BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
FEB 21 2019
WORKERS' COMPENSATION

JOSEPH D. RASMUSSON, Claimant, vs. VERMEER MANUFACTURING, Employer, and EMC RISK SERVICES, Insurance Carrier, Defendants.	File No. 5057557 ARBITRATION DECISION Head Notes: 1402.40, 1803, 2907

STATEMENT OF THE CASE

Joseph Rasmusson, claimant, filed a petition in arbitration seeking workers' compensation benefits from Vermeer Manufacturing, employer and EMC Risk Services, insurance carrier, as defendants. Hearing was held on October 24, 2017 in Des Moines, Iowa.

Joseph Rasmusson and Jim Rosenboom both testified live at trial. Defendants called Mark Fischer as a witness. However, claimant's counsel objected to the witness because he was not identified as a witness at least 30 days before the hearing as required. The objection was sustained. The evidentiary record also includes joint exhibits JE1-JE7, claimant's exhibits 1-9, and defendant's exhibits A-E.

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 parties submitted post-hearing briefs on November 17, 2017.

ISSUES

The parties submitted the following issues for resolution:

1. The nature and extent of industrial disability claimant sustained as a result of the stipulated May 2, 2014 work injury.

2. Assessment of costs.

FINDINGS OF FACT

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

The parties have stipulated that claimant, Joseph D. Rasmusson, sustained a compensable right shoulder injury while working for Vermeer Manufacturing on May 2, 2014. The central issue in this case is the extent of industrial disability claimant sustained as a result of that injury.

At the time of the injury Mr. Rasmusson was working for Vermeer as a material handler. In this job he sorted, moved, and distributed materials in several areas of the manufacturing plant. Claimant used a fork truck to perform his duties. On the date of the injury, Mr. Rasmusson was dismounting from a fork truck when he grabbed the handle with his right arm and stepped down. He testified he did not let go of the handle in time and pulled his right shoulder when he dropped his body weight. He felt immediate, sharp pain in his right shoulder and neck. (Testimony)

Mr. Rasmusson reported the injury to his employer and was sent to Vermeer's Occupational Health Services where he treated with Matthew Doty, M.D. He treated with Dr. Doty without improvement. Dr. Doty ordered an EMG of his right arm and MRI of his right shoulder. Dr. Doty diagnosed Mr. Rasmusson with impingement syndrome. Dr. Doty eventually referred Mr. Rasmusson to see Kary R. Schulte, M.D., orthopaedic surgeon. (Joint Exhibit 1, pages 283-288)

Dr. Schulte assessed Mr. Rasmusson with right shoulder impingement syndrome and calcific tendinitis. On August 8, 2014 Dr. Schulte performed a right shoulder arthroscopic debridement calcific tendonitis and arthroscopic subacromial decompression. Following surgery Mr. Rasmusson continued to treat with Dr. Schulte. On November 13, 2014, Dr. Schulte released Mr. Rasmusson to return to work without restrictions. Dr. Schulte assigned 1 percent whole person impairment for the work injury. (JE4, p. 306; Def. Ex. A, p. 1)

Mr. Rasmusson opted to undergo an independent medical examination (IME) with John Kuhnlein, D.O. This was conducted on April 27, 2015. Mr. Rasmusson reported to Dr. Kuhnlein that he did not have significant issues at work. Dr. Kuhnlein opined that Mr. Rasmusson's shoulder symptoms were related to the work injury.

However, Dr. Kuhnlein determined that the complaints of paresthesia in the right arm and hand were not related to the work injury. Dr. Kuhnlein assigned 2 percent whole person impairment for the work injury. Dr. Kuhnlein noted that Dr. Schulte's rating was inappropriately based on passive, rather than active range of motion testing. Dr. Kuhnlein felt Mr. Rasmusson could work occasionally at or above shoulder height with a 30-pound limit. (JE1)

The impairment ratings from Dr. Schulte and Dr. Kuhnlein are the only ratings in this matter. I find the rating of Dr. Kuhnlein to carry greater weight than that of Dr. Schulte. I find Dr. Kuhnlein's critique of Dr. Schulte's rating to be persuasive. Thus, I conclude that Mr. Rasmusson sustained 2 percent whole person functional impairment due to the work injury.

Mr. Rasmusson returned to work at Vermeer under Dr. Kuhnlein's restrictions. He continued to have complaints. (Testimony)

Mr. Rasmusson returned to see Dr. Schulte on August 15, 2015. No changes were noted in his condition. Dr. Schulte again released Mr. Rasmusson to full duty work without restrictions. He noted if there was doubt about Mr. Rasmusson's ability to work then he recommended a functional capacity evaluation (FCE). (JE4, pp. 307-09)

On September 22, 2015, Mr. Rasmusson participated in an FCE. This FCE report states that the testing was conducted to determine Mr. Rasmusson's tolerance to perform work tasks. Based on the test results, it was determined that Mr. Rasmusson was able to perform within the medium physical demand category of work with occasional lifting below waist height to 60 pounds. He could also lift 50 pounds to shoulder height and 25 pounds overhead. He carried 50 pounds. (JE7, p. 378)

On October 6, 2015, a re-testing of material handling was conducted to determine Mr. Rasmusson's maximums. Based on these results, Mr. Rasmusson was again determined to be able to perform within the medium physical demand category of work. However, this time it was determined that he could perform occasional lifting to waist height to 75 pounds. He lifted 55 pounds to shoulder height and 50 pounds overhead. He carried 70 pounds. (JE7, p. 366)

On October 9, 2015, Dr. Schulte adopted the findings from the re-testing as Mr. Rasmusson's permanent restrictions. The doctor stated that the restrictions should be considered permanent unless Mr. Rasmusson had any significant change in his condition. He then stated:

> Based on the results obtained the client is able to perform within the median physical demand category of work with occasional lifting to waist height to 75 pounds. The client lifted 55 pounds to shoulder height and 50 pounds overhead. The client carried 70 pounds. Pushing abilities were

> evaluated and the client pulled 80 horizontal force pounds and pushed 85 horizontal force pounds respectively.

(JE4, p. 314)

I find that as a result of the May 2, 2014 work injury Mr. Rasmusson has permanent restrictions as set forth by Dr. Schulte. These restrictions are based on a valid FCE that was adopted by an orthopaedic specialist.

Mr. Rasmusson has continued to have ongoing complaints. He returned to see Dr. Schulte in September of 2016. He reported to Dr. Schulte that he had returned to work under the set forth restrictions. He was experiencing occasional throbbing pain in his shoulder, sometimes related to activity and sometimes with no particular aggravating activity. Dr. Schulte noted that Mr. Rasmusson's examination was unremarkable. He recommended that he continue a home exercise program, ice, and ibuprofen as needed. Mr. Rasmusson was to return as needed. (JE4, pp. 315-321)

Dr. Schulte saw Mr. Rasmusson again in June of 2017 for continued pain in his right shoulder, especially after heavy activity. Dr. Schulte did not see anything on examination that warranted further intervention on his part. He provided Mr. Rasmusson with a work release maintaining the same restrictions. Mr. Rasmusson was advised to follow up as needed. Mr. Rasmusson requested further evaluation by a pain management specialist or by another orthopaedic surgeon. Mr. Rasmusson said he was going to discuss that with the workers' compensation carrier. Dr. Schulte stated that, "I never have a problem seeking a second opinion elsewhere." (JE4, p. 322)

In addition to his full-time job at Vermeer, Mr. Rasmusson is also a reserve deputy. He had been a reserve deputy for approximately 10 months prior to hearing. In order to obtain this position, he had to pass a law enforcement-based physical. Mr. Rasmusson had the employment physical performed at Pella Regional Health Center on October 19, 2016. The clinical note states he was there for an employment physical for Iowa State Patrol Reserves. Mr. Rasmusson denied any concerns that day. The doctor noted that Mr. Rasmusson discussed his deviated septum, denied fatigue, and disclosed his seasonal allergies and anxiety. A past surgical history of right shoulder surgery in August of 2014 is noted. Mr. Rasmusson met the physical requirement necessary to fulfill the responsibilities of a law enforcement officer. (JE2, pp. 267-274; Testimony)

Mr. Rasmusson is right-hand dominant. At hearing, Mr. Rasmusson testified that he continues to have right shoulder pain. The more he uses his right shoulder the more pain he has. Lifting overhead is painful. He fatigues easily. Pushing, pulling, and hammering also bothers his right shoulder and causes him pain and fatigue. His shoulder interferes with his ability to sleep. (Testimony)

At the time of the work injury, Mr. Rasmusson was working as a material handler. However, prior to the injury, he was bidding out of that position into the job of saw operator. The saw operator job was less physically demanding and that position also paid more. I find that Mr. Rasmusson did not bid out of the material handler job because of the work injury.

At the time of hearing, Mr. Rasmusson was still working for Vermeer; he was working as an assembler. He is currently earning more than he was at the time of the injury. Mr. Rasmusson testified that he is not looking for other employment and is content in his current position. He testified that he does not believe he could return to work as a material handler due to his shoulder pain and he does not feel he could perform that job and stay within his restrictions. (Testimony)

Prior to beginning his employment at Vermeer, Mr. Rasmusson underwent a pre-employment physical which deemed him physically capable of performing the essential functions of the job without restrictions. (Cl. Ex. 5, p. 15) I find that as a result of the work injury he now has permanent restrictions as assigned by Dr. Schulte.

At the time of hearing, Mr. Rasmusson was in his mid-thirties. He has a high school diploma. Additionally, he has an Associate Degree in Criminal Justice and an Associate Degree in Auto Collision. He was generally an A and B student.
Mr. Rasmusson also has skills he has learned through his prior employment. He knows how to operate a fork truck. He has experience and knowledge in the areas of production, shipping schedules, filling orders, manufacturing techniques, and assembly. Mr. Rasmusson has also worked as a store manager for an auto parts store. In this position he managed employees and inventory. (Testimony)

Considering Mr. Rasmusson's age, educational background, employment history, ability to retrain, motivation to maintain his employment, length of healing period, permanent impairment, and permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that he has sustained a 15 percent loss of future earning capacity as a result of his work injury with Vermeer. I find that Mr. Rasmusson has demonstrated that he is entitled to 75 weeks of permanent partial disability benefits.

We now turn to the issue of costs. Claimant seeks an assessment of costs against defendants as set forth in claimant's exhibit 8. Specifically, claimant is seeking reimbursement for the filing fee ($100.00) and the costs of service ($6.74). Costs are to be assessed at the discretion of the deputy hearing the case. Because claimant was generally successful in his claim I exercise my discretion and award costs. I find that the costs claimant is seeking are appropriate under 876 IAC 4.33 (3) & (7). Thus, I assess costs against defendants in the amount of $106.74.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6)(e).

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

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.

Based on the above findings of fact, I conclude that claimant has carried his burden of proof to show by a preponderance of the evidence that he sustained 15 percent industrial disability as a result of the work injury. As such, he has demonstrated entitlement to 75 weeks of permanent partial disability benefits. These benefits shall commence on the stipulated date of September 26, 2015.

Claimant is also seeking costs. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. I found that claimant was generally successful in this case. I exercise my discretion and award costs as noted above.

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the rate of five hundred forty-two and 88/100 dollars ($542.88).

Defendants shall pay seventy-five (75) weeks of permanent partial disability benefits commencing on the stipulated commencement date of September 26, 2015.

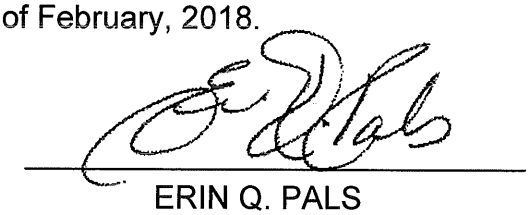
All past due weekly benefits shall be paid in lump sum with applicable interest pursuant to Iowa Code section 85.30.

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

Defendants shall reimburse claimant's costs in the amount of one hundred six and 74/100 dollars ($106.74).

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 21st day of February, 2018.



ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Robert E. Tucker
Attorney at Law
2400 - 86th St. Ste. 35
Urbandale, IA 50322-4306
robtucker@tuckerlaw.net

William D. Scherle
Attorney at Law
5th Floor, US Bank Bldg.
520 Walnut St.
Des Moines, IA 50309-4119
bscherle@hmrlawfirm.com

EQP/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.