BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MATTHEW BRINGMAN,

Claimant,

vs.

HAWARDEN MACHINE, INC.,

Employer,

and

DAKOTA TRUCK UNDERWRITERS,

Insurance Carrier,
Defendants.

File No. 5048044

ARBITRATION

DECISION

Head Note Nos.: 1400; 1800; 1802

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Matthew Bringman, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on August 20, 2014. Claimant alleged he sustained a work-related injury on June13, 2013. (Original notice and petition)

Hawarden Machine, Inc., is insured for purposes of workers' compensation by Dakota Truck Underwriters. Defendants filed their appearance on May 8, 2015. The company admitted the occurrence of the work injury. A first report of injury was filed on September 11, 2013.

The hearing administrator scheduled the case for hearing on September 14, 2015. The hearing took place in Sioux City, Iowa at the Iowa Department of Workforce Development. The undersigned appointed Ms. Teri Lea Autry as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on his own behalf. Mr. Dave Furlong, Vice President and General Manager of Hawarden Machine Inc., testified for defendants.

The parties offered exhibits. Claimant offered exhibits marked 1 through 14. Defendant offered exhibits marked A through I. All proffered exhibits were admitted as evidence in the case. Post-hearing briefs were filed on September 30, 2015. The case

was deemed fully submitted on that date. At the commencement of the proceedings, the parties agreed that defendants would pay the medical mileage incurred for all authorized medical treatment.

ISSUES

The only issues to address in this decision are:

1. Whether claimant is entitled to temporary benefits from September 30, 2014 through January 6, 2015; and

2. Whether claimant is entitled to temporary benefits from May 29, 2015 until such time as claimant reaches maximum medical improvement.

FINDINGS OF FACT

This deputy, after listening to the testimony of claimant and the other witness at hearing, after judging the credibility of both, and after reading the evidence, and the post-hearing briefs, makes the following findings of fact and conclusions of law:

The party who would suffer loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

Claimant is 49 years old and currently resides in Westfield, Iowa. He has adult children. Presently, claimant is unemployed.

The parties stipulated claimant sustained a work-related injury on June 13, 2013 while he was working as a welder. Hawarden Machine, Inc., is engaged in the manufacture and sale of cattle handling equipment such as swinging gates, panels, chutes, and tubs.

Initially, claimant sought chiropractic care. He engaged in conservative care. Claimant did not improve with time. Matthew R. Johnson, M.D., performed a L5-S-1 interbody fusion on January 6, 2014. (Exhibit 7, page 5) Claimant engaged in physical therapy, drug therapy and he had spinal injections. He still complained of pain to Dr. Johnson. Claimant remained off work and was receiving temporary benefits.

Defendants desired a second opinion from Charles Mooney, M.D., an occupational medicine specialist in Ames, Iowa. Dr. Mooney examined claimant on or about July 7, 2014. The physician diagnosed claimant with:

ASSESSMENT:

1. Evidence of spondylolisthesis of L5-S1, status post L5-S1 interbody fusion with diffuse disc disease at L3-L4 and L4-L5 with ongoing pain complaints without significant radicular findings.

2. History of chronic low back pain preceding date of injury consistent with preexisting spondylolisthesis and bilateral pars defects at L5-S1.

(Ex. 9, p. 6)

Dr. Mooney opined claimant had not reached maximum medical improvement. However, the evaluating physician believed claimant could return to light duty work so long as claimant's duties were primarily sedentary in nature. Claimant was advised not to lift more than 10 pounds and he was not to engage in prolonged standing, walking, or repetitive bending. (Ex. 9, p. 7) Dr. Johnson agreed claimant could return to modified duty at Hawarden Machine, Inc. (Ex. 3, p. 50)

Through his attorney, claimant was notified that he was to report for modified duty on September 15, 2014 at 8:00 a.m. (Ex. D, p. 1) The modified duty was offered in a room that was different than the room in which claimant normally worked. The welding foreman designed a new work station for claimant. Claimant was asked to weld bushings which are very small hollow metal tubes that weigh mere ounces. The bushings were inside buckets but claimant was specifically instructed not to lift the buckets. The buckets were placed on claimant's work station by a co-worker. Claimant was given a bar stool for sitting and his work table was tilted for easy access. A jig was placed on the workstation. The jig was used to lift heavy objects. Claimant could sit or stand as he desired.

Mr. Furlong testified claimant had no minimum or maximum bushings to weld per day. The general manager told claimant he could leave the workplace whenever he was tired or when he felt it was too painful to work. Mr. Furlong testified the welding torch weighed less than 10 pounds. Mr. Furlong testified he spoke to claimant at least once a day. According to the witness, claimant had the freedom to come and go as he so pleased. Claimant did not experience one week of perfect attendance. Nevertheless, he suffered no repercussions for working short weeks.

On one occasion, Mr. Furlong asked claimant if he was able to perform the job. Claimant replied, "I do not feel comfortable getting out of bed. I should not be here." Claimant did not dispute he had made such a remark.

Mr. Furlong testified that on September 30, 2014, claimant walked out of the shop. He announced he was not coming back. Mr. Furlong testified Russ, the welding foreman, attempted to visit claimant at his home on two occasions within a three week period. However, claimant was not at home. Mr. Furlong stated he telephoned claimant's wife but claimant would not answer the telephone.

Finally, on October 22, 2014, Mr. Furlong testified he sent to claimant and to his attorney by certified mail a letter which was marked as exhibit 12. It was a letter of termination. A relevant portion of the letter stated:

> I have tried to work with you by doing the following to make you comfortable at work:
>
> -set up your work station with a chair, lowered workstation and comply with weight restrictions
>
> -full compliance of the work restrictions set up by your doctor and consulting with you as well
>
> -told to take breaks when needed to stretch and walk around when needed
>
> -asked a co-worker to help you lift parts and help set up the workstation when needed
>
> . . . .
>
> -had an ergonomic assessment set up for Oct. 3rd with Collin Wiggins (phy therapist) at our cost to evaluate your workstation and we would make changes to help you be more comfortable. You did not show up for that meeting and have not since returned.
>
> -I have made numerous visits to your workstation asking what I could do to make you feel more comfortable at work.
>
> -sent letters and made numerous phone calls asking for a status of your condition. I have not heard from you since the 30th of Sept.. [sic]
>
> My intent was to continue to work with you on your work restrictions and together ramp you back up to full time. However, with your continued refusal to communicate with HMI, the employer is left with no realistic option other than to end our employment relationship with you at this time.

(Ex. 12)

Claimant did not communicate with anyone in management at Hawarden Machine, Inc., following the October 22, 2014 letter. However, counsel for claimant replied to counsel for defendant. Counsel for claimant argued:

> I got a call from Matt Bringman today. As anticipated, even though he gave it his best effort, he is not able to continue the work welding bushings.
>
> There is no way you can look at the doctor's restrictions and tell me that job fits those restrictions. Even if he sits he still has to bend over. This hardly fits the definition of sedentary work and it certainly does not fit the

> definition of his 10 lb. weight restriction. He is jeopardizing his health and future by working this job.

(Ex. 11, p. 6)

Claimant's testimony about his workstation and the duties he was assigned was contrary to the testimony given by Mr. Furlong. Claimant produced exhibits 14, 14-2, 14-3, and 14-4. The exhibits were a series of photographs claimant took of his alleged workstation at Hawarden Machine, Inc. Claimant testified he walked into the plant during the luncheon break several weeks prior to his hearing and snapped the photographs without the permission of anyone connected to the employer. Claimant testified his own workstation was to the left of the workstation depicted in exhibit 14-2. Claimant testified this was the station where he was assigned to work during the time he was placed on light duty. Claimant testified the photo he took just prior to his hearing, depicted the same situation as he encountered when he returned to light duty work. Claimant testified this was the same work setting as the work setting depicted 20 years ago.

Mr. Furlong vehemently denied the work area depicted in exhibit 14-2 represented the work area where claimant performed his light duty work. Moreover, Mr. Furlong testified claimant's workstation had been dismantled once it was determined claimant would not be returning to Hawarden Machine, Inc.

Claimant testified he was required to climb on racks to secure parts from large buckets. He testified he had to scoop parts with a shovel. He testified he had to lift heavy buckets onto his work table. He said he engaged in repetitive bending and prolonged standing because he could not sit and weld bushings. Claimant testified there were many occasions when he lifted objects weighing more than 10 pounds. He testified he could not or would not ask co-workers for assistance. Claimant testified the foreman would assist claimant when the foreman was available. Claimant agreed he could take rest breaks, move, and stretch as needed; he was never reprimanded for his output.

Claimant testified he told management he was leaving and would not return to work until he had been fully released by his doctor. Claimant admitted he did not contact Dr. Johnson, the authorized treating surgeon, for clarification of his work restrictions. Claimant agreed no physician told him he was unable to work. Claimant testified he had no conversations with members of management about a return to work.

In the winter of 2015, claimant learned he had a failed fusion. On April 13, 2015, Dr. Johnson performed:

1. L5-S-1 anterior lumbar interbody fusion.

2. L5-S1 placement of anterior intervertebral cage with plate and screw construct, Synthes SynFix system, and use of bone morphogenic protein.

(Ex. 7, p. 9) Claimant tolerated the procedure well. There were no intraoperative complications. (Ex. 7, p. 9)

Dr. Johnson released claimant to work effective May 29, 2015. Claimant was placed in a sedentary to light work classification. Claimant was assigned temporary restrictions of no frequent lifting greater than 8 pounds and no occasional lifting greater than 10 pounds. (Ex. 3, p. 44)

Defendants paid claimant temporary/healing period benefits from April 13, 2015 through May 31, 2015. (Ex. G, p. 1)

CONCLUSIONS OF LAW AND RATIONALE

It is the determination of this deputy workers' compensation commissioner; defendants provided suitable light duty work to claimant and claimant refused the light duty work. Consequently, claimant's temporary/healing period benefits were properly suspended pursuant to Iowa Code section 85.33(3). The subsection provides:

> If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of the injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employee refuses to accept the suitable work with the same employer, the employee shall not be compensated with temporary partial, temporary total or healing period benefits during the period of refusal.

The correct test for suitable work is found in the case, Schutjer v. Algona Manor Care Center, 780 N.W.2d 549 (Iowa 2010). The Iowa Supreme Court held:

> We agree the correct test is (1) whether the employee was offered suitable work, (2) which the employee refused. If so, benefits cannot be awarded as provided in section 85.33(3).

In the present case, both Dr. Mooney and Dr. Johnson indicated claimant could return to work with defined restrictions. Claimant did not believe he should be working. He thought he should be resting in bed and he expressed his thoughts to Mr. Furlong.

Claimant was not given a set quota of bushings to produce every day. He was allowed to go home if he felt ill or in pain. During the period claimant was working light duty, there was not one week when he had worked a full schedule. Nevertheless, no one disciplined claimant in any way.

Mr. Furlong, the welding foreman, and a specialist met to design a comfortable workstation for claimant. A stool was provided. The table was lowered and tilted slightly. Buckets of metal tubing were placed on the table. A jig was set on the table. Claimant was advised not to lift anything outside of 10 pounds.

The workstation was not depicted in any of the photographs claimant displayed in exhibit 14. Claimant's actual workstation had been dismantled.

Claimant had testified during his direct examination, the photos represented the exact scene where he had to perform his light duty work. Such was not the case at all. The photos in exhibit 14 were taken just weeks prior to the date of the arbitration hearing. Claimant had surreptitiously taken those photos without the permission of anyone at Hawarden Machine, Inc. This deputy seriously questions the veracity of claimant's testimony with respect to his light duty work capabilities.

On September 30, 2014, claimant informed management he was leaving the work site and would not return until he had a full release from his doctor. He chose to walk off the job instead of cooperating with management in an effort to make claimant as comfortable as possible. Claimant never requested an appointment with or made any effort to contact Dr. Johnson to discuss his concerns with working at the time. Claimant never asked Mr. Furlong or the foreman to find something else to do. Claimant simply walked away from a job he purportedly enjoyed.

Even though claimant walked off the job, Mr. Furlong and the welding foreman, still made attempts to communicate with claimant. They wanted claimant to return to work. Claimant refused to maintain contact with members of management. As a result, claimant was terminated by Mr. Furlong on October 22, 2014. (Ex. 12)

Additionally, defendants properly continued the suspension of claimant's temporary healing period benefits after he was released to light duty work subsequent to the second surgery. An employer's acceptance of an injured worker's voluntary quit from suitable employment is a rejection of suitable work on that date and any other future date. Schutjer.

Defendants have met their burden of establishing benefits were properly suspended pursuant to Iowa Code 85.33(3). As a result, claimant is not entitled to additional temporary/healing period benefits.

ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing additional in the form of temporary/healing period benefits.

Defendants shall take credit for all benefits paid prior to the filing of this decision.

Costs in the amount of one hundred and 00/100 dollars ($100.00) are assessed to defendants.

Defendants shall file all reports as required by this division.

Signed and filed this 13th day of November, 2015.

Michelle A. McGovern

MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.