

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KENT CARD,
Claimant,

FILED

APR 26 2017

vs.

WORKERS COMPENSATION

File No. 5054722

SHOE CARNIVAL,
Employer,

ARBITRATION DECISION

and

SENTRY INSURANCE,
Insurance Carrier,
Defendants.

Head Note No.: 1803

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Kent Card, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on October 29, 2015. Claimant alleged he sustained a work-related injury on October 23, 2014. (Original notice and petition.)

For purposes of workers' compensation, Shoe Carnival is insured by Sentry Insurance Company. Defendants filed their answer on November 16, 2015. A First Report of Injury was filed on February 4, 2015.

The hearing administrator scheduled the case for hearing on December 13, 2016. The hearing took place in Des Moines, Iowa at the Iowa Workforce Development Building. The undersigned appointed Ms. Kaylan R. McCord as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on his own behalf. Defendants elected not to call any witnesses at the hearing. The parties offered joint exhibits marked 1 through 7. Defendants offered exhibits marked A and B. All proffered exhibits were admitted as evidence in the case.

A transcript of the proceedings was filed on January 10, 2017. Post-hearing briefs were filed on January 13, 2017. The case was deemed fully submitted on that date.

STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

1. There was the existence of an employer-employee relationship at the time of the alleged injury;
2. Claimant sustained an injury on October 23, 2014 which arose out of and in the course of his employment;
3. The injury is a cause of both temporary and permanent disability;
4. Temporary benefits are no longer an issue;
5. Claimant sustained an industrial disability;
6. The parties agree, if a permanent work injury is determined, claimant reached maximum medical improvement on August 25, 2015 for the right shoulder and August 8, 2016 for the left shoulder;
7. The parties agree, the weekly benefit rate is \$464.94;
8. Defendants have waived any affirmative defenses they may have had available;
9. Medical benefits are no longer at issue;
10. Prior to the date of the hearing, defendants paid claimant 36 weeks of permanent partial disability benefits at the incorrect rate of \$519.78 per week; and
11. The parties agree certain costs that are detailed were paid by claimant.

ISSUE

The issue presented:

1. What is claimant's permanent partial disability?

FINDINGS OF FACT

This deputy, after listening to the testimony of claimant at hearing, after judging his credibility, and after reading the evidence, and the post-hearing briefs, makes the following findings of fact and conclusions of law:

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

Claimant is 45 years old and married. His 17-year-old stepdaughter resides with claimant and his spouse in Norwalk, Iowa. Claimant is right-hand dominant. He stands approximately 5 feet and 4 inches in height.

The extent of claimant's formal education is a General Educational Development equivalency, (GED) from Des Moines Area Community College. Claimant testified he has always experienced problems with reading. He stated he has trouble retaining the content of the sentences he reads. Claimant also testified he has difficulties with his memory.

Claimant's previous work history includes working at McDonald's as a teenager. He worked at the Art Store in the warehouse. He also worked in various home improvement retail outlets as a stocker. He worked briefly at Walmart, and Super Target. Claimant also worked at Kum & Go as the general manager of a store. He was paid a salary in the area of \$32,000.00. He was an assistant manager at Dunham Sports Store. Dunham's Sports Store closed. Claimant commenced employment at Shoe Carnival. Claimant testified his salary was approximately \$40,000.00 per year.

The parties stipulated claimant sustained bilateral injuries to his shoulders on October 23, 2014. The original precipitating incident occurred while claimant was unloading boxes of boots from the back of a truck and stacking the boxes onto the ground. Claimant felt a sharp pain in his right shoulder. (Transcript, pages 19-20) Initially, claimant believed he had merely pulled a muscle. Ultimately, claimant was referred to Christopher B. Vincent, M.D., an orthopedic surgeon at Iowa Ortho.

MRI testing of the right shoulder showed:

1. Extensive superior labral tearing.
2. Linear tear undermining the anterior supraspinous footprint. This is near-complete full-thickness. Contrast extravasation does not extend from the glenohumeral joint into the subacromial subdeltoid bursa.

(Exhibit 2, p. 1)

Dr. Vincent diagnosed claimant with a right complex superior labral tear undermining the biceps anchor. (Ex. 1, p. 7) The orthopedic surgeon opined there was a very slight partial articular-sided tearing of the most ventral fibers of the supraspinatus, but the majority of the tendon was intact. (Ex. 1, p. 7)

On January 28, 2015, Dr. Vincent performed right shoulder surgery. The procedure consisted of:

1. Right shoulder arthroscopy with arthroscopic biceps tenodesis.
2. Right shoulder arthroscopy with debridement of the labrum, subacromial decompression, acromioplasty, and CA ligament release.

(Ex. 3, p. 1)

There were no complications resulting from the surgery. Dr. Vincent placed claimant on a 5 pound weight restriction for a total of 6 weeks. (Ex. 3, p. 2) Later, claimant was given a program to improve the strength of the right biceps. With respect to the right shoulder, Dr. Vincent returned claimant to work without any work restrictions on June 30, 2015. (Ex. 1, p. 19)

By August 25, 2015, claimant's symptoms were less severe than prior to the surgery. (Ex. 1, p. 21) Dr. Vincent opined:

I believe the patient has maximally recovered, and I feel there is minimal to no anticipated change in function, pain level, or need for future treatments.

(Ex. 1, p. 22) Dr. Vincent determined claimant had reached maximum medical improvement on August 25, 2015 with regard to the right shoulder. (Ex. 1, p. 22)

During the time frame claimant was experiencing problems with his right shoulder, he began encountering difficulties with his left shoulder as well. Claimant discussed his left shoulder pain with Dr. Vincent on April 21, 2015. (Ex. 1, p. 13) According to the clinical notes for the same date, claimant reported the following problems with his left shoulder:

Location: left shoulder (anterior). The pain radiates to the left bicep/elbow. The pain is aching and sharp. The pain is aggravated by lifting and raising arm above head. The pain is relieved by ice and rest. Additional information: Had slap tear repair on right shoulder in January. Feels like the left shoulder started hurting when compensating for right. States there were a few times when he was lifting boxes with his left arm that felt like it might be pulling. States that it feels very similar to when he had right SLAP tear.

The patient complains of Left shoulder pain that began mid January. He does not recall the specific date but he reports it is related to stacking freight repetitively. His pain has gotten worse since then. No previous pain or problems with his left shoulder. No physical therapy or injections for the left shoulder.

(Ex. 1, p. 13)

On November 20, 2015, claimant had MRI testing of the left shoulder. (Ex. 1, p. 33) The results demonstrated:

[T]he appearance of a near full-thickness partial articular-sided tear avulsion of the ventral fibers of the supraspinatus. The biceps tendon appears slightly subluxed at the most superior aspect of bicipital groove. Subscapularis and infraspinatus appear intact. The labrum demonstrates small sub-labral contrast extension concerning for SLAP tear. There are tendinopathic changes of the supraspinatus tendon. There is a type II acromion seen.

(Ex. 1, p. 33)

On March 11, 2016, Dr. Vincent performed surgery on the left shoulder. The surgical procedures included:

1. Left shoulder arthroscopic rotator cuff repair
2. Left shoulder arthroscopic biceps tenodesis
3. Left shoulder arthroscopic subacromial decompression, acromioplasty, and CA ligament release

(Ex. 3, p. 3) Claimant suffered no complications as a result of the surgery. Dr. Vincent placed claimant in a sling immobilizer for 6 weeks. (Ex. 3, p. 4) Dr. Vincent determined claimant reached maximum medical improvement on August 8, 2016.

Dr. Vincent rated claimant as having a 2 percent permanent impairment to the body as a whole for the right shoulder. (Ex. 1, p. 48) The surgeon returned claimant to work without any work restrictions. (Ex. 1, p. 49) Dr. Vincent did not provide an impairment rating for the left shoulder. The surgeon did not impose any work restrictions for the left shoulder.

On October 13, 2016, claimant presented to Mark D. Fish, D.O., at Capital Orthopaedics for an independent medical examination pursuant to Iowa Code section 85.39. Dr. Fish physically examined both of claimant's shoulders. The surgeon found no evidence of symptom magnification, malingering, or somatization. (Ex. 4, p.3) Dr. Fish provided a permanent impairment rating for claimant's bilateral shoulder condition. Dr. Fish calculated the rating as follows:

On his exam on October 13, 2016, he did have residual loss of motion and strength. On his left shoulder, due to loss of motion, he has a six (6) percent impairment, and due to loss of strength, this gives a 10 percent impairment, for a total of 16 percent upper extremity impairment for the left shoulder. Regarding the right shoulder, he has five (5) percent impairment due to loss of motion and seven (7) percent impairment due to

loss of strength, which gives a 12 percent upper extremity impairment, for a total of a 17 percent whole person impairment.

(Ex. 4, p. 4)

Dr. Fish imposed some restrictions for claimant's bilateral shoulder condition. The restrictions included:

According to his residual symptomology, it would be reasonable for him to avoid repetitive motions at or above shoulder height, specifically for his left shoulder, as well as lifting greater than 25 pounds at or above shoulder height, again, specifically for his left shoulder.

(Ex. 4, p. 5)

During his hearing, claimant testified he no longer unloads trucks at the shoe store. He is unable to reach the top stack of shoe boxes on a rolling cart, if the stack is higher than four boxes. In the stockroom, claimant has to use a ladder more often than he did pre-injury. He testified he is unable to reach out and up with his arms. He is only able to carry 4 to 5 boxes of shoes at one time now. Previous to the work injury, claimant could carry 10 to 12 boxes of shoes.

When an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522, 133 N.W.2d 867 (1965).

The weight to be given an expert opinion may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. St. Luke's Hospital v. Gray, 604 N.W.2d 646 (Iowa 2000).

Expert testimony may be buttressed by supportive lay testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 380; 101 N.W.2d 167, 170 (1960).

The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence. Together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire and Casualty Co., 526 N.W.2d 845 (Iowa 1995).

Claimant has an injury to the body as a whole. His injury is to be calculated by the industrial method.

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.

Claimant is 45 years old and right-hand dominant. There are two impairment ratings for the right shoulder but only one rating for the left shoulder. Dr. Vincent released claimant to return to work without any restrictions. It seems inconsistent on the part of Dr. Vincent to rate the right shoulder at 2 percent to the body as a whole and then not provide any rating for the left shoulder. Dr. Fish rated the bilateral shoulder condition at 17 percent to the body as a whole.

Dr. Fish provided a more common sense approach to work restrictions. Claimant should not engage in repetitive lifting above his shoulder or lift more than 25 pounds above shoulder height, especially with his left shoulder. This is particularly sensible when one considers claimant's body habitus. He is a slightly built gentleman. He needs to work smartly after undergoing two shoulder surgeries.

All of claimant's adult working life has been spent in retail sales. He does not have any other transferable skills outside of the retail industry. Claimant has a GED but no other training or certificates. Given his difficulties with reading, it is doubtful, retraining is a viable option for him.

Claimant is still employed at Shoe Carnival. He earns the same rate of pay or slightly more money than prior to his work injury. Should he lose his job at the shoe store, it is highly unlikely he could return to work at a home improvement store where he would be required to lift and stock very heavy construction items. It is also unlikely he could return to Kum & Go as the job requires lifting kegs of beer, cases of soda and beer, and other heavy sundries.

Therefore, after considering all of the factors involving industrial disability; it is the determination of the undersigned; claimant is entitled to permanent partial disability benefits in the amount of twenty (20) percent. Claimant is entitled to 100 weeks of

permanent partial disability benefits at the stipulated weekly benefit rate of \$464.94 per week. The parties stipulated the commencement date for the right shoulder is August 25, 2015 and the commencement date for the left shoulder is August 8, 2016.

Defendant shall take credit for any permanency benefits paid to date.

In arbitration proceedings, interest accrues on unpaid permanent disability benefits from the onset of permanent disability. Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979); Benson v. Good Samaritan Ctr., File No. 765734 (Ruling on Rehearing, October 18, 1989).

The final issue is costs to litigate. Iowa Code section 86.40 states:

Costs. All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

Costs. Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under

our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010) The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

The following costs are assessed to defendants:

Filing fee \$100.00

Deposition \$109.75

Total \$209.75

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant a combined total of one hundred (100) weeks of permanent partial disability benefits at the stipulated weekly benefit rate of four hundred sixty-four and 94/100 dollars (\$464.94) and payable for the right shoulder commencing from August 25, 2015 and for the left shoulder commencing from August 8, 2016 until such time as all one hundred (100) weeks have been paid.


Defendants shall take credit for all permanency benefits previously paid to claimant.

Accrued benefits shall be paid in a lump sum, together with interest, as provided by law.

Costs are assessed to defendants as detailed in the body of this decision.

Defendants shall file all reports as required by law.

Signed and filed this 26th day of April, 2017.



MICHELLE A. MCGOVERN
DEPUTY WORKERS'
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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.