BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROGER HAYWARD,

Claimant,

vs.

ROAD MACHINERY & SUPPLIES,

Employer,

and

FEDERATED INSURANCE,

Insurance Carrier,
Defendants.

FILED

SEP 14 2016

WORKERS COMPENSATION

File No. 5052924

ARBITRATION DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Roger Hayward, the claimant, seeks workers' compensation benefits from defendants, Road Machinery & Supplies, the alleged employer, and its insurer, Federated Insurance, as a result of an alleged injury on October 19, 2014. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on August 4, 2016, but the matter was not fully submitted until the receipt of the parties' briefs and argument on August 19, 2016. Oral testimony and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Claimant's exhibits and the joint exhibits were both marked numerically. Defendants' exhibits were marked alphabetically. To differentiate between claimant's exhibits and the joint exhibits, the joint exhibits will be cited by providing the number of the joint exhibit preceded by the letter J. 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 joint exhibit 1, pages 2 through 4 will be cited as, "Ex. J1-2:4." 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 October 19, 2014, claimant received an injury arising out of and in the course of employment with the defendant employer.

2. Claimant is not seeking temporary total, temporary partial or healing period benefits.

3. If the injury is found to have caused permanent disability, the type of disability is an industrial disability to the body as a whole.

4. If I award permanent partial disability benefits, they shall begin on October 19, 2014.

5. At the time of the alleged injury, claimant's gross rate of weekly compensation was $1,396.26. Also, at that time, he was married and entitled to 2 exemptions for income tax purposes. Therefore, claimant's weekly rate of compensation is $856.50 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 paid no weekly benefits for the work injury.

ISSUES

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

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

II. The extent of claimant's entitlement to costs.

FINDINGS OF FACT

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

Roger was 48 years old at the time of the hearing. (Tr-8) He is a high school graduate with no post-high school education. (Tr-9) He served 3 ½ years in the Army, including a tour of duty in Desert Storm. He received an honorable discharge. (Tr-9:10) During his time in the Army, he performed heavy work as a mechanic including repair and replacement of engines; repair and replacement of transmissions; and, working on undercarriages of trucks, tanks and personnel carriers. (Id.) After leaving the Army, his work history has involved grocery store stocking, farm work, factory assembly, water treatment for a small town, auto body repair, paint mixing & sales. His most recent and most financially rewarding work has involved primarily heavy machinery repair. (Tr-12:20; Ex. C)

Roger has worked at RMS since 2002 and continues to do so at the present time. The part of RMS operations in which Roger was employed, sells, rents and repairs heavy earthmoving equipment; concrete and asphalt paving equipment; and, rock quarry equipment. (Tr-97) RMS has 13 locations nationally. The corporate office

is in Minnesota and the regional office for the Midwest is in Des Moines. (Id.) Initially, he was a shop mechanic for RMS. This job involved loading and unloading supplies and equipment in addition to equipment repair in the shop. In 2006, he was promoted to field service mechanic. In this job, Roger repaired machines at various locations in Iowa. This job required extensive traveling and he was assigned a service truck. (Tr. 16-18) This work was more physically demanding as he frequently had to manhandle heavy parts and equipment without assistance from co-workers. (Tr.18-19) In 2009, Roger voluntarily left RMS for about a year because of a lack of work due to an economic recession. He returned in 2010. There is little dispute that Roger's job as field repairman involved frequent lifting of 50-75 pounds; occasional lifting up to 100 pounds; and, constant lifting of at least 25-50 pounds. (Ex. 2-3) Occupants of this job are required to possess a valid commercial driver's license. Consequently, Roger had passed both Department of Transportation (DOT) and company physical examinations along with drug testing. (Id.) Roger testified that occasionally he would have to lift more than 100 pounds. (Tr-23:24) He worked overtime whenever it was necessary to finish a job for a client. Roger testified that he would occasionally work 60-80 hours a week. (Tr-25)

Roger did not have any permanent restrictions or limitations on his ability to perform heavy, manual labor prior to his October 19, 2014 work injury at RMS. (Tr-27) Roger received regular raises prior to his injury and was paid $28.85 per hour at the time of the injury. (Ex. 3-4) Except for safety concerns, Roger received satisfactory or very satisfactory performance reviews. (Ex. 4) He was recently disciplined for bullying a fellow worker and for past safety violations. (Ex. D)

On October 19, 2014, Roger was in Mason City, Iowa to replace a rear differential on a large end loader. Due to the size of the end loader, Roger and a co-worker were assigned to the task. They had to use lifting apparatuses on both of their service trucks to maneuver the differential. In order to lift the differential, a heavy metal plate weighing at least 150 to 200 pounds had to be attached to the differential. Doing so required both servicemen to lift and position the plate in a cramped location while on their knees. While doing this task, Roger felt severe low back pain. This pain continued over the next couple of days. Roger delayed reporting the injury thinking his pain would subside. However, when his pain did not improve, he reported the injury to RMS and was referred for treatment. (see Tr-28:31)

Roger was initially treated at the Ankeny Clinic on November 20, 2014. (Ex. J1-1) Roger subsequently received conservative treatment at this clinic for his low back pain consisting of medications, including opioids. He also was provided a 25-pound lifting restriction. (Id.) Roger continued to work during his treatment, but his job duties were modified to accommodate for the restrictions. (Tr-36) Roger underwent an MRI of the lumbar spine, which indicated degenerative disc disease with herniation. (Ex. J2-4) He was referred to Cassim Igram, M.D., an orthopedic surgeon, on December 15, 2014. Dr. Igram reported that he did not feel there was a surgical option to address Roger's low back injury and referred Roger to Anthony Stark, D.O., a physiatrist (a specialist in physical medicine and rehabilitation), at Dr. Igram's clinic.

(Ex. J2-1) Dr. Stark examined Roger on December 22, 2014. Dr. Stark also recommended continued conservative treatment, including injections, with the same work restrictions. (Ex. J3)

Defendants then referred Roger to David Boarini, M.D. for a neurosurgical evaluation. Dr. Boarini saw Roger very briefly on February 9, 2015. Dr. Boarini also did not feel that surgery was indicated, and recommended that Roger continue with pain management. (Ex. 3) Thomas D. Hansen, M.D., a pain management physician, then provided injection therapy. (Ex. J3-4)

When conservative pain management, including injections, was not effective, Dr. Hansen attempted to refer Roger to the University of Iowa Hospitals and Clinics for a second opinion. However, defendants refused to authorize the referral and Dr. Hansen then indicated he had no problem with this denial of referral as he had already been seen by Dr. Boarini, who rejected surgery. (Ex. 3-6:7)

Roger was then referred to Daniel Miller, D.O., an occupational medicine and family physician. Dr. Miller examined Roger on April 29, 2015. After another MRI, Dr. Miller discharged Roger from his care two weeks later on May 14, 2015, stating he had no explanation for the continuing problems. The doctor told Roger to follow-up with his personal physician to rule out other non-work related causes for his pain. (Tr-38-39; Ex. J4-5)

At the request of his attorney, Roger was evaluated by Marc Hines, M.D., a neurologist, on January 15, 2016. Dr. Hines noted the objective findings on all of the MRIs showing a disc herniation at L5-S1, with L5 radiculopathy on the left. (Ex. J6-8) Dr. Hines assigned a 16 percent permanent impairment rating to the body as a whole. (Ex. J6-9) Dr. Hines noted that a 10-pound lifting restriction was incompatible with Roger's job, but he did not provide any recommendations on permanent restrictions as he felt Roger was not at maximum medical improvement. (Id.) Dr. Hines stated, "I believe very strongly, that is, vehemently, that this patient needs an additional opinion in neurosurgery." (Id.)

Dr. Miller then ordered another MRI of the lumbar spine which was performed on February 24, 2016. The imaging showed the same multilevel spondylosis in the mid and lower lumbar spine, slightly progressed from the previous MRI. The MRI documented the same L5-S1 herniation as well as neural foraminal narrowing, greatest at L5-S1. (Ex. 7-1:2) Dr. Miller re-examined Roger on February 29, 2016 and recommended another neurosurgical consultation. (Ex. 4-6) Dr. Miller assigned a 10-pound lifting restriction, with 25 pounds push/pull, no repeated bending or twisting, and sit/stand as tolerated. (Ex. 4-8) There is no evidence in this record suggesting that Dr. Miller has ever changed these restrictions.

Roger was finally evaluated by Patrick W. Hitchon, M.D., at the University of Iowa Hospitals and Clinics, on April 21, 2016. (Tr-60; Ex. J8) Dr. Hitchon agreed with Dr. Miller that Roger should try to live with his pain with conservative treatment, "if at all possible." (Ex. 8-1) "If the pain is incapacitating, surgery may be considered, so he is

able to stand and walk for longer periods of time." (Id.) Roger testified he is getting close to that point.

At the direction of his attorney, Roger underwent a functional capacity evaluation (FCE) on June 9, 2016 by physical therapist, Todd Schemper. The results of the testing placed Roger in the sedentary category, with lifting less than 10 pounds occasionally and 15 pounds rarely, and regular rest breaks with sitting, standing, and walking. (Ex. J9-2:3).

Roger testified that he continues to have low back pain. He has discontinued the narcotic pain medication because it was giving him stomach trouble. He uses over-the-counter medication. By the end of the day, he is barely able to walk. The pain affects his ability to perform all of his activities of daily living and prevents him from getting a good night's sleep. (Tr-64:67) He has had to use his vacation days on occasion when the pain is unbearable. (Id.) He has had to give up hobby activities he was involved in before the injury, including drag racing. (Id.) He has trouble sleeping. (Id.)

After Dr. Miller placed the 10-pound lifting restriction, Roger's job changed again. He tried to assist with repairs, but his legs would buckle. (Tr-41) He filled in at various lighter duty positions. (Tr-42-43) Lately, he has been assigned to perform various clerical/administrative projects. (Tr. 44-46) He no longer has any tools or the use of a company truck. (Tr-48) He said that he is assigned to sit on a hard chair in a small room full of filing cabinets to perform clerical work projects. (Tr-49) He is in the room all day alone which Roger states was tedious. (Tr-50) In approximately May or June 2016, the employer took back his laptop and phone. (Tr-51) Although he continues to receive the same hourly wage as a field mechanic, he no longer works as a mechanic and has lost the previous lucrative overtime pay he had as a field mechanic. (Tr-56)

Charles Gallagher, who until his recent promotion to vice president, was the manager of Iowa RMS operations, testified that given the restrictions Roger cannot return to his past work as a mechanic, but he has been given light duty tasks. (Tr-125) Gallagher states that these tasks are not make work and are needed for RMS operations. (Tr-103:105) The filing work which consists of cleaning up older files and shredding documents is a task that needs to be done at the end of the year. (Id.) Since March 2016, Roger has been assigned to contact former customers and tell them that RMS needs to update their files as a part of a customer relationship program. (Id.) Also, Roger is to contact rock quarries that have been sold drills to promote a new rock quarry drill line. (Id.) According to Gallagher, Roger's service truck, laptop computer and cell phone was taken from him as he no longer had a use for those items in his current job and these items were needed by a newly hired field mechanic. (Tr-105, 107:109) Although the files are located in a small room, Gallagher states that he does have access to other larger areas and more comfortable seating, and he would be permitted to work in those areas. He also has access to desk phones and computers. However, Gallagher states that Roger has not asked for any change in location. (Tr-106) Finally, Gallagher states that Roger, even if he can no longer perform the

mechanic work, he has the possibility of lighter duty permanent jobs at RBS using his knowledge and experience in repairing RBS equipment that do not require heavy work such a parts person, service writer, and sales that can have the same hourly rate as a mechanic because RMS is a rapidly expanding business. (Tr-131:134) Gallagher admits that such jobs would not involve the extensive overtime hours of a field mechanic. (Id.)

I find the work injury of October 19, 2014 is a cause of a 16 percent permanent impairment to the body as a whole and permanent restrictions consisting of Dr. Miller's continued restrictions: no lifting greater than 10 pounds, no push and pull greater than 25 pounds, no repeated bending or twisting, and only sit/stand as tolerated. As all treatment options have been explored, Roger's condition has plateaued and is now permanent. I am unable to find that the FCE changes Dr. Miller's restrictions. An FCE which has not been adopted by a physician is the opinion of a physical therapist whose views cannot be given the same weight as a licensed physician. Regardless of the FCE, the restrictions of Dr. Miller are fairly severe for a person whose work history primarily consists of heavy manual labor.

As a result of his now permanent restrictions, Roger is no longer able to return to farm equipment repair, auto repair and heavy equipment repair work; the types of work for which is best suited given his age, education, and work experience. On the other hand, Roger has not shown that lighter duty employment is not available to him in the labor market. He has job opportunities at RBS and he has had some sales experience. Roger has not applied for any work elsewhere and there is no vocational expert view in evidence to support a lack of employability.

However, Roger has shown a significant disability. While Roger's current duties at RBS may not be make work, he apparently has no permanent job at RBS. Defendants have only shown that Roger is capable of light administrative or clerical work. From examination of all of the factors of industrial disability, it is found that the work injury of October 19, 2014 was a cause of a 65 percent loss of earning capacity.

CONCLUSIONS OF LAW

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when

performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

A treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2)(a-t), the disability is considered a scheduled member disability and measured functionally. If it is found that the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and measured industrially under Iowa Code subsection 85.34(2)(u). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133; 106 N.W.2d 95, 98 (1960).

Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 593; 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.

However, consideration must also be given to the injured worker's medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured worker's qualifications intellectually, emotionally and physically; the worker's earnings before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted. Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616 (Iowa 1995); 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 parties agreed in this case that if the work injury is a cause of permanent impairment; the disability is an industrial disability to the body as a whole. Since I found permanency, this agency must measure claimant's loss of earning capacity as a result of this impairment.

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 a 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). However, an employer's special accommodation for an injured worker can be factored into an award determination to the limited extent the work in the newly created job discloses that the worker has a discerned earning capacity. To qualify as discernible, employers must show that the new job is not just "make work" but is also available to the injured worker in the competitive market. Murillo v. Blackhawk Foundry, 571 N.W.2d 16 (Iowa 1997).

This agency gives little weight to functional capacity evaluations by physical therapists that are not adopted by a licensed physician and conflict with activity restrictions imposed by licensed physicians. Such therapists simply lack the medical qualifications to make such medical assessments and causally relate their findings to a work injury. Allen v. Annett Holdings, File No. 5024900 (App. July 28, 2011).

In the case sub judice, I found that claimant suffered a 65 percent loss of his earning capacity as a result of the work injury. Such a finding entitles claimant to 325 weeks of permanent partial disability benefits as a matter of law under Iowa Code section 85.34(2)(u), which is 65 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection.

II. Claimant seeks costs consisting of the filing fee of $100.00 and the cost of an FCE report pursuant to our rule 876 IAC 4.33(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).

Defendants assert that an FCE not ordered by a physician cannot be assessed as a cost. No authority was cited for this proposition. Whether or not the FCE was ordered by a doctor, a physical therapist is a practitioner is defined in administrative rule 876 IAC 4.17. The only remaining question is what charges by the therapist are allowed as the cost of preparation of the report.

The bill for the FCE attached to the hearing report shows a $360.00 charge for the evaluation time, and $600.00 charge for documentation. I believe that the testing or evaluation is equivalent to an examination by a physician and cannot be taxed under Young. The claimant already had an examination by Dr. Hines in this case under Iowa Code section 85.39. However, the fee for preparing or reviewing documentation is taxable.

Therefore, defendants will be taxed the sum of $700.00 for the filing fee and FCE report.

ORDER

1. Defendants shall pay to claimant three hundred twenty-five (325) weeks of permanent partial disability benefits at the stipulated rate of eight hundred fifty-six and 50/100 dollars ($856.50) per week from the stipulated date of October 19, 2014.

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

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

4. Defendants shall pay to claimant the sum of seven hundred and 00/100 dollars ($700.00) as reimbursement for his costs of this action pursuant to administrative rule 876 IAC 4.33.

5. 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 September, 2016.

LARRY WALSHIRE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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LPW/srs

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.