BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ALBERTO CERVANTES,

Claimant,

vs.

JBS d/b/a SWIFT & COMPANY,

Employer,

and

AMERICAN ZURICH INSURANCE COMPANY,

Insurance Carrier,
Defendants.

FILED

OCT 25 2016

WORKERS COMPENSATION

File No. 5054219

ARBITRATION DECISION

Head Note Nos.: 1803, 2907, 4000

STATEMENT OF THE CASE

Alberto Cervantes, claimant, filed a petition for arbitration against JBS d/b/a Swift & Company (hereinafter referred to as "Swift"), as the employer, and American Zurich Insurance Company, as the insurance carrier. An in-person hearing occurred on June 21, 2016, in Des Moines, Iowa.

The evidentiary record includes claimant's exhibits 1 through 14. Defendants submitted exhibit A. All exhibits were received without objection. Claimant testified on his own behalf. No other witnesses testified live.

The evidentiary record closed at the conclusion of the arbitration hearing. Claimant's counsel filed a description of disputes brief at the time of hearing. Defense counsel requested the opportunity to file a responsive post-hearing brief. Defendants filed their post-hearing brief on July 13, 2016, at which time the case was considered fully submitted to the undersigned.

STIPULATIONS

The parties submitted a hearing report at the commencement of the arbitration hearing. In the order section of the hearing report, the undersigned found the hearing report "to be a correct representation of disputed issues and stipulations and the report

was approved and accepted into the record of this case." Those stipulations and the disputed issues were discussed by counsel and the undersigned at the commencement of hearing. However, for clarity sake, the parties have entered into the following stipulations:

1. The parties stipulate to "[t]he existence of an employer-employee relationship at the time of the alleged injury." (Hearing Report, page 1)

2. The parties stipulate that "Claimant sustained an injury on December 31, 2012 which arose out of and in the course of employment." (Hearing Report, p. 1)

3. The parties stipulate that "[t]he alleged injury is a cause of temporary disability during a period of recovery." (Hearing Report, p. 1)

4. The parties stipulate that "[t]he alleged injury is a cause of permanent disability." (Hearing Report, p. 1)

5. With respect to the claim for healing period benefits, the parties stipulate that claimant is entitled to healing period benefits from June 26, 2013 through June 28, 2013. (Hearing Report, p. 1)

6. With respect to the claim for permanent disability, the parties stipulate that "[t]he commencement date for permanent partial disability benefits, if any are awarded, is the 17th day of December, 2013." (Hearing Report, p. 1)

7. With respect to the rate of compensation, the parties stipulate that, "[a]t the time of the alleged injury, claimant's gross earnings were $689.00 per week." (Hearing Report, p. 1)

8. With respect to rate of compensation, the parties have stipulated, "[a]t the time of the alleged injury, . . . claimant was married." (Hearing Report, p. 1)

9. With respect to the rate of compensation, the parties have stipulated, "[a]t the time of the alleged injury, . . . claimant was entitled to 5 exemptions." (Hearing Report, p. 1)

10. The parties represent to the undersigned that they believe the applicable weekly rate, if benefits are awarded, is $485.10. (Hearing Report, p. 1)

11. The parties stipulate that "[p]rior to hearing, claimant was paid 5 weeks of compensation at the rate of $468.82 per week." (Hearing Report, p. 2)

The parties' stipulations are accepted. The undersigned will not enter any findings of fact or conclusions of law pertaining to any of the parties' stipulations. The

parties are expected to and ordered to comply with stipulations that have been accepted.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether the alleged injury should result in an award of permanent disability on an industrial disability basis.

2. The extent of claimant's entitlement to permanent partial disability benefits.

3. Whether defendants should be ordered to pay penalty benefits for an unreasonable delay or denial of permanent partial disability benefits.

4. Whether costs should be assessed against either party.

FINDINGS OF FACTS

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

Alberto Cervantes is 51 years of age. (Exhibit 2, p. 1) He was born in Mexico and attended school in Mexico through the sixth grade. He has no further education or formal training. He is able to read, write, and speak in Spanish. He is not able to read or write in English and he speaks very little English. (Claimant's testimony)

Mr. Cervantes immigrated to the United States in 1988 and worked in the construction industry in California for four years and then as a machine operator in California for approximately 13 years. He came to Iowa in 2010. Mr. Cervantes now resides in Marshalltown, Iowa. (Claimant's testimony)

After coming to Iowa, claimant worked for Tyson Fresh Meats in a job where he removed bones from meat in a meat processing facility. He sustained a right shoulder injury while working for Tyson and required surgical intervention for the right shoulder. After leaving his job at Tyson, claimant returned to California to correct his wife's immigration status and then moved back to Iowa. (Claimant's testimony)

Upon returning to Iowa in 2011, Mr. Cervantes obtained work with Swift. He initially performed a job "cleaning knuckles" and earning $11.25 per hour. At the time of the arbitration hearing, claimant was performing a job "cleaning ears" and was earning a base rate of $15.05 per hour. (Claimant's testimony)

On December 31, 2012, the loin line where claimant was working broke down. He was required to manually move meat in wheeled barrels to a different line. In the process of attempting to transfer the meat, claimant slipped, fell, and injured his left

shoulder. (Claimant's testimony) He initially treated through the nurse's station at Swift but was later referred for evaluation by a physician. (Ex. 1)

Conservative treatment attempts failed after a left shoulder MRI demonstrated a torn rotator cuff. (Ex. 3) The treating orthopaedic surgeon, Timothy Vinyard, M.D., diagnosed a left shoulder rotator cuff tear, left shoulder impingement and tendinopathy of the left shoulder. Dr. Vinyard recommended surgical intervention. (Ex. 4, p. 2)

On June 25, 2013, Dr. Vinyard performed an arthroscopic rotator cuff repair, biceps tenodesis, and subacromial decompression/acromioplasty on claimant's left shoulder. (Ex. 4, pp. 4-6) Claimant participated in appropriate rehabilitation efforts, including physical therapy, after surgery. Dr. Vinyard declared him to be at maximum medical improvement and discharged claimant from further care on April 29, 2014. (Ex. 4, p. 25)

Dr. Vinyard attempted to return claimant to full duty work without permanent restrictions. (Ex. 4, p. 21) However, claimant returned to Dr. Vinyard and indicated that he did not believe he was capable of working without restrictions. (Ex. 4, p. 22) Dr. Vinyard ordered a functional capacity evaluation (FCE), which was performed on April 17, 2014. (Ex. 6)

The FCE was considered valid and demonstrated that claimant is capable of lifting up to 40 pounds on an occasional basis and that he should only work overhead on an occasional basis, among other limitations. (Ex. 6) Dr. Vinyard adopted the FCE recommendations as claimant's permanent physical restrictions. (Ex. 4, p. 25) Dr. Vinyard assigned permanent impairment equal to two percent of the left upper extremity, or one percent of the whole person. (Ex. 4, pp. 28-29)

Claimant returned to Dr. Vinyard in 2016 complaining about additional symptoms in his left arm. After ordering an EMG, Dr. Vinyard diagnosed claimant with carpal tunnel syndrome and referred him to a hand specialist. Ultimately, claimant was diagnosed with bilateral carpal tunnel syndrome and had surgery on both wrists for those conditions. However, there is no medical evidence to establish a causal connection between the carpal tunnel syndrome in either upper extremity and the December 31, 2012 work injury. The only medical opinion addressing causal connection comes from claimant's independent medical evaluator, John D. Kuhnlein, D.O., who opines that the carpal tunnel syndrome is not causally related to the December 31, 2012 work injury. (Ex. 8, p. 8)

In addition to Dr. Vinyard, three other physicians have evaluated claimant and offered opinions as to the cause of claimant's left shoulder condition, his permanent impairment, and his need for permanent restrictions. Defendants sent claimant to Mark Kirkland, D.O., who is the orthopaedic surgeon that performed claimant's right shoulder surgery.

Dr. Kirkland performed an independent medical evaluation (IME) on March 10, 2014. He opined that claimant's left shoulder injury achieved maximum medical improvement in December 2013. Dr. Kirkland assigned a six percent permanent impairment of the whole person to claimant's left shoulder injury as a result of loss of range of motion in the left shoulder. (Ex. 5, p. 5)

Defense counsel also sent claimant to Thomas S. Gorsche, M.D. for an IME on December 2, 2015. Dr. Gorsche concluded that claimant sustained two percent permanent impairment of his left upper extremity, or one percent of the whole person as a result of the December 31, 2012 work injury. Dr. Gorsche recommended work restrictions consistent with the FCE findings. (Ex. 7, p. 5)

Claimant's counsel also scheduled claimant for an IME with John D. Kuhnlein, D.O. Dr. Kuhnlein evaluated claimant on January 6, 2016. As noted above, he opined that claimant's carpal tunnel syndrome was not related to the December 31, 2012 work injury. Similarly, Dr. Kuhnlein noted some neck symptoms but could not causally relate any neck condition to the December 31, 2012 work injury. (Ex. 8, p. 8)

Dr. Kuhnlein opined that claimant sustained permanent impairment equivalent to two percent of the whole person as a result of limited range of motion of the left shoulder. He concurred that maximum medical improvement occurred December 17, 2013. However, Dr. Kuhnlein opined that the FCE recommendations and findings overstated claimant's residual functional abilities. Dr. Kuhnlein recommended permanent restrictions that limit claimant to a 30 pound occasional lift, only occasional work at or above the shoulder level, and no use of a vibratory knife. (Ex. 8, p. 9)

When considering claimant's permanent impairment, I note that all of the physicians base their impairment rating upon claimant's loss of range of motion. Some of the medical providers identified greater ranges of motion than others, resulting in discrepancies between the ratings. However, given that two orthopaedic surgeons (Dr. Vinyard and Dr. Gorsche) both reached similar range of motion findings and conclusions as to permanent impairment and both of those demonstrated greater ranges of motion than the other evaluating physicians, I find those impairment ratings to be most convincing. This finding is bolstered by the fact that one of the surgeons offering the one percent permanent impairment rating was the treating orthopaedic surgeon that evaluated claimant over an extended period of time. Therefore, I specifically find that claimant has proven only a one percent permanent impairment rating as a result of the December 31, 2012 work injury.

With respect to permanent physical restrictions, I acknowledge Dr. Kuhnlein's concerns and recommendations. On the other hand, the FCE provides the most objective testing available to measure and estimate claimant's residual physical abilities. Dr. Kirkland concluded that a FCE was a reasonable medical recommendation. (Ex. 5, p. 5) Dr. Vinyard accepted the FCE recommendations as his permanent restrictions.

(Ex. 4, p. 25) Having treated claimant and observed his condition on numerous occasions, I find Dr. Vinyard's opinions to be credible and convincing in this situation.

The FCE recommendations were also adopted by Dr. Gorsche, an orthopaedic surgeon. (Ex. 7, p. 5) It appears that the FCE recommendations are reasonable from a medical standpoint. They represent the most objective testing available in this record. I find that claimant is capable of performing employment activities at the levels demonstrated and recommended in the FCE. (Ex. 6)

Mr. Cervantes is a middle-aged worker. He has a very limited educational background and no advanced training. His work history includes generally manual labor positions, including construction work, machine operator, and meat processing type jobs. Given his limited English skills, claimant is not likely to retrain to a new line of work.

Claimant testified that he does not believe he could return and perform construction work given his current abilities. He testified that he believes construction work would be too heavy. Similarly, Mr. Cervantes testified that he does not believe he could return to work as a machine operator similar to what he performed in California. He testified that he had to load metal bars into the machine and that he does not believe he could physically apply the necessary force to load those bars given his left shoulder injury.

On the other hand, Mr. Cervantes acknowledges that he worked for Tyson and could return to similar employment in that type of meat packing facility. He continues to work for Swift in a meat processing position. His work for Swift is now physically easier and claimant explained that he has lost some bonus type pay (described as "brackets") that comes with working more physically demanding type positions.

At the time of his left shoulder injury in December 2012, claimant was earning $14.12 per hour and did not qualify for any "brackets," or additional pay. (Ex. 11, p. 1) At the time of the arbitration hearing, claimant earned a base rate of $15.20 per hour and three "brackets," or an additional $0.15 per hour. (Claimant's testimony) At the time of hearing, claimant was working 48 hours per week and earning more than he did at Swift at the time of the December 2012 work injury.

Mr. Cervantes performs a legitimate job at Swift and performs the position he holds without accommodations. There is no indication that he cannot continue to perform this job at Swift as a result of his left shoulder injury in December 2012. From a practical standpoint, claimant has not sustained a significant actual loss of future earnings as a result of his December 31, 2012 injury.

On the other hand, it is likely that claimant cannot perform a full range of jobs that he could have performed before December 31, 2012. Claimant has transferred to a different job within Swift to meet his physical restrictions. Claimant is not likely to return

to heavy construction work and may not be able to perform some types of industrial work such as the specific machining job he held in California.

Mr. Cervantes is a motivated worker. He is likely to remain employed and to continue to work for Swift despite his permanent restrictions.

Considering claimant's age, educational background, employment history, ability to return to work in a new position, ability to retrain or find alternate employment, permanent impairment, permanent work restrictions, motivation, as well as all other relevant industrial disability factors, I find that claimant has proven he sustained a fifteen percent (15%) loss of future earning capacity as a result of the December 31, 2012 work injury.

With respect to claimant's penalty benefit claim, I find that claimant has proven defendants denied permanent disability benefits above the one percent permanent impairment rating offered by Dr. Vinyard. However, I find that defendants established there was a reasonable basis for denial of additional benefits. I specifically find that the amount of claimant's industrial disability under the specific facts of this case was fairly debatable. Given that claimant returned to work for Swift, was earning more at the time of the arbitration hearing than on the date of injury, and that no physician opined that claimant could not continue working at Swift, there was no actual loss of earnings and the issue of industrial disability entitlement remained fairly debatable. Claimant receives a minimal industrial disability award in this case and defendants' challenge of additional permanent partial disability entitlement was reasonable under the particular and specific facts of this case.

CONCLUSIONS OF LAW

The initial dispute submitted by the parties is the nature of claimant's injury. Although the parties stipulated that the injury caused permanent disability, defendants disputed whether the injury should be compensated as an industrial disability and the extent of any such permanent disability.

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).

In this case, I found that claimant proved a permanent injury to the left shoulder as a result of the December 31, 2012 work accident.

When disability is found in the shoulder, a body as a whole situation may exist. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949). In Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Commissioner Report 281 (App. 1982), a torn rotator cuff was found to cause disability to the body as a whole. Given that claimant has proven a permanent injury to his left shoulder, I conclude that this case should be compensated as an unscheduled injury with industrial disability benefits pursuant to Iowa Code section 85.34(2)(u).

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.

Having found that claimant proved he sustained a 15 percent loss of future earning capacity as a result of the December 31, 2012 work injury, I conclude that claimant is entitled to a 15 percent industrial disability award, or 75 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u). Permanent partial disability

benefits will be awarded at the stipulated weekly rate of $485.10 per week and, pursuant to the parties' stipulation, will commence on December 17, 2013. (Hearing Report)

In addition to his claim for permanent disability, Mr. Cervantes asserts a claim for penalty benefits pursuant to Iowa Code section 86.13. Claimant contends that the employer unreasonably denied him benefits above and beyond the one percent permanent impairment rating offered by Dr. Vinyard. Although claimant concedes that the defendants paid five weeks of permanent partial disability benefits reflective of the one percent permanent impairment rating from Dr. Vinyard, he asserts that he "is entitled to penalty benefits for not receiving any industrial disability beyond the 1% of the whole body rating by Dr. Vinyard." Claimant asserts that he "suffers a significant industrial disability and, therefore, the Claimant seeks an award of 50% for a penalty benefit of the industrial disability that is awarded." (Claimant's Description of Disputes, pp. 4-5)

Defendants acknowledge that they paid only five weeks of permanent partial disability benefits pursuant to the impairment rating from Dr. Vinyard. However, defendants assert that claimant's entitlement to industrial disability is fairly debatable. Defendants point out that claimant returned to work for Swift, that claimant earned more at the time of hearing than he did on the date of injury, that claimant had no actual wage loss as a result of the injury, that claimant remained capable of work within the medium work category and that no physician has opined claimant cannot continue to work for Swift.

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.

I conclude that the issue of industrial disability was fairly debatable in this instance. Claimant receives a minor industrial disability award in this case, but had no demonstrable ongoing wage loss as a result of the injury. Defendants voluntarily paid the permanent impairment rating offered by the treating surgeon. It was reasonable to dispute further industrial disability under the specific facts of this case.

I found that claimant demonstrated a denial of benefits. However, I also found that defendants demonstrated a reasonable basis to challenge entitlement to the additional benefits. Given these findings, I conclude that claimant has not established a claim for penalty benefits pursuant to Iowa Code section 86.13 in this case.

Finally, claimant seeks an assessment of her costs. Costs are assessed at the discretion of the agency. Iowa Code section 85.40. Exercising the agency's discretion and recognizing that claimant has prevailed on the majority of issues, I conclude that it is appropriate to assess claimant's costs if such claimed costs are legally permissible.

I conclude that it is appropriate to assess claimant's filing fee of $100.00 pursuant to rule 876 IAC 4.33(7). Claimant seeks assessment of his cost for securing claimant's deposition transcript. Claimant's deposition transcript was introduced as Exhibit 13. I conclude this is a permissible cost pursuant to rule 876 IAC 4.33(2) and assess the $87.95 expense against defendants.

Claimant seeks assessment of his independent medical evaluation (IME) fee as a cost. However, at the commencement of the arbitration hearing, counsel for the parties notified the undersigned that they had reached an agreement regarding the IME. The parties are expected to comply with the stated agreement. Therefore, the cost of the IME is not taxed as a cost.

Claimant also seeks the cost of collecting medical records from McFarland Clinic and Iowa Ortho. Such expenses are not outlined as permissible costs in rule 876 IAC 4.33. Claimant's request for additional costs is denied. Defendants shall reimburse claimant's costs totaling $187.95.

ORDER

THEREFORE, IT IS ORDERED:

The parties are ordered to comply with all stipulations that have been accepted by this agency.

Defendants shall pay claimant seventy-five (75) weeks of permanent partial disability benefits commencing on December 17, 2013 at the rate of four hundred eighty-five and 10/100 dollars ($485.10) per week.

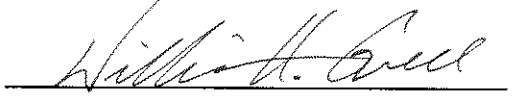
Defendants shall pay interest on all accrued benefits pursuant to Iowa Code section 85.30.

Defendants shall be entitled to credit for benefits stipulated to as being paid prior to the arbitration hearing.

Defendants shall reimburse claimant's costs totaling one hundred eighty-seven and 95/100 dollars ($187.95).

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

Signed and filed this 25th day of October, 2016.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

John T. Hemminger
Greg A. Egbers
Attorneys at Law
2454 SW 9th St.
Des Moines, IA 50315-1904
johnhemminger@hemmingerlaw.com
gregegbers@hemmingerlaw.com

Kent M. Smith
Attorney at Law
1225 Jordan Creek Pkwy., Ste. 108
West Des Moines, IA 50266-0036
ksmith@scheldruplaw.com

WHG/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.