BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MAX L. BYERS, Claimant, vs. GUARDSMARK, LLC, Employer, and NEW HAMPSHIRE INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 5055931 ARBITRATION DECISION Head Note No.: 1803

FILED
JUN 19 2017
WORKERS' COMPENSATION

STATEMENT OF THE CASE

Claimant has a filed petition in arbitration and seeks worker's compensation benefits from Guardsmark, LLC., employer, and New Hampshire Insurance Company, insurance carrier, defendants.

Deputy workers' compensation commissioner, Stan McElderry, heard this matter in Sioux City, Iowa.

ISSUES

The parties have submitted the following issues for determination:

1. Whether the September 1, 2014 injury is the cause of any permanency, and if so, the extent;

2. Gross earnings; and

3. Penalty.

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.

FINDINGS OF FACT

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

The claimant was 72 years old at the time of hearing. He is a high school graduate, and has some post high school training. He is a veteran of the U.S. Army. The claimant has a varied work history including over-the-road truck driver, wedge press operator, bartender, tree service, sales trainer, and deputy sheriff. He began his employment at Guardsmark as a security guard in March of 2014. The job consisted of 8-12 hour shifts of nearly constant walking around between and in buildings. The unrebutted testimony was that each shift involved about 6 or more miles of walking. Walking that the claimant performed without any assistive device. At hearing the claimant's lack of mobility and extreme pain were obvious. He required assistance in walking and standing. A break had to be taken so that the claimant could take narcotics in an attempt to lessen pain such that he could continue.

On September 1, 2014, the claimant was working for Guardsmark as a security guard assigned to the Farmland plant in Denison, Iowa when he suffered an injury arising out of and in the course of his employment when he slipped on and fell on stairs. There is some contradiction in the record about how far the claimant fell, but that is relatively unimportant to the main issue for whether the claimant suffered permanent impairment and/or disability.

At the end of his shift the claimant reported the work injury. On the same day, the claimant was seen at the Horn Memorial Hospital Emergency Room in Ida Grove, Iowa. The chief complaint was noted as "terrible back pain." (Exhibit 1, page 7) An MRI was performed on September 8, 2014 and showed a large central disk herniation at L3-4. (Ex. 7, pp. 7-9) He was referred to William Samuelson, M.D., for further treatment.

The claimant first saw Dr. Samuelson on September 11, 2014. Dr. Samuelson recommended and then performed decompressive laminectomy and bilateral diskectomies the same day. (Ex. 1, pp. 15-16) Leonel Herrera, M.D., saw the claimant on May 29, 2015 and noted a 7mm x 7 mm large disc herniation at L3-4. (Ex. 1, pp. 49-50) Dr. Herrera again saw the claimant for follow-up on July 16, 2015 and transferred care to the University of Nebraska Pain Center as the claimant had moved. (Ex. 1, pp. 65-68)

John Massey, M.D., saw the claimant on August 13, 2015 and noted a significant disc extrusion at L3-4 with a least moderate spinal stenosis. (Ex. 2, p. 3) The claimant saw Timothy Burd, M.D., on January 12, 2016. Dr. Burd noted that the claimant was quite miserable. On February 25, 2016, Dr. Burd wrote that the disc herniation was a result of the September 1, 2014 injury. That the claimant had reached maximum medical improvement (MMI) on January 12, 2016, had a 13 percent permanent body as

a whole (BAW) impairment, and had a 20 pound lifting restriction. Also Dr. Burd stated that the claimant should not engage in repetitive lifting, bending, twisting, or stooping. (Ex. 2, pp. 48-49)

On August 12, 2016, the claimant was seen by Muhammad Iqbal, M.D. (Ex. 8) Dr. Iqbal requested authorization from the defendants for a referral to Mayo Clinic for further evaluation and treatment. The request was not positively acted upon. That failure was a breach of the defendants' statutory requirement to provide timely and appropriate care. Defendants argue that the claimant missed appointments and the refusal to provide the care was thus acceptable. That ignores the fact that the claimant was unable to work and at times homeless during this process.

Defendants also argue that the claimant is not entitled to benefits as he had been unemployed and largely on SSD (regular social security retirement after age 65) since 1998 until hired by Guardsmark in March of 2014. This fails to consider that Guardsmark, by hiring claimant, obviously saw residual industrial capacity that they could use and were willing to pay for. Credible evidence in the record suggests that this was one of the type individuals that the employer recruited.

On February 21, 2017 the claimant was seen by Jacqueline Stoken, D.O., for an independent medical evaluation (IME). (Ex. 11) Dr. Stoken opined that the claimant's low back injury was directly and causally connected to the September 2014 injury. Dr. Stoken opined a 39 percent body as a whole (BAW) as a result of the back injuries. (Ex. 11, pp. 42-43) She also stated that "Mr. Byers is unable to work due to his pain and limited mobility." (Ex. 11, p. 43) It is so found. Considering the claimant's medical impairments, training, permanent restrictions, as well as all other factors of industrial disability, the claimant has suffered a total loss of earnings capacity.

On the date of injury the claimant was single, and entitled to one exemption (S1). Claimant asserts he had gross earnings of $388.17 per week for a benefit rate of $251.53. Defendants assert the claimant had gross earnings of $296.73 for a benefit rate of $198.90 per week. The two week period ending August 2, 2014, and July 19, 2014 show that claimant worked 48 and 30 hours for those two week periods. The next lowest is 65.75 hours for the two weeks ending July 5, 2014. Some two week periods show over 90 hours. One two week period not in the 13 weeks shows over 100 hours worked. Clearly, the two-week periods ending August 2 and July 19, 2014 are not representative weeks and should be excluded. That gives 531.88 hours at $8.65 an hour divided by 13 for average weekly wages of $353.90. S1 status gives a weekly benefit rate of $230.80. Claimant also seeks a penalty for underpayment of rate. Defendants also request a credit for a 1997 worker's compensation claim under 85.34(7) for an injury at another employer that this employer was not a party to.

REASONING AND 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 alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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).

The question of causal connection is essentially within the domain of expert testimony. Cedar Rapids Community Schools v. Pease, 807 N.W.2d 839, 845 (Iowa 2011). 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). The finder of fact, must determine the credibility of the witnesses, weigh the evidence, and decide the facts at issue in a case. See Arndt v. City of LeClair, 728 N.W.2d 389, 394-95 (Iowa 2007). One factor the commissioner considers is whether an expert's opinion is based upon an incomplete medical history. Dunlavey v. Economy Fire & Cas. Co., 526 N.W.2d 845, 853 (Iowa 1995).

It was found that the claimant met his burden of establishing that his injury of September 1, 2014 caused permanent disability.

Permanent disability.

The next issue is extent of permanent disability for the injury.

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 alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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, 593; 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. However, consideration must also be given to the injured worker's medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured worker's qualifications intellectually, emotionally and physically; the worker's earnings before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted, Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616 (Iowa 1995); 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.

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense.

Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 29, 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 19, 1982).

Based on the finding that the claimant has suffered a 100 percent loss of earnings capacity he has sustained a 100 percent permanent total industrial disability.

Penalty

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."
>
> Christensen, 554 N.W.2d at 260.

The supreme court has stated:

> (1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of

legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.

(2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.

(3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).

(4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).

> If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.

Id.

(5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.

(6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

> (7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 593 N.W.2d 833, 840 (Iowa App. 1999). Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008).

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

The minimum rate that defendants could justify is the $231.80 found and concluded herein. Including weeks of 15-24 hours was unreasonable when claimant generally worked 40 or more hours per week. It would even be reasonable to argue that the two-week period of 65.75 hours should be excluded, although the undersigned did not find it necessary. Defendants underpaid benefits by at least $32.90 a week for an underpayment of over $4,000.00. A penalty of $1,000.00 or in the range of 25 percent is necessary and sufficient to deter such actions.

Defendants also request a credit for a 1997 worker's compensation claim under 85.34(7) for an injury at another employer that this employer was not a party to. The quick answer to this baseless request is no. See Iowa Code section 85.34(7).

ORDER

THEREFORE IT IS ORDERED:

That the defendants pay the claimant permanent total disability commencing September 1, 2014, at the rate of two hundred thirty one and 80/100 dollars ($231.80) and continuing during periods of disability.

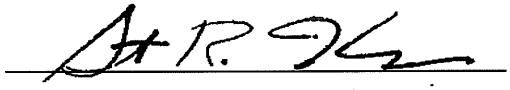
Defendants shall pay a penalty of one thousand and no/100 dollars ($1,000.00); all of which is accrued.

Costs are taxed to the defendant pursuant to 876 IAC 4.33.

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30 with subsequent reports of injury pursuant to rule 876 IAC 3.1.

Defendants shall receive credit for benefits previously paid.

Signed and filed this 19th day of June, 2017.



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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.