

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TIMOTHY PETTUS, JR.,

Claimant,

VS.

BADGER DAYLIGHTING,

Employer,

and

LIBERTY MUTUAL FIRE INS. CO.,

Insurance Carrier,
Defendants.

File No. 21012446.01

ARBITRATION

DECISION

Head Note No. 1803, 2910

STATEMENT OF THE CASE

The claimant, Timothy Pettus, filed a petition for arbitration on April 12, 2022, against Badger Daylighting, employer, and Liberty Mutual Fire Insurance Company, insurance carrier. The employer was served the petition on April 18, 2022. The carrier was served on April 20, 2022. There are return cards in the agency file which verify service. No answer or responsive pleading has ever been filed by either defendant. On June 8, 2022, claimant filed a Notice of Intent to File Written Application for Judgment by Default upon the employer and carrier. Claimant then filed for Default Judgement on June 23, 2022. In the claimant's Motion for Default, the claimant has attached the proof that the employer received the Notice of Intent on June 13, 2022. The carrier received it on June 14, 2022. The undersigned waited over a month, until July 19, 2022, giving the defendants ample opportunity to respond to the motion. On July 19, 2022, the undersigned granted the claimant's Motion for Default after a full review of the file. On August 5, 2022, the undersigned sent an Order of Scheduling setting the hearing for November 7, 2022.

The matter came on for hearing on November 7, 2022, before Deputy Workers' Compensation Commissioner Joe Walsh, in Des Moines, Iowa via Zoom teleconference. The claimant was represented by Christopher Spaulding. The defendants did not appear for hearing. The record in the case consists of Claimant's Exhibits 1 through 7. The claimant testified at hearing. The hearing was recorded electronically. The matter was fully submitted on November 7, 2022.

ISSUES

The parties submitted the following issues for determination:

1. Whether the claimant sustained an injury which arose out of and in the course of his employment on October 1, 2021, and if so, what benefits is he entitled to?

FINDINGS OF FACT

Claimant Timothy Pettus testified live and under oath at hearing. He is a high school graduate with some community college coursework who resides in Des Moines, Iowa. I find him to be a credible witness. His testimony closely matches other evidence in the record. There was nothing about his demeanor which was unusual.

Since high school, Mr. Pettus earned his living mostly in the area of construction work. He began working for Badger Daylighting in October 2020. He was an equipment operator and his job was working on pipeline. Sometime in 2021, he was assigned to a job in Oakland, Iowa. In that position he testified he earned \$43.90 per hour and drove a company vehicle, often working extensive hours. His wage summary is in Claimant's Exhibit 5.¹

Mr. Pettus testified that he sustained an injury which arose out of and in the course of his employment on October 1, 2021. He testified that work ended early that day. When he was leaving a gas station, his vehicle was T-boned by another vehicle which was traveling at a very high speed. Mr. Pettus testified that his work truck was not drivable. He immediately contacted an area manager for Badger who came to the accident site and stayed with him through his drug and alcohol tests.

He testified that the employer directed him to seek medical treatment through Concentra. He returned to Des Moines. On Monday, October 4, 2021, Mr. Pettus was evaluated by Carlos Moe, D.O., at Concentra.

Patient presents to Concentra Urgent care because of a work related injury, on 10/01/2021 around 10am he was driving a got hit by a driver driving fast, the driver hit the car on the side door. pt complains of pain on left shoulder, back of neck, and upper back pain, spasms and decreased ROM, he does have some radicular symptoms down the L arm at this time.

(Claimant's Exhibit 1, page 29 (errors in original)) Dr. Moe provided work restrictions, medications and physical therapy. His diagnosis at that time was: (a) acute whiplash injury, (2) pinched nerve in shoulder, and (3) strain of trapezius muscle, sequela. Mr. Pettus testified that he was off work until sometime in December 2021. He underwent extensive physical therapy during this time and attempted to communicate with Liberty

¹ Mr. Pettus testified that his actual pay was supposed to be \$44.90 per hour but he and other employees were shorted \$1.00 per hour. This was corrected after the fact through a union grievance.

Mutual regarding his claim. He testified that after initially being told his claim would be paid, he was eventually told that he had signed away his workers' compensation rights.

He continued treating with Concentra for some time. The therapy helped to some degree. (Cl. Ex. 1, p. 120) On November 29, 2021, a nurse practitioner released him to full duty. (Cl. Ex. 1, p. 170) There is very little documentation of what occurred at this visit although the note indicates Mr. Pettus asked to return to work. (Cl. Ex. 1, p. 173) His physical therapist examined him the same day and documented the following: "pt states that he is a little sore but overall pretty good. States he feels he is 90-95% better. States he feels he may be able to do his regular job." (Cl. Ex. 1, p. 179) When he returned to work in approximately mid-December 2021, he testified that his opinion was that his supervisor was trying to get rid of him by providing him reduced hours, as well as undesirable and unsuitable assignments such as cleaning bathrooms and other workers' vehicles.

On January 22, 2022, Mr. Pettus saw Kevin Hansen, D.C., with complaints of headaches, low back pain, neck pain, shoulder pain and mid back pain. (Cl. Ex. 2, p. 186) The following history is documented:

Neck and mid to low back pain. Left shoulder pain with tingling in to [sic] fingers of the left hand. Headaches that sometimes can be severe 3 to 4 times per week that may last all day. Difficulty concentrating some days and gets depressed over the persistence of his pain. On 10/1/2021 he was driving his work truck when another truck impacted his truck just behind the drivers [sic] side door. Stated he had his seat belt on and denies losing consciousness. Eventually was seen by Concentra then sent to PT treatments for almost 8 weeks. At that time he was told they did all they could do. PT said he may still have problems for 6 months. Company got him to sign off on it and sent back to work. He has just never got better.

(Cl. Ex. 2, p. 186) "After today's assessment patient's condition is as a result of the auto accident, patient's condition is due to a work related injury." (Cl. Ex. 2, p. 187) Dr. Hansen recommended conservative treatment for another 2 to 4 weeks and then re-evaluation. He provided manipulations, electrical stimulation/ultrasound and therapeutic exercises. (Cl. Ex. 2, p. 188)

He underwent a cervical MRI in February 2022. (Cl. Ex. 3, pp. 193-194) In April 2022, he started treating with Andrzej Szczepanek, M.D., at Central States Pain Clinic. Dr. Szczepanek quickly diagnosed cervical radiculopathy. (Cl. Ex. 3, p. 196) At this time, the pain was documented as being significant. Dr. Szczepanek documented the following:

Tim is a 32-year-old female [sic] with mostly left sided cervical pain radiating occasionally to the left upper extremity and associated with paresthesias, weakness and headaches. His symptoms started suddenly as a result of a motor vehicle accident in October 2021. He denied having

any cervical symptoms prior to the accident. This injury was work-related but his WC case has been closed despite persistent symptoms. He was allowed to return to light duty work, but even light work exacerbates his symptoms. Her [sic] pain has failed to improve with physical therapy, over-the-counter analgesics and muscle relaxers. A recent MRI of the cervical spine demonstrated small disc bulge at C7-T1 without any high-grade stenosis, otherwise it was unremarkable. Clinically the patient presented with a constellation of radicular (mostly in the C8 distribution), facetogenic and myofascial symptoms consistent with whiplash type injury.

(Cl. Ex. 3, p. 199) Dr. Szczepanek recommended trying two medications (pregabalin and tizanidine) before pursuing injection therapy. Since then he has continued to treat with Dr. Szczepanek, and in June 2022 began injection therapy, having trigger point injections. (Cl. Ex. 3, p. 213) He followed up in July and August 2022 as well. His last appointment was August 25, 2022, although he did have another appointment scheduled following the date of hearing.

In May 2022, Mr. Pettus testified that he quit working for Badger and began seeking other employment. He testified that he has another attorney who is pursuing some type of an employment claim against Badger. He started working for McAnich as an operating engineer in approximately September 2022. He earns \$34.20 per hour as an equipment operator. He does not get as much overtime. His benefits are generally the same, although he testified that because his earnings are lower, his pension contributions are lower. I understand from his testimony that he does not work under any formal restrictions, however, he does avoid certain activities which aggravate his symptoms.

In August 2022, Mr. Pettus was evaluated by Sunil Bansal, M.D., for an independent medical examination. (Cl. Ex. 4) Dr. Bansal reviewed appropriate records, interviewed and thoroughly examined Mr. Pettus. (Cl. Ex. 4, pp. 238-250) Dr. Bansal diagnosed cervical myofascial pain, assigning a 7 percent whole body impairment rating. (Cl. Ex. 4, p. 250) He opined this impairment was directly related to his October 1, 2021, work injury. (Cl. Ex. 4, pp. 250-251) He recommended Mr. Pettus continue treating with trigger point injections and assigned maximum medical improvement as of August 25, 2022, the date of his last appointment with Dr. Szczepanek. (Cl. Ex. 4, p. 252) He recommended restrictions of no lifting greater than 10 pounds overhead and avoidance of work activities that require repeated neck motion. (Cl. Ex. 4, p. 252) Mr. Pettus testified that he attempts to follow Dr. Bansal's restrictions at work, particularly the overhead lifting, however, it is apparent that this is not entirely possible.

Mr. Pettus testified credibly that he still has symptoms at the time of hearing. He testified that he has intermittent symptoms down his left arm which are aggravated by using his neck or left arm, particularly lifting pipe or climbing in and out of certain equipment. He has difficulty sleeping.

Based upon the evidence submitted, I specifically find the following:

1. Mr. Pettus sustained an injury which arose out of and in the course of his employment on October 1, 2021, when he was in an automobile accident performing work for his employer, Badger Daylighting.
2. At the time of his injury Mr. Pettus earned \$44.90 per hour and worked substantial overtime. His average weekly wage was \$2,372.80 per week and he was single with 6 exemptions.
3. The defendants directed his medical treatment through Concentra Medical in Des Moines. He was under medical restrictions and otherwise recuperating from his work injury from the date of his injury through the date the employer first brought him back to work on or about December 13, 2021. While the physician at Concentra may have released Mr. Pettus a couple of weeks prior to this, December 13, 2021, is the date Badger allowed him to return to work.
4. Mr. Pettus returned to work from December 2021, through May 2022. He worked fewer hours during this period. He testified that he felt he had no choice but to quit because of the reduced hours and undesirable and inappropriate work assignments.
5. Mr. Pettus had not fully healed from the work injury when he was released in December 2021. This is confirmed in the Concentra records. His employer, however, did not offer further medical care. Mr. Pettus sought and received beneficial treatment with a chiropractor in February 2022, and eventually sought pain management care with Dr. Szczepanek in April 2022. This medical treatment, primarily trigger point injections and medication management, is ongoing.
6. All of the medical treatment outlined in Claimant's Exhibit 7 is causally related to his work injury.
7. Mr. Pettus reached maximum medical improvement (MMI) as of August 25, 2022 per Dr. Bansal.
8. Mr. Pettus has a 7 percent whole body impairment rating and a recommendation for permanent medical restrictions of no overhead lifting of greater than 10 pounds and avoidance of repetitive neck movements.
9. Mr. Pettus is highly motivated and has secured appropriate employment as an equipment operator, the same general type of work he was performing at the time of injury. The position he obtained however is not as demanding. He works fewer hours and earns a little over \$10.00 per hour less than he did for Badger.
10. Mr. Pettus has sustained a moderate loss of earning capacity. It appears he is able to continue working as a union equipment operator at the present time, which significantly mitigates his loss of earning capacity. He has sustained a significant actual loss of earnings as a result of his work injury.

CONCLUSIONS OF LAW

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” refer 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 Elec. 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.

A personal injury contemplated by the workers’ compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke’s Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4)(b); Iowa Code section 85A.8; Iowa Code section 85A.14.

For the reasons set forth in the findings of fact, I find claimant sustained an injury which arose out of and in the course of his employment.

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).

I find that the work injury is a cause of both temporary and permanent disability.

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.

I find that claimant's average weekly wage was \$2,372.80 per week. At the time of hearing, he was single with 6 exemptions. I conclude that his appropriate rate of compensation is \$1,400.90 per week.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

I find that the defendants are responsible for the medical expenses set forth in Claimant's Exhibit 7. It is evident that some of these bills were paid by his group health plan. The defendants shall reimburse the appropriate parties for all of the care set forth in Claimant's Exhibit 7. He is entitled to ongoing future care from the date of hearing forward from his treating physician, Dr. Szczepanek.

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).

I find that the claimant was off work and recuperating from his injury from the date of injury through December 12, 2021. I conclude therefore that claimant is entitled

to 10.4285 week of compensation.

I find that claimant has sustained a permanent impairment and disability as a result of his work injury as opined by Dr. Bansal. I find that his disability should be assessed under Iowa Code section 85.34(2)(v) (2021).

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 Ry. Co. of Iowa, 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 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.

Having reviewed all of the appropriate factors of industrial disability, I conclude that claimant has sustained a 35 percent loss of earning capacity. I conclude that this entitles him to 175 weeks of compensation commencing on the date he reached maximum medical improvement, August 25, 2022.

ORDER

THEREFORE IT IS ORDERED

All benefits shall be paid at the rate of one thousand four hundred and 90/100 dollars (\$1,400.90) per week.

Defendants shall pay healing period benefits from the date of injury through December 12, 2022.

Defendants shall pay the claimant one hundred seventy-five (175) weeks of permanent partial disability benefits commencing August 25, 2022.

Defendants shall reimburse the medical expenses set forth in Claimant's Exhibit 7.

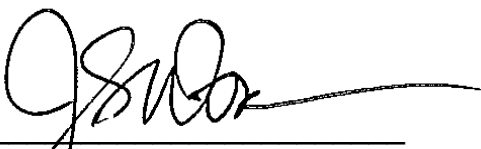
Defendants shall pay accrued weekly benefits in a lump sum.

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

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

Costs are taxed to defendants as set forth in Claimant's Exhibit 6 in the amount of three thousand six hundred eighty-five and 00/100 dollars (\$3,685.00), including the independent medical examination (IME) of Dr. Bansal.

Signed and filed this 30th day of January, 2023.



JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Christopher Spaulding (via WCES)

Badger Daylighting (via regular and certified mail)
4910 N County Rd, 900E
Brownsburg, IN 46112-8540

Liberty Mutual Fire Ins. Co. (via regular and certified mail)
175 Berkeley St.
Boston, MA 02116

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.