BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RUSSELL BAKER, Claimant, vs. KRAFT HEINZ COMPANY, Employer, and INDEMNITY INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5061692 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

Russell Baker, claimant, filed a petition in arbitration seeking workers' compensation benefits from Kraft Heinz Company (Heinz) as a result of an injury he sustained on August 13, 2016 that arose out of and in the course of his employment. This case was heard in Davenport, Iowa, and fully submitted on May 20, 2019. The evidence in this case consists of the testimony of claimant, Quincy Steele, Jeremy Dill Joint Exhibits 1 - 11, Defendants Exhibits A, B and C and Claimant's Exhibits 1 - 5. Both parties submitted briefs.

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.[1]

ISSUES

1. The extent of claimant's disability.

2. Assessment of costs.

FINDINGS OF FACT

[1] As the parties have stipulated to the low back injury, I will not be detailing the medical record up until claimant's back surgery.

The deputy workers' compensation commissioner having heard the testimony and considered the evidence in the record finds that:

Russel Baker, claimant, was 53 years old at the time of the hearing. Claimant graduated from high school and has no other formal education. Claimant has worked for Heinz for over 11 years. Claimant was employed at Heinz, the Oscar Mayer Division, at the time of the hearing.

Claimant's relevant vocational history before he started working for Heinz is identified in Exhibit 1. Claimant worked providing janitorial services from 1994 through 1996. He worked as a laborer for a company that suppled siding from 1997 through 1997. He worked as a loader/unloader for UPS from September 1997 through 1999. Claimant worked for Wonder Bread from 1999 through 2005. From 2006 through 2008 claimant worked for Vanderwoude Plastics. His last job before his employment at Heinz was with Nancy's Pies Bakery. (Ex. pp. 3 – 5) Claimant testified that he cannot perform those jobs now due to lifting and overhead work. (Tr. pp. 28 – 30) Claimant agreed that he could perform some aspects of the Vanderwoude Plastics job. (Tr. p. 37)

On August 13, 2016, claimant was lifting bags weighing about 48 pounds when he felt pain in his back. The defendants have stipulated that this was an injury that arose out of and in the course of his employment at Heinz. Claimant continued to work his shift. The next day he reported his back injury. Claimant then developed sciatica down his right leg.

Claimant received treatment via the company nurse for about three weeks and was referred to Rick Garrels, M.D. (Tr. p. 13) Dr. Garrels order physical therapy and claimant had injections in his back. (Tr. p. 13, 14) Claimant was referred to Michael. Berry, M.D., and saw claimant on March 23, 2017. Dr. Berry performed back surgery on May 24, 2017. (Tr. p. 15) Claimant returned to work on January 22, 2018. (Tr. p. 18; Hearing Report)

On February 23, 2018, shortly after claimant returned to work, Heinz switched to 12 1/2 hour shifts. Claimant was working 12 1/2 hour shifts at the time of the hearing. (Tr. p. 22) Claimant testified that he is performing his job, but does not climb stairs to work on the platform to work with the computer, and limits his lifting. (Tr. p. 21) Claimant testified he has limited his overtime since his return to work and is sore. (Tr. p. 22) Claimant takes over-the-counter medication for his back pain. He does not take prescription medicine for his back. (Tr. p. 26)

Claimant testified that he was concerned about whether he was going to be terminated from Heinz due to an accumulation of attendance points. Claimant testified that on the date of the hearing he had 17 points and the work rule allows for termination after 14 points. (Tr. p. 33) Claimant testified that he misses work about twice a week due to his back. (Tr. p. 34) Claimant said that his right leg is ok, but he still has problems with his lower back. (Tr. p. 34)

Claimant last saw a physician about his back in March 2018. (Tr. p. 38) At the time of the hearing, claimant was working as an injection operator and sanitation. Claimant testified that he can walk 8 – 10 miles a day at the plant. Claimant uses a "mule" to move totes of meat which requires him to walk the 8 – 10 miles. When claimant is performing sanitation he uses hoses, scrub pads and squeegees.

Quincy Steele was called by the claimant to testify. Mr. Steele has known claimant for over 40 years and is a close friend of the claimant (Tr. p. 54) Mr. Steele testified that claimant's level of physical activity has changed since his injury. Mr. Steele said that he would help claimant in the past move items, but now he helped claimant out of necessity. (Tr. p. 56) Mr. Steele said that claimant did not go out as much and did not ride his motorcycle as much since his injury.

Jeremy Dill, Production Supervisor at Heinz testified at the hearing. Mr. Dill was claimant's head supervisor from October 2018.

Mr. Dill said that when claimant returned to work he did not go on the cat walk and did not do paperwork. Mr. Dill said he moved claimant to another portion of his work area where he knew that claimant would get additional help to perform his job. (Tr. p. 69) Mr. Dill described the point attendance system for employees who are warned at 12 points and can be terminated at 14 points. Employees must be given a warning first so some employee could have more than 14 points and still be entitled to a warning. Mr. Dill believed claimant has been warned or spoken to about his attendance at 17 points. (Tr. p. 71) Mr. Dill stated that two more points after a warning can lead to termination. (Tr. p. 72) At present, Mr. Dill stated that claimant's current call-ins are covered by the FMLA. (Tr. p. 72) (See also attendance card JE 8, p. 91)

Claimant reported he had back pain and right leg pain to the Heinz company nurse on August 15, 2016. (Joint Exhibit 1, page 1) A status report stated claimant had an epidural on January 16, 2017. (JE 1, p. 12) A second epidural was ordered February 7, 2017. (JE 1, p. 13) On March 23, 2017, Dr. Berry noted claimant had failed six months of conservative treatment consisting of rest, activity modifications, work restrictions, medications, two epidural steroid injections and physical therapy. And that surgery was now an option. (JE 3, p. 30) Dr. Berry noted the main goal was to reduce the radicular pain and there were inconsistent results for low back pain. (JE 3, p. 31) On May 24, 2017, Dr. Berry performed back surgery. Dr. Berry's postoperative diagnosis was, "L5-S1 isthmic spondylolisthesis with severe right-sided foraminal stenosis and L5 radiculopathy." (JE 2, p. 25) On December 21, 2017, Dr. Berry wrote that claimant could return to work without restrictions. (JE 3, p. 38) On February 12, 2018, claimant informed Dr. Berry he was having difficulty with the cold at work and lifting 50-pound spice bags. Dr. Berry ordered a functional capacity examination (FCE). (JE 3, p. 39) Claimant had a FCE on March 6, 2018. (JE 6, pp. 80 – 86) The FCE noted the limitations were valid for an eight-hour work day. (JE 6, p. 85) Dr. Berry noted the FCE was valid and had claimant at the medium level of work exertion. Dr. Berry noted,

> Physical demand strength achieves are medium. The maximum occasional weight lifted for this patient is 50 pounds at waist level. He is occasionally able to lift from the floor 40 pounds. He is qualified for constant standing if he is allowed to move. With regard to material handling, the patient demonstrated the ability from floor to waist at 32 inches bilaterally of occasional lifting 40 pounds, and frequently 20 pounds. Waist to eye level is 63 inches bilaterally of occasional lifting 40 pounds, and frequently 20 pounds. Waist to eye level is 63 inches bilaterally 32 pounds occasionally and 16 pounds frequently. He is able to carry bilaterally 50 pounds occasionally and 25 pounds frequently. Unilaterally carry 32 pounds occasionally and 16 pounds frequently. He demonstrated the capacity to pull 50 pounds occasionally and pull 25 pounds frequently. He demonstrated the ability to push 50 pounds occasionally and 25 pounds frequently. With regard to nonmaterial handling, he demonstrates the ability to constantly sit to static stand occasionally but 10 minutes continuous, dynamic stand constantly, bends and stoop occasional, vertical reach frequent, horizontal reach frequent, walk frequent, kneel occasional, climb stairs occasional, climb ladder occasional, squat frequent, balanced constant. He is adequate for all grip terrain, firm grasp frequent and light grasp constant.

(JE 3, p. 40) Dr. Berry found claimant at maximum medical improvement on March 22, 2018 (JE 3, p. 42)

On March 29, 2018, Camilla Frederick, M.D., examined claimant. Dr. Frederick recommended the following restrictions;

1. Maximum occasional lift is 50# at waist and 40# from floor.
2. Material handling is:
    - Floor to waist 45# max and 40 occ.
    - Waist to eye level 40# maximum and 32# occasional
    - Carry 40# max and 50# occasional.
    - Push Pull is 60#.

(JE 7, p. 90) Dr. Frederick assigned a 12 percent whole body impairment rating.

On December 17, 2018, Kent Jayne, MA., M.B.A., C.R.C., C.L.C.P., C.C.M. issued a preliminary vocational assessment. (Ex. 2, pp. 6 – 22) Mr. Jayne commented on the prior FCE of claimant and noted there is little support in literature for extrapolating a 2-hour FCE into a worker being able to work 8-hours. (Ex. 2, p. 19) Mr. Kent wrote,

> Results of testing completed here found Mr. Baker to score in the noncompetitive range at approximately the 6th percentile on a test of nonverbal reasoning capacity, with a valid score indicating consistent effort. In verbal reasoning he scored in the below average range at the 15th percentile, and dropped to the noncompetitive range in numerical ability at the 10th percentile or below. On a short test of clerical perception, Mr. Baker scored in the noncompetitive range on both the number comparison and name comparison protocols against norms for entry level clerical employees. His fine motor coordination and finger dexterity were also noncompetitive at approximately the 2nd percentile. His manual dexterity score was low average on the right dominant extremity, but noncompetitive at the 1st percentile on the left. These scores in clerical perception, fine motor coordination, finger dexterity, and manual dexterity would preclude him from entry level clerical or light-sedentary bench assembly type work should he lose or be unable to continue in his present job for any reason. Mr. Baker notes in his interview that he is not sure how much longer he can keep up the physical demands of his current position.

(Ex. 2, p. 19) Mr. Jayne stated that if claimant lost his present position he would likely not be competitively employable. (Ex. 2, p. 19)

On December 21, 2018, Lana Sellner, MS, C.R.C provided a vocational outlook report of the claimant. (Ex. A, pp. 1 – 9) Ms. Sellner conducted a telephone interview with the claimant. Claimant reported to Ms. Sellner he was unable to perform his work prior to his work at Heinz except for his work at Vanderwoude Plastics. (Ex. A, p. 4) Ms. Sellner identified potential work that claimant might be able to perform. (Ex. A, p. 6) Ms. Sellner disagreed with Mr. Jayne that claimant was not employable and referred to the fact claimant was working at Heinz and had been able to work in the economy with his education and cognitive skills. (Ex. A, p. 8)

On January 16, 2019, Mr. Jayne critiqued Ms. Sellner's vocational report. Mr. Jayne was critical of the methodology used by Ms. Sellner. Mr. Jayne asserted claimant was not competitively employable and while he would likely be hired, he would also be terminated due to lack of production. (Ex. 3, p. 31) Mr. Jayne said based upon claimant's limitations and testing results, claimant had a 100 percent loss of employment opportunity in his relevant labor market. (Ex. 3, p. 23)

On February 8, 2019, Ms. Sellner reviewed Mr. Jayne's January 16, 2019 report. Ms. Sellner clarified that she conducted a labor market survey with a phone interview. (Ex. A, p. 10) Ms. Sellner maintained her prior opinions that claimant has the skills to perform a number of jobs in his labor market.

On February 26, 2019, Mr. Jayne evaluated Ms. Sellner's February 8, 2019 letter/report. Mr. Jayne was again critical of the methodology of Ms. Sellner. (Ex. 4, pp. 82 – 84)

Claimant testified he met with Mr. Jayne about three hours and talked to Ms. Sellner on the phone. (Tr p. 36)

I find that claimant's weekly workers compensation rate is $487.70 based upon a gross weekly income of $798.52, single status with one exemption.

CONCLUSIONS OF LAW

The parties have stipulated claimant has an industrial disability. The dispute is the extent of claimant's 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 Ry. Co. of Iowa, 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the Legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

In assessing an unscheduled, whole-body injury case, the claimant's loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

Claimant's back fusion surgery was very successful for his right radiating leg pain. As indicated by Dr. Berry, the results were more inconsistent as for his back pain. Claimant is generally limited to medium work with limits in bending, twisting, squatting, and overhead work.

Claimant was employed full time as an injection operator working 12-hour shifts. Claimant had some accommodation at work such as not having to be on the catwalk. Based upon the testimony of claimant and Mr. Dill, but for the protection of the FMLA claimant could be subject to termination due to attendance problems. Claimant's unrebutted testimony was that he was missing about two days of work per week due to

his back. The undersigned is unaware of any competent employer who will keep a laborer or semi-skilled worker employed with attendance problems as significant as claimants.

Ms. Sellner identified a number of positions and included the median wage. Claimant would generally start at a lower wage than the median. I do not find either vocation report entirely convincing. Many of the positions identified by Ms. Sellner would require frequent bending, twisting, and lifting. Claimant would not have seniority to bid into positions that would accommodate his limitation. I also do not find the claimant is totally precluded by his injuries from any vocationally relevant work. He does however have a significant industrial disability.

No witness testified that claimant could not perform light activities. He has had to modify some of his work and non-work activities but is still capable of gainful employment. None of his treating physicians have put limitations that would preclude regular employment. Claimant's age and education are not positive factors. Claimant is motivated to work, as shown by his continued work for Heinz.

I find that claimant has a 55 percent loss of earning capacity. I find claimant has a 55 percent industrial disability.

Defendants shall pay claimant the filing fee of $100.00, as the claimant generally prevailed.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant two hundred seventy-five (275) weeks of permanent partial disability benefits at the weekly rate of four hundred eighty-seven 70/100 dollars ($487.70) per week commencing on January 22, 2018.

Defendants shall have credit for benefits and overpayment previously paid as identified in the Hearing Report.

Defendants shall pay claimant costs of one hundred dollars ($100.00).

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

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

Signed and filed this 19th day of September, 2019.

James F. Elliott

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Kevin Halligan (via WCES)

Peter Thill (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 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.