BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LESLIE JENSEN,	:	
	:	File No. 5064667
Claimant,	:	
	:	ARBITRATION DECISION
vs.	:	
	:	
R'S RECYCLING, LLC,	:	
	:	
Employer,	:	Head Notes: 1102.30, 1802, 1803, 2501,
Defendant.	:	2502, 2701, 2907, 3002, 4000.2

STATEMENT OF THE CASE

Leslie Jensen, claimant, filed a petition in arbitration against R's Recycling, LLC, as the employer, on August 6, 2018. Claimant served his Petition on defendant via certified mail on August 6, 2018.

To date, the employer has not filed an appearance or an answer in these proceedings. On September 20, 2018, claimant mailed a Notice of Intent to File Written Application for Default to defendant. On October 4, 2018, claimant filed a motion for default against the employer. On October 23, 2018, Deputy Commissioner William Grell entered a ruling on the motion for default. Default was entered against the employer and the evidentiary record was closed to further activity by the employer.

A default hearing was scheduled for January 22, 2020, in Waterloo, Iowa. Claimant appeared personally and through his counsel of record at the default hearing.

Pursuant to the October 23, 2018 ruling, claimant submitted medical records as written evidentiary evidence in advance of the default hearing. Those medical records were submitted via WCES and are accepted into the evidentiary record of this default proceeding. Claimant submitted 31 pages of medical records. Claimant also testified on his own behalf. No other evidence was received on the date of hearing. The evidentiary record was left open until approximately February 7, 2020, to allow claimant to submit an amended cost itemization sheet and the report of Stanley Mathew, M.D. The evidentiary record closed subsequent to claimant filing the aforementioned additional exhibits on February 5, 2020.

ISSUES

1. The extent of claimant's entitlement to temporary disability, or healing period, benefits.

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

3. Claimant's rate of compensation.

4. Claimant's entitlement to past medical expenses contained in Exhibit 4 and Exhibit 5.

5. Whether claimant is entitled to reimbursement for his independent medical evaluation pursuant to Iowa Code section 85.39.

6. Whether claimant is entitled to an order for alternate medical care.

7. Whether penalty benefits should be imposed against defendant for unreasonable delay or denial of weekly benefits through the date of hearing.

8. Whether claimant's costs should be assessed against defendant.

FINDINGS OF FACT

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

Leslie Jensen, claimant, is a 62-year-old gentleman. (Claimant's Testimony) On May 31, 2018, he worked as a laborer for R's Recycling. In this role, claimant disassembled discarded appliances to retrieve valuable scrap metal, such as copper. (Id.) Claimant believed he was an employee based on representations made by defendant. Claimant testified he worked three days each week, from 8:00 a.m. to 4:30 p.m. Claimant testified he earned $60.00 for working an eight-hour shift. He was paid in cash on a weekly basis. Claimant testified defendant supplied all tools necessary to complete the job; however, claimant often chose to use his own. I accept claimant's testimony and find he was an employee of defendant on the date of injury.

On the date of injury, claimant was assisting a co-worker in disassembling an appliance. While in the process of disassembling the appliance, claimant's co-worker accidentally hit claimant's left hand with a sledgehammer. (Claimant's Testimony)

Claimant testified he subsequently reported the injury to the owner of R's Recycling. According to claimant, defendant did not offer him medical care. (Claimant's Testimony)

After reporting the injury to the defendant employer, Mr. Jensen drove to the emergency room. He was evaluated at Covenant Medical Center in Waterloo, Iowa. (Joint Exhibit 1, page 1) The emergency room provider diagnosed claimant with a left hand fracture of the first metacarpal. (Id.) Mr. Jensen's left hand was placed in a splint and he was released from the emergency room on the same date. (JE1, p. 2)

Medical records demonstrate claimant was evaluated by Richard Naylor, D.O., on June 4, 2018. (JE2, p. 3) Dr. Naylor placed claimant's left hand in a fiberglass cast. (JE2, p. 4) Six weeks later, Dr. Naylor collected repeat x-rays of claimant's left hand. (JE2, p. 6) The x-rays revealed a slightly displaced, slightly angled base of the thumb metacarpal fracture extra-articular. (Id.) Following the x-rays, Dr. Naylor placed claimant's left hand back into a fiberglass cast. (Id.) Claimant testified he was in a cast for approximately six months. (Claimant's Testimony)

Claimant returned to Dr. Naylor's office for a six-week follow-up appointment on October 23, 2018. (JE2, p. 7) Medical records from that visit reflect nailbed changes and decreased sensation in all of claimant's fingers on the left hand. (JE2, p. 8) Dr. Naylor scheduled claimant for a consultation with neurology and ordered an EMG. (Id.)

The requested EMG revealed severe carpal tunnel syndrome on the left, and moderate carpal tunnel syndrome on the right. (See JE2, p. 10) Dr. Naylor scheduled claimant for a carpal tunnel release of the left wrist, and a carpal tunnel injection on the right. (Id.)

Aside from treatment for the left carpal tunnel diagnosis, claimant received no further medical treatment related to the work injury after his October 23, 2018, appointment. I find Mr. Jensen obtained maximum medical improvement on October 23, 2018.

At hearing, Mr. Jensen testified that he has been off work since May 31, 2018. (Claimant's Testimony) He testified defendant did not offer him any light duty work. He asserts he was in a healing period from May 31, 2018 through October 23, 2018. I find claimant has proven entitlement to healing period benefits for the time period between May 31, 2018 and October 23, 2018.

Claimant received follow-up care from his primary care physician, Mitchel Bernstrom, M.D. (See JE3) Medical records reflect claimant continued to experience

tenderness, pain, limited range of motion, occasional tremoring, and paresthesia. (JE3, p. 11) Dr. Bernstrom's notes provide claimant is unable to grip, lift, or carry more than 10 pounds with his left hand. (Id.) Dr. Bernstrom opined the diagnosis of carpal tunnel is not related to the May 31, 2018, date of injury. (Id.)

In response to a pre-written letter, dated August 13, 2019, Dr. Bernstrom agreed with a number of opinions. (Ex. 1, pp. 1-4) Dr. Bernstrom causally related the condition of claimant's left upper extremity to the May 31, 2018, work injury, and opined claimant had sustained permanent impairment as a result of the same. (Ex. 1, p. 2) Dr. Bernstrom assigned permanent restrictions consisting of lifting less than 10 pounds on an occasional basis, and lifting 10 pounds on a rare basis. (Ex. 1, p. 3) He recommended claimant avoid grasping objects and fine manipulation with the left hand. (Id.)

Dr. Bernstrom's medical causation, treatment recommendations, and restrictions are unrebutted opinions. They are accepted as accurate. I find that claimant has proven he sustained an injury to his left upper extremity as a result of the May 31, 2018, work incident which arose out of and in the course of his employment with R's Recycling.

Dr. Mathew conducted a records review and produced a report to claimant's counsel on January 28, 2020. (Ex. 6, p. 27) Based on claimant's loss of strength and range of motion, Dr. Mathew assigned 30 percent impairment to claimant's left upper extremity. (Id.)

Dr. Mathew's impairment rating is an unrebutted opinion. I find claimant sustained a permanent injury to the left upper extremity as opined by Dr. Mathew. Claimant testified he experiences ongoing left hand pain, loss of range of motion in the left wrist, and loss of strength in the left hand. (Claimant's Testimony) All of these symptoms are credible and accepted. I find that Mr. Jensen has proven he sustained a 30 percent functional disability to the left upper extremity.

Claimant is single and has no dependents. He testified he worked three days per week and was paid $60.00 for each eight-hour shift. Claimant's testimony is unrebutted. I accept claimant's testimony and find claimant's average weekly wage is $180.00.

As a result of the injuries sustained while employed by R's Recycling, Mr. Jensen has incurred medical expenses. The majority of the medical expenses from MercyONE, contained in Exhibit 4, appear to be related to treatment of claimant's left upper extremity. However, Exhibit 4 also contains a medical billing statement from MercyONE

for treatment claimant received after he was placed at MMI. Several of the charges appear to be related to cancer screening results, which would not be related to the May 31, 2018, work injury. Moreover, several of the charges are related to medical visits with Sangeeta Shah, M.D. The evidentiary record does not contain medical records from Dr. Shah. Claimant has not proven that the medical treatment he received post-MMI are causally related to the May 31, 2018, work injury.

The medical expenses from Covenant Medical Center, located on pages 20 and 21 of Exhibit 4, appear to be related to treatment of claimant's left upper extremity. These are causally related to the work injury. Similarly, the medical expenses from MercyONE, contained in Exhibit 4, for treatment between June 4, 2018 and October 23, 2018, are causally related to the work injury. I find that all of the foregoing medical care and expenses were reasonable and necessary.

With the exception of medical expenses tied to claimant's August 22, 2019 appointment with Dr. Bernstrom, I find the medical expenses incurred following claimant's October 23, 2018, medical appointment with Dr. Naylor are not related to claimant's work injury at R's Recycling.

Claimant's mileage expenses are contained in Exhibit 5. I find the mileage expenses contained in Exhibit 5, for treatment claimant received between May 31, 2018, and October 23, 2018, are causally related to the work injury. Claimant has failed to prove entitlement to medical mileage for medical appointments on November 20, 2018, December 3, 2018, and December 19, 2018. (Ex. 5, p. 26)

Defendant has not offered claimant any medical care in this case. Defendant's conduct in this regard is not reasonable and reasonable care has not been offered. Defendant has abandoned claimant's medical care.

Claimant seeks future medical care for his work injury. His request is reasonable.

Mr. Jensen seeks award of an independent medical evaluation fee from Dr. Mathew. I find that Dr. Mathew's fee is reasonable. However, I find that defendant did not obtain an evaluation of permanent impairment in this case.

Mr. Jensen seeks an award of penalty benefits. I find defendant has not demonstrated payment of any weekly benefits to date. Claimant has established a delay in benefits. Defendant offers no excuse, explanation, or basis for the delay or denial of benefits. Defendant's delay or denial of benefits is found to be unreasonable.

CONCLUSIONS OF LAW

Claimant asserts he sustained an injury to his left upper extremity on May 31, 2018.

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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).

Defendant is in default. All activity has been cut off for defendant. Claimant testified to a work injury on May 31, 2018. Claimant's testimony is in line with the medical records in evidence. I accept claimant's testimony. Therefore, it is concluded claimant has established an injury arose out of and in the course of employment with R's Recycling on May 31, 2018.

Having found that his injury is work-related, and having concluded that the injury is compensable, I must consider claimant's claim for healing period benefits. On the hearing report, claimant asserts a request for healing period benefits from May 31, 2018, through October 23, 2018.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

In this case, I found Mr. Jensen reached MMI on October 23, 2018. Therefore, he is entitled to healing period benefits between May 31, 2018, and October 23, 2018. Iowa Code section 85.34(1).

Mr. Jensen asserts entitlement to permanent disability benefits. Having accepted Dr. Mathew's opinions and having found that claimant has reached MMI, I conclude that it is appropriate to determine and award permanent disability benefits.

Claimant's injury is to his left upper extremity. The left upper extremity injury is a scheduled member injury compensated out of 250 weeks pursuant to Iowa Code section 85.34(2)(m).

Having accepted the impairment rating of Dr. Mathew, I found Mr. Jensen has proven he sustained 30 percent functional disability as a result of his work injury. Therefore, I conclude that claimant is entitled to an award of 75 weeks of permanent partial disability benefits as a result of his work injury at R's Recycling. Iowa Code section 85.34(2)(m).

Mr. Jensen asserts permanent partial disability benefits should commence on October 24, 2018. I concur with his assertion. Permanent disability benefits will be ordered to commence on October 24, 2018. Iowa Code section 85.34(1).

Claimant asserts that he is entitled to a compensation rate of $157.79 per week for healing period benefits, and $201.69 per week for permanent partial disability benefits. I agree with this assertion.

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 claimant was single, entitled to one exemption, had a gross average weekly wage of $180.00, and using the Iowa Workers' Compensation Manual with effective dates of July 1, 2017 through June 30, 2018, I determine that the applicable weekly rate for temporary total disability (healing period) benefits is $157.79. This weekly rate is the spendable weekly earnings according to the applicable manual. I determine that the applicable weekly rate for permanent partial disability benefits is $201.69. Iowa Code section 85.36(6); Iowa Code section 85.37. This weekly rate represents the minimum weekly rate at which permanent disability benefits are payable pursuant to Iowa Code section 85.37.

Mr. Jensen seeks an award for past medical expenses. 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).

Having concluded that claimant has proven a compensable work injury, I further conclude that defendant is responsible for providing claimant's medical care, including payment of past medical and mileage expenses. Iowa Code section 85.27.

Having found the various medical expenses contained in Exhibits 4 and 5, as detailed in the findings of fact section, are causally related to claimant's work injuries, and that those medical expenses were reasonable and necessary, I conclude defendant should be ordered to reimburse claimant for any out-of-pocket expenses, reimburse any third-party payor that has paid medical expenses on behalf of claimant, and should be ordered to pay claimant or the medical providers for any outstanding medical expenses.

Mr. Jensen also seeks alternate medical care given that defendant has not authorized or provided any medical care to date for his work injuries. As noted above, defendant is obligated to provide claimant with medical care for his injury. Given that defendant has provided no medical care for this injury to date, I found that defendant abandoned claimant's medical care and needs. Defendant has forfeited any right to direct claimant's medical care. Claimant will be ordered to be permitted to select and direct his own medical care moving forward.

Mr. Jensen asserts a claim for penalty benefits on the hearing report.

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.

In this case, claimant has established that a delay in benefits has occurred. Defendant offers no evidence that it has paid claimant any weekly benefits. Defendant offers no evidence to establish that the basis for its delay or denial of weekly benefits was based upon any type of investigation, that the basis was reasonable, or that the basis was conveyed to claimant. Iowa Code section 86.13(4). Defendant has failed to establish its delay or denial is reasonable in any manner.

I conclude that claimant is entitled to an award of penalty benefits. Having introduced no justification for its delay or denial of benefits, I conclude that a penalty award of $8,000.00 is justified and warranted under the circumstances of this case. Iowa Code section 86.13(4).

Finally, claimant seeks assessment of his costs. Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40. In this instance, defendant failed to appear for any of the proceedings. Claimant was forced to file a petition with this agency and incur costs related to this case to establish liability. I conclude that it is proper to assess claimant's costs to the extent permitted.

Claimant seeks the cost of his filing fee ($100.00), and the costs associated with the court reporter retained by claimant for the default hearing. These costs are reasonable and are assessed pursuant to 876 IAC 4.33(7).

Mr. Jensen also seeks assessment of the cost of his independent medical evaluation.

In Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015), the Iowa Supreme Court concluded that the expense of obtaining a medical report in lieu of testimony by a medical expert is a taxable cost pursuant to Iowa Code section 86.40 and 876 IAC 4.33(6). However, the Court held that only the expense of

obtaining the written report is taxable and that the expense related to obtaining the medical examination is not a taxable cost.

In this case, Dr. Mathew has provided a breakdown of his expenses related to the records review and the expense of providing a disability rating. Dr. Mathew charged $260.10 for his review of the medical records, and $707.55 for his services in assessing claimant's disability rating. I find the portion of Dr. Mathew's fees for "Disability rating" is akin to fees for drafting his report. As such, I conclude that it is proper to tax $707.55 as a cost pursuant to 876 IAC 4.33(6).

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay claimant healing period benefits from May 31, 2018, through October 23, 2018, at the weekly rate of one hundred fifty-seven and 79/100 dollars ($157.79).

Defendant shall pay claimant seventy-five (75) weeks of permanent partial disability benefits commencing on October 24, 2018, at the weekly rate of two hundred one and 69/100 dollars ($201.69).

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

Defendant shall reimburse claimant for all out-of-pocket medical expenses, reimburse any third-party payor for past medical expenses paid on behalf of claimant, and satisfy any outstanding past medical expenses by either paying those funds directly to claimant or to the medical providers, but in all events shall hold claimant harmless for the past medical expenses and mileage as directed in the above decision.

Defendant shall provide and pay for causally connected future medical care for claimant's left upper extremity injury.

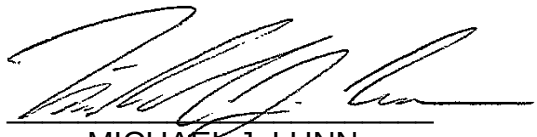
Claimant is permitted to direct his own medical care given defendant's abandonment of its responsibilities and right to direct care.

Defendant shall pay penalty benefits in the amount of eight thousand 00/100 dollars ($8,000.00) for benefits delayed or denied before the January 22, 2020, default hearing.

Defendant shall reimburse claimant's costs totaling nine hundred ninety-four and 55/100 dollars ($994.55).

Defendant 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 19th day of March, 2020.



MICHAEL J. LUNN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

R's Recycling, LLC
324 Glendale
Waterloo, IA 50703
(via Certified and U.S. Mail)

Charles Showalter (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.