BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED

MAY 24 2017

WORKERS COMPENSATION

RONALD SENTERAS,

Claimant,

vs.

BRANDT CONSTRUCTION CO.,

Employer,

and

ZURICH AMERICAN INS. CO.,

Insurance Carrier,
Defendants.

File No. 5054813

ARBITRATION DECISION

Head Note Nos.: 1402.40, 1402.60, 1803, 2907, 3001

STATEMENT OF THE CASE

Ronald Senteras, claimant, filed a petition for arbitration against Brandt Construction, as the employer and Zurich American Insurance Company, as the insurance carrier. The case came on for hearing before the undersigned on January 18, 2017.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits A through K, Claimant's Exhibits 1 through 7 and Defendants' Exhibits A through K. All exhibits were received without objection. Claimant testified on his own behalf. No other witnesses testified.

The evidentiary record closed at the conclusion of the arbitration hearing However, counsel for the parties requested the opportunity to file post-hearing briefs. Their request was granted and the parties filed their briefs simultaneously on February 3, 2017. The case was considered fully submitted to the undersigned upon filing of the parties' briefs.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant is entitled to additional healing period benefits caused by an alleged underpayment of the weekly rate.
2. Whether the alleged injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits.
3. The proper rate at which weekly benefits are payable.
4. Whether claimant is entitled to payment or reimbursement for a medical bill contained as Exhibit 5.

FINDINGS OF FACT

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

Ronald Senteras is a 36-year-old gentleman, who sustained an admitted injury at work on August 11, 2014. (Exhibit K, page 5; Hearing Report) Mr. Senteras commenced employment with Brandt Construction in 2007 and worked as a laborer for Brandt Construction on August 11, 2014. (Ex. K, p. 5; Claimant's testimony) Unfortunately, Mr. Senteras fell backwards into an unguarded box culvert. He estimates that he fell approximately 11 feet. He landed on his back and struck his head as a result of the fall. (Claimant's testimony; Ex. C, p. 1)

Mr. Senteras was transported to the hospital via ambulance and was diagnosed with transverse process fractures in his lumbar spine from L2-L4. (Ex. A, p. 8) Claimant began to develop headaches within a short time after the injury and complained of right shoulder and neck symptoms as well. (Ex. B)

The employer directed claimant to Genesis Occupational Health Clinic for treatment of his injuries. William Morris, APN, evaluated claimant on August 15, 2014. He diagnosed claimant with multiple trauma with fractures of the lower spine as well as post-concussive syndrome. (Ex. B, p. 1) Rick Garrels, M.D. assumed claimant's care and evaluated him on August 18, 2014. He diagnosed claimant with a right shoulder strain, low back contusion, as well as right transverse process fractures from L2 through L4. (Ex. B, p. 2)

Dr. Garrels continued to manage claimant's medical care, which included conservative treatments such as medication management, physical therapy, and use of ice. In October 2014, Mr. Senteras was reporting increased frequency of migraines and Dr. Garrels was concerned that claimant was not putting forth good effort during

examinations. (Ex. B, p. 9) Dr. Garrels released claimant to return to work full duty on October 22, 2014. (Ex. B, pp. 9-10)

Claimant returned to Genesis Occupational and was evaluated by Mr. Morris on October 24, 2014. He expressed concerns about returning to work full duty and those concerns were apparently echoed by the nurse case manager in attendance. (Ex. B, p. 11) On October 28, 2014, Dr. Garrels re-examined claimant and agreed to maintain claimant on restricted work. (Ex. B, p. 12)

In November 2014, claimant was evaluated by a pain specialist, Kerry Panozzo, M.D. Dr. Panozzo administered two epidural injections into claimant's lumbar spine. (Ex. D) A December 11, 2014 office note from Dr. Garrels indicates that claimant experienced "a really good response" to the injections and that claimant "feels as though he does not need any further injection and does not feel that he needs any limitations from the work standpoint." (Ex. B, p. 14) Dr. Garrels declared maximum medical improvement on December 11, 2014 and opined that claimant sustained no permanent impairment as a result of either his low back or shoulder injuries. (Ex. B, p. 14)

Mr. Senteras did not receive treatment from December 11, 2014 through January 20, 2016. On January 20, 2016, claimant returned to Dr. Garrels, who noted low back pain and right shoulder pain. (Ex. B, p. 15) Following additional conservative care, Dr. Garrels noted on August 19, 2016 that "Things have been going well. He has been active this summer with ball. He reports no neck or shoulder issues at this time." (Ex. B, p. 22) On that same date, Dr. Garrels records full range of motion in claimant's right shoulder and cervical spine. However, he notes ongoing low back pain and migraine headaches. (Ex. B, p. 22)

Claimant sought evaluation of his neck with a spine surgeon, Cassim M. Igram, M.D. at the University of Iowa Hospitals and Clinics on June 22, 2016. Dr. Igram opined that claimant continued to experience neck symptoms and that those symptoms were likely related to the initial work injury on August 11, 2014. However, Dr. Igram recommended against any surgical intervention and opined that claimant requires no work restrictions. (Ex. E, p. 2)

Dr. Igram re-evaluated claimant on July 20, 2016 and declared maximum medical improvement. He reiterated that claimant requires no permanent work restrictions for his neck. (Ex. E, pp. 5-6)

Dr. Garrels opined that claimant could continue working regular duty without restrictions. He declared maximum medical improvement again on August 19, 2016 and confirmed that claimant had no permanent impairment. (Ex. B, p. 23)

Claimant sought an independent medical evaluation performed by Richard Neiman, M.D. on October 5, 2016. Dr. Neiman diagnosed claimant with fractures of the transverse process in the lumbar spine at the L2, L3, and L4 levels. He assigned

permanent impairment of 5 percent of the whole person for each of these fractured levels. Dr. Neiman also identified range of motion deficits in claimant's lumbar spine and assigned additional impairment for those decreased ranges of motion. In total, Dr. Neiman opined that claimant sustained a 19 percent permanent impairment of the whole person as a result of low back injury. (Ex. F, p. 3)

Dr. Neiman also identified permanent impairment related to claimant's ongoing migraine headaches. Specifically, Dr. Neiman opined that claimant qualifies for a five percent permanent impairment of the whole person as a result of the migraine headaches. Finally, Dr. Neiman identified restrictions in claimant's right shoulder range of motion and opined that claimant sustained seven percent of the right arm, or four percent of the whole person as a result of injuries to claimant's right shoulder. (Ex. F, p. 3)

Dr. Neiman considered and combined all of the impairment ratings he identified and concluded that claimant sustained 26 percent impairment of the whole person as a result of injuries to his low back, right shoulder, and migraine headaches. As a result of the low back injuries, Dr. Neiman opined that claimant should avoid excessive flexion, extension or lateral flexion of the lumbar spine. He recommended that claimant lift no more than 15 pounds on a repeated basis and no more than 35 pounds up to four times per hour. Dr. Neiman imposed no permanent restrictions for claimant's migraine headaches, but recommended claimant avoid excessive flexion, extension, abduction, adduction, and internal rotation of the right shoulder. However, he indicated that claimant should be capable of continuing to work as a concrete finisher despite his restrictions. (Ex. F, p. 3)

Dr. Garrels and Dr. Neiman both issued supplemental reports critiquing each other's impairment ratings and explaining their bases for impairment ratings within the AMA Guides. (Ex. B, p. 24; Ex. 1, pp. 1-2) Dr. Garrels appears to believe that the DRE method of rating should be utilized under the AMA Guides, while Dr. Neiman utilized the range of motion rating methodology. Review of the AMA Guides reveals that Dr. Garrels' methodology is inaccurate. Claimant sustained non-displaced transverse process fractures, which are specifically referenced in DRE Lumbar Category II in table 15-3. Dr. Garrels' impairment rating of zero percent is not accurate or accepted.

Dr. Neiman's impairment rating utilizes the range of motion methodology. The AMA Guides note, "the ROM method should be used on . . . (3) if multilevel involvement and/or alteration of motion segment integrity has occurred in the same spinal region." AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, p. 398. In this instance, claimant sustained multilevel transverse process fractures in the lumbar spine. Therefore, I conclude that Dr. Neiman's rating methodology is accurate under the AMA Guides. I accept Dr. Neiman's lumbar spine impairment rating as accurate.

With respect to the shoulder and migraine headache issues, claimant continues to experience ongoing symptoms. Dr. Garrels offers no permanent impairment despite

the ongoing symptoms. Dr. Neiman's impairment rating appears to consider the ongoing symptoms. I accept Dr. Neiman's impairment ratings for the right shoulder and migraine headaches as accurate.

With respect to the issue of permanent restrictions, claimant has returned to work for the employer in his pre-injury job. He testified that he had difficulties with some of the job duties that required lifting at least 100 pounds. Realistically, claimant was able to return to work and perform his job duties satisfactorily after his injuries. In this sense, Dr. Neiman's restrictions are likely too restrictive. I find that claimant has not proven the need for permanent restrictions, but that he likely has some practical limitations that make lifting 100 pounds or more difficult for him despite having been able to do such work prior to his August 11, 2014 work injury.

Mr. Senteras has limited educational background. He has a GED and no further education. (Ex. K, pp. 5-6) His employment history consists of his work at Brandt Construction since 2007. Prior to this employment, claimant worked as a laborer for another concrete company from 2000 through 2007. (Ex. K, p. 5) No other employment history is described in this record.

Mr. Senteras appears to be a motivated worker. He returned to work despite his injuries and ongoing symptoms. He has some disputes with the employer pertaining to working conditions, went on strike, and has pending NLRB claims. However, he stated an intention to return to work for the employer if permitted to do so and indicated he has filed other job applications since leaving on strike. Mr. Senteras is considered a relatively young worker and should have the ability to retrain or seek alternate lines of employment, if necessary.

I find that claimant has proven that his August 11, 2014 work injury caused permanent disability. Considering claimant's age, educational background, employment history, permanent impairment, permanent restrictions, motivation, ability to retrain, as well as all other factors of industrial disability as outlined by the Iowa Supreme Court, I find that claimant has proven a 25 percent (25%) loss of future earning capacity as a result of the August 11, 2014 work injury.

The next disputed issue is the claimant's gross weekly earnings preceding the August 11, 2014 work injury. The parties' post-hearing briefs outline the dispute between the parties as whether the earnings for the weeks ending June 7, 2014 and June 14, 2014 should be considered representative of claimants' gross earnings or excluded from calculation of the gross weekly earnings.

It appears the parties concur that the reason for the reduced earnings for both disputed weeks is due to rainy or bad weather. Claimant works a construction job and the number of hours he works is dependent upon the weather. Defendants contend that it is common and expected that weather will prevent work from time to time and reduce claimant's hours of work and earnings. Therefore, according to defendants the earnings

reflected in the weeks ending June 7, 2014 and June 14, 2017 are reflective of and representative of Mr. Senteras' customary earnings prior to the date of injury.

Claimant contends that the earnings for the weeks ending June 7, 2014 and June 14, 2017 were 30-40 percent lower than other earnings included within the gross earnings calculations. Similarly, claimant contends that the earnings for the week ending June 14, 2014 were more than 30 percent lower than the next lowest pay period voluntarily included in the calculations by defendants. Claimant contends that such a fluctuation is not reasonable and demonstrates that the earnings for the weeks ending June 7, 2014 and June 14, 2014 are not representative of claimant's customary gross earnings prior to the date of injury.

Review of the wage information contained in the record and the parties' calculations of the weekly rate reflects that most weeks claimant's gross earnings exceeded $1,000.00. However, there are also several weeks where claimant's earnings are less than $1,000.00 and several weeks when claimant had no earnings.

The claimant's earnings for the week ending June 14, 2014 were $312.00. The earnings for the week ending June 7, 2014 were $416.00. All other weeks included by the parties in their respective calculations included gross earnings of $597.87 or more. I find that the earnings reflected in the weeks ending June 7, 2014 and June 14, 2014 are not reflective of claimant's typical or customary gross weekly earnings preceding this injury.

I find that claimant's calculation of the gross weekly earnings, as set forth in Exhibit 2, page 1 most accurately represent and reflect claimant's customary gross weekly earnings preceding this work injury. I adopt those calculations and find that claimant's average gross weekly earnings immediately preceding the work injury were $1,239.15. The parties stipulated that claimant was married and entitled to five exemptions on the date of injury. (Hearing Report)

Finally, the parties submitted a dispute about claimant's entitlement to a medical bill submitted as Exhibit 5. This billing statement reflects it was for medical services rendered on January 1, 2014. It is unlikely that this billing statement is accurate as to the date of service. However, claimant did not produce evidence of the treatment rendered justifying the charges contained on Exhibit 5. Facially, the charges and date of service contained on Exhibit 5 could not be causally related to or treatment for injuries sustained eight months later on August 11, 2014.

Claimant testified that he had never received medical treatment from Dr. Panozzo prior to August 11, 2014. However, claimant has not established the specific treatment rendered justifying the charges contained in Exhibit 5. Ultimately, I conclude that claimant failed to prove the charges contained in Exhibit 5 are causally related to the August 11, 2014 work injury.

CONCLUSIONS OF LAW

The parties dispute the extent of claimant's entitlement to permanent disability, if any. However, the parties stipulate that claimant's injury should be compensated industrially if it caused permanent disability. (Hearing Report) Having found that claimant proved the August 11, 2014 work injury caused permanent disability, I must consider the extent of claimant's entitlement to permanent 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.

The focus of an industrial disability analysis is on the ability of the worker to be gainfully employed and rests on comparison of what the injured worker could earn before the injury with what the same person can earn after the injury. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 266 (Iowa 1995), Anthes v. Anthes, 258 Iowa 260, 270, 139 N.W.2d 201, 208 (1965). Changes in actual earnings are a factor to be considered, but actual earnings are not synonymous with earning capacity. Bergquist v. MacKay Engines, Inc., 538 N.W.2d 655, 659 (Iowa App. 1995), Holmquist v. Volkswagen of America, Inc., 261 N.W.2d 516, 525, (Iowa App. 1977), 4-81 Larson's Workers' Compensation Law, §§ 81.01(1) and 81.03. The loss of earning capacity is not measured in a vacuum. Such personal characteristics as affect the worker's employability are considered. Ehlinger v. State, 237 N.W.2d 784, 792 (Iowa 1976). Loss of future earning capacity is measured by the employee's own ability to compete in the labor market.

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae

which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

Having found that claimant proved a 25 percent (25%) loss of future earning capacity as a result of the August 11, 2014 work injury, I conclude that claimant is entitled to one hundred twenty-five (125) weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u). The parties stipulated these benefits should commence on October 27, 2014. (Hearing Report)

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.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6).

In this instance, I found that the earnings reflected in weeks ending June 7, 2014 and June 14, 2014 were not fairly representative of claimant's gross earnings prior to the date of injury. Accordingly, I conclude those weeks' earnings should be excluded from calculation of claimant's gross weekly earnings.

Instead, I found that the calculations of the gross average weekly earnings provided by claimant at Exhibit 2, page 1 were accurate and fairly represented claimant's customary gross weekly earnings prior to the date of injury. Having reached that finding, I also found that claimant's gross average weekly earnings prior to the date of injury were $1,239.15. Claimant was married and entitled to five exemptions on the date of injury.

The weekly benefit amount payable to an employee shall be based upon 80 percent of the employee's weekly spendable earnings, but shall not exceed an amount, rounded to the nearest dollar, equal to 66-2/3 percent of the statewide average weekly wage paid employees as determined by the Department of Workforce Development. Iowa Code section 85.37.

The weekly benefit amount is determined under the above Code section by referring to the Iowa Workers' Compensation Manual in effect on the applicable injury date. Having found that claimant's gross average weekly wage was $1,239.15, and using the Iowa Workers' Compensation Manual with effective dates of July 1, 2014 through June 30, 2015, I determine that the applicable weekly rate for benefits is $795.26.

This conclusion as to the weekly rate results in an underpayment of the healing period benefits paid by defendants. Pursuant to the stipulations and discussion with counsel at the commencement of hearing, no additional findings or conclusions are required on the healing period, other than an order that defendants rectify their underpayment of healing period benefits.

Mr. Senteras submitted a medical expense from Dr. Panozzo's office as Exhibit 5. The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6). In this instance, claimant bears the burden to establish that the medical expenses contained in Exhibit 5 are causally related to the August 11, 2014 work injury.

I found that the billing statement was likely erroneous with its referenced date of service of January 1, 2014. However, claimant produced no evidence to substantiate that the treatment or charges contained in Exhibit 5 were related to the August 11, 2014 work injury. Therefore, I conclude that claimant failed to carry his burden of proof to establish entitlement to payment or reimbursement of the charges contained in Exhibit 5.

Finally, claimant submitted a statement of costs as Exhibit 6. 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 all disputed issues, claimant's filing fee of $100.00 in each file shall be assessed pursuant to 876 IAC 4.33(7). Similarly, claimant's service fees ($6.73) are taxed pursuant to 876 IAC 4.33(3).

Claimant seeks assessment of Dr. Neiman's IME report as a cost, presumably under 876 IAC 4.33(6). The Iowa Supreme Court recently addressed whether and the extent to which independent medical examination report costs may be taxed as a cost in a proceeding before this agency. In Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015), the Iowa Supreme Court concluded that the cost of a medical report may be taxed as a cost but that the expense of the examination performed by the physician cannot be taxed as a cost pursuant to 876 IAC 4.33(6).

In this instance, Dr. Neiman's billing statement is not contained in the evidentiary record. It is impossible for the undersigned to determine whether the cost listed by claimant on Exhibit 6 reflects Dr. Neiman's examination fee, report fee, or a combination

of both. Claimant has not established entitlement to the requested expense for Dr. Neiman's charges.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay all healing period benefits at the weekly rate of seven hundred ninety-five and 26/100 dollars ($795.26), including rectifying the underpayment of healing period benefits due to underpayment of the weekly rate.

Defendants shall pay claimant one hundred twenty-five (125) weeks of permanent partial disability commencing on October 27, 2014 at the weekly rate of seven hundred ninety-five and 26/100 dollars ($795.26).

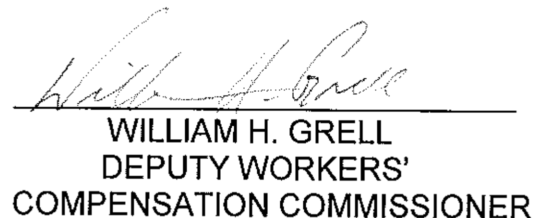
Defendants shall pay interest on any accrued weekly benefits pursuant to Iowa Code section 85.30.

Defendants shall be entitled to credit for all weekly benefits paid to date pursuant to the parties' stipulation in the hearing report.

Defendants shall reimburse claimant's costs totaling one hundred six and 73/100 dollars ($106.73).

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 24th day of May, 2017.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Nathan Willems
Attorney at Law
PO Box 637
Cedar Rapids, IA 52406
nate@rushnicholson.com

Jean Z. Dickson
Attorney at Law
1900 E. 54th St.
Davenport, IA 52807
jzd@bettylawfirm.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.