

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DALE FRANK,  
Claimant,

**FILED**

MAY 31 2016

vs.

WORKERS COMPENSATION

SCHINDLER ELEVATOR CORP.,  
Employer,

File No. 5046571

ARBITRATION DECISION

and

AMERICAN ZURICH INS. CO.,  
Insurance Carrier,  
Defendants.

Head Note Nos.: 1803; 4100

STATEMENT OF THE CASE

Dale A. Frank filed a petition for arbitration seeking workers' compensation benefits from Schindler Elevator Corporation and American Zurich Insurance Company.

The matter came on for hearing on May 20, 2015, before deputy workers' compensation commissioner Joseph L. Walsh in Cedar Rapids, Iowa. The record in the case consists of claimant's exhibits 1 through 9; defense exhibits A through N; as well the sworn testimony of claimant, Dale Frank. The parties briefed this case and the matter was fully submitted on June 11, 2015.

ISSUES

The dispute in this case is the nature and extent of Dale Frank's disability. The claimant contends he is permanently totally disabled and has alleged the odd-lot theory. The defendants contend that the claimant is employable and has suffered an industrial disability in the 20 percent range.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship.
2. Claimant sustained a cumulative injury which arose out of and in the course of employment on January 8, 2013.

3. The injury has caused some level of both temporary and permanent disability; however, temporary benefits are no longer in dispute.
4. Affirmative defenses have been waived.
5. Medical benefits are not in dispute.
6. The weekly rate of compensation is \$806.53 per week based upon gross wages of \$1,404.13 and being single with 1 exemption.
7. Defendants have paid and are entitled to a credit of 31.571 weeks of compensation paid prior to hearing.

#### FINDINGS OF FACT

Dale Frank was born in 1959 and was 56 years old as of the date of hearing. Dale graduated from Jefferson High School in Cedar Rapids, Iowa in 1977. He was an average student. After he graduated from high school he briefly attended a community college for less than a year. Dale is not skilled in computers or keyboarding.

Dale testified under oath at hearing. I find Dale to be credible. His sworn testimony is consistent with the records and exhibits in the file. There was nothing about his demeanor which caused any concern about his truthfulness.

Dale has been employed in the field of elevators and escalators since 1981. Prior to that, he worked as a crane operator for a couple of years. In 1981, he moved to Houston, Texas, and worked as a helper for Montgomery Elevator Company. He worked through the International Union of Elevator Constructors (I.U.E.C.). He completed the six month helper program and began the union's apprenticeship program. He worked as an I.U.E.C. apprentice for ten years, learning to repair and install friction and hydraulic elevators and escalator systems. He passed the mechanic's test on his third attempt. (Defendants' Exhibit N, Frank Deposition, page 11) Dale has maintained his mechanic's license through 2012.

Dale secured employment through the I.U.E.C. while employed in the Houston, Texas area. He later moved to Iowa in approximately 2005, and continued to secure employment through the union. (Def. Ex. N, Frank Depo., pp. 14-17) Employment was secured through a process delineated in a collective bargaining agreement (CBA) between various elevator constructors and the union. (Def. Ex. L) An employer would notify the union of needed workers and the union would refer the mechanics, assistant mechanics, helpers and apprentices who were "qualified to perform the work required by the Company" and available for work. By the terms of the CBA, "the Company has the right to reject any and all applicants referred to it by the Union." (Def. Ex. L, p. 67) When the job was completed, the union member would return to the applicant pool to await another referral. (Def. Ex. N, Frank Depo., pp. 20-22)

Dale worked through I.U.E.C. Local 33 in Cedar Rapids since 2005. He worked

for various elevator companies in Iowa. Dale began working for Schindler Elevator ("Schindler") in July 2012. He was hired as an assistant mechanic at the pay rate of \$31.31 per hour. (Def. Ex. K, p. 57) The parties have stipulated that his average wage at the time of his injury was \$1,404.13 per week. The assistant mechanic pay was significantly less than the mechanic pay he was eligible to earn according to his licensure and the CBA. (Def. Ex. J, p. 47)

Dale testified extensively at hearing about the physical requirements for installation, maintenance and repair of elevators and escalators. He worked as a helper, apprentice and mechanic for 31 years. These jobs require significant technical skills. They are also physically demanding and require heavy lifting with both arms. The lifting is often overhead or at difficult angles. The physical demands are also outlined in various job descriptions. (Claimant's Ex. 1, pp. 1-4)

On January 8, 2013, Dale was assisting with the installation of an escalator at the U.S. Cellular Center in Cedar Rapids, Iowa. During the process, Dale tripped and fell to the floor. (Cl. Ex. 8, p. 3) He landed on his left shoulder and felt immediate pain. He reported the injury right away.

The next day, Dale was sent to Concentra in Davenport, Iowa, for treatment. Concentra diagnosed a shoulder strain and conservative care commenced, including restrictions, physical therapy and medications. (Cl. Ex. 2, pp. 103) Dale was provided light-duty work at Schindler. (Cl. Ex. 7, p. 2)

The conservative care did not provide any relief and on January 31, 2013, he had an MRI of the left shoulder, which demonstrated the following:

1. Full-thickness tear of the posterior aspect of the supraspinatus tendon and the infraspinatus tendon with infraspinatus tendon retraction and muscle atrophy.
2. Anterior labral detachment.
3. Degenerative change of the AC joint.

(Cl. Ex. 3) At this point, Dale was referred to David Hart, M.D., for orthopedic care. (Cl. Ex. 2, p. 6)

On February 21, 2013, Dr. Hart reviewed the films and diagnosed retracted large rotator cuff tears in Dale's left shoulder. (Cl. Ex. 4, p. 3) A plan was developed at that visit which included surgery. Dale remained on light-duty at work until his surgery, which was performed on April 12, 2013. (Cl. Ex. 4, pp. 4-5) Following surgery, Dale underwent extensive physical therapy from April through November 2013. (Cl. Ex. 5) Dale's shoulder condition improved significantly. Dale testified that Schindler offered him no work during his physical therapy recuperation period. (Def. Ex. N, Frank Depo., pp. 25-26)

After treatment was completed, Dale underwent a functional capacity evaluation at Accelerated Rehabilitation Centers. The report showed significant functional deficits, but ultimately found that Dale "does demonstrate the physical capabilities and tolerances to perform all essential job functions of an Elevator Mechanic." (Cl. Ex. 5, p. 2) Numerous other findings in the report showed his significant limitations, including the following:

- He demonstrates significant loss of strength with (L) shoulder when hands start higher on the crate. (Cl. Ex. 5, p. 3)
- He demonstrates strong and controlled lifting with arm at carrying angle and close to body but is challenged with shoulder reaching/overhead reaching when lifting. (Cl. Ex. 5, p. 3)
- . . . after prolonged period in the overhead position [he] began to use substitution patterns of (L) shoulder due to fatigue. (Cl. Ex. 5, p. 4)
- He did drop 2 of the objects when working in the overhead position. (Cl. Ex. 5, p. 4)
- Reduced left arm strength and range of motion with flexion, abduction, and internal/external rotation. (Cl. Ex. 5, pp. 2-3)

Dr. Hart released Dale on November 25, 2013, noting that he still had "some significant functional deficits regarding his strength particularly when reaching and performing" with his left arm. (Cl. Ex. 4, p. 11) He recommended restrictions of no lifting greater than 100 pounds floor to waist, and no lifting with the left arm 10 pounds overhead, 15 pounds floor to shoulder and 40 pounds floor to waist. (Cl. Ex. 4, p. 13) He also provided a functional impairment rating of 5 percent of the body as a whole. (Cl. Ex. 4, p. 14)

Dale attempted to return to work after being released. He called his union business agent and asked to go back to work. He told him he probably could not do everything required in the job. (Def. Ex. N, Frank Depo., p. 28) Specifically, Dale did not feel he could do the lifting and repetitive work away from his body with his left arm. (Def. Ex. N, Frank Depo., pp. 28-29) The union advised Dale to contact Schindler. Schindler had no work available for him. (Def. Ex. N, Frank Depo., pp. 29-30) Dale subsequently retired from the elevator industry. He receives a pension of approximately \$2,600.00 per month. (Def. Ex. N., Frank Depo., p. 32)

Dale was evaluated for litigation purposes by the following experts:

- Medical Evaluation with Farid Manshadi, M.D., October 13, 2014. Dr. Manshadi confirmed Dale's rating and restrictions. (Cl. Ex. 6, p. 4) He subsequently recommended additional restrictions to avoid "activities which require repetitious reaching, shoulder height or overhead activities." (Cl. Ex. 6, p. 5)

- Vocational Evaluation with Barbara Laughlin, M.A., November 3, 2014. Ms. Laughlin concluded Dale "has a significant loss of employability given Dr. Manshadi's restrictions. There may be some jobs he could perform, but likely with no quality, quantity or dependability." (Cl. Ex. 7, p. 12)

- Vocational Evaluation with CorVel, Michelle Barns, B.S. and Lawrence Kahan, C.R.C, December 19, 2014. CorVel located four jobs that Dale could perform within his medical restrictions. "Based on the information obtained, employment was available in the areas surveyed. It is this writer's opinion that with a diligent job search, Mr. Frank could obtain employment in the above-mentioned areas, with the anticipated salary range most likely in the \$8.00 - \$20.00 an hour as a Customer Service Representative, \$8.00 - \$16.00 an hour as a Counter Clerk, \$12.00 - \$14.00 an hour as a Machine Operator and 9.00 - \$19.07 per hour as an Assembler." (Def. Ex. H, p. 41)

Dale sought work with a number of different employers after retiring from the elevator industry. In September 2014, Dale began working for Advance Automotive Parts, delivering parts and working at the counter. (Cl. Ex. 8, p. 7) He earns \$8.25 per hour.

#### CONCLUSIONS OF LAW

The issue in the case is the extent of Dale's industrial disability. Claimant seeks a permanent total disability, while the defendants have alleged a minor disability in the 20 percent range.

When disability is found in the shoulder, a body as a whole situation may exist. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949). In Nazarenius v. Oscar Mayer & Co., II Iowa Industrial Commissioner Report 281 (App. 1982), a torn rotator cuff was found to cause disability to the body as a whole.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

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

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 Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id., at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. 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. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

I do not find that the claimant has met his burden under the test set forth in Guyton, supra. Dale is gainfully employed and, based upon the record before me, he is capable of working in full-time employment in the competitive job market. I base this finding upon Dale's testimony regarding his current job, the functional capacity evaluation and the CorVel expert report.

Dale, however, has a substantial loss of earning capacity as evidenced by his actual loss of wages, his significant functional deficits documented in the FCE, his permanent work restrictions from the treating physician and his inability to engage in past employment as an elevator mechanic. Considering Dale's advanced age, his educational background and work skills, I find he has suffered a 60 percent loss of earning capacity.

The defendants argue, with some merit, that Dale chose to retire from a lucrative trade, draw a good pension and work in a relatively simple part-time position. They assert that Dale lacks the motivation to continue in a more lucrative career for reasons unrelated to his injury. I agree with the defendants insofar as I suspect that Dale could find a more demanding position with more hours if he did not have access to his

pension. I find, however, that with his left shoulder limitations and restrictions, combined with the fact that the employer did not offer him any work after his recovery, Dale is not truly suited to work in the field of elevator installation and repair. This has been his vocation for the past 31 years prior to the injury. Elevator maintenance is a skilled trade which enabled Dale to earn \$30.00 to \$40.00 per hour plus good benefits. He is now, at best, relegated to the jobs as set forth by defendants' experts in the \$8.00 to \$20.00 per hour range.

ORDER

THEREFORE IT IS ORDERED

Defendants shall pay the claimant three hundred (300) weeks of permanent partial disability benefits at the rate of eight hundred sixty-one and 63/100 (\$861.63) per week commencing November 25, 2013.

Defendants shall pay accrued weekly benefits in a lump sum.

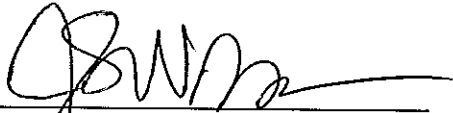
Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall be given credit for the weeks previously paid as stipulated thirty-one point five seven one (31.571) weeks.

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

Costs are taxed to defendants.

Signed and filed this 31<sup>st</sup> day of May, 2016.

  
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JOSEPH L. WALSH  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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JLW/srs

**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.