BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ALFRED GATEWOOD, Claimant, vs. INNKEEPER HOSPITALITY SERVICES, LLC, Employer, and BERKSHIRE HATHAWAY HOMESTATE INSURANCE COMPANY, Insurance Carrier, Defendants.	File Nos. 19007309.01 20000508.01 A P P E A L D E C I S I O N Headnotes: 1402.40; 1803; 1804; 4100

Claimant Alfred Gatewood appeals from an arbitration decision filed on June 3, 2022. Defendants Innkeeper Hospitality Services, LLC, employer, and its insurer, Berkshire Hathaway Homestate Insurance Company, respond to the appeal. The case was heard on November 19, 2021, and it was considered fully submitted in front of the deputy workers' compensation commissioner on December 28, 2021.

In the arbitration decision, the deputy commissioner found claimant sustained 50 percent industrial disability as a result of the stipulated May 19, 2019, and November 17, 2019, work injuries, which entitles claimant to receive 250 weeks of permanent partial disability (PPD) benefits commencing on May 19, 2020. Pursuant to 876 IAC 4.33(7), the deputy commissioner found defendants should reimburse claimant for the filing fees, but found claimant is not entitled to reimbursement from defendants for the vocational reports prepared by Barbara Laughlin, M.A.

On appeal, claimant asserts the deputy commissioner erred in finding claimant did not sustain reflex sympathetic dystrophy or complex regional pain syndrome as a result of the work injuries. Claimant asserts the deputy commissioner erred in finding claimant sustained 50 percent industrial disability, and claimant asserts he is entitled to additional industrial disability benefits. Claimant asserts the deputy commissioner erred in finding he is not entitled to reimbursement from defendants for the cost of Ms. Laughlin's vocational reports under 876 IAC 4.33(7).

Defendants assert on appeal that the arbitration decision should be affirmed in its entirety.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.15 and 86.24, the arbitration decision filed on June 3, 2022, is affirmed in part, and is modified in part, with the following additional and substituted analysis.

Without additional analysis, I affirm the deputy commissioner's finding that claimant did not meet his burden of proof to establish he sustained reflex sympathetic dystrophy or complex regional pain syndrome caused by the stipulated work injuries. I affirm the deputy commissioner's findings that pursuant to 876 IAC 4.33(7), defendants should reimburse claimant for the cost of the filing fees, but not for the cost of Ms. Laughlin's vocational reports.

With the following substituted and additional analysis, I find claimant sustained 70 percent industrial disability as a result of the work injuries, which entitles claimant to receive 350 weeks of permanent partial disability benefits.

Claimant commenced employment with defendant-employer on March 19, 2019, as a banquet supervisor and server. (Transcript, p. 34) Claimant earned $14.00 per hour and he worked 30 hours per week. (Tr., pp. 30, 63)

On May 19, 2019, claimant felt and heard a "pop" in his low back when he bent down and attempted to pick up a tub of silverware from the floor weighing between 50 and 75 pounds while working as a supervisor and server for defendant-employer. (Tr., pp. 30-31) Following the work injury, claimant complained of low back pain, left lower extremity pain, and parathesias. (Joint Exhibit 7, p. 18) Claimant testified he did not have any problems with his low back or left leg prior to the May 19, 2019, work injury. (Tr., p. 34)

Todd Ridenour, M.D., neurosurgeon, diagnosed claimant with severe left-sided L5 and S1 radiculopathies related to degenerative lumbar spondylosis and a large sequestered disc fragment, left side, L5-S1. (JE 4, p. 11) On August 19, 2019, Dr. Ridenour performed left sided L5 and S1 hemi laminectomies followed by partial medial facetectomies, left side, L4-L5 and L5-S1, and open microdiscectomy, left side, L5-S1. (JE 4, p. 11; JE 7, p. 26) The surgery did not relieve claimant's low back pain or left leg symptoms. (JE 7, p. 26; Tr., p. 36) Claimant was referred for pain management and at the time of the hearing he was taking pregabalin, duloxetine, and hydrocodone for pain and he was treating with pain management and his primary care physician. (Tr., pp. 50-51)

During an appointment on August 26, 2019, Dr. Ridenour released claimant to return to work with restrictions of no lifting over ten pounds for one week, with no excessive bending or twisting. (JE 7, p. 27) Claimant returned to work, but in a different position, as a food and beverage supervisor, where he worked less hours. (Tr., p. 38)

Claimant sustained a second low back injury at work on November 17, 2019, when he slipped on water on the floor that spilled when a table collapsed. (Tr., p. 39) Claimant did not miss any additional work as a result of the November 17, 2019, injury, but resigned in December 2019 because he did not believe his employer was respecting him. (Tr., pp. 41-42)

In 2015, Claimant started working as a part-time homemaker for a neighbor, assisting the neighbor 2.5 hours per day. (Tr., pp. 42-43) A few years later claimant began providing homemaker services for his father, who lived with claimant, until his father died in April 2021. (Tr., pp. 42-43) Claimant received pay as a homemaker from the State of Iowa. (Tr., p. 44) At the time of his father's death, the State of Iowa paid claimant $1,270.00 per month for the services he provided for his father, and $972.00 per month for the services he provided for his neighbor. (Tr., p. 45)

In May 2021, claimant commenced part-time employment with Hy-Vee Market Grille as a cook. (Tr. p. 47) Claimant earned $14.00 per hour and he was scheduled to work 24 hours per week. (Tr., p. 48) Claimant testified he informed Hy-Vee of his work injuries and Hy-Vee agreed claimant did not have to lift anything and he could sit down when he wanted. (Tr., p. 48) Claimant worked for Hy-Vee for one week, and he resigned because he did not want to wear a NASCAR shirt to work which was required as part of a special event. (Tr., pp. 47-48, 65)

In late August 2021, claimant commenced employment with Hilton DoubleTree as a bartender and server, working 30 hours per week. (Tr., pp. 22-23) The DoubleTree pays claimant $8.00 per hour when he works as a bartender, $10.00 per hour when he works as a server in the restaurant, and $12.00 per hour when he works as a banquet server. (Tr., p. 25) Claimant testified he works as a banquet server 99 percent of the time. (Tr., p. 26) When he works as a server in the restaurant or during a banquet, claimant serves and clears individual dinner plates and he serves water. (Tr., pp. 26-27) Claimant does not lift any heavy trays of food or plates.

Claimant testified that after he started working for the DoubleTree his symptoms became worse when he worked four days in a row, so his primary care provider issued a noted stating claimant is "limited to only working Friday, Saturday & Sunday." (JE 2, p. 4; Tr., pp. 23-24) Claimant was working for the DoubleTree at the time of the hearing under the three-day restriction. (Tr., p. 23) At the time of the work injuries, claimant worked 30 hours per week for defendant-employer, earning $14.00 per hour. (Tr., pp. 30, 63) At the time of the hearing claimant was working less hours per week for the DoubleTree, and he was earning $12.00 per hour as a banquet server, $8.00 per hour as a bartender, and $10.00 per hour in the restaurant. (Tr., p. 25)

"Industrial disability is determined by an evaluation of the employee's earning capacity." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 852 (Iowa 2011). In considering the employee's earning capacity, the deputy commissioner evaluates

several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-138 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(v). When considering the extent of disability, the deputy commissioner considers all evidence, both medical and nonmedical. Evenson v. Winnebago Indus., Inc., 881 N.W.2d 360, 370 (Iowa 2016).

The Iowa Supreme Court has held, "it is a fundamental requirement that the commissioner consider all evidence, both medical and nonmedical. Lay witness testimony is both relevant and material upon the cause and extent of injury." Evenson, 881 N.W.2d 360, 369 (Iowa 2016) (quoting Gits Mfg. Co. v. Frank, 855 N.W.2d 195, 199 (Iowa 2014)).

Claimant alleges the deputy commissioner erred in finding he sustained only 50 percent industrial disability as a result of the work injuries, and claimant contends he is permanently and totally disabled under the odd-lot doctrine, or, alternatively, that he is entitled to additional industrial disability benefits. Defendants assert the deputy commissioner's decision should be affirmed.

In Iowa, a claimant may establish permanent total disability under the statute, or through the common law odd-lot doctrine. Michael Eberhart Constr. v. Curtin, 674 N.W.2d 123, 126 (Iowa 2004) (discussing both theories of permanent total disability under Idaho law and concluding the deputy's ruling was not based on both theories, rather, it was only based on the odd-lot doctrine). Under the statute, the claimant may establish the claimant is totally and permanently disabled if the claimant's medical impairment together with nonmedical factors totals 100 percent. Id. The odd-lot doctrine applies when the claimant has established the claimant has sustained something less than 100 percent disability but is so injured that the claimant is "unable to perform services other than 'those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.'" Id.

"Total disability does not mean a state of absolute helplessness." Wal-Mart Stores, Inc. v. Caselman, 657 N.W.2d 493, 501 (Iowa 2003) (quoting IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 633 (Iowa 2000)). Total disability "occurs when the injury wholly disables the employee from performing work that the employee's experience, training, intelligence, and physical capacity would otherwise permit the employee to perform." IBP, Inc., 604 N.W.2d at 633.

Four physicians provided expert opinions in this case, Rick Garrels, M.D., an occupational medicine physician who performed an independent medical examination (IME) for defendants on August 31, 2020, David Segal, M.D., a neurosurgeon, who performed an IME for claimant on December 10, 2020, Sanjay Sundar, M.D., an anesthesiologist who specializes in pain management, who performed an IME for defendants on September 29, 2021, and Chad Abernathey, M.D., a neurosurgeon who performed an IME for defendants on October 8, 2021. The deputy commissioner found Dr. Segal's opinion to be the most persuasive. I agree Dr. Segal's opinions are most persuasive, as supported by Dr. Abernathey's opinion. Drs. Segal and Abernathey have superior training to Drs. Sundar and Garrels. I also agree Dr. Segal's opinion is more detailed than the opinions of Drs. Sundar, Garrels, and Abernathey and Dr. Segal used the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides") in reaching his conclusions.

Dr. Garrels assigned claimant ten percent permanent impairment under the AMA Guides, based on residual radiculopathy resulting in dermatomal pain, paresthesias, and sensory loss. (Ex. A) Dr. Garrels did not provide an opinion on whether claimant should be assigned any permanent restrictions or whether he need any future medical care. (Ex. A)

Dr. Sundar also assigned claimant ten percent permanent impairment under the AMA Guides and opined the work injuries aggravated or exacerbated a preexisting condition caused by an earlier fall down the stairs when claimant broke his toe. (Ex. B, p. 10) Dr. Sundar did not assign any permanent restrictions or recommend any future medical care. (Ex. B, p. 10)

Dr. Abernathey diagnosed claimant with "chronic low back pain and primarily left L5 radiculopathy with ankle and foot dorsiflexion weakness (foot drop) and sensory loss," caused by his work injuries on May 19, 2019, and November 17, 2019. (Ex. C) Dr. Abernathey assigned claimant 25 percent permanent impairment and imposed a 30 pound lifting restriction. (Ex. C, p. 11) Dr. Abernathey documented claimant may benefit from reconstructive surgery of the L4-L5 degenerative and postsurgical findings. (Ex. C, p. 13) As correctly noted by the deputy commissioner, Dr. Abernathey did not indicate he used the AMA Guides in reaching his conclusions.

Dr. Segal documented he used the range of motion method under the AMA Guides because claimant has multilevel nerve root involvement as well as multilevel involvement with stenosis, herniation, and the need for surgery at both L4-L5 and L5-S1. (Ex. 1, p. 19) Dr. Segal assigned claimant 33 percent whole person impairment based on spine disorder impairment, range of motion impairment, and spinal nerve deficits. (Ex. 1, pp. 19-23)

The deputy commissioner correctly adopted Dr. Segal's permanent restrictions. The arbitration decision does not set forth all of the restrictions. Dr. Segal recommended the following permanent restrictions:

- Sitting 60 minutes with shifting, 10 minutes without shifting: Frequently
- Standing 20 minutes consecutive, then change position, then stand again: Occasionally
- Walking 20 minutes consecutive, then stop and rest, then can walk again: Occasionally
- Lifting floor-to-waist: 30 lbs., rarely
- Lifting floor-to-waist: 20 lbs., Occasionally
- Lifting floor-to-waist: 10 lbs., Frequently
- Lifting waist-to-shoulder: 15 lbs., Occasionally
- Lifting waist-to-overhead: 15 lbs., Occasionally
- Bilateral carrying, 25 feet: 15 lbs. Occasionally
- Pushing/Pulling with 30 pounds of force: Occasionally
- Bending/Twisting/Turning (not repetitive): Rarely
- Bending/Twisting/Turning, repetitive: Never
- Squatting/Stooping/Kneeling: Occasionally
- Stairs, 1 flight: Occasionally
- Stairs, > 1 flight: Rarely
- Ladders: Never

(Ex. 1, p. 25)

I find Dr. Segal's restrictions are claimant's permanent restrictions.

Claimant lives in Davenport, Iowa. (Tr., p. 20) Claimant lost his driver's license in 2001 after he was arrested for driving under the influence. (Tr., p. 45) Claimant testified he did not try to get his license back due to the expense. (Tr., p. 45) Since 2001, claimant has used public transportation, rideshare, or he walks. (Tr., pp. 23, 45-48, 63) At the time of the hearing he was 55 years old. (Ex. I, pp. 42-43)

Claimant graduated from high school in Davenport in 1984 and he attended one year at Hamilton Technical College where he studied to become an electronic engineering technician, but he did not earn a certificate or degree. (Tr., pp. 27-28)

Claimant testified he was diagnosed with dyslexia in school, but when asked if he had any learning disabilities, he stated "I'm good." (Tr., p. 63) During his deposition he testified he has not been diagnosed with any type of learning disability. (Ex. I, p. 43) Claimant is able to send an e-mail and perform an internet search. (Tr., p. 28)

The majority of claimant's work has been in hospitality, as a restaurant/hotel server, bartender, and supervisor. (Tr., pp. 52-53, 67) Claimant worked for Zales Diamonds part-time as a jewelry salesman for a few years while working as a server/manager. (Tr., p. 54)

I find claimant is motivated to work. Claimant is an older worker with limited education. Claimant sustained significant injury to his spine as a result of the work injuries and he now requires permanent work restrictions that interfere with his ability to perform full-time work consistent with his prior work experience. At the time of the hearing he was working and earning less than he was at the time of the work injuries.

Claimant lives in Davenport, a large, urban city. At the time of the hearing he was working part-time for the DoubleTree, and after his work injuries he was able to secure part-time employment with Hy-Vee as a cook, and he worked as a homemaker for his father and neighbor. I do not believe claimant is so injured that he is unable to perform services other than those that are so limited in quality, dependability, or quantity, that a reasonably stable market for his services does not exist, as supported by his post-injury employment and the vocational opinion of Lana Sellner, M.S., C.R.C. Claimant has sustained a significant industrial disability, but I do not find he is permanently or totally disabled under the statute or under the odd-lot doctrine. Considering all of the factors of industrial disability, I find claimant has sustained 70 percent industrial disability, which entitles him to receive 350 weeks of permanent partial disability benefits.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on June 3, 2022, is affirmed in part, and modified in part.

Defendants shall pay claimant 350 weeks of permanent partial disability benefits at the weekly rate of two hundred fifty-four and 74/100 ($254.74), commencing on May 19, 2020.

Defendants shall pay accrued weekly benefits in a lump sum together with interest 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 percent.

Pursuant to rule 876 IAC 4.33, defendants shall reimburse claimant two hundred and 00/100 ($200.00) for the cost of the filing fees, and the parties shall split the costs of the appeal, including the cost of the hearing transcript.

Pursuant to rule 876 IAC 3.1(2), defendants shall file subsequent reports of injury as required by this agency.

Signed and filed on this 28th day of September, 2022.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Kevin Halligan (via WCES)

Robert Gainer (via WCES)