

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARK MAURER,

FILED

Claimant,

SEP 12 2017

vs.

WORKERS COMPENSATION

GERDAU AMERISTEEL U.S. CORP.,

File No. 5056359

Employer,

ARBITRATION DECISION

and

AMERICAN ZURICH INS. CO.,

Insurance Carrier,
Defendants.

Head Note No.: 1803

STATEMENT OF THE CASE

Mark Maurer, claimant, filed a petition for arbitration against Gerdau Ameristeel US, Inc. (hereinafter referred to as "Gerdau"), as the employer, and American Zurich Insurance Company as the insurance carrier. The case was heard by the undersigned on April 6, 2017.

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.

The evidentiary record includes Defendants' Exhibits A through G. Claimant testified live at trial. Defendants called Lynda Verhelst to testify. The evidentiary record closed at the conclusion of the evidentiary hearing and 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.

FINDINGS OF FACT

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

Mark Maurer is a 52-year-old gentleman, who lives in Wilton, Iowa. He is a high school graduate with no post-secondary education or training. Mr. Maurer began working for Gerdaus predecessor in August 1999 and remained employed at Gerdaus continuously through the date of his injury. (Claimants testimony) On August 12, 2013, he sustained an admitted right shoulder and right biceps injury. (Hearing Report) On that date, Mr. Maurer lifted a 50 pound bag for his job when he felt and heard a pop in his right shoulder. He attempted to lift another 50 pound bag and was unable to do so. (Claimants testimony)

Mr. Maurer testified that he had no prior right shoulder problems. There is no contrary evidence in the record. Unfortunately, following the August 2013 injury, claimant required surgical intervention. On October 23, 2014, James V. Nepola, M.D., performed arthroscopic rotator cuff repair on claimants right shoulder. (Exhibit E, pages 23-24)

Surgery was technically successful and Dr. Nepola released claimant to return to work without restrictions on August 25, 2015. (Ex. E, p. 31) Dr. Nepola reiterated his full release in a report dated January 13, 2016 and opined that Mr. Maurer sustained a two percent permanent impairment of the whole person as a result of restricted range of motion in his right shoulder. (Ex. E, p. 32) The evidentiary record contains no contrary medical opinions. Dr. Nepolas opinions pertaining to claimants range of motion, permanent impairment, and work release are accepted as credible and convincing in this record.

Mr. Maurer worked light duty for Gerdaus after surgery but has returned to his full-time, regular duty position with Gerdaus since his full duty release by Dr. Nepola. Claimant conceded that his injury has had no effect on his hourly rate of pay nor any effect on the number of hours he works as compared to his pre-injury status. Claimant conceded that he continues to have earnings that are the same as prior to his injury and that he intends to continue working for Gerdaus as long as he can. Claimant is clearly motivated to continue to work after his injury.

However, Mr. Maurer testified that he receives assistance from co-workers since his shoulder surgery. Mr. Maurer is in a position now at Gerdaus where he can obtain assistance from other workers. Specifically, he noted that he receives assistance from others to pull a hose and needs other assistance toward the end of a work week. Claimant testified that he now finds it difficult to work above shoulder height and needs assistance with a jackhammer they use at work. (Claimants testimony)

Mr. Maurer also testified that he does not believe he can return to some of his prior employment positions as a result of his right shoulder injury. Claimants full employment history is contained in Exhibit C, page 4. Claimant testified that he

probably could not return and perform the necessary job duties at the cemetery where he worked because he had to dig graves by hand. He testified he could not perform his job at Rid-a-Bird because it involved a lot of physical work and overhead work. He testified that he did not believe he could perform his prior work duties at Freeman Construction because it required the use of ladders and overhead work. Similarly, he testified that he did not believe he could return to his former job with HON because it required continuous use of the arm.

Claimant's employment history appears to include physical labor or assembly-type work. On the other hand, claimant has returned to work in what is described as fairly physical work as well and his surgeon has imposed no restrictions. Ultimately, without having attempted a return to physical work, I find that Dr. Nepola's estimates as to claimant's work capabilities are the best and most informed opinion. Nevertheless, I find that physical work and repetitive assembly work may be uncomfortable and less desirable given claimant's right shoulder injury, particularly since he is right-hand dominant. Nevertheless, I find that claimant has proven only a very minor loss of future earning capacity as a result of his August 13, 2013 right shoulder work injury.

Considering claimant's age, the situs and severity of his injury, as well as his educational background, employment history, lack of permanent physical restrictions, permanent impairment, motivation, as well as all other factors of industrial disability for which there is evidence in this record, I find that claimant has proven a five percent loss of future earning capacity as a result of the August 13, 2013 work injury.

CONCLUSIONS OF LAW

The parties stipulated that claimant sustained a work related injury on August 13, 2013. The parties further stipulate that the injury caused permanent disability and that the injury should be compensated industrially pursuant to Iowa Code section 85.34(2)(u). (Hearing Report) The remaining dispute for me to decide is the extent of claimant's entitlement to permanent partial disability benefits. (Hearing Report)

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.

Having considered all of the relevant industrial disability factors outlined by the Iowa Supreme Court, I found that claimant has proven a five percent loss of future earning capacity. This is equivalent to a five percent industrial disability and entitles claimant to an award of 25 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u).

Claimant seeks an assessment of his filing fee as a cost of this action. Costs are assessed at the discretion of the agency. Iowa Code section 85.40. Exercising the agency's discretion and recognizing that claimant has received an industrial disability award, claimant's filing fee of \$100.00 shall be assessed pursuant to 876 IAC 4.33(7).

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant twenty-five (25) weeks of permanent partial disability benefits commencing on January 15, 2015 at the stipulated weekly rate of nine hundred twenty-eight and 46/100 dollars (\$928.46).

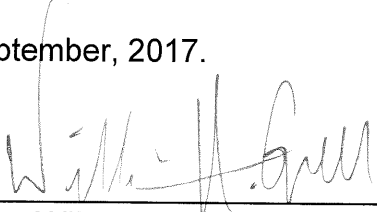
Defendants shall be entitled to a credit for all benefits paid to date.

Defendants shall pay accrued weekly benefits, if any, in lump sum, along with applicable interest calculated pursuant to Iowa Code section 85.30.

Defendants shall reimburse claimant's costs totaling one hundred dollars (\$100.00).

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 12th day of September, 2017.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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WHG/srs

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.