BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GEORGE E. SCHUSTER, JR.,	FILED FEB 27 2015 WORKERS' COMPENSATION	
Claimant,		File No. 5046350
vs.		ARBITRATION
ANNETT HOLDINGS, INC., d/b/a TMC TRANSPORTATION,		DECISION
Employer, Self-Insured, Defendant.		Head Note Nos.: 1803; 1300

STATEMENT OF THE CASE

Claimant, George E. Schuster, Jr., filed a petition in arbitration seeking workers'compensation benefits against Annette Holdings Inc., d/b/a TMC Transportation, self-insured employer, for an alleged work injury date of February 24, 2010.

This case was heard on December 15, 2014, in Des Moines, Iowa, and considered fully submitted on January 5, 2014, upon the simultaneous filing of briefs.

The evidence in this case consists of Joint Exhibits 1-33 and the testimony of the claimant.

ISSUES

1. The extent of claimant's disability;

2. The rate; and

3. Whether claimant was underpaid benefits because of a miscalculated rate.

STIPULATIONS

The parties stipulate that the claimant's injury of February 24, 2010, arose out of and in the course of his employment. Parties further agree that any disability would be industrial in nature and the commencement date of any permanent partial disability benefits awarded would be June 2, 2011.

At the time of the injury, claimant was single and entitled to one exemption. Prior to the hearing the claimant was paid 172 weeks of compensation at the rate of $520.12

As to the issue of previous benefits paid, the defendant is to be entitled to a credit of any amounts paid up until June 2, 2011. It would be entitled to credit of any amount paid past June 2, 2011 against an award of permanent benefits.

If it is found that there is an underpayment of benefits, the claimant would be owed the underpayment due between the date of injury of February 24, 2010 and up through June 1, 2011.

Claimant seeks reimbursement of costs in the amount of $506.99. (Exhibit 16, page 274)

FINDINGS OF FACT

Claimant was 54 years old at the time of hearing. He received a degree in 1979. After graduation, he joined the Air Force. He was in the service as a jet engine mechanic for ten years. The work he performed required heavy lifting and regular application of force. He was discharged honorably in 1989. He began working at Metal Masters, making commercial sinks.

He worked at metal masters for approximately a year to year and a half after which he then moved to Pennsylvania. He worked for a particleboard company that was used to make furniture. He was a shift supervisor, working the fourth shift. He held that job for a little over 13 years. Around the time that he left, he was making $45,000 per year.

The plant closed down and he looked for other employment finding a job with the defendant employer in 2006. Between 2003 and 2006 claimant performed home-improvement tasks for other people.

Claimant's driving job involved physical labor such as caring for tarp and securing it over a load, using chains to secure the load, lifting the tractor hood which requires 60 to 90 pounds of force, and raising the landing gear which takes approximately 30 pounds of force. The weather, surface, and other environmental circumstances can increase or decrease the difficulty of claimant's job at any given time.

On February 24, 2010, claimant was in Crawsfordsville, Indiana attempting to remove an icy tarp off a load. He recalled that there was a variety of different machinery and boxes that were stacked unevenly on the flatbed trailer. The wind caught the tarp and whipped him around, blowing him off the truck onto the ground.

He fell hard on his back. Subsequent medical records show that he broke four ribs in the back near the spine on the right side. At the time, however, he was able to rise, push the tarp off, and continue about his work.

The driver's job description is contained in Exhibit 20. The driver must be able to safely handle the assigned equipment including driving a tractor up to 11 consecutive hours and to be able secure loads of freight by chaining or tarping loads. (Ex. 20, p. 314) The driver must bend, twist, lift, push and pull on chains, binders and straps. It is noted that that work is strenuous. (Ex. 20, p. 314)

About four weeks after the incident, the pain became too serious for him to ignore and at the urging of his sister he took himself to Elk Regional Health Center on March 3, 2010 where he was seen by Scott McKimm, D.O. (Ex. 3, p. 9) He was given narcotics for pain and it was recommended he rest and not return to work. "He is not medically stable to travel to Iowa and participate in the light duty program due to fractures and breathing difficulties." (Ex. 3, p. 10)

He followed up with Dr. McKimm a week later and was informed that he should continue his current medication along with being restricted from traveling or working. (Ex. 3, p. 12) He continued to return to Dr. McKimm because there was a significant pain on the right side. The bones of two of the fractured ribs were not closing. (Ex. 3, p. 26) Driving continued to be a risk due to this. (Ex. 3, p. 29) On January 19, 2011, x-rays showed that there was a worsening of the fracture and that the bones appeared to be separated and further apart. (Ex. 3, p. 36)

Claimant was put on a no activity restriction and his oxycodone prescription was increased but as a result claimant began to gain weight and his blood pressure became elevated. (Ex. 3, p. 43)

Because of the ongoing pain, claimant was referred to Dr. Patel for a possible nerve block. (Ex. 3, p. 49) Dr. Patel believed the claimant was experiencing a muscle cramp and recommended the claimant undergo physical therapy and use a TENS unit. (Ex. 3, p. 50) After the prescription of the TENS unit, claimant began to walk and exercise but continued to have pain. (Ex. 3, p. 57)

On May 12, 2010, Dr. McKimm filled out the employee status worksheet restricting claimant from lifting along with limited sitting and driving. Claimant was also restricted from repetitive movement with his feet to operate foot controls and advised not to bend, squat, climb, or perform overhead work. (Ex. 3, p. 87)

On June 2, 2010, claimant was seen by Lynn A. Myers, M.D., at Summit Rehabilitation Associates, P.C., who opined the claimant should continue operating under work restrictions which limited his riding in the car along with driving. He was advised to keep his work activities to sedentary to moderate. Dr. Meyer anticipated the ribs would continue to heal and that after four to six months, claimant would be able to progress to the point where he could return to full duty work. (Ex. 1, p. 3)

On June 4, 2010, claimant's employee status worksheet indicated that he should not work. (Ex. 3, p. 89)

On January 24, 2011, claimant was released to do moderate work which limited his lifting to 20 pounds maximum with frequent lifting and carrying 8 to 10 pounds. (Ex. 3, p. 103) He was also restricted to driving under three hours a day. (Ex. 3, p. 104)

On February 15, 2011, claimant was taken off of work again and then released to work approximate four hours a day on March 13, 2011. (Ex. 3, p. 109)

On May 27, 2011, a fresh fracture of the right ninth rib was noted. (Ex. 3, p. 146) It was felt that this represented evidence of a nonunion or a fibrous union. (Ex. 3, p. 147)

On August 9, 2011, Dr. McKimm believed that there was still a medical threat of puncturing a lung from movement. (Ex. 10, p. 229) He believed the claimant could not fly or drive to Iowa to perform suitable modified work duty. (Ex. 10, p. 229)

By October 2011 claimant was able to work approximately four hours a day and he had increased endurance and a reduction in his pain. (Ex. 3, p. 69)

On November 30, 2011, claimant's hourly work was increased to five hours a day. (Ex. 3, p. 75) Dr. McKimm left the family practice as of August 31, 2012. (Ex. 3, p. 85)

On March 21, 2012, claimant was given a sedentary work release due to his non healing fracture. (Ex. 3, p. 125)

On May 7, 2012, claimant underwent a functional capacity evaluation placing him in the light physical demand level for floor to waist lifting and the sedentary level for lifting for waist to shoulder and over the shoulder work. Dr. McKimm placed claimant at maximum medical improvement with continued medication and light-duty restrictions.

Claimant was seen on July 23, 2012 for an independent medical evaluation at the defendant's request. Laun Hallstrom, M.D., assigned a 5 percent whole person impairment on the basis of the thoracic spine injury and assigned light-duty restrictions. (Ex. 9, p. 221) He did not place any limitations on sitting or driving.

On October 18, 2012 Edward J. McVay, M.D., suggested the claimant's ongoing pain was a result of a thoracic spine injury. (Ex. 2, p. 7) At that time, he had been released to modified duty of eight hours per day. (Ex. 2, p. 7)

Following this visit, claimant did not have additional medical care until May 28, 2013 when he saw Dr. Graciela Bauza at the University of Pittsburgh. (Ex. 8, p. 209) Dr. Bauza requested a new CT scan of the chest and recommended nerve blocks to treat the pain. The CT scan was performed on June 14, 2013 which revealed the ninth and tenth ribs showed evidence of a fibrous union or nonunion. There was no change in the appearance of ribs when compared to the films dated November 23, 2011.

In a letter to defense counsel on September 9, 2013, Dr. Bauza opined that claimant would have chronic pain and disability because of the inadequately healed fractured ribs. (Ex. 8, p. 216) On an encouraging note, she felt that there was little chance of aggravating the injury but agreed that the pain could be debilitating. At that time, claimant was no longer taking narcotics for pain control. She recommended local anesthetic injections for pain control and believed that surgery could improve claimant's pain. She opined that he could return to activity, but it would be limited by his pain.

Claimant told Dr. Kuhnlein that he did not want the injections because the pain served as a warning signal for him to slow down or stop activity. He was worried that if the injections mask the pain that he would injure himself further, perhaps even puncturing an organ.

On January 22, 2014, claimant was seen at Keystone Rehabilitation Systems for an assessment of his functional ability to return to his prior duties. Claimant reported to the therapist that his pain during the interview was approximately 3 out of 10 on a 10 scale, and at its best it was 1 out of 10 and that at worst it was 8 out of 10. Claimant shared that pain increased with reaching using his right upper extremity, twisting, and sitting after two to three hours. He believed that the TENS unit decreased his pain slightly. (Ex. 5, p. 164) His blood pressure remained very high during the trials which claimant attributed to his pain. Because of the elevated blood pressure, the examination was not able to be completed. (Ex. 5, p. 165) It was noted that the claimant presented with normal psychometric findings relative to his Numeric Pain rating, Waddell's Inappropriate Symptoms, and McGill Pain questionnaires. (Ex. 5, p. 163)

On November 10, 2014, claimant underwent an independent medical examination with Jacqueline M. Stoken, D.O. His subjective complaints were consistent with his medical history that he had a prolonged recuperation where ribs 9 and 10 never healed and continued to have pain in his right thoracic region. (Ex. 6, p. 168) He reported that the pain ranged from 3 to 6 on a 10 scale, but that almost any activity increases pain. (Ex. 6, p. 179) Dr. Stoken assessed an 8 percent impairment of the whole person due to his loss of range of motion, radicular complaints, and pain. (Ex. 6, p. 181) She would place claimant in the sedentary work category and would continue to treat his pain with medications. (Ex. 6, p. 21)

On November 6, 2014, claimant underwent a second functional capacity evaluation which placed him in the medium physical demand level. (Ex. 11, p. 239) Claimant had pain at the end of the examination. The examiner believed that there was no suspicious or overt pain behaviors and that claimant gave maximum effort. (Ex. 11, p. 241)

On November 7, 2014, claimant was seen by John Kuhnlein, D.O., for an independent medical examination requested by the defendants. He reported that his pain was 2 at the time of the evaluation, but that it ranged between 2 and 8 and was usually either 2 or 3. (Ex. 7, p. 191) Dr. Kuhnlein agreed that the rib fractures were as

a result of the injuries sustained on February 24, 2010 and that the maximum date of medical improvement would be June 2, 2012. Claimant has had years of little, if any, change in symptoms with his very conservative care. Dr. Kuhnlein noted that Dr. Hallstrom's 5 percent whole person impairment was based on a thoracic injury and claimant did not have a thoracic spine injury but rib fractures. Rib fractures are not addressed in the AMA guides and therefore Dr. Kuhnlein assigned to 2 percent whole person impairment for chronic pain associated with the two nonunion fractures. (Ex. 7, p. 194) Dr. Kuhnlein would not wholeheartedly adopt the November 6, 2014 functional capacity evaluation. Claimant was in a great deal of pain following the test and Dr. Kuhnlein did not believe claimant would be able to perform at the medium physical demand level consistently throughout the course of a workday. (Ex. 7, p. 194)

Instead, Dr. Kuhnlein would impose restrictions of 30 pounds lifting from floor to waist and waist to shoulder and 20 pounds occasional lifting over the shoulder. He believed claimant would be capable of climbing in and out of a tractor, but would not be able to work in flatbed trucking from the physical demands of tarping and securing loads. Dr. Kuhnlein recommended the claimant look into drop-and-hook trucking operations and pretrip inspections. He agreed that activity was not likely to aggravate his injury but that his pain would be a limiting functional factor. (Ex. 7, p. 194) Dr. Kuhnlein believed that claimant's shortness of breath was less likely to two rib injuries and more likely to the pack a day smoking habits of 30 years.

Claimant's ribs still have not grown back together. Dr. Kuhnlein suspected that part of claimant's healing problem is associated with his smoking; however, Dr. Kuhnlein also attributed the broken ribs and chronic pain to the original fall.

Claimant takes 4 to 5 Aleve at one time to ease his pain and does use his TENS unit from time to time. He has high blood pressure now which claimant attributes to his injury.

He has had to modify his sleeping so that he sleeps on his stomach or left side so as not to cause pain on his right side. He has difficulty lifting heavy things and must rely on his family members to assist him.

He has applied for jobs online and he believes that there are jobs that would fall within his work restrictions such as operating machinery, forklifts or a production manager. He has not been able to obtain employment.

Claimant began working at Elcam, Inc., on August 22, 2011. He was assigned to place labels on cases. He was able to work at his own pace and allowed to stretch and rest when necessary. He eventually increased his hours to six per day and did not complain of pain to his employer. On May 20, 2012, claimant's work hours were reduced to four hours per day and he worked until September 28, 2012, at the four-hour per day schedule.

His current employment appears to be taking care of his elderly father. He maintains his father's household, does his finances, and his shopping.

Claimant's weekly computation excludes weeks with a holiday and therefore his gross earnings would be $887.44. Being single and entitled to one exemption, the weekly benefit rate would be then $534.58. Defendants calculate claimant's weekly earnings by taking the 13 weeks prior to claimant's injury including the Christmas and Thanksgiving holiday. (Ex. 21, p. 360) Based on those figures the average weekly wage would be $827.35 with a benefit rate of $504.60. The week of Thanksgiving and the week of Christmas represent mileage significantly less than the other weeks.

Claimant was subject to surveillance and observed to be moving about as well as frequently smoking. The surveillance footage did not provide any illumination on claimant's injury. He complained activity increased his pain and that conclusion was confirmed by every doctor.

Claimant does not wish to go forward with surgery or any pain reduction medical procedures such as nerve blocks because the medical professionals will not give him a guarantee of success. He also did not believe that his smoking could adversely affect the union of his bones and attributes his shortness of breath to his injury rather than his smoking.

Claimant engages in self-limiting behavior.

CONCLUSIONS OF LAW

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

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

Defendants argue claimant's calculations are incorrect because they include the week claimant was injured and excluded two low paying weeks which happened to be Thanksgiving and Christmas. In the defendant's post hearing brief, they do not characterize the two excluded weeks as holiday weeks but rather identify those two week as the lowest paying in claimant's recent work history.

Iowa Code section 85.36(6) provides:

> The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings means gross salary,

> wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee's employer for the work or employment for which the employee was employed, computed or determined as follows and then rounded to the nearest dollar:
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> . . . .
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> 6. In the case of an employee who is paid on a daily or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, including shift differential pay but not including overtime or premium pay, of the employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury... A week which does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week with earnings that fairly represent the employee's customary earnings.

Established appeal level case law establishes that weeks containing an unpaid holiday are not representative of customary earnings. D'iapico v. H & W Motor Express, No. 1058723 (App. 1999).

However, there are not 13 weeks of pay preceding the injury in the record. (See e. g., Ex. 23) Therefore, the rate is calculated on the 12 weeks included in Exhibit 23 excluding the holiday weeks.

Therefore, the 12 weeks of completed period immediately preceding the injury are $10,534.90 and based upon claimant's stipulated status as single and entitled to one exemption, the weekly benefit rate is $530.00.

Claimant would be entitled to the difference between what he was paid and the adopted weekly benefit rate of $530.00.

The remaining issue is the extent of claimant's disability. Defendants argue that claimant's industrial disability is not over 20 percent based on three primary factors:

1) Claimant has not returned for medical care

2) Claimant refuses to undergo medical treatment that could increase his pain tolerance and/or decrease his restrictions

3) Claimant is capable of work as evidenced by his light duty job at Elcam, Dr. Kuhnlein's report that claimant could do drop-and-hook, and claimant's existing position as an in-home aid for his father.

4) Claimant continues to smoke which increases his shortness of breath and decreases his ability to heal.

The greater weight of the evidence supports a finding that claimant is entitled to a 75 percent industrial disability award.

Defendants arguments are largely just that—arguments. There is little evidence to support their conclusions. The medical testimony is largely undisputed. Claimant sustained multiple rib fractures as a result of a fall on February 24, 2010. Two of those rib fractures have not healed properly resulting in regular and persistent pain.

Claimant's current day to day pain level appears to be around 2 or 3 on a 10 scale, but he is not performing any strenuous labor. Dr. Kuhnlein, while noting the validity of the November 6, 2014, FCE believed that it was unlikely claimant could perform medium duty work on a regular basis. At the end of the FCE, claimant was in pain. Working regularly at the medium duty work level would result in much higher day to day pain levels.

Dr. Kuhnlein did opine that claimant's shortness of breath was more likely due to claimant's smoking than his injury. Further, while the smoking history was a significant factor in claimant's nonhealing, Dr. Kuhnlein clarified that it was not the exclusive factor in the nonunion or delayed union of the 9th and 10th ribs. His opinion was that stopping smoking *may* help claimant's pain and facilitate healing.

While claimant is looking for guarantees, there are none in medicine. He does not appear to be actively improving his health nor does he appear to be taking the medical professionals advice seriously as it relates to his smoking.

Nonetheless, the medical professionals from Dr. McKimm to Dr. Hallstrom to Dr. Stoken to Dr. Kuhnlein all agree that claimant has a nonunion from rib fractures arising out of a work injury. None of the testing indicated claimant is exaggerating or overplaying his pain.

Further, while claimant has not sought out medical care, claimant's conservative treatment has rendered no change in circumstance since 2011. And there are no "more probable than not" opinions from the doctors to indicate that surgery or nerve blocks would improve claimant's present condition.

Claimant is 54 year old man at the time of the hearing. He has a high school education and some training as a truck driver. He has worked as a plant supervisor. His functional capacity evaluations place claimant somewhere between the sedentary duty and light duty work category. Dr. Kuhnlein, who appeared to take in all of the medical records and medical conditions and considered every angle from the smoking to the increased pain post FCE, concluded that claimant's restrictions should be limited to 30 pounds from floor to waist and waist to shoulder and 20 pounds occasional lifting

over the shoulder. He and Dr. Bauza agreed that claimant would not suffer injury to an organ due to activity.

Claimant has looked for work but has not been successful in finding it. The defendants have not offered alternative employment either although claimant could likely serve as a truck driver, school bus driver, chauffeur, taxi driver, along with other driving related jobs. He also has some supervisory experience.

He is not precluded from gainful employment but he is limited in the scope of the labor market open to him given his education, training, background, and medical condition. Therefore the greater weight of the evidence supports a finding claimant is 75 percent industrially disabled.

ORDER

THEREFORE IT IS ORDERED:

Defendant shall pay unto claimant three hundred seventy-five (375) weeks of permanent partial disability benefits at the stipulated weekly benefit rate five hundred thirty and no/100 dollars ($530.00) per week and commencing from June 2, 2011.

Defendants shall pay unto claimant any underpayment of benefits based on the adopted rate of five hundred thirty and no/100 dollars ($530.00).

Accrued benefits shall be paid in a lump sum together with interest as allowed by law.

Defendant shall pay for the costs to litigate this contested case.

Defendant shall file all requisite reports in a timely manner.

Signed and filed this 27th day of February, 2015.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JGL/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.