BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SHAWN COSENZA, Claimant, vs. AUTOMOTIVE ENTERPRISES COMPANY, INC., Employer, and ACCIDENT FUND INS. CO. OF AM., Insurance Carrier, Defendants.	File No. 5047579 ARBITRATION DECISION Head Note No.: 1803

FILED
MAR 08 2018
WORKERS' COMPENSATION

STATEMENT OF THE CASE

Shawn Cosenza filed a petition for arbitration seeking workers' compensation benefits from Automotive Enterprises Company and Accident Fund Insurance Company of America.

The matter came on for hearing on September 14, 2017, before deputy workers' compensation commissioner Joseph L. Walsh in Des Moines, Iowa. The hearing issues were bifurcated. The first hearing in this matter was held on April 15, 2016, before Deputy Commissioner Erin Pals. She entered an arbitration decision dated July 13, 2016.

The record in the case consists of claimant's exhibits 1 through 26 (1 through 18 were submitted at earlier hearing); defense exhibit A; as well the sworn testimony of claimant, Shawn Cosenza.

Michele Chase was appointed the official reporter for this hearing. The parties briefed this case and the matter was fully submitted on October 23, 2017.

SUMMARY OF ISSUES AND STIPULATIONS

The parties previously tried this case on April 15, 2016, before Deputy Erin Pals. An arbitration decision awarding benefits was entered on July 13, 2016. Administrative notice is taken of the file. That decision is a binding snapshot of the claimant's condition as of April 15, 2016.

The parties entered a number of stipulations in the hearing report. Those stipulations appear to be consistent with the arbitration decision and are accepted by this agency and are deemed binding upon the parties. Prior to the start of hearing, the defendants stipulated that they are responsible for $3,078.90 in medical travel expenses. The parties have stipulated that the claimant's disability is industrial and the commencement date for benefits is November 18, 2014.

The parties have asked the agency to determine two disputed issues: (1) the extent of claimant's industrial disability and (2) costs.

As mentioned above, there is a final and binding arbitration decision in this file, dated July 13, 2016. Claimant was granted a running award of healing period benefits. The factual findings therein are binding.

FINDINGS OF FACT

Shawn Cosenza is a pleasant, soft-spoken 39 year old, right-handed man. He appears slightly older than his stated age. He was born in Florida and lived in Florida and Georgia until he dropped out of high school in the 9th grade. He was not a good student. Mr. Cosenza testified he has significant difficulty reading and writing. He moved to the Dubuque, Iowa area with a friend.

Mr. Cosenza testified under oath at hearing. I find him to be highly credible. His testimony was consistent with the medical records, as well as his prior sworn testimony. His demeanor was subdued and appropriate. There was nothing at all about his demeanor which caused me any concern regarding his truthfulness. In fact, he did not appear to exaggerate his claims at all.

The parties have stipulated that Mr. Cosenza sustained a cumulative injury to his bilateral hands and his right shoulder on March 17, 2014. In November 2005, he was hired by Automotive Enterprises Company, Inc. ("Automotive Enterprises"); a company that chrome-plates auto parts. Mr. Cosenza specialized in chrome-plating motor vehicle bumpers. He described his work as demanding and heavy. He was required to lift heavy bumpers and place them into vats of chemicals. He also had to hold the bumpers against a bench-mounted buffer, wheel, or lathe in order to grind, sand, and polish them. Shawn's job also required the use of hand-held grinders.

After his injury, Mr. Consenza began a lengthy and frustrating course of treatment which was well-described by Deputy Pals and mostly unsuccessful.

> Shawn was directed to see Julie Muenster, ARNP at Tri-State Occupational Health. She assessed him as having bilateral carpal tunnel syndrome, provided him with splints, and referred him to an orthopaedic surgeon. (Ex. 5, pages 1-5)
>
> On June 19, 2014, Shawn saw Edwin Castaneda, M.D. at Medical Associates. Shawn reported his hand and arm symptoms as well as his

right shoulder problems. However, according to Shawn, Dr. Castaneda told him that he could only deal with one part of the body at a time and the carpal tunnel was more significant, so that would be dealt with first. The doctor recommended surgery on both hands for the carpal tunnel. (Ex. 6, pp. 1-3) Dr. Castaneda performed right hand surgery on August 8, 2014, and a similar surgery on the left side on September 19, 2014. (Ex. 7, pp.1-3; Ex. 4, pp. 3-6)

Shawn performed his normal, full-time duties at Automotive Enterprises until the time of the first surgery on August 8, 2014. He had restrictions placed on his activities after the surgery. Automotive Enterprises did not have light-duty work available so Shawn was not able to return to work. (Testimony)

Shawn continued to follow-up with Dr. Castaneda. By November 17, 2014, Shawn's numbness and tingling had completely resolved and he had excellent range of motion in his hands. His grip strength returned and he was not having any pain or discomfort. Dr. Castaneda released Shawn to return to normal activity without restriction. The doctor assigned zero percent permanent impairment. The note states that Shawn was released from his care. (Ex. 6, pp. 15-17) Shawn testified that he again mentioned his right shoulder symptoms to Dr. Castaneda at this appointment. However, Dr. Castaneda informed Shawn that he did not treat shoulders and that would have to be a totally separate claim. Dr. Castaneda's notes make no mention of Shawn's right shoulder.

Shawn testified that he reported for work the next day at his normal 5:00 a.m. start time. He told his employer that the doctor had released him to return to work but his shoulder was still causing him problems so he needed light duty work. His employer told him that they did not have any light duty work. Shawn did not return to work. At hearing Shawn admitted that he did not have any formal restrictions placed on his activities by a medical provider at that time; any "restrictions" he had were self-imposed. (Testimony)

Shawn continued to experience problems with his right shoulder. At some point he requested treatment for his shoulder. Defendants eventually agreed to provide an orthopaedic evaluation for the right shoulder injury with Kyle S. Galles, M.D. Shawn saw Dr. Galles in Des Moines on January 14, 2015. Dr. Galles stated that Shawn's right shoulder was quite likely aggravated by his work activities. He gave Shawn a subacromial cortisone injection. He also recommended outpatient physical therapy which, according to claimant, was never scheduled. (Ex. 9, pp. 1-2)

With the loss of Shawn's full-time income, he and his family were having financial difficulties. Shawn's mother, who lived in Georgia, offered to provide them a temporary place to live. In June of 2015, Shawn went to Georgia. Over the course of that summer Shawn also moved his wife and five children to Georgia. (Testimony)

Defendants scheduled a follow-up appointment for Shawn to see Dr. Galles in Des Moines on July 2, 2015. The clinical notes indicate that the January shoulder injection provided only temporary relief. Dr. Galles ordered an MRI of the right shoulder, which was performed on July 16, 2015. The MRI revealed a small superior labrum tear, but no rotator cuff tear. (Ex. 9 & Ex. 10)

At a July 18, 2015 appointment, Dr. Galles reviewed the MRI and informed Shawn that the MRI was consistent with a bone bruise to the clavicle and that his case was not surgical. Dr. Galles opined that Shawn should be able to return to work without restrictions in 4 to 6 weeks. (Ex. 9, pp. 15-16) The July 18, 2015, Patient Status Report form indicates permanent restrictions of minimizing repetitive heavy lifting over shoulder height. According to Shawn, this would prohibit him from ever returning to his position at Automotive Enterprises. (Ex. 9, p. 18) It is noted that this was changed to a temporary restriction on September 1, 2015. (Ex. 9, p. 23) However, Dr. Galles issued a report also dated July 18, 2015, wherein he placed Shawn at maximum medical improvement (MMI), assigned zero percent impairment, and stated that he should avoid heavy lifting with the right shoulder over shoulder height. The report does not state whether the restriction is temporary or permanent. (Ex. 9, p. 24)

On September 3, 2015, defendants advised that all further benefits for Shawn would terminate as of September 30, 2015. (Ex. 14, p. 8)

Shawn was evaluated by Mark C. Taylor, M.D. at Medix. He opined that the right shoulder injury was work-related and recommended further treatment, including a referral to an orthopaedic specialist in Georgia. (Ex. 12)

On October 9, 2015, claimant's counsel expressed dissatisfaction with the medical care provided and requested further orthopedic treatment with a shoulder specialist. Additionally, a petition for alternate medical care was filed, but was dismissed once defendants agreed to send Shawn to an orthopaedic surgeon near his residence in Georgia. (Ex. 14, p. 9)

Defendants arranged for Shawn to be seen by William E. MacLeod, M.D. at Optim Healthcare on December 15, 2015. Dr. MacLeod stated that Shawn's history, exam and MRI findings were consistent with a SLAP tear, rotator cuff tear, biceps tenosynovitis, and severe acromioclavicular

> (AC) arthrosis. He recommended right shoulder arthroscopic rotator cuff repair, SLAP repair, biceps tenodesis, distal clavicle resection, and subacromial decompression. (Ex. 13, pp. 1-2)
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> At defendants' request, Dr. Galles reviewed Dr. MacLeod's records. Dr. Galles still felt that the injury was a bone bruise and mild arthritis. (Ex. 9, p. 26)
>
> Defendants initially denied the shoulder surgery that was recommended by Dr. MacLeod, a specialist selected and hired by defendants. Eventually, defendants agreed to a repeat right shoulder MRI, with and without contrast; this was carried out on March 8, 2016. The MRI showed a tear in the supraspinatus, tendinosis, and AC joint osteoarthritis. (Ex. 13, pp. 4-5) Once again, Dr. MacLeod recommended surgery. He noted that the MRI confirmed a partial-thickness tear on the supraspinatus tendon on the articular side and AC arthrosis and biceps tenosynovitis. (Ex. 13, p. 6) Dr. MacLeod performed extensive surgery, which included rotator cuff repair, on March 28, 2016.

Cosenza v. Automotive Enterprises Company, Inc., File No. 5047579, pages 3-5 (July 13, 2016 Arb). An extensive shoulder surgery was performed by William E. MacLeod, M.D., on March 28, 2016.

> At the time of hearing [April 15, 2016], Shawn was undergoing physical therapy and had been told that his rehabilitation could take up to a year. (Ex. 13, p. 9) The parties stipulated that Shawn is entitled to a running award of temporary disability benefits until he returns to work or reaches maximum medical improvement.

Cosenza, File No. 5047579 at 5.

After the date of his first arbitration hearing, Mr. Consenza remained in a healing status, receiving active medical treatment and temporary workers' compensation payments. On June 28, 2016, Mr. Cosenza returned to Dr. MacLeod, who documented the following. "We are going to continue him in physical therapy. Allow him to return to full-duty probably in 1 month. We will continue him at limited lifting, no overhead work." (Cl. Ex. 13, p. 13) Physical therapy was provided at Rehabilitation Services of Coffee, Inc., from April 2016, through July 26, 2016. (Cl. Ex. 22, pp. 4-31) He reported significant improvement in physical therapy and minimal pain. (Cl. Ex. 22, p. 31) On the same date, Dr. MacLeod released him from medical care and referred him for a functional capacity evaluation. (Cl. Ex. 13, p. 15) He also provided a full-duty work slip. (Cl. Ex. 13, p. 16)

Claimant underwent an FCE with Linda King, PT, on August 15, 2016. She performed range of movement measurements and rated claimant's impairment of 6 percent of his whole body. (Cl. Ex. 19) She recommended restrictions for the claimant

which placed him in the medium work category. (Cl. Ex. 19, p. 2) She recommended a 50-pound lifting limitation overall and a 25-pound limitation on frequent lifting. (Cl. Ex. 19)

On February 21, 2017, at the request of claimant's counsel, Mr. Cosenza underwent a second FCE through Advantage Physical Therapy and Rehab. (Cl. Ex. 20) Following testing, Charles Goodhue, PT, placed the claimant at "the upper end of the light work category." (Cl. Ex. 20, p. 5) This evaluation placed greater restrictions upon the claimant. The restrictions are quite detailed with different restrictions on different types and frequencies of the lifts. This is all set forth in detail in claimant's exhibit 20, pages 6 to 9. Most significantly, a 25 pound floor to waist restriction was recommended, as well as no lifting from waist to shoulder height on a frequent basis.

Mark Taylor, M.D., performed an independent medical evaluation at claimant's request on February 21, 2017. He reviewed records, took a history and performed an evaluation. He assigned a 10 percent whole person impairment rating specific to the right shoulder. (Cl. Ex. 21, p. 4) Dr. Taylor generally approved of the restrictions from the second FCE, which he characterized as follows.

> I would recommend the restrictions outlined as part of his FCE on February 21, 2017, which included floor-to-waist lifting of 35 pounds occasionally, and carrying of 30 pounds occasionally. In my opinion, as long as he can keep his right arm close to his body, he may be able to lift up to 25 pounds occasionally between waist and chest level. However, I agree with the 10-20 pound limit up to or above shoulder level. I would recommend rare overhead reaching with the right arm, and no forceful pushing or pulling with the right arm. As noted in my prior report, he should avoid repetitive gripping and grasping. I also recommend that he avoid forceful gripping grasping other than on a rare basis. Similarly, he should avoid vibratory or power tools other than on a rare basis.

(Cl. Ex. 21, pp. 4-5)

I generally find that the restrictions provided by Linda King represent the most believable limitations in the record. Ms. King noted claimant's deficits in doing work away from his body and overhead.

Since recuperating from his surgeries, Mr. Cosenza has not sought employment. He now lives in a small town in Georgia, which has lower cost of living and fewer work opportunities.

Q. Okay. Have you worked any where since then [Automotive Enterprises]?

> A. No. I – I – my wife – see, I can go out and get like a McDonald's job, you know, something like that, but they only pay minimum wage. So I

> ended up being the stay home father, you know, with my kids. Clean the house and my wife works for Hospice. So you know she – she making thirteen dollars and hour. Se we just went ahead and went that route, you know?

(Cl. Ex. 25, Cosenza Depo, p. 10) Claimant's wife was increasing her education to advance in the field of nursing at the time of hearing. Mr. Cosenza clearly believes that he will be unable to earn much, if anything beyond minimum wage, given his impairments and restrictions. He testified that his plan is to return to work within the next year or so after his kids are a little older. At the time of hearing, his youngest was 9-years-old. He did testify that he believes he will be able to secure employment and that he would be able to perform some of his past relevant work such as maintenance or security.

The decision to remain out of the workforce appears perfectly reasonable under the circumstances. Based upon the record before me, it makes sense that claimant would focus on his children while his wife advances her career at this time. In any event, his decision to not seek employment does make it slightly more difficult to assess his precise loss of earning capacity.

CONCLUSIONS OF LAW

It is stipulated that claimant has suffered some permanent industrial disability as a result of his March 17, 2014, work injury. The primary question is the nature and extent of claimant's 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, 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.

The refusal of defendant-employer to return claimant to work in any capacity is, by itself, significant evidence of a lack of employability. Pierson v. O'Bryan Brothers, File No. 951206 (App. January 20, 1995). Meeks v. Firestone Tire & Rubber Co., File No. 876894, (App. January 22, 1993); See also, 10-84 Larson's Workers' Compensation Law, section 84.01; Sunbeam Corp. v. Bates, 271 Ark. 609 S.W.2d 102 (1980); Army & Air Force Exchange Service v. Neuman, 278 F. Supp. 865 (W.D. La. 1967); Leonardo v. Uncas Manufacturing Co., 77 R.I. 245, 75 A.2d 188 (1950). An employer who chooses to preclude an injured worker's re-entry into its workforce likely demonstrates by its own action that the worker has incurred a substantial loss of earning capacity. As has previously been explained in numerous decisions of this agency, if the employer in whose employ the disability occurred is unwilling to accommodate the disability, there is no reason to expect some other employer to have more incentive to do so. Estes v. Exide Technologies, File No. 5013809 (App. December 12, 2006).

I find that the claimant has suffered a 45 percent loss of earning capacity as a result of his work injury.

Claimant was 39 years old as of the date of hearing. He has an eighth grade education. He has not attained his G.E.D. His formal education is quite limited. He is not a likely candidate for retraining.

Mr. Cosenza was paid well for his work with Automotive Enterprises. His average weekly earnings at the time of injury were over $1,000 per week on a commission basis. It was heavy, physically demanding work to be sure. He has had surgeries on both wrists (carpal tunnel) in 2014. After a prolonged course of care on the right shoulder, he was finally offered surgery through Dr. MacLeod in March 2016. The diagnosis was right shoulder rotator cuff tear, right shoulder arthroscopic biceps tenodesis. All of the surgeries were reasonably successful, although he has suffered permanent impairments in the affected areas (bilateral hands and right shoulder). I reject Dr. Castaneda's assertion that he has no functional loss in his bilateral hands. The record in this case totally belies this assertion. Dr. Taylor assessed his permanent functional loss as three percent of each upper extremity. I find this to be a reasonable assessment of Mr. Cosenza's permanent loss of function. Likewise, I adopt Dr. Taylor's rating on the right shoulder, of 10 percent of the whole body.

As noted, the healing period was quite long. Mr. Cosenza went off work at around the time of his first wrist surgery in 2014 and was not released from medical care for nearly two years (July 2016). It has been a long time since Mr. Cosenza worked in the competitive job market or sought employment of any kind. This will undoubtedly make re-entry into the workforce more difficult and time-consuming. The claimant has made a conscious, albeit reasonable, decision not to re-enter the workforce as of the time of hearing as his wife advances her career in nursing. The claimant believes he could only work a minimum wage-type entry level position at this time, given his condition. While that may be true, it is not entirely clear in this record

partially due to the fact that he has not attempted to secure employment.

Generally speaking, I find that the restrictions set forth by Valdosta Physical Therapy, Linda King, are the most accurate reflection of claimant's current restrictions. The restrictions provided therein place claimant in a medium work classification and recommend he not exceed lifting of 50 pounds and frequent lifting of 25 pounds. (Cl. Ex. 19, p. 2) These restrictions are clear and understandable. My only hesitancy in adopting these restrictions is that it is evident that claimant's shoulder condition will cause him some difficulty performing overhead work and away from his body. The restrictions provided from his second FCE through Advantage Physical Therapy and Rehab are more detailed and also more complicated. (Cl. Ex. 20, pp. 6-9) It would not be reasonable to attempt to work under such restrictions and I strongly suspect when claimant does return to the workforce he will attempt to utilize the medium work restrictions. Nevertheless, his lack of range of motion such as his inability to reach behind himself is well documented and believed. (Cl. Ex. 19, p. 2) Furthermore, Dr. Taylor's advice to avoid the regular use of power tools and repetitive forceful gripping and grasping seems like a common-sense recommendation. (Cl. Ex. 21, p. 5)

There is little doubt that Mr. Cosenza would be unable to perform his position for the employer in this case even if they had not terminated his employment. It was quite heavy and required substantial lifting. In this position, claimant experienced substantial earnings. It will be very difficult for claimant to ever achieve this level of earnings again given his age, education and work skills. It is hard to tell precisely what claimant will be able to earn when he re-enters the competitive job market. Again, while I find his decision to stay home with his children reasonable under the circumstances, I find that the ambiguity created by this decision is generally held against the claimant. In other words, while his actual loss could be slightly higher than 45 percent, I do not find that loss in excess of 45 percent has been proven as of the date of hearing. He testified that he intends to seek jobs driving and that he would be capable of performing some of his past relevant jobs, including security and maintenance.

Having found that claimant has suffered a 45 percent loss of earning capacity, I conclude that he is entitled to 225 weeks of compensation at the rate of compensation previously determined.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay the claimant two hundred twenty-five (225) weeks of permanent partial disability benefits at the rate of six hundred ninety-two and 14/100 dollars ($692.14) determined in the July 2016, arbitration decision. Benefits shall commence on November 18, 2014.

Defendants shall pay accrued weekly benefits in a lump sum.

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

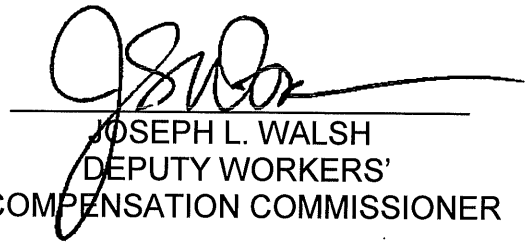
Defendants shall be given credit for the weeks previously paid.

Defendants are responsible for three thousand seventy-eight and 90/100 dollars ($3,078.90) in medical travel expenses as stipulated.

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

Costs are taxed to defendants.

Signed and filed this 8th day of March, 2018.



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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.