BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOSE ACOSTA, Claimant, vs. TYSON FRESH FOODS, INC., Employer, Self-Insured, Defendant.	:	File No. 1663215.01 ARBITRATION DECISION Head Note Nos.: 1402.40, 1803, 3001

STATEMENT OF THE CASE

Jose Acosta, claimant, filed a petition in arbitration seeking workers' compensation benefits from self-insured employer Tyson Fresh Foods, Inc. ("Tyson") This matter came before the undersigned for hearing on March 7, 2022, via CourtCall.

The parties filed a hearing report at the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 8, Claimant's Exhibits 1 through 10, and Defendant's Exhibits A through M. All exhibits were received without objection.

Mr. Acosta testified on his own behalf using the services of a Spanish to English interpreter. Stephanie Tiefenthaler testified on behalf of the defendant. The evidentiary record closed at the conclusion of the arbitration hearing.

The undersigned requested post-hearing briefs. All parties filed their post-hearing briefs on April 18, 2022, at which time this case was deemed fully submitted to the undersigned.

ISSUES

The parties submitted the following disputed issues for resolution:

1. The extent of claimant's entitlement to permanent partial disability benefits for an injury to his back;

2. Claimant's gross earnings, number of exemptions, and corresponding workers' compensation rate; and

3. Whether costs should be assessed against either party.

FINDINGS OF FACT

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

Jose Acosta is a 62-year-old individual who sustained a cumulative low back injury as a result of his job duties at Tyson Fresh Foods, Inc. ("Tyson"). (Hearing Transcript, page 13) At the time of the evidentiary hearing, Mr. Acosta was living in Storm Lake, Iowa. (Hr. Tr., p. 11) He completed 12 years of basic education in El Salvador before entering the workforce. (Hr. Tr., p. 13) Mr. Acosta is unable to read or write the English language. He speaks "very little" English. (Hr. Tr., pp. 13-14)

Since moving to the United States in 2000, Mr. Acosta has only worked for two employers. (See Hr. Tr., pp. 20-21) While living in California, Mr. Acosta built houses for a construction company. (Hr. Tr., pp. 20-21) He later moved to Iowa and began working for defendant.

Mr. Acosta began working at IBP, Inc. n/k/a Tyson Fresh Foods, Inc., in 2002. (Exhibit 6, page 50) He did not have any work restrictions or physical limitations in place when he applied to work for Tyson. (Hr. Tr., p. 22) Mr. Acosta started out as a "skinner," skinning and processing meat. (Hr. Tr., p. 22) In this role, claimant had to continuously lift pieces of meat weighing between 20 and 30 pounds. According to Mr. Acosta, he would have to grab the meat from his right side, move the meat in front of him, push the meat through a skinning machine, and then move the meat to the left of his body. (See Hr. Tr., pp. 22-25)

After working as a "skinner" for approximately 5 to 6 years, Mr. Acosta transitioned into a new role as an Operate Trayformer in the "Box Shop." (Hr. Tr., p. 25) He held this position for roughly 11 years. As an Operate Trayformer, Mr. Acosta separated cardboard packages and placed them onto a machine that would then mold the cardboard into boxes. He estimates that the cardboard packages he maneuvered weighed between 50 and 200 pounds. (See Hr. Tr., pp. 25-28; Exhibit M, page 69)

Prior to his work injury, Mr. Acosta experienced several episodes of back pain associated with his repetitive and physical work at Tyson, including episodes in 2003, 2008, 2009, 2011, 2012, 2013, and 2014. Mr. Acosta consistently demonstrated the ability to return to work without restrictions following conservative treatment. (See Hr. Tr., pp. 30-34)

On July 19, 2018, Mr. Acosta sustained a stipulated injury to his low back while pushing and pulling heavy boxes. (Joint Exhibit 3, page 6) Mr. Acosta testified that the pain he experienced on July 19, 2018, was "more intense" than the pain he experienced following any of his prior episodes. (Hr. Tr., p. 37) After reporting the injury, defendant modified claimant's job duties to accommodate for his pain. (Hr. Tr., p. 38)

Defendant eventually authorized medical treatment through David Archer, M.D. (Joint Exhibit 4) Dr. Archer was familiar with claimant, as he had provided treatment to claimant for his prior episodes of back pain. (See Hr. Tr., p. 39) Defendant provided claimant with an interpreter for his medical appointments with Dr. Archer. (Hr. Tr., pp. 38-39)

Dr. Archer first examined Mr. Acosta on August 16, 2018. (JE4, p. 11) He assessed congenital spondylolisthesis, spondylosis of lumbosacral region without myelopathy or radiculopathy, and a strain of the lumbar region. (JE4, pp. 11-14) Dr. Archer imposed work restrictions and referred Mr. Acosta to physical therapy. (JE4, p. 12)

After four visits and little to no improvement in claimant's symptoms, Dr. Archer ordered an MRI of the lumbar spine. (JE4, p. 19; see JE4, pp. 11-19)

The MRI, dated October 5, 2018, revealed bilateral L4 pars interarticularis defects, grade 1 anterolisthesis of L4 on L5 increased since 2011, bilateral L4-L5 neural foraminal stenosis with borderline spinal canal stenosis; a small right eccentric L5-S1 disc osteophyte complex; and a subtle L2-L3 right central disc protrusion with inferior extension to the mid L3 vertebral body resulting in no spinal canal stenosis or mass effect on the adjacent nerve roots. (JE4, p. 23)

After reviewing the MRI results, Dr. Archer referred claimant to Wade Jensen, M.D., for an orthopedic consultation. (JE4, p. 24; see Joint Exhibit 6) Mr. Acosta first presented to Dr. Jensen on October 29, 2018, reporting low back pain and left worse than right leg pain and weakness. (JE6, p. 52) Dr. Jensen reviewed claimant's diagnostic imaging and noted significant stenosis at L4-L5, and moderate L5-S1 narrowing. (Id.) He diagnosed degenerative lumbar spinal stenosis and degenerative spondylolisthesis and referred Mr. Acosta to Siouxland Pain Clinic for pain management. (JE6, p. 53) However, when L4-L5 selective nerve root blocks proved ineffective, Dr. Jensen recommended surgical intervention. (See JE6, pp. 57, 60-61)

Dr. Jensen performed a posterolateral arthrodesis, transforaminal lumbar interbody fusion at L4-L5; Gill laminectomy L4 for L4-L5 neuroforaminal decompression including entire Gill body; partial L5 laminectomy for exiting L5-S1 neuroforaminal decompression, bilaterally; application of prosthetic cage L4-L5, pedicle screw instrumentation at L4-L5 bilaterally, bone marrow aspirate from the left iliac crest for supplemental fusion through a separate fascial incision, and morselized allograft for fusion. The surgery was performed on May 2, 2019. (Joint Exhibit 8, pages 107-108)

At his six-week post-op appointment, Mr. Acosta reported that he was doing fairly well but still experiencing some symptoms into his legs, depending on activity. (JE6, p. 71) Mr. Acosta was referred to physical therapy and allowed to return to work with light duty restrictions. (See JE6, pp. 72, 73) Mr. Acosta returned to work for Tyson approximately one month after surgery. (Hr. Tr., pp. 45-46)

Stephen Liddiard, PA-C recommended full duty with work hardening following Mr. Acosta's August 14, 2019, post-op appointment. (JE6, pp. 78, 79) Unfortunately, Mr. Acosta had not moved forward with the work hardening program prior to his September 9, 2019, appointment. (JE6, p. 80) Mr. Liddiard again recommended work hardening with a gradual return to full duty work and a referral to physical therapy to establish a home exercise program. (JE6, p. 81)

Mr. Acosta returned to Dr. Jensen on October 7, 2019, reporting complete resolution of his leg symptoms. (JE6, p. 83) He continued to report numbness in the bottom of his foot if he stood for too long, and activity-based back pain. (Id.) Mr. Acosta discussed his then-current job duties with Dr. Jensen. He described handling four different job rotations, noting he did "pretty well" with two of the four rotations. (Id.) Dr. Jensen's medical notes provide that Mr. Acosta was unable to complete the work hardening program. (Id.) As such, Dr. Jensen recommended Mr. Acosta return to physical therapy for another round of work-hardening. (JE6, p. 84)

After gradually increasing the amount of time Mr. Acosta could perform full duty work between October and December 2019, Mr. Liddiard placed Mr. Acosta at maximum medical improvement and released him to full duty work, without restrictions, on December 16, 2019. (JE6, pp. 90, 91) Mr. Acosta was similarly discharged from physical therapy on December 23, 2019. (JE5, p. 51) The discharge notes provide that claimant was still having some trouble with his lower back. (See id.)

Outside of his independent medical examination with Dr. Bansal, claimant has not sought treatment for his low back condition since he was released by Dr. Jensen. (Hr. Tr., p. 68)

Mr. Acosta returned to work for Tyson, sorting boxes, until June 9, 2021, when he was terminated for excessive absenteeism. (Hr. Tr., p. 84) According to Mr. Acosta, he was only making small boxes when he returned to work following surgery. (Hr. Tr., p. 48) He testified that he did not handle anything that weighed more than 25 pounds. (Ex. K, Depo. pp. 24-25) Tyson allowed Mr. Acosta to alternate between sitting and standing, and he was allowed to sit when he felt pain in his low back. (Hr. Tr., p. 47)

Defendant called Stephanie Tiefenthaler at the evidentiary hearing. Ms. Tiefenthaler is a human resources manager at the Storm Lake, Iowa Tyson plant, where Mr. Acosta worked. (Hr. Tr., p. 84) She testified to Tyson's attendance policy and confirmed that Mr. Acosta was terminated on June 9, 2021, for attendance issues. (Hr. Tr., p. 84; Ex. C, p. 15)

Mr. Acosta continues to experience low back and bilateral leg pain. (Hr. Tr., p. 57) He takes an over-the-counter pain reliever two to three times per week for his pain. (Hr. Tr., p. 58) Mr. Acosta is independent with his self-care activities; however, he moves slowly when performing such tasks due to his low back pain. (Ex. 2, p. 26) He is able to wash dishes and clean around the house. (Ex. K, Depo. p. 31)

In response to a letter from defendant, dated December 31, 2019, Dr. Jensen placed claimant's low back condition in DRE Category IV and assigned 20 percent whole person impairment. (JE6, p. 92) The impairment rating was assigned pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Id.) As noted on the Hearing Report, defendant subsequently paid Mr. Acosta 100 weeks of permanent partial disability benefits.

Mr. Acosta subsequently sought an independent medical examination ("IME") with Sunil Bansal, M.D. The IME was conducted on August 12, 2020. (See Exhibit 1, page 1) Dr. Bansal agreed that claimant reached MMI on December 16, 2019. (Ex. 1, p. 13) Like Dr. Jensen, Dr. Bansal also found that Mr. Acosta's low back condition qualifies for placement in DRE Category IV. (Ex. 1, p. 15) Given the type of surgery performed and his ongoing pain, Dr. Bansal assigned Mr. Acosta 22 percent whole person impairment. (Ex. 1, pp. 15-16) In terms of permanent restrictions, Dr. Bansal recommended no lifting greater than 25 pounds at any level, no frequent bending or twisting, no prolonged sitting greater than 60 minutes at a time, and no prolonged standing greater than 30 minutes at a time. (Id.) Dr. Bansal concluded his report by noting Mr. Acosta is at high risk for adjacent segment disease of his lumbar spine and may need additional surgical intervention in the future. (Ex. 1, p. 16)

Dr. Jensen reviewed the IME report of Dr. Bansal and offered a response on October 11, 2021. (JE6, p. 93) In addressing the higher impairment rating assigned by Dr. Bansal, Dr. Jensen explained that the AMA Guidelines allow physicians to assign between 20 and 22 percent impairment in DRE Lumbar Category IV. (Id.) Dr. Jensen then expressed his belief that any rating between 20 and 22 percent would be considered reasonable. He then explained that he assigned an impairment rating on the lower end of this range because, "we had resolved his symptoms with his L4-5 decompression and fusion[.]" (Id.)

Dr. Jensen questioned Dr. Bansal's recommendations regarding permanent restrictions, noting claimant's back is, "more stable today than it has been for many years previously." (Id.) Dr. Jensen endorsed a 50-pound permanent lifting restriction to prevent adjacent level disease above or below the fusion. (Id.) He further noted that such a recommendation is used in practice and supported by the medical literature. (Id.) Dr. Jensen opined that Dr. Bansal's 25-pound restriction is "purely made up." (Id.)

To better assess his physical abilities, Mr. Acosta obtained a functional capacity evaluation (FCE) performed by Daryl Short, DPT, on October 22, 2021. (Exhibit 2, page 21) During the examination, claimant reported that he continues to experience a constant pain in his low back that ranges from 2-7 out of 10. (Ex. 2, p. 26) Mr. Short

concluded that claimant was cooperative and demonstrated a consistent effort throughout his examination. (Id.) Due to his decreased range of motion, strength, and endurance, the FCE report found that Mr. Acosta's capabilities fell in the sedentary to light category of physical demand. More specifically, the FCE report recommended Mr. Acosta only lift up to 15 pounds on an occasional basis at waist level. (Ex. 2, p. 22)

Claimant's attorney attempted to obtain an updated opinion from Dr. Bansal following Dr. Jensen's October 11, 2021, report and the October 22, 2021, FCE report. (See Ex. 1, pp. 17-18) Dr. Bansal was asked to send "a follow-up report" as to "whether these additional records in any way changes or supports" his medical conclusions set forth in the original IME report. (Ex. 1, p. 18) Unfortunately, Dr. Bansal did not provide a follow-up report or opinion; rather, he simply signed the letter from claimant's attorney. (Id.)

As I weigh the respective experience and credentials of the competing experts, I find that Dr. Jensen's credentials are superior with respect to diagnosing and opining on conditions relating to the lumbar spine. That being said, the impact of his superior credentials is mitigated in this case by the fact both experts agree on diagnosis, causation, and the DRE category in which claimant's low back condition falls.

While I acknowledge Dr. Jensen's credentials are superior to Dr. Bansal's, his belief that the L4-L5 decompression and fusion resolved claimant's symptoms is not supported by the evidentiary record as a whole. The medical records in evidence note ongoing complaints of pain in the low back and weakness in both legs following the L4-5 decompression and fusion. (See JE5, pp. 38, 40, 42-43, 45, 47, 49; JE6, pp. 71, 83, 86, 89) Moreover, claimant credibly testified to his ongoing symptoms at the evidentiary hearing. (Hr. Tr., pp. 48, 57) Dr. Bansal's impairment assessment correctly notes claimant's ongoing complaints of pain and reasonably assigns impairment regarding the same. Dr. Jensen's supplemental report confirms Dr. Bansal's impairment rating is reasonable. For these reasons, I ultimately find Dr. Bansal's impairment rating is more consistent with the evidentiary record as a whole. I find his opinion convincing. Therefore, I accept Dr. Bansal's impairment rating and find that Mr. Acosta sustained 22 percent permanent functional impairment as a result of his work injury.

With respect to permanent restrictions, I again note that Dr. Jensen is a spine surgeon and, as such, he is uniquely qualified to address the issues surrounding Mr. Acosta's spine. He was also able to evaluate claimant's spine on a number of occasions, including intraoperatively. However, Dr. Jensen's recommendations are not consistent with the unrebutted FCE results. Moreover, his recommendations do not appear to be tailored to Mr. Acosta. Instead, his opinion is based on what is typically recommended by surgeons around the country to prevent adjacent level disease. I find the 50-pound lifting restriction offered by Dr. Jensen does not accurately reflect claimant's functional abilities at any point in time since his July 19, 2018, work injury.

Prior to July 2018, claimant was able to perform all aspects of his job at Tyson. (Hr. Tr., pp. 29-34) This includes the ability to lift 50 pounds and above. (Ex. M; see Hr. Tr., p. 29) Mr. Acosta has not returned to this level of functioning since the date of injury. Mr. Acosta has consistently testified that when he was released to return to work, his supervisor permitted him to avoid the heavier aspects of his job duties. (Hr. Tr., pp. 46-48, 51-53) Defendant did not call Mr. Acosta's supervisor to rebut this testimony. One month prior to his release, Mr. Liddiard recommended that claimant find a lighter job. (JE6, pp. 86-88; see Hr. Tr., p. 51) Lastly, claimant submitted an FCE where he demonstrated the ability to lift 15-25 pounds floor-to-waist, 10-20 pounds waist-to-crown, and a front carry weight between 15-25 pounds. (Ex. 2, p. 24)

For these reasons, I find Dr. Bansal's restrictions to be reasonable and convincing. His recommendations are supported by the accommodated work Mr. Acosta returned to at Tyson and the findings of the October 2021 FCE report.

Tyson retained the services of Lana Sellner, a vocational specialist, to provide a vocational outlook regarding Mr. Acosta's employability. Ms. Sellner reviewed documents but did not interview Mr. Acosta. (Exhibit A, page 1) Ms. Sellner opined that Mr. Acosta has worked primarily in unskilled to semi-skilled, medium work jobs. (Ex. A, p. 3) When considering Dr. Jensen's recommendations, Ms. Sellner concluded that Mr. Acosta sustained no occupational loss and could continue to search for employment in the medium physical demand category. (Ex. A, p. 4) Ms. Sellner discussed Dr. Bansal's recommendations and the recommendations of the October 2021 FCE; however, she did not specifically provide an estimate of claimant's occupational loss utilizing the same. She did, however, opine that Mr. Acosta could work in a selective medium work demand level with Dr. Bansal's restrictions, and a selective light work demand level with the FCE results. (Id.) Ultimately, Ms. Sellner concluded that Mr. Acosta can work in a full-time environment under Dr. Bansal's restrictions, the FCE recommendations, or Dr. Jensen's restrictions. (Id.)

Ms. Sellner completed a labor market survey in the Storm Lake, Iowa area and listed a number of available jobs that meet Dr. Bansal's restrictions, including work as a delivery driver, cashier, sewing machine operator, and custodian. (Ex. A, p. 5) Ms. Sellner further opined that claimant would be a candidate for working as a host, driver, or kitchen helper in the nearby Mexican stores and restaurants. (Id.)

Ms. Sellner's opinion is based, in part, on the understanding that Mr. Acosta returned to his regular, full-duty job with Tyson for several months before his termination in June 2021. (Ex. A, p. 7) I have accepted Mr. Acosta's testimony that he did not return to his regular, full duty position and that he instead worked a modified duty role. Additionally, Ms. Sellner's report fails to discuss claimant's inability to speak the English language and how such a language barrier might impact the labor market survey.

Admittedly, I am somewhat concerned about claimant's motivation to secure employment at this time. There is little evidence that claimant has legitimately tested the labor market since his employment with Tyson ended. Through his testimony and

discovery responses, claimant has asserted that he applied to numerous employers within the Storm Lake area but did not receive any offers of employment. (See Ex. 7; Ex. 8; Ex. E, p. 20) Several of the applications claimant entered into evidence are blank or incomplete. (Ex. 7, pp. 55-56, 63-64, 67-68) Others fail to provide any information as to what position claimant was applying for. (Ex. 7, pp. 54, 57-58, 61-66)

Defendant contacted a number of the potential employers claimant listed in his answers to interrogatories as places he "requested work." (Ex. E, p. 20) Representatives from Goodwill, McDonalds, Meridian Manufacturing, and VT Industries reported no records of Mr. Acosta applying for work through their companies. (Ex. F, pp. 22-31) Moreover, a serious job search requires something more than simply contacting a large number of prospective employers.

Claimant also submitted documents showing he had successfully submitted applications for employment with Lunchtime Solutions, Fareway, and Comes Investments. (Exhibit 10, pages 88-91) Claimant did not submit copies of the completed applications; rather, he simply submitted a screenshot notifying him that each potential employer received his application. According to the timestamps, the applications were submitted at 9:40 a.m., 9:46 a.m., and 9:51 a.m. on February 21, 2022, a mere 14 days before the evidentiary hearing. (Ex. 10, pp. 88-91) The "Completed!" notification from Fareway, providing it was "Last updated on: Feb 21, 2022 9:45 AM" supports a finding that the applications were submitted, rather than simply printed, on February 21, 2022. (See Ex. 10, p. 90) It is difficult to accept applications submitted in the weeks leading up to the evidentiary hearing as evidence of a legitimate work search.

Further calling the legitimacy of the above applications into question is the fact that they all appear to have been submitted online, and Mr. Acosta has consistently testified that he does not know how to type or use a computer. (Ex. 10, pp. 88-91) It is also worth mentioning that the Fareway application, and claimant's application to Rembrandt Foods, list a "gmail" account under the "Contact Info" tab. (Ex. 10, p. 90; Ex. 7, pp. 65-66)) It is possible claimant's attorney or a relative helped Mr. Acosta complete these applications. That being said, the uncertainty surrounding the same diminishes the legitimacy of claimant's work search and, to an extent, his overall credibility.

For these reasons, I find Mr. Acosta failed to prove he conducted a legitimate work search following his termination from Tyson.

At the time of the evidentiary hearing, claimant was a 62-year-old individual with limited education. He is unable to read, write, or fluently speak the English language. He has physical restrictions that he did not have when he started working for Tyson. It has been recommended that Mr. Acosta refrain from lifting anything weighing more than 25 pounds. The evidence demonstrates that Mr. Acosta is no longer physically capable of performing his trayformer job duties. The evidence further demonstrates that Mr. Acosta is no longer physically capable of performing construction work.

I find that Mr. Acosta has sustained a significant loss of future earning capacity as a result of the stipulated work injury to his low back; however, I find that the evidence does not indicate that he is permanently and totally disabled.

Considering claimant's age, education, language barrier, limited employment history, his inability to return to his full duty position with defendant, his impairment rating, permanent restrictions, his proximity to retirement age, as well as all other factors of industrial disability identified by the Iowa Supreme Court, I find that Mr. Acosta proved he sustained a 50 percent loss of future earning capacity as a result of the July 19, 2018, low back injury.

The undersigned is cognizant of defendant's argument that claimant returned to work earning the same or greater wages and, as such, he is only entitled to compensation for the functional loss he sustained to the low back. For reasons that will be explained in the Conclusions of Law section, I reject defendant's argument and specifically find claimant's employment was terminated by the defendant employer on June 9, 2021.

Lastly, the parties disagree as to claimant's applicable weekly rate. More specifically, the parties dispute claimant's gross earnings and the number of exemptions he was entitled to claim on the date of injury.

Mr. Acosta urges that the pay periods ending on June 2, 2018, and July 7, 2018, are not representative of his customary earnings and should be excluded as they each include eight hours of holiday pay. Defendant advocates for including both of the holiday pay weeks.

The pay period ending on June 2, 2018, includes 48.43 hours of pay status. The pay period ending on July 7, 2018, includes 39.75 hours of pay status. The remaining pay periods produce an average of 43.48 hours, with a high of 47.58 and a low of 38.15. Given that the two holiday pay weeks fall within this typical, or representative, range for claimant's working hours, I find that the holiday weeks included in defendant's calculations are representative of claimant's typical work week.

Claimant also excludes the pay period ending on May 19, 2018, but provides no explanation regarding the same. The pay period ending on May 19, 2018, includes 42.97 hours of pay. This pay period is in line with the other representative weeks. As such, I find that the pay period ending May 19, 2018, is representative of claimant's typical work week.

Defendant next challenges claimant's entitlement to five exemptions. Tyson asserts that claimant is, at most, entitled to three exemptions.

In his response to defendant's request for admissions, claimant admitted that he had four dependent children on the date of injury. (Ex. 5, p. 44) Defendant asked claimant to admit or deny whether he qualified for five exemptions in calculating his weekly workers' compensation benefit rate. (Ex. 5, p. 45) Claimant admitted to the same. (Id.)

At hearing, Mr. Acosta testified that all four of his children were living with him on the date of injury. (Hr. Tr., pp. 11-12) He further testified that all four kids were financially dependent upon him at that time. (Hr. Tr., p. 12) However, defendant produced claimant's tax returns from 2018 showing Mr. Acosta only claimed one dependent. (Ex. L, p. 68) Mr. Acosta explained that he has someone help him file his taxes and said individual recommended he only claim one dependent. (Hr. Tr., p. 12) Mr. Acosta further testified that his partner claimed the other three children as dependents. (Hr. Tr., p. 13) Claimant produced no evidence demonstrating his entitlement to claim all four children for tax purposes.

Payroll records preceding the date of injury indicate that Mr. Acosta claimed three dependents on his W-4. (See Ex. I, pp. 38-54)

On the hearing report, defendant asserts a weekly rate of $482.16, based on claimant's status of being single with a total of three exemptions, including himself. I accept this calculation and find that Mr. Acosta proved entitlement to claim two of his children as exemptions.

CONCLUSIONS OF LAW

The first issue to be addressed in this decision is the extent of claimant's entitlement to permanent partial disability benefits.

First, it must be determined whether claimant's entitlement to permanent disability benefits is limited to the functional, whole person impairment rating, or, whether claimant is entitled to an industrial disability analysis at this point in time.

Iowa Code section 85.34(2)(v) provides, in part:

> If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity.

It is undisputed that following the July 19, 2018, work injury, claimant returned to work for the defendant employer and received the same or greater earnings than what he was receiving at the time of the injury.

Iowa Code section 85.34(2)(v) continues:

> Notwithstanding section 85.26, subsection 2, if an employee who is eligible for compensation under this paragraph returns to work with the same employer and is compensated based only upon the employee's functional impairment resulting from the injury as provided in this paragraph and is terminated from employment by that employer, the award or agreement for settlement for benefits under this chapter shall be reviewed upon commencement of reopening proceedings by the employee for a determination of any reduction in the employee's earning capacity caused by the employee's permanent partial disability.

Defendant correctly notes that the commissioner addressed this issue in Martinez v. Pavlich, Inc., File No. 5063900 (App. July 30, 2020). In Martinez, the commissioner held that if an employee makes a post-injury return to work and receives the same or greater wages than they were earning at the time of their injury, but is then subsequently terminated, they are entitled to an assessment of industrial disability.

Martinez implies, but does not specifically state, that the phrase "termination from employment by that employer" is a broad standard to be interpreted liberally. The standard is not limited to situations in which the employer terminates, or fires, the injured worker. Importantly, the claimant in Martinez was offered work at the same or higher wages and accepted said offer; however, he later terminated his employment with the employer prior to the date of the evidentiary hearing.

Judicial review was taken from the commissioner's decision. The district court disagreed with the Commissioner's interpretation of Iowa Code section 85.34(2)(v) and held that claimant should only be compensated under the functional impairment methodology because the claimant was earning the same or greater wages at the time of the arbitration hearing through a subsequent employer. The Iowa Supreme Court or Court of Appeals have not yet provided a definitive interpretation of this statutory provision.

Until a definitive interpretation is provided by the appellate courts, I am bound by the precedent of this agency found in Martinez. I conclude that claimant's injury should be compensated using the industrial disability analysis because claimant's employment was terminated after the injury and after he returned to work. Iowa Code section 85.34(2)(v); Martinez v. Pavlich, Inc., File No. 5063900 (App. July 30, 2020).

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).

Having considered the relevant industrial disability factors outlined by the Iowa Supreme Court, I found that claimant proved a 50 percent loss of future earning capacity as a result of the July 19, 2018, work injury. This is equivalent to a 50 percent industrial disability and entitles claimant to an award of 250 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(v).

The parties dispute the appropriate weekly rate at which benefits should be paid to claimant. The initial dispute is claimant's gross average weekly earnings immediately prior to the work injury.

Iowa Code section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings that fairly represent the employee's customary earnings, however. Section 85.36(6).

Claimant alleges an average weekly wage of $763.00, whereas defendant asserts the correct average weekly wage is $735.81. The main difference between the two calculations is claimant's exclusion and defendant's inclusion of three pay periods.

As discussed in the findings of fact, claimant excludes the pay periods ending on June 2, 2018, and July 7, 2018, because they each include 8 hours of holiday pay. Typically, this agency is less concerned with the amount of the earnings, and more concerned with the hours of work claimant missed out on due to their holiday pay being limited to 8 hours. For example, the claimant who customarily works overtime cannot do so on a holiday as his or her hours are limited.

The pay period ending on June 2, 2018, includes 48.43 hours of pay status. The pay period ending on July 7, 2018, includes 39.75 hours of pay status. Given that the two holiday pay weeks fall within the typical, or representative, range for claimant's working hours, I found that the holiday weeks included in defendant's calculations are representative of claimant's typical work week.

Claimant also excludes the pay period ending on May 19, 2018, but provides no explanation regarding the same. By all accounts, the pay period ending on May 19, 2018, is a normal, representative week. Claimant worked 42.97 hours, which is in line with the other representative weeks. The pay period ending on May 19, 2018, shall be included in claimant's average weekly wage calculation. Therefore, I conclude that defendant's calculation of the average weekly wage is accurate.

The second dispute is whether claimant is entitled to three or five exemptions.

The number of exemptions to be used in determining the rate of compensation is based upon tax law because tax law is what determines the number of exemptions when arriving at spendable earnings as defined in Iowa Code section 85.61(9). Lopez v. Tyson, Inc., File No. 5014281 (Arb. September 2006). Although not always determinative, tax records are good evidence of marital status and entitlement to exemptions. DeRaad v. Fred's Plumbing and Heating, File No. 1134532 (App. January 16, 2002). Mr. Acosta bears the burden to establish entitlement to the additional exemptions. Iowa R. App. P. 6.14(6).

In this instance, I found that claimant failed to prove entitlement to five exemptions. Instead, I concluded that claimant's weekly workers' compensation rate should be calculated using three exemptions pursuant to his payroll records.

The weekly benefit amount is determined under the above Code section by referring to the Iowa Workers' Compensation Manual in effect on the applicable injury date. Having found that claimant was single, entitled to three exemptions and that his gross average weekly wage was $735.81, I utilize the Iowa Workers' Compensation Manual ("rate book") with effective dates of July 1, 2018 through June 30, 2019, and determine that the applicable weekly rate for claimant's weekly benefits is $482.16. This rate matches the rate asserted by defendant on the hearing report.

The parties stipulated that claimant was paid 100 weeks of permanent partial disability benefits at the rate of $513.73 per week prior to hearing. Defendant is entitled to a credit for its overpayment.

The final issue for determination is a specific taxation of costs pursuant to Iowa Code section 86.40 and rule 876 IAC 4.33. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33.

Mr. Acosta seeks the costs associated with his filing fee. The cost of the filing fee is appropriate and assessed pursuant to 876 IAC 4.33(7).

Mr. Acosta also seeks the costs associated with his service fees. The cost of the service fees is appropriate and assessed pursuant to 876 IAC 4.33(3).

Lastly, Mr. Acosta seeks the costs associated with Mr. Short's FCE report. The FCE fees can be assessed as a cost under rule 4.33(6), regardless of whether the FCE was requested by an authorized treating physician. See Jasper v. Nordstrom, Inc., File No. 5052714 (App. October 7, 2020) (reh'g denied October 16, 2020) The cost of the FCE report is appropriate and assessed pursuant to 876 IAC 4.33(6).

The costs associated with the preparation of a practitioner's report can be awarded under our rule 876 IAC 4.33(6); however, the costs associated with the examination performed in order to arrive at any findings or opinions contained in the report are not taxable against defendant. Des Moines Area Reg'l. Transit Auth. v. Young, 867 N.W.2d 839 (Iowa 2015)

The claimant has the burden to establish which portion of the charges associated with those reports are taxable as costs under rule 876 IAC 4.33(6). Claimant submitted an itemized invoice with respect to Mr. Short's functional capacity examination. (Ex. 9, p. 86) Mr. Short charged $550.00 for the evaluation and $350.00 for the report. (Id.) As such, I award $350.00 for the cost of claimant's FCE report.

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay claimant two hundred fifty (250) weeks of permanent partial disability benefits commencing on December 16, 2019, at the weekly rate of four hundred eighty-two and 16/100 dollars ($482.16).

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

Defendant shall pay costs of four hundred sixty-seven and 32/100 dollars ($467.32).

Defendant 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 15th day of September, 2022.

MICHAEL J. LUNN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

James Byrne (via WCES)

Chris Scheldrup (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.