BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
JUN 18 2018
WORKERS' COMPENSATION

JOSEPH GORDON, Claimant, vs. SAFELITE FULFILLMENT, INC., d/b/a SAFELITE AUTO GLASS, Employer, and TRAVELERS PROPERTY CAS. CO. OF AMERICA, Insurance Carrier, Defendants.	File No. 5063169 ARBITRATION DECISION Head Note No.: 1801.3

STATEMENT OF THE CASE

Claimant, Joseph Gordon, filed a petition in arbitration seeking workers' compensation benefits against Safelite Fulfillment, Inc, d/b/a Safelite Auto Glass, employer, and Travelers Property Cas. Co. of America, insurer, both as defendants, for an accepted work injury dated November 25, 2012. This case was heard on February 15, 2018, and considered fully submitted on the same. Parties declined the offer to brief.

The record consists of joint exhibits 1-7, claimant's exhibits 1-3, and defendants' exhibits A-E along with the testimony of claimant.

ISSUE

Extent of claimant's permanent partial disability.

STIPULATIONS

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 agree the claimant sustained an injury on November 25, 2012, which arose out of and in the course of his employment. They agree that the injury was the cause of some temporary disability, entitlement to which is no longer in dispute. They further agree the injury was the cause of some permanent disability, but dispute the extent. They agree that the disability is industrial in nature and that the commencement date for permanent partial disability benefits is July 1, 2014.

At the time of the injury, the claimant's gross earnings were $555.91 per week. He was married and entitled to four exemptions. The weekly benefit rate is $395.71 based on those foregoing numbers.

Defendants waive all affirmative defenses. There are no medical benefits in dispute.

Prior to the hearing the claimant was paid 30 weeks of compensation at the rate of $398.85 per week. The parties agree that defendants are entitled to a credit of this amount against any award herein.

FINDINGS OF FACT

Claimant was a 39-year-old person at the time of the hearing. He received a high school diploma at Sioux City East where he achieved average grades. Claimant acknowledges some experience with computers. At all relevant times hereto, he has been married with two children.

Claimant is right-handed.

His past work history includes lawn care work, work for a plumbing company, assisting in installing sewer, water, and gas lines in residential and commercial buildings along with water softeners and heaters installation. Claimant grew tired of the physical nature of his work and moved on to Kryger Glass where he installed auto glass, commercial, and residential glass for approximately 6 to 7 years. This work required lifting of 50 to 100 pounds.

He then obtained a job as a maintenance engineer at Sara Lee Bakery, hoping for a job with better benefits and better pay. This job was also physical, requiring lifting of 30-80 pounds. He left this position because the hours were not suited for his family. Briefly, he worked at SmithCo as a welder/fabricator and then moved on to Wilson Trailer repairing damaged trailers and building custom boxes. He was let go as a result of layoffs and downsizing.

After Wilson Trailer, claimant found work with Dwyer Construction as a concrete laborer. Claimant described this is a very physical job where he would haul wheelbarrows of concrete around job sites.

He began working for defendant employer around 2013. He started off as a technician, installing glass windshields. He moved into a lead tech position and was an acting store manager for some time.

His duties for defendant were similar to those he performs at Kryger Glass. As a glass technician for defendant employer, he would lift heavy windshields weighing 70 to 100 pounds. Over 50 percent of his job was using his arms at or above his shoulders. Windshields are lifted by attaching suction cups to the glass and manually positioning the glass into place on the automobile. As store manager, claimant would complete paperwork, close the store, handle the cash register, take care of bills and track incoming jobs.

At some point, a store manager position became available. Claimant applied for this job, but the position was given to someone outside of the company. At that point, claimant decided to move on to new employment at Gelita, USA. This position had been obtained prior to leaving the defendant employer and paid more than his position with defendant employer.

Claimant's job duties as plant 100 utility operator for Gelita required lifting of 50 to 70 pounds on an occasional basis. (Ex. C:20) Claimant underwent a 20 to 30-minute pre-employment physical on March 2, 2015, and was found to be able to perform the essential job functions. (Ex. C: 29) During the examination, there was no notation regarding any numbness, muscle weakness or nerve trouble nor any permanent restrictions of lifting, carrying, pushing or pulling. (Ex. C:24) His shoulder range of motion was deemed normal. (Ex. C:24) He was found to be able to exert in excess of 100 pounds of force occasionally, in excess of 50 pounds of force frequently, and in excess of 20 pounds of force constantly. (Ex. C:25) It was noted that claimant tested 13.37 percent difference on the shoulder flexion strength, which translated into an impairment of 10 percent. (Ex. C:26)

In 2015, claimant began working as a utility operator for Gelita. He worked in the P100 department, which is the beginning of the process of making gelatin. The heaviest amount that he lifted was between 10 to 15 pounds. Much of the job was monitoring a screen, writing down numbers, and pushing buttons. Claimant testified that he would still be able to do the job of utility operator at Gelita despite his current physical condition.

He was terminated from that position due to violation of rules such as missing work and working more time than he was scheduled.

He is not currently employed but has been looking for work. He received a job offer working as an oil tech for nine dollars an hour. He had an interview recently with a pet food manufacturing company as a machine operator. He plans to take the job if it is offered.

On or about November 25, 2012, claimant developed left shoulder pain which he attributed to lifting windshields. He was first seen by Rodney Cassens, M.D., who prescribed pain medication and advised claimant to undergo physical therapy. (JE 1:2) Claimant underwent the conservative treatment through December 2012. When claimant's symptoms did not resolve, an MRI was scheduled. (JE 1:7) The MRI was conducted on December 27, 2012, which showed mild tendinopathy of the supraspinatus and infraspinatus tendons along with bursitis in the subacromial subdeltoid. (JE 1:8) There were also signs of mild degenerative joint disease. (JE 1:9)

Because there was no evidence of a tear, claimant was continued on physical therapy. (JE 1:10) Claimant's symptoms did not improve and he was referred to Charles Rosipal, M.D, an orthopedic specialist. (JE1:16) Dr. Rosipal diagnosed claimant with left shoulder adhesive capsulitis with subacromial/subdeltoid bursitis. (JE 2:18) Dr. Rosipal administered an injection and ordered more therapy. (JE 2:18) After the physical therapy was unsuccessful, an MRI arthrogram was conducted on April 18, 2013, which showed a small partial articular surface tear involving the posterior aspect of the infraspinatus tendon as well as supraspinatus tendinosis. (JE 3:32) Dr. Rosipal recommended manipulation under anesthesia, which took place on May 9, 2013. (JE 4:36) During the procedure, audible popping and tearing sensations were noted as manipulation was performed. There was no evidence of interarticular loose bodies, the humeral head was well centered, the biceps had normal appearance, and there was no evidence of any high-grade partial thickness or full-thickness tear. (JE 4:37) There was evidence of adhesions in the region of the rotator interval which were divided. (JE 4:37) There was also evidence of findings consistent with the Buford complex anteriorly. (JE 4:37)

Claimant continued to report pain and stiffness along with popping upon range of motion. (JE 2:28) A diagnostic injection was performed on July 16, 2013. (JE 2:29) Dr. Rosipal then recommended a second surgery. Claimant sought out a second opinion with Ryan C. Meis, M.D., a surgeon recommended by friends and family. (JE 5) Dr. Meis wrote that he felt that claimant's treatment had been exemplary despite the claimant's lack of improvement. (JE 5:41) Dr. Meis offered to do an arthroscopy with subacromial decompression, scar excision in the subacromial space and a close evaluation of the biceps. (JE 5:41)

Claimant agreed with this and Dr. Meis performed surgery on November 7, 2013. (JE 6:58) A complete bursectomy was performed in the subacromial space as well as removal of adhesions. Five millimeters of the anterior aspect of the acromion was also removed. (JE 6.59) By February 4, 2014, claimant reported some improvement with range of motion and comfort level while sleeping, but still had discomfort on a regular basis. (JE 5:46) Dr. Meis advised claimant that there was nothing obstructive inside the joint that should be causing discomfort. (JE 5:46)

May 2, 2014, claimant returned for follow-up with Dr. Meis reporting pain and limited range of motion. (JE 5:49) His range of motion in the shoulder was good at

lower levels, but limited flexion to 160 degrees and with abduction to 120 degrees. (JE 5:49) He had good strength and no numbness or tingling. (JE 5:49)

On July 1, 2015, Dr. Meis found claimant had plateaued. (JE 5:52) Dr. Meis documented claimant was doing most routine activities without severe pain except upon extremes of motion and with heavier loads. (JE 5:52) Work restrictions were recommended of no working on the glass on semi's, some assistance when working on regular vehicles, occasional overhead activity with no lifting greater than 19 pounds on the left. (JE 5:52) Claimant has not returned for any treatment since this date although he testified that he may return for more injections.

Claimant testified that while he was still working for the defendant employer, there was another worker that would help him lift if there were weights in excess of his restrictions.

Claimant testified that he felt more appropriate work restrictions would be 35 pounds with both arms and 10 pounds with one. He testified that he struggled lifting with his left arm and has numbness in the two middle fingers on the left. The complaint of numbness was not corroborated in the medical records. For instance, on the May 12, 2015 visit, light touch was intact throughout his hand. (JE 5:54) During the July 1, 2014, visit, claimant denied numbness or tingling. (JE 5:52) A year later, claimant was still denying numbness or tingling in his hands or fingers. (Ex. 5.55) Based on the medical records, it is determined that to the extent claimant suffers from numbness and tingling, it is not associated with his work injury.

He testified at hearing that he cannot reach behind his back or above his shoulder. He has difficulty putting a belt on by himself. Prior to the injury his home leisure activities included playing softball and riding his motorcycle. He can no longer ride his motorcycle for more than 20 minutes because his left arm will go numb and there will be a burning sensation in his left shoulder.

On January 12, 2015, claimant underwent an independent medical examination with Sunil Bansal, M.D. (Ex. 1:66) Dr. Bansal recorded claimant as experiencing frequent numbness and tingling in the left arm, starting at the small finger and moving to the other three fingers and dissipating by the time it reached the index finger. Claimant also reported experiencing occasional popping of his left shoulder and constant aching pain with the occasional sharp shooting pain. (CE 1:73) Claimant maintained to Dr. Bansal that his average left shoulder pain was 4/10 on a 10 scale but that it could get as high as 8 or 9 on a 10 scale. (JE 1:73)

Claimant was tender to palpation and exhibited some small reduction in range of motion. (CE 1:74)

Dr. Bansal assigned a 7 percent impairment of the body as a whole and recommended the restrictions of no lifting greater than 35 pounds with both arms and no lifting greater than 10 pounds over shoulder level with the left arm. (CE 1:75-76)

CONCLUSIONS OF LAW

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

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.

The only issue in this case is the extent of the claimant's disability. The claimant urges the agency to adopt the findings of Dr. Bansal. Dr. Bansal's assessment was claimant sustained a 7 percent whole body impairment and recommended the restrictions of no lifting greater than 35 pounds with both arms and no lifting greater than 10 pounds over shoulder level with the left arm. Dr. Meis's restrictions were only occasional overhead activity with no lifting greater than 19 pounds on the left.

Claimant has not seen any physician for his shoulder injury since being released from Dr. Meis's care in 2015. Further, only months prior to his release, claimant underwent a pre-employment physical wherein it was found that he could do heavy duty labor. However, that pre-employment physical did indicate the claimant had a 13.37 percent difference in shoulder flexion strength. Otherwise, his shoulder range of motion tests were normal in the March 2, 2015, pre-employment physical.

The testing results of the pre-employment physical are more closely aligned with the medical findings and recommendations of Dr. Meis. Claimant's past employment history is varied including everything from store manager to heavy duty laborer. There are some jobs claimant would not be able to perform under Dr. Meis's restrictions such as the concrete work and possibly the position as maintenance engineer at Sara Lee Bakery. He was able to return to the employ of defendant employer and continue as an acting store manager and glass technician, albeit with occasional help from a co-worker.

Claimant is motivated to return to work. He has been actively applying for positions and interviewing. Before he left defendant employer, he had a new position with Gelita USA lined up.

Based on the foregoing, this determined the claimant has sustained a 15 percent whole person impairment.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant seventy-five (75) weeks of permanent partial disability benefits at the rate of three hundred ninety-five and 71/100 dollars ($395.71) per week from July 1, 2014.

That defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten (10) percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two (2) percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

That defendants are to be given credit for benefits previously paid.

That defendants shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

Signed and filed this 18th day of June, 2018.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
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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.