BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GREG SHADLOW,	:	File No. 21001168.01
Claimant,	:	A P P E A L
vs.	:	D E C I S I O N
LOVE'S TRAVEL STOPS,	:	
Employer,	:	
INDEMNITY INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	Head Notes: 1402.40; 1403.10; 1803; 1804; 1806; 2502; 2907; 4100

Defendants Love's Travel Stops, employer, and its insurance carrier, Indemnity Insurance Company, appeal from an arbitration decision filed on June 12, 2023. Claimant Greg Shadlow responds to the appeal. This case was heard on November 14, 2022, and it was considered fully submitted in front of the deputy workers' compensation commissioner on December 23, 2022.

In the arbitration decision, the deputy commissioner found claimant proved he was an odd-lot employee, and awarded claimant permanent total disability benefits. The deputy commissioner also awarded claimant's requested past medical expenses itemized in claimant's Exhibit 6, and the deputy commissioner taxed defendants with the full amount of the fee from claimant's vocational expert.

Defendants assert on appeal that the deputy commissioner erred in finding claimant was an odd-lot employee, and in awarding permanent total disability benefits. Defendants assert the deputy commissioner erred in using the modified fresh start rule, and defendants assert benefits should be apportioned from a prior military disability. Defendants assert the deputy commissioner erred in awarding permanent total disability benefits during periods when claimant was working or receiving unemployment benefits. Finally, defendants assert the deputy commissioner erred in awarding the full amount of the fee from claimant's vocational expert.

Claimant asserts on appeal that the arbitration decision should be affirmed in its entirety. Claimant asserts defendants failed to raise apportionment issues at hearing, and defendants should be barred from arguing on appeal that claimant cannot receive permanent total disability benefits during periods of time he worked subsequent to his

injury or during periods when he received unemployment benefits. Finally, claimant asserts the deputy commissioner accurately and appropriately assessed costs, and claimant requests that the arbitration decision be affirmed in its entirety.

Those portions of the proposed arbitration decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.5 and 86.24, the arbitration decision filed on June 12, 2023, is modified as follows:

Defendants assert that the deputy commissioner erred in using the fresh start rule. Defendants assert the legislature's 2017 statutory amendments eliminated the fresh start rule in Iowa.

"The fresh start rule is a theoretical construct presuming that when an employee who has sustained a work-related injury resulting in permanent partial industrial disability begins employment with a new employer, the employee enjoys a renewed earning capacity." Roberts Dairy v. Billick, 861 N.W.2d 814, 818 (Iowa 2015). "Under the fresh-start rule, if the employee sustains a new work-related injury after commencing work for a new employer, any resulting loss of earning capacity is measured as a diminution of the new, complete earning capacity that existed at the time the employment with the new employer commenced." Id.

The principle of a "fresh start" and renewed earning capacity upon commencement of new employment was explained by the Iowa Supreme Court in Celotex Corp. v. Auten, 541 N.W.2d 252 (Iowa 1995) and again explained in Second Injury Fund v. Nelson, 544 N.W.2d 258 (Iowa 1995). Debate about the application of the fresh-start rule has been ongoing since that time.

In 2002, the Iowa Supreme Court again reiterated that an injured worker obtains a "fresh start" through free market principles when he or she leaves a job where he or she was injured and commences new employment with a different employer. Venegas v. IBP, Inc., 638 N.W.2d 699 (Iowa 2002). Shortly thereafter, in 2004, the Iowa legislature enacted an amendment to Iowa Code section 85.34(2)(u)[1] and Iowa Code section 85.34(7).

Debate again ensued about the effect of the 2004 statutory modifications on the fresh start rule. The agency interpreted the statutory amendments and concluded that the statutory changes did not eliminate the fresh start rule when an injured worker changed employers because of the free market reset, or provided a fresh start, to evaluate claimant's earning capacity. In 2015, the Iowa Supreme Court considered the 2004 statutory modifications and concluded that a modified fresh-start rule continued to

[1] Following 2017 legislative enactments, this statutory section has been amended and moved to Iowa Code section 85.34(2)(v).

apply under the 2004 statutory changes. Roberts Dairy v. Billick, 861 N.W.2d 814 (Iowa 2015).

The Court held:

> We respectfully disagree with the district court's conclusion that the commissioner's interpretation of the amendments – preserving the fresh-start rule in cases of successive unscheduled injuries with different employers - cannot be squared with the clear language of section 85.34(7)(*a*), which provides that "[a]n employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment with a different employer...." Iowa Code § 85.34(7)(*a*).

Roberts Dairy v. Billick, 861 N.W.2d 814, 823 (Iowa 2015).

Following the 2015 Billick decision, the Iowa legislature again amended Iowa Code section 85.34(7) in 2017. However, the language quoted above by the Iowa Supreme Court was retained in Iowa Code section 85.34(7). As amended in 2017, Iowa Code section 85.34(7) still provides, "An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment with a different employer or from causes unrelated to employment." Again, this language was contained in the prior version of Iowa Code section 85.34(7) and was specifically contemplated and interpreted in Billick. Given that the Iowa Supreme Court held this statutory language did not eliminate the fresh-start rule in the 2004 statutory version of Iowa Code section 85.34(7), this agency concluded that inclusion of the same language in the 2017 statutory enactment does not eliminate the modified fresh-start rule. Wilkie v. Kelly Services, File No. 5064366 (Appeal September 2020). Therefore, I affirm the deputy's use and application of the modified fresh-start rule.

However, I respectfully disagree with the deputy commissioner's application of the odd-lot rule and the permanent total disability determination in this case. Typically, the odd-lot doctrine is utilized to establish a permanent total disability if the claimant fails to prove a permanent total disability under the traditional industrial disability analysis. Turkovic v. Wal-Mart Stores, Inc., File No. 5037110 (Appeal October 2013). However, since the deputy commissioner considered and utilized the odd-lot doctrine in this case, I consider the odd-lot claim first.

In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985) the Iowa court formally adopted the "odd-lot doctrine." Under the odd-lot 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.

As noted, the deputy commissioner concluded that claimant in this case was an odd-lot employee. Using the odd-lot analysis, the deputy commissioner found that the employee met his initial burden to establish a prima facie case as an odd-lot employee. I concur with that assessment and find that claimant generated evidence to establish a prima facie case as an odd-lot employee. Having met that burden, defendants bore a burden of production to rebut the prima facie case established by claimant.

The deputy commissioner found that the employer failed to produce evidence to rebut the odd-lot assertion made by claimant. However, defendants produced a vocational report documenting jobs that claimant could still perform and opining that clamant remains employable in the general labor market. Claimant also secured employment with a new employer after his injury date. Although claimant testified he could not continue to perform that position and ultimately quit the subsequent job, the ability to obtain subsequent employment as well as the defendants' vocational opinion both constitute evidence that rebuts claimant's odd-lot assertion and satisfies defendants' burden of production.

Therefore, the burden of persuasion on the odd-lot claim, as well as the permanent total disability claim under a traditional industrial disability analysis, remained with claimant. Guyton, 373 N.W.2d at 106. Ultimately, I consider all of the industrial disability factors, all of the medical and vocational evidence, claimant's testimony, as well as all other evidence in this record and I find claimant did not carry his burden of proof to establish he is an odd-lot employee or that he is permanently and totally disabled.

The deputy commissioner cited appropriate legal standards for assessing industrial disability. However, my analysis of those standards leads me to the conclusion that claimant did not prove permanent total disability or odd-lot status. The deputy commissioner's findings pertaining to claimant's age, educational background, employment history, motivation, computer skills, prior medical history, and ongoing symptoms are generally accurate and accepted.

I acknowledge the competing medical opinions of Richard Kreiter, M.D., Jonathan Fields, M.D., and Nicholas Bingham, M.D. I find the restrictions and impairment rating offered by Dr. Bingham to be most convincing, and I specifically find that claimant sustained an eight percent functional impairment of the whole person as a result of the work injury. (Joint Exhibit 2, page 40) I find claimant remains capable of lifting 18 pounds occasionally from floor to waist, 15 pounds occasionally from waist to overhead, that he is capable of occasional bending, reaching above shoulders, and working with elevated arms, stair climbing, or use of ladders, but that he should vary his sit, stand, and walk positions at least every 20 minutes. I specifically accept the restrictions set forth by Dr. Bingham at Joint Exhibit 2, pp. 37-38, including a limitation to an 8-hour workday.

I also accept the opinions of the defense vocational expert as most convincing in this situation. The restrictions utilized by the defense vocational expert are based upon the valid FCE performed by claimant and are very similar to the restrictions outlined by Dr. Bingham and referenced above. Using those restrictions, defendants' expert reviewed claimant's prior employment as well as conducting labor market research. She identified eight jobs in claimant's local area that would reasonably fit within his current restrictions and abilities. Claimant did not apply for any of the positions identified by the defense vocational expert.

Defendants' vocational expert opines that claimant remains employable and notes claimant was offered subsequent employment that he resigned due to subjective pain complaints. Ultimately, I find claimant remains employable in the competitive labor market and I find there still exist reasonable employment options for claimant with his residual abilities, education, employment background, and skills. However, this injury has limited claimant's options for work and caused a significant reduction in his future earning capacity. Considering all of the industrial disability factors, as well as claimant's proximity to retirement, I find claimant proved 75 percent loss of future earning capacity as a result of this work injury. Therefore, I find claimant is entitled to an award of 375 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(v).

Dr. Bingham declared claimant achieved maximum medical improvement (MMI) on July 21, 2021. (Joint Ex. 2, p. 37) I accept Dr. Bingham's opinion in this regard and I find claimant achieved MMI on July 21, 2021. Accordingly, permanent partial disability benefits commence on July 21, 2021. Iowa Code section 85.34(2).

Other issues raised on appeal by defendants and related to payment of permanent disability benefits are rendered moot by these findings and conclusions. However, defendants also challenge the assessment of costs. Specifically, defendants challenge the deputy commissioner's assessment of the full amount of the fee from claimant's vocational expert. I find claimant's vocational expert's fee was reasonable, I find the expert presented a prima facie case of odd-lot status and permanent total disability. Therefore, I concur with the deputy commissioner that it is appropriate to assess this expense in some amount. Iowa Code section 86.40; 876 IAC 4.33(6).

However, the deputy commissioner assessed the entirety of claimant's vocational expert expense. Claimant's expert submitted an invoice that detailed her work. She performed a conference with claimant, two phone calls, reviewed file materials, performed expert research on OASYS, performed a labor market survey, performed other unspecified research, and drafted a report for this case. Claimant's expert also assessed an "OASYS User Fee." In total, claimants' vocational expert submitted an invoice totaling $1,325.00. Of this amount, she recorded 4.5 hours of work and a total of $562.50 in expense related to the preparation of her written report. (Claimant's Ex. 3, p. 7)

In Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 846 (Iowa 2015), the Iowa Supreme Court held, "a physician's report becomes a cost incurred in a hearing because it is used as evidence in lieu of the doctor's testimony." The same administrative rule, 876 IAC 4.33(6) permits assessment of the cost of a vocational expert's report. Kirkendall v. Cargill Meat Solutions Corp., File No. 5055494 (Appeal December 2018). However, only the cost for preparation of the vocational report, introduced in lieu of the experts trial testimony, is a permissible cost. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 846 (Iowa 2015); Kirkendall v. Cargill Meat Solutions Corp., File No. 5055494 (Appeal December 2018). In this case, the permissible cost of claimant's vocational expert report is $562.50. I find defendants should be assessed $562.50 as a cost pursuant to 876 IAC 4.33(6).

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on June 12, 2023, is modified.

Defendants shall pay claimant three hundred seventy-five (375) weeks of permanent partial disability benefits at the stipulated weekly rate of five hundred eighty-five and 89/100 ($585.89) commencing on July 21, 2021.

Defendant shall receive credit for all benefits previously paid as stipulated by the parties.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

Defendants are responsible for the outstanding medical expenses set forth in Claimant's Exhibit 6.

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

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding in the amount of five hundred sixty-two and 50/100 dollars ($562.50), and defendants shall pay the costs of the appeal, including the cost of the hearing transcript.

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

Signed and filed on this 26thth day of October, 2023.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Adnan Mahmutagic (via WCES)

Robert Gainer (via WCES)