BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROGER JACOBS,

Claimant,

vs.

RUAN LOGISTICS CORP.,

Employer,
Self-Insured,
Defendant.

File No. 5065569

ARBITRATION

DECISION

Head Note Nos.: 1803, 2500

STATEMENT OF THE CASE

Roger Jacobs, claimant, filed a petition in arbitration seeking workers' compensation benefits from Ruan Logistics, Corp., the self-insured employer.

The matter proceeded to hearing on January 26, 2018.

The evidentiary record includes: Joint Exhibits JE1 through JE7; Defendants' Exhibits A through D; and, Claimant's Exhibits 1 through 6. At hearing, claimant provided testimony.

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.

The parties submitted post-hearing briefs on March 9, 2018 and the matter was considered fully submitted on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Extent of industrial disability.
2. Medical expenses and mileage.
3. Costs.

FINDINGS OF FACT

After a review of the evidence presented, I find as follows:

Claimant was 61 years old at the time of the hearing and is left hand dominant.

Claimant dropped out of high school during his senior year. He obtained a G.E.D. in 1980 at Scott Community College. He attended Lakeland College in Mattoon, Illinois, and received training in emergency medical services (EMS), first responder, and search and rescue. He only worked as a volunteer through local fire departments in this capacity, and was never in a paid position. Claimant agreed that this was more of a hobby for him. (Testimony) He last worked in EMS about six or seven years ago. He agreed that ceasing volunteer work in EMS has no relationship to his work injury herein. (Testimony) Claimant also attended Barber College from 1983-85, but he has never worked in a paid position as a barber.

Claimant does not believe that he could presently return to volunteer EMS work, because he does not believe that he could operate a heavy water hose, or handle the other tools and equipment necessary to do the job. Claimant estimated that a water hose may weigh between 80 and 100 pounds and some of the rescue tools may weigh up to 145 pounds. These would exceed his current lifting restrictions applicable to his left shoulder injury. Claimant also did not believe that he could work as a barber because of his lack of mobility with his left hand and anticipated difficulty operating the shears. There are no restrictions that would appear to specifically eliminate this potential occupation. However, claimant has never actually been employed as a barber.

1) WORK HISTORY

Claimant's primary occupation has been working as a truck driver and heavy equipment operator. He has been driving truck since about 1977.

On July 1, 2016, claimant began working for the defendant employer. He was hired as a spotter/yard driver, which involved dropping and hooking up trailers in Muscatine, Iowa. Claimant did not leave the city of Muscatine in this job. The job required him to hook and unhook air-lines and electrical cords that he described as "pretty heavy when under pressure." (Testimony) He estimated that the air-lines weigh about 12 pounds, but added that he had to reach up and out from a ladder about 4 feet off the ground to hook and unhook them. He also had to crank the trailer legs up and down and shut and latch trailer doors.

The physical demands of the yard driver/spotter job as contained in the employer's job description included the ability to: push up to 75 pounds at a height of 65 inches; pull up to 125 pounds at height of 72 inches; push and pull 100 pounds horizontally at a height of 44 inches; forward bending; crouching; kneeling; gripping with a force of 25 pounds; and lifting up to 50 pounds, among others. (Exhibit 4, page 2)

These physical requirements were necessary to open and close the cab hood to check fluid levels in the engine, to manually release the fifth wheel lever pin, and to do inspections and hook and unhook the trailers. (Id.) There was no handling of freight in this position. (Testimony)

While working at Ruan, claimant moved to the position of a shuttle driver, which was similar to the spotter job concerning the work involved, but this new job required him to leave the city and drive to Milan, Illinois or Ft. Madison, Iowa.

Claimant testified that he typically worked about 56 hours per week prior to the injury. He earned about $15.00 per hour. (Testimony) He also stated that although he has not worked for quite some time, he has never been officially terminated by the employer and he continues to receive the employee newsletter. The employer agreed in their answer to interrogatory that "[c]laimant is still currently an employee," and that the "[e]mployer is determining whether his permanent restrictions can be accommodated." (Ex. 3, p. 2)

After the injury, claimant was returned to light duty at the Salvation Army for a time, but he never went back to work for the defendant employer on regular duty. He was recently offered a job to return to work for the employer, which is discussed further below under the heading of current work status.

2) THE INJURY

On August 4, 2016, in Muscatine, Iowa, after hooking up to a trailer, claimant went to the back of the trailer to open the doors and stepped into a hole. He stumbled, fell and landed on his left side.

After the fall, claimant had immediate pain in his left wrist/arm, which he said was "obviously broke" because it was "laid over" in the wrong direction. (Testimony) He called his supervisor and told him that he had broken his arm and needed medical attention. The employer sent another driver to take him to the emergency room. Claimant estimated it took about an hour for the other driver to arrive. (Testimony)

3) MEDICAL TREATMENT AFTER INJURY

Claimant was taken to the Unity Point Medical Emergency Room in Muscatine, Iowa. He was diagnosed with: a dislocated left wrist; a closed fracture of the lower end of his left radius and ulna; a closed fracture of the lower end of his left humerus; and a contusion to his left hip and thigh. (Ex. JE1, pp. 1, 7)

Claimant testified that there is an unpaid medical bill in the amount of $1,703.35 from this initial visit to the Unity Point Emergency Room. (Ex. 5, p. 1) In addition, claimant asserts that there is substantial unpaid medical mileage owing associated with authorized medical treatment, which has been set out in Exhibit 6, page 1, which totals $1,038.80.

On August 10, 2016, claimant underwent surgery and had a rod and seven screws placed in his arm with Michael Pyevich, M.D., to address the fractures. (Ex. JE2, p. 1)

On August 23, 2016, Dr. Pyevich recommended discontinuing a sling and placing claimant in a temporary cast to elevate his wrist above his heart. (Ex. JE3, p. 5)

On September 13, 2016, Dr. Pyevich diagnosed a left "coronoid fracture with tenderness over the brachialis muscle as it inserts onto the ulna status," as well as issues with claimant's left shoulder, which he described as "some left subacromial tenderness" in the shoulder despite normal x-rays. (Ex. JE3, p. 7) Claimant was returned to work with the restriction of no use of the left hand. (Ex. JE3, p. 9)

On November 18, 2016, claimant was cleared to drive at work, although his prior restriction of lifting no more than 5 pounds with the left hand was not modified. (Ex. JE3, pp. 14, 15)

On November 29, 2016, claimant's left shoulder symptoms continued to bother him and he was diagnosed with frozen shoulder and continued to have limited range of motion in his left wrist. (Ex. JE3, p. 16) He was noted to be "doing fine as far as the left hand, wrist and elbow are concerned," and he was released from physical therapy and placed at maximum medical improvement (MMI) concerning the hand, wrist and elbow. (Ex. JE3, p. 17) He was referred to another physician for further evaluation of the left shoulder symptoms. He was released to return to regular duty concerning the left hand, wrist and elbow, with no restrictions. However, he was restricted to no lifting more than 5 pounds in connection with the left shoulder injury. (Ex. JE3, p. 18)

On December 14, 2016, claimant had an MRI of his left shoulder, which showed a possible "small focal full-thickness tear of the subscapularis." (Ex. JE3, p. 19) He also had a steroid injection in his left shoulder on the same day. (Ex. JE3, p. 21)

On December 21, 2016, claimant was seen by Jason Clark, M.D., and diagnosed with "[l]eft shoulder adhesive capsulitis/frozen shoulder, possible cervical radiculopathy." (Ex. JE3, p. 23) A cervical MRI was recommended to exclude any contribution from the cervical spine. (Id.)

On February 13, 2017, claimant underwent left shoulder surgery with Dr. Clark. (Ex. JE7, p. 2) The surgery involved: arthroscopic capsular release; labral debridement; biceps tenotomy; subacromial bursectomy and decompression; and, manipulation under anesthesia. (Id.)

On February 28, 2017, claimant was continued off work and prescribed physical therapy. (Ex. JE3, p. 34) Two days later on March 2, 2017, claimant was returned to work with no use of the left arm, but was allowed to drive, provided he was not taking pain medication. (Ex. JE3, p. 35)

On June 9, 2017, claimant was placed at MMI concerning his left shoulder and was to return to Dr. Clark as needed. (Ex. JE3, p. 47) The record states that "[h]e has completed a work hardening program since his last visit," and that he "feels that he would be able to perform his job with his current shoulder function," and that he has "[n]o major issues." (Ex. JE3, p. 46)

Claimant has not returned to work in a driving position or any other regular full-duty position for the defendant employer since the injury.

Claimant testified that he has neither sought nor received any further medical care after being released from Dr. Clark in June, 2017. He is not presently taking any prescription medication. Claimant agreed that his left shoulder has been about the same since being released by Dr. Clark, although it is aggravated by the weather. (Testimony)

On July, 19, 2017, and considering claimant's left shoulder condition, Dr. Clark authored a letter to the insurance carrier and assigned 25 percent permanent impairment to the left upper extremity, which he converted to 15 percent to the whole person. (Ex. JE3, p. 50) The impairment rating is based on American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition, (AMA Guides). The rating is based on claimant's reduced range of motion and loss of strength. (Id.) Dr. Clark opined that claimant is capable of climbing into and out of the cab of the semi-truck, but that he should be permanently restricted from: lifting more than 50 pounds from floor to waist; 25 pounds overhead; and pushing or pulling more than 50 pounds. (Id.)

On October 4, 2017, Dr. Pyevich issued a letter to defense counsel concerning permanent impairment related to only the left hand, wrist and elbow, and specifically excluding the left shoulder. (Ex. JE3, p. 51) Dr. Pyevich confirmed that claimant had reached MMI when he was released on November 29, 2016, to full duty for the hand, wrist and elbow. Based on the AMA Guides, Dr. Pyevich assigned 2 percent to the upper extremity concerning the elbow, 7 percent to the upper extremity for the wrist, and 3 percent to the upper extremity for the hand, all based on loss of range of motion. Dr. Pyevich also assigned a rating of 10 percent to the upper extremity for reduced strength. He combined the ratings and arrived at 21 percent total impairment to the left upper extremity for the hand, wrist and elbow. (Ex. JE3, p. 52) He did not assign any restrictions.

4) CLAIMANT'S CURRENT CONDITION

Claimant testified that he has reduced grip strength and limited mobility with his left thumb and wrist. Claimant stated that his left thumb essentially will not bend, it is straight all the time.

He testified that he was told by the therapist to wear a compression glove. He stated that he wears it "almost all the time." He stated that the glove helps to eliminate or reduce swelling.

Claimant stated that he no longer swims because of the motion required with his left arm and that he has trouble getting dressed, doing laundry, making his bed and sleeping due to his shoulder. He stated that he also sold his motorcycle because it was too difficult for him to squeeze and hold the clutch lever with his left hand.

5) CURRENT WORK STATUS

Claimant was not employed at the time of the hearing. He stated that he had inquired with a temporary company that places truck drivers on short-term jobs. He contacted the company in October, 2017, and was told that the company would call him if they found something. He has not heard from them. However, he is not sure how long the company looked for a job for him, or if they are still looking for a job for him. He has not followed up with the company since his initial contact with them.

Claimant agreed that he is limited by the D.O.T. to driving only within a 100 mile radius from the point of origin, and which means that although he testified that he is not interested in over-the-road jobs, he is also not allowed to drive over-the-road with this restriction. The restriction was placed on his commercial driver's license as a penalty for being over his allotted hours, which is wholly unrelated to his work injury. (Ex. B, pp. 10, 11) When claimant was asked whether he agreed that this mileage restriction limits his job prospects as a driver, he responded; "definitely." (Ex. B, p. 11)

Claimant testified that the employer asked him to return to work as a shuttle driver about two and half weeks before the arbitration hearing in this matter. (Ex. C, p. 1) He did not accept the offer because it was his understanding that the job requirements had not changed and he did not believe he could do all aspects of the job. There is no indication in the offer letter that any accommodations were being made. (Id.) Claimant believes that in his current condition, he could still drive a truck, but that he would not be able to hook and unhook trailers. (Testimony) However, he agreed that he could use his right hand/arm to crank the trailer legs up and down. (Testimony)

Claimant testified that he had asked in September 2017 about returning to work as a "no-touch" driver, requiring him only to drive, but that he did not hear back from the employer on this request. (Testimony)

Claimant continues to hold a Class A commercial driver's license (CDL) and passed his last D.O.T. physical on or about August 7, 2017, which was conducted by James Hudson, D.C. He has no restrictions on his CDL due to any physical impediment.

The employer's answer to interrogatories states that they are "determining whether his permanent restrictions can be accommodated." (Ex. 3, pp. 4, 5)

6) ADDITIONAL FINDINGS

Considering claimant's permanent impairment, the only functional assessments in this file are from Dr. Clark who assigned 15 percent to the whole person based on the left shoulder injury and from Dr. Pyevich who assigned 21 percent impairment to the left upper extremity based on the injuries to the left hand, wrist and elbow. I convert the 21 percent rating from Dr. Pyevich to 13 percent to the whole person, based on Table 16-3, page 439 of the AMA Guides. Relying on the Combined Values Chart, at page 604 of the AMA Guides, I find that 15 percent of the whole person plus 13 percent of the whole person equals 26 percent of the whole person, which I find is the overall functional impairment as a result of this stipulated work injury.

Dr. Pyevich assigned no restrictions for the hand, wrist and elbow, but Dr. Clark assigned permanent restrictions for the left shoulder of: lifting no more than 50 pounds from floor to waist; 25 pounds overhead; and push and pull up to 50 pounds. (Ex. JE3, p. 50) I accept the unrebutted permanent restrictions of Dr. Clark.

Considering the extent of industrial disability, I note that claimant's age, education, functional impairment, and permanent work restrictions applicable to his shoulder, among other factors would tend to support a higher industrial finding. Also, defendant's job description, identifies that the spotter position required claimant to push and pull at levels well beyond his assigned restrictions.

But, claimant's lack of permanent restrictions concerning his hand, wrist and elbow and his stated ability to continue to drive a truck in a "no touch" job (which is to say that in at least some respect, that he can continue to do the work for which he is best fitted) and his non-work related CDL restriction concerning mileage which eliminates any over-the-road employment opportunities, all tend to support a lower industrial disability award.

Based on the above and in consideration of all other appropriate industrial disability considerations, I find that claimant has sustained 50 percent industrial disability.

Claimant received authorized medical treatment in this file and was transported by the employer to the initial medical appointment at Unity Point Health on August 4, 2016.

The parties have stipulated that the appropriate workers' compensation rate is $581.17 and the commencement date of permanency benefits is June 9, 2017. The parties have also stipulated that defendants are entitled to a credit of thirty three (33) weeks against any additional permanent partial disability.

CONCLUSIONS OF LAW

The primary 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).

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 (Iowa 2009).

I have found above for the reasons there stated that claimant sustained 50 percent industrial disability. Fifty percent of the whole person equals 250 weeks of permanent partial disability benefits.

The second issue is medical expenses and medical mileage reimbursement.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening, October 16, 1975).

I have found above that the medical treatment in this file has been authorized and defendant is therefore obligated to pay the authorized medical bills, specifically including the medical bill incurred on August 4, 2016 at Unity Point Health, contained at Claimant's Exhibit 5, pages 1-2. Also, defendant is obligated to pay the mileage expense associated with the authorized medical treatment in this matter, as set forth in Claimant's Exhibit 6, page 1.

The final issue is costs.

Claimant clarified at hearing, that he is seeking only the filing fee of $100.00.

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 defendant in the sum of the requested $100.00 for the filing fee.

ORDER

IT IS THEREFORE ORDERED:

Defendants shall pay claimant industrial disability benefits of two hundred and fifty (250) weeks, beginning on the stipulated commencement date of June 9, 2017 until all benefits are paid in full.

Defendants shall be entitled to a credit for all weekly benefits paid to date. The parties have stipulated that defendants are entitled to a credit of thirty three (33) weeks.

All weekly benefits shall be paid at the stipulated rate of five hundred eighty-one and 17/100 dollars ($581.17) per week.

All accrued benefits shall be paid in a lump sum.

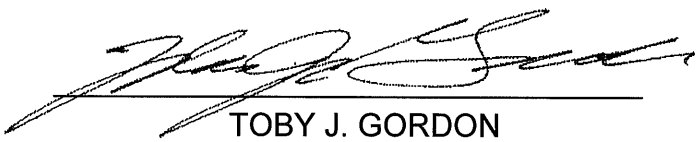
Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten (10) percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall 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 (2) percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. April 24, 2018).

Defendants shall reimburse claimant for his out-of-pocket medical expenses and medical mileage expenses, and shall pay, reimburse, and or otherwise satisfy all remaining medical and mileage expenses contained in Claimant's Exhibits 5 and 6.

Defendants shall pay costs of one hundred and no/100 dollars ($100.00).

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 19th day of June, 2018.



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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.