

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RALPH ZESCH,

FILED

Claimant,

APR 26 2017

File No. 5053955

vs.

WORKERS COMPENSATION

ARBITRATION

HEARTLAND EXPRESS, INC.
OF IOWA,

DECISION

Employer,
Self-Insured,
Defendant.

Head Note Nos.: 1402.40, 1803, 3002

Claimant Ralph Zesch filed a petition in arbitration on February 25, 2016, alleging he sustained an injury to his back, and body as a whole while working for the defendant, Heartland Express, Inc. of Iowa ("Heartland"), on June 20, 2013. Heartland filed an answer on March 31, 2016.

An arbitration hearing was held on February 8, 2017, in Cedar Rapids, Iowa. Attorney Sara Riley represented Zesch. Zesch appeared and testified. Attorney Chris Scheldrup represented Heartland. Jared Bruening appeared and testified on behalf of Heartland. Exhibits 1 through 6, and A through O were admitted into the record. The record was left open through March 1, 2017, for the receipt of post-hearing briefs. At that time the record was closed.

Before the hearing the parties prepared a hearing report listing stipulations and issues to be decided. Heartland waived all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between Zesch and Heartland at the time of the alleged injury.
2. Zesch sustained an injury on June 20, 2013, which arose out of and in the course of his employment with Heartland.
3. The alleged injury is a cause of temporary disability during a period of recovery.
4. Temporary benefits are no longer in dispute.
5. If Zesch sustained a permanent disability, the disability is an industrial disability.

6. At the time of the alleged injury Zesch was single.
7. Medical benefits are no longer in dispute.
8. Prior to the hearing Zesch was paid compensation as set forth in Exhibit L.

ISSUES

1. Did the alleged injury cause a permanent disability?
2. If the alleged injury caused a permanent disability, what is the extent of disability?
3. If the alleged injury caused a permanent disability, what is the commencement date for permanent partial disability benefits?
4. What is Zesch's rate?
5. Should costs be assessed against either party?

FINDINGS OF FACT

Zesch graduated from high school in 1990. (Transcript, page 7) Throughout his schooling Zesch attended special education classes. (Tr., p. 8) Zesch participated in sports during his freshman year in high school, but stopped participating due to academic difficulties. (Tr., p. 9) At the time of the hearing he was forty-five. (Tr., p. 32)

After high school Zesch worked several jobs, selling vacuum cleaners, laying carpet, vinyl, and tile, and cleaning stables. (Tr., pp. 9-10) Zesch was not successful with sales. (Tr., pp. 9-10) He also briefly worked as a wood worker and as a temporary employee in distribution for Proctor and Gamble. (Exhibit N, p. 12)

In 1992, Zesch secured employment as a diesel mechanic for Ron Hummer Trucking. (Tr., pp. 10, 70; Ex. N, p. 12) Zesch reported he changed clutches, transmissions, tires, and rebuilt trucks. (Tr., pp. 70-71) Zesch continued to work for Ron Hummer Trucking for many years.

In February 1998, Oral B Laboratories hired Zesch as a discovery technician. (Tr., p. 11) Zesch worked in manufacturing performing assembly line work. (Tr., p. 11) Zesch continued to work for Oral B Laboratories through August 18, 2008, when he was terminated for poor attendance. (Tr., p. 11; Ex. N, p. 1) Zesch was unemployed for six to eight months after his termination. (Tr., p. 12)

Heartland hired Zesch to rebuild trailers in 2009. (Tr., p. 12) Zesch testified that he repaired damaged trailers for Heartland. (Tr., p. 12) On June 20, 2013, Zesch was on a lift in the air repairing a trailer that had been hit by a train. (Tr., p. 12) While he was cutting the trailer roof, the roof split apart and he fell through the roof of the trailer onto the trailer floor. (Tr., pp. 12-13) Zesch reported he tried to move, but he was in

pain, and he yelled for help. (Tr., p. 13) A Heartland employee came to Zesch's aid, and later he saw Bruening, the shop foreman. (Tr., pp. 14, 89) Bruening grabbed Zesch's hand and told him not to move. (Tr., p. 14)

Heartland called an ambulance and Zesch was transported to the University of Iowa Hospitals and Clinics ("UIHC") for treatment. (Ex. 1; Tr., p. 14) UIHC staff assessed Zesch with thoracic spine fractures at T4, T7, and T10-12, and prescribed a brace cyclobenzaprine and oxycodone. (Ex. 2, pp. 1-2) Zesch was admitted to the UIHC and discharged on June 22, 2013. (Exs. 2; D)

During his hospitalization Zesch received magnetic resonance imaging and computerized tomography. (Exs. 2, p. 11D, p. 9) The reviewing radiologist compared both, and listed an impression of:

1. No acute fracture of the cervical spine.
2. Interspinous ligament strain of the cervical spine.
3. Congenital cervical spinal stenosis, with superimposed degenerative changes resulting in moderate spinal canal stenosis as described.
4. Burst fracture at T7 with 3 mm retropulsion without evidence for cord compression or signal abnormality.
5. Acute compression fractures T4, T10, T11, and T12.
6. Focal disruption the posterior longitudinal ligament at T7. ALL and ligamentum flavum appear intact.
7. No evidence for epidural hematoma.

(Exs. 2, p. 12; D, p. 12)

Zesch received follow-up care at the UIHC with Ambur Reddy, M.D., in neurosurgery. (Ex. 2, pp. 13-15) During his appointment on July 11, 2013, Zesch reported he was not taking narcotics, but he was taking Flexeril at night to sleep due to discomfort. (Exs. 2, p. 13; D, p. 24) Dr. Reddy released Zesch to return to light duty work four hours per day for two weeks, six hours per day for one week, and then eight hours per day, and imposed a restriction of lifting no more than ten to fifteen pounds, effective Monday, July 15, 2013. (Exs. 2, pp. 15, 26; D, pp. 26-27) Zesch returned to work.

Zesch returned to the UIHC on August 2, 2013, reporting he was experiencing a mild backache, and denying any weakness or numbness of his bilateral lower extremities. (Ex. 2, p. 16) Dr. Reddy recommended he continue wearing his back brace, and imposed a lifting restriction of ten pounds. (Exs. 2, pp. 16, 27; D, p. 32)

During his appointment on September 13, 2013, Dr. Reddy released Zesch from all restrictions effective September 16, 2013, and told him he could wear his back brace for comfort. (Exs. 2, pp. 19, 28; D, pp. 33, 35) Dr. Reddy prescribed cyclobenzaprine for muscle spasms, buspirone, and fluoxetine. (Exs. 2, p. 20; D, 34)

Dr. Reddy referred Zesch to Joseph Chen, M.D., a physiatrist, for an impairment rating in November 2013. (Exs. 2, p. 21; D, p. 36) Dr. Chen noted Zesch had been released to full duty on August 2, 2013, he was continuing to perform computer work, and he was eager to return to his prior work duties. (Exs. 2, p. 22; D, p. 37) Dr. Chen examined Zesch, reviewed his medical records, and diagnosed him with multiple fractures of the thoracic spine. (Exs. 2, pp. 24-25; D, pp. 39-40) Dr. Chen opined:

Because of your multiple thoracic compression fractures at T4, T7, T10, T11, and T12, that were seen on your thoracic spine CT, you can be rated as having a 2% impairment of the whole person for each of these levels according to Table 15-7 page 404 of the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition. Therefore, it is my medical opinion that you have a **10% impairment of the whole person** as a result of your work-related injury of June 2013. (Emphasis in original.)

(Ex. A, p. 1) Dr. Chen recommended no permanent restrictions. (Exs. A, p. 1; D, p. 40)

Robin Sassman, M.D., an occupational medicine physician, conducted an independent medical evaluation of Zesch on October 27, 2014. (Ex. 3) Dr. Sassman reviewed Zesch's medical records and examined him. (Ex. 3, p. 1) Dr. Sassman diagnosed Zesch with T4, T10, T11, and T12 thoracic spine compression fractures, and a T7 burst fracture as a result of his fall on June 20, 2013, at work. (Ex. 3, pp. 1, 6) Zesch reported that he was experiencing "fairly constant" pain in the middle of his back between his shoulder blades, with tightness and stiffness. (Ex. 3, p. 3) Zesch told Dr. Sassman he could ride his motorcycle, but not for as long as he used to be able to ride it, and he had not tried bowling, softball, or golf since his work injury. (Ex. 3, p. 4)

Dr. Sassman opined:

According to the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition*, pages 379-380, the Range of Motion Method appears appropriate given that he had fractures at multiple levels in the thoracic spine. The following measurements were determined to be valid and were used to assign impairment by the Range of Motion Method: Figure 15-10 on page 411 was used to determine range of motion impairment for flexion and extension. The maximum thoracic flexion angle was 20 degrees, which equates to 2% impairment of the whole person.

Table 15-11 on page 414 was used to determine range of motion impairment for rotation angles. The maximum thoracic left rotation angle was 18 degrees, which equates to 1% whole person impairment. The

maximum thoracic right rotation angle was 18 degrees, which equates to 1% whole person impairment.

Therefore, the total thoracic range of motion impairment by adding all of these together equals 4% impairment of the whole person.

Using Table 15-7 on page 404, Section I (fractures), for the T4 compression fracture he will be assigned 2% whole person impairment. For the T10 compression fracture he will be assigned 2% whole person impairment. For the T11 compression fracture he will be assigned 2% whole person impairment. For the T12 thoracic spine compression fractures he will be assigned 2% whole person impairment. For the T7 burst fracture, he will be assigned 5% whole person impairment.

No ratable impairment exists for sensory deficits.

Using the Combined Values Chart on page 604, 5% whole person impairment (for the T7 fracture) is combined with 4% whole person impairment (for range of motion) 2% whole person impairment (for the T4 fracture), 2% whole person impairment (for the T10 fracture) 2% whole person impairment (for the T11 fracture) 2% whole person impairment (for the T12 fractures) for a total of 17% whole person impairment.

This impairment rating differs from that of Dr. Chen who assigned him 10% impairment of the whole person. In reviewing his documentation, it is unclear how Dr. Chen arrived at this number. It does not appear that he applied the Range of Motion criteria, however, as instructed in *The Guides*. Therefore, it is my opinion that that the above impairment rating is consistent with the instructions in *The Guides* and reflective of Mr. Zesch's status at the time I examined him.

(Ex. 3, pp. 7-8) Dr. Sassman recommended restrictions of lifting, pushing, pulling, and carrying up to thirty pounds occasionally from floor to waist, forty pounds occasionally from waist to shoulder, keeping his elbows at his sides, and thirty pounds occasionally over shoulder height. (Ex. 3, p. 8) Dr. Sassman also found Zesch can occasionally sit, stand, and walk, but he needs to change positions frequently due to his symptoms, and recommended he limit squatting and bending to a rare basis. (Ex. 3, p. 8) Zesch testified his attorney requested physical therapy, which has not been approved by Heartland. (Tr., p. 74)

Jeffrey Westpheling, M.D., an occupational medicine physician, performed an independent medical evaluation of Zesch in October 2016. (Ex. B) Dr. Westpheling examined Zesch and reviewed his medical records. (Ex. B, p. 1) Zesch continued to complain of pain between his shoulder blades, a constant tightness, occasional shooting pain, and increased symptoms with prolonged sitting. (Ex. B, p. 2) Dr. Westpheling assessed Zesch with a history of compression fractures of T4, T10, T11, and T12, and history of a burst fracture of T7. (Ex. B, p. 2)

Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Westpheling opined:

According to page 380, figure 15-4, an injury involving multiple levels of the spine is rated using the range of motion method. This consists of 3 elements: diagnoses, range of motion, and any neurologic deficit.

In regard to diagnoses, we turn to table 15-7 on page 404. A 0-25% compression of a thoracic vertebrae is 2% whole person impairment. Therefore, he is awarded 2% whole person impairment for the fractures at T4, T10, T11 and T12. He is given 5% whole person impairment for the burst fracture at T7. These percents are then combined using the combined values chart on page 604 of the Guides to a 13% whole person.

In regard to range of motion, we turn to table 15-10 on page 411. Flexion to 51% is 0% whole person. We then turn to table 15-11 on page 414 which indicates that left rotation to 19° is 1% whole person impairment and right rotation is 17° is 1% whole person. These combine to 2% whole person.

There is no ratable neurologic deficit.

13% whole person impairment for diagnoses combined with 2% whole person impairment for range of motion equals 15% whole person impairment as a result of his work injuries.

(Ex. B, p. 3) Dr. Westpheling did not recommend any permanent work restrictions or additional care. (Ex. B, p. 3)

Zesch testified that his pain level is essentially the same as it was when he saw Dr. Chen in 2013. (Tr., p. 17) There are days when it feels better and days when it feels worse. (Tr., p. 18) Zesch described the pain as a dull ache to a sharp knife. (Tr., p. 28)

Zesch testified since he returned to work he has been performing the duties of a service writer. (Tr., p. 27) Zesch answers the telephone and takes the paperwork completed by the mechanics and enters the data into the computer. (Tr., p. 21) Zesch did not perform the duties of a service writer before his work injury. (Tr., p. 22) Zesch has received raises since his work injury. (Tr., p. 22) Zesch acknowledged that Heartland has employed service writers in the past; Heartland did not create the position for Zesch following his work injury. (Tr., p. 71) Before his work injury, Bruening was performing the service writer duties along with his foreman duties. (Tr., p. 99)

Zesch reported he is concerned about losing his employment. (Tr., p. 30) Zesch stated that he used to work more hours, checking the lot, an hour to ninety minutes each day. (Tr., p. 30) During his deposition, Zesch testified he worked between forty and forty-five hours per week before his work injury. (Tr., p. 62) The week of

January 27, 2017, Zesch worked 66.7 hours, and the week of January 20, 2017, he worked 56.3 hours. (Tr., p. 62) Zesch agreed that there were times in 2016 where he regularly worked fifty, approaching sixty hours per week. (Tr., p. 63) Zesch also reported a member of management has expressed he should not return to his former duties because he could be reinjured.

Since his work injury Zesch has performed additional duties beyond his work as a service writer. (Tr., pp. 57-58) Zesch testified that he has changed tires on trailers while working as a service writer. (Tr., p. 58) He has also performed service work on trucks, including putting "grease into the grease zerks and put[ting] grease under the fifth wheel." (Tr., p. 59) Zesch has swept the floor and scrubbed the floor with a self-propelled scrubbing machine, and he has pushed snow with a plow truck at work. (Tr., pp. 60, 92)

Zesch testified in his deposition in October 2016 that he believed he could perform his former duties with Heartland given his present physical condition. (Tr., pp. 63-64) Zesch has also looked for part-time employment as a party bus driver and pizza delivery person. (Tr., p. 65) Zesch reported he failed the DOT test for the party bus driver position, but acknowledged he holds a valid CDL license, and he failed the test due to reasons unrelated to his back injury. (Tr., pp. 76, 84) Zesch testified he has not heard back regarding the pizza delivery position. (Tr., p. 76) Zesch reported he had asked for additional hours from Heartland, he did not receive additional hours, so he applied for a second, part-time job. (Tr., pp. 77-78)

Since he was released to full duty Zesch has been able to mow his grass, shovel snow on his sidewalk, hunt, and fish. (Tr., pp. 66-67) He regularly drove his motorcycle to work until he sold it, and has been an assistant baseball coach for his son's team. (Tr., p. 67) Zesch testified he does not play baseball, but he plays catch and hits the ball for his son. (Tr., p. 68) Zesch testified at hearing he sold his motorcycle because he could not afford it and he could not ride it for more than thirty to forty-five minutes without experiencing severe pain in the middle of his back where his work injury occurred. (Tr., pp. 72-73)

Zesch has developed computer skills while working for Heartland. (Tr., pp. 80-81) Heartland recently combined two companies and two computer systems. (Tr., pp. 80, 90-91) Bruening testified that since Zesch was released to full duty, Zesch has not indicated to him that he could not perform any of his work because of ongoing problems with his back, and denied he had missed work because of symptoms related to his back. (Tr., pp. 95-96)

CONCLUSIONS OF LAW

I. Nature and Extent of Disability

The parties stipulated Zesch sustained an injury on June 20, 2013, which arose out of and in the course of his employment with Heartland. (Hearing Report) The parties also agree if Zesch sustained a permanent disability, the disability is an

industrial disability. (Hearing Report) Zesch contends he has sustained a permanent impairment. Heartland contends he has not sustained a permanent impairment.

The claimant bears the burden of proving the claimant's work-related injury is a proximate cause of the claimant's disability and need for medical care. Ayers v. D & N Fence Co., Inc., 731 N.W.2d 11, 17 (Iowa 2007); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 153 (Iowa 1997). "In order for a cause to be proximate, it must be a 'substantial factor.'" Ayers, 731 N.W.2d at 17. A probability of causation must exist, a mere possibility of causation is insufficient. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). The cause does not need to be the only cause, [i]t only needs to be one cause." Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60, 64 (Iowa 1981).

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The deputy commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

Three physicians have assigned Zesch permanent impairment ratings under the AMA Guides. Dr. Chen assigned a ten percent whole person impairment, but did not recommend any permanent restrictions. (Exs. A, p. 1; D, p. 40) Dr. Sassman assigned a seventeen percent whole person impairment, and recommended permanent restrictions. (Ex. 3, pp. 7-8) Dr. Westpheling assigned a fifteen percent whole person impairment and did not recommend any permanent restrictions. (Ex. B, p. 3) None of the examining physicians provided ongoing treatment to Zesch.

Dr. Chen's impairment rating does not account for range of motion. Dr. Sassman challenged Dr. Chen's opinion, noting it was unclear how Dr. Chen arrived upon his impairment rating and it did not appear that he had used the range of motion criteria as instructed in the AMA Guides. (Ex. 2, p. 8) Dr. Westpheling agreed with Dr. Sassman and explained "[a]ccording to page 380, figure 15-4, an injury involving multiple levels of the spine is rated using the range of motion method. This consists of 3 elements: diagnoses, range of motion, and any neurologic deficit." (Ex. B, p. 3) Zesch's injury occurred to multiple levels of his spine. Under the AMA Guides, the range of motion method should be used when determining Zesch's impairment rating. I do not find Dr. Chen's opinion persuasive because his opinion does not explain how he arrived at his conclusions and whether he considered range of motion.

I find Dr. Westpheling's opinion more persuasive than Dr. Sassman's opinion. Dr. Sassman has recommended Zesch receive additional medical care, and she has

recommended permanent restrictions. No other physician has recommended permanent restrictions, including Zesch's treating physician, Dr. Reddy. Zesch testified at hearing he continues to mow the grass and shovel snow at home. He has also performed activities at work without difficulty that require bending, squatting, and pushing, and pulling inconsistent with Dr. Sassman's opinion. The record does not support Dr. Sassman's opinion.

The AMA Guides are a "uniform set of standards and guidelines for medical practitioners to utilize in evaluating permanent impairment and rendering opinions on the percentages of impairment." Prewitt v. Firestone Tire & Rubber Co., 564 N.W.2d 852, 855 (Iowa 1997) (citing to an earlier version of the AMA Guides). No physician in this case has opined that Zesch has not sustained a permanent impairment. Zesch continues to complain about pain and his employer has not returned him to his pre-injury position. I find Zesch has established he sustained a permanent impairment.

"Industrial disability is determined by an evaluation of the employee's earning capacity." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 852 (Iowa 2011). In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u). When considering the extent of disability, the deputy commissioner considers all evidence, both medical and nonmedical. Evenson v. Winnebago Indus., Inc., 818 N.W.2d 360, 370 (Iowa 2016).

As discussed above, I find Dr. Westpheling's opinion more persuasive than the opinions of Drs. Chen and Sassman. Dr. Westpheling assigned Zesch a fifteen percent whole person impairment. (Ex. B, p. 3) He did not recommend any permanent work restrictions. (Ex. B, p. 3)

Zesch is forty-five and he is a high school graduate. Zesch attended special education classes throughout his schooling, but has developed computer skills while working for Heartland. While Zesch had learning difficulties in school, the record is void of evidence Zesch has difficulty learning new skills or tasks at work. During his employment with Heartland he developed his computer skills and was involved with a process where two computer systems were combined.

The record establishes Zesch is motivated to work. Zesch continues to work for Heartland and he has received at least one raise since his work injury. Zesch testified he is worried his job is in jeopardy because Heartland has assigned him to the service

writer position and Heartland has not allowed him to return to his former duties. A member of the management team has expressed several times Zesch should not return to his former employment fearing he will be reinjured. Zesch may fear his employment will be terminated, but this decision must be based on Zesch's current situation, and not the fear of some future event that could be the subject of a review-reopening action.

Since he returned to work, Zesch has performed additional duties beyond the service writer position, including changing tires on trailers, greasing the "grease zerks" and putting grease under the fifth wheel, sweeping the floor, running a scrubbing machine, and pushing snow with a plow truck. (Tr., pp. 58-60, 92) He also worked regular overtime for Heartland before the hearing. Zesch performs normal duties around his home, including mowing his lawn, shoveling snow. He also plays baseball with his son.

Zesch testified he experiences regular pain in his thoracic spine. During the hearing I observed Zesch change positions due to discomfort he was experiencing. I did not observe Zesch engage in furtive or suspicious movements during the hearing. He maintained appropriate eye contact and his rate of speech was normal. I found Zesch's testimony that he continues to experience regular pain in his thoracic spine convincing.

Zesch sustained a serious work injury. He has recovered to a great extent, due to his motivation to work and to lead a normal life. Zesch has experienced a permanent impairment, as documented by Dr. Westpheling, and he continues to experience pain following the work injury. Considering the factors of industrial disability, I conclude Zesch has sustained a twenty percent permanent impairment.

The parties dispute the commencement date for permanency in this case. In Evenson, the Iowa Supreme Court held that the healing period lasts until the claimant has returned to work, has reached maximum medical improvement, or until the claimant is medically capable of returning to substantially similar employment, "whichever occurs first." 881 N.W.2d at 372-74. The record establishes Zesch was released to return to work effective Monday, July 15, 2013, and he returned to work. (Exs. D, p. 27; L, p. 1) Under Evenson, the commencement date for permanent partial disability benefits is July 15, 2013, the date Zesch returned to work.

II. Rate

Zesch contends he is entitled to three exemptions when determining his rate because he has two children. Heartland contends Zesch is entitled to one exemption. Zesch testified he currently lives with his girlfriend, Jennifer Lampe, and their two minor children. (Tr., pp. 36-37) Zesch pays child support, which is deducted automatically from his pay. (Tr., p. 37) At the time of his injury Lampe and Zesch's children were not living with Zesch. (Tr., pp. 38-39, 55-56) Zesch did not claim his children as dependents on his 2013 income tax return, Exhibit H. The payroll withholding rules under the Internal Revenue Code and applicable regulations govern entitlement to exemptions in weekly rate determinations. Iowa Code § 85.61(6); 876 IAC 8.8; see also

James R. Lawyer, Iowa Practice Series – Workers' Compensation § 12.2., at 128. Zesch has not established he is entitled to three exemptions. The record supports he is entitled to one exemption.

Zesch alleges his average weekly wage is \$789.93 and Heartland avers his average weekly wage is \$773.40. For three of the thirteen weeks prior to the work injury, Zesch received an additional payment of \$30.00 per week for service calls. Zesch contends this compensation should be included in determining his rate; Heartland disagrees.

Iowa Code section 85.36 sets forth the basis for determining an injured employee's compensation rate. Mercy Med. Ctr. v. Healy, 801 N.W.2d 865, 870 (Iowa Ct. App. 2011). The basis of compensation shall be the "weekly earnings of the injured employee at the time of the injury." Iowa Code § 85.36.

Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee's employer for the work or employment for which the employee was employed . . . rounded to the nearest dollar.

Id. The term "gross earnings" is defined as "recurring payments by employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits." Id. § 85.61.

Zesch testified he received the payments when he was on call and had to leave for a repair in the field outside the office. (Tr., pp. 35-36) Bruening agreed that when employees leave the facility or office for a service call they received additional money for going off premises to perform the service. (Tr., pp. 96-97) The record supports Zesch received regular, recurring payments for service calls prior to his work injury. The \$30.00 payments for service calls should be included in the rate determination. According to the ratebook in effect at the time of Zesch's work injury, Zesch's weekly rate is \$494.01. <https://www.iowaworkcomp.gov/pdfs>.

III. Costs

Zesch seeks to recover the \$100.00 filing fee, the \$6.95 service fee, and \$75.00 cost of Zesch's deposition transcript set forth in Exhibit 5. Rule 876 IAC 4.33 outlines the costs that can be taxed, as follows,

Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original

notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

The rule allows for the recovery of the filing fee, service fee, and deposition transcript. Zesch is awarded \$181.95 in costs.

ORDER

IT IS THEREFORE ORDERED, that:

Defendant shall pay the claimant one hundred (100) weeks of permanent partial disability benefits, at the rate of four hundred ninety-four and 01/00 (\$494.01), commencing on July 15, 2013.

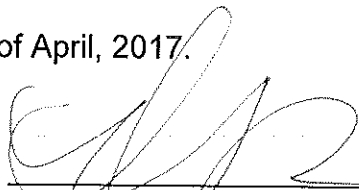
Defendant shall take a credit for all benefits previously paid.

Defendant shall pay accrued benefits in a lump sum, with interest on all accrued benefits pursuant to Iowa Code section 85.30.

Defendant is assessed the one hundred and 00/00 dollar (\$100.00) filing fee, the six and 95/100 dollar (\$6.95) service fee, and seventy-five and 00/00 dollar (\$75.00) cost of Zesch's deposition transcript.

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

Signed and filed this 26th day of April, 2017.


HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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HLP/srs

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.