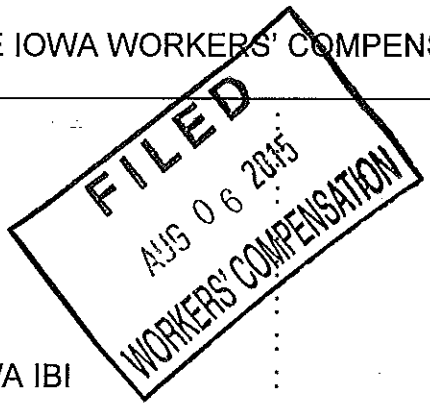
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



JAMES NEIMAN, Claimant, vs. MIRSAD IKELJIC D/B/A IBI CONSTRUCTION, Employer, Defendant.	:	File No. 5047972 A R B I T R A T I O N D E C I S I O N Head Note No.: 2910

STATEMENT OF THE CASE

Claimant filed a contested case proceeding under Iowa Code Chapter 17A seeking workers' compensation benefits. Defendant was properly served original notice, as shown by proofs on file, and defendant has not filed an answer or otherwise responded to the petition. Default was rendered in this case.

Claimant moved for and was granted default under Iowa Rules of Civil Procedure 230 et seq. Notice of the intent to file this motion has been provided to the defaulting party within the time and in the manner provided by IRCP 231.

A telephone hearing on this claim was held on June 8, 2015 for consideration of evidence to substantiate this claim. This decision awards the relief warranted by the evidence presented at hearing. The hearing was recorded my means of audiotape.

ISSUES

I. Whether claimant received an injury arising out of and in the course of employment;

II. The extent of claimant's entitlement to permanent disability benefits, including claimant's weekly rate of compensation;

III. The extent of claimant's entitlement to medical benefits; and,

IV. The extent of claimant's entitlement to penalty benefits for an unreasonable delay or denial of weekly benefits pursuant to Iowa Code section 86.13.

FINDINGS OF FACT

1. On June 12, 2013, claimant lacerated his right leg and suffered an injury arising out of and in the course of his employment with defendant employer, Mirsad Ikeljic d/b/a IBI Construction, a sole proprietorship owned and operated by Mirsad Ikeljic.

2. Claimant immediately reported his injury to defendant employer and sought treatment from Broadlawns Medical Center. The expense of the medical treatment of the injury from this provider totals $981.03. (Exhibit B) Claimant requested but was refused time off work. Claimant returned to work after the injury to avoid losing his job.

3. To date, defendant employer has refused to compensate claimant for his leg injury and to pay for treatment of the injury.

4. Defendant has refused to participate in these proceedings despite receiving adequate notice of the proceedings.

5. At the time of his injury, claimant was earning $20.00 per hour with a customary 45-hour work week. At the time of his work injury, claimant's average gross weekly earnings were $900.00 using the normal hourly rate for the overtime hours which exceed the normal scheduled hours of 40 per week. He was married and entitled to two exemptions on his income tax returns.

6. Based upon his uncontroverted testimony, claimant has permanently lost 5 percent of the use of his right leg as a result of the injury due to residual pain when exposed to cold temperatures and scarring.

7. Claimant has incurred costs consisting of a $100.00 fee for filing his petition with this agency and $106.00 from attempts to serve defendant employer.

8. Due to his lack of participation in these proceedings, defendant has failed to show the reasonableness of his denial of this claim.

CONCLUSIONS OF LAW

I. The claimant has the burden of proving by of 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.

In the case sub judice, I found that claimant carried the burden of proof and demonstrated by the greater weight of the evidence that he suffered a leg injury arising out of and in the course of employment with defendant employer.

II. 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).

The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2)(a-t), the disability is considered a scheduled member disability and measured functionally. If it is found that the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and measured industrially under Code subsection 85.34(2)(u). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

Where an injury is limited to scheduled member the loss is measured functionally, not industrially. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983).

The courts have repeatedly stated that for those injuries limited to the schedules in Iowa Code section 85.34(2)(a-t), this agency must only consider the functional loss of the particular scheduled member involved and not the other factors which constitute an "industrial disability." Iowa Supreme Court decisions over the years have repeatedly cited favorably the following language in the 66-year-old case of Soukup v. Shores Co., 222 Iowa 272, 277; 268 N.W. 598, 601 (1936):

> [t]he legislature has definitely fixed the amount of compensation that shall be paid for specific injuries . . . and that, regardless of the education or qualifications or nature of the particular individual, or of his inability . . . to engage in employment . . . the compensation payable . . . is limited to the amount therein fixed.

Our court has even specifically upheld the constitutionality of the scheduled member compensation scheme. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404 (Iowa 1994). Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Graves, 331 N.W.2d 116; Simbro v. DeLong's Sportswear 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C. M. Co., 194 Iowa 819, 184 N.W. 746 (1921). Pursuant to Iowa Code section 85.34(2)(u) the workers' compensation commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Co., 164 N.W.2d 84 (Iowa 1969).

Evidence considered in assessing the loss of use of a particular scheduled member may entail more than a medical rating pursuant to standardized guides for evaluating permanent impairment. A claimant's testimony and demonstration of difficulties incurred in using the injured member and medical evidence regarding general loss of use may be considered in determining the actual loss of use compensable. Soukup, 222 Iowa 272, 268 N.W. 598. Consideration is not given to what effect the scheduled loss has on claimant's earning capacity. The scheduled loss system created by the legislature is presumed to include compensation for reduced capacity to labor and to earn. Schell v. Central Engineering Co., 232 Iowa 421, 4 N.W.2d 339 (1942).

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by statute. Soukup, 222 Iowa 272, 268 N.W. 598.

On the other hand, industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W.2d 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. However, consideration must also be given to the injured workers' medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured worker's qualifications intellectually, emotionally and physically; the worker's earnings before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted; Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616, (Iowa 1995); McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Serv. Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

In this case, the work injury was limited to the right leg, a scheduled loss of use. I found that claimant suffered a 5 percent permanent loss of use of his right leg. Based on such a finding, claimant is entitled to 11 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(o), which is 5 percent of 220 weeks, the maximum allowable weeks of disability for an injury to the leg in that subsection.

Iowa Code 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 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 at the earnings over the 13-week period immediately preceding the injury. Iowa Code section 85.36(6).

When the earnings customarily fluctuate, the earnings used to determine the rate of compensation are those within the customary range of fluctuation. Daniels v. T & L Cleaning Services, File No. 1283486 (App. August 7, 2003).

In this case, I found that claimant's customary gross weekly earnings at the time of injury were $900.00, and he was married and entitled to two exemptions. According to the Workers' Compensation Commissioner published rate booklet for this date of injury, claimant's weekly rate of compensation is $589.11.

III. Pursuant to Iowa Code section 85.27, claimant is entitled to payment of reasonable medical expenses incurred for treatment of a work injury. Claimant is entitled to an order of reimbursement if he/she has paid those expenses. Otherwise, claimant is entitled only to an order directing the responsible defendants to make such payments directly to the provider. see Krohn v. State, 420 N.W.2d 463 (Iowa 1988).

In the case at bar, I found that the work injury was a cause of medical treatment costing claimant $981.03. Such will be awarded.

IV. Claimant seeks additional weekly benefits under Iowa Code section 86.13 (4). This provision states that if a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the industrial commissioner shall award extra weekly benefits in an amount not to exceed 50 percent of the amount of benefits that were unreasonably delayed or denied if the employee demonstrates a denial or delay in payment or termination of benefits and the employer has failed to prove a reasonable or probable cause or excuse for the denial, delay or termination of benefits. (Iowa Code section 85.13(4)(b)) A reasonable or probable cause or excuse must satisfy the following requirements:

> (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 of the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay or termination of benefits.

(Iowa Code section 86.13(4)(c))

The employer has the burden to show a reasonable and probable cause or excuse. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable." Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996); Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Due to his lack of participation in these proceedings, the defendant employer failed to provide any rational basis for denying this claim. The maximum penalty of 50 percent of claimant's entitlement to permanent disability benefits will be imposed. Claimant was awarded 11 weeks of permanent partial disability benefits at a weekly rate of $589.11 which totals $6,480.21. Therefore, the penalty is $3,240.11.

Claimant will also be awarded his costs for filing the petition and attempts at service which total $206.00.

ORDER

Defendant shall pay to claimant eleven (11) weeks of permanent partial disability benefits at a rate of five hundred eighty-nine and 11/100 dollars ($589.11) per week from June 12, 2013. As all of these benefits have accrued, the claimant is entitled to a lump sum payment for all accrued, unpaid weekly benefits including interest pursuant to Iowa Code section 85.30.

Defendant shall pay an additional three thousand two hundred forty and 11/100 dollars ($3,240.11) to claimant as penalty for an unreasonable denial of weekly benefits for this injury.

Defendant shall pay to Broadlawns Medical Center the sum of nine hundred eighty-one and 03/100 dollars ($981.03) together with any late payment penalties for claimant's treatment of his leg injury. Defendant shall reimburse claimant for any of his out-of-pocket medical expenses and shall hold claimant harmless from the remainder of those expenses.

Defendant shall pay to claimant his costs of this action pursuant to administrative rule 876 IAC 4.33 in the amount of two hundred six and 00/100 dollars ($206.00).

Defendant shall file subsequent reports of injury (SROI) as required by our administrative rule 876 IAC 3.1(2).

Signed and filed this 10th day of August, 2015.

LARRY WALSHIRE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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LPW/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.