BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

VINCENE SMITH,

Claimant,

vs.

CITY OF DAVENPORT,

Employer,
Self-Insured,
Defendant.

File No. 5065172

ARBITRATION DECISION


Head Note: 1803

## STATEMENT OF THE CASE

Vincene Smith, claimant, filed a petition in arbitration seeking workers' compensation benefits from the City of Davenport, the self-insured defendant employer.

The matter proceeded to hearing on March 8, 2018.

The evidentiary record includes: Joint Exhibits JE1 through JE4; Defendant's Exhibits A through C; and, Claimant's Exhibits 1 through 3. At hearing, both claimant and Jeff Good, a Route Supervisor for the employer, 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 April 5, 2018, and the matter was considered fully submitted on that date.

## ISSUES

The parties submitted the following disputed issues for resolution:

1. Extent of permanent partial disability.

2. Costs.

## FINDINGS OF FACT

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

The parties agree that claimant sustained an injury that arose out of and in the course of his employment on June 14, 2016, and if the undersigned finds that claimant sustained permanent partial disability, they agree that the disability is an industrial disability, with permanency benefits commencing on March 3, 2017 at the weekly workers' compensation rate of $588.14. (Hearing Report, page 1) The parties also agree that claimant was paid 5.598 weeks of permanent partial disability benefits at the above stipulated rate, prior to the hearing in this matter. (Hearing Report, p .2)

At the time of the hearing, claimant was 42 years old. (Transcript, p. 7) He is right-hand dominant. (Tr. p. 23) The stipulated work injury involves the right shoulder.

Claimant graduated from high school in 1994. He attended a technical college for electronics, but did not complete the program. He obtained a commercial driver's license (CDL) with an airbrake endorsement, which he needed for his job with the defendant employer. (Tr. pp. 8-9)

### 1) WORK HISTORY

Prior to working for the defendant employer, claimant worked as a machine operator for a plastics manufacturer; as a cook and delivery driver for a pizza restaurant; and, at a kitchen and bath design store where he loaded, unloaded and delivered kitchen cabinets. (Tr. pp. 9-13) He testified that he did not have any work injuries to his right shoulder prior to the injury claimed herein.

In 2008, claimant went to work for the defendant employer, the City of Davenport as a "[p]acker and driver and loader." (Tr. p. 14) His job involved picking up recycling and garbage. Claimant started at about $15.00 per hour and worked full-time, plus overtime. (Tr. p. 15) He worked primarily picking up recycling, which was done by hand until the employer obtained automated trucks. He would throw the recycling "over the shoulder into the truck." (Tr. p. 14) Claimant described the lifting as constant overhead lifting of 20 to 25 pounds for about 4 or 5 hours during his shift. (Tr. p. 16) About 4 years before the hearing in this matter, the employer purchased the automated trucks for the recycling routes, which eliminated the overhead lifting. However, disposing of yard waste continues to require loading the material by hand. (Tr. p. 17) Yard waste is collected for about 6 weeks in the autumn and 2 weeks in the spring. (Ex. 3, p. 10)

### 2) PRIOR MEDICAL CONDITION

Claimant denied any injuries to his right shoulder prior to the injury alleged herein. (Tr. pp. 14, 20) When claimant commenced working for the defendant, he did so with no work restrictions and was not under any medical care for his shoulder. Additionally, he passed a pre-employment physical. (Tr. pp. 20-21)

## 3) THE INJURY

On June 14, 2016, claimant was working for the defendant. He was lifting a garbage cart into the truck and felt a pop in his shoulder, which he described as being unlike anything he had felt before. (Tr. pp. 22-23)

## 4) POST-INJURY MEDICAL TREATMENT

On June 14, 2016, the date of the injury, claimant was directed by his employer to Genesis Occupational Health for treatment following the work injury. He presented with right shoulder pain. (Ex. 2, p. 6) X-rays were ordered and he was placed on restricted duty of no use of the right arm, and no more than 40 hours of work per week. (Ex. JE2, pp. 7, 9) He was instructed on range of motion exercises and prescribed ibuprofen and cyclobenzaprine. (Ex. 2, p. 7)

On June 23, 2016, he was given an injection in his shoulder. (Ex. JE2, p. 12)

On June 28, 2016, claimant reported that following the injection the pain "is essentially resolved," but continued to have muscular tightness. (Ex. JE2, p. 14) It is also recorded that claimant had tingling down his right arm. (Ex. JE2, p. 14)

Claimant continued with conservative care at Genesis Occupational Health and attended physical therapy at Rock Valley Physical Therapy. (Ex. JE 4, pp. 61-71)

On July 11, 2016, claimant was noted to have received "significant benefit" from the June 23, 2016 injection and he requested a second injection. (Ex. JE2, p. 16) Claimant had "normal" range of motion "in all planes with end range tightness in the UT with forward flexion and abduction." (Id.) It is recorded that claimant was tolerating work, but had pain at times with overhead activities and his exam was concerning for a labral tear. (Ex. JE2, p. 18) An MRI of the shoulder was ordered.

The MRI showed a "superior labral tear and partial thickness RCT." (Ex. JE2, p. 19) On July 15, 2016, claimant was referred to Suleman Hussain, M.D. of ORA Orthopedics. (Id.) He was also returned to regular duty at work on the same day. (Id.)

On July 22, 2016, claimant was seen by Dr. Hussain. (Ex. JE3, p. 49) Claimant described pain in his right shoulder that did not radiate, and did not limit activities. (Id.) Dr. Hussain diagnosed a slap tear and gave claimant an injection into his shoulder.

On August 24, 2016, claimant indicated short-term relief from the injections of about 2 weeks and reported that he wanted to hold off on surgery until January "to get through his work schedule." (Ex. JE3, p. 51) However, Dr. Hussain recommended not putting it off and proceeding with surgery. (Id.)

On September 22, 2016, claimant underwent surgery with Dr. Hussain, consisting of: a SLAP repair; anterior capsulorrhaphy with anterior labral repair; posterior labral repair with posterior capsulorrhaphy; chondroplasty of the glenoid with

microfracture of the glenoid, biceps tenolysis, and debridement of the superior labral region and supraglenoid tubercle; and, subacromial bursectomy and acromioplasty.

Claimant had follow-up care with ORA Orthopedics. He was placed in a sling, taken off work and prescribed physical therapy. (Ex. JE3, pp. 53, 54)

On November 16, 2016, claimant reported to Genesis Occupational Medicine that he was "doing fairly well," and he was progressing with physical therapy. (Ex. JE2, p. 28)

On December 2, 2016, claimant complained of an "irritable" shoulder that was "limited and painful." (Ex. JE3, p. 55) He was given in injection. It was explained that Dr. Hussain wanted to "get his pain under control" so that "he is able to perform his best at physical therapy." (Ex. JE3, p. 55) He was returned to light duty work. (Id.)

On January 6, 2017, claimant reported to Genesis Occupational Medicine that he had significant improvement and his pain level was at 0-1/10, with primary concern of stiffness. At the time of the exam, he had "no reported pain." (Ex. JE2, p. 34) However, it is noted that he had only progressed to using 5 pound weights in physical therapy at that time. (Id.)

On February 1, 2017, Dr. Hussain prescribed Tramadol and recommended that he continue with work hardening for three more weeks, and then return to full-duty work. (Ex. JE3, p. 59) He also stated that it was "Ok for Dr. Garrels to modify and determine MMI and final status." (Id.)

On March 3, 2017, claimant was seen by Genesis Occupational Medicine and had "no reported pain." (Ex. JE2, p. 39) He requested Tramadol for bedtime, but had not had Tramadol for a while and had not been using ibuprofen either. (Id.) He was given a prescription for 800 mg ibuprofen instead. (Ex. JE2, p. 40) He was returned to regular duty work.

On April 5, 2017, claimant was placed at maximum medical improvement (MMI) by Cheryl Benson, PA-C of Genesis Occupational Medicine. (Ex. JE2, p. 42) It was reported that after moving to regular duty at work, he was "having no problems with his daily job duties," although he was experiencing "daily tightness in the shoulder." (Ex. JE2, p. 42)

On April 27, 2017, Dr. Garrels assigned 1 percent whole person impairment based on reduced range of motion, specifically internal rotation of the shoulder. Dr. Garrels relied upon the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides) in his assessment of permanent impairment. (Ex. JE2, p. 43)

On August 16, 2017, Sunil Bansal, M.D. issued a report following an independent medical evaluation (IME) conducted on June 16, 2017 at the request of claimant's counsel. (Ex. 3) Dr. Bansal stated that claimant reported that his shoulder was "mostly

pain-free," with only occasional pain in his right shoulder along with occasional numbness in his right arm and hand. (Id.) However, Dr. Bansal described claimant as being "limited with activity." (Ex. 3, p. 9) Dr. Bansal assigned 6 percent permanent impairment to the upper extremity, which he converted to 4 percent of the body as a whole. (Ex. 3, p. 13) This was based on the AMA Guides, Fifth Edition, with impairment assigned for loss of range of motion, specifically: flexion; abduction; external rotation; extension; and internal rotation. (Id.) Dr. Bansal noted that claimant reported returning to work and that he was able to do his job and he did not want to have permanent restrictions. Dr. Bansal stated that he did "not feel permanent restrictions are necessary at this juncture." (Ex. 3, pp. 12-13) He went on to state that if claimant were to change employers, he would suggest a restriction of "no lifting greater than 10 pounds over shoulder level with the right arm occasionally," and "[n]o frequent over shoulder lifting with the right arm." (Ex. 3, p. 13) There was no discussion concerning the basis for these possible future restrictions.

On September 28, 2017, claimant returned to see Dr. Garrels for an examination related to his impairment rating. (Ex. JE2, p. 44) Claimant reported to the nursing office and stated "I tweaked my neck while tossing garbage." (Ex. JE2, p. 45) The assessment was a slight left neck muscle strain and claimant was returned to work with no restrictions.

On November 16, 2017, Dr. Garrels provided a response to Dr. Bansal's IME report. (Ex. JE2, pp. 47-48) Claimant testified that he did not return to see Dr. Garrels at that time. (Tr. p. 37) Dr. Garrels stated that claimant had been back to work for 6 months without reporting any difficulty doing his job, in which he "throws garbage cans on a routine basis." (Ex. JE2, p. 47) Dr. Garrels stated that there is "no basis" for the assertion that claimant may need "any type of restriction" and claimant, by working successfully, without any complaints has proven his ability to work without restrictions. (Id.) Referring to his September 28, 2017 findings regarding right shoulder range of motion, Dr. Garrels stated that claimant sustained 2 percent permanent impairment to the upper extremity, which he converted to 1 percent of the whole person. (Ex. JE2, p. 48) This was based specifically on loss of range of motion concerning flexion and abduction. (Ex. JE2, pp. 47-48) Dr. Garrels suggested the different findings of range of motion between his evaluation and that of Dr. Bansal was reflective of a "lack of complete effort from the patient during the testing." (Ex. JE2, p. 47) However, he does not provide any significant discussion on the matter or support for his conclusion.

I accept the functional impairment rating assigned by Dr. Bansal of 4 percent to the body as a whole. I find Dr. Garrels' assessment that Dr. Bansal only found a greater loss of range of motion due to claimant's lack of effort during his exam to be lacking. I find no reasonable basis in the records to support that assertion. It is clear that the stipulated injury was significant, requiring substantial surgery, time off work, physical therapy and work hardening. Claimant returned to work without restrictions and continued to work in his regular position at the time of the hearing. When viewed as a whole, I do not accept the notion that claimant put forth a weak effort during his examination with Dr. Bansal.

Concerning restrictions, I accept Dr. Bansal's position that the same are not necessary. This is supported by Dr. Garrels' statement that no restrictions are needed and further supported by claimant's successful return to work without restrictions.

**5) Current Condition**

Claimant testified that he has difficulty putting his belt on and rather than reaching around his body to do so, he puts the belt through the belt loops first, and then puts his pants on. He will get a tingling sensation trying to put his belt on in the traditional manner. (Tr. p. 35)

Claimant testified that he is "trying to fix up the house lately," and he has trouble holding his "hand up with the drill" for more than about 10 minutes. (Tr. pp. 42, 43)

He also stated that lifting, pushing and pulling are not too bothersome and "unless I'm doing a long - - a lot all day. And that's usually just a little sore. It's not too bad." (Id.)

Aside from getting his belt on, claimant did not indicate that he had any other issues or problems with hygiene, getting dressed or activities of daily living. (Tr. pp. 43-44)

**6) Additional Findings**

Claimant was terminated from his employment with the defendant employer on February 16, 2018, for alleged illegal drug activity. (Tr. p. 40) No criminal charges had been filed at the time of the hearing. (Id.) Claimant filed a grievance, which was scheduled to be heard on March 14, 2018, about one week after the hearing herein. (Ex. 40)

After Dr. Hussain released claimant on February 1, 2017, he did not return or seek to return to Dr. Hussain for any additional care. (Tr. p. 47)

After Cheryl Benson, PA-C, at Genesis Occupational Medicine released claimant to return to full-duty work on March 3, 2017, claimant did not return or seek to return to Cheryl Benson for any additional care. (Id.)

At the time of this hearing, claimant was not taking any prescription medication from any treating physician. (Tr. p. 42) Claimant testified that he did take over-the-counter medication for his shoulder. (Id.)

Claimant did not believe that he could return to the Kitchen and Bath Design store because of the heavy lifting of cabinets. (Tr. p. 41) Aside from working at the Kitchen and Bath Design store, claimant was not aware of any other jobs that he had done in the past that he felt he would be unable to do now. (Tr. p. 42)

Claimant agreed that the job that he had been performing for the city required "very little" lifting, pushing or carrying above chest level. (Tr. p. 41)

Concerning industrial disability, factors such as claimant's age, his limited education, the significance of the injury, and the length of the healing period would tend to support a higher level of industrial disability.

However, claimant's successful return to work without restrictions, his limited functional loss, his ability to continue to engage in the type of work to which he is suited, and his motivation to obtain and remain employed, would tend to support a lower industrial disability rating.

Considering the above and all other appropriate factors for the assessment of industrial disability, I find that claimant has sustained 10 percent industrial disability. Ten percent industrial disability represents 50 weeks of benefits.

## 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).

Claimant argues that a release to return to full duty is not always evidence of no permanent disability, citing Baker v. Firestone, File Nos. 5040732, 5040733 (App. Dec. 2016) I agree and note the functional loss found in this case by both Dr. Garrels and Dr. Bansal. In addition, I weigh the other factors stated above including, but not limited to, claimant's relatively mild complaints of ongoing symptoms, his ability to function well at his former employer without restrictions and his lack of any recent medical treatment including prescription medication.

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

The final issue is costs. 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 assess costs of $100.00 for the filing fee to be paid by defendants. I note that there is no itemized statement of costs attached to the Hearing Report or contained within claimant's exhibits.

## ORDER

**IT IS THEREFORE ORDERED:**

Defendant shall pay claimant industrial disability benefits of fifty (50) weeks, beginning on the stipulated commencement date of March 3, 2017 until all benefits are paid in full.

Defendant shall be entitled to credit for all weekly benefits paid to date. The parties have stipulated that defendant is entitled to a credit of five point five nine eight (5.598) weeks.

All weekly benefits shall be paid at the stipulated rate of five hundred eighty-eight and 14/100 dollars ($588.14) per week.

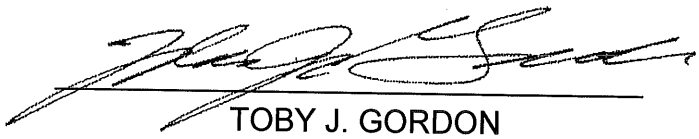
All accrued benefits shall be paid in a lump sum.

Defendant 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)

Defendant shall pay costs of one hundred and 00/100 dollars ($100.00).

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 8th day of August, 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.