BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MATILDE ANAYA PASTOR,

Claimant,

vs.

FARMLAND FOODS,

Employer,

and

SAFETY NATIONAL,

Insurance Carrier,
Defendants.

FILED
APR 12 2016
WORKERS' COMPENSATION

File No. 5050551

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Matilde Anaya Pastor, claimant, filed a petition in arbitration seeking workers' compensation benefits from Farmland Foods and its insurer, Safety National as a result of an injury she sustained on June 19, 2012 that arose out of and in the course of her employment. This case was heard and fully submitted in Sioux City, Iowa and considered fully submitted after the receipt of the briefs on September 30, 2015. The evidence in this case consists of the testimony of claimant, Joint Exhibits 1 through 24 and defendants' Exhibit A. The hearing was interpreted by Frank Gonzales. Both parties submitted briefs. Defendant filed a correction to its brief requesting the argument that claimant was living in the Omaha area be disregarded, as she was living in the Denison, Iowa, area. The correction is noted and the argument concerning claimant living in Omaha will not be considered.

ISSUES

1. The extent of claimant's disability;

2. Whether claimant is permanently and totally disabled;

3. Whether claimant is an "odd-lot" employee and entitled to permanent total disability;

4. Whether claimant is entitled to payment of certain medical benefits;

5. Assessment of costs.

The stipulations contained in the hearing report are accepted as if fully set out in this decision.

FINDINGS OF FACT

The deputy workers' compensation commissioner having heard the testimony and considered the evidence in the record finds that:

Matilde Pastor, claimant, was 36 years old at the time of the hearing. She was born in El Salvador. She went as far as to the equivalent of the tenth grade in the United Stated. (Exhibit 19, page 3) Claimant came to the United States in 1999. She is able to understand some English. Claimant attempted to obtain a GED in Denison, Iowa, but was not successful. While studying for her GED she also attended some ESL classes. Claimant's primary language is Spanish. She is not fluent in English.

Claimant worked cleaning houses in El Salvador. When she came to the United States she worked in a meatpacking plant, in Minnesota, operating a multi-vac machine. (Transcript, page 20) Claimant then worked in Iowa at Premium Pork and would weigh boxes all day. (Ex. 2, p. 2)

Claimant started working for defendant Farmland on February 23, 2009. Claimant works on the production side of the plant, not on the kill floor. Claimant was classified as a miscellaneous worker and performed eight different jobs. (Tr. p. 26)

On June 19, 2012 claimant was on a staircase landing at work when her foot slipped and she fell and struck the left side of her back. (Tr. p. 33; Ex. 5, p. 2; Ex. 6, p. 1) Claimant went to the nurse's station at work. Later that day saw Scott Hoffman, D.O. Dr. Hoffman provided treatment for a left ankle sprain. (Ex. 6, p. 2; Ex. 9, p. 1) On July 10, 2012, claimant complained of back pain to Dr. Hoffman. (Ex. 9, p. 6)

Claimant had an MRI on August 22, 2012. (Ex. 9, p. 12) She was referred to back specialist Eric Phillips, M.D. Dr. Phillips provided an injection on claimant's first visit of September 10, 2012. (Tr. p. 35; Ex. 10, p. 11) On October 4, 2012, Dr. Phillips recommended back surgery. At that time, claimant wanted to continue with conservative care, physical therapy. (Ex. 10, p. 17; Tr. p. 36) Claimant continued to have pain and agreed to have surgery on November 8, 2012. (Ex. 10, p. 21) On December 5, 2012 Dr. Phillips wrote:

> I am at a loss of how to treat her at this time. She is tearful and is getting weaker in front of our eyes. We will request an EMG nerve conduction study, a fine-cut CAT scan of the spine and a better quality MRI scan. She will be kept out of work. A Medrol Dosepak is to be given along with Flexeril. We will see her back in six weeks' time and hopefully in the interim something can be done for her. The insurer's lack of authorizing care will need to be offset by diagnostic tests to ensure that

> she is not developing permanent nerve damage. If nerve damage is enclosed on the EMG, she will be declared a surgical emergency.

(Ex. 10, p. 25)

Spinal fusion surgery was performed on January 22, 2013. The surgery was completed in two stages, with incisions in her front and back. (Ex. 10, pp. 23, 33) Claimant was discharged on January 25, 2013. Claimant did not believe the surgery was successful. (Tr. p. 39)

On March 1, 2013 Dr. Phillips wrote:

> Matilde and I have a long discussion today. Ms. Roberson from the plant is here along with John Huffman as interpreter. We summarize her situation. She was evaluated on 9/10/12. Date of injury was 6/19/12. On 10/4/12 I recommended surgery however the patient herself declined. On 11/8/12 we strongly recommended surgery and there was a significant delay in getting approval until surgery was performed on 1/22/13. Preoperative EMG's demonstrated an L5 radiculopathy on the left and now her most recent EMG's demonstrate chronic radiculopathy. I believe this is the cause for her ongoing lower extremity pain.

(Ex. 10, p. 52)

In June 2013 Dr. Phillips' office told claimant that they did not do long term medical management and she should get her Lyrica and hydrocodone from her family doctor. (Ex. 10, p. 65; Tr. p. 74)

A functional capacity evaluation (FCE) was performed on September 12, 2013. (Ex. 14, p. 1) This FCE recommended a number of restrictions. Due to claimant's report of not being able to perform sitting, standing, walking, bending for more than 30 minutes without increased pain, the FCE recommended the claimant never perform these activities. The FCE recommended claimant never kneel, squat or crawl. The FCE showed that claimant could lift within the sedentary to light category of work. (Ex. 14, pp. 5, 6) On October 13, 2013, Dr. Phillips reviewed the FCE. He noted that the FCE was invalid and raised her restrictions to being able to perform light to medium duty. He noted that claimant could have reduced abilities based upon chronic radiculopathy. (Ex. 10, p. 73) On November 21, 2013, Dr. Phillips wrote that claimant was at maximum medical improvement (MMI) as of October 21, 2013 and that she had a 25 percent impairment rating. (Ex. 10, p. 77)

On December 13, 2013, Douglas Martin, M.D., performed a file review, primarily concerning the rating provided by Dr. Phillips. Dr. Martin generally agreed with the approach and rating of 25 percent that Dr. Phillips provided. (Ex. 15, p. 2)

On July 23, 2013, claimant received treatment from Midwest Pain Clinic in Omaha, Nebraska. (Ex. 13, pp. 1 -35) In September, the clinic did not feel that it had any additional care to offer claimant and referred claimant back to her primary care physician. (Ex, 13, p. 17) Claimant returned to the pain clinic on June 11, 2015 due to lower back and shoulder pain. She was assessed with myofascial pain, lumbosacral radiculopathy, shoulder pain and chronic pain. (Ex. 13, p. 24)

Claimant's last day working for Farmland was September 3, 2013. (Tr. p. 45) She was terminated on February 21, 2015 as she had been off work for 18 months. (Ex. 21, p. 1) Claimant applied for work at one restaurant and did not hear anything concerning her application. Claimant applied for and was hired to temporarily work in a school lunch/day care program. She would work 6 or 7 hours per day. Claimant did not apply for a permanent position for this job due to the condition of her back. (Tr. p. 53)

Claimant's primary care physician Rosemary Mason, M.D. Dr. Mason's treatment notes start in May 2011 through June 2015. (Ex. 8, pp. 1 – 30) She provided care for claimant for a number of illnesses that were not related to her work injury as well as provide some medications for claimant's back pain. On June 4, 2015, Dr. Mason responded to a letter from claimant's attorney. In her response she said that the work injury of June 19, 2012 caused claimants back problems and that claimant was disabled and unable to work. (Ex. 8, p. 31)

Kathy Christenson testified via deposition. (Ex. 25) Ms. Christenson was head of the food programs at Denison Community Schools. She needed temporary help and interviewed claimant by phone. While she had some difficulty understanding claimant, she felt she would fit in and hired her as a substitute worker serving food in the daycare. (Ex. 25, 9) Ms. Christenson said that claimant worked for about two weeks. Claimant called in once and told her she was hurting and did not want to come in. Claimant told Ms. Christenson that due to her back she could not accept a permanent job. (Ex. 25, p. 14)

On April 30, 2014, Sunil Bansal, M.D., performed an independent medical examination (IME). (Ex. 16, pp. 7 – 29) Dr. Bansal provided a 22 percent rating to the claimant and adopted the restriction recommended in the September 12, 2013 FCE. (Ex. 16, p. 22) Dr. Bansal did not believe that claimant could return to production work. He also found her current back condition causally related to her work injury of June 12, 2012. (Ex. 16, p. 23) On April 23, 2015, Dr. Bansal recommend another FCE due to claimant's worsening pain. (Ex. 16, p. 29) An FCE was performed on May 5, 2015. This FCE was deemed valid. (Ex. 17, p. 1) Dr. Bansal adopted the restriction of this FCE and stated that they should be permanent restrictions. (Ex. 16, p. 32) The May 5, 2015 FCE provided, in part, the following restrictions:

- In general, Mrs. Anaya-Pastor is best suited for table height work with physical demand level up to sedentary/light level.

- In terms of strength, she is able to lift and carry 15 lbs. occasionally. It is not recommended that she lift frequently below waist level because the restrictions of both bending and squatting. She is able to lift 10 lbs. between waist and shoulder frequently. The reason for this is that her lifting is limited by pain at a specific amount of biomechanical loading.

- Low level work that includes squatting, bending, stooping and crouching should be limited to an occasional basis.

. . . .

- Static postures including sitting and standing should be limited to less than an hour at a time but can be repeated several times throughout the work day. Her standing tolerance is between 4-6 hours in a work day and her sitting tolerance is between 2-4 hours in a work day.

- The client can reach forward on a constant basis and overhead reaching on an occasional basis.

- The client has no restrictions with neck movements and demonstrates good balance.

- With gripping activities, the client has no restrictions with grip strength with the right or left hands and demonstrates normal hand dexterity.

(Ex. 17, pp. 1, 2)

I find that the May 5, 2015 FCE most accurately reflects claimant's ability to work. I make this finding based upon the hearing testimony of claimant, the treatment claimant received from the pain clinic, the statement of Dr. Mason on claimant's ability to work and evaluation of the report by Mr. Newman.

On June 29, 2015, claimant had another FCE. This FCE was deemed valid. (Ex. 18, p. 1) This FCE found that claimant could lift and carry 25 to 30 pounds on an occasional basis and 15 pounds on a regular basis. The FCE found that claimant should not perform prolonged or repetitive forward bending and forward bending is limited to an occasional basis. Stair climbing was limited to an occasional basis. She had no significant restrictions on standing, sitting or walking. The FCE recommended that claimant could work at the light to light-medium level. (Ex. 18, p. 1) A DVD of a portion of this FCE was reviewed by the undersigned. (Ex. 24)

A vocational evaluation by Michael Newman, M.S., LPC, was completed on June 23, 2015. (Ex. 19, pp. 1 – 39) A supplement report was completed on July 14, 2015 after the June 29, 2015 FCE was provided to Mr. Newman. The June 23, 2015 evaluation included an in-person interview with the claimant. Mr. Newman opined that Ms. Pastor, based only on a computerized skill assessment, had a 50 percent loss of

the labor market. Based upon other vocational factors, he opined that claimant had lost 95 percent or greater access to the labor market in Crawford County area. (Ex. 19, p. 9) Mr. Newman did not believe that jobs would be available for the claimant in the light physical area with an accommodation of sitting and standing at one hour. (Ex. 19, p. 13) He concluded that claimant had a 100 percent loss of earning capacity. (Ex. 19, p. 14) After reviewing the June 29, 2015 FCE, Mr. Newman did not change his opinion that claimant was not employable. (Ex. 19, p. 41)

On July 20, 2015, Theresa Wolford, M.S., C.R.C., commented on the vocational reports that Mr. Newman prepared. (Ex. 20, pp. 1 – 6) Ms. Wolford pointed out that claimant was able to function in some circumstances without an interpreter. While acknowledging that the U.S. Department of Labor has found that those out of work for more than a year have a 50 percent chance of return to work and those out for two years virtually no chance, she commented that individual motivation can play a part and that employers are not as biased against people with employment gaps as in the past. (Ex. 20, p. 2) Ms. Wolford did not believe claimant was an odd-lot employee and identified seven potential categories of work she thought claimant could perform. (Ex. 20, pp. 3, 4) Ms. Wolford found that claimant's loss of wages was to between 18 to 57 percent and that her loss of earning capacity was approximately 30 to 45 percent. Considering a potential language barrier she found her loss was approximately 55 to 60 percent. (Ex. 20, pp 5, 6)

Claimant was evaluated by Rosanna Jones-Thurman, Ph. D., on July 1, 2015 for her application for social security disability. (Ex. A) (Some of the first page was not legible.) The claimant has not asserted any mental impairment in this case so the report is of limited value. There are some observations of the claimant's gait and ability to sit and walk, but given the extensive care claimant has received by her surgeon, pain clinic, and her primary care physician, the comments are given little weight.

Claimant can speak and understand some English. She is not fluent. Most telling was the deposition testimony of Ms. Christenson who said that while she could communicate with claimant, she had difficulty understanding her. Claimant is intelligent and can cope with her lack of English, but she is far from fluent and could not work in areas that require interaction with English speaking public or detained instruction or changing instructions in English.

With respect to the odd-lot claim, I find that claimant met her burden to establish a prima facie case as an odd-lot employee. However, I find that defendants produced sufficient evidence from Ms. Wolford to refute the prima facie case and to place the burden of persuasion back on claimant to establish the odd-lot claim.

Claimant attempted to work after she was terminated for Farmland. The work for the day care was unsuccessful even with the employer willing to accommodate claimant's need to sit. She only lasted a brief time and could no longer do her work and had to quit.

Having considered the claimant's age, education, employment history, motivation, permanent impairment, permanent restrictions, as well as all other factors of industrial disability, I find that claimant has proven she is not capable of obtaining or performing competitive, gainful employment given the restrictions that are currently imposed upon her by Dr. Bansal as well as the opinions of Mr. Newman and Dr. Mason concerning claimant's ability to work. Therefore, using either the odd-lot theory or the traditional industrial disability analysis, I find that claimant has proven she is not capable of gainful employment within the competitive labor market. Claimant is currently permanently and totally disabled.

Claimant submitted a list of costs from the Wal-Mart pharmacy that includes costs she paid in this case. (Ex. 23, p. 1 -7) The claimant is requesting reimbursement for the items that are circled on this exhibit. Upon review of this exhibit, I find that the circled costs are related to her work injury. Dr. Phillips authorized the claimant's primary care physician, (Dr. Mason), to provide pain medication management. Dr. Mason was an authorized physician by way of this assignment and her costs and prescriptions for the back injury. I find that claimant is entitled to reimbursement for these costs under Iowa Code section 85.27.

I find the claimant's weekly rate to be $532.26.

CONCLUSIONS OF LAW

The parties have stipulated that claimant sustained a work-related injury, that the injury resulted in permanent disability, and that the injury should be compensated industrially pursuant to Iowa Code section 85.34(2)(u). (Hearing Report)

Since claimant has 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 refusal of defendant-employer to return claimant to work in any capacity is, by itself, significant evidence of a lack of employability. Pierson v. O'Bryan Brothers, File No. 951206 (App. January 20, 1995). Meeks v. Firestone Tire & Rubber Co., File No. 876894, (App. January 22, 1993); See also, 10-84 Larson's Workers' Compensation Law, section 84.01; Sunbeam Corp. v. Bates, 271 Ark. 609 S.W.2d 102 (1980); Army & Air Force Exchange Service v. Neuman, 278 F. Supp. 865 (W.D. La. 1967); Leonardo v. Uncas Manufacturing Co., 77 R.I. 245, 75 A.2d 188 (1950). An employer who chooses to preclude an injured worker's re-entry into its workforce likely demonstrates by its own action that the worker has incurred a substantial loss of earning capacity. As has previously been explained in numerous decisions of this agency, if the employer in whose employ the disability occurred is unwilling to accommodate the disability, there is no reason to expect some other employer to have more incentive to do so. Estes v. Exide Technologies, File No. 5013809 (App. December 12, 2006).

The claimant also asserts that she is an odd-lot employee. In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id., at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co.,

288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

In this case, claimant produced a vocational report from Mr. Newman, which opines that she has been rendered unable to effectively compete for a full-time job in the competitive labor market. Claimant has met her prima facie case, and the burden of production shifts to defendants to identify suitable work opportunities for claimant.

Defendants came forward with a competing vocational expert opinion from Ms. Wolford, which identifies potential jobs available to claimant. Therefore, I conclude that defendants effectively produced evidence to refute the prime facie case presented by claimant. When this occurs, the ultimate burden of persuasion remains with claimant to establish that the only services she can perform are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist.

One of the issues surrounding the assessment of permanent disability and determination of the odd-lot claim asserted by claimant involves claimant's functional ability to perform competitive employment, full time and also her English abilities. Claimant has a spinal fusion. Dr. Phillips found that due to the time it took to have surgery, claimant's nerves were permanently damaged. Claimant has not returned for work at Farmland. Claimant did try to work at the day care and that was unsuccessful after less than two weeks. Dr. Mason opined that claimant does not have the capacity to work. I find that the May 5, 2015 FCE most accurately reflects claimant's ability to work. While claimant has some ability to speak and understand English, her lack of English is an impediment to perform light work that requires interaction with coworkers or the public.

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).

I found the restrictions recommended by Dr. Bansal, the most appropriate and convincing. Applying those medical restrictions, I found claimant has proven she is not capable of performing gainful employment within the competitive labor market. Therefore, I conclude claimant has proven she is permanently and totally disabled and entitled to benefits pursuant to Iowa Code section 85.34(3).

Defendant has objected to payment of certain costs in this case, including costs of the vocational report prepared by Mr. Newman.

Iowa Code section 86.40 states:

> Costs. All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states in part:

> Costs. Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas,... (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate,

A recent decision analyzes the reimbursement of a vocational specialist. I agree with the analysis. The Carlson v. Pattison Sand Co., LLC., File No. 5051757 (Arb. March 14, 2016) held:

> Claimant also seeks reimbursement for the fees of the vocational specialist, Phil Davis in the total amount of $1,343.20 under our costs rule 876 IAC 4.44 (6). Only costs for the preparation of two doctor or practitioner reports can be awarded as costs under our rule 876 IAC 4.33(6), not the cost of any examination performed to arrive at any findings or opinions contained in the report. Des Moines Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015); Lagrange v. Nash Finch Company, File No. 5043316 (App. July 1, 2015). The question is what charges are allowed as the cost of preparation of the report. Turning to the specific decision of the Iowa Supreme Court in Young, the Court

> discussed a previous Court of Appeals decision in John Deere Dubuque Works v. Caven, 804 N.W.2d 297, 301 (Iowa Ct. App. 2011). In Caven, the appeals court awarded the cost of a report from an audiologist, which included a charge for a review of medical records and an interview of the claimant. Young had cited this case as precedent for awarding the costs of a medical examination. The Supreme Court in Young distinguished Caven by stating that the Caven court awarded the report cost under the general costs provisions of Iowa Code section 86.40, not for an examination under Iowa Code section 85.39. The Young court did not reverse Caven.
>
> Consequently, the cost of preparing a report by the practitioner can include the costs of a record review and an interview of the claimant. Exhibit 16 sets forth the specific charges from Davis which include a $100.00 charge for meeting with claimant; $73.00 charge for travel and mileage to claimant's attorney's office, $1,150.00 charge for vocational research, comprehensive file review and vocation report, and a $10.00 charge for the cost of sending the report (presumably to claimant's attorney). Given the Caven case, the charges for the meeting with claimant and the charge for vocational research, file review and report, which total $1,250.00 are reimbursable and shall be awarded

Carlson v. Pattison Sand Co., LLC., File No. 5051757 (Arb. March 14, 2016).

The commissioner recently ruled in Mlady v. Searle Petroleum, Inc., File No. 5024091 (App. February 17, 2016), using his discretion under 876 IAC 4.33, that a FCE was not payable as it was not required by a doctor or practitioner. The Mlady case cited Caven with approval. Caven did allow the cost of an FCE under the facts of that case. Both the Iowa Supreme Court and commissioner have recently relied upon the Caven case and it is still the law.

While in the context of defining records to be disclosed, there is a rule that offers guidance as to who is considered a practitioner under the workers' compensation law. Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010) The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

I find that the reports submitted by Mr. Newman are vocational or evaluation for rehabilitation reports and is a practitioners report.

In this case claimant is requesting $2,684.00 for Mr. Newman's June 23, 2015 report and $385.00 for his July 14, 2015 letter to claimant's attorney. (Claimant's costs p, 12). An itemization does show that the claimant's interview took 2.4 hours and at his billing rate of $110.00 per hour represents $246.00 of the total bill. I award claimant this cost of $3,069.00.

I find that the FCE report of Jake DeNell, Exhibit 17, is also a practitioner's report and award the $900.00 in cost for this report.

As claimant has received payment for two reports, I decline to award the costs of Dr. Mason's report. I also do not award the costs of obtaining medical records.

Claimant is awarded the filing fee of $100.00.

Total costs awarded are $4,069.00 ($3,069.00 + $900.00 + 100.00 = $4,069.00)

ORDER

Defendants shall pay to claimant permanent total disability benefits at a rate of five hundred thirty-six and 26/100 dollars ($536.26) per week from October 21, 2013 during the period of disability. Defendants shall pay accrued weekly benefits in a lump sum with interest provided by law.

Defendants are entitled to a credit of ninety one (91) weeks of benefits at the weekly rate of five hundred thirty-six and 26/100 dollars ($536.26).

Defendants shall pay cost in the amount of four thousand sixty-nine and no/100 dollars ($4,069.00).

Defendants shall reimburse the claimant's medical expenses the circled costs in Exhibit 23.

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

Signed and filed this 12th day of April, 2016.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFE/kjw

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.