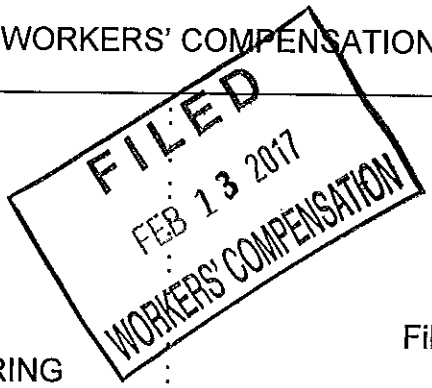
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



ROBERT KIRCHNER,

Claimant,

vs.

R.J. THOMAS MANUFACTURING COMPANY, INC.,

Employer,

and

COMMERCE AND INDUSTRY INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5052224

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Robert Kirchner, claimant, filed a petition in arbitration seeking workers' compensation benefits from defendants, R.J. Thomas Manufacturing Company, Inc., the employer, and their workers' compensation insurance carrier, Commerce and Industry Insurance Company. The arbitration hearing was held on January 31, 2017, in Des Moines, Iowa.

Claimant and Michael Reed, claimant's supervisor, provided testimony. The evidentiary record also includes Claimant's Exhibits 1 through 10, and Defendants' Exhibits A through H, both of which were admitted into evidence without objection. Citations to exhibits in this decision may only include one exhibit number or letter and may not include the corresponding duplicate exhibit submitted by the parties.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

Counsel for the parties waived the submission of post-hearing briefs and the matter was considered fully submitted at the conclusion of the hearing.

ISSUE

The parties submitted the following disputed issue for resolution:

The extent of industrial disability, if any.

FINDINGS OF FACT

At the time of the hearing, claimant, Robert Kirchner, was 56 years old. He graduated from high school in 1979 with average grades and did not pursue any additional formal education. (Testimony) I find claimant provided credible testimony.

This claim involves a stipulated work injury to claimant's back that occurred on March 28, 2013, when claimant was making grills. At that time, he was flipping product onto a pallet and noticed back pain.

Prior to working for R.J. Thomas, claimant worked full-time at Simonsen Mill, where he bagged sacks of feed and made deliveries of both bagged feed and bulk feed. The bagged feed required loading and unloading by hand. The bulk feed was handled by machine. (Testimony) This was claimant's first job following high school. He worked for Simonsen Mill from 1979 until 1982. Claimant described this as medium level work on a scale of light, medium and heavy. (Exhibit 10, page 4; Testimony)

Claimant then worked for Beal's Motor Rewind from 1982 until 1999, when he purchased the business and became the owner/operator. The company repaired electric motors, which involved replacing and "rewinding" copper wire in the motors. Claimant ran this business until he closed it in 2008, when the demand for the service became increasingly small in light of the fact that replacement cost of an electric motor became equal to or less than the cost of repair. (Ex. 10, p. 4; Testimony)

Claimant has worked part-time as a police officer for the city of Cherokee, Iowa from about 1993 to 2001 and for the city of Aurelia, Iowa from about 2000 to 2008. This job would, on occasion require him to wrestle with an unwilling arrestee.

Claimant began working for the defendant employer, R.J. Thomas Manufacturing in 2008 and continued to work there at the time of the hearing. (Ex. 10, p. 4; Testimony) His job at R.J. Thomas involves operating metal fabrication machines. The company builds heavy duty barbeque grills and fire rings among other things designed for use in city, state and national parks. The company also builds park benches, bear-proof trash receptacles and other such equipment. The company's customers include Yellowstone National Park and Yosemite National Park.

At R.J. Thomas, claimant works in the fabrication department. (Ex. D, p. 24; Testimony) In this department, workers produce parts from raw steel to be used in the production process. The raw steel is placed next to the machines in tubs and the fabricator/operator then removes the steel from the tub, places it in a machine and depresses palm buttons or a foot pedal to operate the machine. After the machine has

completed a cycle, the newly formed part is removed and placed in a different tub to be transported to the welding shop to be assembled and eventually to the finish shop for paint or powder coat, etc. (Testimony)

Prior to claimant's work injury, he worked on jobs producing parts ranging from a few pounds up to 50 or 100 pounds. (Testimony) However, after this work injury, claimant testified that he only makes "small" parts, and he is able to get help on occasion from co-workers. (Testimony) Michael Reed, claimant's supervisor, who has worked at R.J. Thomas for 28 years, agreed that claimant's current work involves "lighter" work and that claimant is typically required to handle parts weighing just a few pounds, but potentially as much as 25 to 30 pounds. (Ex. D, p. 24; Testimony) Mr. Reed testified that he keeps claimant on "jobs that I believe he can do" following his injury. (Testimony) He stated that there are some machines such as a large press brake that claimant no longer operates in the fabrication shop because the material involved would exceed his lifting restriction.

Mr. Reed stated that claimant is an excellent worker. He arrives on time, does his job well, does not complain and is in good standing with the employer. (Testimony)

Mr. Reed testified that about four or five Saturdays per year, one half day of overtime is offered to meet customer demand, which typically involves the weld shop employees and not fabricators. Although, the fabricators are authorized to take a shorter lunch break on their regularly scheduled work days, if they choose, and earn overtime during the regular five day week. (Testimony)

Mr. Reed testified that he is on the floor regularly and interacts with claimant and that claimant has never complained to him about being unable to do his job. However, he also testified that claimant is not the type of person to complain, but will simply get the job done. (Testimony)

Following the March 28, 2013, work injury, claimant had pain in his low back and was seen by Stephen Veit, M.D., who prescribed physical therapy. (Ex. 1, p. 1) Unfortunately, claimant's pain did not improve and he developed radicular symptoms in both legs. (Ex. 1, p. 5) Dr. Veit obtained an MRI, which showed a large broad-based disc bulge with bilateral neuroforaminal stenosis at L4-5 with effect on the exiting nerve roots. (Ex. 2, p. 3) This finding was noted to "correlate to patient's symptomology." (Id.) Claimant was then referred to Wade Jensen M.D. for orthopedic care.

Dr. Jensen began treating claimant on June 3, 2013. (Ex. 3, p. 2) He provided conservative treatment including multiple injections. Although the records indicate that claimant had periods of reduced symptoms, conservative care did not provide long-lasting relief. On May 5, 2014, Dr. Jensen recommended an L4-5 decompression and fusion surgery. (Ex. 3, p. 28) Twelve weeks later, on July 28, 2014, Dr. Jensen stated that the recommended surgery had not yet been approved. He, again, recommended the same surgery. (Ex. 3, pp. 30-31) On February 23, 2015, over nine months after the surgery was originally recommended, it was finally approved. (Ex. 3, p. 35) A repeat

MRI was performed and surgery followed on March 12, 2015, in which Dr. Jensen performed the L4-5 decompression and fusion. (Ex. 2, p. 4; Ex. 5, p. 3) Six weeks post-surgery, Dr. Jensen recorded that claimant's radicular symptoms were gone, claimant was using no pain medication, and "he has no issues or concerns." (Ex. 3, p. 52) He was returned to work initially for half days, and then regular days with restrictions. On September 18, 2015, six months after surgery, claimant was noted to be "doing remarkably well," indicating that he had only "occasional discomfort based on activities but feels he is progressing nicely." (Ex. 3, p. 61)

On October 17, 2015, Dr. Jensen issued a letter to the insurance carrier opining that claimant had sustained a 20 percent whole person impairment based on Table 15-3 of the AMA Guides to Evaluation of Permanent Impairment, Fifth Edition (AMA Guides). Dr. Jensen based his opinion on a finding that claimant would be classified in the DRE category IV. (Ex. H, p. 101)

The parties agreed at hearing that claimant is working under a 35 pound lifting restriction from Dr. Jensen and/or Stephen Liddiard, PA, who is in Dr. Jensen's office, in spite of Exhibit H, page 100, which is a release to return to work with no restrictions dated September 18, 2015, from Mr. Liddiard. I therefore find based on the agreement of the parties and the testimony of claimant and Mr. Reed that claimant is working under a permanent restriction of no lifting greater than 35 pounds.

On March 28, 2016, Sunil Bansal, M.D., after a review of the medical records and evaluation of claimant, offered his opinions concerning permanency. He agreed with Dr. Jensen's assessment that claimant would fall under the DRE Category IV of Table 15-3 of the AMA Guides, resulting in a 20 percent permanent impairment to the whole person. (Ex. 8, p. 13) Dr. Bansal also opined that claimant should have permanent work restrictions of no lifting over 40 pounds occasionally and 30 pounds frequently. He should also not frequently bend or twist. (Id.) Claimant testified that he agreed that these restrictions fairly represent his physical capacity. (Testimony)

Claimant testified at hearing that he is not presently taking any prescription medication for this injury and he has not attempted to seek any additional medical attention since September, 2015. Also, he stated that he has no problem sleeping, but sometimes when he wakes up in the morning, he has some pain and stiffness. (Testimony) He advised that he takes ibuprofen for pain about two times per week, although this is only for back pain, because he continues to be free of any leg pain. (Testimony)

Claimant testified that although he may not take ibuprofen daily, he does have low back pain nearly every day, which increases with prolonged standing and sitting. He estimated that he stands about 70 percent of the work day and sits the remaining 30 percent. He also stated that following some days of prolonged standing, after he gets home from work he may spend most of the night sitting down after taking ibuprofen. (Testimony)

I find from claimant's credible testimony, that he continues to have back pain almost daily, which is aggravated by prolonged standing and sitting.

Claimant has received regular wage increases at R.J. Thomas, including after his work injury. (Ex. B, p. 3) His W-2 statements showed wages from the defendant employer in 2012 of $36,392.97 and wages of $36,678.88 in 2015. (Ex. 9, pp. 17, 26) Claimant's wages from January 1, 2016, through December 20, 2016 totaled $38,052.02. (Ex. A, p. 2) Therefore, I find that claimant's wages have remained generally steady with some increase since the work injury.

In 2016, claimant has regularly worked overtime, which claimant testified he accumulates during the week by taking a shorter lunch, which is approved by the employer. However, he testified that he has not been able to work any Saturday overtime since the injury, which he did prior. (Ex. A, pp. 1-2; Testimony) As stated above, Mr. Reed indicated that Saturday overtime only occurs about four to five times per year, and then predominantly for welders, not for fabricators. Mr. Reed denied the notion that claimant's overtime was being limited due to the work injury.

Claimant testified that he did not believe he could return to the type of work he performed at Simonsen Mill because he would not be able to lift the 50-pound bags of feed and twist his back, which was required to load/unload the bagged feed. This job would exceed his present restrictions. He also stated that he would not be able to do the electric motor repair work that he had done at Beal's Motor Rewind because of the long work days, standing on concrete. Finally, he did not think he could return to police work, because he would have difficulty if he needed to wrestle with someone during an arrest. (Testimony) I find claimant's concern that he could not return to his prior occupations due to the work injury to be legitimate and realistic concerns.

Claimant advised that he and his wife burn wood for heat in the winter, and his wife has taken over the chore of splitting fire wood, because the activity causes him pain. (Testimony) He also advised that he no longer goes fishing after the work injury because he is concerned about slipping on a rock or wet surface and falling or twisting his back causing re-injury.

Claimant testified that his wife operates a small business selling parts for industrial torpedo heaters. Claimant previously repaired these heaters as part of his electric motor repair shop. He still provides free trouble shooting service to customers over the phone who call his wife's parts business. He may have one to twelve phone call inquires that he responds to daily. However, this is seasonal, and as the weather warms, the volume of calls drops. Also, he occasionally still repairs the heaters that are brought to him. Claimant testified that his wife operates a computer for her business, but that he has no appreciable computer skills. (Testimony)

Concerning claimant's extent of industrial disability and in consideration of his age, level of education, his restrictions, his functional impairment, which is agreed upon by both experts in this case, his work experience, potential for rehabilitation, his

earnings before and after the injury, his continued employment and obvious motivation to remain employed, and all other appropriate factors for consideration of industrial disability, I find claimant has sustained 40 percent industrial disability.

CONCLUSIONS OF LAW

The only disputed issue in this case is the extent of industrial disability.

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, 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 workers' qualifications intellectually, emotionally and physically; the worker's earning 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).

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 (Iowa 1995).

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).

As stated above and for the reasons there given, I have determined that claimant has sustained 40 percent industrial disability.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant industrial disability benefits of two hundred (200) weeks, beginning on the stipulated commencement date of September 18, 2015, until all benefits are paid in full.

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

All weekly benefits shall be paid at the stipulated rate of four hundred eighty nine and 65/100 dollars ($489.65) per week.

All accrued benefits shall be paid in a lump sum.

Defendants shall pay interest on any accrued weekly benefits pursuant to Iowa Code section 85.30

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 13th day of February, 2017.

TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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TJG/sam

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.