

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SHAWN COSENZA,

Claimant,

FILED

JUL 13 2016

vs.

WORKERS COMPENSATION

File No. 5047579

AUTOMOTIVE ENTERPRISES
COMPANY, INC.,

ARBITRATION DECISION

Employer,

and

ACCIDENT FUND NATIONAL
INSURANCE COMPANY,

Insurance Carrier,
Defendants.

Head Note Nos.: 1802, 3001

STATEMENT OF THE CASE

Shawn Cosenza, claimant, filed a petition in arbitration seeking workers' compensation benefits from Automotive Enterprises Company, Inc., and their workers' compensation carrier, Accident Fund Insurance Company of America. Hearing was held on April 15, 2016. Presiding at the hearing was Deputy Workers' Compensation Commissioner Erin Q. Pals.

Claimant, Shawn Cosenza, and Michelle Freisinger were the only witnesses who testified live at trial. The evidentiary record also includes claimant's exhibits 1-18, with the exception of exhibit 14, pages 6 & 7, which were withdrawn and defendants' exhibit A. The parties submitted a hearing report at the commencement of the evidentiary hearing. On the hearing report, the parties entered into certain stipulations. Those stipulations are accepted and relied upon in this decision. No findings of fact or conclusions of law will be made with respect to the parties' stipulations. It should be noted that at the time of hearing claimant was still treating for his right shoulder and the extent of permanent partial indemnity benefits was not yet ripe for determination. A ruling was entered by the undersigned on April 7, 2016, which granted claimant's request to bifurcate the issue of permanency.

The parties requested the opportunity for post-hearing briefs, which were submitted on May 6, 2016.

ISSUES

The parties submitted the following issues for resolution:

1. The appropriate weekly workers' compensation rate.
2. Claimant's entitlement to healing period benefits.

FINDINGS OF FACT

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

The parties have stipulated that Shawn sustained a cumulative injury to his bilateral hands and his right shoulder on March 17, 2014. At the time of the injury, Shawn Cosenza, was employed by Automotive Enterprises Company, Inc. ("Automotive Enterprises"); a company that chrome-plates auto parts. Shawn was hired in November of 2005. He specialized in chrome-plating motor vehicle bumpers. Shawn described his work as physically demanding. He was required to lift heavy bumpers and place them into vats of chemicals. He also had to hold the bumpers against a bench-mounted buffer, wheel, or lathe in order to grind, sand, and polish them. Shawn's job also required the use of hand-held grinders.

Initially Shawn was paid on an hourly basis but in April of 2012, his compensation changed to a commission-only basis. Shawn was paid 25 percent of the amount Automotive Enterprises billed the customer for the work that he performed. He testified that he earned on average \$800.00-\$900.00 per week. His pay was solely dependent on the amount of work he produced. He worked approximately 4, 10-hour work days each week. Shawn was encouraged to work a 40-hour work week but it was not required; sometimes he worked more than 40 hours per week. He was allowed to leave once his work was complete. He worked at his own pace and set his own schedule. (Testimony)

Leading up to the cumulative injury date of March 17, 2014, he experienced pain that would wake him up at night, including tingling and numbness in both of his hands. He also had difficulty holding objects and would drop them. He testified he also had pain in his right shoulder that radiated down his right arm. Shawn reported his symptoms to his supervisor, Tom Feldman. According to Shawn, his employer did not refer him for care immediately so he sought treatment on his own. He first received treatment at Dubuque Internal Medicine with Melissa K. Casey, PA. (Exhibit 2) Shawn testified that she referred him to an orthopaedic surgeon. An EMG was performed which showed nerve entrapment. Shawn said he brought the paperwork to his employer and then workers' compensation began directing care. (Ex. 3 & 4)

Shawn was directed to see Julie Muenster, ARNP at Tri-State Occupational Health. She assessed him as having bilateral carpal tunnel syndrome, provided him with splints, and referred him to an orthopaedic surgeon. (Ex. 5, pages 1-5)

On June 19, 2014, Shawn saw Edwin Castaneda, M.D. at Medical Associates. Shawn reported his hand and arm symptoms as well as his right shoulder problems. However, according to Shawn, Dr. Castaneda told him that he could only deal with one part of the body at a time and the carpal tunnel was more significant, so that would be dealt with first. The doctor recommended surgery on both hands for the carpal tunnel. (Ex. 6, pp. 1-3) Dr. Castaneda performed right hand surgery on August 8, 2014, and a similar surgery on the left side on September 19, 2014. (Ex. 7, pp.1-3; Ex. 4, pp. 3-6)

Shawn performed his normal, full-time duties at Automotive Enterprises until the time of the first surgery on August 8, 2014. He had restrictions placed on his activities after the surgery. Automotive Enterprises did not have light-duty work available so Shawn was not able to return to work. (Testimony)

Shawn continued to follow-up with Dr. Castaneda. By November 17, 2014, Shawn's numbness and tingling had completely resolved and he had excellent range of motion in his hands. His grip strength returned and he was not having any pain or discomfort. Dr. Castaneda released Shawn to return to normal activity without restriction. The doctor assigned zero percent permanent impairment. The note states that Shawn was released from his care. (Ex. 6, pp. 15-17) Shawn testified that he again mentioned his right shoulder symptoms to Dr. Castaneda at this appointment. However, Dr. Castaneda informed Shawn that he did not treat shoulders and that would have to be a totally separate claim. Dr. Castaneda's notes make no mention of Shawn's right shoulder.

Shawn testified that he reported for work the next day at his normal 5:00 a.m. start time. He told his employer that the doctor had released him to return to work but his shoulder was still causing him problems so he needed light duty work. His employer told him that they did not have any light duty work. Shawn did not return to work. At hearing Shawn admitted that he did not have any formal restrictions placed on his activities by a medical provider at that time; any "restrictions" he had were self-imposed. (Testimony)

Shawn continued to experience problems with his right shoulder. At some point he requested treatment for his shoulder. Defendants eventually agreed to provide an orthopaedic evaluation for the right shoulder injury with Kyle S. Galles, M.D. Shawn saw Dr. Galles in Des Moines on January 14, 2015. Dr. Galles stated that Shawn's right shoulder was quite likely aggravated by his work activities. He gave Shawn a subacromial cortisone injection. He also recommended outpatient physical therapy which, according to claimant, was never scheduled. (Ex. 9, pp. 1-2)

With the loss of Shawn's full-time income, he and his family were having financial difficulties. Shawn's mother, who lived in Georgia, offered to provide them a temporary place to live. In June of 2015, Shawn went to Georgia. Over the course of that summer Shawn also moved his wife and five children to Georgia. (Testimony)

Defendants scheduled a follow-up appointment for Shawn to see Dr. Galles in Des Moines on July 2, 2015. The clinical notes indicate that the January shoulder injection provided only temporary relief. Dr. Galles ordered an MRI of the right shoulder, which was performed on July 16, 2015. The MRI revealed a small superior labrum tear, but no rotator cuff tear. (Ex. 9 & Ex. 10)

At a July 18, 2015 appointment, Dr. Galles reviewed the MRI and informed Shawn that the MRI was consistent with a bone bruise to the clavicle and that his case was not surgical. Dr. Galles opined that Shawn should be able to return to work without restrictions in 4 to 6 weeks. (Ex. 9, pp. 15-16) The July 18, 2015, Patient Status Report form indicates permanent restrictions of minimizing repetitive heavy lifting over shoulder height. According to Shawn, this would prohibit him from ever returning to his position at Automotive Enterprises. (Ex. 9, p. 18) It is noted that this was changed to a temporary restriction on September 1, 2015. (Ex. 9, p. 23) However, Dr. Galles issued a report also dated July 18, 2015, wherein he placed Shawn at maximum medical improvement (MMI), assigned zero percent impairment, and stated that he should avoid heavy lifting with the right shoulder over shoulder height. The report does not state whether the restriction is temporary or permanent. (Ex. 9, p. 24)

On September 3, 2015, defendants advised that all further benefits for Shawn would terminate as of September 30, 2015. (Ex. 14, p. 8)

Shawn was evaluated by Mark C. Taylor, M.D. at Medix. He opined that the right shoulder injury was work-related and recommended further treatment, including a referral to an orthopaedic specialist in Georgia. (Ex. 12)

On October 9, 2015, claimant's counsel expressed dissatisfaction with the medical care provided and requested further orthopedic treatment with a shoulder specialist. Additionally, a petition for alternate medical care was filed, but was dismissed once defendants agreed to send Shawn to an orthopaedic surgeon near his residence in Georgia. (Ex. 14, p. 9)

Defendants arranged for Shawn to be seen by William E. MacLeod, M.D. at Optim Healthcare on December 15, 2015. Dr. MacLeod stated that Shawn's history, exam and MRI findings were consistent with a SLAP tear, rotator cuff tear, biceps tenosynovitis, and severe acromioclavicular (AC) arthrosis. He recommended right shoulder arthroscopic rotator cuff repair, SLAP repair, biceps tenodesis, distal clavicle resection, and subacromial decompression. (Ex. 13, pp. 1-2)

At defendants' request, Dr. Galles reviewed Dr. MacLeod's records. Dr. Galles still felt that the injury was a bone bruise and mild arthritis. (Ex. 9, p. 26)

Defendants initially denied the shoulder surgery that was recommended by Dr. MacLeod, a specialist selected and hired by defendants. Eventually, defendants agreed to a repeat right shoulder MRI, with and without contrast; this was carried out on March 8, 2016. The MRI showed a tear in the supraspinatus, tendinosis, and AC joint osteoarthritis. (Ex. 13, pp. 4-5) Once again, Dr. MacLeod recommended surgery. He noted that the MRI confirmed a partial-thickness tear on the supraspinatus tendon on the articular side and AC arthrosis and biceps tenosynovitis. (Ex. 13, p. 6) Dr. MacLeod performed extensive surgery, which included rotator cuff repair, on March 28, 2016.

At the time of hearing, Shawn was undergoing physical therapy and had been told that his rehabilitation could take up to a year. (Ex. 13, p. 9) The parties stipulated that Shawn is entitled to a running award of temporary disability benefits until he returns to work or reaches maximum medical improvement.

The first issue to be addressed is the proper weekly workers' compensation rate for the claimant. Claimant contends the rate should be \$692.14, which is based on average weekly wage of \$1,027.37, with M-7 exemptions. (Ex. 15) Defendants contend that the rate is \$640.87, based on an average weekly wage of \$951.84 with M-6 exemptions. (Ex. A)

Regarding the exemptions, defendants acknowledge that Steve's 2014 tax returns show entitlement to exemptions for M-7. Claimant failed to produce a copy of his 2014 tax returns until April 11, 2016. Claimant also testified that at the time of the injury he was married with five children. He has a daughter by a prior relationship. He was allowed to claim her as a dependent in 2014. (Ex. 16) I find that the preponderance of the evidence demonstrates that for rate purposes claimant has shown that he is married and entitled to seven exemptions.

The parties agree that Shawn's weekly workers' compensation rate should be calculated pursuant to Iowa Code section 85.36(6). The central dispute regarding the rate issue is whether the week ending February 14, 2014, fairly reflects the employee's customary earnings. During that week Shawn earned \$490.01. Defendants contend that this week should be included in the rate calculation. Michelle Freisinger works for the defendant employer as the office manager. She testified that if a week of earnings was unusually low it would be either due to Shawn's choice to work less or due to a lack of available work. Exhibit A, page four is a copy of the Custom Bumper Worksheet for that week. It shows the jobs that Shawn worked on during the week. There are several half-jobs during that pay period. Defendants argue that this leads to the conclusion that there was work available and thus, Shawn simply personally chose to work less that week. Thus, those earnings should be considered customary and representative of his customary earnings. I find that the evidence in support of defendants' contention that

this week was lower than the others was because Shawn chose to work less is speculative at best. Thus, I do not find defendants' argument to be convincing.

Claimant contends that the week of February 14, 2014 should be excluded because it is the only week that is substantially below his average earnings of \$1,027.37. Shawn testified that during the week ending February 14, 2014, the work was unusually slow and as a result he could not work a normal work week; he only worked a total of 27.25 hours. (Ex. A, pp. 4-6) A review of the evidence demonstrates that this week does in fact stand out as being substantially less than the other weeks. I find that this week does not fairly reflect the Steve's customary earnings and therefore, should be excluded from the rate calculation. Thus, I find that claimant's gross average earnings at the time of the injury were \$1,027.37. Based on an individual who is married and entitled to 7 exemptions, his correct weekly workers' compensation rate is \$692.14.

We now turn to Shawn's claim for healing period benefits. Defendants have paid weekly workers' compensation benefits since the first surgery on August 8, 2014 and continuing through the date of the arbitration hearing. Defendants contend that there are periods of time that should be classified as payment of permanent partial disability benefits. The specific periods in question are from November 17, 2014 through January 14, 2015 and September 1, 2015 through March 27, 2016. (Ex. 14, p. 24) Claimant contends all benefits paid to date should be classified as healing period benefits.

During the first disputed time period, November 17, 2014 through January 14, 2015, Steve did not have any formal restrictions placed on his activities by a medical provider. He testified that he went to work on November 17, 2014, informed his employer that he was released to full duties for his wrists, but due to his right shoulder symptoms he believed he still required light duty work. The employer informed Shawn that they did not have any light duty work for him. Shawn said he gave his employer his new phone number and told them to call him when they had work for him. Shawn never received a phone call regarding returning to work from the employer. Claimant seemingly argues that the employer never made him an offer of suitable work on November 17, 2014. Shawn further argues that defendants denied treatment until January 14, 2015, when they finally scheduled an appointment for Shawn to see Dr. Galles for his right shoulder. At that time, Dr. Galles immediately placed him under restrictions and also indicated that the shoulder symptoms were work-related. (Ex. 9, pp. 1-2) Claimant argues this is proof that he required restrictions for his shoulder the entire time. Thus, although there were periods of time when he was technically released from restrictions for his bilateral carpal tunnel injuries, he continued to be impaired by the right shoulder. He testified he attempted to return to light duty work, but was told the employer did not have any light-duty work available.

Defendants contend that these benefits should be classified as permanency benefits. In support of their position, defendants argue that Dr. Castaneda placed

claimant at MMI for his bilateral upper extremities and his notes did not even mention right shoulder pain. Dr. Castaneda allowed Shawn to return to work, full duty, without impairment. (Ex. 6, p. 16) However, given the recent medical developments in this case, I do not accept the medical opinion of Dr. Castaneda that claimant had reached MMI for his right shoulder. I find that as of November 17, 2014, claimant had not reached MMI for his right shoulder.

Alternatively, defendants argue that even if he had not reached MMI, Shawn was not entitled to temporary disability benefits during these time periods because he refused suitable work. At hearing, Shawn admitted that after his November 17, 2014, appointment with Dr. Castaneda he returned to his employer to inquire about returning to work. He confirmed that his employer did offer that he could return to his pre-injury job. However, Shawn testified at hearing that he declined the offer of work because he believed he was limited by his shoulder pain. He admitted that these were "self-imposed" restrictions.

I find that Shawn told the employer he needed light duty work due to his shoulder; however, there is no expert medical opinion to support claimant's contention that he required light duty work at that time. I further find that the defendants offered Shawn his regular duty work. Claimant refused the suitable work when he informed his employer that he had to have light duty work. Therefore, under the Iowa Code there is no basis to award claimant temporary benefits during this time periods. Although the undersigned does not like that this essentially rewards defendants for delaying medical treatment for his right shoulder, there is no expert medical opinion to support claimant's contention that he required light duty work during the time in question. Furthermore, claimant had been performing his normal duties with his bilateral hand and arm complaints and with his right shoulder symptoms up until the time of his carpal tunnel releases. It does not follow that once his carpal tunnel improved he was unable to perform his prior duties. I find claimant was medically capable of returning to employment substantially similar to the employment in which he was engaged at the time of his injury work. Because of this, his healing period ended on November 17, 2014.

We now turn to the second disputed time period, September 1, 2015 through March 27, 2016. Shawn underwent authorized shoulder surgery on March 28, 2016; defendants have been paying healing period benefits since that time. The record demonstrates that temporary disability benefits were recommenced when Dr. Galles imposed restrictions on January 14, 2015, for Shawn's right shoulder. Claimant continued to treat with Dr. Galles until the doctor issued the September 1, 2015 letter placing claimant at MMI with no impairment. Dr. Galles restricted Shawn to minimize repetitive heavy lifting over shoulder height. (Ex. 9, p. 21) Shawn testified that this restriction from Dr. Galles would prevent him from returning to work at the defendant employer. Based on the more recent medical treatment, I found that Shawn had not reached MMI for his right shoulder.

Defendants argue that it was at this point that claimant reached the end of another healing period and thus his benefits were converted to permanency benefits. Defendants state that because claimant had moved to Georgia he had in essence removed himself from the ability to return to work with the defendant employer, who is located in Dubuque, Iowa. Thus, claimant's actions should be considered a voluntary resignation and/or another refusal of work. Either way, defendants contend that claimant's entitlement to temporary disability terminated once again on September 1, 2015, based on claimant's refusal of suitable work. However, I do not find this argument to be convincing. Claimant testified that after he left his employer on November 17, 2014, he never received an offer of any work from the employer. Defendants offered no evidence to refute this testimony. I find that defendants failed to offer claimant suitable work during this timeframe in question. Defendants cannot assume that if they had offered claimant work he would have refused to come back from Georgia to perform the suitable work. Claimant testified that he was forced to move to Georgia due to financial stress from not having his full-time income from the defendant employer. It may be that claimant would have agreed to move back to perform suitable work or it may be that claimant would have refused to move back for the work. However, it is not known because defendants failed to offer suitable work. Therefore, claimant is owed healing period benefits beginning on January 14, 2015, when he had restrictions placed on his activities and continuing until such time as claimant returns to work, returns to substantially similar work he was performing at the time of injury, or achieves maximum medical improvement, whichever occurs first.

Finally, claimant seeks an assessment of costs. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. Specifically, claimant is seeking recovery of the \$100.00 filing fee. This is a cost provided for in rule 876 IAC 4.33(7). Therefore, I find that this is an appropriate cost. Because claimant was generally successful in his claim, I assess costs in the amount of \$100.00 against defendants.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6)(e).

There is a dispute in this case regarding claimant's weekly workers' compensation rate. Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6).

Based on the above findings of fact, I concluded that the week ending February 14, 2014 does not fairly reflect Steve's customary earnings and therefore, should be excluded from the rate calculation. Thus, I find that claimant gross average earnings at the time of the injury were \$1,027.37. Additionally, based on the above findings of fact, I concluded that Steve's weekly workers' compensation rate should be based on an individual who was married and entitled to 7 exemptions. Thus, Steve's correct weekly workers' compensation rate is \$692.14. Therefore, all weekly benefits should be paid based on a weekly workers' compensation rate of \$692.14. Defendants shall pay claimant any underpayment of weekly benefits, plus interest pursuant to Iowa Code section 85.30.

Claimant is also seeking additional healing period benefits. Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986). If an injured employee refuses to accept suitable work, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal. Iowa Code section 85.33(3).

Based on the above findings of fact, I conclude that claimant refused suitable work during the period of November 17, 2014 through January 14, 2015. Therefore, claimant is not entitled to temporary benefits during this time. Because I found he was medically capable of returning to employment substantially similar to the employment he was engaged in at the time of his injury his initial healing period ended on November 17, 2014. Under a recent Iowa Supreme Court decision permanent partial disability benefits should commence on November 18, 2014.¹ See Evenson v. Winnebago Industries, Inc., No. 14-2097 (Iowa, June 3, 2016).

Furthermore, I concluded that claimant's healing period began again on January 14, 2015, when he had restrictions placed on his activities and continuing until such time as claimant returns to work, returns to substantially similar work he was

¹ But compare that case to Bell Brothers Hearing & Air Conditioning v. Gwinn, 779 N.W.2d 193, 200-201 (Iowa 2010) (a claim for permanent disability benefits is not ripe until maximum medical improvement has been achieved; until that time, only temporary benefits are available.)

performing at the time of injury, or achieves maximum medical improvement, whichever occurs first.

Costs are to be assessed at the discretion of the deputy commissioner hearing the case. Because claimant was generally successful in his claim, I find it is appropriate to assess costs against the defendants as set forth above. Thus, defendants shall reimburse claimant costs in the amount of \$100.00.

The parties have asked the undersigned to address the proper procedure for scheduling a hearing on this issue of permanency. Because the issue of permanency was bifurcated the parties may simply follow the normal scheduling process to request their next hearing date. When requesting the next hearing date, please indicate that this was previously bifurcated. The issue of permanency may be heard by any deputy.

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the rate of six hundred ninety-two and 14/100 dollars (\$692.14).

Defendants shall pay healing period benefits beginning on January 14, 2015, when he had restrictions placed on his activities and continuing until such time as claimant returns to work, returns to substantially similar work he was performing at the time of injury, or achieves maximum medical improvement, whichever occurs first.

All past due weekly benefits shall be paid in lump sum with applicable interest pursuant to Iowa Code section 85.30.

Defendants shall be entitled to credit for all weekly benefits paid to date.

Defendants shall reimburse claimant's costs in the amount of one hundred and no/100 dollars (\$100.00).

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1 (2) and 876 IAC 11.7.

Signed and filed this 13th day of July, 2016.



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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.