BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

THOMAS DUNLAP,

Claimant,

vs.

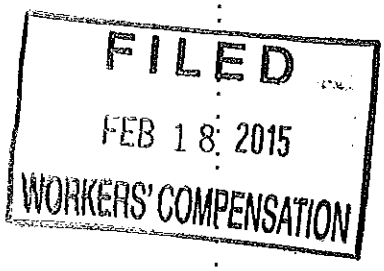
ACTION WAREHOUSE,

Employer,

and

AIG INSURANCE SERVICES, d/b/a COMMERCE AND INDUSTRY,

Insurance Carrier,
Defendants.



File No. 5026306

RULING ON CLAIMANT'S

REHEARING APPLICATION

On February 3, 2015, the undersigned filed a review-reopening decision in the above-captioned case. Claimant filed a timely rehearing application on February 10, 2015.

In his rehearing application, claimant asserts four challenges to the review-reopening decision. First, claimant contends that he should be awarded permanent total disability benefits and that it was legally incorrect for the undersigned to continue the running healing period previously established in the May 29, 2009 arbitration decision. Second, claimant contends that the ruling and order entered in the review-reopening decision was deficient with respect to claimant's request for alternate medical care. Third, claimant asserts that the review-reopening decision should award him medical mileage pursuant to Iowa Code section 85.27 for all travel to utilize his gym membership at the YMCA Healthy Living Center. Finally, claimant contends that the undersigned overlooked, or failed to award, mileage to attend his independent medical evaluation.

Defendants filed a response to claimant's application for rehearing on February 16, 2015. Defendants concur with claimant that the issue of permanent disability is ripe for determination at this time. Defendants contend that claimant should receive a permanent partial disability award, but resist any modification in the award of alternate medical care benefits or mileage that was not requested at the time of the arbitration hearing.

Permanent Total Disability Claim

In his application for rehearing, claimant asserts that the undersigned misapplied the holding in Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193 (Iowa 2010). Instead, claimant distinguishes the facts and holding in Gwinn, urging that it should not be applied as broadly as the undersigned applied it in the review-reopening decision. Mr. Dunlap urges a determination of permanent disability at this time.

In their response to the application for rehearing, defendants "agree with Claimant that the Deputy erred in providing a running award of TTD/healing period benefits." (Defendants' Response to Claimant's Rehearing Application, p. 1) Instead, defendants urge a conclusion that this case is ripe for determination of permanent disability.

Clearly, all parties urge a determination of permanent disability at this time. All parties contend that claimant has achieved maximum medical improvement for the low back and mental conditions. All parties urge specific dates for conversion from healing period to permanent disability benefits. All parties contend that the undersigned erred in the review-reopening decision by finding that the issue of permanent disability is not ripe for determination.

Review of the hearing report demonstrates that the parties asserted different commencement dates for permanent disability benefits. However, all parties asserted that permanent disability benefits should have commenced before the review-reopening hearing. (Hearing Report) Therefore, I accept and rely upon the parties' assertions in the hearing report and their mutually consistent arguments on rehearing. In reliance upon the parties' contentions on rehearing, I conclude that it was error to award a running healing period in the review-reopening decision. Drake University v. Davis, 769 N.W.2d 176, 181 (Iowa 2009); Robinson v. City of Des Moines, File No. 5035076 (Appeal January 25, 2013).

Having determined that the issue of permanent disability is ripe for determination, I find that claimant did not return to work after the prior arbitration hearing and that he is not medically capable of returning to substantially similar employment as that he worked before his July 18, 2007 work injury. I find that Mr. Dunlap did not achieve maximum medical improvement for his low back until September 17, 2013 and did not achieve maximum medical improvement for his mental health issues until September 15, 2014.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

The only factor outlined in Iowa Code section 85.34(1) that has occurred is achieving maximum medical recovery. Claimant did not achieve maximum medical improvement until September 15, 2014. Therefore, the conversion from healing period to permanent disability would occur at that time with permanent disability benefits commencing on September 16, 2014. This represents a significant change in condition that warrants review-reopening and conversion of benefits from healing period to permanent disability. Iowa Code section 86.14(2).

It is also necessary to consider the extent of claimant's permanent disability. Mr. Dunlap asserts claims for permanent total disability under both the traditional industrial disability analysis as well as under an odd-lot theory.

Mr. Dunlap's injuries are to the low back, bilateral upper extremities, and mental injuries. Given that the bilateral upper extremities are not yet at maximum medical improvement, their permanent effects, if any, are not considered in rendering this permanent disability award. Instead, my analysis of permanent disability focuses on the effects of claimant's low back and mental injuries. The parties stipulate that these injuries should be compensated under an industrial disability analysis 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.

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with

regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

Assessments of industrial disability involve a viewing of loss of earning capacity in terms of the injured workers' 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).

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

In assessing an unscheduled, whole-body injury case, the claimant's loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009).

I already provided analysis of and accepted certain medical opinions within the review-reopening decision with respect to claimant's low back condition and mental health issues. Considering claimant's need for two spinal cord stimulators and the medical opinions from Dr. Klein about Mr. Dunlap's residual abilities, I find that Mr. Dunlap is unable to return to work and perform any employment positions within the competitive labor market as a result of his low back condition.

Mr. Dunlap also has mental health issues that have been addressed primarily by Dr. Gallagher, a psychiatrist, and Dr. Graham, a psychologist. I found their opinions to be credible and convincing. I now find that Mr. Dunlap is not capable of working in any employment positions within the competitive labor market as a result of his mental health injuries and conditions.

Considering his age, the situs and severity of his injuries, his residual function, his permanent restrictions, his educational background, his employment background, his motivation to improve, and all other relevant industrial disability factors outlined by

the Iowa Supreme Court, I find that Mr. Dunlap is permanently and totally disabled as a result of his low back injuries. I similarly find that Mr. Dunlap is permanently and totally disabled as a result of his mental health injuries. Either of these conditions would be sufficient to render Mr. Dunlap permanently and totally disabled. Their combined effect leaves no doubt that Mr. Dunlap is permanently and totally disabled. Therefore, I conclude that Mr. Dunlap is entitled to permanent total disability benefits commencing on September 16, 2014 and continuing during the period of Mr. Dunlap's total disability. Iowa Code section 85.34(3).

Mr. Dunlap also asserts a claim as an odd-lot employee. Although this analysis is likely moot given that I find Mr. Dunlap permanently and totally disabled under the traditional industrial disability analysis, I provide the following analysis for purposes of any appellate review.

In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id., at 105. Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

In this case, I find that claimant produced prima facie evidence of total disability. Mr. Dunlap produced substantial evidence demonstrating he was not employable in the competitive labor market by introducing the medical opinions of Dr. Graham and Dr. Gallagher on the mental issues. The opinions of Dr. Kuhnlein, Dr. Brunz, and particularly Dr. Klein also constitute substantial evidence that claimant was not employable in the competitive labor market considering his low back injury.

Mr. Dunlap also introduced a vocational opinion from Phil Davis. Mr. Davis opined that Mr. Dunlap is unemployable in the competitive labor market as a result of both his physical and mental limitations. (Ex. 13; Ex. MM) Mr. Davis' analysis and opinions are consistent with the medical evidence that I found to be convincing in this case. Mr. Davis' vocational opinions are rational and well-reasoned in this case. I find Mr. Davis' vocational opinions to be convincing and accurate. Therefore, I conclude that claimant has clearly produced substantial evidence establishing that he is not employable in the competitive labor market.

Once claimant produced that evidence, the burden shifted to defendants to produce evidence of availability of suitable employment. Defendants offered no mental health expert opinions to contradict those of Dr. Graham and Dr. Gallagher. Defendants offered no vocational opinions to identify available and suitable employment opportunities for claimant. I conclude that defendants did not meet their burden of production under the odd-lot doctrine.

However, defendants may contend that they met their burden or that claimant's refusal to meet with their vocational expert was evidence that claimant lacked motivation to return to work and that such evidence is sufficient to meet defendants' burden of production under the odd-lot doctrine. I do not read Guyton to suggest such evidence is necessarily sufficient.

However, assuming for the sake of argument that defendants produced sufficient evidence to meet their burden of production under the odd-lot doctrine, I find that claimant proved by the preponderance of the evidence that he is permanently and totally disabled as a result of the effects of either his low back injury or his mental health difficulties resulting from the low back injury. When the combined effects of the low back injury and mental health difficulties are considered, claimant clearly established he is permanently and totally disabled. Therefore, I conclude that claimant carried the burden of persuasion and has proven he is permanently and totally disabled if the odd-lot doctrine is considered and applied.

Alternate Medical Care

In the review-reopening decision, the undersigned ordered:

> Within twenty (20) days of entry of this decision, defendants shall select and authorize either Dr. Cherny or a qualified orthopaedic surgeon to treat claimant's bilateral upper extremity compression neuropathies.
>
> Defendants shall schedule an evaluation with the surgeon of their choosing at the earliest possible date for claimant to resume his treatment of the bilateral upper extremities.

(Review-Reopening Decision, p. 18)

On rehearing, claimant challenges the sufficiency of that ruling. Claimant contends that his request for alternate medical care was specific in that it requested defendants be ordered to provide treatment for the upper extremity conditions through Dr. Cherny or one of the physicians identified by Dr. Kuhnlein. (Claimant's Application for Rehearing, p. 8) Review of the review-reopening decision discloses that the undersigned indicated, "Claimant does not assert a claim for a specific physician. Instead, claimant seeks authorization of care through either Dr. Cherny or a qualified orthopaedic surgeon." (Review-Reopening Decision, p. 14) This statement is not as precise as claimant's specific request.

The review-reopening decision is accurate that "claimant does not present specific evidence that one surgeon should be favored over another." This is accurate in the sense that claimant did not attempt to distinguish between Dr. Cherny or one of the surgeons recommended by Dr. Kuhnlein. However, claimant has established that defendants did not authorize any care for the upper extremities and claimant did establish that reasonable and appropriate care should be offered through either Dr. Cherny or one of the surgeons recommended by Dr. Kuhnlein following his July 28, 2014 evaluation. Given defendants' refusal to authorize any treatment for the upper extremities prior to this hearing, I conclude it is appropriate to grant the specific relief requested by claimant and to modify the review-reopening decision to require authorization of Dr. Cherny or one of the specifically identified surgeons mentioned and recommended by Dr. Kuhnlein.

Claimant also seeks an order "requiring that all future treatment shall be provided by physicians and care providers whom Tom trusts." (Claimant's Application for Rehearing, p. 8) The undersigned can understand the frustration claimant has experienced and recognizes the findings made in the 2009 arbitration decision about defendants' callous and roughshod treatment of claimant's medical care. However, such a prospective order would render no objective basis for measurement of defendants' future selection of medical providers, if any other providers are needed. Instead, the order requested would render all medical care subject to claimant's subjective determinations. I do not conclude that such an order is appropriate. Claimant retains the ability to file future alternate medical care petitions (and may have alternate remedial avenues available) if defendants do not offer reasonable and suitable medical care into the future. Therefore, I conclude that claimant's application for rehearing in this respect is not well-founded.

I conclude that claimant's rehearing request is well-founded with respect to the request for specific identification of the permissible surgeons to treat claimant's upper extremity conditions. The review-reopening decision is amended to reflect that defendants should provide future treatment for claimant's bilateral upper extremity conditions through Dr. Cherny or one of the surgeons identified by Dr. Kuhnlein. Claimant's application for rehearing is sustained in this respect.

Claimant's request for an order requiring that all future treatment shall be provided by physicians and care providers in whom the claimant subjectively trusts is denied. Claimant is free to file future petitions for alternate medical care if there is a breakdown in the doctor-patient relationship with any authorized medical providers or if defendants fail to provide reasonable and suitable medical care. However, claimant's application for rehearing is denied in this respect.

Mileage to Attend YMCA Healthy Living Center

Review of the hearing report, exhibits, post-hearing brief, and application for rehearing does not disclose a specific request for award of past mileage expenses related to claimant's attendance at the YMCA Healthy Living Center in West Des Moines. Rather, it appears that claimant is requesting an order for payment of future mileage as part of his request for alternate medical care.

To the extent that authorized medical providers continue to recommend use of the YMCA Healthy Living Center, that gym membership and mileage to and from the gym are medical benefits payable pursuant to Iowa Code section 85.27. Schlicht v. Railcrew Express, L.L.C., File No. 5029695 (Arbitration June 10, 2010) (affirmed on appeal July 27, 2011). Therefore, to the extent that an authorized medical provider continues to recommend use of the YMCA Healthy Living Center, defendants should pay that expense as well as mileage pursuant to Iowa Code section 85.27 and 876 IAC 8.1(2).

Iowa Code Section 85.39 Mileage Request

Mr. Dunlap's final request in his rehearing application is for an award of mileage expenses to attend his independent medical evaluation with Dr. Kuhnlein. Claimant established entitlement to reimbursement of Dr. Kuhnlein's evaluation fees pursuant to Iowa Code section 85.39 and defendants are ordered to pay those evaluation fees.

On page 16 of the review-reopening decision, the undersigned notes that Iowa Code section 85.39 "also permits reimbursement for reasonably necessary transportation expenses incurred" to attend an independent medical evaluation. However, the undersigned failed to enter specific findings of fact with respect to the number of miles claimant traveled to attend the evaluation by Dr. Kuhnlein or findings as to whether the travel expenses were reasonable.

Claimant asserted a right to reimbursement for mileage to Dr. Kuhnlein's evaluation at Tab A attached to the hearing report. The review-reopening decision should be amended to include findings that claimant incurred reasonable travel expenses associated with attending the section 85.39 evaluation with Dr. Kuhnlein. Specifically, claimant traveled 76.5 miles roundtrip to attend that evaluation. I conclude that claimant is entitled to mileage reimbursement totaling $42.84 for his attendance at

the independent medical evaluation performed by Dr. Kuhnlein on July 28, 2014. Iowa Code section 85.39.

THEREFORE, IT IS ORDERED:

The review-reopening decision is amended and supplemented with the additional factual findings and legal conclusions as noted in the body of this decision.

The order section of the review-reopening decision is amended to reflect the following orders:

Defendants shall pay healing period benefits from the date of the arbitration hearing through September 15, 2014 at the stipulated weekly rate of three hundred sixty and 49/100 dollars ($360.49).

Defendants shall pay claimant permanent total disability benefits commencing on September 16, 2014 and continuing during the period of claimant's total disability at the stipulated weekly rate of three hundred sixty and 49/100 dollars ($360.49).

Defendants shall pay any accrued weekly benefits in lump sum with applicable interest pursuant to Iowa Code section 85.30.

Defendants shall be entitled to credit for any weekly benefits paid to date.

Pursuant to counsel's agreement and the undersigned's verbal order at the time of hearing, defendants shall hold claimant harmless against any of the outstanding charges submitted by Dr. Gallagher and Medical Center Anesthesiologists, as itemized and attached at Tab C of the Hearing Report.

Within twenty (20) days of entry of this decision, defendants shall select and authorize either Dr. Cherny or a qualified orthopaedic surgeon recommended by Dr. Kuhnlein in his independent medical evaluation report contained at hearing exhibit 11 to treat claimant's bilateral upper extremity compression neuropathies.

Defendants shall schedule an evaluation with the surgeon they select at the earliest possible date for claimant to resume his treatment of the bilateral upper extremities.

Defendants remain liable for any reasonable, necessary and causally related medical care for claimant's low back, bilateral upper extremity compression neuropathies, and mental health injuries into the future.

To the extent that an authorized medical provider continues to recommend use of the YMCA Healthy Living Center, defendants should pay that gym membership expense as well as reimburse claimant's mileage to and from the gym pursuant to Iowa Code section 85.27 and 876 IAC 8.1(2).

Defendants shall reimburse claimant's independent medical evaluation fee with Dr. Kuhnlein as well as for mileage to attend that evaluation as itemized and attached at Tab A of the hearing report.

Defendants shall reimburse claimant's costs as itemized and attached at Tab B of the hearing report.

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 18th day of February, 2015.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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