BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CHRISTOF VON RABENAU, Claimant, vs. NATIONAL CO-OP GROCERS, Employer, and THE HARTFORD, Insurance Carrier, Defendants.	File No. 5053916 A R B I T R A T I O N D E C I S I O N Head Note No.: 1803

STATEMENT OF THE CASE

Christof Von Rabenau, claimant, filed a petition in arbitration seeking workers' compensation benefits from defendants, National Co-Op Grocers, employer and The Hartford, insurance carrier. The arbitration hearing was held on March 21, 2017, in Des Moines, Iowa. The parties waived post-hearing briefs and the matter was considered fully submitted on that date.

The evidentiary record includes Claimant's Exhibits 1 through 7, and Defendants' Exhibits A through F, all of which were admitted without objection. Claimant and Mr. Claude E. Pugh, the Chief Operating Officer of the defendant employer, both provided testimony at the hearing.

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.

ISSUES

The parties submitted the following disputed issue for resolution:

1. The extent of permanent partial disability.

FINDINGS OF FACT

After reviewing the evidence presented in this case, I find as follows:

Claimant was 50 years old at the time of the hearing. He is right-hand dominant. (Testimony)

Claimant graduated from high school in 1984 and obtained a Bachelor of Science degree in biology from the University of Minnesota at Duluth in 1992. (Exhibit 1, page 6; testimony) He then attended graduate school from 1993 to 1996 at the University of Minnesota at Duluth seeking a Master of Science degree in Zoology. He completed the coursework, but not his dissertation. (Id.) He has also completed some professional development courses in areas of project management and statistics. (Testimony)

Claimant's work history includes jobs as a research assistant and graduate teaching assistant in the late 1980's to mid-1990's where he earned from $7.00 to $9.00 per hour. He also worked as a night watchman for the City of Duluth Parks and Recreation Department, earning approximately $7.00 per hour. In 1986, claimant began working at Whole Foods as a cashier earning $6.00 per hour and moved to a front end manager in 1992, earning $12.00 per hour. He then moved to an assistant manager position, earning $34,000 per year. (Ex. 1, p. 2)

Claimant's career path turned toward technology in 2004 and 2005. From 2004 to 2007, claimant worked part-time as a software developer for Wedge Community Co-op, earning $17.00 per hour. He also worked from 2005 through 2007 as the Whole Foods Community Co-op Information Technology Manager, earning $42,000 per year. (Id.)

In 2007, claimant began working for the defendant employer as the Director of Information Technology, with earnings in 2014 of $124,000 per year. In 2014, his job title changed to Centralized Services-Information Technology Manager, and his earnings increased to $129,000. His job title changed again in 2015 to Senior Data Architect, which is the job that he continued to have at the time of the hearing. In this position, claimant was earning $134,000 per year, which had increased to approximately $136,000 per year at the time of the hearing. (Ex. 1, p. 2; Testimony)

The defendant employer provides professional services and guidance to grocery stores who are members of the cooperative. Claimant's primary office is located in Iowa City. (Testimony)

Claimant testified that the jobs he held as a research assistant, a graduate teaching assistant and night watchman would be difficult for him to perform now due to the lifting required in those jobs, which he did not believe he could do now, after his work injury. (Testimony) He also agreed that he was unlikely to pursue such jobs in the future, based on their wage compared to his current position. (Testimony)

Claimant also testified that some of the lifting aspects of the jobs he held at Whole Foods would be difficult to perform after this work injury, but that if he needed to at some point in the future, he could see himself pursuing a manager type position, similar to his past work experience. (Testimony)

Claimant was injured on October 18, 2014, when he was traveling as part of his job for the defendant employer and was involved in a motor vehicle accident. Claimant was riding in a hotel shuttle van while in Bozeman, Montana, at the time of the collision. (Ex. 6, p. 1; Testimony) The injury involves his right shoulder. (Id.)

Claimant's current job of Senior Data Architect was described primarily as a desk job that includes significant travel. However, since the injury, when he is required to travel by airplane, he now checks baggage, rather than hauling carry-on bags as he had done prior to his injury. This change occurred, because of the difficulty he experiences placing the luggage in the overhead bins on the airplane. (Testimony) His current job description does not require any lifting. (Ex. 5, pp. 3-4) However, both claimant and the Chief Operating Officer of the defendant employer, Claude "C.E." Pugh, agreed that from time to time, claimant may be occasionally engaged in lifting technology equipment, which would typically be of a similar weight to a home desk top computer or a laptop computer. Mr. Pugh also stated that on rare occasion, it is possible that claimant may lift a scanner/scale, which would weigh less than 50 pounds. (Testimony) However, it was clear from the testimony of both witnesses, that lifting is not in any way considered a significant or regular event related to his job. (Testimony) Mr. Pugh stated that he estimated that claimant has likely lifted more than 25 pounds less than 6 times over the last 4 years as part of his job. (Testimony) He also testified, after being released to return to full duty work, that claimant has not asked for any accommodations to perform his job. (Testimony)

Following the October 18, 2014 injury, claimant was seen at the University of Iowa Hospitals and Clinics on October 21, 2014. (Ex. 6, p. 1)

Claimant described some difficulty with obtaining authorization for continued treatment, but was seen again at the University of Iowa Hospitals and Clinics on February 19, 2015 by Matthew Bollier, M.D. (Testimony; Ex. 6, p. 4) Dr. Bollier recommended an MRI, which was completed on February 26, 2015, which showed a near full thickness supraspinatus tendon tear and a small SLAP lesion of the labrum along with tendinosis of the supraspinatus tendon and mild to moderate degenerative changes of the AC joint. (Ex. 6, p. 8)

On March 17, 2015, Dr. Bollier performed an arthroscopic rotator cuff repair, SLAP repair, biceps tenodesis and debridement of the right shoulder. (Ex. 6, p. 11) Claimant returned to work on or about March 30, 2015 on a part-time basis and progressively returned to regular, full-time work. (Ex. 2, p. 4; Testimony)

Claimant underwent physical therapy following surgery. (Ex. 8, p. 19)

On August 28, 2015, the lateral shoulder pain that claimant had prior to surgery was gone, but he still reported discomfort and stiffness with certain movements. (Ex. 6, p. 26) Diagnostic injections were recommended to "calm down inflammation and accelerate his postoperative rehabilitation." (Ex. 6, p. 27) He was placed on a restriction of no lifting, pushing or pulling over 25 pounds. (Id.) On October 27, 2015, claimant received two corticosteroid injections in the subacromial/subdeltoid and the glenohumeral joint of the right shoulder. (Ex. 6, p. 28)

On December 14, 2015, claimant was noted as having "substantial relief" from the injections and was placed at maximum medical improvement (MMI). (Ex. 6, p. 31) Claimant was told to follow-up as needed and was assigned no restrictions. (Ex. 6, p. 31; Ex. A, p. 1)

On March 1, 2016, Dr. Bollier issued a letter without an additional evaluation of claimant and assigned an impairment of 2 percent of the whole person. (Ex. 6, p. 35) In doing so, he noted that his records indicate only passive range of motion for abduction and the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, states that active range of motion should be used to assess impairment. He then relies on his recollection of claimant's prior active abduction to support his conclusion. (Id.)

On April 27, 2016, Brian Crites, M.D., of Capital Orthopaedics & Sports Medicine issued a report following an independent medical evaluation (IME) at the request of claimant's counsel. (Ex. 7, p. 1) Dr. Crites reviewed medical records, and conducted a physical examination of claimant contemporaneous to his assessment of impairment and arrived at a conclusion of 5 percent permanent impairment to the whole person. (Ex. 7, p. 2) Dr. Crites then also assigned permanent work restrictions of no lifting over 25 pounds above the shoulder and no sustained or frequent work above shoulder level. (Ex. 7, p. 3)

On December 12, 2016, claimant returned to Dr. Bollier for additional care stating that his pain level had increased, which was intermittently affecting his sleep. He reported taking ibuprofen as needed for pain and continued to work without restrictions. (Ex. 6, p. 36) An MRI obtained on January 13, 2017, showed mild tendinopathy. (Ex. 6, p. 44; Ex. B, p. 2) An injection was recommended by Dr. Bollier and completed on February 20, 2017. (Ex. 6, p. 46)

Claimant testified at hearing that surgery, physical therapy and the injections have all been helpful and improved his condition. (Testimony)

He also stated at the hearing that he presently has limited range of motion with his right shoulder. Claimant explained that it is difficult for him to reach into his right-hand back pocket, and that he cannot extend his right hand overhead to the same level as his left, and that he has a nagging pain all the time in his right shoulder. (Testimony) He stated that he can no longer use his right hand to clean using a scrub brush, and he cannot throw a ball or engage in home repairs that require overhead work. He stated

that he recently hired home improvements done that include hanging sheetrock and running electrical overhead, which are the type of home repair/improvement work that he would have done himself before the injury occurred. (Testimony)

Claimant was not taking any prescription medication for his work injury at the time of the hearing. (Testimony)

Considering the two impairment ratings I find that the opinion of Dr. Crites is more persuasive because it is based on a contemporaneous physical examination. I further find that the restrictions assigned by Dr. Crites are consistent with the limitations claimant described at hearing and I accept the same as an appropriate statement of claimant's physical limitations as a result of this work injury.

Claimant testified that he has diabetes and high blood pressure and has found physical exercise helpful to control the effects of both of these conditions. Claimant engages in regular physical exercise. This includes riding his bicycle up to 15 to 20 miles at a time and regularly exercising at an exercise facility or gym. Claimant's regular exercise at the gym was made known to both Dr. Bollier and to Dr. Crites, and neither suggested that he avoid such activity. (Ex. 6, p. 38; Ex. 7, p. 1) Claimant testified that he sometimes acts as an instructor, including demonstrating a number of exercises. Claimant stated that concerning overhead exercises, he does not do those with his right arm. He further stated that the exercise facility that he attends includes people of all physical capabilities and provides alternative exercises for people, such as himself, that are unable to perform the standard exercises. (Testimony) Claimant stated that he is not required to, and does not, violate his restrictions while exercising or instructing.

Claimant has sustained a shoulder injury that has resulted in surgical repair, 5 percent whole person functional impairment, and restrictions limiting work over shoulder height and lifting over shoulder height. Claimant is 50 years old and likely to face age discrimination if he were seeking new employment. However, the question of loss of earning capacity also takes into consideration claimant's intellectual and educational qualifications, his ability to engage in employment for which he is fitted, such as his continued employment in the same or similar position, and his lack of any actual loss of earnings, among other things.

In consideration of claimant's loss of earning capacity, I consider the findings and factors discussed above, along with all other appropriate matters for the consideration of industrial disability, I find that claimant has sustained a 10 percent industrial disability.

CONCLUSIONS OF LAW

The disputed issue in this case is the extent of industrial disability.

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, 593; 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. However, consideration must also be given to the injured worker's medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured workers' qualifications intellectually, emotionally and physically; the worker's earning before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted. Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616 (Iowa 1995); 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).

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience, as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

Assessments of industrial disability involve 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 one's present 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 (Iowa 1995).

As stated above and for the reasons there given, I have determined that claimant has sustained 10 percent industrial disability, which is 50 weeks.

Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I conclude that claimant was successful in this claim and therefore exercise my discretion and assess costs against the defendants. Claimant has provided a statement of costs, however, from that list, the IME expense of Dr. Crites, was resolved prior to hearing and was not an issue for determination and is therefore specifically excluded as a cost in

this matter. In addition, the deposition transcript of claimant was not submitted at hearing and is therefore excluded as a cost for taxation. Defendant shall pay the remaining costs totaling $206.50.

ORDER

IT IS THEREFORE ORDERED:

Defendants shall pay claimant industrial disability benefits of fifty (50) weeks, beginning on the stipulated commencement date of December 15, 2015, until all benefits are paid in full.

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

All weekly benefits shall be paid at the stipulated rate of one thousand three hundred ninety and 09/100 dollars ($1,390.09) per week.

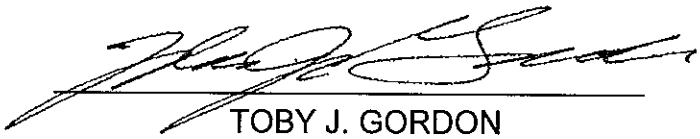
All accrued benefits shall be paid in a lump sum.

Defendants shall pay interest on any accrued weekly benefits pursuant to Iowa Code section 85.30

Defendants shall pay costs as described above.

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 12th day of April, 2017.



TOBY J. GORDON
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TJG/kjw

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.