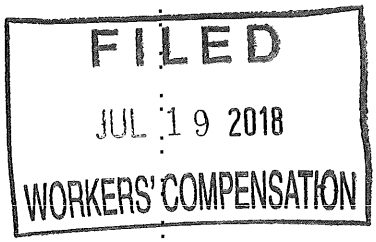
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



ALEJANDRO LOPEZ, Claimant, vs. KRAFT HEINZ COMPANY f/k/a KRAFT FOODS GROUP, INC., Employer, and INDEMNITY INSURANCE CO. of N.A., Insurance Carrier, Defendants.	File No. 5039752 ARBITRATION DECISION Head Note No.: 1803

STATEMENT OF THE CASE

Alejandro Lopez, claimant, filed a petition in arbitration seeking workers' compensation benefits from Kraft Heinz Company, the employer, and Indemnity Insurance Company, the insurance carrier.

The matter proceeded to hearing on February 5, 2018.

The evidentiary record includes: Joint Exhibits JE1 through JE10; Defendants' Exhibits A through G; and, Claimant's Exhibits 1 through 7. At hearing, claimant and Aurelio Trevino provided testimony.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

After an extension of time was granted, the parties submitted post-hearing briefs on April 2, 2018, and the matter was considered fully submitted on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Extent of Industrial Disability regarding the stipulated February 23, 2011 work injury.

2. Costs.

FINDINGS OF FACT

After a review of the evidence presented, I find as follows:

Claimant was 55 years old at the time of the hearing. (Transcript page 7) He was born in Mexico. (Id.) Claimant graduated from high school in Mexico and attended college for four years where he studied agricultural engineering. (Tr. pp. 7-8)

1) WORK HISTORY

Claimant started working for defendant employer on May 2, 1994, and voluntarily retired in September, 2017, in conjunction with a retirement incentive program the employer offered at that time. (Tr. p. 8) Claimant described being paid an additional $750.00 and the "chance to get insurance benefits" as part of the retirement incentive. (Tr. p. 9)

At the time of the hearing, claimant had been unemployed since his retirement. (Tr. p. 10) However, he testified that he was seeking new employment, and wanted a "decent job." (Id.) He had applied at John Deere, Purina Nestle, and Jewel Osco. (Tr. p. 9) He has not sought any assistance from a vocational counselor or rehabilitation expert. (Ex. G, p. 28)

2) PRIOR MEDICAL CONDITION

There was no indication that claimant had any injuries or medical conditions of significance to his left lower extremity or low back prior to the work injury, which is the subject of this matter.

3) THE INJURY

On February 23, 2011, claimant was working for the defendant employer. He was walking upstairs toward the cafeteria for break, he missed a step and came down on his left foot and twisted his ankle, causing him to fall. (Tr. p. 11; Ex. JE2, p. 1) He was taken to the hospital at Genesis Medical Center. (Tr. p. 11; Ex. JE1)

4) POST-INJURY MEDICAL TREATMENT

Claimant was seen at Genesis Medical Center on the day the injury occurred. (Tr. p. 11) He was x-rayed and diagnosed with a "comminuted fracture of the posterior calcaneus with extension into the posterior subtalar joint," and "soft tissue swelling." (Ex. JE1, p. 4)

Also on the day of the injury, claimant was sent to ORA Orthopedics for follow-up treatment. (Tr. p. 13) Mark Hichborn, PA-C recommended a CT scan, placement in a splint, and that claimant continue with a non-weight bearing restriction. (Ex. JE2, pp. 5-6) Claimant was taken off work, prescribed naproxen and Vicodin and advised to keep his heel elevated. (EX. JE2, pp. 5-6)

Unfortunately, after leaving ORA, claimant was riding in a vehicle being driven by a safety representative from the defendant employer when it was rear-ended by another vehicle. (Tr. p. 13) He was transported from the scene of the motor vehicle accident to the hospital by ambulance. (Id.) He reported neck and sacrum pain at the hospital. (Ex. JE1, p. 6) X-rays revealed no new fractures or abnormal findings. (Ex. JE1, p. 9)

On March 9, 2011, claimant had follow-up treatment with Michael Pyevich, M.D., at ORA, who stated that he did not recommend surgery and instead "put him back in a short leg non-weightbearing cast." (Ex. JE2, pp. 7) Claimant was told to continue with restrictions of "four hours sit down with intermittent elevation but no weightbearing." (Id.)

On April 6, 2011, Dr. Pyevich placed claimant in a boot and recommended physical therapy to wean him out of the boot, with weight bearing as tolerated. (Ex. JE2, p. 8) Claimant continued to have follow-up care with Dr. Pyevich who described claimant's healing process as "a long haul" and "life-altering." (Ex. JE2, p. 10)

However, on June 20, 2011, Dr. Pyevich stated that claimant "is ready to go back to regular duties, or at least give them a try." (Ex. JE2, p. 11) He did not place claimant at MMI because Dr. Pyevich suspected that claimant would need "a lateral wall debulking" procedure. (Ex. JE2, p. 11)

On August 22, 2011, Dr. Pyevich recommended a "left lateral calcaneus debulking with partial calcanectomy," and stated that claimant might need a "subtalar fusion down the road." (Ex. JE2, p. 13)

On September 19, 2011, claimant underwent surgery of a lateral wall debulking, partial calcanectomy and peroneus brevis tendon repair with Dr. Pyevich. (Ex. JE4, p. 1)

On October 26, 2011, claimant was instructed by Dr. Pyevich to return to work the following Monday on light duty. (Ex. JE2, p 16)

On January 10, 2012, Dr. Pyevich advised claimant that his "left heel bone will never be normal and he will always feel some intermittent achiness from time to time," but some of the severe pain could be alleviated with a left subtalar fusion. (Ex. JE2, p. 20) Claimant wanted to proceed with surgery and Dr. Pyevich "put in a surgery request for a left subtalar fusion." (Id.)

On July 19, 2012, Dr. Pyevich signed a letter prepared by claimant's counsel confirming his opinion that the work injury caused the need for the left subtalar fusion. (Ex. JE5, p. 2)

On October 1, 2012, Dr. Pyevich noted that the workers' compensation insurance carrier "has finally consented to agree to do a subtalar fusion," with hardware. (Ex. JE2, p. 23)

The surgery was performed by Dr. Pyevich on October 22, 2012. (Ex. JE6) Post-surgery, claimant continued to receive follow-up care with Dr. Pyevich. On January 7, 2013, claimant was noted to be walking with a limp. (Ex. JE2, p. 25) He was to continue with physical therapy and wean out of the boot.

On February 14, 2013, claimant was seen by Rick Garrels, M.D. of Genesis Occupational Health who stated that Dr. Pyevich had released claimant to return to work with no restrictions. (Ex. JE3, p. 5) However, on January 7, 2013, claimant was returned to work by Dr. Pyevich with restrictions of "light duty sit down duties only." (Ex. JE2, p. 25) On February 11, 2013, Dr. Pyevich returned claimant to work "with the same restrictions." (Ex. JE2, p. 26) Nevertheless, Dr. Garrels placed claimant at maximum medical improvement (MMI) and "[u]sing the AMA Guides, 5th" he assigned "a 10% whole person impairment or 25% lower extremity impairment is assessed for the subtalar fusion using Table 17-29 on page 542." (Ex. JE3, p. 6)

On May 8, 2013, claimant was diagnosed by Dr. Pyevich with bilateral plantar fasciitis left worse than right, and a cortisone injection in the left heel was recommended. (Ex. JE2, p. 28) Claimant was advised that Dr. Pyevich would not evaluate his low back pain, and at that time, he was released to return to work with no restrictions. (Id.)

On August 7, 2014, Mark Taylor, M.D. of Medix, issued a report following an independent medical examination (IME) at the request of claimant's counsel. (Ex. 1) At the time of the exam, claimant described pain in his heel and foot from 0/10 while inactive to 3-5/10 if he is on his feet. (Ex. 1, p. 5) He also described pain in his low back that comes and goes, and that "[h]e does have pain in the leg but not the entire leg." (Id.) Dr. Taylor conducted a physical exam, including an assessment of range of motion that revealed reduced motion in the left ankle/foot compared to the right. (Ex. 1, p. 7) Dr. Taylor diagnosed claimant with the following work injuries:

1. Comminuted left calcaneal fracture with extension into the subtalar and calcaneal cuboid joints.

2. Motor vehicle accident resulting in temporary neck and low back pain.

3. Left lateral wall debulking, partial calcanectomy, and peroneus brevis tendon repair on September 19, 2011 by Dr. Pyevich.

4. Left subtalar fusion on October 22, 2012 by Dr. Pyevich.

5. Plantar fasciitis.

6. Low back pain.

(Ex. 1, p. 8) Dr. Taylor opined that claimant's back injuries related to the work injury "resolved with conservative treatments, specifically physical therapy and time." (Ex. 1, pp. 8-9) Concerning the left lower extremity, he placed claimant at maximum medical improvement (MMI) as of June 8, 2013, which is about one month after his last appointment with Dr. Pyevich on May 8, 2013. (Ex. 1, p. 9) However, Dr. Taylor did not place claimant at MMI concerning the back injury noting that claimant may benefit from physical therapy and an assessment of his altered gait pattern.

Dr. Taylor assigned a 24 percent permanent impairment to the left lower extremity based on loss of range of motion, per Table 17-2, page 526 of the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides). (Ex. 1, p. 10)

Dr. Taylor assigned permanent work restrictions of 50 pounds lifting at or above knee level, 40 pounds below knee level. (Ex. 1, p. 11) He also recommended alternating walking, standing and sitting as needed for comfort, kneeling occasionally, avoiding climbing ladders other than step ladders, climb stairs occasionally with use of the handrail and avoid uneven surfaces. (Ex. 1, p. 11)

Dr. Taylor did not assign any impairment to the back condition noting that claimant did not undergo any specific evaluation or treatment for the back and he may improve with therapy. (Ex. 1, pp. 10-11)

Dr. Taylor's and Dr. Garrels' assessment of permanent impairment of the left lower extremity of 24 percent and 25 percent, respectively, are very similar. I note that under Table 17-3, page 527 of the AMA Guides, both ratings convert to 10 percent impairment to the whole person. Therefore, I find that the functional impairment concerning the left lower extremity is 10 percent to the whole person.

Concerning restrictions for claimant's left lower extremity, on May 8, 2013, claimant was returned to work with no restrictions by the treating physician, Dr. Pyevich. (Ex. JE2, p. 28) Claimant testified at hearing that he has no problems going up or down steps, and after the second surgery with Dr. Pyevich, he can "walk okay" and he can run "[a] little bit." (Tr. p. 26) I also note that claimant was working significant

overtime without restrictions at the time of his voluntary retirement, which is indicative of his functional ability.

On November 23, 2015, Robert Milas, M.D. authored a letter to claimant's counsel in which he opined that claimant likely had disc derangement at the L3-4 level, and noted complaints of radicular symptoms. He recommended an MRI of the lumbar spine. Dr. Milas opined that claimant sustained 13 percent impairment to the whole person based on placement in the DRE Lumbar Category III, Table 15-3, page 384. However, Dr. Milas provided no specific basis for this assessment, which erodes the reliability of his opinion.

On December 8, 2015, claimant returned to Dr. Garrels at Genesis Occupational Health complaining of low back pain that he related to the motor vehicle collision that he was involved in after the orthopedic evaluation on the day of the injury. (Ex. JE3, p. 7) He continued to work his regular job without apparent difficulty. Claimant reported that the IME physician, Dr. Taylor suggested further evaluation for his back. Dr. Garrels recommended an MRI or CT. (Id.)

On December 30, 2015, claimant underwent an MRI of his lumbar spine, which showed moderately severe central canal narrowing at L3-4 and congenital narrowing of the central canal. (Ex. JE7, p. 2)

Claimant had additional care with Dr. Garrels from March 8, 2016 through April, 2017. On September 13, 2016, Dr. Garrels indicated that he would make a referral to Michael Berry, M.D. for a surgical consultation concerning claimant's lumbar strain/radiculitis. (Ex. JE3, p. 13)

On December 20, 2016, claimant underwent surgery with Dr. Berry consisting of: "1. extreme lateral interbody fusion, L3-4; 2. reduction of spondylolisthesis at L3-4; 3. pedicle screw instrumentation, bilateral L3 and L4; 4. posterolateral fusion, L3-4." (Ex. JE8, p. 1)

On March 7, 2017, claimant was seen by Dr. Garrels in follow-up to his lumbar fusion. Dr. Garrels noted that claimant's range of motion is "stiff and limited by more than 50%." (Ex. JE3, p. 14) However, on April 18, 2017, Dr. Garrels recorded that claimant had "full lumbar ROM." (Ex. JE3, p. 15)

On June 8, 2017, claimant was returned to regular work duty with no restrictions concerning his back condition by Dr. Garrels. (Ex. JE3, p. 16)

On June 14, 2017, Dr. Berry assigned claimant 10 percent permanent impairment to the whole person based on placement in DRE lumbar category 3 and Example 15-3, on page 386 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Ex. JE9) Dr. Berry also noted that claimant had completed physical therapy and returned to work without restrictions. He found that claimant had "essentially full range of motion." (Id.)

I find that claimant sustained 10 percent permanent impairment to the whole person as a result of the back injury.

I further find based on the combined values chart on page 604 of the AMA Guides, that the whole person rating of 10 percent for the left lower extremity and the 10 percent whole person impairment for the back injury combine to equal 19 percent to the whole person. I find that claimant sustained 19 percent permanent impairment to the whole person concerning this work injury.

In September, 2017, claimant voluntarily retired when he was offered a retirement incentive. (Tr. pp. 8-9) At the time of his retirement, claimant was working about 60 hours per week. (Tr. p. 38)

Concerning permanent restrictions I note that claimant was returned to work by the treating physicians with no restrictions and continued to work full-time, including overtime thereafter until his voluntary retirement, which he chose as part of an early retirement incentive. Claimant does not argue that his work injuries prompted his decision to retire.

5) Additional Findings

Considering assessment of industrial disability, I find that claimant's age, functional impairment, his work history in the United States involving labor-based jobs, and the significance of his injuries resulting in multiple surgeries would all tend to support a higher finding of industrial disability. However, claimant's education, intelligence, his demonstrated ability to work without restrictions until his voluntary retirement, which included significant overtime up to 60 hours per week, and his physical ability to continue in the labor-type positions that claimant has held since working in the United States would tend to support a lower level of industrial disability. Considering the above and all other factors appropriate for the consideration of industrial disability, I find that claimant has sustained 25 percent industrial disability.

The parties stipulated that prior to the hearing, claimant was paid 105 weeks of permanent partial disability benefits at the stipulated rate of $571.11 per week. (Hearing Report, pp. 1-2)

Claimant testified that he has looked for work since his retirement from the defendant employer, but has not found anything.

CONCLUSIONS OF LAW

The disputed issue in this case is the extent of 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, 593; 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. However, consideration must also be given to the injured worker's medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured workers' qualifications intellectually, emotionally and physically; the worker's earning before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted. Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616 (Iowa 1995); 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).

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

Assessments of industrial disability involve a viewing of loss of earning capacity in terms of the injured workers' present ability to earn in the competitive labor market without regard to any accommodation furnished by one's present employer. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996); Thilges v. Snap-On Tools Corp., 528 N.W.2d 614 (Iowa 1995).

As stated above and for the reasons there given, I have determined that claimant has sustained 25 percent industrial disability.

The final issue is costs. Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I conclude that it is appropriate to assess costs against defendants in the sum of $367.00 as set forth in the statement of costs attached to the hearing report.

ORDER

IT IS THEREFORE ORDERED:

Defendants shall pay claimant industrial disability benefits of one hundred twenty-five (125) weeks, less a credit for the one hundred five (105) weeks paid prior to the hearing. The remaining benefits shall be paid pursuant to stipulation of the parties commencing on April 1, 2018, until all benefits are paid in full.

All weekly benefits shall be paid at the stipulated rate of five hundred seventy-one and 11/100 dollars ($571.11) per week.

All accrued benefits shall be paid in a lump sum.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten (10) 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 (1)-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two (2) percent, See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018)

Defendants shall pay costs in the sum of three hundred sixty-seven and 00/100 dollars ($367.00) as set forth in the attachment to the Hearing Report.

Defendants 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 19th day of July, 2018.

TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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TJG/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.