BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOHN P. NEUNABER,

Claimant,

vs.

HOME TOWN RESTYLING, INC.,

Employer,

and

IOWA MUTUAL INSURANCE,

Insurance Carrier,
Defendants.

File No. 5043591

APPEAL

DECISION

Head Note No.: 1803

Defendants, Home Town Restyling, Inc. and its insurer, Iowa Mutual Insurance Co., appeal from an arbitration decision filed October 9, 2014. Responding to this appeal is claimant, John P. Neunaber.

In the arbitration decision, claimant was awarded workers' compensation benefits consisting of permanent total disability benefits.

The issues presented on appeal and the record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal.

Those portions of the proposed agency decision pertaining to issues not raised on appeal or cross appeal are adopted as a part of this appeal decision.

ISSUES ON APPEAL

The sole issue presented by the parties is the extent of claimant's entitlement to weekly permanent industrial disability benefits.

In the hearing report submitted at hearing, defendants raised the issue of the application of Iowa Code section 85.34(7), based on a prior military injury and/or low back disability which relate to successive disabilities. This suggests an issue of apportionment under that Code section. Claimant added in the hearing report he was asserting common law fresh start/full responsibility rule and Iowa Code section 85.34(2)(u).

The problem is that an issue of apportionment under Iowa Code section 85.34(7), or any application of the fresh start or full responsibility rule was not raised or discussed in the appeal brief of defendants, the appellants in this case. Curiously, claimant in his appeal brief, did list an issue of apportionment in the first part of his brief, but never discussed that issue again in argument. Claimant is only a respondent in this appeal and not a cross-appellant.

Our administrative rule states the issues considered on appeal are those presented by appellant in an appeal brief. 876 IAC 4.28(7) Therefore, an apportionment issue, common law or otherwise, was not presented and shall not be considered.

STIPULATIONS AT HEARING

The parties agreed to the following matters in a written hearing report submitted at hearing:

1. On March 5, 2012, claimant received an injury arising out of and in the course of employment with defendant employer.

2. The work injury is a cause of some degree of permanent, industrial disability to the body as a whole.

3. Permanent partial disability benefits shall commence on November 26, 2012.

4. At the time of the alleged injury, claimant's gross rate of weekly compensation was $714.00. Also, at that time, claimant was single and entitled to one exemption for income tax purposes. Therefore, claimant's weekly rate of compensation is $448.81 according to this agency's published rate booklet for this date of injury.

5. Prior to hearing, defendants voluntarily paid 72 and 2/7 weeks of compensation at the stipulated weekly rate according to the hearing report. Nowhere in the hearing report, briefs or evidence do the parties indicate whether these weekly benefits were for healing period, permanent disability, or a combination of both. Since a credit issue was not raised at hearing or in this appeal, the parties apparently are willing to work out themselves the extent of defendants' entitlement to credit for past payment of benefits.

FINDINGS OF FACT

Claimant is 61 years of age. He dropped out of high school after the tenth grade. He then served three years in the U.S. Marine Corps as a tank mechanic after receiving training in diesel mechanics. He obtained a G.E.D. while in the Marines. His work as a tank mechanic required heavy manual labor and claimant suffered injuries to his low back. These injuries led to two back surgeries: a laminectomy in 1972 at the L4-5 vertebral level of the spine and another laminectomy in 1973 at the L5-S1 vertebral level. (Transcript pp. 10-12, Exhibit E, p. 10) Claimant states he had an excellent

recovery from these surgeries and received no permanent restrictions from the military doctors (Tr. p. 12, 15). However, he admits he was medically discharged from the service in November 1973 due to a low back disability. (Tr. p. 13, Ex. E, p. 1) He has received military disability benefits since his discharge which currently amounts to $867.00 per month. (Ex. G, deposition transcript p. 9)

After his military service, claimant took some time off for a while and then began working for a company erecting farm silos. He held this job for 3 years. He states the silo work was very physically demanding and he was able to do such work despite his prior back difficulties. (Tr. p. 15) After leaving the silo company, he worked in a factory operating machines for one year. (Tr. p. 16) Claimant then began a career installing various types of siding on buildings for several contractors and in his own siding installer business. He states that most of his siding work was performed during his own siding businesses. His first business was as a subcontractor which began in the mid-1980s. He installed vinyl siding on new residential homes for various general contractors. (Tr. pp. 16-21)

In 1989, claimant testified that while performing his subcontractor work, he again developed increased low back problems and underwent a third low back surgery in August 1989 by James LaMorgese, M.D., a neurosurgeon. (Tr. pp. 21-22) There are no medical records in evidence about this surgery except that claimant's most recent neurosurgeon, Darin Smith, M.D., refers to it as another laminectomy, but Dr. Smith did not mention the spinal level. (Ex. 1, p. 2) Claimant was off work for 4-6 weeks and returned to his subcontracting work, part-time for one week and then full duty. (Tr. p. 23) Claimant again states he had a 100 percent recovery and no permanent restrictions. Id. Claimant continued subcontracting until 2000 when his main general contractor went bankrupt and he was financially compelled to end his subcontracting business. (Tr. p. 23) He then worked a few months for National Oats performing light duty and unloading boxcars. (Tr. p. 23-24) For the next two years, he worked for a general contractor doing various types of work in residential construction. He said this work was at times physically demanding. (Tr. p. 24) Claimant then was hired as a siding installer by defendant employer, Home Town. After two years, he left Home Town and again restarted his own business with another person selling and installing siding. In 2008, he returned to Home Town and remained there as a siding installer until his March 2012 work injury. (Tr. p. 27)

Claimant admits that he has been receiving treatment from the Veterans Administration (VA) since leaving the Marines. Claimant testified that this was mostly for his upper back. (Tr. p. 27) He denied any low back treatment for this work injury in his deposition. (Ex. G, deposition transcript p. 21) However, the VA records in evidence show periodic evaluations since 1974 which include treatments for chronic low back pain. He has received low back treatment from the VA since the work injury. (Ex. E, pp. 24-37) The VA physicians typically prescribed pain medications including Vicodin, and most recently hydrocodone. This treatment with hydrocodone continues today. (Ex. E)

On March 5, 2012, claimant suffered a stipulated work injury when he slipped and fell and began to have left shoulder and back pain radiating into the right leg. Initially, claimant was treated by his family doctor for his back and leg pain, but after an MRI in April 2012, he was referred to Dr. Smith, the neurosurgeon who was mentioned earlier. Dr. Smith's most significant assessment was a disc herniation and stenosis at the L2-3 vertebral level. (Ex. 2, pp. 1-4) Dr. Smith ordered physical therapy at Marion Physical Therapy, (Ex. 4, pp. 1-12) and he later ordered a series of epidural steroid injections (ESI) by a pain management physician. (Ex. 2 pp. 5-9) Claimant reported no improvement from either of these treatment modalities. Dr. Smith then performed a fourth laminectomy at the L2-3 level on June 26, 2012. (Ex. 3, p. 1)

Following surgery, Dr. Smith reports that claimant improved for a time, and claimant agrees. However, about a month later, his low back and right leg symptoms returned, but not to the level of pain he had prior to surgery. In August 2012, Dr. Smith ordered additional physical therapy from the same therapists as before and another ESI, but this time at the L4-5 level, because an MRI taken after surgery showed an open spinal canal at L2-3, which was the only level addressed in his surgery. (Ex. 2, p. 13-14; Ex. 3, p. 1) Claimant subsequently reported to Dr. Smith that the physical therapy and the ESI again did not improve his back and leg symptoms. (Ex. 2, p. 16) The physical therapist reported some progress, but in the last report on September 9, 2012, the therapist stated claimant was unchanged since his first therapy session after Dr. Smith's surgery. (Ex. 4, p. 24) Dr. Smith then ordered nerve conduction studies. When the studies came back normal, on October 8, 2012, Dr. Smith placed claimant at maximum medical improvement (MMI) and he ordered a functional capacities test to determine work restrictions. The office note of this visit is the last medical treatment record from Dr. Smith. However, Dr. Smith did recommend referral to an occupational health physician.

Defendants then sent claimant to Rick Garrels, M.D., an occupational medicine physician, to address his ongoing symptoms. Dr. Garrels ordered work hardening therapy by Accelerated Rehabilitation Centers. After his first visit on October 31, 2012, an Accelerated therapist reported to Dr. Garrels as follows:

> ASSESSMENT: It is important to note that the client demonstrated inconsistency in his performance as evident by cogwheeling with MMT, 4/5(+) Waddell's Signs, and varied body mechanics with lifting tasks. Due to this and the disparity between the client's performance today and the essential functions of his job, as stated his employer, there is a hgh [sic] likelihood that the client will not achieve the goals set for him.

(Ex. 6, p. 2)

This assessment language appears in every subsequent report submitted to Dr. Garrels until the therapy ended on November 29, 2012. In the discharge report, an Accelerated therapist provided the following assessment:

> Patient has not progressed well in treatment. Patient no longer benefits from physical therapy at this time. He has put forth moderate effort in physical therapy. The patient has not progressed toward return to work. The patient has been compliant in the home exercise program. Mr. Neunaber has not made significant improvement in his symptoms or function since last reassessment. He has decreased frequency of work conditioning visits to 3x/week, and has still not been able to improve his lifting and work related function....

(Ex. 6, p. 8)

The therapist then restated the same assessment language about inconsistent performances previously quoted.

Claimant returned to Dr. Garrels in November 2012 and reported he could not tolerate the work hardening therapy. Dr. Garrels placed claimant at MMI. Dr. Garrels opined at this time that claimant has a 12 percent permanent partial impairment of the whole body pursuant to the AMA Guides and permanent restrictions as follows:

> Lifting occasionally up to 40 pounds below shoulder level. Lifting occasionally up to 10 pounds above shoulder level. Occasional push-pull up to 100 pounds and then occasional bending twisting with the back.

(Ex. 7, p. 2)

Claimant testified he experienced a recurrence of severe back and leg pain in February 2013 and the nurse case manager sent him back to Dr. Garrels in February 2013. Claimant stated he did not know why the nurse case manager did not return him to Dr. Smith, but claimant did admit Dr. Smith had previously released him from treatment. (Tr. pp. 41-42)

Dr. Garrels' records in evidence show that after he released claimant from his care in November 2012, he did not see him again until April 5, 2013. The doctor reports claimant stated he began to have continuous pain after bending over at home. The doctor then ordered another MRI. (Ex. 7, p. 3) The MRI was performed on April 12, 2013. (Ex. D, pp. 1-2) Claimant returned to Dr. Garrels on April 17, 2013. The doctor did not mention the MRI results in the office note of that visit. (Ex. 7, p.4) He stated that claimant reported his pain had already improved just with time. (Id.) The doctor noted the hydrocodone claimant was receiving from the VA seemed to be managing his pain well enough, but he also prescribed Valium. (Id.) The doctor offered claimant the option of another ESI, but claimant declined stating he had not obtained any relief from the prior ESIs. (Id.) Dr. Garrels continued the previous permanent restrictions and told claimant to return if symptoms persisted and he decided to have the ESI. (Id.) Claimant testified Dr. Garrels told him the MRI revealed only a minor bulge. (Tr. p. 43)

The MRI report itself states that degenerative changes and disc bulges and protrusions were found at several levels with the greatest disc narrowing at L4-5. Also, the disc bulging at L2-3 was slightly larger than the prior study. (Ex. D, pp. 1-2) Claimant admitted he has not requested authorization from Defendants for any further treatment by Dr. Garrels. (Tr. p. 69)

At the request of his attorney, claimant was evaluated by Richard Neiman, M.D., neurologist. Dr. Neiman causally related claimant's symptoms to the work injury and disagreed with the method Dr. Garrels utilized in the AMA Guides to arrive at his permanency rating. Using a different method, Dr. Neiman provided a 13 percent rating. (Ex. 8, p. 3) The doctor recommended the following restrictions based on claimant's complaints to him which included inability to sit or stand for long periods of time:

> He needs to be able to change sitting to standing, he needs to lie down throughout the day, driving more than half hour to hour at a time next to impossible. With his age of 59, I am afraid he probably will not be employable in the future. Might consider retraining, but I am never optimistic as far as the potential to find a position. I think he should consider looking into social security due to his ongoing complaints....

(Ex. 8, p. 4)

It is unclear if Dr. Neiman reviewed the latest MRI because in his report he stated he had not seen it, but was requesting it from the hospital. There is no further report from Dr. Neiman in evidence.

Claimant testified that he worsened after the physical therapy at Accelerated and has not been able to engage in any form of physical activity that requires more than minimal effort. (Tr. pp. 44) He states he cannot sit for more than an hour or two, or stand for more than 5-15 minutes without experiencing significant symptoms. (Tr. pp. 44-45) He stated that last winter he only sat and watched television and a friend would drive them to a casino now and then. (Tr. p. 48) He states he can drive without experiencing pain for "up to an hour maybe." (Tr. p. 49)

Claimant has not returned to work with defendant-employer and has not returned to any type of full-time or regular part-time work. Claimant was awarded social security disability benefits in 2013.

Claimant admits that he has not conducted any type of job search and testified he does not know of any work he can perform. (Tr. pp. 47, 70, Ex. G, deposition transcript p. 25) Since his treatment ended, he has done some estimating for contractors on an ad hoc basis. In 2013, he worked on three siding jobs for a few hours for people in his home town. His gross earnings were $20,000, but after expenses such as the costs of supplies, tools, and delivery of materials, his net income was only

$3,400. (Tr. p. 45, 55-56) This work involved siding residential homes, but claimant states he was only assisting the homeowners, mostly by showing them what to do. He admits to using a radial arm saw he purchased to allow him to cut siding at waist level, but he claims he could only do this an hour or two a day. He also did some measuring. (Tr. pp. 57-59)

Claimant states before his work injury, he planned to continue working for defendant employer until he died. (Tr. p. 49) He states he does not drink or smoke and has a clean criminal record. (Tr. p. 50-51)

Defendants assert claimant is employable with his vast experience in construction. They point to the work he performed in the 2013 siding installations. In support of this assertion, defendants retained Lana Sellner, MS, CRC, a vocational rehabilitation consultant. In her report dated December 11, 2013, Ms. Sellner opines that given claimant's education, work history, and significant transferable skills in construction work, including an ability to read blueprints, he is employable despite his receipt of social security benefits. (Ex. F, p. 12) She states that she performed a labor market survey and there are open positions in the geographical area of claimant's residence in Wyoming, Iowa, that claimant may qualify for under Dr. Garrels' permanent work restrictions. Ms. Sellner listed those jobs in her report, such as press operator and machine operator jobs in Monticello Iowa; a sales associate position in a Home Depot store and cashier/clerk jobs in a convenience store, both in Cedar Rapids, Iowa; and, factory assembly and manufacturing utility operator jobs in Peosta, Iowa. (Ex. F, pp. 11-12) Those jobs pay from $8 to $12 per hour. (Id.) Ms. Sellner cautions that she has not personally contacted any of the employers involved, but would do so if defendant authorized placement services. There is no further report from Ms. Sellner in this record.

Claimant responds that Ms. Sellner is just speculating without actually contacting the employers involved as to the actual physical requirements of their jobs she listed. Claimant also argues that all of these jobs will require prolonged driving which claimant cannot perform.

I find the views of Dr. Garrels more convincing that those of Dr. Neiman. First, Dr. Garrels was a treating physician who clearly had more clinical experience with claimant than did Dr. Neiman. Dr. Garrels' specialized knowledge in the area of occupational medicine further adds to his credibility. I find the permanent restrictions recommended by Dr. Garrels to be the best indicator of claimant's physical limitations and capabilities. The inability to sit or stand for long periods of time appears to be a recent complaint. I see no such complaint in the records of Dr. Smith or Dr. Garrels. My review of the physical therapy records does not indicate any sitting or standing problems, other than a brief reference in the Accelerated records to claimant sitting and pacing back and forth in the waiting area before his sessions. Also, claimant's testimony is not convincing as to his limitations in sitting and standing as it conflicts in many ways with physician reports and on a few occasions with other testimony he has

given. He initially stated he could do nothing physically that would require more than a minimal amount of effort, but then admits to performing physical labor installing siding for neighbors, albeit for short periods of time. Finally, his inconsistent performance during physical therapy sessions at Accelerated does nothing to bolster his claim for total disability benefits.

Admittedly, there is some merit to claimant's criticism of the views of the vocational consultant as to actual viability of jobs in the competitive labor market as she did not contact the employers and was apparently not authorized to perform placement services. One of the jobs she suggested, the assembly work in Peosta which requires repetitive lifting of 40 pounds throughout the shift, clearly violates Dr. Garrels' restrictions. (Ex. F, p. 12) However, the other jobs suggested appear plausible. Claimant has not made any effort to look for suitable work and he never made any attempt to apply for any of the jobs suggested by Ms. Sellner. Claimant did not offer any vocational evidence to counter the views of Ms. Sellner. Claimant simply has not made a sufficient showing that no suitable work is available to him. Claimant's total rejection of all of the jobs suggested by Ms. Sellner is based on a driving restriction that I did not find to be a permanent restriction.

On the other hand, I find claimant has suffered a very significant permanent loss of earning capacity, just not a total loss. There is little dispute among the parties that given Dr. Garrels' restrictions, claimant will never be able to return to the occupation of a full-time siding installer, the work for which he is best suited given his age, education, and work experience. On top of three prior surgeries, he had to undergo yet another back surgery due to this work injury. He is now limited to entry level medium labor, light or sedentary work and would suffer a substantial loss of income even if he obtained such a job.

I find the work injury of March 5, 2012, is a cause of a 75 percent loss of earning capacity.

CONCLUSIONS OF LAW

The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2)(a-t), the disability is considered a scheduled member disability and measured functionally. If it is found that the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and is measured industrially under code subsection 85.34(2)(u). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. Delong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W.2d 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 workers' 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 worker's qualifications intellectually, emotionally and physically; the worker's earnings 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).

In this case, the parties in the hearing report agreed that the stipulated work injury is a cause of some degree of permanent loss of earning capacity or industrial disability. Consequently, this agency must measure claimant's loss of earning capacity as a result of this impairment.

Although claimant is closer to a normal retirement age than younger workers, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). However, this agency does consider voluntary retirement or withdrawal from the work force unrelated to the injury. Copeland v. Boones Book and Bible Store, File No. 1059319 (App. November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

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 accommodations 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, 617 (Iowa 1995).

Claimant asserts that defendants failed to show that suitable work was available to him. However, a showing of a lack of suitable employment is claimant's burden, not defendants. There is a burden shifting feature in the odd lot doctrine. Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985) However, claimant has not pled an application of this doctrine. Even if he did, claimant has not made a sufficient showing of a lack of suitable employment to invoke the odd-lot doctrine. The factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable, but unsuccessful effort to find steady employment, vocational or other

expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995).

I find that claimant has suffered a 75 percent loss of his earning capacity as a result of the work injury of March 5, 2012. Such a finding entitles claimant to 375 weeks of permanent partial disability benefits as a matter of law under Iowa Code section 85.34(2)(u), which is 75 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection.

ORDER

The arbitration decision filed October 9, 2014, is modified and the following is ordered:

1. Defendants shall pay to claimant 375 weeks of permanent partial disability benefits at the stipulated weekly rate of four hundred forty-eight and 81/100 dollars ($448.81) from the stipulated commencement date of November 26, 2012.

2. Defendants shall pay accrued weekly benefits in a lump sum and shall receive credit against this award for all benefits previously paid.

3. Defendants shall pay interest on unpaid accrued weekly benefits awarded herein pursuant to Iowa Code section 85.30.

4. Defendants shall pay the costs of the arbitration proceeding pursuant to administrative rule 876 IAC 4.33, but claimant shall pay the costs of this appeal proceeding.

5. Defendants shall file subsequent reports of injury (SROI) as required by our administrative rule 876 IAC 3.1(2).

Signed and filed this 24th day of August, 2015.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

Copies to:

Matthew J. Petrzelka
Attorney at Law
1000 – 42nd St. SE, Ste. A
Cedar Rapids, IA 52403-3902
mpetrzelka@petrzelkabreitbach.com

Peter J. Thill
Attorney at Law
1900 E. 54th St.
Davenport, IA 52807
pjt@bettylawfirm.com