BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

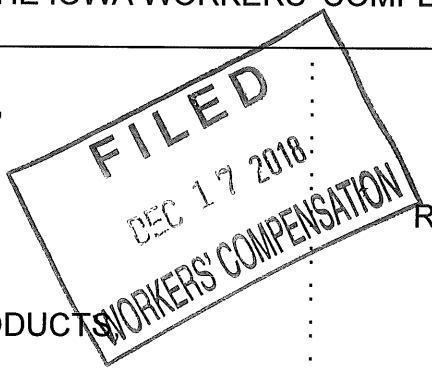
DARRYL BREWER,

Claimant,

vs.

GRIFFIN PIPE PRODUCTS,

Employer,
Self-Insured,
Defendant.



File No. 5038723

REVIEW-REOPENING DECISION

Head Notes: 1402.40, 1803, 2905

STATEMENT OF THE CASE

This case previously proceeded to an arbitration hearing and a former deputy workers' compensation commissioner awarded claimant a running healing period in an arbitration decision filed March 29, 2013. Darryl Brewer, claimant, filed a review-reopening petition against Griffin Pipe Products, as the self-insured employer. An in-person hearing occurred in Des Moines on August 7, 2018.

The parties filed a hearing report at the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 5, and Claimant's Exhibits 1 and 2. Defendant did not file a separate, independent set of exhibits. All exhibits were received without objection. The parties also asked the agency to take administrative notice of the previously filed exhibits. Administrative notice of the prior exhibits is taken, along with administrative notice of the arbitration decision filed March 29, 2013.

Claimant was the only witness to testify live at the review-reopening hearing. The evidentiary record automatically closed after the allotted two-week period after the evidentiary hearing.

However, counsel for the parties requested the opportunity to file post-hearing briefs. Their request was granted. The case was deemed fully submitted upon the simultaneous filing of the post-hearing briefs by the parties on August 31, 2018.

ISSUES

The parties submitted the following disputed issues for resolution:

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

2. Whether costs should be assessed against any party and, if so, the extent to which costs should be assessed.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Darryl Brewer was 53 years of age at the time of the review-reopening hearing. His educational and employment background are summarized on pages 2 and 3 of the arbitration decision filed on March 29, 2013 and will not be reiterated here. Mr. Brewer has not held any employment since being terminated by Griffin Pipe Products in October 2011. All of Mr. Brewer's prior employment involved heavy manual labor.

The facts surrounding Mr. Brewer's injury on June 18, 2010, are similarly summarized on page 3. His medical history through the date of the March 2013 arbitration hearing is similarly summarized in the arbitration decision and will not be revisited or modified. Suffice it to say that claimant sustained serious injuries to his jaw, neck, low back, and right knee as a result of the June 18, 2010 work injury.

Since the arbitration hearing, claimant has undergone a cervical fusion in December 2013. (Joint Exhibit 2, page 27) He has a spinal cord stimulator implanted into his neck as well as a spinal cord stimulator implanted into his lumbar spine. (Joint Exhibit 2, pp. 48, 50) Claimant's treating neurosurgeon, John S. Treves, M.D., declared claimant to be at maximum medical improvement (MMI) on April 13, 2016. (Joint Ex. 2, p. 43)

Dr. Treves recommended a functional capacity evaluation (FCE) be performed to assist with determining claimant's permanent work restrictions and abilities. Claimant submitted to an FCE on June 20, 2016. The FCE was determined to be valid and recommended that claimant perform work at or below the light work level. Specifically, the FCE demonstrated a residual ability to lift and carry up to 20 pounds on an occasional basis and up to 10 pounds on a frequent basis. (Joint Ex. 5, pp. 93) Dr. Treves concurred with the FCE findings and recommendations as claimant's permanent work abilities. (Joint Ex. 2, p. 43)

Claimant obtained and introduced an independent medical evaluation performed by Sunil Bansal, M.D. on January 26, 2018. Dr. Bansal concurred with Dr. Treves as to maximum medical improvement. (Claimant's Ex. 1, p. 26) Dr. Bansal concurred with the FCE findings, but also imposed additional restrictions against repeated neck

motions or placing claimant's neck in a posturally flexed position for more than 15 minutes at a time. Dr. Bansal also recommended against claimant standing or walking greater than 60 minutes at a time. (Claimant's Ex. 1, p. 27)

When considering the restrictions offered, I accept the restrictions and ability levels identified by the FCE as applicable. These abilities were adopted by claimant's long-time neurosurgeon, Dr. Treves. Dr. Treves evaluated and treated claimant over an extended period of time and has had the best opportunity to evaluate and assess claimant's injuries, abilities, and need for restrictions. Dr. Bansal evaluated claimant one time. His ability to assess claimant's current function is limited to his one evaluation and interview of claimant.

It is understandable that a one-time evaluator would be cautious about claimant's abilities given the surgeries, multiple injuries, and residual symptoms. However, I find the opinions of Dr. Treves to be more credible in this situation and adopt the restrictions as outlined by the FCE as the applicable restrictions and residual work abilities claimant possesses. (Joint Exhibit 5)

With respect to permanent impairment, only one physician has offered an opinion. Specifically, Dr. Bansal opines that claimant sustained a 3 percent permanent impairment of the whole person as a result of his jaw injury. Dr. Bansal assigns a 28 percent permanent impairment of the whole person as a result of claimant's neck injury, as well as a 5 percent permanent impairment of the whole person as a result of claimant's low back injury. Finally, Dr. Bansal assigns a 4 percent permanent impairment of the whole person as a result of claimant's right knee injury.

Again, these impairment ratings are not rebutted in this record and are accepted as credible and accurate. According to the Combined Values Chart on pages 604-606 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, the 3 percent impairment rating combines with the 28 percent impairment rating to equal 30 percent of the whole person. The 30 percent impairment combines with the 5 percent impairment for the low back to produce a combined impairment of 34 percent of the whole person. This combines with the 4 percent impairment for the left knee to result in a total impairment of 37 percent of the whole person. I specifically find that claimant has proven a 37 percent permanent impairment of the whole person as a result of the combined work injuries sustained on June 18, 2010.

Claimant testified credibly that he continues to experience headaches, some dizziness, clicking in his jaw and pain in his jaw, neck pain, low back pain, swelling in his right knee and a sensation that his right knee "goes out" occasionally and especially during the winter months. Mr. Brewer also testified credibility that he cannot return to either of his prior employment scenarios given his ongoing symptoms and residual limitations as demonstrated in the FCE.

As noted above, claimant has not worked since being terminated by Griffin Pipe Products in 2011. Claimant applied for two jobs after his termination, one at Walmart and the other as a garbage collector. He was not offered either job.

Claimant has made no attempts to look for, apply for, or pursue any other job potentials since he qualified for Social Security disability in 2014. When asked by defense counsel at trial why he has not attempted to look for work, claimant responded with something like, "I got hit in the head by a pipe, man. Be reasonable." (Claimant's testimony) However, with residual abilities that permit lifting up to 20 pounds and light demand level work, it is not unreasonable to expect claimant to pursue alternate employment. Claimant has made no attempt to return to employment. He demonstrates no intention of doing so into the future. Yet, his residual abilities suggest that he is likely capable of gainful employment.

Mr. Brewer exhibits no motivation to seek or obtain new employment. Rather, it appears he has resigned himself to receiving Social Security disability benefits and remaining unemployed. While this is certainly an option Mr. Brewer may elect, this choice by itself, does not prove permanent and total disability. Instead, I find it exhibits a lack of motivation to return to gainful employment.

Claimant points out that he receives Social Security disability. While true, that award was made in 2014. In late 2014, claimant had a lumbar spinal cord stimulator implanted, which is helpful for claimant's low back symptoms. (Joint Ex. 2, pp. 31, 48) In 2016, claimant had a cervical spinal cord stimulator implanted, which is beneficial for claimant's neck symptoms. (Joint Ex. 2, p. 40, 50) Within a year of trial, claimant lost a considerable amount of weight. He is in a better physical condition now than he was in 2014 when Social Security assessed his condition and awarded him benefits.

I find that Mr. Brewer has not proven that he is permanently and totally disabled. He has made no legitimate effort to seek employment since achieving maximum medical improvement. He has residual work abilities that suggest he is capable of gainful employment. If claimant had demonstrated a significant motivation to return to work and demonstrated an unsuccessful effort to do so, perhaps he could have proven permanent and total disability. However, on the record before me, claimant has demonstrated no significant motivation to return to work. His residual abilities suggest he is capable of gainful employment. Therefore, I find that claimant has not proven he is permanently and totally disabled as a result of the June 18, 2010 work injury.

Considering all of the relevant industrial disability factors outlined by the Iowa Supreme Court, I find that Mr. Brewer has sustained a significant industrial disability. He is no longer able to perform heavy manual labor, which excludes him from all prior jobs he has held. Claimant has residual abilities that he could perform in the general labor market, but likely would have to reenter the workforce at entry level pay in an unskilled type position. Therefore, he has demonstrated that he has sustained a significant loss of future earning capacity, or industrial disability. Specifically, I find that

claimant has established he sustained an 80 percent loss of earning capacity as a result of the June 18, 2010 work injury.

CONCLUSIONS OF LAW

The parties appropriately stipulated that claimant sustained permanent disability as a result of the June 18, 2010 work injury and that the injury should be compensated with industrial disability as an unscheduled injury 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.

Having considered all of the industrial disability factors outlined by the Iowa Supreme Court and having found that claimant proved an 80 percent loss of future earning capacity, I conclude that claimant has proven an 80 percent industrial disability. This entitles claimant to an award of 400 weeks of permanent partial disability benefits against the employer. Iowa Code section 85.34(2)(u).

Pursuant to the parties' stipulation, claimant's entitlement to permanent disability commences on April 13, 2016. All weekly benefits shall be paid at the rate of $710.66. (Hearing Report)

Finally, claimant seeks an award of costs. Costs are awarded at the discretion of this agency. Iowa Code section 86.40. In this case, claimant has prevailed. I conclude that it is appropriate to assess costs in some amount against the employer and insurance carrier.

Claimant's Exhibit 11 contains claimant's requested costs. The initial request is for reimbursement of claimant's filing fee. This is appropriate and is assessed pursuant to 876 IAC 4.33(7).

Claimant also seeks his deposition transcript charges totaling $281.95. Claimant's deposition transcript was not an exhibit at the time of review-reopening. Claimant's deposition testimony was not necessary or helpful, as claimant's live testimony provided all necessary information to decide this case. I conclude that claimant's deposition transcript is not a cost that should be assessed in this case.

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay claimant four hundred (400) weeks of permanent partial disability benefits at the rate of seven hundred ten and 66/100 dollars ($710.66) per week, commencing on April 13, 2016.

Defendant shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable 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. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

Defendant shall reimburse claimant's costs in the amount of one hundred dollars ($100.00).

Defendant 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 17th day of December, 2018.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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WHG/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.