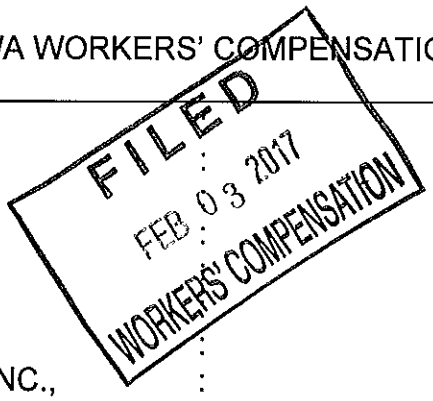
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| ROXANNA L. GALLAHER,<br><br>Claimant,<br><br>vs.<br><br>PATRIOT CONVERTING, INC.,<br><br>Employer,<br><br>and<br><br>MERIDIAN SECURITY INS. CO.,<br><br>Insurance Carrier,<br>Defendants. | File No. 5054527<br><br>A R B I T R A T I O N<br><br>D E C I S I O N<br><br>Head Note Nos.: 1100, 1803 |

## STATEMENT OF THE CASE

Claimant, Roxanna Gallaher, has filed a petition in arbitration and seeks worker's compensation benefits from Patriot Converting, Inc., employer, and Meridian Security Insurance Company, insurance carrier, defendants. Deputy Workers' Compensation Commissioner, Stan McElderry, heard this matter in Des Moines, Iowa.

## ISSUES

The parties have submitted the following issues for determination:

1. Whether the injury arising out of and in the course of employment on July 10, 2015 is the cause of any permanency/impairment;
2. Temporary benefits;
3. Commencement date of benefits;
4. Gross earnings at the time of injury;
5. Medical benefits;
6. Independent Medical Evaluation (IME); and
7. Penalty (Waived in claimant's brief; no longer an issue).

## FINDINGS OF FACT

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

The claimant was 51 years old at the time of hearing. Her formal education ended in the 11th grade, but she earned a GED in her 30's. For approximately the last 30 years the claimant has been a truck driver. She also worked 2 years as an aide in a nursing home, and was a retail store manager for about 2 years. She began working for the employer herein as a truck driver on or about June 3, 2015.

On July 10, 2015 the claimant spent several hours restacking pallets. She initially felt some soreness from the pallet job. By July 14, 2015 the claimant was experiencing significant back pain. (Exhibit 9, page 30) She went to the emergency room. (Ex. 2) She was referred to Dan Miller, D.O., who she first saw on July 22, 2015. (Ex. 3) Dr. Miller imposed restrictions of no lifting over 10 pounds, no push/pull over 25 pounds, and to avoid repetitive bending/twisting. (Id.)

On July 17, 2015 the claimant submitted a letter of resignation stating she was relocating and was willing to continue work until September 11, 2015 if needed. (Ex. D, p. 2) She had an MRI on September 17, 2015 which showed back changes at L4-5 including severe narrowing of the right lateral recess with compression on the descending right L5 nerve root. (Ex. 4, pp. 6-7)

The claimant saw Chad Abernathey, M.D., on November 2, 2015. He diagnosed a synovial cyst at L4-5 and an incident L5-S1 synovial cyst. He opined they were made symptomatic from work and recommended surgery. (Ex. 6) On December 6, 2015 he performed a right L4-5 partial hemilaminectomy, synovial cyst resection and decompression. (Ex. 6) On February 22, 2016 he released the claimant to work, a full duty release to work on March 2, and on June 5, 2015 he opined a 7 percent body as a whole (BAW) impairment. (Ex. 6)

The claimant had an IME with Farid Manshadi, M.D. on August 2, 2016. (Ex. 8) He charged $1200.00 for the IME. Dr. Manshadi opined a 10 percent BAW impairment with restrictions of avoiding repetitive bending or stooping or twisting at the waist, and no lifting over 35-40 pounds. (Ex. 8, p. 5) He placed the claimant at MMI effective June 29, 2016. (Ex. 8, p. 4) The MMI date here is March 2, 2016; the date Dr. Abernathey released the claimant to return to work full duty.

After leaving Patriot the claimant first worked for PCA beginning May 25, 2016. She prepared boxes and also used a "bander" to make bundles. She left that employment for Mid-Iowa Co-Op in Conrad, Iowa. There she drives an 18 wheeler with a fully automatic trailer for "no touch" loads. At hearing she testified she has improved but has problems with her right leg climbing stairs and has pain when climbing stairs or sitting for prolonged periods.

The claimant makes over 30 percent less than she did pre-injury. She has industrial loss in that she has restrictions and cannot return to all relevant prior work. Ability to climb is an important part of being able to drive an 18 wheeler. Considering the claimant's medical impairments, training, permanent restrictions, as well as all other factors of industrial disability, the claimant has suffered a 35 percent loss of earnings capacity.

On the date of injury the claimant was single and entitled to 1 exemption (S1). Defendants assert claimant's gross average weekly earnings were $564.75 per week and the claimant asserts $657.75. The claimant worked for 6 full weeks for Patriot before the injury herein. She averaged $675.75 per week in those 6 weeks. The defendants would exclude the last 2 weeks for some reason. The benefit rate for S1 and $675.75 per week is $406.93. The commencement date for permanent disability is March 2, 2016. The claimant seeks medical expenses as detailed in Exhibits 11 and 12. Those expenses were reasonable and necessary for diagnosis and treatment of the work injury.

## REASONING AND CONCLUSIONS OF LAW

The first issue is extent of permanent disability for the injury.

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).

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 Elec. 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.

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.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, 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.

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961). 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).

Based on the finding that the claimant has suffered a 35 percent loss of earning capacity, she has sustained a 35 percent permanent partial industrial disability entitling her to 175 weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(u).

The next issue is healing period.

An employee is entitled to appropriate temporary partial disability benefits during those periods in which the employee is temporarily, partially disabled. An employee is temporarily, partially disabled when the employee is not capable medically of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability. Temporary partial benefits are not payable upon termination of temporary disability, healing period, or permanent partial disability simply because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury. Section 85.33(2).

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits.

Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1).

The claimant's injury caused permanent disability and impairment. Thus, the temporary benefits herein are healing period benefits. The claimant was off work from September 15, 2015 until released to full duty effective March 2, 2016 when she could have returned to driving and work. The defendants are responsible for paying healing period benefits for this period (September 15, 2015 through March 1, 2016) to the extent they have not already done so.

Medical

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).

The medical expenses detailed in Exhibits 11 and 12 were reasonable and necessary to diagnose and treat the work injury. They are the responsibility of the defendants.

IME

Iowa Code section 85.39 provides, in relevant part, as follows:

> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be

> too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Dr. Manshadi provided an IME after the defendants got a rating from Dr. Abernathey which claimant believed was too low. The defendants shall pay/reimburse the $1,200.00 IME fee of Dr. Manshadi.

## ORDER

Therefore it is ordered:

That defendants pay claimant healing period benefits from September 15, 2014 through March 1, 2016, at the weekly rate of four hundred six and 93/100 dollars ($406.93).

That the defendants pay claimant one hundred seventy-five (175) weeks of permanent partial disability at the weekly rate of four hundred six and 93/100 dollars ($406.93) commencing March 2, 2016.

Defendants shall pay/reimburse as appropriate the medical expenses as detailed above.

Defendants shall pay/reimburse as appropriate the twelve hundred and 00/100 dollars ($1200.00) IME fee of Dr. Manshadi.

Costs are taxed to the defendants pursuant to 876 IAC 4.33.

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30 with subsequent reports of injury pursuant to rule 876 IAC 3.1.

Signed and filed this 3rd day of February, 2017.

STAN MCELDERRY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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**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.