BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

URIAH KREB,

Claimant,

vs.

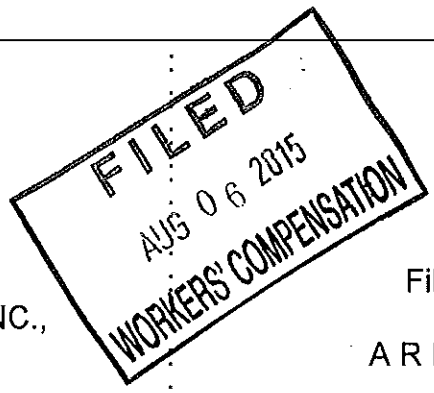
HOMETOWN RESTYLING, INC.,

Employer,

and

IOWA MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.



File No. 5048685

ARBITRATION

DECISION

Head Note Nos.: 1800, 1803, 2501, 2701

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Uriah Kreb, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on May 2, 2014. Claimant alleged he sustained a work-related injury on June 29, 2012. (Original notice and petition)

Hometown Restyling, Inc., defendant, and its workers' compensation insurance carrier, Iowa Mutual Insurance Co., filed their answer on June 5, 2014. They initially denied the occurrence of the work injury. A first report of injury was filed on October 9, 2013.

The hearing administrator scheduled the cases for hearing on May 4, 2015 at 1:00 p.m. The hearing took place in Cedar Rapids, Iowa at the Iowa Department of Workforce Development. The undersigned appointed Ms. Marla Happel, as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on his own behalf. He was the sole witness to testify.

The parties offered exhibits. Claimant offered exhibits marked 1 through 8. Defendants offered exhibits marked A through L. All proffered exhibits were admitted as evidence in the case. Post-hearing briefs were filed on June 8, 2015. The case was deemed fully submitted on that date.

STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

1. There was the existence of an employer-employee relationship at the time of the alleged injury.

2. Claimant sustained an injury on June 29, 2012 which arose out of and in the course of his employment;

3. The work injury is a cause of both temporary and permanent disability;

4. Temporary benefits are no longer at issue;

5. The commencement date for any permanent partial disability benefits that may be awarded is December 30, 2013;

6. The weekly benefit rate for which benefits should be paid is $559.71 per week;

7. Prior to the hearing, defendants paid unto claimant, 26.429 weeks of permanent partial disability benefits at the weekly rate of $559.71 per week, and defendants are entitled to a credit for the same; and

8. Defendants have waived any affirmative defenses they may have had available.

ISSUES

The issues presented are:

1. The extent of permanent disability benefits to which claimant is entitled;

2. Whether claimant is entitled to an independent medical examination pursuant to Iowa Code section 85.39;

3. Whether defendants are entitled to a credit for an overpayment in temporary benefits in the amount of $294.00;

4. Whether claimant is entitled to alternate medical care pursuant to Iowa Code section 85.27; and

5. To whom the costs of the litigation should be assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This deputy, after listening to the testimony of claimant at hearing, after judging the credibility of the claimant, and after reading the evidence and the post-hearing briefs makes the following findings of fact and conclusions of law:

The party who would suffer loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

Claimant is a pleasant 39-year-old single father of one minor child. He is right-hand dominant. At the time of the hearing, claimant resided in Cedar Rapids, Iowa.

Claimant left school in the tenth grade. He was declared an emancipated minor at the age of 16 and commenced work at Kentucky Fried Chicken during the week and became a construction worker on the weekends. To his credit, claimant obtained a GED in the mid-1990s. He has no formal education beyond the GED level.

Claimant moved to the Cedar Rapids area in the late 1990s. He commenced employment as a fertilizer applicator with TruGreen and as a sales representative. A detailed list of claimant's various employers is contained in claimant's answers to interrogatory 1, which is identified as Exhibit G, pages 4, 5, and 7. Those pages are incorporated by reference as though fully set out herein.

In 2008, claimant started working for Hometown Restyling. Claimant was hired to install siding and windows on residential buildings. He was a trusted employee and promoted to a working foreman. During the winter season, business slowed, and claimant would be laid off periodically. As a result, claimant collected unemployment insurance benefits when he was not working. He was also allowed to have his own construction jobs on the side, as well as, a snow plowing operation during the winter months.

It is undisputed; claimant sustained a work-related injury to his right shoulder on June 29, 2012. Initially, the owner sent claimant for chiropractic treatments with Casey Coberly, D.C. Claimant engaged in two unsuccessful chiropractic treatments on July 12, 2012 and July 13, 2012. (Exhibit B, pages 1 through 4)

On July 16, 2012, Jeffrey Jones, M.D., examined claimant's right shoulder. (Ex. 1, pp. 1 through 3) On July 18, 2012, Dr. Jones referred claimant to an orthopedist. (Ex. 1, p. 5)

Cassandra S. Lange, M.D., an orthopedist, examined claimant on August 6, 2012. Dr. Lange diagnosed claimant with: "Right shoulder pain following work related injury." (Ex. 2, p. 1) Dr. Lange recommended an MR arthrogram. (Ex. 2, p. 1)

Dr. Lange reviewed the radiographs. She indicated:

> **REVIEW OF RADIOGRAPHS:**
>
> His MR arthrogram did not indicate labral pathology nor [sic] any rotator cuff tears requiring surgery. Again noted is [sic] some arthritis changes in the distal clavicle.
>
> **ASSESSMENT:**
>
> I told him this was a good thing that we did not find anything disrupted in his shoulder that requires a surgical repair. He definitely has had a strain, and it is not unusual to have some pain, but structurally his shoulder looks pretty normal. It is hard to tell whether or not he considered this good news.

(Ex. 2, p. 3)

Dr. Lange ordered conservative modalities such as physical therapy, work hardening and an injection into claimant's right shoulder subacromial space. The conservative treatment methods did not provide any relief to claimant.

Defendants changed the authorized treating orthopedist to David S. Tearse, M.D. The initial examination occurred on November 20, 2012. Dr. Tearse diagnosed claimant with:

> **IMPRESSION:** Right shoulder adhesive capsulitis with myofascial pain and probable underlying impingement.

(Ex. 4, p. 1)

Dr. Tearse ordered additional physical therapy, soft tissue mobilization, stretching, ice therapy, medication and a TENS unit. (Ex. 4, p. 1) Work restrictions were imposed too. (Ex. 4, p. 1)

On December 12, 2012, claimant returned to Dr. Tearse with the same complaints and with little improvement. (Ex. 4, p. 2) On December 21, 2012, claimant underwent a right shoulder distention arthrogram for adhesive capsulitis. (Ex. 3, p. 4) A second right shoulder distention arthrogram occurred on February 25, 2013. (Ex. 3, p. 5)

Claimant returned to Dr. Tearse on March 15, 2013. Claimant had only improved slightly after all of the conservative measures had been performed. (Ex. 4, p. 4) Dr. Tearse opined it was reasonable to consider a right shoulder arthroscopy with debridement, capsular releases and manipulation. (Ex. 4, p. 4)

On April 10, 2013, claimant underwent a right shoulder arthroscopy, debridement, capsular releases, and manipulation under anesthesia. There were no operative complications. The patient tolerated the procedure well. (Ex. 4, pp. 13-14) Claimant engaged in follow-up care with Dr. Tearse on April 19, 2013, May 13, 2013, and June 10, 2013. Dr. Tearse ordered physical therapy and a TENS unit for claimant. On July 12, 2013, claimant had a corticosteroid injection to the subacromial bursa. (Ex. 4, p. 7) Effective August 8, 2013, Dr. Tearse ordered six more weeks of physical therapy. (Ex. 4, p. 8) On October 22, 2013, Dr. Tearse ordered six weeks of work hardening. (Ex. 4, p. 10) On December 2, 2013, Dr. Tearse ordered three more weeks of work hardening for claimant.

On December 30, 2013, claimant returned to Dr. Tearse for another follow-up appointment. The authorized treating surgeon opined claimant had reached maximum medical improvement. (Ex. 4, p. 12) Dr. Tearse advised claimant to continue with his home exercise program. The physician did not impose any permanent work restrictions. Claimant placed a self-imposed lifting restriction of ten pounds on his ability to work.

Dr. Tearse did determine claimant had a permanent impairment rating according to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Dr. Tearse assigned claimant an eight percent permanent impairment rating to the upper extremity which equated to a five percent permanent impairment rating to the body as a whole. (Ex. 4, p. 12)

Claimant exercised his right to an independent medical examination pursuant to Iowa Code section 85.39. Claimant presented to Richard F. Neiman, M.D., on August 15, 2014. Dr. Neiman examined claimant's right shoulder. Dr. Neiman found:

> His range of motion of the right shoulder is remarkably limited. He has flexion forward at 100 degrees, extension 40, abduction at 90, adduction at 50, external rotation 40, and internal rotation 40 degrees. Using American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition, he would qualify for Figure 16-40 with flexion at 100 degrees would be 5% impairment of the upper extremity. Extension at 40 degrees, 1%. Using Figure 16-43, abduction at 90 would be 4%, adduction at 50, zero. Using Figure 16-46, external rotation at 40 would be 1%. Internal rotation at 40 would be 3%. He does not qualify for Table 16-27, as the distal clavicle was not resected. However, he had a total acromionectomy. Level of impairment would be, in my opinion, of 14% of the upper extremity, translating into Table 16-3, 8% impairment of the whole person. As far as his industrial impairment, he has difficulty with any task which requires repetitive flexion, extension, abduction, adduction, and internal and external rotation of the right shoulder. Cannot use the

> right arm above the shoulder level. No restrictions below the shoulder level.

(Ex. 7, p. 3)

Dr. Neiman also opined claimant would benefit from an evaluation from another shoulder specialist, such as James Nepola, M.D. at the University of Iowa Hospitals and Clinics. Finally, Dr. Neiman opined claimant would benefit from vocational rehabilitation. (Ex. 7, p. 3)

After Dr. Neiman issued his independent medical opinion, defense counsel contacted Dr. Tearse and asked him to comment on Dr. Neiman's report. Dr. Tearse wrote in relevant portion:

> It is my opinion, to within a reasonable degree of medical certainty, that the cause for this loss in range of motion and therefore the increased impairment rating, and the recommendation by Dr. Nieman [sic] for permanent work restrictions, are all unrelated to his 6/29/12 work injury. I have not direct information regarding whether Mr. Kreb had any further injury, or exactly what his activities were, but I do not believe this change is related to his 6/29/12 work injury, as his condition had stabilized. I stand by my impairment rating and my recommendation for no work restrictions, based on my evaluation of him at that time, on 12/30/13.

(Ex. A, p. 2)

Claimant testified his shoulder felt horrible when Dr. Tearse released him to return to work without restrictions. (Transcript, page 27) Claimant stated he was not in any shape to perform construction work. (Tr., p. 27) He testified he did attempt to contact the owner of the siding company to see about sales work, but there was a breakdown in communication. (Tr., p. 28) Under cross-examination, claimant admitted he did miss an interview at his employer's place of business for a position that did not require installing siding. (Tr., pp. 57-58) In any event, claimant never worked for Hometown Restyling after the date of his work injury.

Since his release to return to work, claimant performed snow plowing during winter months as a self-employed individual. On April 21, 2014, claimant worked in sales for TruGreen Lawn Care. He terminated his position in March 2015 because he did not approve of the sales practices he was asked to implement. On the date of the hearing, claimant was working as a lead person for 5 Star Home Improvement. His job was paid on a commission basis. Claimant also contracted a remodeling project on his own. He testified he did not perform any of the manual labor but retained subcontractors to do the project.

The parties have stipulated claimant has sustained a permanent injury to his body as a whole. 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.

There are two impairment ratings for claimant's right shoulder. One is five percent to the body as a whole. The other is eight percent to the body as a whole. There are some discrepancies as to the loss of range of motion between the findings of Dr. Tearse and the findings of Dr. Neiman. Dr. Tearse did not impose any work restrictions. Dr. Neiman's restriction of no activity above shoulder height, seems more reasonable, given the nature of claimant's injury, and the surgical repair required. Dr. Neiman did not impose any lifting restrictions below shoulder level. Claimant's self-imposed lifting restriction of ten pounds is extreme, in light of the injury claimant sustained.

It is difficult to determine the actual loss of wages claimant has sustained since he left the employ of Hometown Restyling, Inc. Claimant has not filed relevant state and federal tax returns for 2013 and 2014. There have been periods of time when claimant was not working but then there were also periods when he was self-employed. Claimant testified he is losing his home, and he has lost all but one of his rental properties due to his poor financial situation.

Claimant is a young man of 39. He has the ability to engage in retraining or vocational rehabilitation. He has no education beyond the high school level. He is well spoken and appears to have good people skills.

After considering all of the relevant factors relating to industrial disability; it is the determination of the undersigned deputy workers' compensation commissioner; claimant has a permanent partial disability in the amount of 25 percent. Defendants shall pay unto claimant 125 weeks of permanent partial disability benefits commencing from the stipulated date of December 30, 2013 and payable at the rate of $559.71 per week.

Defendants shall take credit for all permanency benefits paid prior to the filing of this decision.

Defendants shall also take credit against permanency benefits for $294.00 in an overpayment made for healing period benefits. See McBride v. Casey's Marketing Company and Employer's Mutual Casualty Company, File No. 5037617 (Remand February 9, 2015).

In arbitration proceedings, interest accrues on unpaid permanent disability benefits from the onset of permanent disability. Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979); Benson v. Good Samaritan Ctr., File No. 765734 (Ruling on Rehearing, October 18, 1989).

The next issue to address is the issue of alternate medical care pursuant to Iowa Code section 85.27. Under Iowa Code section 85.27(1), the employer has the duty to furnish reasonable medical care to an injured claimant. Iowa Code section 85.27(4) provides the employer-chosen medical treatment "must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." However, if the employee is "dissatisfied" with the employer-chosen care being provided, the claimant may petition the workers' compensation commissioner to allow claimant to pursue alternate care if the parties are unable to agree to alternative care reasonably suited to treat the injury.

Claimant bears the burden to show the care provided by the employer is not reasonably suited to treat the injury, or the care was not offered promptly, or the care was unduly inconvenient for the claimant. Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 436 (Iowa 1997).

Dr. Neiman recommended claimant have another medical opinion concerning the right shoulder. Dr. Neiman suggested Dr. Nepola at the University of Iowa. Claimant's counsel requested alternate medical care in a letter, dated August 26, 2014. (Ex. 8) Defendants declined to set the appointment at the University of Iowa.

At the hearing, claimant failed to prove by a preponderance of the evidence that claimant's treatment was not reasonably suited to treat the injury, was not offered promptly, or the treatment caused undue inconvenience to claimant. It is true claimant is dissatisfied with the result of his surgery, but he has not shown Dr. Tearse acted unreasonably. However, a claimant's dissatisfaction with the chosen care, without more, is not sufficient grounds for granting an application for alternate medical care. Long v. Roberts Dairy Co., 528 N.W.2d 122, 123 (Iowa 1995).

Claimant is not entitled to alternate medical care with Dr. Nepola. Defendants are required to set another appointment for claimant with Dr. Tearse for followup care.

Claimant is requesting the cost of his independent medical examination pursuant to Iowa Code section 85.39. Section 85.39 permits an employee to be reimbursed for

subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Dr. Neiman charged $850.00 for the independent medical examination and report. The fee is reasonable. Defendants are liable for the same under Iowa Code section 85.39.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant one hundred twenty-five (125) weeks of permanent partial disability benefits commencing from December 30, 2013 and payable at the stipulated weekly benefit rate of five hundred fifty-nine and 71/100 dollars ($559.71) per week.

Accrued benefits shall be paid in a lump sum with interest as provided by law.

Defendants shall take credit for all benefits paid prior to the filing of this decision, including two hundred ninety-four and 00/100 dollars ($294.00) in an overpayment made on healing period benefits.

Defendants are assessed the cost of the independent medical examination performed by Dr. Neiman pursuant to Iowa Code section 85.39.

Within twenty (20) days of the filing of this decision, defendants shall schedule a followup appointment for claimant with Dr. Tearse.

Other costs to litigate this claim are assessed to defendants.

Defendants shall file all reports as required by this division.

Signed and filed this 6th day of August, 2015.

Michelle A. McGovern

MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.