BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GARTH WITTE II,

Claimant,

vs.

AL PRICE TRUCKING, INC.,

Employer,

and

AUTO-OWNERS INSURANCE,

Insurance Carrier,
Defendants.

File No. 5049539

ARBITRATION

DECISION

Head Note Nos.: 1803, 2907, 3001

STATEMENT OF THE CASE

Garth Witte II, claimant, filed a petition in arbitration and seeks workers' compensation benefits from defendants, Al Price Trucking, Inc., as the employer, and Auto-Owners Insurance, as the insurance carrier. Hearing was held on October 6, 2015.

Claimant testified on his own behalf and called two witnesses, Lana Sellner and Lisa Meier, to testify. Defendants did not call any additional witnesses to testify. The evidentiary record also includes claimant's exhibits 1 through 12 and defendants' exhibits A through H.

The parties also submitted a hearing report, which contains numerous stipulations. The parties' stipulations are accepted. No factual findings or conclusions of law will be made in this decision regarding the parties' stipulations.

ISSUES

The parties submitted the following disputed issues for determination:

1. The extent of claimant's entitlement to permanent partial disability benefits.

2. Claimant's average gross weekly earnings preceding the date of injury and the applicable weekly workers' compensation rate.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Claimant, Garth Witte, is a 61 year old man. He is a high school graduate from Fort Dodge High School in 1972. Mr. Witte testified that he struggled academically and did not enjoy high school. He received no other training or education beyond high school, other than a certification he obtained to be allowed to spread manure from hog confinements onto farm fields. (Claimant's testimony)

Mr. Witte has worked mainly heavy, manual labor jobs during his work life. He has experience in building construction. He worked for a short time in a packing plant. He has driven a dump truck and worked with an auto mechanic at a car lot seasonally. Mr. Witte also held employment for a period of time as a laborer in a brick laying job in which he would manually carry and move heavy blocks and mortar. (Claimant's testimony)

In 1997, Mr. Witte met his long-time employer, Al Price. Mr. Price owned hog operations at the time and Mr. Witte worked on Mr. Price's various farm locations performing farm services in the farrow to finish hog operation. Over the years, Mr. Price delved into various other business ventures and Mr. Witte has worked for Mr. Price on and off in several different capacities over the years. They have done farm tiling, hog finishing, hydro excavating, drain or water line rootering, and other business ventures. (Claimant's testimony)

As noted, Mr. Witte's employment has not been continuous but has been extensive for Mr. Price since 1999. When he was not employed with Mr. Price, claimant would obtain employment driving an asphalt truck or through Electrolux and its predecessor companies assembling washers and dryers. He earned more per hour at Electrolux than he earned working for Mr. Price. However, he obtained more hours working for Mr. Price and enjoyed the outdoor nature of his employment with Mr. Price more than working indoors on an assembly line. (Claimant's testimony)

On June 21, 2013, Mr. Witte lifted a drain rooter machine out of the back of a pickup. He estimated the rooter machine weighed approximately 70 to 75 pounds. He experienced an immediate pain when lifting the machine and knew right away he had injured his low back. (Claimant's testimony)

Following the work injury, the employer accepted liability and offered medical care. Conservative measures, including physical therapy and injections were attempted. (Ex. 2; Ex. 3, p. 7) However, none of these measures were adequate to resolve claimant's symptoms and he was referred to a back surgeon, Mark Palit, M.D. (Claimant's testimony)

Mr. Witte ultimately submitted to low back surgery performed by Dr. Palit on December 4, 2013. (Ex. 5, p. 4) Claimant then developed an infection at the surgical site and required two additional surgical procedures in December 2013 to debride the infected tissue and clean the infection. (Claimant's testimony; Ex. 5, pp. 7-17) He required daily infusions of antibiotics following his low back surgeries to combat his surgical infection. (Claimant's testimony; Ex. 5, pp. 18-20)

Mr. Witte testified that the surgery significantly improved his left leg pain, numbness and tingling. However, surgical intervention did not resolve his low back pain. At hearing, Mr. Witte demonstrated where he feels pain and pointed to his belt-line area and mainly toward the left hip and left of his spine. He testified that he experiences increased symptoms on the left side of his low back every time he leans on or bears weight on his left leg.

An additional injection was attempted after surgery but provided no relief. (Claimant's testimony; Ex. 3, p. 11) Mr. Witte testified that he does not like medications and does not take pain medications to control his low back symptoms. He last treated for his low back with Dr. Palit on June 26, 2014. Dr. Palit declared claimant at maximum medical improvement at that time and imposed a permanent 30-pound lifting restriction. (Ex. 4, p. 14) Dr. Palit did not impose any additional work restrictions, though claimant testified that he has ongoing difficulties with bending, stooping, and twisting. Dr. Palit assigned a 13 percent permanent impairment to the whole person as a result of claimant's June 25, 2013 work injury. (Ex. 4, p. 24)

In addition to this low back injury, Mr. Witte has sustained numerous prior work related injuries working for Mr. Price. Claimant testified that he has had rotator cuff repairs on both shoulders. He also had a right knee replacement, which was considered work related. Claimant's only permanent work restriction following these other work injuries was a prohibition against crawling due to his right knee. (Claimant's testimony; Lana Sellner's testimony)

After receiving the 30-pound permanent lifting restriction from Dr. Palit, Mr. Witte presented the restriction to Al Price. Mr. Price indicated that he does not have any light duty positions available, which is not really surprising given claimant's description of the business operations as essentially a two or three man operation throughout the years. However, the result is that claimant cannot work for Mr. Price at present or into the future. Electrolux is no longer in business in northern Iowa. (Claimant's testimony)

Mr. Witte testified that he has attempted to make some contacts with people he is friends with or at least acquaintances near his home. He testified that none of these individuals or businesses has an employment opportunity for him within the 30-pound restriction imposed by Dr. Palit.

Realistically, however, Mr. Witte's job search was less than thorough. He worked with his daughter one time to identify some open positions identified on the Iowa Workforce website. (Claimant's testimony) Claimant's daughter, Lisa Meier, confirmed

that she assisted claimant only one time to conduct an internet search for employment and that the search was limited to review of job postings on the Workforce Development website. She also confirmed that she printed five job possibilities for claimant to investigate. (Lisa Meier's testimony)

Mr. Witte testified why he does not believe he could perform any of the jobs that he and his daughter identified. He contacted 12 employers since the date of injury, many of whom were his friends. He has not worked in any form since the date of injury. In fact, claimant has not applied for any open job opportunities since his injury. Claimant testified that he has "given up" on looking for work at this point in time. (Claimant's testimony)

Defendants offered active vocational placement services to claimant. Mr. Witte declined that offer for vocational placement services. (Claimant's testimony) Therefore, defendants retained a vocational expert, Lana Sellner, to perform an employability analysis for Mr. Witte. Ms. Sellner identified several job possibilities consistent with the 30-pound lifting restriction imposed by Dr. Palit. (Ex. A)

At trial, claimant critiqued and argued that many of the positions identified by Ms. Sellner are not consistent with his current capabilities. Indeed, many of those positions may not be suitable. Ms. Sellner conceded as much, but she also noted that with active placement services she could have explored claimant's subjective complaints further and attempted to secure reasonable accommodations with employers or pursue other employment options. (Lana Sellner Testimony)

Claimant has demonstrated very little effort to secure alternate employment. Ms. Sellner has identified potential employment opportunities within claimant's medical restrictions. Claimant has made no effort to pursue or even investigate any of those opportunities.

Ms. Sellner testified that she considers claimant to remain employable within the labor market. Claimant offers no contrary vocational opinions and has not really cooperated or even put forth a reasonably diligent job search since his injury. I find Ms. Sellner's opinions reasonable and convincing that claimant remains employable. Therefore, I reject claimant's contention that he is permanently and totally disabled.

On the other hand, claimant presents a convincing case that he has sustained significant loss of future earning capacity. He is a 61 year old gentleman that has worked in heavy manual labor positions over the course of his work life. He is no longer capable of working heavy category jobs. Mr. Witte has minimal educational background and has difficulties with academic studies. He is not likely able to retrain into skilled professions.

Ms. Sellner testified that claimant does not have the necessary skill sets to perform sedentary type positions. I find that it is unlikely that he has the academic capacities, or that it is reasonable to expect at his age, for him to obtain alternate

training or education. Therefore, I accept Ms. Sellner's opinions that claimant is now limited to light category work and some limited, or selected, positions within the medium category of work. This will significantly limit Mr. Witte's job opportunities into the future.

Claimant is drawing Social Security Disability benefits, though his benefits are currently off-set completely by his worker's compensation benefit payments. Mr. Witte has ongoing low back and left sacroiliac symptoms that are consistent with his injury and found credible. He has a reasonable and credible medical restriction per Dr. Palit. He has an undisputed 13 percent permanent impairment of the whole person as a result of this injury, which is specifically accepted as accurate.

Considering Mr. Witte's permanent impairment, permanent work restriction, educational background, employment history, inability to retrain, inability to perform in his prior lines of work, as well as considering his motivation level and the opinions of Ms. Sellner, along with all other industrial disability factors outlined by the Iowa Supreme Court, I find that claimant has proven he sustained a 60 percent future loss of earning capacity as a result of his June 25, 2013 work injury.

The parties also submit a dispute for resolution pertaining to claimant's customary gross earnings for the time period immediately preceding the date of injury. Claimant contends that two weeks should be excluded from calculation of the gross weekly earnings because they are significantly lower earnings and not representative of claimant's customary earnings before the injury. Specifically, claimant contends that the earnings contained in checks dated April 19, 2013 and April 5, 2013 should be excluded and that the earnings contained in checks dated March 15, 2013 and March 8, 2013 should be substituted to provide a more accurate estimation of claimant's customary gross weekly earnings at the time of this injury. Claimant's calculations are contained at Exhibit 12.

Defendants contend that the earnings reflected in the checks dated April 19, 2013 and April 5, 2013 should both be included and are representative of claimant's customary earnings. Defendants include their wage rate calculations as exhibit E.

Claimant testified that he was the only long-term employee working for Al Price. Mr. Price would hire temporary workers from time to time, but claimant was his only employee most of the time. Mr. Witte also confirmed that he worked all of the hours offered and available. However, his hours fluctuated as a result of weather. This certainly makes sense given the work he performed for Mr. Price.

Claimant offered no specific explanation why he had reduced hours for the weeks represented by checks dated April 19, 2013 and April 5, 2013. The only explanation offered for this fluctuation at trial was due to weather conditions. There is no evidence that the reduced hours and earnings in either of these paychecks was due to any personal reason. Rather, it appears that the reduction in hours during these weeks was typical of claimant's employment and that his hours fluctuated based upon the availability of work and weather conditions. Therefore, I find that the earnings

contained in the checks dated April 19, 2013 and April 5, 2013 are representative of claimant's customary earnings prior to the work injury.

I calculate claimant's average gross weekly earnings as follows:

Week No.	Check Date	Number of Hours	Hourly Rate	Gross Wages
1	6/21/13	40.14	$15.00	$602.10
2	6/14/13	42.00	$15.00	$630.00
3	6/10/13	41.50	$12.00	$498.00
4	5/31/13	35	$12.00	$420.00
5	5/24/13	36.75	$15.00	$551.25
6	5/17/13	45.22	$12.00	$542.64
7	5/10/13	46.00	$12.00	$552.00
8	5/3/13	31.25	$12.00	$375.00
9	4/26/13	30.00	$12.00	$360.00
10	4/19/13	26.17	$12.00	$314.04
11	4/12/13	36.625	$12.00	$439.50
12	4/5/13	22.75	$12.00	$273.00
13	3/28/13	35	$12.00	$525.00

Defendants included a $50.00 fuel payment in check dated April 5, 2013. No evidence was introduced to explain this payment. No argument was received to suggest that a gas reimbursement was intended to be "wages" for claimant. No other checks or payments contain a similar payment. I find that claimant failed to prove the $50.00 payment represents wages paid on April 5, 2013. Therefore, I did not include the $50.00 payment in my calculation of claimant's customary earnings.

Adding the above weekly earnings results in gross earnings for the 13 weeks immediately preceding the date of injury totaling $6,082.53. Dividing this amount by the 13 weeks results in an average gross weekly wage of $467.89.

CONCLUSIONS OF LAW

The parties stipulate that claimant's injury should be compensated industrially. (Hearing Report) 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.

The focus of an industrial disability analysis is on the ability of the worker to be gainfully employed and rests on comparison of what the injured worker could earn before the injury with what the same person can earn after the injury. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 266 (Iowa 1995), Anthes v. Anthes, 258 Iowa 260, 270, 139 N.W.2d 201, 208 (1965). Changes in actual earnings are a factor to be considered, but actual earnings are not synonymous with earning capacity. Bergquist v. MacKay Engines, Inc., 538 N.W.2d 655, 659 (Iowa App. 1995), Holmquist v. Volkswagen of America, Inc., 261 N.W.2d 516, 525, (Iowa App. 1977), 4-81 Larson's Workers' Compensation Law, §§ 81.01(1) and 81.03. The loss of earning capacity is not measured in a vacuum. Such personal characteristics as affect the worker's employability are considered. Ehlinger v. State, 237 N.W.2d 784, 792 (Iowa 1976). Loss of future earning capacity is measured by the employee's own ability to compete in the labor market.

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).

In this case, I found that Mr. Witte remains capable of performing full-time gainful employment within his local labor market. Having reached this finding, I conclude that claimant failed to prove he is permanently and totally disabled pursuant to Iowa Code section 85.34(3). Nevertheless, I found that claimant did prove he sustained a substantial loss of future earning capacity as a result of the June 25, 2013 work injury.

Having found that claimant proved a 60 percent loss of future earning capacity, claimant is entitled to 300 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u). The parties have stipulated these benefits should commence on June 26, 2014. (Hearing Report)

The parties dispute the appropriate gross earnings and corresponding weekly worker's compensation rate at which benefits should be paid. Claimant contends that his average gross weekly earnings prior to the date of injury were $471.00 per week with a corresponding weekly compensation rate of $305.99. Defendants contend that claimant's average gross weekly earnings prior to the date of injury were $471.49 and that the weekly compensation rate should be $298.94.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings that fairly represent the employee's customary earnings, however. Section 85.36(6).

In this case, I found that claimant was paid on an hourly basis. Therefore, I utilize Iowa Code section 85.36(6) to calculate claimant's average gross weekly earnings prior to the date of injury. I found that claimant's customary gross average earnings immediately prior to the date of injury were $467.89 per week.

The weekly benefit amount payable to an employee shall be based upon 80 percent of the employee's weekly spendable earnings, but shall not exceed an amount, rounded to the nearest dollar, equal to 66-2/3 percent of the statewide average weekly wage paid employees as determined by the Department of Workforce Development. Iowa Code section 85.37.

The weekly benefit amount is determined under the above Code section by referring to the Iowa Workers' Compensation Manual in effect on the applicable injury date. The parties stipulated that claimant was single and entitled to one exemption on the date of injury. (Hearing Report) Having found that claimant's customary gross average weekly wage was $467.89, I utilize the Iowa Workers' Compensation Manual ("rate book") with effective dates of July 1, 2012 through June 30, 2013, and determine that the applicable weekly rate for claimant's weekly benefits is $304.22.

Claimant filed a statement of costs at the time of hearing. Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40. Mr. Witte has prevailed and received a substantial award in this case. Therefore, I exercise this agency's discretion and conclude that it is appropriate to assess claimant's permissible costs. Claimant's filing fee ($100.00) is assessed pursuant to 876 IAC 4.33(7).

Claimant seeks service fees for service of a subpoena upon defendants' vocational expert. Those service fees ($32.00) are assessed against defendants pursuant to 876 IAC 4.33(3).

Claimant also itemizes several medical record expenses as costs. Agency rule 876 IAC 4.33(6) permits assessment of "the reasonable costs of obtaining no more than two doctors' or practitioners' reports." Reviewing claimant's statement of costs, the records obtained from the Social Security Administration and Iowa Workforce Development do not qualify as costs pursuant to 876 IAC 4.33(6). Of the remainder of the itemized costs, I exercise the agency's discretion and assess the costs of obtaining the medical records from TRMC ($88.50) and Wright Medical Center ($239.20). No other costs are assessed.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay to claimant three hundred (300) weeks of permanent partial disability benefits at the rate of three hundred four and 22/100 dollars ($304.22) per week commencing on June 26, 2014.

Defendants shall pay interest on any accrued weekly benefits pursuant to Iowa Code section 85.30 and shall be entitled to credit for all permanent partial disability benefits paid to date.

Defendants shall reimburse claimant's costs in the amount of four hundred fifty-nine and 70/100 dollars ($459.70).

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 30th day of November, 2015.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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WHG/kjw

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.