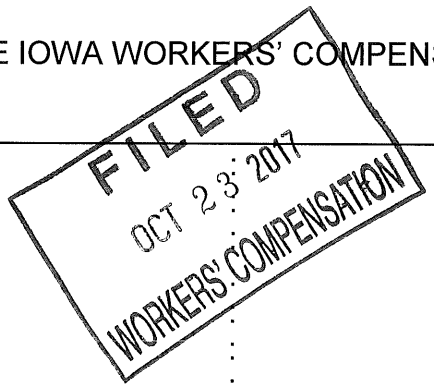
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



YOURN RIFAS,		
Claimant,		File No. 5053535
vs.		
THE REHAB CENTER OF DES MOINES,		ARBITRATION
Employer,		DECISION
AMERICAN ZURICH INS. CO.,		
Insurance Carrier, Defendants.		Head Notes: 1802, 1803, 1900, 2500

STATEMENT OF THE CASE

Yourn Rifas filed a petition for arbitration seeking workers' compensation benefits against The Rehab Center of Des Moines, as the employer, and American Zurich Insurance Company, its insurance carrier.

The matter came on for hearing on August 26, 2016, before Deputy Workers' Compensation Commissioner Joseph L. Walsh in Des Moines, Iowa. The record in the case consists of Claimant's Exhibits 1 through 19; Defense Exhibits A through C; as well the sworn testimony of claimant, Yourn Rifas. Buffy Nelson was appointed the official reporter of the notes of the proceeding. The parties briefed this case and the matter was fully submitted on October 7, 2016.

ISSUES & STIPULATIONS

The stipulations in the hearing report are approved and are binding.

Through the hearing report, the parties stipulated that there was an employer-employee relationship between the parties. The defendants further stipulated that the claimant sustained an injury which arose out of and in the course of employment on June 30, 2014. This injury is a cause of both temporary and permanent disability. Claimant seeks payment for temporary partial disability for two periods between November 2, 2014 and September 1, 2015. The parties stipulate claimant was paid TTD between April 8, 2015, and June 30, 3015. Claimant is further seeking permanent partial disability, commencing, by stipulation, on September 3, 2015.

The defendants dispute claimant's entitlement to permanent partial disability benefits, however, they stipulate that if any are owed, the disability is industrial. The elements comprising the rate of compensation are stipulated as outlined in the hearing order with the exception of the number of exemptions to which claimant is entitled. Affirmative defenses have been waived. Claimant seeks medical mileage as set forth in Claimant's Exhibit 17, as well as payment for an independent medical evaluation under section 85.39 as set forth in Claimant's Exhibit 18. The parties stipulate that claimant has received ongoing permanent partial disability payments from September 3, 2015, through the date of injury. In addition, claimant seeks penalties.

FINDINGS OF FACT

Claimant was born March 4, 1973 in the country of Cambodia. Claimant immigrated to the USA in 1983. Claimant lives with an extended family unit. She lives with children ages 21, 19, 12 and 5. She also resides with her disabled father. The 19-year-old is in college. The 21-year-old is not working nor in school. The 21-year-old does not help pay bills and was not taken as an exemption on the claimant's tax return.

I find that the 21-year-old child is not a dependent. The child is of legal age and fully capable of gainful employment. Absent attendance at school or some proof of disability, I find the 21-year-old is not a dependent. Claimant's disabled father pays $100.00 per month in bills. It is found that claimant's father is not a dependent. His disabled status, age and reliance on claimant would make him an exemption for tax purposes yet was not declared on claimant's tax returns. The remainder of the children are dependent due to age and attendance in school. Claimant is married with four exemptions for calculation of the workers' compensation rate.

Claimant is a high school graduate with some college. She obtained a certified nursing assistant (CNA) certificate. Claimant has worked as a CNA for the majority of her working life.

On June 30, 2014, Ms. Rifas sustained an injury while placing a patient in bed. On that date, she fell to the ground and felt a pop in her low back. Claimant experienced pain in the back and hip with radiation into the left leg.

The employer provided medical care. Claimant underwent an MRI examination, used prescription medication and had significant work restrictions during her recuperation. The employer was not interested in accommodating the restrictions and put claimant back to full-duty work. As her healing progressed the company doctor changed the restrictions to sit down work only effective August 19, 2017. The employer briefly accommodated the work restrictions. Claimant accommodated the pain syndrome by using her accrued paid time off from November 2, 2014 through January 31, 2015. This time off paid with paid time off (PTO) was not authorized by a doctor. There is no credible medical evidence to causally connect the claimant's PTO use to the work injury. While anecdotally connected, causation is within the domain of the medical expert. Without credible and reliable evidence of time off for work-related back pain, it

cannot be found that the PTO use was causally connected to the work injury. The fact that claimant had restrictions does not equate to lost time for a work-related injury any time claimant saw fit to call in absent.

Claimant underwent surgery for the back pain April 8, 2015. Lynn Nelson, M.D. performed an L3-5 decompression and L4-5 discectomy surgery. Claimant was off work receiving temporary disability benefits at a rate of $414.46 from April 8, 2015 through June 30, 2015. Claimant asserts the rate is low because of alleged miscalculation of dependents.

Claimant continued to have low back pain that was exacerbated by performance of work. Dr. Nelson gave work restrictions of four hours a day then six hours per day from July 1, 2015, through August 15, 2015. Claimant was released to return to work September 3, 2015 with no work restrictions, per Dr. Nelson.

Claimant asserts entitlement to temporary disability benefits for the period July 1, 2015, through September 1, 2015. I find that claimant was restricted in her work hours during this period for causally connected back pain. The reduction in work hours is connected to the injury and authorized by a company treating doctor. Claimant has, as a matter of fact, established entitlement to temporary partial disability payments during this period. The employer did not provide a reasonable basis for the denial of temporary partial disability (TPD) during this period of time that accrued prior to the commencement date for permanent partial disability (PPD).

After the release to return to work, claimant continued to experience symptoms in her back and leg. Dr. Nelson ordered a prescription and an MRI test. Dr. Nelson was unimpressed with claimant's ongoing complaints of pain and opined maximum medical improvement (MMI), a 10 percent impairment rating, no work restrictions, causally connected to the work injury. Dr. Nelson then declined to treat claimant further.

Claimant then sought treatment from Broadlawns Medical Center with pain medications. Claimant through date of hearing is receiving ongoing care from Broadlawns that was not authorized.

After reaching maximum medical improvement, claimant underwent two functional capacity evaluations (FCE). The FCE requested by claimant's attorney was valid, while that requested by the employer attorney was invalid, which is fairly common in workers' compensation cases. Claimant was placed in the light work category by the first FCE and in the medium light category by the second FCE. Again, the treating doctor disagreed with both and opined that claimant needed no work restrictions.

Claimant saw Sunil Bansal, M.D., who agreed with the 10 percent functional impairment rating. Dr. Bansal agreed with the assignment of work restrictions in the light work category.

Claimant, through date of hearing, continues to perform work for the employer.

She has help from coworkers with heavy lifting. The employer intentionally suppressed discovery of evidence from coworkers at employer's place of business. Claimant's testimony on this issue is found credible. Claimant asserts continued low back pain, buttocks pain, hip and leg pain secondary to the work-related injury. The assistance with lifting by co-workers supports her testimony. It is found that claimant has a lifting restriction in the 25-pound category for repetitive lifting.

CONCLUSIONS OF LAW

The first issue is whether claimant is entitled to temporary partial disability benefits during two distinct time periods. Claimant argues she is entitled to TPD benefits from November 2, 2014 through January, 31, 2015, and July 1, 2015, through September 1, 2015.

An employee is entitled to appropriate temporary partial disability benefits during those periods in which the employee is temporarily, partially disabled. An employee is temporarily, partially disabled when the employee is not capable medically of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability. Temporary partial benefits are not payable upon termination of temporary disability, healing period, or permanent partial disability simply because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury. Section 85.33(2).

Regarding the first time period, November 2014, through January 2015, I find the medical evidence is lacking on the issue of causation to the work injury. There is no medical evidence that claimant required a reduction in hours or that her reduced pay is otherwise causally related to her work injury.

Regarding the second timeframe (July through September 2015), I find that her reduction in pay during this period is directly causally related to her work injury. Therefore, claimant is entitled to TPD for this second period of time. Claimant's restricted hours were caused by medical restrictions from the authorized treating physician. The total award of TPD is $1,779.68.

The next issue is whether claimant is entitled to any 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.

Claimant was age 41 at the time of injury with a high school diploma and some college coursework. Claimant has a CNA certificate and has worked that profession for the majority of her vocational history. Claimant continues to work for this same employer with some accommodation from co-workers. The claimant is bright and employable with high-demand skills.

I find that claimant has work restrictions consistent with a medium work category. While the assessment of work restrictions was hotly disputed, it is obvious that the three-level surgery performed by Dr. Nelson resulted in a restricted ability to perform repetitive manual labor. There is no "faking" a back surgery. The reality is she had a three-level back surgery. Defendants argue strongly that claimant has embellished her condition; it does not overcome the objective evidence of surgical intervention. Just because the symptoms are not as bad as claimant makes it out to be does not mean this is not a legitimate case for work restrictions. To the contrary, to ignore the invasive procedure at three levels of the lumbar spine would be inconsistent with common sense. After this surgery claimant would be expected to have some work restrictions both on ability to work and precautionary to prevent further injury to the already surgically altered spinal column. It is found that claimant has a safe repetitive lifting capacity in the 25-pound range.

Claimant's ability to return to work is well established. She has continued on in her job with the same employer with a comparable rate of pay. This detracts from a finding of significant industrial disability.

Having considered all industrial disability factors it is held that as a result of the June 30, 2014 injury claimant has sustained 30 percent industrial disability causally connected to the work injury.

The next issue concerns calculation of claimant's weekly rate.

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.

In this case, there is no dispute about the gross wages. The dispute revolves around the claimant's dependents. The claimant seeks to have her grown adult child and her father as exemptions, while the defendants dispute this.

Having found claimant married and entitled to four dependents it follows that the rate is held as $407.28. Failure to claim the two disputed dependents on claimant's tax returns is strong evidence of non-dependency. Employer's rate calculated at $406.66 does not follow the rate book ending June 30, 2014. It is also not apparent why the benefits were paid at a rate of $414.46. Nevertheless, the rate book is always right, and this is the weekly benefit amount based on the stipulated gross of $587.63 (rounded up to $588.00). Should the parties find a scrivener's error in the hearing order, a nunc pro tunc order may be appropriate.

The next issue is entitlement to penalty.

Having found that claimant sustained an injury arising out of and in the course of her employment I concluded that claimant is entitled to these medical benefits pursuant to Iowa Code section 85.27. Defendants are responsible for the medical expenses set forth in the attachment to the hearing report.

Claimant also seeks an award of penalty benefits pursuant to Iowa Code section 86.13. Iowa Code section 86.13(4) provides:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination in benefits.
>
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

c. In order to be considered a reasonable or probable cause or excuse under paragraph "b," an excuse shall satisfy all of the following criteria:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

I find claimant is entitled to a penalty of $500.00 for the nonpayment of TPD benefits ending September 1, 2015. The defendants provided no excuse at hearing for their failure to pay.

As for PPD, a small penalty is awarded. The delay in payment of permanency benefits was from November 24, 2015, through December 30, 2015. This one-month delay is not so significant as to shock the conscience. In claims handling terms, it was a very short, albeit unreasonable delay. An additional $500.00 penalty is awarded for the delay in commencing permanency. Some latitude is granted employer since this did cover two holiday periods.

The next issue concerns entitlement to alternate medical care.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code Section 85.27 (2013).

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is

reasonable under the statute is a question of fact. Id. The employer's obligation turns on the question of reasonable necessity, not desirability. Id.; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983).

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

An employer's statutory right is to select the providers of care and the employer may consider cost and other pertinent factors when exercising its choice. Long, at 124. An employer (typically) is not a licensed health care provider and does not possess medical expertise. Accordingly, an employer does not have the right to control the methods the providers choose to evaluate, diagnose and treat the injured employee. An employer is not entitled to control a licensed health care provider's exercise of professional judgment. Assman v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 19, 1988). An employer's failure to follow recommendations of an authorized physician in matters of treatment is commonly a failure to provide reasonable treatment. Boggs v. Cargill, Inc., File No. 1050396 (Alt. Care Dec. January 31, 1994).

The employer did not authorize Broadlawns for treatment of claimant's ongoing complaints. Since Dr. Nelson completely refused to treat claimant, she is entitled to medical care from an alternate source. The employer is required to specify another doctor that will accept claimant as a patient and provide the ongoing maintenance care requested. Broadlawns is held as an authorized provider effective the date of this order until such time as employer designates alternate care suitable for claimant's ongoing maintenance treatment. Authorizing a provider who does not want to treat claimant is an abandonment of care.

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

Mileage costs are also disputed. Claimant incurred $255.89 in mileage costs attending doctor and therapy appointments. These costs are compensable as shown in Claimant's Exhibit 17.

Finally, claimant seeks assessment of hearing costs. The disputed item is a bill from Advantage PT for $850.00. This bill is for an FCE. It does not split out a report cost from the actual testing. The report cost is compensable. Here it cannot be determined what part of the $850.00 is for a report. The entire bill is thereby not taxed as a cost. The Charles Goodhue report however is a taxable cost as an expert witness. In total, the costs are taxed to employer in the amount of $2,767.03. Hearing costs are also taxed to employer.

ORDER

THEREFORE IT IS ORDERED:

All weekly benefits shall be paid at the rate of four hundred seven and 28/100 dollars ($407.28) per week.

Defendants shall pay claimant one thousand seven-hundred seventy-nine and 68/100 dollars ($1,779.68) temporary partial disability.

Defendants shall pay the claimant one hundred fifty (150) weeks of permanent partial disability benefits at the rate of four hundred seven and 28/100 dollars ($407.28) per week commencing September 3, 2015.

Defendants shall receive credit for benefits previously paid.

Defendants shall pay accrued weekly benefits in a lump sum.

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

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

Defendants shall pay a penalty of one thousand and 00/100 dollars ($1,000.00) for delays in payments of TPD and PPD.

Costs are taxed to defendants as set forth in the decision and for hearing costs incurred not shown in Exhibit 18.

Defendants shall pay claimant two hundred fifty-five and 89/100 dollars ($255.89) in mileage costs.

Broadlawns Medical Center is the authorized provider of medical care effective the date of this order until such time as defendants authorize a medical provider that is

willing to treat claimant for ongoing complaints of pain. Defendants shall designate a treating physician within two (2) weeks of this order.

Signed and filed this 23rd day of October, 2017.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JLW/sam

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.