876 IAC 4.33(6).

FINDINGS OF FACT

In these findings, I will refer to the claimant by his first name, Gary, and to the defendant employer as Pattison.

From my observation of his demeanor at hearing including body movements, vocal characteristics, eye contact and facial mannerisms while testifying in addition to consideration of the other evidence, I found Gary credible.

Gary is 52 years of age and is a high school graduate. He has resided in a small town in southwestern Wisconsin called Gays Mills for many years. He began working

for Pattison on November 7, 2011 at their facility in Clayton County, west of McGregor, Iowa. At the time of his work injury in this case, his job was called a lube technician. He serviced heavy equipment performing tasks such fueling the equipment, changing filters along with lubricating and maintaining fluid levels. (Transcript-9, Exhibit 11) He was a full time worker earning $17.00 per hour. (Tr-11) He was terminated by Pattison on October 28, 2014 because no work was available to him within the work restrictions imposed by physicians as a result of his work injury. (Ex. 13-135; Ex. 17-141)

The work injury of December 13, 2012 involved the low back. While lifting a fuel nozzle, Gary felt a sharp pain in the left side of his low back unlike anything he felt before. (Tr-11:13; Ex. 4-12) When his symptoms failed to subside, he reported the injury to his supervisor. (Tr-12; Ex. 9)

Defendants referred Gary for treatment with Tri- State Occupational Health on December 21, 2012 and specifically to Erin Kennedy, M.D., an occupational medicine physician. (Ex. 4) Gary then underwent several months of conservative treatment, including epidural steroid injections and physical therapy. (Id.) When this treatment failed to alleviate his symptoms, Gary was subsequently referred to Michael Chapman, M.D., an orthopedic surgeon, who evaluated Gary on April 24, 2013. Dr. Chapman concluded that a disc herniation at the L5-S1 vertebral level was the source of Gary's symptoms and surgery was discussed. However, Gary felt he was improving and wanted to wait on the surgery and the doctor agreed. (Ex. 4-37) When the treating occupational doctor felt Gary was sufficiently improved, he ordered a functional capacity evaluation (FCE) which took place on July 1, 2013. However, the exam was stopped when Gary suffered an onset of low back pain during testing. (Ex. 4-45) Gary was then referred to Mark Stevens, M.D., another orthopedist, who on October 3, 2013, performed surgery described as a left L4 partial hemilaminectomy; left L5-S1 medial facetectomy; left S1 foraminotomy with excision of left L5-S1 herniated nucleus pulposis; and use of C-arm fluoroscopy for localization. (Ex. 5-56)

Gary testified that he continued to suffer left-sided low back pain and left leg radiculopathy and weakness following his surgery. (Tr-19:20) He treated for a year following his surgery with Brian Withers, D.O., another occupational medicine physician, who offered a third epidural injection, more physical therapy, a TENS unit, and several different medications including Percocet, Lyrica, Flexeril, Nortriptyline, and Cymbalta. (Ex. 5-70:88) Dr. Withers recommended another FCE which was performed on October 14th and 15th, 2014. (Ex. 5-89) According to the FCE evaluator, Gary provided a maximum valid effort and therapist Julie Olson stated Gary's performance placed him in the light to sedentary work category. (Ex. 5-90) In her report, Therapist Olson indicated Gary had several significant deficits that limited his functional capacity including: functional lifting, elevated work, forward bending and sitting, forward bending and standing, crawling, kneeling, crouch deep static, repetitive squat, stair climbing, ladder climbing, balance and walking. (Ex. 5-91)

Dr. Withers placed Gary at maximum medical improvement (MMI) on October 23, 2014 and provided a 13 percent whole person impairment rating. The doctor then imposed the following permanent work restrictions based upon the FCE results.

> [L]ifting or carrying 15 pounds occasionally, kneeling and squatting never, climbing rarely, avoiding any frequent prolonged bending and twisting at the waist, rarely doing any heavy forceful pushing or pulling.

(Ex. 5-96)

Dr. Withers stated that Gary will likely require ongoing treatment with Lyrica and Nortriptyline to control the radicular symptoms in his left leg. (Id.)

At the request of his attorney, Gary was evaluated by John Kuhnlein, D.O., an occupational medicine physician in May 2015. In his report, Dr. Kuhnlein agrees with Dr. Witters' impairment rating and permanent restrictions. (Ex. 6-104)

As stated previously, Dr. Witters' restrictions led to the loss of his job at Pattison. Defendants provided no vocational rehabilitation services to Gary to enable him to locate suitable replacement employment. (Tr-25; Ex. 13-135) Gary testified that he has looked on his own for suitable employment. (Ex. 12; Ex. A-13) He registered for vocational assistance with the state of Wisconsin and received emails for potential job openings in his area. He then would apply for these jobs. (Tr-25:26) He has applied for work at locations within a 45-minute travel time radius of his home. (Tr-26:29) While working at Pattison, his commute to work took about an hour. (Tr-30) At the time of hearing, he had not received a job offer. (Id.)

Gary admitted to various accident injuries prior to work at Pattison, but states he had no permanent restrictions before coming to Pattison. (Tr-13:14; Ex. A-15:20) There is nothing in the record to suggest otherwise. Gary also had prior work injuries at Pattison, but Gary states he had no permanent restrictions prior to his December 12, 2012 work injury. (Tr-14:16; Ex. A-20:22) There is nothing in the record to suggest otherwise.

At the request of his attorney, Gary's employability was evaluated in December 2015 by Phil Davis, M.S., a vocational specialist. (Ex. 14) According to Davis's report Gary's employment history began with farm labor in his early adulthood. He then was a gas station attendant for a period of time. Between 1981 and 2009 (27 years), he was employed as a factory production worker with Philips Advance Transformer. Gary states that his job required lifting up to 75 pounds. From 2004 to 2009, the report states that Gary was a part-time cashier and stocker at a local convenience store. (Ex. 14-140) He stated he was a cashier in his deposition. (Ex. A-30) At hearing, Gary stated he was required to also unload trucks and stock shelves, which would be in violation of his current restrictions. (Tr-31) In 2010, Gary was employed by Walmart as an asset protection associate or security guard. Gary states that he was not expected

to physically apprehend a suspect, but was expected to assist in unloading trucks. (Tr-32) Gary did not mention unloading trucks as an aspect of this security position in his deposition. (Ex. A-12) From October 2010 to November 2011, Davis's report states that Gary was a care worker at Wyalusing Academy. This job required Gary to direct the care and supervise emotionally disturbed children and he was trained and expected to physically restrain the residents when necessary. (Tr-33; Ex. 14-241) When asked why he did not mention the physical aspects of the convenience store, Walmart and Academy jobs in his answers to interrogatories or deposition testimony, Gary stated that he was just summarizing, but admitted that some products at the convenience store were unloaded by the delivery person and that he was not always asked to unload a truck at Walmart. (Tr-47:48)

Gary's employment at Philips Advance Transformer ended when the plant closed. At that time, the employer provided re-training assistance and Gary used this benefit to attend and complete studies at a local community college to obtain an associate's degree in criminal justice in 2010. (Tr-7) Thereafter, he attended and completed training at a law enforcement academy with the intent of becoming a police officer. (Id.) However, Gary states that he was never hired because he could not compete with younger persons for the limited openings available. (Tr-57:58)

In his report, Davis concludes that Gary is physically unable to return to his past jobs and given his age, education, and work experience and his permanent work restrictions, Gary is 100 percent precluded in his ability to obtain or maintain gainful competitive employment. (Ex. 14-143:144)

Gary testified that he currently continues to experience constant back pain that radiates down his left leg along with stabbing pains in the leg and numbness below his knee down to his foot. The left foot is always numb or tingling. (Tr-35) He used a cane at hearing, but admits that no doctor has prescribed use of a cane. He states that he no longer takes prescription medications because he could not function with them, but continues to take over-the-counter analgesics. (Tr-36:37) He does admit to some home activity and some hunting and fishing, but states he has curtailed a lot of the more physically demanding work around his home. (Tr-37:40)

I find that the work injury of December 13, 2012 is a cause of a permanent and total loss of earning capacity. Defendants argue that claimant is capable of some type of employment because he is still able to perform sedentary work and some light duty work, but offers no evidence to rebut the views of the vocational expert Phil Davis. Admittedly, Gary's description of more physical requirements than earlier reported is belated, but I believe Gary because there is nothing unusual about convenience store clerks being required to unload trucks or stock shelves with heavy beverage containers in the experience of this agency. It is also not unusual for a security type person to be asked to occasionally unload a truck. It is not unusual for a care person to be expected to restrain emotionally disturbed residents of a care center. Possibly there may be some security type of job available that would fit within Gary's restrictions, but

apparently in the view of Davis, such jobs are not sufficiently available to provide suitable stable employment.

CONCLUSIONS OF LAW

The parties agreed that the work injury is a cause of some degree of permanent industrial disability. Consequently, this agency must measure claimant's loss of earning capacity as a result of this impairment.

Pursuant to Iowa Code section 85.34(2)(u) , Iowa has adopted the so-called "fresh start rule." Industrial loss now is no longer a measure of claimant's disability from all causes after which we then apportion out non-work causes and leave in work related causes under the full responsibility rule. The percentage of industrial loss now is the loss of earning capacity from what existed immediately prior to the work injury. This means that an already severely disabled person before a work injury can have a high industrial loss because the loss is calculated in all cases from whatever his earning capacity was just before the injury and what it was after the injury, not the loss as compared to a healthy non-disabled person. In other words, all persons start with a 100 percent earning capacity regardless of any prior health or disability conditions. The rationale for this approach is that an employer's liability for workers' compensation benefits is dependent upon that person's wages or salary. Consequently, the impact, if any, of any prior mental or physical disability upon earning capacity is automatically factored into a person's wages or salary by operation of the competitive labor market and there is no need to further apportion out that impact from any workers' compensation award. Roberts Dairy v. Billick, 861 N.W.2d 814 (Iowa 2015); Steffan v. Hawkeye Truck & Trailer, File No. 5022821 (App. September 9, 2009).

A showing that claimant had no loss of his job or actual earnings does not preclude a finding of industrial disability. Loss of access to the labor market is often of paramount importance in determining loss of earning capacity, although income from continued employment should not be overlooked in assessing overall disability. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991); Collier v. Sioux City Community School District, File No. 953453 (App. February 25, 1994); Michael v. Harrison County, Thirty-fourth Biennial Rep. of the Industrial Comm'r, 218, 220 (App. January 30, 1979).

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

Assessments of industrial disability involve viewing of loss of earning capacity in terms of the injured worker's present ability to earn in the competitive labor market without regard to any accommodation furnished by one's present employer. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996); Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 617 (Iowa 1995).

In the case sub judice, I found that claimant suffered a total loss of his earning capacity as a result of the work injury. Such a finding entitles claimant to permanent total disability benefits as a matter of law under Iowa Code section 85.34(3), which provides for weekly disability benefits from the date of injury and continuing indefinitely thereafter. Absent a change of condition, such benefits last a lifetime.

II. Claimant seeks reimbursement for the fees of Dr. Kuhnlein in the amount of $2,030.00 (Ex. 8) for his medical evaluation pursuant to Iowa Code section 85.39. This Code section permits an employee to be reimbursed by the defendants for a subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. In this case, there was a prior evaluation by Dr. Witter, an employer-retained physician. Therefore, claimant is entitled reimbursement of the fees of Dr. Kuhnlein.

Claimant also seeks reimbursement for the fees of the vocational specialist, Phil Davis in the total amount of $1,343.20 under our costs rule 876 IAC 4.44 (6). Only costs for the preparation of two doctor or practitioner reports can be awarded as costs under our rule 876 IAC 4.33(6), not the cost of any examination performed to arrive at any findings or opinions contained in the report. Des Moines Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015); Lagrange v. Nash Finch Company, File No. 5043316 (App. July 1, 2015). The question is what charges are allowed as the cost of preparation of the report. Turning to the specific decision of the Iowa Supreme Court in Young, the Court discussed a previous Court of Appeals decision in John Deere Dubuque Works v. Caven, 804 N.W.2d 297, 301 (Iowa Ct. App. 2011). In Caven, the appeals court awarded the cost of a report from an audiologist, which included a charge for a review of medical records and an interview of the claimant. Young had cited this case as precedent for awarding the costs of a medical examination. The Supreme Court in Young distinguished Caven by stating that the Caven court awarded the report cost under the general costs provisions of Iowa Code section 86.40, not for an examination under Iowa Code section 85.39. The Young court did not reverse Caven.

Consequently, the cost of preparing a report by the practitioner can include the costs of a record review and an interview of the claimant. Exhibit 16 sets forth the specific charges from Davis which include a $100.00 charge for meeting with claimant; $73.00 charge for travel and mileage to claimant's attorney's office, $1,150.00 charge for vocational research, comprehensive file review and vocation report, and a $10.00 charge for the cost of sending the report (presumably to claimant's attorney). Given the

Caven case, the charges for the meeting with claimant and the charge for vocational research, file review and report, which total $1,250.00 are reimbursable and shall be awarded.

ORDER

1. Defendants shall pay to claimant permanent total disability benefits at a rate of four hundred two and 27/100 dollars ($402.27) per week from December 13, 2012 and continually thereafter. Credit shall be given against this award for the weekly benefits already paid to claimant.

2. Defendants shall reimburse claimant the sum of two thousand thirty and 00/100 dollars ($2,030.00) for the cost of Dr. Kuhnlein's disability evaluation.

3. Defendants shall pay accrued weekly benefits in a lump sum.

4. Defendants shall pay interest on unpaid weekly benefits awarded herein pursuant to Iowa Code section 85.30.

5. Defendants shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33, including reimbursement to claimant for any filing fee paid in this matter, including reimbursement to claimant in the amount of one thousand two hundred fifty and 00/100 dollars ($1,250.00) for the cost of preparation of the vocational report.

6. Defendants shall file subsequent reports of injury (SROI) as required by our administrative rule 876 IAC 3.1(2).

Signed and filed this 14th day of March, 2016.

LARRY WALSHIRE
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.