BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

THEODORE J. MALGET, Claimant, vs. JOHN DEERE WATERLOO WORKS, Self-Insured Employer, Defendant.	:	File No. 5048441 REMAND DECISION

FILED
MAY 23 2018
WORKERS' COMPENSATION

This matter is before the Iowa Division of Workers' Compensation on remand from the Iowa District Court for Polk County.

An August 5, 2015 arbitration decision found, in part, claimant was entitled to 250 weeks of permanent partial disability benefits. A February 14, 2017 appeal decision affirmed the finding of industrial disability. The appeal decision also found claimant was not totally and permanently disabled and claimant was not an odd-lot employee.

The decision was appealed in a petition for judicial review to the Iowa District Court for Polk County. On September 18, 2017, the District Court remanded this matter back to this agency to determine if claimant's job at John Deere Waterloo Works (Deere) was available in the overall labor market. The remand decision also affirmed the appeal decision finding claimant failed to carry his burden of proof he was an odd-lot employee.

In the remand decision the District Court ordered this agency "...to determine whether the arc flash position created for Malget after sustaining his work related injury is available on the competitive labor market". If it was not, this agency was ordered to re-determine claimant's industrial loss without considering the position.

FINDINGS OF FACT

Claimant was 64 years old at the time of hearing. (Transcript, page 8) He graduated from high school. Claimant was in the Air Force. Claimant worked as an electrician/mechanic. Claimant also worked as a manufacturing engineer and facility manager at Donaldson. (Exhibit O, pages 10-15)

Claimant began with Deere in 2001. Claimant testified that from 2001 to 2008 he worked in an office ordering electrical parts for Deere. (Ex. O, pp 26-27

From approximately 2008 through 2011 claimant worked as a construction electrician at Deere. (Tr. pp.11-12)

As stipulated by the parties, claimant sustained a work-related injury on September 8, 2011. Claimant was eventually assessed as having a L4 burst fracture (Ex. 2, p.8; Ex. 9, p. 2)

Robert Broghammer, M.D. found claimant has 21 percent permanent impairment. Dr. Broghammer gave restrictions allowing claimant to take breaks as needed and walking only five to ten minutes at a time. (Ex. 6, pp. 13-15, 17)

Ray Miller, M.D., performed an independent medical evaluation (IME) of claimant. Dr. Miller found claimant has 23 percent permanent impairment. Dr. Miller limited claimant to standing up to five minutes. He also limited claimant to lifting up to 50 pounds waist to shoulder, and carrying up to 30-40 pounds. (Ex 2, pp. 11-12)

Claimant had no surgery.

Claimant testified he lost no time from work because of the injury. (Tr. 14)

Claimant continued to work at a light duty capacity after his injury until May of 2014. In his light duty position, claimant performed a job called arc flash. This required claimant to go to machinery throughout the plant and turn off electricity so others could work on machines. (Tr. pp. 18-19) Claimant testified light duty work as an electrician also required he work on small appliances. He also checked circuit breakers throughout the plant. Claimant testified that on heavy work days, he would respond to between 15 to 20 calls per shift. (Tr. pp 21-22)

Gil Schultz testified he was the safety manager at the Deere plant in Waterloo where claimant worked. Mr. Schultz testified the arc flash job was a part of the job duties for all electricians at all Deere facilities. (Tr. 77) He said the other jobs claimant performed on light duty were tasks all electrician at Deere performed. (Tr. 79)

Claimant left Deere on May 16, 2014. Mr., Schultz testified claimant would still be employed with Deere had claimant not decided to leave. (Tr. 79)

Claimant applied for weekly indemnity disability benefits (WI) through Deere. Those benefits are available only for non-occupational injuries. (Ex A, pp. 19-20)

Claimant applied for Social Security Disability benefits in June of 2014. Claimant began receiving benefits in December of 2014. (Ex. L, p. 4)

At the time of hearing claimant was a city council person for the City of Oelwein. As a city council person, claimant was involved with, but not limited to, issues concerning planning, economic development and waste disposal. (Tr. pp. 69-71)

Kent Jayne, M.A., M.B.A., C.R.C., issued two opinions regarding claimant's vocational opportunities. In his initial report, dated December 24, 2013, Mr. Jayne opined claimant could perform sedentary work. (Ex. 3, p. 13)

In his supplemental report, Mr. Jayne opined claimant was not able to obtain employment. (Ex. 3, p. 20)

No doctor has opined claimant cannot work. Claimant testified he has not applied for a job or looked for work since leaving Deere. (Ex. O, deposition page 52)

CONCLUSIONS OF LAW

The District Court ordered this agency to determine if the arc flash position claimant held at Deere is available in the overall labor market. If it is not, then the agency must re-determine claimant's industrial loss without considering his two years of employment with Deere following his injury.

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) (2015).

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., 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." 219 Iowa 587, 592, 258 N.W. 899, 901 (1935).

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, 192 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 1120, 125 N.W.2d 251, 256 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 290, 110 N.W.2d 660, 663 (1961).

Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Iowa Code Section 85.34(u) (2015).

In Guyton v. Irving Jensen Co., the Iowa court formally adopted the "odd-lot doctrine." 373 N.W.2d 101, 102 (Iowa 1985). 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. Id. at 105. 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.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Guyton v. Irving Jensen Co., 373 N.W.2d 101, 105 (Iowa 1985). 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. Id at 106. 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. Id 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, 265-66 (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.

An assessment of industrial disability involves a viewing of loss of earning capacity in terms of the injured workers' present ability to earn in the competitive labor market without regard to any accommodation furnished by an employer. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996); Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 617 (Iowa 1995) An employer's accommodations for a worker can be factored into an award determination to the extent the work in the job indicates the worker has a "discerned earning capacity" To qualify as discernible, employers must show that the new job is not just "make work" but is also available to the injured worker in the competitive market. Murillo v. Blackhawk Foundry, 571 N.W.2d 16, 18 (Iowa 1997) See Norton v Hy-Vee, Inc., No 16-1299 , filed November 8, 2017, (Iowa Ct. App.) Unpublished, 909 N.W. 2d 442 (Table)

There is little evidence in the record regarding the availability of the arc flash job in the overall job market. The only evidence in the record regarding this issue is in the testimony of Mr. Schultz. He testified arc flash work is work all Deere electricians are required to do, and that it is a normal job duty of a Deere electrician. He also testified it is a normal job duty for electricians at all Deere facilities. (Tr. p. 76-77) He also testified

claimant's other job duties, outside of the arc flash work, were duties all Deere electricians performed. (Tr. p. 78-79)

It is unclear if the term "all facilities", found in Mr. Schultz's testimony, refers to all Deere facilities nationally, in Iowa, or only at the Waterloo plant. (Tr. p. 77)

The record indicates the job duties claimant performed at Deere were required by all electricians at Deere, and were not just "make work". However, because there is little evidence regarding the availability of the arc flash job in the overall labor market, this agency must re-determine claimant's industrial loss.

Claimant was 66 years old at the time of hearing. He graduated from high school. Claimant was in the Air Force. He worked as an electrician/mechanic. Claimant also worked as a manufacturing engineer and facility manager at Donaldson.

Claimant had a L4 burst fracture caused by his fall. Claimant had no surgery. Claimant lost no time from work from his accident. Claimant has a permanent impairment between 21 to 23 percent. Claimant has restrictions limiting his ability to walk and bend. No doctor has restricted claimant from working.

Since leaving Deere, claimant has not made an application for work, nor has he looked for work. A loss of earning capacity due to voluntary choice or lack of motivation to return to work is not compensable. Rus v. Bradley Puhrmann, File No. 5037928 (Appeal Decision December 16, 2014); Gaffney v Nordstrom, File No. 5026533 (App. September 8, 2011); Snow v. Chevron Phillips Chemical Co., File No. 5016619 (App. October 25, 2007); Copeland v. Boone Book and Bible Store, File No. 1059319 (App. November 6, 1997). See also Brown v. Nissen Corp., 89-90 IAWC 56, 62 (App. 1989) (no prima facie showing that claimant is unemployable when claimant did not make an attempt for vocational rehabilitation).

Claimant has been found by the Social Security Disability Determination Services to be disabled, as that term applies to the Federal Social Security Act. The law from the Federal Social Security Act is different from that of the Iowa Workers' Compensation Act. The findings of the Social Security Disability Determination Services are found to be useful in determining claimant's industrial disability, but they are not controlling.

As noted, Mr. Jayne initially opined claimant could perform sedentary work. In a subsequent opinion, after claimant voluntarily left Deere, Mr. Jayne changed that opinion and found claimant was incapable of obtaining employment.

As noted in the March 24, 2017 rehearing decision, a review of agency decisions spanning 2014 through 2016 indicates Mr. Jayne routinely opines claimants are precluded from the competitive labor market. The cases cited in the March 24, 2017 rehearing decision regarding Mr. Jayne and concerning allegedly unemployable claimants, are applicable in this remand decision, but will not be repeated here. Given this record, it is again found the opinions of Mr. Jayne are not credible.

At the time of hearing claimant was a city council person for the City of Oelwein. As a city council person, claimant was involved with, but not limited to, issues concerning planning, economic development and waste disposal. (Tr. pp. 69-71)

When all relevant factors are considered, it is found claimant has a 60 percent loss of earning capacity or industrial disability.

Given this record, claimant has failed to make a prima facie case of total disability and he has failed to carry his burden of proof he is not employable in the competitive labor market. As a result, the burden to provide evidence of available and suitable employment does not shift to defendant in this case.

Claimant has failed to carry his burden of proof he is an odd-lot employee. Claimant would also not be found to be permanently and totally disabled applying the same factors of industrial disability was used in the odd-lot analysis.

ORDER

IT IS THEREFORE ORDERED that the decision filed on August 5, 2015, is affirmed in part and modified in part.

Defendant shall pay claimant three hundred (300) weeks of permanent partial disability benefits commencing on September 9, 2011, payable at the stipulated weekly benefit rate of seven hundred and 70/100 dollars ($700.70).

Defendants shall pay accrued weekly benefits in a lump sum together with interest pursuant to Iowa Code section 85.30.

Defendant shall be given credit for all benefits previously paid, including benefits paid pursuant to Iowa Code section 85.38(2).

Claimant and defendant shall split the costs, if any, of the remand.

Signed and filed this 23rd day of May, 2018.

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

Copies To:

Thomas M. Wertz
Attorney at Law
P.O. Box 849
Cedar Rapids, IA 52406-0849
twertz@wertzlaw.com

Michael A. McEnroe
Attorney at Law
3151 Brockway Rd.
P.O. Box 810
Waterloo, IA 50704-0810
mcenroem@wloolaw.com