BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DAVID BORG, Claimant, vs. RHODEN AUTO SERVICE CENTER, Employer, and FARM BUREAU PROPERTY & CASUALTY INSURANCE CO., Insurance Carrier, Defendants.	File No. 5046635 REMAND DECISION Head Note: 1804

STATEMENT OF THE CASE

This matter is before the Iowa Workers' Compensation Commissioner on remand following a decision dated May 9, 2019, from the Iowa District Court for Polk County. The decision from the District Court was not received by this agency until May of 2020 when it was emailed by the parties.

An arbitration decision issued December 4, 2015, found, in part, claimant was permanently and totally disabled from a November 19, 1997, work accident.

An intra-agency appeal decision, dated May 10, 2017, modified the arbitration decision and found, in part, that claimant sustained 90 percent industrial disability from the stipulated work injury.

Following that appeal decision, on July 11, 2017, the District Court for Polk County granted claimant's application for leave to present new evidence. The District Court remanded this matter back to the workers' compensation commissioner to allow for additional evidence to be taken for further consideration under Iowa Code section 17A.19(7). The evidence ordered to be made a part of the record in this matter and considered upon appeal is limited to:

1. A letter claimant received in February of 2016 concerning the sale of Rhoden Auto Service Center (Rhoden) to H&H Automotive;

2. A letter from H&H Automotive dated February 24, 2016 regarding claimant's future employment; and

3. A Social Security Administration determination that claimant was disabled under the Social Security Act as of February 26, 2016.

In response to defendants' motion to submit new evidence, on October 31, 2017, this agency allowed defendants to rebut only the three documents detailed above.

In a June 22, 2018, order, the District Court in and for Polk County remanded this matter back to this agency to consider only the letter concerning the sale of Rhoden to H&H Automotive, and a letter from H&H Automotive regarding claimant's future employment. The District Court also ordered this agency to establish parameters for defendants to conduct discovery and rebuttal. In response to the District Court's order, this agency allowed defendants to submit a rebuttal vocational report based only on evidence in the record, limited to ten pages.

In response to that order, defendants submitted a vocational report from Scott Mailey, M.S.

On November 6, 2018, claimant filed a motion to conduct additional discovery. That motion was denied in a ruling of January 2019.

According to the May 9, 2019, order on motion to dismiss from the District Court for Polk County, claimant then filed a petition for judicial review arguing that the January 2019 ruling on remand be overruled.

In a May 9, 2019 order on motion to dismiss, the District Court dismissed claimant's petition for judicial review.

As the District Court dismissed claimant's most recent petition for judicial review, this agency must now comply with the June 22, 2018, order from the District Court, ordering this agency to consider the letter regarding the sale of Rhoden Auto, the letter from H&H Automotive regarding claimant's future employment, and the vocational report from Mr. Mailey, and how that impacts the findings of fact and conclusions of law regarding claimant's industrial disability.

ISSUE

The only issue to be considered on remand is whether the new evidence affects the finding of claimant's industrial disability as detailed in the May 10, 2017, appeal decision.

FINDINGS OF FACT

Judicial notice is taken of the findings of fact in the May 10, 2017, appeal decision.

As noted in the appeal decision, claimant was 57 years old at the time of hearing. He graduated from high school and he has an AA degree in auto mechanics. (Appeal Decision, page 3)

Claimant was hired by defendant-employer in 1983 as a service technician. In 1989, claimant was promoted to the position of Fixed Operations Director. Id.

On November 19, 1997, claimant was in an automobile accident and was severely injured. Claimant's injuries from that accident include, but are not limited to, a fracture of the ulna and radius, a left inferior orbital rim fracture, a left sensory brachioradialis sensory deficit, a post-traumatic aortic arch transection, multiple fractures, laceration of the liver, T-1 spinous process displaced fracture, and a left scrotal laceration. A more detailed list of claimant's total injuries are found in the arbitration and appeal decisions. In an October 2014 independent medical evaluation (IME), Robin Sassman, M.D., identified 20 different diagnoses due to the 1997 work injury. (Exhibit 10, pp. 2-15)

Claimant returned to work as a Fixed Operations Director after the injury. The record indicates claimant only performed work that he was comfortable performing. Claimant said it took years for him to figure out what he could do, given his multiple injuries and restrictions. Claimant said he did not work full time as he routinely missed work for medical appointments. (App. Dec, p. 6)

In September 2006, claimant was assessed as having post-traumatic stress disorder (PTSD) and found to have a 15 percent permanent impairment related to the mental injury. (Ex. 5, p. 14)

In June of 2013, claimant underwent an L4-S1 spinal fusion. The surgery was found to be causally connected to the 1997 auto accident. (Ex. N, p. 2)

In an October 2014 IME report, Dr. Sassman found claimant had an overall functional impairment of 69 percent to the body as a whole. She limited claimant to lifting, pulling, pushing or carrying 20 pounds occasionally. (Ex. 10, pp. 25-26)

As noted above, this matter was heard in arbitration on May 18, 2015. The arbitration decision, filed on December 4, 2015, found claimant was permanently and totally disabled.

The appeal decision, filed May 10, 2017, affirmed and modified the arbitration decision and found claimant had a 90 percent industrial disability.

In a February 8, 2016, letter, Rod Rhoden, president of Rhoden Automotive Center, indicated that Rhoden was sold to H&H Automotive. The last day the company operated Rhoden Auto Center was February 26, 2016. (Ex. 20)

The letter indicated the owner of H&H Automotive would not offer claimant a position in their organization and that claimant's last day of employment with Rhoden was February 26, 2016. (Ex. 20) The letter also noted:

> Due to this accident, David's ability to walk, stand, bend, lift, sit, concentrate, and more have been dramatically impacted. It is now increasingly clear that despite the accommodations afforded to him, the wear and tear from the

> car accident related injuries, and its considerable mental and physical impact, have made it nearly impossible for him to continue to perform his job, and appear to be accelerating the decline in David's mental and physical health as he ages.

(Ex. 20)

In a February 24, 2016, letter, H&H Automotive indicated it was not offering claimant employment with the company. (Ex. 21)

In an October 30, 2018, report, Mr. Mailey gave his opinions of claimant's vocational opportunities following a vocational evaluation. In his evaluation, Mr. Mailey used the permanent restrictions recommended by Dr. Sassman. Mr. Mailey identified approximately 35 actual different positions claimant could perform within claimant's geographic labor market. (Ex. N, pp. 39-44)

Mr. Mailey opined claimant had a loss of access to the labor market of between 65 to 70 percent. He opined claimant would have access to jobs earning between $10.63 an hour to $35.95 per hour. Mr. Mailey noted,

> Mr. Borg's transferable skills, based on his previous work history, training and residual functional capabilities would allow Mr. Borg to successfully obtain and maintain gainful employment in occupations listed above. Though not all inclusive, these occupations are representative of those available to Mr. Borg should he seek alternate gainful employment. No further training other than on-the-job training would be necessary.

(Ex. N, p. 45)

CONCLUSIONS OF LAW

The only issue to be determined is whether the new evidence affects the finding of claimant's industrial disability as determined in the May 10, 2017, appeal decision.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

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 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.

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).

Defendant employer sold its business in February of 2016. The new employer, H&H Automotive, did not hire claimant. (Exs. 20 & 21)

The most recent evidence of claimant's industrial disability is a vocational evaluation performed by Mr. Mailey. Mr. Mailey used Dr. Sassman's permanent restrictions to evaluate claimant's vocational opportunities. He found claimant had a 65 to 70 percent loss of access to the labor market. He also identified approximately 35 actual positions claimant could work within his geographic labor market.

Mr. Mailey did not meet or interview claimant. He reviewed claimant's records. After his review of the records, Mr. Mailey performed a geographic labor market survey. There is no indication in the report the jobs identified by Mr. Mailey were referred to claimant. There is no indication in the report Mr. Mailey assisted claimant in finding work. It appears Mr. Mailey was only hired to opine on the potential vocational opportunities for claimant and the potential employers who might hire claimant.

When this matter went to hearing in arbitration, claimant was still working with defendant Rhoden. The record on appeal was the record made at the arbitration hearing. Claimant's continued employment with Rhoden was a significant factor in finding, on appeal, that claimant had a 90 percent industrial disability as a result of the work injury.

Since the appeal decision, the record has been supplemented. The record before this agency now is Rhoden was sold to H&H Automotive, and claimant was not hired by the successor employer. Most telling is the opinion of Rod Rhoden, president of Rhoden Auto Center. That opinion bears repeating.

> It is now increasingly clear that despite the accommodations afforded to him, the wear and tear from the car accident related injuries, and its considerable mental and physical impact, have made it nearly impossible for him to continue to perform his job, and appear to be accelerating the decline in David's mental and physical health as he ages.
>
> (Ex. 20)

Claimant was employed with Rhoden for approximately 33 years. Mr. Mailey spent a few hours reviewing claimant's records and doing research regarding claimant's potential job opportunities. Since 1997, defendant-employer has accommodated claimant's employment and observed claimant work hard to maintain his job. Defendant employer's opinion is that the accelerated deterioration of claimant's mental and physical condition has made it "nearly impossible" for him to continue to do his job. Defendant employer's opinion is that the work claimant did at Rhoden quickened his mental and physical decline.

The employer, in this case, has far more experience in observing and working with claimant, than does Mr. Mailey. The employer has far more experience in dealing with claimant daily, than does Mr. Mailey. Based on this record, it is found the opinions of Mr. Rhoden are far more convincing than the opinions of Mr. Mailey.

A significant factor in the May 10, 2017, appeal decision was that claimant was still employed. Since late February of 2016, claimant has not been employed with defendant-employer, or the successor employer. Defendant employer's opinion is that claimant's condition made it nearly impossible for him to do his job.

Given the new evidence, the appeal decision is modified to reflect that claimant is permanently and totally disabled. Claimant is entitled to permanent and total disability benefits starting November 23, 1998, through December 13, 1998, and from June 28, 1999, until claimant is no longer permanently and totally disabled.

ORDER

IT IS THEREFORE ORDERED:

Given the new evidence, the appeal decision is modified.

Defendants shall pay claimant permanent and total disability benefits beginning November 23, 1998, through December 13, 1998, and from June 28, 1999, until claimant is no longer permanently and totally disabled at the weekly rate of eight hundred fifty-three and 25/100 dollars ($853.25) per week.

Defendants shall receive credit for all benefits paid to date.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30. Defendants 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).

Signed and filed on this 8th day of June, 2020.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Kyle T. Reilly (via WCES)

Caroline Westerhold (via WCES)

James W. Russell (via WCES)

Paul S. Swinton (via email pswinton@fbfs.com)