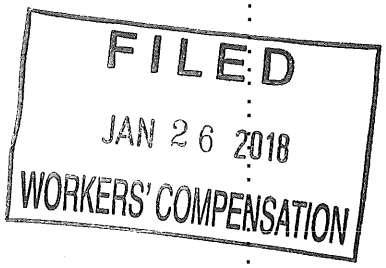
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CORY WEST, Claimant, vs. TYSON FOODS, INC., Employer, Self-Insured, Defendant.		File No. 5056947 ARBITRATION DECISION Head Note Nos.: 1108; 1803.1; 4000

STATEMENT OF THE CASE

Cory West filed a petition for arbitration seeking workers' compensation benefits from, the employer, Tyson Foods, Inc., a self-insured employer.

The matter came on for hearing on June 7, 2017, before deputy workers' compensation commissioner Joseph L. Walsh at the Sioux City IowaWORKS office. The record in the case consists of joint exhibits 1 through 19; claimant's exhibits 1 through 6; defense exhibits A through C; as well the sworn testimony (via telephone) of claimant and Tammie Swanson, a Tyson nurse. Carin Eckhoff served as the court reporter. The parties argued this case and the matter was fully submitted on June 21, 2018.

ISSUES AND STIPULATIONS

The stipulations contained in the hearing order have been approved and are deemed ordered with the consent of the parties.

The parties have stipulated that claimant sustained an injury which arose out of and in the course of employment on July 22, 2014. While the parties stipulate the injury occurred, the defendant contends that the injury was not a cause of any temporary or permanent disability. The claimant is seeking both temporary disability benefits (from August 3, 2014, through August 31, 2014) and permanent partial disability benefits. The defendant denies claimant is entitled to any weekly benefits.

The claimant alleges his disability is to his bilateral arms and he alleges it is industrial. Defendant denies this. The commencement date for benefits, if any are owed, is also disputed. Regarding rate, the parties stipulated that claimant was single and entitled to one exemption at the time of hearing. The weekly gross earnings, however, are disputed.

Affirmative defenses have been waived. Claimant makes no claim for medical expenses, however, he does seek reimbursement for the independent medical evaluation under Section 85.39. No weekly benefits have been paid and there is no

issue regarding credit. The claimant seeks penalty benefits for an unreasonable denial and delay of benefits.

FINDINGS OF FACT

Cory West is 45 years old and resides in Cherokee, Iowa in a civil-commitment unit. He testified under oath at hearing by telephone. I find his testimony to be generally credible.

Mr. West earned a Bachelor's degree from Central Christian College in Business Management. He began working for Tyson Foods, Inc., at their Storm Lake facility, in April 2014 in the Rendering Department. He was terminated following an incident where he violated the rules of the civil commitment unit where he resides. He was no longer allowed to leave the unit to work and was terminated.

On July 22, 2014, Mr. West reported an injury to Tyson Health Services Department. He had sustained a burn to his left hand when he tried to shut off water to a pipe from a heat exchange unit. (Joint Exhibit, page 2) The following day, he returned to Health Services. It became apparent the burn affected both of his arms and hands. (Jt. Ex., p. 1) The affected area blistered and was painful. Tyson Health Services treated the burns with burn cream and bandages.

Mr. West testified he followed up with Tyson Health Services for his burns approximately 10 times although this is not documented in the Tyson records. By July 30, 2014, Tyson Health Services took the position that claimant had fully healed from his condition. "NO FURTHER TX NEEDED, FD, OHS PRN." (Jt. Ex., p. 1) Mr. West also sought treatment from a nurse-practitioner named Mary Benson. (Jt. Ex., pp. 4-5) He complained to Ms. Benson about the burn particularly on his right lower arm on November 12, 2014. Mr. West testified that the burns remained painful and have never fully healed. He kept a journal which documented his symptoms. (Cl. Ex. 3, pp. 23-37) He also has scars. (Cl. Ex. 4) He testified that he takes Tylenol for pain.

Tyson never had him evaluated by a physician. It is also true there is no documentation in this record that he asked for further treatment after July 30, 2014. Claimant sought an independent medical evaluation from Jacqueline Stoken, D.O., on May 25, 2016. She prepared a report dated June 10, 2016, offering various expert medical opinions on claimant's condition. After performing a review of the records and examination, she diagnosed "thermal burns to the bilateral forearms" and opined that no further treatment would be required for this condition. (Jt. Ex., pp. 6-7) She opined that he had suffered a whole person impairment of 1 percent. (Jt. Ex., p. 7) Dr. Stoken charged $2,000.00 for this evaluation.

CONCLUSIONS OF LAW

The primary question in this case is whether the claimant's stipulated work injury resulted in any permanent disability. The claimant contends that he has suffered an industrial disability to his bilateral arms caused by his work injury. The defendant

contends that claimant suffered a minor burn which, caused some temporary pain, however, resulted in no disability whatsoever.

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. 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).

There is only one expert medical opinion in this record. After reviewing all of the medical records available and examining the claimant, Dr. Stoken opined that claimant suffered a scarring and a minor functional impairment resulting from the stipulated July 2014, work injury. By a preponderance of evidence, I adopt her opinion.

Defendant argues strenuously, that claimant had fully healed from the stipulated work injury. "It is patently obvious that at the time of his last visit at Health Services on July 30, 2014, the burn had completely resolved with no complaints. *JE-1*" (Def. Brief., p. 3) Mr. West ceased working for Tyson shortly after his July 30, 2014, visit to Health Services, although the exact date is not in the record. While the July 30, 2014, visit to Health Services is evidence that Tyson reasonably believed claimant was fully healed and recovered, I cannot find that it is "patently obvious" that this was a fact.

Mr. West has permanent scars on his arms where the burns occurred. He documented his ongoing use of Tylenol and journaled regularly about his pain. In November 2014, several months after the accident, he mentioned his ongoing difficulties to his nurse practitioner in an evaluation. Most significantly, he has permanent scars. (Cl. Ex. 4) While the functional disability may be relatively insignificant, he has, in fact, met his burden of proof that the work injury is a cause of permanent disability.

The next issue is the nature and extent of claimant's disability. The claimant argues that he should be awarded industrial disability benefits for his loss of earning capacity. Defendant argues that the disability is scheduled. The defendant is correct.

Where an injury is limited to a scheduled member the loss is measured functionally, not industrially. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983).

The courts have repeatedly stated that for those injuries limited to the schedules in Iowa Code section 85.34(2)(a)-(t), this agency must only consider the functional loss of the particular scheduled member involved and not the other factors which constitute an "industrial disability." Iowa Supreme Court decisions over the years have repeatedly cited favorably the following language in the case of Soukup v. Shores Co., 222 Iowa 272, 277; 268 N.W. 598, 601 (1936):

> The legislature has definitely fixed the amount of compensation that shall be paid for specific injuries . . . and that, regardless of the education or qualifications or nature of the particular individual, or of his inability . . . to engage in employment . . . the compensation payable . . . is limited to the amount therein fixed.

Our court has even specifically upheld the constitutionality of the scheduled member compensation scheme. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404 (Iowa 1994). Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Graves, 331 N.W.2d 116; Simbro v. DeLong's Sportswear 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

Thus, when the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C. M. Co., 194 Iowa 819, 184 N.W. 746 (1921).

Benefits for permanent partial disability of two members caused by a single accident is a scheduled benefit under section 85.34(2)(s); the degree of disability must be computed on a functional basis with a maximum benefit entitlement of 500 weeks. Simbro v. DeLong's Sportswear, 332 N.W.2d 886 (Iowa 1983).

The disability in question is to Mr. West's bilateral arms. It does not, in any way, extend into his body past his bilateral arms. As such, compensation is dictated by Iowa Code section 85.34(2)(s) (2015). Industrial disability concepts are not applicable in this case.

The AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, has been adopted as a guide for determining an injured worker's extent of functional disability. 876 IAC section 2.4. In making an assessment of the loss of use of a

scheduled member, however, the evaluation is not limited to the use of the AMA Guides. Lay testimony and demonstrated difficulties from claimant must be considered in determining the actual loss of use so long as loss of earning capacity is not considered. Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420, 421 (Iowa 1994); Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936). This agency has a long history of recognizing that the actual loss of use which is to be compensated is the loss of use of the body member in the activities of daily living, including activities of employment. Pain which limits use, loss of grip strength, fatigability, activity restrictions, and other pertinent factors may all be considered when determining scheduled disability. Bergmann v. Mercy Medical Center, File Nos. 5018613 & 5018614, (App. March 14, 2008); Moss v. United Parcel Service, File No. 881576 (App. September 26, 1994); Greenlee v. Cedar Falls Community Schools, File No. 934910 (App. December 27, 1993); Westcott-Riepma v. K-Products, Inc., File No. 1011173 (Arb. July 19, 1994); Bieghler v. Seneca Corporation, File No. 979887 (Arb. February 8, 1994); Ryland v. Rose's Wood Products, File No. 937842 (Arb. January 13, 1994); Smith v. Winnebago Industries, File No. 824666 (Arb. April 2, 1991).

By a preponderance of evidence, I conclude that the claimant has suffered a one percent functional loss to his body as a whole as a result of his July 22, 2014, work injury. This is based upon the unrebutted expert medical opinion of Dr. Stoken, taken in consideration with claimant's testimony of his ongoing symptoms and functional loss. A one percent loss of use of his bilateral arms entitles claimant to five weeks of permanent partial disability benefits. These benefits shall commence upon claimant's initial return to work, July 24, 2014. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 372 (Iowa 2016).

The next issue is whether the claimant is entitled to any penalty benefits. Claimant alleges defendant failed to properly investigate his claim and pay benefits properly. Defendant contends that penalty benefits are unwarranted.

Claimant seeks penalties for late payments based upon the failure of the defendants to seek an impairment rating for her left index finger injury. Claimant's penalty benefit claim is based upon the statutory language contained at Iowa Code section 86.13(4), which provides:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:

(1) The employee has demonstrated a denial, delay in payment, or termination in benefits.

(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

c. In order to be considered a reasonable or probable cause or excuse under paragraph "b," an excuse shall satisfy all of the following criteria:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254

(Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

Under the current statutory framework, the burden is on the claimant to demonstrate when a payment is due and that the payment was not made on time. Once the claimant has proven the delay or denial, the burden shifts to the defendants to provide a reasonable excuse.

In this case, I find that the employer had a reasonable basis for denying payment of permanency benefits. The employer's chosen medical provider, Tyson Health Services (nursing staff), determined that claimant had fully healed from his work injury as of July 30, 2014. This was the date Mr. West last visited the Health Services Department. (Jt. Ex., p. 1) At that time, it appeared that he had a minor burn which was healing nicely which had not caused any lasting disability. The defendant in this case then did not hear from claimant until he submitted an evaluation from Dr. Stoken through his attorney seeking benefits. While I have found that, in fact, claimant did not fully heal from the work injury, it was not unreasonable for the defendant to rely upon its medical department. The Tyson Medical Services Department undoubtedly operates under the direction of a physician. It was reasonable to rely upon such treatment records.

Finally, the claimant seeks payment of his independent medical evaluation expense from Dr. Stoken in the amount of $2,000.00. The claimant argues the employer is responsible for this bill. Employer argues that the statute has not been triggered because an employer rating was never rendered.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

The employer raises a highly technical defense that for Section 85.39 to apply, a rating must first be rendered by "physician retained by the employer." Iowa Code Section 85.39 (2015). This is undoubtedly true. The employer, however, seeks to improperly utilize this statutory language as a technical trap for the unwary.

Workers' compensation statutes are to be liberally construed in favor of the worker and the worker's dependents. Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503 (Iowa 1981); McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 192 (Iowa 1980). The statute's beneficent purpose is not to be defeated by reading something into the statute that is not there. Cedar Rapids Community School v. Cady, 278 N.W.2d 298 (Iowa 1979).

Speaking on behalf of the Iowa Supreme Court, Justice Lavorato stated the following in regard to interpreting the Iowa Workers' Compensation law:

> Our review of this unusual case is controlled by the principles set forth in Iowa Code sections 4.1(2), 4.2, 4.4, 4.6, and 17A.19(8), which we have applied to the workers' compensation act. Foremost is that which acknowledges the act is to be liberally construed in the employee's favor. Cf. Doerfer Division of CCA v. Nicol, 407 N.W.2d 428, 434 (Iowa 1984). *Any doubt in its construction is thus resolved in favor of the employee.* Usgaard v. Silver Crest Golf Club, 256 Iowa 453, 459, 127 N.W.2d 636, 639 (1964).

Teel v. McCord, 395 N.W.2d 405, 406-07 (Iowa 1986) (*emphasis added*).

Moreover, the fundamental reason for the enactment of the Workers' Compensation Act is to avoid litigation, lessen the expense incident thereto, minimize appeals, and afford an efficient and speedy tribunal to determine and award compensation under the terms of this act.

> 'It was the purpose of the legislature to create a tribunal to do rough justice — speedy, summary, informal, untechnical. With this scheme of the legislature we must not interfere; for, if we trench in the slightest degree upon the prerogatives of the commission, one encroachment will breed another, until finally simplicity will give way to complexity, and informality to technicality.'

Zomer v. West River Farms, Inc., 666 N.W.2d 130, 133 (Iowa 2003) (quoting Flint v. City of Eldon, 191 Iowa 845, 847, 183 N.W. 344, 345 (1921)).

In this case, it is true the employer technically never had the claimant evaluated by a "physician" at all prior to claimant's IME. Instead, they merely directed him to their Health Services Department (which undoubtedly operates under the direction of a physician). Mr. West received treatment for about one week before being released. The employer's own designated medical professionals then determined that claimant had fully healed from the injury without ever having him specifically evaluated by a "physician" of their own designation. In fact, their counsel argued the following based upon the Health Services Department note. "It is patently obvious that at the time of his last visit at Health Services on July 30, 2014, the burn had completely resolved with no

complaints. *JE-1*" (Def. Brief., p. 3) I conclude the Tyson's Health Services Department's determination is tantamount to an opinion that claimant had suffered no functional impairment from his work injury.

In fact, in denying claimant's penalty claim, I found that this was reasonable under the circumstances for defendant to rely upon this opinion. Mr. West had suffered a burn injury and the treatment he was provided appears to be reasonable. Therefore, I find that the opinion of the Medical Services Department is equivalent to a zero rating from a physician. If I were to find otherwise, as the employer has requested, that no such medical assessment had been made, I would also be required to assess a penalty against the employer for failure to reasonably investigate the claim.

With the benefit of hindsight, it may have been a better practice for claimant to request a formal examination from a physician designated by the defendant before securing an IME. I conclude, however, that neither party ultimately acted unreasonably. The defendants did not act unreasonably in relying upon the opinions of their Medical Services Department in concluding the claimant had suffered no permanent impairment. The claimant did not act unreasonably in relying upon the opinion of the Medical Services Department when he decided to seek an IME.

Consequently by a preponderance of evidence, I find that the employer is responsible for the $2,000.00 IME expense.

Alternatively, I would assess the IME bill as an expense of the case. "All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Iowa Code section 86.40 (2015).

Finally, the parties have listed the rate of compensation as being disputed. Claimant, however, did not brief the issue or provide specific calculations. I have reviewed the wage records. (Cl. Ex. 1) I have also reviewed the employer's calculations as set forth in Defendant's Exhibit C, and I adopt those calculations as the correct gross wages for the purpose of calculation of claimant's rate of compensation.

ORDER

THEREFORE IT IS ORDERED:

All weekly benefits shall be paid at the rate of three hundred and ninety-nine and 74/100 ($399.74) per week.

Defendant shall pay the claimant five (5) weeks of permanent partial disability benefits commencing on July 23, 2014.

Defendant shall pay accrued weekly benefits in a lump sum.

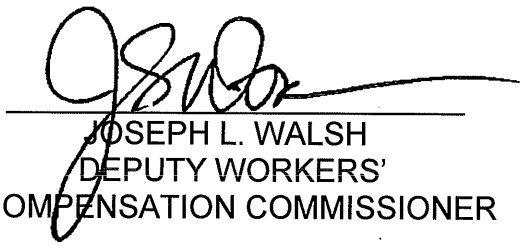
Defendant shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

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

Defendant shall reimburse the IME expense of two thousand and no/100 dollars ($2,000.00).

Costs are taxed to defendant.

Signed and filed this 26th day of January, 2018.



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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.