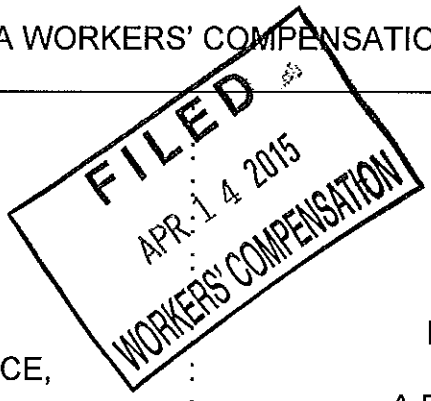
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



CHARLES HUISENGA,

Claimant,

vs.

VUGTEVEEN LAWN SERVICE,

Employer,

and

NATIONWIDE INSURANCE,

Insurance Carrier,
Defendants.

File No. 5048201

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Charles Huisenga, claimant, has filed a petition in arbitration and seeks workers' compensation benefits from Vugteveen Lawn Service, employer, and Nationwide Insurance, insurance carrier, defendants.

This matter came on for hearing before Deputy Workers' Compensation Commissioner, Jon E. Heitland, on January 23, 2015 in Des Moines, Iowa. The record in the case consists of claimant's exhibits 1 through 17; defense exhibits A through F; as well as the testimony of the claimant and Kevin Vugteveen.

ISSUES

The parties presented the following issues for determination:

1. The extent of the claimant's entitlement to permanent partial disability benefits, including whether claimant is an odd-lot worker.

2. The hearing report shows a disputed issue as to whether the claimant is entitled to penalty benefits. However, claimant has waived that issue in his post-hearing brief.

FINDINGS OF FACT

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

Claimant, Charles Huisenga, testifies he lives in Milford, Iowa. He is 52 years old at the time of the hearing. He graduated from high school in Carroll, Iowa, in 1980.

He then went to work for a steel company. He then was in the Navy from 1982 to 1986. He had no problems with his right shoulder at that time. He was honorably discharged. He had no injuries while in the Navy.

After his military service, he moved to Tennessee and attended college. He did not receive a degree but studied industrial robotics, learning how to set up and maintain manufacturing robots. He left college for financial reasons and moved to Arizona to join his father.

He then drove a long haul truck for companies first in Estherville, then Ida Grove, Iowa, for about three years. His work involved driving and occasionally unloading semi-trucks. He had no problems with his shoulders or body that required any medical attention. He then worked for a realty company in Spirit Lake, Milford Electric, and others. He did site cleanup for construction sites. He had no injuries at these jobs.

He is married and has two dependent children. His wife passed away in December 2009. He has cared for the children since then. One child has special needs in that she has a disease that includes a cleft palate and failure to thrive.

Claimant was diagnosed with multiple sclerosis in 1993. He treated at the University of Iowa Hospitals and Clinics, and later the Mayo Clinic. He initially had a left side condition. Today he only has a condition in his right eye that gives him headaches. His primary symptom of his MS was headaches. His insurance lapsed and he did not receive treatment for his MS for some time. He was able to continue to work without problems, but he has now been found to have new lesions on his brain, which cause him headaches again.

Claimant then worked for defendant employer, and he had a prior injury there when he fell. He reported the injury and received some medical attention, but had no problems with his shoulder and continued to be able to do his job.

For this injury on March 4, 2012, claimant was getting out of a dump truck when he slipped on the ice and fell onto his right shoulder. He reported this to his employer, Kevin Vugteveen. He treated with his chiropractor, who he had treated with for the prior shoulder injury. The employer sent him there again. The chiropractor tried manipulation, but when that did not help, he was referred to Alexander Pruitt, M.D., an orthopedic surgeon in Spencer, Iowa.

Dr. Pruitt found claimant to have a probable rotator cuff tear and adhesive capsulitis. (Exhibit 5, page 1) An MRI was ordered, which showed tearing and/or tendinopathy involving the supraspinatus and subscapularis, and a possible labral tear. (Ex. 6, p. 2)

Dr. Pruitt performed arthroscopic surgery on April 16, 2012. The surgery did not help much. Claimant received injections for pain and inflammation, which helped a little. He was also advised to undergo physical therapy, which claimant did for about a year. The employer paid for this. Claimant was then released to return to light duty, but the employer did not have any available. Claimant then started receiving workers' compensation benefits.

When his symptoms persisted after the surgery by Dr. Pruitt, claimant was referred to Ryan Meis, M.D. When claimant's range of motion was found to have deteriorated further, Dr. Meis performed a capsular release surgery on February 11, 2013. (Ex. 7, p. 2)

Claimant attended physical therapy from February 13, 2013, to June 7, 2013. The therapist noted claimant did heavy work as a landscaper and no longer had sufficient strength for these duties. (Ex. 9, p. 1)

Claimant was released by Dr. Meis to light duty work and restrictions of not lifting over five pounds, with no overhead activity, on March 25, 2013. (Ex. 8, p. 6) However, the employer had no light duty work, and claimant's employment was terminated. (Ex. 13, p. 10)

Claimant's second surgery also did not relieve his symptoms. He continued to have chronic pain, and reported depression. In spite of the ongoing pain, Dr. Meis found claimant to be at maximum medical improvement (MMI) on August 2, 2013.

Claimant then looked for another job, but without success. (Ex. B, p. 6) He received unemployment benefits. He found work at a restaurant where he was paid $10.00 per hour, but after five months his job was terminated because he could not keep up with the job duties. (Ex. C, p. 7)

Claimant still has pain and loss of range of motion in his shoulder. Claimant underwent a functional capacity exam, which recommended restrictions of not lifting over 30 pounds with one hand, 40 with the other, and not working overhead. The test was considered valid. He cannot work overhead. His sleep is disrupted, and he can only sleep in limited positions. He has trouble washing himself or doing household chores. He has difficulty vacuuming, showering, scrubbing walls and dishes, and making beds is painful. At work he limits use of his right arm as much as he can but has to use it sometimes. It is painful to use tools with his right arm. He can lift to his waist without pain, but lifting above his head or using tools above his head is painful. He can no longer go ice fishing and engage in other recreational activities he used to enjoy.

Claimant feels the treatment aggravated claimant's prior depression he first experienced during the loss of his wife, coupled with the loss of his job and loss of income.

After the employer had no light duty for him, claimant applied at a resort, a condominium complex, with various contractors, the city of Milford, the city of Arnold's Park, and others. He was not hired. However, he now is employed at a golf course although he is laid off for the winter. During warm weather he mows fairways. He was filmed doing his work, and it is part of the evidence. He uses his right arm to operate a 15-pound blower, which involves a strap over his shoulder which is painful. Claimant states the film shows his right arm was on the armrest the entire time.

Claimant was advised to stay away from pain medications if possible. Some of them bothered his stomach. He only uses over-the-counter medications.

Claimant was sent to Marc Hines, M.D., for an independent medical evaluation (IME). Dr. Hines concluded claimant has serious depression, which was caused by his injury. Dr. Hines also recommended claimant be treated by a pain specialist.

Claimant has not been able to find full-time work after trying at several businesses. He has had continuous pain since the work injury. He describes it as a constant pain. When he uses his arm it becomes quite painful by evening.

In the past he has broken an ankle, had minor injuries requiring stitches, and treated with a chiropractor on occasion. When he was injured he had not been suffering any pain or impairment. Recently he was told he might have epilepsy. He is undergoing evaluation of that condition. Although he had no insurance, he is now on Medicaid, which he attributes to "Obamacare", the Affordable Care Act.

He worked as a cook in between his surgeries. He was paid about $10.00 per hour. He was discharged after a disagreement with the cook. He was twice convicted of operating while intoxicated a few years ago, but he has had no problems with alcohol since then.

When he was hired by defendant employer, he was required to sign a non-compete agreement, effective for three years. He has not tried to compete with the employer and has not sought work in lawn care. He does not feel he could do any landscaping because of his injury. He does not feel he could return to his prior jobs involving construction due to his shoulder pain. He also failed a drug test for the employer one time which showed he had used marijuana. He said this was at a party and he has not used it since. He enjoyed his job with the employer but does not feel he could return to that type of work.

Today he continues to experience a constant headache near his right eye. When it flares up it is hard for him to function. It has gotten worse since he has been out of work. Claimant looks for a job on the internet.

His first surgery was on April 16, 2012. His second surgery, with Dr. Meis, was on February 11, 2013. He was placed at maximum medical improvement on August 2, 2013.

Claimant did not file a tax return the years following his wife's death as he could not bring himself to do so. He has now filed those returns. He could have received income tax refunds but it is too late to do so. Because he was not earning much some of those years, he was not required to file a return. He currently gets Social Security survivor's benefits. He is looking for a job that would provide him year-round full-time income with benefits, but he has not been able to find one.

The insurance carrier has paid all of his medical bills for his shoulder. He has no complaints about his treatment by the employer. He understands they have no work for him. The employer, in fact, commendably advanced claimant some funds during his treatment, and he has no objection to them being reimbursed those funds.

Dr. Hines' examination was thorough, and involved various tests. Dr. Hines concluded claimant's depression had been aggravated by his injury. He felt claimant might have a SLAP tear in his shoulder.

On cross examination, he stated when the golf course is open, he works Monday through Friday, and the hours vary. The video surveillance showed claimant worked from the morning to the late afternoon. His job there is not so much part time as seasonal. Dr. Hines recommended a 30-pound lifting restriction. The FCE actually said claimant could lift 50 pounds floor to waist. Claimant agreed he did custodial work, construction work, and handyman work in the past.

He agreed his daughters each get a Social Security check regardless of his income. In 2013 when he was not working, he received about $22,000.00. (Ex. B, pp. 10-12) After being released in August 2013 he worked the following summer as a cook, working 30 hours per week, until August 2014. He then went to work at the golf course. He earns $13.00 per hour. He does not recall if he earned $12.00 at Vugteveen, defendant employer. He agreed he is able to step up onto the mower he uses at the golf course.

For his examination by Dr. Hines, claimant stated he gave truthful answers to the doctor's questions. He told Dr. Hines he had numbness in his fingers. The exam was on August 8, 2014. The report indicates claimant's work history was confined to landscaping, but claimant states that is incorrect. A couple weeks later claimant began seeing a neurologist for his MS. (Ex. 12) Her records show a report of tingling in both hands and both feet.

He agreed he had a history of insomnia even before this injury. As to his depression, claimant agreed in his deposition he stated he had no idea why prior medical records showed a history of depression. He agreed he told Dr. Hines he had

no diagnosis of depression. He agreed he was noted to be tearful in 2011. His wife died in 2009.

His application for the employer showed he had experience in electrical work, carpentry, landscaping, etc. In the summer of 2013, he applied for disability benefits but was denied. He agreed no doctor has made a connection between his eye problem and headaches to his work injury. He also agreed he was told by his doctors all of the scar tissue had been removed, and he should use his shoulder. He was only treated by Dr. Meis and Dr. Pruitt.

On re-direct examination, claimant testified he experienced pain while mowing at the golf course. He stated he was in pain at the hearing. He could have driven to the hearing and home again but it would hurt.

On re-cross examination, he disagrees with what Jamie Hicks put into his records, especially the statement he has a drinking problem. He acknowledges Dr. Hines also felt he had a problem. He agreed the surveillance video showed he worked from 7:45 a.m. to 3:45 p.m. It also showed him going to a bar after work for two or three hours.

On questioning by the undersigned claimant indicated his aerospace training was a 12-week course. He obtained a certificate but was not able to find a job in that industry. He indicated the headache behind his eye was present during the hearing, and he rated it as three on a scale of one to ten. Most days it ranges from three to five, with heat, sun and stress making it worse. This happens often at his lawn mowing job. He can drive a car but it causes pain. For this reason he cannot return to his over-the-road truck driving job. He agreed his restrictions did not prevent him from working.

Claimant called Kevin Vugteveen, claimant's employer, as a witness. He has known claimant since he employed him. He agreed claimant signed a non-compete agreement. (Ex. 17) He agreed the employer received two letters of recommendation at the time he was hired. (Ex. 18, 19) He also agreed claimant was a good employee.

CONCLUSIONS OF LAW

The first issue in this case is the extent of the claimant's entitlement to permanent partial disability benefits, including whether claimant is an odd-lot worker.

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 seeks a finding of permanent total disability under the odd-lot doctrine.

In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id., at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

Claimant asserts the only work he can do is so limited in quality, quantity and dependability that a reasonably stable market does not exist for his services. He submits he is motivated to find work and has looked for full-time work, but he is not capable of full time, year-round work.

Claimant is 52 years old. This does put him at a disadvantage when competing with younger workers in the job market. His education is limited to a high school diploma. The lack of any further education, however, does not particularly adversely

affect him, as his work experience has been in manual labor jobs such as truck driving, construction, maintenance and landscaping.

Prior to his injury, claimant was able to perform the duties of his job for the employer. That work included mowing, landscape construction, fertilization, snow removal, and irrigation. (Ex. 14, p. 7) He was able to lift between 50 and 100 pounds. He was able to work year round, doing snow removal in the winter months.

After his work injury to his right shoulder, he now has chronic shoulder pain. He can no longer do the physical work, including overheard work, he did before. He has sleep disruption from his shoulder pain. His activities of daily living such as personal hygiene and dressing himself are more difficult because of his injury. His recreational activities are curtailed as well.

Claimant also credibly testified he now experiences severe headaches, which he feels is aggravated by being unemployed. He also reports being depressed, which he attributes to his injury, pain, and being unemployed.

A functional capacity evaluation (FCE) conducted on September 18, 2013, was considered valid. (Ex. 10) It showed claimant capable of doing heavy demand work, lifting on the right limited to 30 pounds, and only occasional elevated work.

Dr. Meis assigned claimant a rating of permanent partial impairment of seven percent of the right upper extremity, or four percent of the body as a whole, and adopted the FCE restrictions. He felt claimant had the ability to lift 50 pounds floor to waist, and 55 pounds bilateral carry ability. (Ex. 8, p. 11; Ex. 10)

Dr. Hines conducted an independent medical examination (IME). He rated claimant's right shoulder impairment as 28 percent of the body as a whole, due to weakness and limited range of motion along with depression. (Ex. 11, p. 6) Dr. Hines also noted claimant had been dealing with the loss of his wife prior to the injury, but the injury, resulting pain, and losing his job and not finding substitute work had aggravated claimant's depression. (Ex. 11, p. 7) He felt claimant should have restrictions against repetitive work, clutch driving, working at heights and working with vibrating tools. (Ex. 11, p. 7)

Claimant asserts his headaches and pain in his eye from optic neuritis are caused by his work injury. However, there is no medical record to support a causal connection between the work injury and these conditions. Dr. Hines does not attribute these conditions to the work injury. It is found claimant has not carried his burden of proof to show his eye condition or his headaches are caused by his work injury to his right shoulder. (Ex. 11, Ex. 12) Similarly, he has failed to show his right finger numbness is caused by the work injury. (Ex. 11, pp. 4-5) Although claimant states his insomnia has been increased by the work injury, he had a history of insomnia before the work injury. Claimant also has multiple sclerosis, unrelated to this work injury. Claimant's right shoulder condition has been shown to be caused by his work injury.

Claimant's injury prevents him from returning to the work he was doing at the time he was injured, landscaping. It also prevents him from returning to his past job as a truck driver. He is limited in the jobs for which he can apply due to his impaired right arm and shoulder.

Claimant has shown good motivation to find substitute work. He found one job, which did not work out due to his inability to perform the duties of a cook with his impaired shoulder. That job paid less than he was earning when he was injured. He applied for Social Security Disability benefits, but was denied.

The fact the employer had to let him go because he could no longer do the work is significant. So is the fact he will be unable to realistically apply for any type of job he has held in the past. He will have to find a new line of work, for which he has no experience or training, and convince a hiring employer his right shoulder impairment will not preclude him from doing that job. Claimant was earning $12.00 per hour when he was injured. He then lost his job, worked for a short time for $10.00 per hour, and was let go from that job when he could not keep up with the work. He now works for a golf course mowing roughs and fairways, working 40 hours per week with seasonal layoffs. He now earns $13.00 per hour for the golf course.

Thus, claimant is employed. This would normally preclude a finding of permanent total disability, but for the odd-lot doctrine. Under that doctrine, a worker who has found employment but the employment is so limited in quantity, quality and dependability that he or she is basically still unemployed and unemployable. However, that is not the case here. Claimant is working at a job doing roughly the same duties he did when he was injured. He is earning roughly the same amount. There may be a difference in that his work for the defendant employer was year round in that it included snow removal, and the golf course job is seasonal and does not involve winter work, but otherwise he is back to full-time employment and earning $13.00 per hour. Even when working for defendant employer, records show he received unemployment benefits for seasonal layoffs in 2010 and 2011. (Ex. B, pp. 8-9) He actually works for $1.00 per hour more today than when he was injured, $13.00 per hour versus $12.00 per hour. A video in the record shows claimant working at his new job, and he acknowledged he works eight hours per day there, although at the time of the hearing in January, 2015, he was on a seasonal layoff.

It cannot be said he is permanently and totally disabled, under either standard industrial disability analysis or under an odd-lot analysis. He did seasonal landscaping work prior to his injury, and he is back to doing the same kind of work.

This is not to say he has not suffered disability as a result of his injury. He has. Because of his injury, he now has work restrictions, ratings of impairment, and chronic pain that adversely affect his ability to work at the type of jobs he has done in the past, as well as his ability to compete against non-disabled workers in the job market.

Claimant also asserts his work injury has aggravated his depression. He lost his wife in 2009, a devastating experience for anyone. He acknowledges he was depressed from that loss prior to his injury, but submits, and Dr. Hines agrees, his work injury, the resulting chronic pain, loss of his job, and inability to find other work for a time has aggravated that depression.

Defendants point out claimant was treated for depression and tearfulness on January 12, 2011, a year before his work injury. (Ex. A, p. 6) He began taking Celexa at that time. Claimant had a history of depression in his personal physician's records prior to his work injury.

Dr. Hines is the only medical professional in the record to attribute an increase in claimant's depression to his work injury. Defendants point out several errors in Dr. Hines' report. He states claimant has difficulty cooking, yet claimant was employed as a cook at the time. He notes claimant had trouble playing with his grandchildren, yet claimant has no grandchildren. (Ex. C, p. 7) Dr. Hines stated claimant's work history was limited to landscaping work, but claimant had worked at a variety of jobs. (Ex. F, p. 5) Dr. Hines assigned claimant a rating of 15 percent of the body as a whole for his depression. Dr. Hines' opinion claimant's work injury has aggravated his depression, and his rating of 15 percent impairment to the body as a whole from the aggravation, which he combined with physical impairment in his rating of 28 percent, is not contradicted in the record. It is concluded claimant's work injury has resulted in both physical impairment and psychological impairment.

Based on these and all other appropriate factors of industrial disability, it is concluded claimant has, as a result of his work injury, an industrial disability of 60 percent.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay unto the claimant three hundred (300) weeks of permanent partial disability benefits at the rate of three-hundred twenty and 94/100 dollars ($320.94) per week from August 3, 2013.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall be given credit for benefits previously paid.

Defendants shall pay the claimant's prior medical expenses submitted by claimant at the hearing.

Defendants shall pay the future medical expenses of the claimant necessitated by the work injury.

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 14th day of April, 2015.

JON E. HEITLAND
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.