BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FELICIANO GARCIA-DIAZ a/k/a FELICIANO GARCIA,	:	File No. 5026201
Claimant,	:	
vs.	:	A R B I T R A T I O N
SWIFT PORK COMPANY,	:	D E C I S I O N
Employer,	:	
GALLAGHER BASSETT SERVICES,	:	
Insurance carrier, Defendants.	:	Head Note No.: 1801; 1801.1; 1802; 1803; 1804

STATEMENT OF THE CASE

The above named claimant filed a petition in arbitration seeking workers' compensation benefits from the above named defendants as a result of an injury he sustained on August 22, 2007, which arose out of and in the course of his employment. The case was heard and fully submitted in Des Moines, Iowa, on May 28, 2009. The evidence in the case consists of the testimony of claimant, Jacqueline Stoken, D.O., Mark Blankenspoor, Carma Mitchell, Irma Garcia, Martin Garcia, Margarito Hernandez-Garcia, Tony Luce, and Robert Sullivan. The evidence also consists of claimant exhibits 1 through 10 and 12 through 16 and defendant exhibits A through J. Exhibit 6, pages 10 through 11 was objected to by defendants and that objection was sustained. As a result those two pages of exhibits were excluded.

ISSUES

The parties presented the following issues for resolution in the case:

Although it was stipulated the injury is the cause of temporary disability there is a dispute as to whether all total disability/healing period benefits had been paid on the claim and whether claimant is entitled to temporary partial disability benefits;

Although it was stipulated the injury did cause permanent disability there is a dispute as to the nature and extent of that permanent disability;

Whether claimant is entitled to reimbursement for an independent medical evaluation under Iowa Code section 85.39;

The amount of credit to be given to defendants for weekly benefits previously paid; and

Whether all costs set forth in exhibit 16 are taxable pursuant to rule 876 IAC 4.33 and Iowa Code section 622.69 and 622.72.

FINDINGS OF FACT

Deputy Workers' Compensation Commissioner having heard the testimony of the witnesses and considered the evidence in the record finds that:

Claimant in this matter was 57 years old at the time of the hearing. Claimant was born in Mexico and came to the United States in 1972. His education involved four to six years of school in Mexico. Claimant testified that he can read and write a little in Spanish but that he is not able to read or write English.

Claimant testified he performed farm work in Mexico. In the United States he has worked in a foundry and also has done meat packing work. He started for the employer in this case in 1999, left, and then returned in 2001.

Claimant was on the job on August 27, 2007, working with a large press type machine. His right thumb became entangled in the machine which caused a crush injury to his right thumb. The machine also pulled on his thumb. Claimant came under the care of Bradley Lister, M.D., who performed surgery on August 22, 2007. Dr. Lister noted in his operative report that two-thirds of claimant's right thumb (distal phalanx) had to be amputated and that claimant had sustained severe damage to the tendons and nerves of the right thumb and right wrist area. (Exhibit 1, page 1)

Dr. Lister took claimant off work until August 27, 2007, when claimant was allowed to return to work to do left-handed work only. (Ex. 2, p. 1) Claimant testified that his job involved him separating gloves and that he did this up to February 28, 2008.

In a follow-up appointment with Dr. Lister on October 31, 2007, claimant reported having a lot of right arm pain and also straining his right shoulder. Dr. Lister offered the impression claimant had right shoulder pain with impingement and right shoulder rotator cuff tendonitis based on poor use of claimant's right hand, wrist, and fingers. Claimant also was noted as having pain from the tendons having been torn back to claimant's right wrist and right forearm. Dr. Lister ordered physical therapy for claimant to work on claimant's hypersensitivities that he had in his right thumb and hand and to work on any right shoulder impingement. Dr. Lister also offered an injection to claimant's right shoulder on that date. (Ex. 2, pp. 3-4)

On November 28, 2007, Dr. Lister examined claimant finding claimant to have good right shoulder range of motion and that claimant's right shoulder impingement was not as severe. Dr. Lister indicated that claimant was able to do light work with his right hand lifting no more than 10 to 20 pounds and that claimant was to avoid extremes of heat or cold. (Ex. 2, pp. 6-7)

On January 9, 2008, Dr. Lister noted that physical therapy was causing claimant pain and discomfort and that claimant continued to have hypersensitivities at the amputation site. Because of claimant's increase in symptoms in his right thumb and right upper extremity Dr. Lister began claimant on Lyrca. Dr. Lister also noted that claimant's neurological problem of the upper extremity could turn into reflex sympathetic dystrophy (RSD). (Ex. 2, pp. 9-10)

On February 13, 2008, Dr. Lister again believed claimant was having symptoms of RSD or complex regional pain syndrome (CRPS) which was progressing. Dr. Lister also noted claimant as being depressed. It was noted that the physical therapy sessions had been suspended as claimant was not doing much and had been walking out on sessions. Dr. Lister recommended that claimant be seen by a neurologist. (Ex. 2, pp. 12-14)

On March 12, 2008, Dr. Lister noted that claimant had continued thumb hypersensitivity and problems with his arm, elbow, shoulder, and neck. Dr. Lister stated that claimant had gone from an amputation and local pain of the right thumb into neurologic problems with RSD or CRPS. (Ex. 2, p. 15)

On August 25, 2008, Dr. Lister sent a letter to a pain clinic doctor asking that doctor to evaluate claimant's right upper extremity for RSD/CRPS. (Exhibit B, page 27) Claimant was eventually referred for such a consultation with Kenneth Pollack, M.D., who saw claimant on September 18, 2008.

Dr. Pollack's physical examination found very limited right shoulder range of motion. However, he determined claimant's skin temperature was the same for each hand and that claimant had no upper extremity edema/tremor present. Dr. Pollack also noted inconsistencies in claimant's pain complaints regarding his hand. Dr. Pollack also measured claimant's biceps finding his right bicep to be larger than his left bicep. Dr. Pollack also did not find sufficient physical findings for a diagnosis of CRPS type I. On that day Dr. Pollack offered claimant a sympathetic block injection. (Ex. E, pp. 2-3) Dr. Pollack saw claimant again on September 22, 2008, with claimant indicating that he had had some improvement initially from the block but that his symptoms had returned. Claimant also reported the spreading of the pain, as well as intensification of it, in areas that were not affected before the block was offered. Dr. Pollack offered a second sympathetic block on that date. (Ex. E, p. 4)

Claimant had undergone electrodiagnostic studies in August of 2008 which showed claimant to have some right carpal tunnel syndrome with medial nerve compression. (Ex. B, p. 30)

Claimant saw Dr. Lister on October 27, 2008, with claimant stating that the blocks offered by Dr. Pollack had made no difference in his symptoms. Dr. Lister indicated that the injection showed claimant did not have a large percentage of RSD/CRPS and that most of the findings could be local in claimant's medial nerve at the right wrist. (Ex. 2, p. 26) On November 26, 2008, Dr. Lister indicated that claimant had received two injections into the right carpal tunnel which had offered limited relief of claimant's symptoms. At that point Dr. Lister opined claimant to be at maximum medical improvement. Dr. Lister stated claimant had to avoid repetitive gripping and grabbing as well as power activities with his right hand and fingers. Claimant was also to avoid extremes of hot and cold weather. (Ex. 2, pp. 28-29)

Claimant testified on February 28, 2008, he was placed on a lay off status by the employer for one year in order to determine if a job could be found within his restrictions. If no job was found after that one year period claimant's employment would be terminated. This did occur in claimant's case.

Claimant underwent a functional capacity evaluation (FCE) on March 4, 2009, by Mark Blankenspoor. Mr. Blankenspoor indicated that claimant gave maximum consistent effort during the evaluation and that claimant demonstrated appropriate symptom response during testing. He also determined claimant's mechanics were consistent with claimant's symptoms and physical limitations. At hearing Mr. Blankenspoor determined that he found this to be a valid FCE.

Mr. Blankenspoor testified that he found claimant had range of motion and strength limitations in claimant's right hand, right elbow, and right shoulder compared to the left side. In his report Mr. Blankenspoor determined that claimant's capabilities placed claimant in a sedentary work category where claimant could lift up to 15 pounds rarely and 10 pounds occasionally with front carry tasks. (Ex. 4, pp. 1-2)

Dr. Lister, on April 6, 2009, offered permanent restrictions for claimant's right hand, wrist, and forearm due to the right thumb amputation. He determined claimant should not lift more than 30 pounds with the right hand. He opined claimant had a total 69 percent right upper extremity impairment, 63 percent of which was for right arm CRPS. (Ex. 2, pp. 31-32)

Claimant was seen by Jacqueline Stoken, D.O., for an independent medical evaluation. At the time of her physical examination of claimant Dr. Stoken noted claimant's right hand and thumb were shiny, swollen, purplish in color, and extremely sensitive to the lightest touch. She offered the impression that claimant had CRPS of the right thumb, hand, forearm, and right shoulder and causally related her diagnosis to the work injury. She determined claimant to have a combined right upper extremity

impairment of 99 percent which she converted to 59 percent whole person impairment. Dr. Stoken also adopted the restrictions set forth in the FCE. (Ex. 5, pp. 9-10)

Dr. Stoken testified at hearing that although claimant only had five of the criteria set forth in the 5th Edition of the AMA Guides for a diagnosis of CRPS she still believed that claimant does have CRPS. She stated that although Dr. Pollack reported no symptoms of CRPS, CRPS symptoms can come and go.

Dr. Pollack on March 20, 2009, in a letter to defendants' attorney, restated the inconsistencies he found during claimant's physical examination on September 18, 2008. He also restated his opinion that claimant did not have sufficient physical findings of CRPS pursuant to the Guides. He also found no evidence that claimant's injury extended beyond claimant's right upper extremity. (Ex. E, p. 9) On March 12, 2009, Dr. Pollack sent another letter to defendants' attorney, after reviewing Dr. Stoken's IME report. Dr. Pollack noted Dr. Stoken found only four of the eleven findings needed for a CRPS diagnosis under Table 16-16 of the Fifth Edition of the AMA Guides. He again indicated that he found no such findings on his physical examination of claimant and as a result he disagreed with Dr. Stoken's conclusion that claimant had CRPS. (Ex. E, p. 14)

Exhibit H are three jobs that claimant was offered by the employer in April of 2009. One job that was deemed to be the easiest job for claimant to do, driving hogs, was offered to claimant to perform. Claimant returned to work in that job on April 8, 2009, however, he only worked approximately two days and left. Claimant testified that he left because he was not able to do the job with one arm. He indicated that it was hard for him to keep from having contacts with the hogs that he was driving, with his right arm. He also testified that it was hot in the area in which he worked.

Tony Luce is the employer's employment manager. He testified that the driving hogs job was the easiest job in the plant and that it involved an employee moving hogs from one pen to another and opening and closing gates which did not involve much effort. Mr. Luce indicated that this is a regular bid job at the plant and that other employees, including an arm amputee, have performed this job. The rate of pay for the job was $12.60 an hour and it would have involved working 40 hours a week.

Robert Sullivan is the safety and health manager for the employer. He testified that he is familiar with the driving hogs job and believed that the job did not involve any significant physical labor on the part of claimant to perform the job. He indicated that some of the gates that were to be opened manually required only five to ten pounds of force to open and shut. Claimant also indicated that there was a hose that he was to use in doing the job but Mr. Sullivan indicated this hose had a squeeze gun at the end of it and was used to wash off boots of the individuals who did the driving hogs job.

Claimant testified that he has not sought work since leaving the employer.

Dr. Pollack indicated that he reviewed the jobs the employer was offering to claimant and found them to be compatible with claimant's physical capabilities. (Ex. E, p. 14) Dr. Stoken testified that she did not believe any of the jobs offered to claimant were jobs claimant could perform based on her physical examination of the claimant as well as the FCE. However, Mr. Blankenspoor testified that he believed claimant could have been able to do the job of driving hogs.

On May 15, 2009, Dr. Lister indicated his disagreement with Dr. Pollack's opinion that claimant did not have CRPS pursuant to the Guides. Dr. Lister indicated he completed his rating as a CRPS type II and that the impairment claimant had was limited to the right upper extremity. Dr. Lister indicated that claimant could do the drive hogs job using his left hand only. (Ex. 2, p. 36)

Carma Mitchell is a vocational specialist. She authored a vocational evaluation on August 16, 2009. She indicated that taking claimant's age, education, work history, the functional limitations set forth by Dr. Stoken and in the FCE, claimant would be unable to return to any of his past work. She also stated that there would not be a substantial number of jobs available in a labor market which claimant could perform. (Ex. 7, p. 3)

Ms. Mitchell testified at hearing her opinion that the drive hogs job could have presented a hazard to claimant of bumping claimant's right hand and fingers.

Claimant began seeing Craig Rypma, Ph.D., who is a psychologist, on July 28, 2008. Claimant reported to Dr. Rypma since his injury he had progressively gotten more anxious and avoided leaving the house. Dr. Rypma indicated that claimant had developed symptoms of anxiety and depression related to the injury and the consequences of its aftermath. (Ex. 6, pp. 3-5)

On March 30, 2009, Dr. Rypma diagnosed claimant as having major depression moderate single episode without psychosis and post-traumatic stress disorder along with avoidant features. He went on to state the following:

> He has developed symptoms of anxiety that now appear to be consistent with Posttraumatic Stress Disorder, and his depression has intensified remarkably to a point where he now is suffering from a Major Depression. These injuries continue to be related to his injury and the consequences of failure to treat in its aftermath. This evaluator strongly recommends that this individual be referred for psychological treatment.

(Ex. 6, p. 9)

Irma Garcia is claimant's daughter. She testified that prior to the injury her father was very social. However, since the injury she testified that he does not speak much,

does not go out in public and stays in his house. She also testified that he seems to be very depressed.

Martin Garcia is claimant's son. He noted the same changes in his father.

REASONINGS AND CONCLUSIONS OF LAW

The first issue to be resolved in this matter is the nature of claimant's permanent disability. The primary issue being whether claimant's injury is localized in his right upper extremity or whether claimant has a body as a whole injury requiring an evaluation of claimant's industrial disability.

Claimant contends that the injury he had to his right thumb has developed into RSD/CRPS. Claimant relies on the opinions of Dr. Lister, who was claimant's authorized treating physician, who saw claimant on several occasions, and who has consistently diagnosed claimant as having RSD/CRPS, limited to claimant's right upper extremity. Dr. Stoken has also opined claimant has CRPS.

Defendants contend that based on Dr. Pollack's opinion claimant does not have sufficient findings for a diagnosis of CRPS in this case. Dr. Pollack relies on the Fifth Edition of the AMA Guides for his opinion that claimant did not have sufficient findings for such a diagnosis and also based on the inconsistencies he found in claimant's physical examination.

It has been held by the commissioner that although the AMA Guides are a useful tool in evaluating loss of use the Guides were not adopted as a diagnosis guide. It has been held that medical professionals are free to diagnose based on the condition and physical impact. If it is determined that there is the presence of permanent, chronic, and disabling pain sufficient for a diagnosis of CRPS one can be offered and accepted. Atchison v. Platinum Hospitality, File No. 5016528 (Appeal Decision September 23, 2008)

Dr. Lister has consistently diagnosed claimant as having RSD/CRPS throughout his treatment of claimant. Dr. Stoken has also found claimant to have sufficient indications for such a diagnosis. It is concluded that more weight will be given to the opinion of Dr. Lister and Dr. Stoken.

It has been held that a diagnosis of RSD is to be evaluated industrially. Collins v. Dept. of Human Service, 529 N.W.2d 627 (Iowa App 1995) Accordingly, an evaluation on that basis will now be done.

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.

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.2d 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.

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co.,

288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Comm'r. Report 134 (App. May 1982).

Claimant is 57 years old at the time of the hearing. He understands very little English and cannot read or write English. His employment history has involved manual type labor. The valid functional capacity evaluation has determined claimant to be in the sedentary work category and both Dr. Stoken and Dr. Lister have provided permanent work restrictions in relation to claimant's injury which limits the types of work claimant can perform.

Carma Mitchell testified as to the lack of jobs that would be available in the labor market for claimant to perform.

Defendants terminated claimant's employment after one year when claimant was not able to perform any jobs in the plant within restrictions that had been imposed. Although defendants did attempt to re-employ claimant in a job which defendants contend is the easiest job in the plant, claimant testified that he was not able to continue working in this job because of his having continued pain complaints. Claimant also was in an area where the temperature was hot and there was also risk of claimant coming into contact with livestock with his injured right upper extremity.

After considering all of these factors it is determined that claimant's job opportunities are so limited in quality, dependability, or quantity that claimant meets the definition of being an odd-lot worker and is therefore totally disabled.

Claimant is contending that he is entitled to temporary total disability benefits from August 22, 2007 through August 26, 2007, as well as additional temporary total disability benefits from February 28, 2008 through May 19, 2008. However, as claimant is being awarded permanent total disability benefits claimant is not entitled to an award of temporary total/healing period benefits but would be entitled to permanent total disability benefits during those times. Claimant did work between August 27, 2007 up to February 28, 2008 and obviously claimant would not be entitled to any weekly benefits during that time as that would not be period of disability. Claimant is entitled to permanent total disability benefits during those times when claimant was off work. Defendants will be given credit against this permanent total disability award for any weekly benefits paid after the date of injury, August 22, 2007.

Claimant is contending he is entitled to temporary partial disability benefits as set forth in exhibit 2 for time that he lost due to leaving work early on the dates set forth in that exhibit because of pain he had in his right upper extremity. No evidence was offered by defendants to rebut this request. Based on the hours claimant missed it has been calculated that claimant would be entitled to a total of $57.95 in temporary partial disability benefits.

Claimant is requesting that the independent medical evaluation by Dr. Stoken be paid for by defendants under Iowa Code section 85.39. It is determined that defendants will be responsible for the payment of that evaluation.

Claimant is entitled to future medical benefits for this work injury and defendants will be responsible for the payment of those benefits causally connected to the injury in this case.

The last issue involves costs as set forth in exhibit 16. Defendants are disputing their being responsible for the total costs of Dr. Rypma's expert witness report as well as Mr. Blankenspoor's expert report. Under Iowa Code sections 622.72 expert witness fees are not to exceed $150.00. Therefore, defendants will be responsible for $150.00 of the costs of those 2 expert reports. Defendants will be responsible for the full amount of other costs set forth in exhibit 16.

ORDER

THEREFORE, IT IS ORDERED:

That defendants shall pay claimant permanent total disability benefits at the stipulated weekly rate of three hundred twelve and 76/100 dollars ($312.76) commencing on August 22, 2007. Claimant is not entitled to such benefits after that injury date for periods when claimant worked.

That defendants shall be given credit for the weekly benefits paid after August 22, 2007, against the permanent total disability award.

That defendants shall pay all outstanding weekly benefits owing after August 22, 2007.

That defendants shall pay claimant a total of fifty-seven and 95/100 dollars ($57.95) in temporary partial disability benefits.

That defendants shall pay the costs of the independent medical evaluation by Dr. Stoken.

That defendants shall provide for and pay for future medical benefits related to claimant's injury.

That defendants shall pay interest pursuant to Iowa Code section 85.30.

That defendants shall pay the costs of this action as set forth in the decision pursuant to rule 876 IAC 4.33.

That defendants shall file subsequent reports of injury as required by this agency.

Signed and filed this ____21st_____ day of July, 2009.

_____
STEVEN C. BEASLEY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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