

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CLIFFORD DANIEL RAPER,

Claimant,

vs.

HARRISON COUNTY,

Employer,

and

IMWCA,

Insurance Carrier,
Defendants.

FILED

MAR 08 2019

WORKERS COMPENSATION

File No. 5058466

ARBITRATION

DECISION

Head Note No. 1803

STATEMENT OF THE CASE

The claimant, Clifford Daniel Raper, filed a petition for arbitration and seeks workers' compensation benefits from Harrison County, employer, and IMWCA, insurance carrier. The claimant was represented by Channing Dutton. The defendants were represented by Ryan Clark.

The matter came on for hearing on March 2, 2018, before deputy workers' compensation commissioner Joe Walsh in Des Moines, Iowa. The record in the case consists of claimant's exhibits 2 through 4 and defense exhibits A through G and Joint Exhibit 1. The claimant testified under oath at hearing. Emily Maiers served as the court reporter. The matter was fully submitted on April 9, 2018, after helpful briefing by the parties.

ISSUES

The parties submitted the following issues for determination:

1. The nature and extent of claimant's industrial disability.
2. The appropriate commencement date for benefits.
3. Whether defendants are entitled to a credit for 46 weeks of compensation paid.

STIPULATIONS

Through the hearing report, the parties stipulated to the following. These stipulations have been accepted by the agency and are deemed enforceable at this time:

1. The parties had an employer-employee relationship.
2. Claimant sustained an injury which arose out of and in the course of employment on February 26, 2015.
3. The injury is a cause of both temporary and permanent disability.
4. Temporary disability/healing period and medical benefits are no longer in dispute.
5. The weekly rate of compensation is \$353.32.
6. Affirmative defenses have been waived.

FINDINGS OF FACT

Claimant, Clifford Daniel Raper (hereafter "Dan") was 74 years old as of the date of hearing. Dan is married and has two grown children. His wife Betty had a stroke a few years ago and Dan has been caring for her in Lenexa, Kansas. Dan graduated from high school in 1961 in Greenfield, Iowa. He also graduated from the Iowa Law Enforcement Academy. He served honorably in the United States Navy from approximately 1963 to 1967.

Dan testified live and under oath at hearing. I find his testimony to be highly credible. I find him to be an accurate historian. His testimony is consistent with the documents in the record, including the medical file. There was nothing about his demeanor at hearing which adversely impacts his credibility whatsoever.

After graduating the Law Enforcement Academy, Dan worked as an Iowa State Patrol officer. He worked in this position for approximately 30 years, promoting up to the rank of sergeant. As a sergeant, Dan performed regular patrol work and also supervised other officers. Unfortunately, Dan suffered a series of injuries which led to two low back surgeries. Eventually, he was no longer able to pass the physical testing required to be a trooper. He retired from the Iowa State Patrol in approximately 1996 under its disability program at the age of 51. Based upon the record before me, it is not entirely clear what his exact restrictions were when he took disability retirement from the State Patrol.

In spite of his medical condition, Dan was not ready to retire. He desired to stay active and busy. In approximately 1999, he developed a second career working for several different counties in western Iowa as a driver's license examiner. Over time, his

precise relationship with various local governments changed to some degree, however, in general he worked for several different counties administering driving examinations. (Claimant's Exhibit 3) In 2014, he was working for Harrison, Sac and Greene counties. This was essentially light-duty work, which were within his abilities. He administered commercial and passenger driving examinations, oral examinations and occasionally help out around the office.

On February 26, 2015, while working for Harrison County, Dan was going to his car parked at the courthouse lot in Logan, Iowa. He slipped on ice causing him to fall unexpectedly. He suffered a cut on his head and his right elbow. He reported the injury right away; however, he did not seek treatment immediately. After the pain persisted in his shoulder and head, he sought medical care.

Dan first received treatment on March 6, 2015, at Overland Park Regional Medical Center. (Joint Exhibit 1, page 1) After a number of radiology tests, he was diagnosed primarily with a head injury and a neck strain. On March 12, 2015, he was evaluated by Mary Lob, M.D., at Logan Clinic. She treated Dan for significant headaches and right sided pain. (Jt. Ex. 1, p. 20) He saw various physicians in his initial course of care which focused mainly on the headaches and, to a lesser degree his neck or cervical spine. Eventually, physicians focused in on his right shoulder. (Jt. Ex. 1, p. 36)

In October 2015, Dan was referred to Des Moines Orthopedic Surgeons where he was evaluated by Thomas Dulaney, M.D. (Jt. Ex. 1, p. 57) Shortly after this evaluation, Dr. Dulaney provided a pain injection for his right shoulder and ordered an MRI. In July 2016, Dan was finally referred to Mark Rasmussen, M.D., an orthopedic surgeon. Dr. Rasmussen diagnosed a full thickness rotator cuff tear. (Jt. Ex. 1, p. 73) After noting that considerable conservative medical treatments had already been attempted, the decision was to move forward with surgery. Surgery was performed on August 30, 2016. (Jt. Ex. 1, p. 115) This was followed by a relatively normal period of post-operative treatment and a period of recovery. On April 11, 2017, Dr. Rasmussen released Dan back to his regular work activities. "At this stage I would allow him to work his normal job type duty and I have given him that. He would not be able to do heavy lifting, but that was not part of his job requirement before." (Jt. Ex. 1 p. 97)

During claimant's treatment in 2015 through Summer 2016, Dan continued to work. He commuted between his home in Denison, Iowa, and Lenexa, Kansas, where his wife and children live. He testified that the rehabilitation services were better in Lenexa, Kansas, so he made it work. On August 30, 2016, Dan went off work from the surgery and remained off work ever since. He was paid benefits during this period of time. When he was released by Dr. Rasmussen on April 11, 2017, all three of the counties he worked for had terminated their employment relationships. Therefore, when Dan was released, there was no job to return to, and he remained off work. He has not sought other employment since this time, instead focusing on assisting his wife who requires full-time care in Lenexa, Kansas.

When he was released by Dr. Rasmussen, the defendants switched his benefits from temporary disability payments to permanent partial disability payments. (Defendants' Exhibit G, p. 49) Claimant contends that, since no work was offered, he should have remained on temporary disability benefits until he reached maximum medical improvement (MMI). I find that Dan was capable of substantially similar employment. As of April 11, 2017, benefits were properly converted to permanent partial disability. Dan reached MMI on or about October 18, 2017. (Jt. Ex. 1, p. 108)

Dan was next evaluated by Sunil Bansal, M.D., in November 2017. Dr. Bansal performed a thorough review of the medical file and examined Dan. He agreed with the diagnosis of Dr. Rasmussen and assigned a 4 percent whole body impairment rating. He also assigned a 3 percent whole body rating for disc bulges in Dan's cervical spine. He provided no rating for claimant's right elbow. (Cl. Ex. 2, p. 169) Dr. Bansal recommended the following restrictions:

I would place a lifting restriction of 20 pounds. He should avoid lifting more than 10 pounds overhead, and no frequent overhead lifting. He needs to avoid work or activities that require repeated neck motion, or that place his neck in a posturally flexed position for any appreciable length of time (greater than 15 minutes). No lifting over the shoulder level with the right arm.

(Cl. Ex. 2, p. 170) Dr. Bansal did not specifically mention the head injury in his conclusions.

In January 2018, Dr. Rasmussen provided a 5 percent whole body impairment rating for the permanent damage in Dan's right shoulder. (Jt. Ex. 1, pp. 110-111) This is a credible rating. The diagnosis was right shoulder rotator cuff tear, impingement, labral tear. Dr. Rasmussen did not address permanent restrictions. It is likely he did not address restrictions because Dan was not seeking work and had essentially chosen to be retired once his employment relationships with the various counties had ended.

Dan testified at hearing in detail regarding his difficulties using his right shoulder now. He has difficulty using his right arm and shoulder, particularly away from his body or overhead. This impairs his activities of daily living in a variety of ways and is also documented in the physical therapy records. (Jt. Ex. 1, p. 119)

CONCLUSIONS OF LAW

The primary question submitted is nature and extent of claimant's disability. Claimant alleges he is significantly permanently partially disabled while defendants contend he has no real industrial loss or the loss has already been compensated fairly.

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.

Although claimant is close to a normal retirement age, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund 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.

Claimant was 74 years old at the time of hearing. He has a high school diploma. He was already significantly disabled as a result of low back injuries and surgeries suffered while working as a sergeant in approximately 1996. Since 1999, he has been a driver's license examiner. This position was quite light already. He was able to do the work even with his back disability.

The claimant now has a right shoulder and neck condition which impairs his abilities in the competitive job market. He also suffered a head injury in the accident; however, no physician has specifically opined that he suffers any permanent impairment associated with this condition. Claimant testified credibly that he had ongoing symptoms similar to the symptoms he first developed following his head injury. In particular, he has headaches and sensitivity to light. These symptoms have not improved since the injury. For purposes of his industrial disability analysis though, these symptoms are not factored in. There is simply not enough medical evidence that these symptoms amount to a permanent condition which in any way impacts his employability. I do find that the symptoms are likely related to his original injury, which entitles him to ongoing treatment for these problems, if any is available. I simply find that, with the current record, there is not enough evidence to assess industrial disability for these symptoms.

Claimant's primary problem is his right shoulder. He has suffered a 4 or 5 percent body as a whole rating from his rotator cuff tear, impingement and labral tear. The restrictions recommended by Dr. Bansal are quite reasonable. He requires reasonable lifting restrictions, particularly above the shoulder and overhead. These restrictions would still allow him to perform his past work as a driver's license examiner. I find that claimant does also suffer from some ongoing damage to his cervical spine; however, this is fairly minimal and adds very little to his overall industrial disability.

Claimant's employers terminated their employment relationships with him while he was recuperating from this injury. It is noted that claimant's recuperation period was quite long. He was injured in February 2015. He originally continued to work through 2015 and 2016. He was laid off by Harrison County due to budget cuts in June 2016. His other two jobs laid him off while he was off work for his surgery after August 2016. While he is likely capable of performing his past employment, it seems far less likely that he would be able to secure such employment at the age of 74 with multiple disabilities.

I conclude, however, the burden is on the claimant to prove the extent of his industrial disability. The fact that he has chosen to retire and care for his wife, which is perfectly reasonable, does make it more challenging to determine the precise extent of his industrial disability. In other words, we would know, with a much higher level of certainty, what his exact earning capacity is at the time of hearing if he had sought employment.

Nevertheless, I find that the claimant has proven he suffered a moderate amount of industrial disability as a result of his February 2015 work injury. He has a damaged right shoulder which impedes his ability to lift and work overhead. At the age of 74 this is more significant than it would be for an otherwise healthy 35 year old, or even someone in their 50's. Having considered all of the relevant factors of industrial disability, I find that claimant has suffered a 25 percent loss of earning capacity as a result of his February 26, 2015, work injury. I conclude this entitles claimant to 125 weeks of benefits at the stipulated rate of compensation.

The next issue is the commencement date for such benefits.

The parties dispute the proper commencement date for permanent partial disability benefits. Permanent partial disability benefits commence upon the termination of the healing period. Iowa Code section 85.34(1). As the Iowa Supreme Court explained, the healing period terminates and permanent partial disability benefits commence at the earliest of claimant's return to work, medical ability to return to substantially similar employment, or the point at which the claimant achieves maximum medical improvement. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 374 (Iowa 2016).

Claimant was capable of substantially similar employment on April 11, 2017, the date Dr. Rasmussen released him to work. I agree with claimant that he was still restricted to some degree at that time, as he continues to be; however, under Section 85.34(1) this is the date healing period benefits cease. Consequently, I find defendants properly classified all benefits thereafter as permanent partial disability benefits and they are entitled to a credit for all such payments.

ORDER

THEREFORE IT IS ORDERED

Defendants shall pay the claimant one hundred and twenty-five (125) weeks of permanent partial disability benefits at the rate of three hundred and fifty-three and 32/100 (\$353.32) per week from April 11, 2017.

Defendants shall pay accrued weekly benefits in a lump sum.


Defendants shall pay accrued weekly benefits in a lump sum together with interest 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, as required by Iowa Code section 85.30.

Defendants shall be given credit for the forty-six (46) weeks previously paid.

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, 2019.



JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Channing L. Dutton
Attorney at Law
1415 Grand Ave.
West Des Moines, IA 50265
cdutton@lidd.net

Ryan M. Clark
Attorney at Law
505 Fifth Avenue, Ste 729
Des Moines, IA 50309
rclark@pattersonfirm.com

JLW/kjw

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.