BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JEREMY LEAIR, Claimant, vs. WES JARNAGIN, INC., Employer, BERKSHIRE HATHAWAY HOMESTATE INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 1634239.02 ARBITRATION DECISION Head Note Nos.: 1803, 2907

STATEMENT OF THE CASE

Jeremy Leair, claimant, filed a petition for arbitration against Wes Jarnagin, Inc., as the employer, and Berkshire Hathaway Homestate Insurance Company, as the insurance carrier. This case came before the undersigned for an arbitration hearing on January 9, 2023.

Pursuant to an order from the Iowa Workers' Compensation Commissioner, this case was heard via videoconference using Zoom. All participants appeared remotely for the hearing.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 7, Claimant's Exhibit 1, as well as Defendants' Exhibits A through C. All exhibits were received without objection.

Claimant testified on his own behalf. No other witnesses were called to testify at the hearing. The evidentiary record closed at the conclusion of the arbitration hearing. However, counsel for the parties requested an opportunity to file post-hearing briefs. This request was granted, and both parties filed briefs simultaneously on January 30, 2023. The case was considered fully submitted to the undersigned on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. The extent of claimant's entitlement to permanent disability benefits.

2. Whether costs should be assessed against either party and, if so, in what amount.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Jeremy Leair, claimant, is a 48-year-old man, who lives in Thailand. Mr. Leair is a high school graduate. He testified that he received training in food handling after high school. He has worked in various positions during his career. He worked as a sandblaster and painter from 1996 through 2000, also working in lawn care from 1998 through 2004. Mr. Leair has experience laying carpets, renting equipment to customers, as a quality control assistant in a custom screen-printing business, framing and performing wood construction of new homes, and as a stagehand.

In 2011, Mr. Leair began his employment with Wes Jarnagin in Johnston, Iowa. Claimant obtained training from the International Union of Painters and Allied Trades School from approximately 2012 through 2016 and continued his employment with Wes Jarnagin performing primarily sand blasting duties until his work injury on June 2, 2017. On that date, claimant was performing his sandblasting duties for the employer when he became unable to hold the hose he used to sandblast.

The employer admitted the injury and provided medical care for claimant. Initial care included conservative measures. An orthopaedic surgeon ruled out any injury or need for treatment in the left shoulder. (Joint Ex. 3, p. 13) Ultimately, the physiatrist treating claimant opined that he achieved maximum medical improvement on March 28, 2018 and that claimant sustained no permanent impairment. (Joint Ex. 3, p. 17)

However, claimant was involuntarily laid off in approximately February 2019 and moved to Las Vegas. (Defendants' Ex. B, p. 8, Depo p. 23) Mr. Leair requested additional care in Las Vegas and defendants transferred care to a spine surgeon, Patrick McNulty, M.D., in Las Vegas. Dr. McNulty evaluated claimant on May 31, 2019, and opined that claimant's work duties at Wes Jarnagin materially aggravated an underlying degenerative disc disease in claimant's neck. (Joint Ex. 4, p. 30) Dr. McNulty recommended surgical intervention and ultimately performed a 2-level anterior cervical diskectomy and a two-level anterior interbody fusion at C4-6 on March 25, 2020. (Joint Ex. 4, pp. 56, 59)

Dr. McNulty's surgery provided excellent improvement of claimant's left arm symptoms and left thumb numbness. (Joint Ex. 4, p. 64) Ultimately, claimant submitted to a functional capacity evaluation (FCE) on January 5, 2021. (Joint Ex. 6, p. 77) The

FCE was deemed valid and documented the ability to occasionally lift up to 100 pounds to waist level and 80 pounds to shoulder level. (Joint Ex. 6, p. 77) The FCE recommended work at the medium physical demand level. (Joint Ex. 6, p. 77) Dr. McNulty adopted the recommendations of the FCE and released claimant to return to work at the medium demand work category on January 21, 2021. (Joint Ex. 4, p. 71) The work restrictions imposed by Dr. McNulty are essentially undisputed and accepted as accurate. I find claimant is capable of returning to work at the medium work level and that the FCE findings are an accurate depiction of claimant's residual work abilities.

Dr. McNulty indicated that he does not provide permanent impairment ratings. (Joint Ex. 4, p. 73) Therefore, defendants obtained a medical record review performed by Charles D. Mooney, M.D. on March 30, 2021. Dr. Mooney opined that claimant qualifies for a 17 percent permanent impairment of the whole person as a result of his June 2, 2017 work injury. He further opined that claimant does not qualify for impairment under the DRE methodology of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Joint Ex. 7, p. 94) I accept Dr. Mooney's opinions and find that Mr. Leair has prove he sustained 17 percent permanent impairment as a result of the work injury.

Claimant testified that he continues to experience symptoms in his neck. He testified that he continues to experience pain when he turns his head in certain ways and that it hurts when he looks over his shoulder. Mr. Leair also testified that he cannot put his hands above his head and that he experiences pain in his neck, left shoulder and numbness in his arm down to his left thumb. (Ex. B, p. 8, Depo pp. 32-33) Claimant also testified that he experiences pain when he walks downstairs or downhill, when he hikes too long, or when he looks down at his phone for an extended period of time. (Tr., p. 27) Nevertheless, claimant also concedes that he has not obtained any medical care for his injury since January 2021 and has no appointments scheduled into the future for this injury. (Tr., p. 32; Defendants' Ex. B, p. 8, Depo p. 36)

Mr. Leair moved to California and obtained employment as a stagehand in approximately September 2019. He continued in that position until March 2021. Claimant described his job duties as a stagehand to include putting bolts in trusses at ground level, moving trusses into position at ground level, and rolling carts to others with necessary parts and materials. (Defendants' Ex. A, p. 4; Tr., pp. 29-30)

In April 2019, Mr. Leair moved to Thailand on a student visa. He has taken Thai language classes since moving to Thailand and testified that he still has at least a year of classes remaining. Claimant's goal is to become sufficiently proficient in the Thai language to be able to teach English in Thailand. Claimant earned just over $1,200.00 per week at the time of his injury and estimated that an English teacher in Thailand earns approximately $1,500.00 per month. However, he also conceded that the cost of living is significantly lower in Thailand. (Hearing Report; Tr., p. 30) Claimant is not certain how long he will remain in Thailand. However, he is unable to work while in Thailand under his student visa. (Tr., pp. 33, 36)

Although claimant cannot currently work because he is in Thailand and must comply with his student visa, claimant remains capable of employment and could resume gainful employment if he returned to the United States. Claimant's decision to move to Thailand was a reasonable personal decision, but he also voluntarily removed himself from the labor market by making this decision. On the other hand, he is also developing new skills that will increase his marketability and ability to work either in Thailand or potentially as an interpreter should he elect to return the United States.

Mr. Leair is middle-aged. He has a varied work history. However, his job with Wes Jarnagin was his longest tenured position and his highest paying job. He is not likely to be able to return to his painting or sandblasting occupation.

Similarly, house construction is likely too physical for claimant post-injury. He likely could return to work as a stagehand since he performed that after his work release and prior to moving to Thailand. He likely could return to work in quality control for a screen printer, working in equipment rental, and potentially in lawn care. He is not likely to be capable of returning to work laying carpeting. I find that Mr. Leair has lost the ability to perform several of his prior jobs and that he has lost the ability to perform his highest paying occupation.

Neither party inquired of claimant's intentions pertaining to retirement. However, at age 48, claimant likely has significant remaining work life. His voluntary removal from the workforce is not the employer's fault. Yet, he is currently developing new skills that may increase his employability. The employer is not providing this training and it is solely claimant's motivation that is developing this new skill.

Considering the situs and severity of Mr. Leair's injury, including his need for a significant surgical intervention, his age, permanent impairment, permanent restrictions, motivation, proximity to retirement, voluntary removal from the workforce, voluntary attempts to develop new skills, his ability to return to some prior employment positions, inability to return to other prior employment, as well as all other factors of industrial disability outlined by the Iowa Supreme Court, I find Mr. Leair has proven a 40 percent loss of future earning capacity.

CONCLUSIONS OF LAW

The primary disputed issue in this case is the claimant's entitlement to permanent partial disability benefits. The parties stipulate that claimant sustained permanent disability as a result of the June 2, 2017, work injury. The parties also stipulate that the injury should be compensated as an unscheduled injury with industrial disability benefits pursuant to Iowa Code section 85.34(2)(v).

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 Ry. Co. of Iowa, 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.

In addition, Iowa Code section 85.34(2)(v) provides that the undersigned "take into account … the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury." All factors of industrial disability are considered, and none are given specific or greater weight when determining industrial disability. Having considered all of the factors of industrial disability enumerated by the Iowa Supreme Court as well as Iowa Code section 85.34(2)(v), I found that Mr. Leair proved a 40 percent loss of future earning capacity as a result of the June 2, 2017, work injury. Accordingly, I conclude that claimant has proven a 40 percent industrial disability as a result of the injury. A 40 percent industrial disability entitles claimant to an award of 200 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(v).

The final disputed issue is whether costs should be assessed against either party. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. Claimant has prevailed and obtained an award of benefits in this proceeding. He seeks assessment of his filing fee, which is reasonable and permissible under 876 IAC 4.33(7). I conclude it is reasonable and appropriate to assess claimant's filing fee ($100.30) as a cost.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant two hundred (200) weeks of permanent partial disability benefits at the stipulated weekly rate of six hundred ninety-six and 13/100 dollars ($696.13).

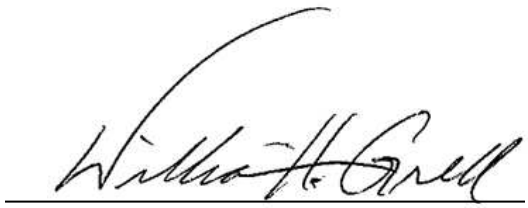
Permanent partial disability benefits shall commence on January 26, 2021, and be paid continuously until paid in full.

Defendants shall pay interest on any outstanding weekly benefits owed pursuant to Iowa Code section 85.30.

Defendants shall receive credit for benefits paid and stipulated to in the hearing report and at the commencement of hearing, as well as any weekly benefits paid to claimant since the date of the arbitration hearing.

Defendants shall reimburse claimant's costs in the amount of one hundred and 30/100 dollars ($100.30)

Signed and filed this 14th day of June, 2023.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Jerry Jackson (via WCES)

Alison Stewart (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.