

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RUBEN VILLASANA,

Claimant,

vs.

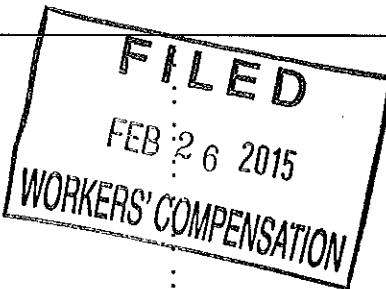
TEAM STAFFING SOLUTIONS,

Employer,

and

UNITED HEARTLAND,

Insurance Carrier,
Defendants.



File No. 5046335

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Ruben Villasana, claimant, has filed a petition in arbitration and seeks workers' compensation from Team Staffing Solutions, employer and United Heartland, insurance carrier, defendants.

This matter came on for hearing before deputy workers' compensation commissioner, Jon E. Heitland, on December 18, 2014 in Davenport, Iowa. The record in the case consists of claimant's exhibits 1 through 18; defense exhibits A through H; as well as the testimony of the claimant.

ISSUES

The parties presented the following issues for determination:

1. Whether the alleged injury as it pertains to the neck is a cause of permanent disability.
2. Whether the claimant is entitled to healing period benefits during a period of recovery from February 25, 2013 to May 13, 2014.
3. The extent of the claimant's entitlement to permanent partial disability benefits.

4. The commencement date for any permanent partial disability benefits awarded. Defendants assert a commencement date of November 6, 2012. Claimant asserts a date of September 11, 2014.
5. Whether the claimant is entitled to alternate medical care for his neck with Dr. Milas pursuant to Iowa Code section 85.27.
6. The amount of credit to which defendants are entitled.

FINDINGS OF FACT

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

Claimant, Ruben Villasana, testified he is 48 years old. His education consists of attending school in Mexico, where he was born. He completed middle school but did not attend high school.

His work history consists of working at West Liberty Foods, where his work involved processing turkeys, and required him to handle 50 pound bags. He worked there about a year before being laid off. He later returned after a short time off, and he worked another year before being laid off again. He was paid about \$8.50 or \$9.00 per hour, working an average of eight hours daily.

He then looked for another job. In May 2012, he began working with Team Staffing. On October 4, 2012, claimant was injured. Claimant arrived for work but was told the machines were not working. He and a co-worker were assigned to move a cabinet from the first floor to the basement. While taking it on a dolly down some stairs, the other worker lost his grip. The cabinet, which was heavy, hit claimant, breaking his left wrist, injuring his right shoulder. The right side of his head was hit, and his knee was bleeding.

Claimant was taken to a hospital, where he was seen by Daniel Miller, M.D. He was found to have pain in the left wrist, right shoulder, back of his head, and his knee. (Exhibit C, page 1) X-rays showed a left intra-articular distal radius fracture, an AC separation of the right shoulder, and abrasions. (Exhibit C, page 2)

On October 8, 2012, Atiba Jackson, M.D., put a cast on claimant's wrist, and prescribed physical therapy. For his shoulder, Dr. Jackson recommended only physical therapy.

He was later seen by Jerry Jochims, M.D. From October 12, 2012 through January, 2013, claimant was treated by Dr. Jochims. He focused on claimant's left wrist, and did little for claimant's right shoulder. He offered no surgery for the shoulder, and did not offer an MRI of the shoulder. Claimant asked about his shoulder, but Dr. Jochims gave his shoulder a pull, and told him he did not need surgery. He said as with a baseball player, it would improve with use. Dr. Jochims never ordered an MRI of

the right shoulder. For some of the appointments with Dr. Jochims, there was no interpreter present.

From October 4, 2012 to November 2012, claimant was off work about five weeks. He was then released back to light duty work, but he was assigned to the same duties as his co-workers. Dr. Jochims released him in January 2013.

In January or February 2013, claimant has again requested to see a doctor for his shoulder pain. He told someone at the human resources department at work that he was having pain and that his fingers were cold to the touch.

Claimant had been released to light duty work in November 2012. However, he was assigned to both light duty work and his regular job as well. He continued to experience shoulder pain, and would call in that he was unable to work due to pain. He reported the pain to "Lourdes" at the Nypro site, and she stated she had forwarded emails to Team Staffing but had not gotten a response. In February 2013, claimant was terminated for failing to appear for work or call in to be excused. However, claimant stated he did call in.

He saw no doctor for another year, until February 2014, when he began treating with Theron Jameson, D.O. In March 2014, an MRI was conducted. Claimant underwent right shoulder surgery involving a distal clavicle resection open, acromioclavicular repair using hamstring allograft, on May 14, 2014. (Ex. 11, p. 31)

Today his sleep is affected by his pain, and he cannot sleep on his right side. He described his pain as a burning sensation which increases if he leans against something. He took pain medications prescribed by Dr. Jameson after the surgery. Now he occasionally takes over-the-counter medication for pain when he needs to. He has less strength in his right arm, and has pain when he tries to lift something. His left wrist also is painful. He has pain when he uses the stick shift in his car.

Claimant has looked for another job. He has tried to find another job through Team Staffing and another company, Temp Staffing. Team Staffing has not called with any jobs.

When he left Team Staffing he was making \$9.00 per hour. He worked three twelve-hour days one week, and four twelve-hour days the next week, at a location called Nypro. His paychecks came from Team Staffing. His normal job was operating a machine which produced plastic for a food product.

On cross examination, claimant stated he looked for a job the week before the hearing at West Liberty, but he has not yet filled out their online application. He also inquired about two weeks ago at a molding plant in Mount Pleasant, Iowa. He was told work was "slow". He has been off work since losing his job at Nypro through Team Staffing in February 2013 but has not looked for work until a couple of weeks ago. He states this was because his shoulder was in a lot of pain from his separated shoulder.

When asked if his shoulder was not better since he has now looked for jobs, he stated it still hurts but not as much as before the surgery. He has gone back to Team Staffing once or twice and signed a paper indicating he would like to be contacted about any work, but they have not contacted him.

Claimant now takes some medications from before he did not finish. He only takes them as needed because they make him nervous. He takes pills for pain about once or twice per week. He has only a few left. Claimant also treats with a doctor in Iowa City for diabetes, unrelated to this work injury.

Claimant did not mention his ongoing shoulder issues to anyone at Team Staffing. He also agreed there was only one visit with Dr. Jochims without an interpreter. (Ex. B, page 10) He had seen Dr. Jochims two or three other times with an interpreter.

Claimant was asked about being struck on the right side of his head. Exhibit C, page 1, an emergency room note on the date of injury, states claimant complained of being hit on the back of his head. Claimant denies this, stating he had a "ball" on the side of his head. The exhibit merely notes an abrasion on the back of the head. The exhibit also states claimant's neck had full range of motion. Claimant disputes this as well.

He speaks almost no English. However, Exhibit C, page 1, the emergency room note, states claimant was offered translation but declined. He had a co-worker with him as well as an HR person from Nypro.

Claimant has a valid driver's license. He has not applied for Social Security Disability benefits, although he sought information about it. He lives in an apartment. He did not receive unemployment benefits following his termination. He applied but was denied. He has relied on relatives for support, and traveled to California by bus to stay with them. He agreed Dr. Jochims never assigned any permanent work restrictions, nor did Dr. Jameson.

He first noted pain in the right side of his neck when he pushed on it, but he does not recall when. He noticed coldness in his hand sometime after the accident. He does not recall telling Dr. Jameson on June 26, 2014, that he had no numbness or tingling anywhere in his right arm. On September 11, 2014, his last visit with Dr. Jameson, claimant told the doctor he only had a small amount of pain, in his clavicle area. (Ex. B, p. 33) In November 2014, claimant saw Dr. Milas for one visit.

On March 11, 2014, an MRI was done of the right shoulder. This showed an old healed fracture. (Ex. 10, p. 30) Claimant stated he had never broken his shoulder or arm before. Exhibit E, pages 4 and 5, shows Team Staffing talked to claimant about returning to Nypro to do light-duty work. His actual last day of work was February 21, 2013. Claimant reported he would not be in to work due to his shoulder pain on

February 25, 2013. Claimant agrees on February 26, March 1, March 2, and March 3, 2013, claimant was a "no call no show" and was terminated.

He also agreed he was normally not required to lift over 20 pounds at Nypro. He used a dolly to move heavy items.

On re-direct examination, claimant testified when he saw Dr. Sassman in July 2013, she explained why she was recommending permanent work restrictions, and that some of his pain may be due to his neck and not his shoulder. (Exs. 1, 2 and 3) When claimant was seen by Dr. Milas, he also explained some of claimant's pain may be caused by his neck, along with his shoulder. (Exs. 4, 5 and 6) From when he last saw Dr. Jochims in February 2014, claimant received no care from any authorized company doctor. (Exs. 7 and 8)

In February 2014, claimant was treating with Dr. Jameson. He underwent surgery in May 2014. He then received weekly checks. In September 2014 claimant was released by Dr. Jameson. He underwent physical therapy both before and after his surgery.

He does not know if the person at Team Staffing, Lourdes, actually sent emails about his pain to Team Staffing. When claimant failed to call in for three or four days, he states he called in the first day, did not call in for two days, then when he called in the fourth day he was told he was terminated by Nypro. Claimant clarified he called Team Staffing to say he was not coming in to work, but he did not call Nypro except for one day.

On re-cross examination, claimant could not recall if Dr. Sassman or Dr. Milas had him lift any weights to test his strength. He cannot write in English or read in English, but he can read and write in Spanish.

Dr. Jochims assigned claimant a rating of permanent partial impairment of 10 percent of the right upper extremity, or 6 percent of the body as a whole, on January 20, 2013. (Ex. B, p. 15)

He was seen by Robin Sassman, M.D., for an independent medical examination (IME) in June 2013. She found claimant to have a right shoulder AC joint separation, left wrist distal radius fracture and questionable nondisplaced ulnar styloid fracture, and cervical pain with radiculopathy. (Ex. 3, p. 12) For the right shoulder injury, she assigned claimant a rating of 11 percent permanent partial impairment of the right arm, or 7 percent of the whole person. She assigned permanent partial impairment of 3 percent of the left arm for the left wrist injury, or 2 percent of the whole person. For the neck injury, she assigned 15 percent of the whole person. The three impairment ratings combined equal 22 percent of the whole person. (Ex. 3, p. 14)

She also recommended an MRI of the cervical spine. She assigned work restrictions of limiting lifting, pushing, and carrying to 20 pounds rarely from floor to waist, and 10 pounds occasionally from waist to shoulder; no working over the shoulder; no crawling or use of a ladder; and gripping and grasping limited to below shoulder height on an occasional basis and no use of vibratory or power tools. (Id.)

Robert Milas, M.D., also conducted an IME, in November 2014. He concluded claimant had an 18 percent permanent partial impairment of the body as whole for the neck injury; 25 percent for the right upper extremity for the right shoulder injury, or 15 percent of the body as a whole; and 10 percent of the left arm for the left wrist injury, or 6 percent of the body as a whole. These ratings combine for a 34 percent permanent partial impairment of the whole person. (Ex. 6, p. 25)

CONCLUSIONS OF LAW

The first issue in this case is whether the alleged injury as it pertains to the neck is a cause of permanent disability.

Claimant seeks benefits for a traumatic injury involving three parts of his body: his right shoulder, his neck, and his left wrist. Defendants deny liability for any neck injury.

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).

Claimant failed to address this issue in his post-hearing brief.

Defendants argue claimant's initial emergency room records do not mention a neck injury, only that claimant was struck on the back of the head. Later treatment by Dr. Jochims was confined to the left wrist and shoulder, and does not include treatment for a neck injury. They note Dr. Sassman finds a neck condition in her IME, but without any empirical basis. Dr. Sassman did note numbness and tingling in claimant's right hand fingers as well as posterior arm pain on the right. (Ex. 3, p. 9) She did also recommend an MRI be conducted of claimant's neck injury, which was not done as defendants denied liability for any neck condition from the start.

Dr. Jameson did specifically state the work injury did not cause a cervical injury. (Ex. A) He had previously attributed claimant's right hand fingers numbness to "ulnar nerve distribution". (Ex. E, p. 19)

However, claimant has credibly testified as to ongoing cervical pain from the outset. He related how his complaints of neck pain were ignored. Both Dr. Sassman and Dr. Milas find a cervical condition related to the work injury. Their conclusions are consistent with claimant's testimony and the other evidence, whereas Dr. Jameson's explanation of ulnar nerve distribution is inconsistent with the facts. It is concluded the greater weight of the evidence establishes that claimant sustained a cervical condition as a result of his work injury.

The next issue is whether the claimant is entitled to healing period benefits during a period of recovery from February 25, 2013 to May 13, 2014.

Claimant was off work about five weeks. He received temporary benefits from the date of injury, October 4, 2012 until November 5, 2012. (Ex. 16, p. 1) He then returned to light-duty work. He worked until February 25, 2013, when shoulder pain caused him to miss work and he was terminated.

Claimant at that time requested resumption of temporary benefits, disputing Dr. Jochim's finding of maximum medical improvement (MMI) for the shoulder injury, and asserting a need for shoulder surgery and possibly cervical surgery. Claimant now requests healing period benefits from his last day of work, February 25, 2013, to the day before his shoulder surgery, May 13, 2014.

Defendants assert claimant was paid benefits through July 4, 2013. (Ex. D, p. 1; Ex. F) In addition, defendant's dispute claimant is entitled to healing period benefits because Dr. Jochims had placed claimant at MMI effective January 16, 2013. (Ex. B, p. 14) This is one of the conditions for termination of healing period under Iowa Code section 85.34(1). Defendants voluntarily paid claimant permanent partial disability benefits after that date through July 4, 2013.

Normally a finding of MMI would terminate healing period benefits. However, here the record clearly establishes Dr. Jochims' finding of MMI for the right shoulder was premature. Claimant later had to undergo right shoulder surgery to address the

effects of the work injury. He clearly was not at MMI for that condition when Dr. Jochims said he was.

Claimant will be awarded healing period benefits from February 25, 2013 to May 13, 2014.

The next issue is the extent of the claimant's entitlement to permanent partial disability benefits.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, 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.

For his work injury, claimant has received various ratings of permanent partial impairment. Dr. Jochims assigned claimant a rating of permanent partial impairment of 10 percent of the right upper extremity, or 6 percent of the body as a whole, for the right shoulder injury.

Dr. Sassman assigned claimant a rating of 11 percent permanent partial impairment of the right arm, or 7 percent of the whole person, for the right shoulder injury. She also assigned permanent partial impairment of 3 percent of the left arm for the left wrist injury, or 2 percent of the whole person. For the neck injury, she assigned 15 percent of the whole person. Her three impairment ratings combined equal 22 percent of the whole person.

She also assigned work restrictions of limiting lifting, pushing, and carrying to 20 pounds rarely from floor to waist, and 10 pounds occasionally from waist to shoulder; no working over the shoulder; no crawling or use of a ladder; and gripping and grasping limited to below shoulder height on an occasional basis and no use of vibratory or power tools. (Id.)

Dr. Silas found an 18 percent permanent partial impairment of the body as whole for the neck injury; 25 percent for the right upper extremity for the right shoulder injury, or 15 percent of the body as a whole; and 10 percent of the left arm for the left wrist injury, or 6 percent of the body as a whole. These ratings combine for a 34 percent permanent partial impairment of the whole person.

Dr. Jameson returned claimant to full duty work on September 11, 2014. (Ex. B, pp. 33, 36) He assigned a rating of 8 percent of the body as a whole for the right shoulder injury. (Ex. B, p. 37)

Claimant is 48 years old. His education is extremely limited, having never attended high school. His work history consists mostly of manual labor. His restrictions will adversely affect his ability to compete with non-impaired applicants for future manual labor jobs.

Claimant's termination of employment was due to being a "no call, no show" for two or three days. Claimant claims he did call in. Although claimant subjectively concluded he could not work due to shoulder pain, no physician had taken him off work.

Based on these and all other appropriate factors of industrial disability, it is concluded claimant has, as a result of his work injury, an industrial disability of 60 percent.

The next issue is the commencement date for any permanent partial disability benefits awarded. Defendants assert a commencement date of November 6, 2012. Claimant asserts a date of September 11, 2014.

Claimant asserts September 11, 2014, as the commencement date because that is when Dr. Jameson found him to be at MMI following his right shoulder surgery. As discussed above, Dr. Jochim's finding of MMI for the shoulder was premature. Claimant still needed surgery on his shoulder, which was not performed until May 2014. Claimant's recovery from that surgery was completed on September 11, 2014, per Dr. Jameson. The commencement date is found to be September 11, 2014.

The next issue is whether the claimant is entitled to alternate medical care with Dr. Milas pursuant to Iowa Code section 85.27.

Claimant previously requested an MRI of his neck injury, but defendants did not provide it. Defendants have denied liability for the neck injury throughout this case.

Both Dr. Sassman and Dr. Milas recommended claimant undergo a neck MRI. Dr. Milas found claimant to have cervical radiculopathy. This part of claimant's work injury has never been addressed for treatment.

Claimant is granted alternate medical care in the form of treatment by Dr. Milas for his neck injury.

The next issue is the amount of credit to which defendants are entitled.

The question is whether payments made from February 12, 2013 to July 4, 2014, should be deemed healing period benefits or permanent partial disability benefits. As found above, claimant was not at MMI when first designated by Dr. Jochims. He did not reach MMI until his shoulder injury was surgically addressed and he completed his recovery from the procedure. Benefits paid from February 12, 2013 to July 4, 2014, are healing period benefits and not permanent partial disability benefits. Defendants are not entitled to a credit for any portion of those benefits toward their permanent partial disability obligation.

The next issue is whether claimant is entitled to penalty benefits under Iowa Code section 86.13.

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.

Again, claimant has failed to address this issue in his post-hearing brief.

Defendants correctly point out Dr. Jochims found claimant to be at MMI early on. Although that opinion has been found to be in error in this decision, defendants were entitled to rely on it and acted reasonably in doing so. That opinion made entitlement to healing period benefits fairly debatable. Penalty benefits are not appropriate.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay unto the claimant healing period benefits from February 25, 2013 to May 13, 2014, at the rate of two hundred fifty six and 82/100 dollars (\$256.82) per week.

Defendants shall pay unto the claimant three hundred (300) weeks of permanent partial disability benefits at the rate of two hundred fifty six and 82/100 dollars (\$256.82) per week from September 11, 2014.

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 be given credit for benefits previously paid.

Defendants shall pay the claimant's prior medical expenses submitted by claimant at the hearing.

Defendants shall pay the future medical expenses of the claimant necessitated by the work injury.

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.

Signed and filed this 26th day of February, 2015.



JON E. HEITLAND
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

William J. Bribriescio
Attorney at Law
2407 - 18th St., Ste. 200
Bettendorf, IA 52722
bill@bribriesciolawfirm.com
bribries@netexpress.net

Edward Rose
Attorney at Law
111 E. 3rd St., Ste. 600
Davenport, IA 52801-1596
ejr@bettylawfirm.com

JEH/kjw

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.