BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

AARON TAMMEN,

Claimant,

vs.

ECHO POWERLINE LEASING, LLC,

Employer,

and

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA,

Insurance Carrier,
Defendants.

File No. 5053791

ARBITRATION DECISION

Head Note Nos.: 1801, 1804, 3000, 3001, 3002

STATEMENT OF THE CASE

Aaron Tammen, claimant, filed a petition in arbitration seeking workers' compensation benefits against Echo Powerline Leasing, LLC, employer, and Travelers Property Casualty Company of America, insurer, for an accepted work injury date of June 28, 2013.

This case was heard on July 28, 2017, in Des Moines, Iowa. The case was considered fully submitted on August 29, 2017 upon the simultaneous filing of briefs.

The record consists of Joint Exhibits 1-14, Claimant's Exhibits 1-5, Defendants' Exhibits A-C and testimony of the claimant.

ISSUES

The period of time prior to hearing during which claimant was entitled to temporary benefits as opposed to permanent benefits and vice versa;

The extent of claimant's industrial disability;

The rate of compensation;

Whether defendants are entitled to credit for indemnity benefits paid;

Whether claimant is entitled to reimbursement of a second independent medical evaluation (IME) per section 85.39.

STIPULATIONS

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The parties agree claimant sustained a back injury on June 28, 2013, which arose out of and in the course of his employment with defendant employer. The parties further agree the injury was the cause of a period of temporary disability during a period of recovery followed by a permanent disability.

The commencement date for permanent benefits beyond those which were already paid would be May 25, 2017.

The claimant was single and entitled to one exemption at the time of the injury.

FINDINGS OF FACT

Claimant was a twenty-three year old person at the time of the hearing. He has a high school diploma and some college. The costs of post-secondary education were too prohibitive to continue and therefore claimant entered the workforce. His first position, during high school, was in fast food. He worked as a line cook, cashier, and clerk. Claimant's first full-time position was with the defendant employer.

He began working June 10, 2013, for the defendant employer erecting power lines across the country. His job was a ground hand, which primarily was a laboring position. Because of his travel, his pay was supplemented by a $20.00 per diem. It was paid with his regular and ordinary wages. (Exhibit 3:14) He was told he would have to work eighty hours per week for seven days except for the days that it rained. (See e.g., Ex. A:8) Overtime was mandatory as the crew was required to complete a certain number of miles of power line construction within a specific period of time. After his first two week job, he would be given a week off and then would return to another job working similar hours.

During the first week, claimant worked only thirty-two hours as they were assigned to clean up after the previous work crew and to train for the upcoming job. During the second week, he was working twelve hours per day with overtime paid at time and a half. There was no guarantee of hours, as evidenced by the rain pay. (See Ex. A) On a rain day, he would be paid for a half day of work.

Claimant did not work on June 28, 29, or 30, due to his injury. The pay records reflect what he would have made if he was not in an accident. (Ex 3:14)

Claimant asserts that his average weekly wage should include both per diem and the overtime pay which would amount to $840.00. With his single status, entitled to one exemption, claimant maintains his benefit rate is $520.02. (Ex. 3)

Defendants proposed a benefit rate of $338.02 based on an average weekly wage of $539.00. (Ex. A, p. 1) Claimant had not worked a full 13 weeks at the time of the injury. Defendants provided wage information for 2 employees who also earned the same hourly wage of $12.00. (Ex. A, p. 1) The average of the 2 employees was 44.9 hours per week at $12.00 per hour. The defendants did not include per diem as part of the taxable income. (Ex. A, p. 1) The comparable employees worked a variety of hours ranging from 83 down to 14 on rain days. (Ex. A, p. 6, 8)

On or about June 28, 2013, claimant was in a work vehicle that rolled into a ditch. He felt immediate pain and had a panic attack. Hypersensitivity set in shortly thereafter. He was taken to the Audubon County Memorial Hospital emergency department where he was diagnosed with a T12 compression fracture and a L1 burst fracture with retropulsion and a closed head injury. (JE 4:23) Claimant was then airlifted to Mercy Medical Center in Des Moines. (JE 2:3)

On July 1, 2013, claimant underwent a T12 and L2 fusion. (JE 4:33) His posterior scalp laceration was stapled in the emergency room. (JE 4:58)

He was discharged after a week of hospitalization with instructions of no lifting greater than ten pounds, no bending or twisting. (JE 1:4) He was to wear a TLSO brace when not in bed. (JE 4:24)

Following his discharge, he was seen by Andrew Utter, M.D. on July 15, 2013. (JE 5:62) Claimant presented to Dr. Utter in a wheelchair and when claimant ambulated, he walked very slowly. A re-evaluation of his cervical spine was ordered. (JE 5:61) There was some discussion that the hardware would need to be removed posteriorly. (JE 5:61)

On August 5, 2013, claimant returned Dr. Utter with complaints of pain between the shoulder blades. (JE 5:63) He was tender to palpation. The follow up MRI showed compression fractures at T2 and T3. Dr. Utter wanted better imaging and sent claimant off for additional testing. (JE 5: 64) Subsequent MRIs revealed mild to moderate canal compromise at the area of L1 and disk displacement at T7-8 and mild compression at T2-T3. (JE 5:66).

On August 29, 2013, claimant reported a pop in his back while at home. He took himself to the emergency room where he was evaluated by Emmanuel Witherspoon, M.D. Dr. Witherspoon ascribed the pain to claimant's recent surgery, prescribed Percocet and advised him to return to Dr. Utter.

He followed up with Dr. Utter on August 29, 2013. (JE 5:65) The MRI and CT scans were reviewed. Dr. Utter cautioned him that there may be additional remodeling

of the spinal canal as well as possible hardware failure. (JE 5:66) He advised claimant to continue wearing the back brace.

On November 4, 2013, claimant returned to Dr. Utter's office with reports of pain and hyperesthesia in the back of legs and bottom of feet. (JE 5:69) Claimant also noted bladder difficulty. (JE 5:69) CTs were reviewed which showed a set screw that perhaps popped off at right T12 and a laminotomy on the left. (JE 5:70) Dr. Utter advised that claimant should wait on hardware removal in hopes that his spinal stenosis would improve over time. (JE 5:70)

During his December 16, 2013 visit, claimant had symptoms of numbness and pain in the back of legs along with some allodynia symptoms. (JE 5:71) Claimant had some relief with Neurontin. Dr. Utter again advised waiting, but noted that claimant had some progression of his kyphosis in the thoracolumbar region. Because of this, Dr. Utter recommended a second surgery and fusion with re-instrumentation. (JE 6:72)

On February 20, 2014, claimant was referred to Jeffrey Adair, M.D. for pain management. (JE 5:85)

Claimant returned to Dr. Utter on March 17, 2014, with considerable pain in the thoracic and low back. (JE 5:82) Dr. Utter wanted to proceed with the second surgery despite not being sure "whether it would take away all of his pain as he may have some residual pain from the fracture deformity which is present at L1." (JE 5:83) The second surgery took place on May 16, 2014. (JE 5:90)

Claimant returned to Dr. Adair on May 12, 2014. (JE 7: 147) The initial treatment was prescription of Percocet and gabapentin. (JE 7:148) In June 2014, Oxycontin and Zanaflex were added. (JE 7:151)

In a follow up visit on June 26, 2014, claimant reported ongoing pain in addition to anxiety that was interfering with his daily activities. Xanax was added to his Percocet prescription. (JE 5:98) His activity level was low. He was not able to do any activities such as mowing his lawn. (JE 5:98) Kimberly Sports, Dr. Utter's physician's assistant, prescribed claimant Valium for the anxiety, physical therapy for his back, and a referral for his anxiety. (JE 5:98)

Claimant underwent psychological testing on September 18, 2014. (JE 9:183) Claimant was deemed to be psychologically disabled at the time due to PTSD which developed after the work injury. (JE 9:196) Jean Boudreaux, Ph.D. recommended psychotherapy. (JE 9:196) On October 8, 2015, after three treatments and medication therapy, Dr. Boudreaux released claimant with no restrictions as it relates to his mental state other than avoiding riding or operating trucks. (JE 9:200)

Another MRI was deemed necessary but it was inadequate. (JE 5: 106; 105) A subsequent MRI of the entire thoracolumbar region was ordered. (JE 5:105) The October 2014 MRI showed mild thoracolumbar kyphosis and compression deformities around the L1-T12 fracture unchanged from previous MRIs. (JE 5:109) Meanwhile,

despite physical therapy and pain management, claimant's pain was high while his activity level was low. He continued to treat with Dr. Adair who admitted, "I do not have much else to offer than medical management." (JE 7:155)

He was seen again at Dr. Utter's office on March 26, 2015. (JE 5:111) At this time, claimant remained off work. He was taking up to five Percocet pills a day and tolerating activities poorly. (Ex. 7:161) Dr. Utter felt that claimant may benefit from rhizotomy which was a procedure recommended by Dr. Adair. If that was not successful, Dr. Utter recommended another fusion. (JE 5:112)

On August 10, 2015, Dr. Adair wrote that "he will have a difficult time with almost any type of activity." (JE 7:148) In a letter to Genex, the work comp benefit management company, Dr. Adair opined that claimant could work at a sedentary level only. (JE 8:181)

On November 4, 2015, claimant returned to Dr. Utter. While claimant had managed to reduce his Percocet intake, he continued to have pain on a daily basis. His conservative treatments had failed. He was taking college courses but had to drop some because he was unable to sit for a prolonged period of time. (JE 5:113) Updated imaging was ordered for a possible future fusion. Dr. Utter felt that claimant might have a 70 percent chance of improvement. (JE 5:116)

Claimant underwent the T11-L2 spinal fusion on August 10, 2016. (JE 5:124) Initially, claimant was hopeful but as time went on, pain continued. He began to develop numbness in his thighs. His activity included limited walking, lifting very light weights. He returned to school, but had difficulty sitting for prolonged periods. (JE 5:134) New MRIs were conducted that showed a possible chronic fracture in the L1 vertebral body as well as mild lumbar spondylosis at the L4-5 facet joint with some thickening of the ligamentum flavium. (JE 5:136) Disk herniation was evident at the midline of T6-T8. (JE 5:137) While the hardware was intact, there was no fusion at T11-12 and T-12 to L1. (JE 5:141) Claimant was ordered to wear a bone stimulator for another nine months. (JE 5:141)

Most recently, claimant was seen by Dr. Utter in follow up on June 3, 2017. (JE 5:140) Claimant reported chronic pain around the fracture site. Dr. Utter re-examined claimant's radiology studies. The hardware appeared to be intact. Claimant was instructed to continue to wear the bone stimulator and to return in a year. (JE 5:141; 5:143)

On September 3, 2015, Dr. Adair signed a letter drafted by Genex, a case management service, regarding his opinions. (JE 8:181) Dr. Adair set claimant's maximum medical improvement (MMI) as June 28, 2013. (JE 8:181) He recommended claimant continue to take Percocet along with an NSAID and Neurontin, gabapentin, or Lyrica. For future care, claimant would need to have periodic spine surgeon visits as well as pain management treatment to manage his medication. (JE 8:181) Dr. Adair further opined that claimant would be able to return to work at a sedentary level only. (JE 8:181)

On November 11, 2015, claimant underwent an IME with Robin Sassman, M.D. (JE 14:224) Dr. Sassman's assessments track with the treating physicians and surgeons and offer little new insight into claimant's condition. She encouraged claimant to continue treatment with a pain management specialist, the mental health professionals, and to continue treatment option discussions with Dr. Adair. (JE 14) Dr. Sassman's report was updated after the third surgery with the same regurgitative opinions that claimant should continue to follow care with Dr. Utter and Dr. Adair. She determined that claimant was at MMI on May 24, 2017, and that he was 44 percent industrially impaired. (JE 14:236)

Dr. Sassman recommended that claimant limit lifting, pushing, pulling and carrying to 10 pounds rarely from floor to waist, waist to shoulder, and above shoulder height. (JE 12:218) He should limit standing and walking to an occasional basis, and must be allowed to change positions frequently. (JE 12:218) Dr. Sassman did not believe that claimant should drive a truck-type vehicle because of claimant's psychological trauma. (JE 12:218)

Claimant is currently not employed and has not worked since the day of his accident. He has not requested any vocational assistance. Since the time of his accident to the date of the hearing, he has received workers' compensation benefits.

After the third surgery, claimant has more pain and more limitations. He wishes he did not have the third surgery. He has numbness in his legs on the front and back, ending near the knee caps. There is some numbness in his mid to lower back.

Currently, he is on a battery of medications including Terocin patch, LidoPro ointment, Oxycodone, gabapentin, Zanaflex, Xtampza, and Cymbalta. He uses the patches and cream only sparingly.

He can walk periodically and tries to do various physical therapy exercises to strengthen his back.

Claimant did attempt to return to college, but the classes requiring lab or sitting for long periods of time were taxing on his body. His medications also impact his ability to concentrate. He has tried to go a day without medications but it's too painful. He is still enrolled in school and plans to take classes in the fall.

He does not believe he could work a 40 hour work week. He questions whether he could work even a single full day of work.

Claimant no longer takes Xanax. He recognizes what a panic or anxiety attack is and can manage it.

Claimant applied for Social Security Disability but was denied. He plans to appeal.

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).

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 question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

This case is fairly straightforward. The question presented is primarily the extent of the claimant's disability in addition to what, if any, additional temporary disability he is entitled. The parties also disagree as to the appropriate rate.

Claimant sustained a serious back injury arising out of a work related injury. The back injury necessitated three surgeries, ultimately fusing his spine from T11 to L2. Since the 2016 surgery, claimant has shown signs of problematic fusion at all but the

L1-L2 levels. He is currently using a bone stimulator. In the meantime, he has significant pain and limitations in his activities. Dr. Adair opined claimant can only work a sedentary position and Dr. Sassman questions whether claimant could work at all.

Claimant has no post-secondary degree and has been able to complete only a handful of college courses. His ability to study and learn is affected by his inability to sit for long periods of time as well as the amount of medications he takes. Neither party proposed jobs that claimant was capable of doing within his disability, education and work experience. While claimant may be best suited for sedentary positions, even those would be difficult due to claimant's constant back pain. Given claimant's condition, it was difficult to pinpoint a position that claimant could undertake given that he cannot sit or stand for significant periods of time.

It is discomfiting to find a person of claimant's age fully disabled, but the facts support this. Claimant sustained a serious injury to his back which has rendered him fully disabled. It may be that when complete fusion happens in his back that his pain will abate. Perhaps he will obtain a college degree and find gainful employment. If his circumstances change and he becomes employable, defendants have the ability to file a review-reopening. However, measuring his current capacity to compete in the labor market, it is found that claimant is fully and completely disabled.

Turning to the issue of temporary disability, claimant believes 83 weeks of payment should be applied to temporary benefits and the remainder as a credit against permanent benefits owed.

Defendants have continuously paid claimant since the time of the accident, either through a wage or benefits. Prior to hearing, claimant had been paid benefits from January 10, 2104 through April 24, 2014, October 9, 2015 through August 9, 2016, and May 25, 2107 through July 26, 2017. Defendants assert that claimant reached MMI on October 8, 2015, and again on May 24, 2017.

Permanent benefits begin at the end of the injured worker's entitlement to temporary benefits.

An employee is entitled to appropriate temporary partial disability benefits during those periods in which the employee is temporarily, partially disabled. An employee is temporarily, partially disabled when the employee is not capable medically of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability. Temporary partial benefits are not payable upon termination of temporary disability, healing period, or permanent partial disability simply because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury. Section 85.33(2).

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides

that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

In this circumstance, claimant did not return to work nor has he ever been medically cleared to return to substantially similar employment. Thus, the question is when claimant achieved maximum medical recovery.

On September 3, 2015, Dr. Adair opined claimant had reached MMI and released claimant to return to sedentary work. (JE 8:181) The work restrictions imposed by his mental health provider, other than to avoid trucking jobs, were lifted on October 8, 2015. (JE 9:200) Claimant did not improve however, and continued to seek treatment options from Dr. Utter, his surgeon. In January 7, 2016, claimant discussed the possibility of another surgery and Dr. Utter noted in his records that there was a 70 percent chance that claimant's condition would improve with surgery. The surgery took place on August 10, 2016. Up until that point, both Dr. Utter and claimant believed that there was a chance for improvement, possibly up to 70 percent. Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60, 65 (Iowa Ct. App. 1981).

Claimant was continually seeking treatment with Dr. Utter and exploring possible options for improvement. Therefore, claimant was not at MMI until June 3, 2017. At that time, Dr. Utter had released claimant with the expectation that he would return in a year. Dr. Utter is hopeful that claimant would obtain better bone fusion but did not opine on the probability or likelihood of such. In other words, Dr. Utter did not express any reasonable expectation of improvement of the disabling condition after June 3, 2017. Therefore, the MMI date is deemed to be June 3, 2017. All payments made up to June 3, 2017, are deemed temporary or healing period benefits. All payments subsequent to that date would be deemed permanent benefits. Defendants are entitled to credits accordingly.

Claimant seeks an average weekly wage calculation based upon the work that he was promised.

Under section 85.36(7), the gross weekly earnings of an employee who has worked for the employer for less than the full 13 calendar weeks immediately preceding the injury are determined by looking at the earnings of other similarly situated employees employed over that full period, but if earnings of similar employees cannot be determined, by averaging the employee's weekly earnings computed for the number of weeks that the employee has been in the employ of the employer.

Defendants accurately point out that claimant did not provide any evidence

regarding similarly situated employees. Instead, claimant relies solely on what he was told he would earn in addition to the per diem. Conversely, defendants provided two employees earning $12.00 per hour, the same hourly wage rate of the claimant. The hours were consistent in their variability. The similarly situated employees did not always work 80 hours per week with one week off. Instead, there were days punctuated by rain or other, lesser intensive work. The evidence supports a finding that the claimant's work schedule would have varied from week to week depending on the job and/or weather. Therefore, the hours of the similarly situated employees are adopted.

Claimant seeks to add claimant's per diem. Defendants refused as it is not part of taxable income. Claimant did not provide any briefing on this issue but did include a citation to Premium Transp. Staffing, Inc. v. Bowers, 872 N.W.2d 199 (Iowa Ct. App. 2015) which upheld an agency decision to award per diem. The Bowers case is substantially different than the case at bar. In the Bowers case there was testimony that the injured worker consistently underspent his per diem in expenses. He testified he would only eat two meals per day or obtain a free meal and shower with a fuel purchase. He intentionally acted to increase his income by only using a portion of his per diem for expenses. Id.

For a payment to be a bona fide per diem or expense allowance, there must be some relationship between the amount of the allowance and the amount of the expenses for which it is purportedly related. Berst v. TTC, Inc., File No. 1053524 (Arb. Dec. August 3, 1994).

Claimant's per diem was $20.00 per day as opposed to the $52.00 per day the injured worker in Bowers was allowed. There was scant evidence that the claimant's expenses were lower than the $20.00 per day allotted. Therefore, claimant's request for per diem is denied.

Defendants' rate calculation is adopted. It is found claimant is entitled to a benefit rate of $338.02.

Claimant seeks reimbursement for a second independent medical examination. He offers no precedent for such an argument. The agency has ruled that a second examination is impermissible under 85.39. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 394-95 (Iowa 2009). Claimant is not entitled to reimbursement of the second independent medical examination.

ORDER

THEREFORE, IT IS ORDERED:

That defendants are to pay unto claimant permanent total disability benefits at a rate of three hundred thirty-eight and 02/100 dollars($338.02) commencing June 4, 2017 and continuing during the period of permanent total disability.

That defendants shall pay accrued weekly benefits in a lump sum.

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

That defendants are to be given credit for benefits previously paid. Benefits paid prior to June 4, 2017, are considered temporary benefits. Benefits paid on or after June 4, 2017, are considered permanent benefits.

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

That defendants shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

That defendants shall pay the costs of this matter pursuant to rule 876 IAC 4.33 as itemized in Exhibit 4 under medical records fees and postage and service or process costs. The expert witness fees are not allowed as costs.

Signed and filed this 8th day of December, 2017.

JENNIFER S. GERRISH-LAMPE
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.