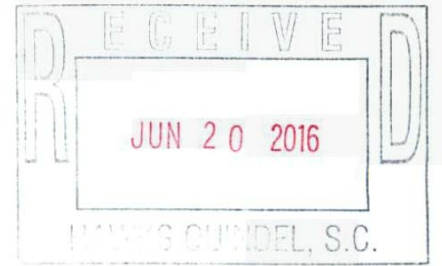


STATE OF WISCONSIN DIVISION OF
HEARINGS AND APPEALS
OFFICE OF WORKER'S COMPENSATION HEARINGS
P.O. BOX 7922
MADISON, WISCONSIN 53707-7922
(608) 266-1340



2014-009953

SCOTT D DOWER
N4307 13TH LN
WAUTOMA WI54982

Applicant,

vs.

PLEASE SEE ENCLOSURE

ROUNDY'S SUPERMARKETS INC
875 E WISCONSIN AVE# 100
MILWAUKEE WI 53202

Respondent,

OLD REPUBLIC INS CO
C/O INSURANCE PROGRAM MANAGERS GRP IPMG
225 SMITH ROAD
STCHARLES IL 60174

Insurance Carrier.

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A hearing was held in the above matter in Appleton, Wisconsin on May 23, 2016.

APPEARANCES: Applicant appeared in person and by ATTORNEY WILLIAM E. PARSONS; Respondent and insurance carrier appeared by ATTORNEY DAVID L. STYER.

Conceded were jurisdictional facts, and an \$835.38 average weekly wage, and a compensable injury of April 7, 2014. In dispute were nature and extent of disability, vocational

rehabilitation entitlement, and liability for treatment expense. Indemnity of \$19,413.10 was paid in temporary disability for the period of April 7, 2014 through December 7, 2014.

On the issues, the Administrative Law Judge makes the following

FINDINGS OF FACT

Applicant was doing his normal order filling job for the employer when injured. He had bent over to reach for and grab two twenty pound cases of seafood when he stood and twisted to the right, injuring his low back.

He reported the injury and went to the emergency room to treat. He followed up with a nurse practitioner and was referred to physical therapy. Upon return for a further follow-up, applicant was referred to Dr. Fairchild. He ceased his physical therapy as of three weeks after the injury.

An MRI of April 24, 2014 showed a noticeable disc bulge at L4-5 (resulting in a finding by the examiner of "early degeneration" in the mid and lower lumbar discs).

Dr. Fairchild noted an unusual presentation of symptoms in his June 7, 2014 note (last paragraph of the note), including symptoms that would not relate to a low back injury. Additionally, injections were attempted with pain relief that was not long-lasting.

A chart entry of July 29, 2014 has Dr. Fairchild noting applicant complaining of a "constellation of symptoms" which he briefly outlined in said note, some of which had apparently resolved. Applicant was referred to Dr. Rave for a neurologic workup.

Applicant told Dr. Rave of "hundreds of sensations throughout my body that just don't make sense." There was a persistent complain of feet and toes numbness and tingling that went up into applicant's legs. Dr. Rave diagnosed applicant's back problems as musculoskeletal/myofascial (that is, not disc-related), which was consistent with the spine's appearance in the MRI (Dr. Rave eventually reviewed the MRI). He noted applicant's lower extremity complaints as being over multiple dermatomes, which caused him to have no explanation for same. The other "somatic complaints" made no sense to the doctor, just as they hadn't to the applicant.

An NCS/EMG was performed, which gave no evidence of lumbosacral radiculopathy.

Dr. Rave concluded that applicant's back pain was understandable, but there was no good cause of his leg pain/symptoms noted from examination or testing. Dr. Rave advised the applicant of his "myofascial" conclusions.

Applicant was next seen for a rheumatological examination. Dr. Juozevicius found nothing of the sort happening.

Applicant was referred to Dr. Greenberg at Meriter Hospital. Another lumbar MRI was performed (February 18, 2015) which noted no change in applicant's spine since the previous lumbar MRI. During that course of care, very little of consequence changed or improved. Dr. Greenberg eventually assigned a 10 percent permanent disability due to "centralized pain syndrome," discogenic low back pain, mechanical low back pain, and bilateral lumbar radiculopathy, all of which he related to the injury.

An FCE was performed on April 14, 2015. Dr. Greenberg adopted those restrictions in the August 17, 2015 WKC-168 (Applicant's Exhibit A).

The physical disability claim propounded by applicant is countered by respondents with the opinions of Dr. Robbins. Dr. Robbins authored two opinions after examination, the first occurring after examination of November 18, 2014. Dr. Robbins concluded applicant suffered a mere lumbar strain which would resolve the day before his report was issued (a date which occurred after the examination, however). Dr. Robbins opined applicant was still restricted as of the examination to a 25 pound lifting restriction, but applicant could return to full duty work as of the day before the opinion was issued. The injury was felt to be a temporary aggravation of the pre-existing discogenic degenerative condition.

Dr. Robbins issued a second IME report after examination of January 5, 2016. He reiterated his earlier causation opinion and indicated that his other opinions remained the same as well, indicating further that applicant required no further formal treatment, nor had he the need for work restrictions (work-caused or otherwise).

While a loss of earning capacity claim has been worked up by both applicant and respondents, applicant has started retraining under the auspices of the DVR, training which commenced pursuant to their IPE on August 18, 2015 (and which apparently will go two years for

applicant to receive a 2 year diploma in the Machine Tool Technician program, for becoming a CNC operator). Respondents have not offered applicant this retraining; despite that, respondents insisted at hearing that applicant should not be able to claim loss of earning capacity yet because he is retraining to restore earning capacity.

Respondent also appeared to suggest that applicant, because he still wanted to seek further care to reduce disability, was premature in claiming permanent disability as well (despite their refusal to offer that care to him, relying on the opinion of Dr. Robbins on the subject).

The DVR offer of services was based on restrictions in place at the time which were given by Dr. Greenberg; they were temporary restrictions in place at the time (March 27, 2015, which was before the FCE findings were published and later adopted by Dr. Greenberg). Additionally, the DVR counselor relied on the fact that applicant could only work 2 hours per day, which was likewise temporary (The May 6, 2015 report of the April 14, 2015 FCE test indicates that applicant can work 8 hours per day at sedentary work).

Of interest to the findings below, applicant's back pain did increase as a result of the FCE activities, though his lower extremity symptoms did not.

I find as follows:

Respecting temporary disability, I find that Dr. Robbins was correct that applicant reached an end of healing as of December 7, 2014. Even though applicant has had numerous interventions and evaluations since (which I do not necessarily believe were unreasonable at the time to obtain), - applicant has simply not improved (nor gotten-dramatically worse)-since-the first Robbins' evaluation report was issued. In that sense, past that date, applicant's symptoms and disability were no longer temporary. I do not award temporary disability after that point based on the Robbins opinion, as it is the most credible on applicant's healing period.

As to permanent disability, I reject the Greenberg opinion on causation of disability because I believe Dr. Greenberg has inaccurately diagnosed applicant. I likewise reject the Robbins opinion on the same (and I reject the Robbins opinion on degree of permanent disability) for the same reason.

The lumbar MRIs are pretty clear that nothing of consequence happened to applicant's spine as a result of the injurious event, and there certainly hasn't been interval change between the two MRI's indicating progression of the condition. It is clear that applicant has a mild degenerative condition in his back that (as Dr. Rave notes, calling it "minor") is not significant, and probably does not cause his leg symptoms (the alleged radiculopathy does not show up in NCS/EMG testing).

Dr. Rave says that applicant's back condition is myofascial/musculoskeletal in nature. The applicant's course of care, added to the findings on MRI, cause me to agree. While he thought the leg pain/symptoms may be in part due to myofascial causes, he did not have a good explanation for the same. I don't either, therefore, and find that applicant's back pain is myofascial/musculoskeletal in cause, caused by the work injury, and do not find any particular other symptoms/syndromes work-caused.

In part, I do this inasmuch as: 1. Applicant has had numerous symptoms complaints since the work injury that had and could have had nothing to do with the work injury (a fact he forthrightly has admitted), and 2. Applicant's work at the FCE increased his back pain but did not affect his leg pain (which lends credence to the notion of a lack of causal connection between the injury and the lower extremity symptoms, even despite the applicant's claim that he had no leg problems before the injury).

I do find applicant credible, however, in his complaints of back pain and dysfunction. I reject Dr. Robbins' opinion on that subject because it focuses only on the spinal appearance and concludes that since the spine does appear affected, applicant is likely just magnifying his symptoms. I reject Dr. Robbins' declaration that applicant was fully healed (without restriction or disability) even in spite of ongoing legitimate pain complaints. The ongoing, credible, legitimate pain complaints are the cause of that rejection.

Dr. Rave indicated applicant's pain is chronic; with this I agree. It has not changed much since Dr. Robbins saw applicant in November of 2014. It is therefore likely permanent. Back pain affected the FCE (and was affected by it). An award of permanent disability is appropriate.

A musculoskeletal/myofascial back pain is likely closer to 5 percent than 10 percent (I reject the Greenberg assessment of disability because it assesses disability for the leg complaints, which

I do not associate with the work injury on a permanent basis per the above). I can make this finding consistent with Wisconsin Statute section 102.18 (1) (d). It makes adequate provision for the results of the FCE (which I find credible and reflective of applicant's current physical condition).

As to the issues of vocational retraining and loss of earning capacity, I note that applicant's employment with respondent has ceased, and therefore these issues are ripe for consideration. I first turn to the issue of appropriate restrictions for the applicant based on his permanent disability.

As to restrictions, I find Dr. Greenberg is credible on this score inasmuch as he adopts what appears to be a valid FCE showing applicant's physical abilities. Those remaining abilities place *him in the* sedentary range of employment. I am not troubled by the back/legs issue here because the applicant's back was temporarily made more painful by the exam (the lower extremities were not). I am not surprised applicant complained of lower extremity pain in the examination (he, after all, believes he has it), but it is the fact of the work worsening overall applicant's back pain that causes me to assign those restrictions revealed by the FCE to his back injury and permanent disability therefrom.

These restrictions are somewhat different than those relied upon by the DVR in accepting applicant for retraining (I doubt the 2 hour versus 8 hour job issue would cause them not to have certified applicant, given that the retraining is attempting to return him to full duty work). However, I conclude that DVR's retraining decision was an appropriate exercise in discretion inasmuch as I agree that applicant is restricted due to his injury to a level of work revealed by the FCE, and I note that both vocational examiners find a substantial loss of earning capacity attendant to those restrictions if applicant does not retrain. As such, DVR's decision is likewise not based on a misrepresentation of material fact (there was no fact misrepresented to it, and the FCE restrictions lead to a need for retraining as well as did the temporary restrictions on which the DVR originally relied).

I award the retraining commenced in August of 2015 as resulting from the injury and will calculate it below. The retraining contemplated in the IPE is the responsibility of the carrier to pay for the two year program that has been started and is ongoing.

Because of the above findings, tuition, fees, books, mileage, and meals on campus while retraining are awarded to the applicant for training awarded in this order. Applicant did not make out a specific claim for these expenses of retraining at the time of hearing; I therefore reserve jurisdiction to award those expenses for the periods of retraining for which indemnity is awarded below. I also award these expenses for the future periods of retraining that are currently approved under the IPE to finish the two year program. While there is some showing of tuition in respondent's exhibits, I do not choose to guess which entity should be paid or reimbursed and in what amount; hence this reservation of jurisdiction.

As to the indemnity due for future retraining awarded by this order (which training completes the program), a 20 percent attorney fee is awarded for all such indemnity due, which will be subtracted from applicant's entitlement and paid directly to the attorney. The future reimbursement for statutory expenses for retraining are not subject to attorney fees.

The balance of the payable indemnity after the subtraction for attorney fees will be paid directly to the applicant.

Because I award vocational retraining benefits, I defer a finding of loss of earning capacity at this time, as applicant has elected to attempt to ameliorate that with r training, which is a reasonable effort on his part. I reserve jurisdiction for further findings on the subject of loss of earning capacity as future circumstances may dictate.

I award treatment expenses in Applicant's Exhibit E, except for the ThedaCare entry. That was for an annual examination for insurance purposes and largely was not motivated by treatment-- for a work injury.

The rest of the charges listed (paid and unpaid) were for reasonable attempts to diagnose and treat applicant's work-caused pain. The treatment coming after end of healing date above assigned was all a reasonable attempt to cure and relieve the pain caused by the injury, and as such the treatment is deemed necessary to cure and relieve from the effects of injury. That the treatment did not do so (that is, that it did not truly improve the applicant over time) led to the conclusion respecting the date of end of healing, but that finding does not merit nonpayment for

said treatment. I reject the Robbins opinions on that subject and rely on the medical records provided by the treaters in coming to this conclusion.

As to mileage and attendant expenses, I award the mileage claimed, and I deny the claim for the lost wages of the wife for attending/driving the applicant. This is expected activities of family to perform for their family members; as such, I do not award for those expenses. The mileage awarded equals \$1,123.02.

Permanent disability is all accrued, 5 percent as compared to permanent total disability, 50 weeks at \$322.00 per week or \$16,100.00.

Vocational rehabilitation indemnity is due from August 18, 2015 through December 15, 2015, 16 weeks 5 days at \$556.92 per week or \$9,374.87. Additional indemnity is due from January 11, 2016 through May 11, 2016, 17 weeks 1 day, or \$9,560.51. Total vocational rehabilitation indemnity due is \$18,935.38.

Total due for all indemnity pursuant to this order is \$35,035.83. The attorney fee is \$7,007.08, the costs are \$3,540.11, and the balance due the applicant after subtraction of those amounts is \$24,488.19.

Treatment expenses are awarded as specified in the order below.

The department reserves jurisdiction for future claims out of this injury (including but not limited to loss of earning capacity and the completion of the awarded vocational retraining), and jurisdiction is also reserved as specifically noted in the findings above for statutorily permitted expenses due for the awarded vocational rehabilitation already accomplished.

Based on the above findings,

NOW, THEREFORE, this:

ORDER

Within 21 days of the date of this order, respondent and insurance carrier shall pay to applicant, Scott Dower, the sum of Twenty Four Thousand Four Hundred Eighty Eight Dollars and Nineteen Cents (\$24,488.19), and shall pay to applicant's attorney, William E. Parsons, the sum of Seven Thousand Seven Dollars and Eight Cents (\$7,007.08) attorney fees and the sum of Three Thousand Five Hundred Forty Dollars and Eleven Cents (\$3,540.11) as reimbursement for costs.

Further, within like time period, respondent and insurance carrier shall pay the following treatment expenses: Two Thousand Seven Hundred Sixty Seven Dollars and Fifty Eight Cents (\$2,767.58) to Blue Cross/Blue Shield; Four Hundred Twenty Dollars and Forty Seven Cents (\$420.47) to Meriter Hospital; Six Hundred Seventy Three Dollars and Six Cents (\$673.06) to Ministry Medical Group Rice Lake; One Thousand Two Hundred Twenty One Dollars and Forty Two Cents (\$1,221.42) to UW Health; and One Thousand One Hundred Twenty Three Dollars and Two Cents (\$1,123.02) to the applicant as reimbursement for mileage.

The DWD and the DOA reserve jurisdiction as noted in the findings above for additional claims. These findings are not to be relitigated as far as they go.

Dated and mailed at Madison, Wisconsin

this 16th day of June, 2016.



Edward W. J. Falkner, Administrative Law Judge

DowerScottEJFkakDO

cc:

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