

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CURTIS GRIFFEY by mother and
Father and next friends SANDRA and
VERNON GRIFFEY and DEVON
MICHAEL GRIFFEY and MATTHEW
TYLER GRIFFEY by mother and next
friend KELSEY A. GRIFFEY and
AUSTIN ALAN ADAMS by mother
and next friend ROSANNE SMITH,

Claimant,

vs.

WESTERN EXPRESS, INC.,

Employer,

and

PA MANUFACTURERS
ASSOCIATION INSURANCE COMPANY,;

Insurance Carrier,
Defendants.

File No. 5062272

ARBITRATION

DECISION

Head Notes: 1201, 1204, 1901, 2907

STATEMENT OF THE CASE

Claimants, Curtis Griffey by mother and father and next friends, Sandra and Vernon Griffey and Devon Michael Griffey and Matthew Tyler Griffey by mother and next friend Kelsey A. Griffey and Austin Alan Adams by mother and next friend Rosanne Smith, filed petitions in arbitration seeking workers' compensation benefits from Western Express, Inc., employer and PA Manufacturers Association Insurance Company, insurance carrier as defendants. Hearing was held on January 13, 2020 in Des Moines, Iowa.

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.

Sandra Griffey, Kelsey A. Griffey, Matthew Griffey, Devon Griffey, and Rosanne Smith all testified live at trial. The evidentiary record also includes joint exhibits JE1-JE19, claimant, Curtis Griffey's exhibits 1-5, claimant, Devon Griffey's exhibits 6-12, claimant Matthew Griffey's exhibits 13-18, claimant, Austin Adams's exhibits 20-31 and defendants' exhibits A-B. All exhibits were received without objection. At the start of the hearing, the parties had not yet received the bills for the depositions of Craig Rypma, Ph.D., and Carma Mitchell, M.S. The parties agreed the record would be left open for submission of those bills as costs. At the conclusion of the arbitration hearing, the evidentiary record was left open solely for submission of the bills for the depositions of Dr. Rypma and Carma Mitchell. These bills were filed on January 16, 2020 and the record was closed at that time.

The parties submitted post-hearing briefs on February 14, 2020, at which time the case was fully submitted to the undersigned.

ISSUES

The parties submitted the following issues for resolution:

1. Which children are entitled to benefits?
2. During what period of time is each child entitled to benefits?
3. The appropriate weekly workers' compensation rate.
4. Assessment of costs.

FINDINGS OF FACT

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

Claimants, Curtis Griffey by mother and father and next friends, Sandra and Vernon Griffey; Devon Michael Griffey and Matthew Tyler Griffey by mother and next friend Kelsey A. Griffey; and Austin Alan Adams by mother and next friend Rosanne Smith, filed petitions in arbitration seeking death benefits from Western Express, Inc., employer and PA Manufacturers Association Insurance Company, insurance carrier as defendants.

Tragically, Gary Griffey died in a work-related accident on May 22, 2015, with Western Express, Inc. At the time of his death, Gary was 39 years old. Gary was hired by Western Express as a semi-truck operator on May 11, 2015. On May 22, 2015 he was working tandem in a truck that was involved in an accident. Gary was not the driver at the time of the accident; he was asleep in the back bunk. The driver does not remember exactly what occurred, but his vehicle swerved and hit an embankment on a highway outside of Iowa City, Iowa. The driver left the truck and tried to get back to where Gary was sleeping, but he had to stay away from the truck because there were

too many flames. Sadly, Gary died. There is no dispute that Gary's death arose out of and in the course of his employment. (Exhibit 22)

The central disputes in this case are which children are entitled to receive death benefits and the appropriate rate of weekly workers' compensation benefits. At the time of Gary's death, he was single. Gary Griffey had four biological sons who are seeking benefits through this action.

Curtis Griffey

Curtis Griffey was born in 1995 and is the biological son of Gary Griffey. Vernon Griffey is the biological father of Gary Griffey and Curtis Griffey's biological grandfather. Vernon has been married to Sandra Griffey for 43 years and they have raised Curtis Griffey since he was four months old. Although Curtis is 24 years old, he still lives with Sandra and Vernon in Minot, South Dakota because he is not capable of living on his own. Sandra and Vernon had attained a child support order against Gary through the North Dakota courts which was enforced through Indiana. At the time of his death, Gary was making periodic payments to child support. Sandra had intended to make the child support order permanent, but then Gary died. Gary and Curtis had a close relationship with one another. (Transcript pages 22-36; Joint Exhibits 1-10)

Curtis has been on Social Security Disability for severe autism, severe Attention Deficit Hyperactivity Disorder (ADHD), anxiety, and depression since he was nine years old. Curtis scored 70 on the Wechsler Adult Intelligence Scale which placed him within the borderline range of intellectual functioning. Sandra is the legal guardian of Curtis and the payee for his disability. Curtis has not received any workers' compensation payments in this matter. (Tr. pp. 25-36; JE1-10)

Sandra testified about her experience in raising and trying to assist Curtis through his various disabilities. She has participated in the Individualized Education Programs (IEP) and in the special training that Curtis received in school. Curtis has been in special classes since the age of four. He was in special education classes and in IEP plans. After his senior year in high school, he was placed in a program called Crossroads. He attended Crossroads for two years and was eventually able to obtain his high school diploma. He is a loner and also has anger management problems. Throughout his schooling he had a resource room available to him. This was basically a padded room that he could be placed in during his outbursts.

Sandra also participated in his medical appointments for the past 24 years. Sandra has tried multiple ways to try to help Curtis to live independently and to be able to take care of himself. Curtis has attempted to work, but is unable to maintain employment, even with the help of Job Corps. Due to the mental status of Curtis, Job Corps eventually dismissed him because they felt he just could not make employment work. He can get a job, but each job only lasts a few days or maybe one week. He has problems with personal hygiene. He cannot handle pressure or constructive criticism. When he experiences pressure or constructive criticism he basically shuts down and refuses to do the job. He has difficulty following even simple instructions. He cannot

manage money. Unfortunately, despite treatment, Job Corps assistance, conferences, IEPs, and training programs Curtis still cannot maintain employment or live independently. (Tr. pp. 22-50; JE1-10)

I find that Curtis is dependent upon others to support him, including what was to be child support from Gary. I further find that Curtis is mentally incapacitated from earning.

Devon Griffey & Matthew Griffey

Devon and Matthew are twins. They were born in 2000 and at the time of hearing were 19 years old. They are the biological sons of Gary and Kelsey Griffey. Gary and Kelsey were married from 1999 to 2010; they were not married at the time of Gary's death. After Gary and Kelsey divorced, the boys lived with Gary. For a while, Gary and Kelsey also lived together and had joint custody and cared for the boys in the same house. Kelsey is unable to work and receives Social Security Disability. At the time of Gary's death, Kelsey was living with Gary, Devon, Matthew, and Gary's girlfriend. Kelsey and Gary had joint custody and shared expenses for the children and the house. (Tr. pp. 55-60)

At the time of Gary's death, Devon and Matthew were fifteen years old and in high school. Even before Gary's death, the boys struggled in school. After their father's death, their problems increased. The boys had problems paying attention due to ADHD. Both boys were tested for intellectual problems and the results were described as borderline. Kelsey was told this meant borderline for mental retardation. Both boys have had special education plans and IEPs. Kelsey testified that the Lafayette school just kept passing the children to the next grade every year, even though they were behind academically. When Matthew was a junior, he was still taking classes from his freshman year. Once the school realized that continuing to pass the boys onto the next grade was not working, they pressured Kelsey to remove the children from school. She did withdraw the kids from school, so they could try to obtain their education elsewhere. Matthew continued his education, but Devon did not. (Tr. pp. 60-105)

Devon's academic struggles are demonstrated in his historical grade sheet. (JE11, pp. 1-3) Devon has ADHD and had been diagnosed with intermittent explosive disorder, oppositional defiant disorder, and at one time, depression. He has been prescribed medications for his mental disorders. Devon also has a speech problem, which makes him difficult to understand. He has a borderline IQ of 70. Kelsey testified that Devon's grades were a bit better than Matthew's, but Devon is not back in school yet. Due to his explosive disorder, he has problems interacting with others. Once his anger reaches a certain point he basically explodes. He throws things and he has hit his brother. He has episodes of anger and then he balls himself up in a corner, cries, shakes, and just holds himself. It is impossible to even try to talk to him during these times. (Tr. pp. 60-105; JE11-13; Claimant's Ex. 12, p. 12)

Devon has been employed. He does not have a driver's license, so when he did have a job he walked to work. He has tried taking the bus, but even with detailed

instructions, he gets lost. He worked at Hardee's for approximately four months, but that job ended because he had a pneumothorax. After he healed from that condition, Hardee's switched him from nights to days, so Devon quit. He also worked at McDonald's, but he quit that job. He does not understand the concept that you should not quit one job until you have another job. He is not capable of managing money or living on his own. He is extremely forgetful and stubborn. Devon speaks very slowly and deliberately. (Tr. pp. 112-122)

Matthew has been diagnosed with ADHD, oppositional defiant disorder, and epilepsy. Following the death of his father, he was diagnosed with post-traumatic stress disorder. Kelsey was told he might also have Asperger's syndrome, but this has never been formally diagnosed. Matthew's epilepsy makes it difficult for him to pay attention because he has seizures throughout the day. When it came time for him to do his homework, he had difficulty remembering what the teacher had told him. He also has difficulty staying awake in class. Matthew's historical grades demonstrate his academic struggles. Matthew went to the Excel Center which is a school for GEDs or diplomas after high school. Matthew has attended the Excel Center for approximately one year; during this time, he has passed one class. The school has now asked that he only take one class at a time. Matthew is attempting to continue at Excel to complete his high school classes. At the time of the hearing, he was almost twenty years old and still working on classes he should have taken his freshman year in high school. Matthew has never worked. He applied for a job once, but was never called back. He became angry that he was not called back. (Tr. pp. 60-105; JE8; JE14-16)

Matthew has received mental health treatment at Valley Oaks Health. The notes indicate that over a year's time he made little progress improving his behaviors. He was apathetic about improving his behavior and he struggled greatly with social interactions. He was extremely underweight due to poor nutrition. He was frequently lethargic and struggled to stay engaged with others. He lacked motivation and frequently refused to complete work. His diagnoses included attention deficit disorder with hyperactivity and oppositional defiant disorder. In April of 2015 he was prescribed Vyvanse, Strattera and Intuniv. He was also diagnosed with petite mal seizures. He struggled to maintain focus, complete tasks, and maintain organization. Matthew required frequent redirection to engage in a classroom setting and complete tasks and frequently he was unable to be redirected. The counselor noted that he still had not developed any of his own friendships and would only interact with adults when he was persistently and repeatedly engaged. By the end of 2016, Valley Oaks Health noted that Matthew had not complied with medication prescriptions and had not been willing to make any significant changes in his behaviors. His treatment was ended. (JE16)

Matthew has never worked anywhere. He has applied for jobs at Family Video, the public library, and at Goodwill, but he has never received a job offer. At hearing when Matthew was asked about his future plans, he replied that he did not know because he does not plan. He was living with his brother Zachary at the time of the hearing. Matthew does not know his address. (Tr. pp. 60-105)

Dr. Rypma performed a records review and issued a report dated September 19, 2019. His report discusses Matthew, Devon, and Austin.

Dr. Rypma has not met or interviewed Devon. In that report, Dr. Rypma rendered some opinions regarding Devon. Dr. Rypma noted that although Devon did struggle academically, he was able to gain employment at one time. He was employed at a Hardee's restaurant during the summer of 2018. However, he was not able to maintain the employment. He noted that Devon was moderately limited in his ability to understand and remember very short and simple instructions. He was markedly limited in several areas related to understanding and memory, sustained concentration and persistence, social interaction, and adaptation. Dr. Rypma opined that Devon will not improve sufficiently to be able to function and interact with the general public in a manner that would afford them the opportunity to work. He felt Devon appeared disabled by his emotional condition, which was exacerbated by prior social experiences, including the untimely death of his father. (Cl. Ex. 8. pp. 1-3, 6-7)

As noted by Dr. Rypma, historically Matthew would self-isolate and was not compliant with his medications. He also refused skills training or case management services. Dr. Rypma also noted that academically he functioned poorly. Matthew is markedly limited in several categories of understanding and memory, sustained concentration and persistence, social interaction, and adaptation. (Cl. Ex. 8, p. 8) Although he did not have an IQ measurement for Matthew, he noted that Matthew was functioning worse than Devon. (Cl. Ex. 12, p. 8)

Dr. Rypma had his deposition taken on January 2, 2020. He discussed how Matthew, Devon, and Austin all have behavioral difficulties. They have what he described as an extremely deficient level of functioning. He feels that Devon and Matthew, both have severely impaired ability to maintain attention or concentration. He does not believe that they will be able to maintain socially appropriate behavior that would allow them to interact with others in a work environment. Dr. Rypma opined that based on the diagnoses that Matthew and Devon have, combined with their academic performance, they would not be able to function in the workplace. Dr. Rypma further opined that any motivational deficit the boys might have is the direct result of their intellectual deficits, their emotional disabilities, and their mental health diagnoses. Dr. Rypma's opinions are unrebutted. (Cl. Ex. 12)

Carma Mitchell, a vocational consultant, issued a report on September 23, 2019 that contained her vocational opinion regarding Devon, Matthew, and Austin. Carma Mitchell was deposed on January 7, 2020. (Cl. Ex. 18) She stood by the opinions she offered in her report. Her opinions are unrebutted.

Ms. Mitchell opined that if a person were markedly limited in the following areas then that person would not be able to sustain full-time competitive employment:

The ability to maintain attention and concentration for extended periods.

The ability to perform activities within a schedule, maintain regular attendance and be punctual within customary tolerances.

The ability to sustain an ordinary routine without special supervision.

The ability to work in coordination with or in proximity to others without being distracted by them.

The ability to make simple work-related decisions.

The ability to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods.

The ability to accept instructions and respond appropriately to criticism from supervisors.

The ability to maintain socially appropriate behavior and to adhere to basic standards of neatness and cleanliness.

The ability to respond appropriately to changes in the work setting.

(Cl. Ex. 15, p. 1)

Dr. Rypma has opined that Devon and Matthew are each markedly limited in all of these areas.

Based on the testimony and the record as a whole, I find that Devon is dependent upon others to support him, including what was to be financial support from Gary. I further find that Devon is mentally incapacitated from earning.

Based on the testimony and the record as a whole, I find that Matthew is dependent upon others to support him, including what was to be financial support from Gary. I further find that Matthew is mentally incapacitated from earning.

Austin Adams

Gary's youngest child is Austin Adams. He was born in 1995 and was 15 years old at the time of the arbitration hearing. The parties have stipulated that Austin is entitled to receive benefits until he reaches the age of 18. Austin resides in Indiana with his mother, Rosanne Adams. Prior to Gary's death, he had a close relationship with Austin. Gary was ordered to pay child support and was paying child support for Austin. Unfortunately, Austin also struggles in school, as reflected in his official transcript and testing scores. His schooling includes several resource education classes. He has been diagnosed with ADHD. He also has anxiety, depression, and anger issues. (JE17; JE18; Tr. pp. 123-136) I find Austin is entitled to benefits until the age of 18 or

until the age of 25 if he is enrolled as a full-time student in any accredited educational institution.

Based on the briefs in this case, it appears Austin is seeking a determination as to whether he is physically or mentally incapacitated from earning. However, no determination is being made at this time regarding his capacity to earn.

There is a dispute between the parties regarding the calculation of the weekly rate of workers' compensation. Gary was hired on May 11, 2015, as a semi-truck operator. At the time of his death on May 22, 2015, he was still in training and was paid at a trainee rate. Defendants submitted a wage statement using like wages of another employee who was also in training. That statement says the rate of pay was \$35.72 per day or \$250.00 per week. An eight-hour day, at the rate of \$35.72, amounts to an hourly rate of \$4.47. A 40-hour work week at \$250.00, amounts to \$6.25 per hour. At the time of his death, Gary was working in tandem. Western Express expected tandem drivers to drive at least 5,000 miles per week which means the drivers would work more than 40 hours per week. (Def. Ex. B; Ex. 24, p. 9)

Gary wanted to be a truck driver because that is what his grandfather did. This job was like a dream come true for Gary. He was excited about his job with Western Express and intended to make this his career. Gary was excited about the job with Western Express because it was a chance for him to improve the lives of his sons. (Tr. pp. 34-60)

There is no dispute that Gary was a trainee at the time of his death. The evidence is unrefuted that Gary planned on making truck driving his career. Gary was not having any difficulty in his position with Western Express prior to the accident. It is clear that once driver's training was over, the driver's earnings were expected to increase. It is reasonable to assume that Gary did not intend to work for \$250.00 per week forever. I find that Gary's earnings were expected to increase. The evidence in this case shows that full-time drivers at Western Express earn \$65,000/year or more. (Cl. Ex. 25, p. 1) Another advertisement states Western Express drivers could earn up to \$65,000 per year. (Cl. Ex. 25, p. 2) Yet another advertisement notes that the pay scale for Western Express drivers ranges from a minimum of \$35,000 to a maximum of \$85,000. (Cl. Ex. 26, p. 3) Western Express was listed as number 7 on a list of Best Paying Trucking Companies, with an annual salary of \$79,628 and per hour pay of \$38.28. (Cl. Ex. 27, p. 1) Sandra Griffey testified that Western Express advertised that their drivers earned \$35,000 to 45,000 per year. (Tr. p. 43) The only other wage evidence in the record is that of another trainee. I find that the training pay Gary was receiving does not take into account the fact that his earnings were expected to increase. Additionally, I find that the training pay does not fairly reflect Gary's probable future earning loss. Based on the evidence before me, I find the appropriate basis for Gary's gross weekly wages is an annual salary of \$35,000, which is the minimum salary in evidence.

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 R. App. P. 6.14(6)(e).

The Iowa Code states:

1. a. When death results from the injury, the employer shall pay the dependents who were wholly dependent on the earnings of the employee for support at the time of the injury, during their lifetime, compensation upon the basis of eighty percent per week of the employee's average weekly spendable earnings, commencing from the date of death as follows:

(1) To the surviving spouse for life or until remarriage, provided that upon remarriage two years' benefits shall be paid to the surviving spouse in a lump sum, if there are no children entitled to benefits.

(2) To any child of the deceased until the child shall reach the age of eighteen, provided that a child beyond eighteen years of age shall receive benefits to the age of twenty-five if actually dependent, and the fact that a child is under twenty-five years of age and is enrolled as a full-time student in any accredited educational institution shall be a prima facie showing of actual dependency.

(3) To any child who was physically or mentally incapacitated from earning at the time of the injury causing death for the duration of the incapacity from earning.

Iowa Code § 85.31.

Gary was not married at the time of his death, it is only his four children who are seeking benefits. Iowa Code § 85.42 addresses conclusively presumed dependents, the pertinent portion states:

The following shall be conclusively presumed to be wholly dependent upon the deceased employee:

2. A child or children under eighteen years of age, and over said age if physically or mentally incapacitated from earning, whether actually dependent for support or not upon the parent at the time of the parent's death.

Iowa Code § 85.42.

With regard to payment to actual dependents, the law states:

In all other cases, a dependent shall be one actually dependent or mentally or physically incapacitated from earning. Such status shall be determined in accordance with the facts as of the date of the injury. In such cases if there is more than one person, the compensation benefit shall be equally divided among them. If there is no one wholly dependent and more than one person partially dependent, the compensation benefit shall be divided among them in the proportion each dependency bears to their aggregate dependency.

Iowa Code § 85.44.

Based on the above findings of fact, I conclude that Curtis Griffey has been and continues to be dependent upon others to support him, including what was to be child support from Gary Griffey. I further conclude that Curtis has been and is mentally incapacitated from earning.

Based on the above findings of fact, I conclude that Devon Griffey has been and continues to be dependent upon others to support him, including what was to be child support from Gary Griffey. I further conclude that Devon has been and is mentally incapacitated from earning.

Based on the above findings of fact, I conclude that Matthew Griffey has been and continues to be dependent upon others to support him, including what was to be child support from Gary Griffey. I further conclude that Matthew has been and is mentally incapacitated from earning.

Based on the above findings of fact, I find Austin is entitled to benefits until the age of 18 or until the age of 25 if he is enrolled as a full-time student in any accredited educational institution. No determination is being made at this time regarding his capacity to earn.

The weekly benefit amount shall be divided equally among the dependent children.

Under Iowa law, payments must be made to a trustee for minors or dependents. The Code states:

1. When a minor or a dependent who is mentally incompetent is entitled to weekly benefits under this chapter or chapter 85A or 85B, payment shall be made to the parent, guardian, or conservator, who shall act as trustee, and the money coming into the trustee's hands shall be expended for the use and benefit of the person entitled to it under the direction and orders of a district judge. The trustee shall qualify and give bond in an amount as the district judge directs, which may be increased or diminished from time to time.

2. If the domicile or residence of the minor or dependent who is mentally incompetent is outside the state of Iowa, the workers' compensation commissioner may order and direct that benefits to the minor or dependent be paid to a guardian, conservator, or legal representative duly qualified under the laws of the jurisdiction wherein the minor or dependent shall be domiciled or reside. Proof of the identity and qualification of the guardian, conservator, or other legal representative shall be furnished to the workers' compensation commissioner.

Iowa Code § 85.49.

Curtis Griffey is 24 years old and resides in South Dakota with Vernon and Sandra Griffey. Curtis is entitled to benefits from the date of Gary's death and shall continue so long as he remains mentally incapacitated from earning. A trustee shall be established and the payments shall be made to the trustee. The trustee must comply with the requirements of Iowa Code section 85.49, including a bond in the amount as directed by a district court judge.

Devon is 19 years old. Devon resides in Indiana with his uncle. Devon is entitled to benefits from the date of Gary's death and shall continue so long as he remains mentally incapacitated from earning. A trustee shall be established and the payments shall be made to the trustee. The trustee must comply with the requirements of Iowa Code section 85.49, including a bond in the amount as directed by a district court judge.

Matthew is 19 years old. Matthew resides in Indiana with his brother Zachary. Matthew is entitled to benefits from the date of Gary's death and shall continue so long as he remains mentally incapacitated from earning. A trustee shall be established and the payments shall be made to the trustee. The trustee must comply with the requirements of Iowa Code section 85.49, including a bond in the amount as directed by a district court judge.

Austin Adams is 15 years old and resides with his mother, Rosanne Smith, in Indiana. Austin is entitled to benefits from the date of Gary's death. A trustee shall be established and the payments shall be made to the trustee. The trustee must comply with the requirements of Iowa Code section 85.49, including a bond in the amount as directed by a district court judge.

We now turn to the issue of the appropriate weekly worker's compensation rate. Iowa Code 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.

When attempting to determine the wage for use in calculating the correct weekly compensation rate, the Iowa Supreme Court stated:

Our goal, when interpreting a statute, is to give effect to the intent of the legislature. *Griffin Pipe Prods. Co. v. Guarino*, 663 N.W.2d 862, 864 (Iowa 2003). To determine the intent of the legislature, we look first to the words of the statute itself as well as the context of the language at issue. *Id.* at 865. We seek to “interpret [the provision] in a manner consistent with the statute as an integrated whole.” *Id.* Mindful that a fundamental purpose of the workers' compensation statute is to benefit the injured workers, we interpret chapter 85 “liberally in favor of the employee.” *Id.*

Consistent with the remedial nature of workers' compensation laws, statutes for computation of wage bases are “meant to be applied, not mechanically nor technically, but flexibly, with a view always to achieving the ultimate objective of reflecting fairly the claimant's probable future earning loss.” *Hanigan*, 524 N.W.2d at 160 (quoting 2 Arthur Larson, *Workmen's Compensation Law* § 60.11, at 10–622 (1994) (now found at 5 Arthur Larson & Lex Larson, *Larson's Workers' Compensation Law* § 93.01[1][c], at 93–7 (2009))).

Jacobson Transp. Co. v. Harris, 778 N.W.2d 192, 197 (Iowa 2010).

Gary was hired on May 11, 2015, as a semi-truck operator. At the time of his death on May 22, 2015, he was still in training and was paid at a trainee pay rate. Defendants submitted a wage statement using like wages of another employee. That statement says the rate of pay was \$35.72 per day or \$250.00 per week. (Def. Ex. B)

There is no dispute that Gary was a trainee at the time of his death. Iowa Code provides, “If the employee was an apprentice or trainee when injured, and it is established under normal conditions the employee’s earnings should be expected to increase during the period of disability, that fact may be considered in computing the employee’s weekly earnings.” Iowa Code section 85.36(9)(b).

Defendants argue that this Code section is not applicable because Mr. Griffey's injury resulted in death, not “disability.” However, as noted above, the Iowa Supreme Court, has stated statutes for computation of wage bases are not meant to be applied, mechanically or technically, but flexibly, with the goal to fairly reflect the claimant's probable future earning loss. Furthermore, an individual who has died as the result of a work injury is permanently disabled from working. I find defendants' interpretation of Iowa Code section 85.36(9)(b) is too technical and does not achieve the goal of fairly reflecting Gary's probable future earning loss. It is unrefuted that Gary was a trainee on May 22, 2015. I find that Iowa Code section 85.36(9)(b) is the appropriate section to use in this case.

As noted above, Gary planned on making truck driving his career. I conclude that when Gary's training was over, his earnings were expected to increase. The

evidence in this case shows that full-time drivers at Western Express earned a minimum of \$35,000 per year. Based on the above findings of fact, I conclude the appropriate basis for Gary's gross weekly wages is an annual salary of \$35,000. This amounts to gross weekly wages of \$673.07. The parties have stipulated that Gary was single and entitled to five exemptions. Thus, the appropriate weekly workers' compensation rate in this case is four hundred fifty-four and 18/100 dollars (\$454.18).

Finally, the claimants are seeking an assessment of costs as set forth in claimant's exhibit 31. I find that the claimants were generally successful in this case and that an assessment of costs against the defendants is appropriate.

Claimants are seeking costs in the amount of \$100.00 for the filing fee. I find that this is an appropriate cost under 876 IAC 4.33(7).

Claimants are seeking costs in the amount of \$2,500.00 for the review of records and written report of Craig B. Rypma, Ph.D. Pursuant to Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015), I conclude that only charges related to drafting of a report to avoid the necessity of trial testimony are legitimately taxed as costs. I cannot decipher, and I am not willing to speculate, on the charges specifically attributed to Dr. Rypma's drafting of a report.

Claimant is seeking costs in the amount of \$130.00 for the review of records and written report of Carma Mitchell. The cost of two practitioner reports up to \$150.00 each is allowed as costs pursuant to our rule 876 IAC 4.33. It has been determined that reports from vocational counselors are considered practitioner reports as defined in our rule 876 IAC 4.17. However, I conclude that only charges related to drafting of a report are allowable in order to avoid the necessity of trial testimony. See Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015). In the present case, Ms. Mitchell's deposition was offered. I conclude claimant may not recover both costs. The cost of the deposition transcript is assessed as a cost; thus, I conclude the assessment of the report as a cost is not appropriate.

Claimant is seeking transcription costs for the depositions of Sandra Griffey, Matthew Griffey, Kelsey Griffey, Devon Griffey, Rosanne Adams, Craig Rypma, Ph.D., and Carma Mitchell. I conclude that these are also appropriate costs. These costs total \$622.20.

Defendants are assessed costs totaling \$722.20.

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the weekly rate of four hundred fifty-four and 18/100 dollars (\$454.18). The weekly benefit amount shall be divided equally among the dependent children.

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

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Deciga Sanchez v. Tyson Fresh Meats, Inc., File No. 5052008 (App. Apr. 23, 2018) (Ruling on Defendants' Motion to Enlarge, Reconsider or Amend Appeal Decision re: Interest Rate Issue).

Defendants shall reimburse claimants' costs as set forth above.

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 30th day of April, 2020.



ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Jeff Carter (via WCES)

Gary Goudelock (via WCES)

Bruce Stoltze (via WCES)

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.