BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
MAR 23 2018
WORKERS' COMPENSATION

MICHAEL GAETA, Claimant, vs. QWEST/CENTURYLINK, Employer, and XL SPECIALTY INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5062792 ARBITRATION DECISION Head Note Nos.: 1703, 1803, 2500, 2502

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Michael Gaeta, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on November 23, 2016. Claimant alleged he sustained a work-related injury on September 17, 2016. (Original notice and petition)

For purposes of workers' compensation, Qwest/CenturyLink, defendant, is insured by XL Specialty Insurance Company, defendant. Defendants filed their answer on December 19, 2016. They denied the occurrence of the work injury. A First Report of Injury was filed on April 5, 2017.

The hearing administrator scheduled the case for hearing on January 25, 2018. The hearing took place in Davenport, Iowa at the Iowa Works Building. The undersigned appointed Ms. Lucinda Winslow-Haidsiak as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on his own behalf. Defendants elected to call Rick Garrels, M.D. to testify on behalf of Qwest/CenturyLink.

The parties offered joint exhibits. The exhibits were marked A through L. All proffered exhibits were admitted as evidence in the case.

Post-hearing briefs were filed on or before February 23, 2018. The case was deemed fully submitted on that date.

STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

1. There was the existence of an employer-employee relationship at the time of the alleged injury;
2. Claimant sustained a work-related injury on September 17, 2016 which arose out of and in the course of his employment;
3. Claimant did not claim any temporary or healing period benefits;
4. The parties agree if permanency is found, the permanency is an industrial disability;
5. The parties agree, the weekly benefit rate is $1,021.88;
6. Prior to the hearing, claimant was paid 37 weeks of compensation at the rate of $766.22 per week and defendants are entitled to a credit for the same;
7. Defendants have waived any affirmative defenses they may have had available; and
8. The parties agree certain costs that are detailed, were paid by claimant.

ISSUES

The issues presented are:

1. Is claimant entitled to any permanent partial disability benefits?
2. If so, to what extent is claimant entitled to those benefits?
3. What is the commencement date for any permanent partial disability benefits that may be awarded?
4. Are defendants liable for a medical bill in the amount of $334.00; and
5. Are defendants liable for the cost of an independent medical examination pursuant to Iowa Code section 85.39?

FINDINGS OF FACT

This deputy, after listening to the testimony of claimant at hearing, as well as the testimony of Dr. Garrels, after judging the credibility of the witnesses, and after reading the evidence, and the post-hearing briefs, makes the following findings of fact and conclusions of law:

The party who would suffer loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

Claimant is 67 years old. He had worked for Qwest/CenturyLink Telephone Company for 44 years. On June 30, 2016, claimant presented to Amber Meyer, M.D., for a non-work related back strain after he had trimmed a hedge. Dr. Meyer diagnosed claimant with "likely a low back strain." (Joint Exhibit A, page 1) Dr. Meyer removed claimant from work for several days. The physician also suggested claimant take over-the-counter Ibuprofen, use ice or heat and rest his back. (Jt. Ex. A, p. 1)

Claimant sustained a work-related injury on September 17, 2016 when he was cleaning brush and weeds from a manhole. He was bending over and experienced a sharp pain in his back. He continued to work for the duration of his shift. However, his condition worsened with time. Claimant telephoned his supervisor and left a voice mail message for him relative to the nature of the work injury.

Two days after the work injury, claimant went to urgent care at Genesis Convenient Care. (Jt. Ex. B, p. 1) Joseph Bergstrom, D.O., examined claimant for localized back pain on the left side of the lumbar region. (Jt. Ex. B, p. 1) Dr. Bergstrom diagnosed claimant with a lumbar sprain. Claimant was removed from work for three days. The physician ordered claimant to be seen by someone in the occupational health department. (Jt. Ex. B, p. 2)

Claimant's initial visit to Genesis Occupational Health Clinic occurred on September 22, 2016. (Jt. Ex. C, p. 1) Ms. Jane Anderson, PA-C, examined claimant. The physical examination revealed: claimant was not in acute distress. He had a normal gait. He was able to squat. He possessed tenderness and increased muscle tone in the paralumbar muscles. Claimant had good range of motion but some discomfort. He was able to heel-toe walk. He had negative straight leg raising. Ms. Anderson diagnosed claimant with "Low back pain." (Jt. Ex. C, pp. 1-2) The physician's assistant placed claimant on restricted duty effective September 22, 2016. (Jt. Ex. C, pp, 1-2) Claimant was advised to sit, stand and walk as tolerated. He was to bend, twist, squat and kneel on rare occasions only. He was restricted from crawling or climbing on ladders. Claimant was prohibited from lifting more than 15 pounds or pushing and pulling 30 pounds. (Jt. Ex. C, p.2)

The next appointment claimant had with a medical provider occurred on September 29, 2016. (Jt. Ex. C, p.4) Once again Ms. Anderson treated claimant for low back pain. Claimant complained of muscle pain and weakness. Claimant's restricted work duty was continued. Ms. Anderson referred claimant for physical therapy treatments three times a week for two weeks. (Jt. Ex. C, p. 4) Ms. Anderson causally related claimant's condition to his work. (Jt. Ex. C, p. 5)

Geeta Mahadevia, M.D., examined claimant on October 6, 2016. The physician found no LS-spine tenderness. However, there appeared to be tenderness and increased muscle tone in the paralumbar muscles with more tenderness on the left side. (Jt. Ex. C, p. 7) Dr. Mahadevia continued the physical therapy and kept claimant on restricted duty. (Jt. Ex. C, pp. 7-8)

Dr. Garrels, treated claimant on October 20, 2016. (Jt. Ex. C, p. 10) Claimant complained of stiffness and pain primarily in the morning with improvement later in the day. (Jt. Ex. C, p. 10) Dr. Garrels examined claimant's lumbar spine. The physician found no muscle tenderness there. Range of motion was full. Claimant was tender over the left sciatic notch region. (Jt. Ex. C, p. 10) Dr. Garrels diagnosed claimant with low back pain and sciatica on the left side. (Jt. Ex. C, p. 10) MRI testing was ordered. (Jt. Ex. C, p. 11) Claimant was instructed to remain on restricted duty. (Jt. Ex. C, p. 11)

MRI testing of the lumbar spine occurred on October 31, 2016. (Jt. Ex. D, pp. 1-2) Andrew Crush, M.D., interpreted the results as:

IMPRESSION:

1. Disk bulging with a left posterior paracentral/left lateral disk protrusion at L4-5. These findings produce moderate spinal cord stenosis as well as bilateral neural foraminal stenosis, severe on the left and moderate on the right.

2. Disk bulging at L3-4 with mild/moderate bilateral neural foraminal stenosis.

(Jt. Ex. D, p. 2)

Claimant returned to Dr. Garrels after the MRI testing had been conducted. Dr. Garrels opined the MRI showed stenosis on the left which most likely was the cause of claimant's symptoms. (Jt. Ex. C, p. 14) The physician recommended an epidural injection. (Jt. Ex. C, p. 14) The diagnoses were low back pain and left side sciatica. (Jt. Ex. C, p. 15)

In December of 2016, claimant had an epidural injection. Claimant reported a resolution of his low back pain. He denied leg symptoms. (Jt. Ex. C, p. 16) Dr. Garrels did not find any muscle tenderness; claimant's gait was normal; and he had full range of motion. (Jt. Ex. C, p. 16) Dr. Garrels returned claimant to regular duty effective December 27, 2016. (Jt. Ex. C, p. 17) Dr. Garrels was informed claimant had already

retired from his employment at Qwest/CenturyLink. Claimant was discharged from the care of Dr. Garrels on the same date. (Jt. Ex. C, p. 18)

Claimant returned to Dr. Garrels on February 8, 2017. Claimant had been performing routine chores in his yard when he experienced symptoms in his back with pain radiating into his left leg. Claimant had full range of motion but mild tenderness in the right upper lumbar region. Dr. Garrels opined claimant was "back to baseline." (Jt. Ex. F, p. 1) Dr. Garrels recommended stretching and observation. (Jt. Ex. F, p. 2)

On March 10, 2017, Dr. Garrels provided a permanent partial impairment rating for claimant's work injury. The final diagnoses were low back pain and sciatica, left side. Dr. Garrels relied on Chapter 15 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition at pages 373-431. (Jt. Ex. G, p.1) He explained how he derived at his rating in his report. He wrote:

> Methodology determined using Figure 15-4 on page 380. Symptoms the result of an injury and MRI findings are an L4-5 disc protrusion with pre-existing degenerative disc disease. DRE method is indicated.
>
> **Table 15-3 Criteria for Rating Impairment Due to Lumbar Spine Injury, page 384**
>
> DRE: Lumbar Category II supported by:
>
> >Patella and Achilles reflexes are 1+/symmetric
>
> >Calf circumference measurement 39cm and symmetric 10 cm distal to patella
>
> >Muscle strength is symmetric and 5/5 in lower extremity muscle groups
>
> **Conclusion: Using the AMA Guides, 5th Edition a [sic] 8% is assessed.**

(Jt. Ex. G, p. 1)

Pursuant to Iowa Code section 85.39, claimant exercised his right to an independent medical examination. Richard Neiman, M.D., examined claimant on April 12, 2017. Dr. Neiman conducted a physical examination of claimant. Dr. Neiman found:

> ...Straight leg test was normal. No hernias being noted. His neurological examination revealed the station and gait performed normally. He can walk on heels and toes. Good strength noted in the upper and lower extremities, 5/5. His reflexes tend to be at trace throughout. Plantar responses downgoing. Sensation was intact to cold and vibration. Cerebral Function: Oriented to

> person, place, and time. No evidence of aphasia. His range of motion of the LS spine flexion forward at approximately 60, extension about 20, right and left lateral flexion at 25 degrees. Has some pain with hyperextension on the back.
>
> **RECOMMENDATIONS:** I would like to get the actual MRI scan for analysis. However, based upon the records, he does have permanency related to this injury. Using the American Medical Association Guides to Permanent Impairment, 5th Edition, he qualify [sic] for the DRE Lumbar Category III. Level of impairment between 10% to 13% impairment of the whole person. At the current time, he is doing reasonably well. I suggest a 10% level of impairment of the whole person. As far as restrictions, I would suggest that he will be placed on light duty. Lifting range at probably in the range of 10 to 15 pounds, maximum of up to about 30 pounds. Avoid excessive flexion, extension, lateral flexion of the lumbar spine, squatting, kneeling, and bending. The level of impairment 10% of the whole person with functional restrictions related to his injury occurred at work on or about September 17, 2016, while working clearing brush for CenturyLink Telephone Company.
>
> **ADDENDUM:** Certainly, I would like to look at the actual MRI scan. Based upon the disk herniation, which was caused by the injury at work on September 17, 2016. The level of impairment and functional restrictions are related to the same.
>
> As far as trying to keep the back in the best shape, I have suggested weight reduction 20 pounds water exercise and walking would be excellent for him.

(Jt. Ex. L, p. 4)

Claimant retired from CenturyLink on December 17, 2016. Claimant was offered an incentive package of $33,000.00, plus his retirement benefits; he was paid for his unused vacation and personal days too. Claimant selected to take his retirement benefits in a lump sum. He received in excess of $200,000.00. Claimant is now on Medicare and receives his Social Security retirement benefits in the amount of $2,400.00 per month.

Claimant testified he could not perform one hundred percent of his job duties. He stated he had to rely on his co-workers for assistance and he did not want to burden anyone. Claimant testified he could not lift ladders or perform aerial work. He was unable to work in manholes or lift more than 25 pounds.

Claimant admitted he was not forced to take retirement on December 17th. At the time, claimant was working full time with some restrictions. Dr. Garrels released claimant to full duty work on December 27, 2016, just ten days after claimant had retired. Since the day he was released to full duty work, claimant has not sought other employment. He reported he does not want to re-injure his back.

Claimant is able to lift his toddler grandson if the child is not squirming. Claimant performs some household and garden chores. He avoids squatting and kneeling. He performs his tasks in a slower fashion than prior to his work injury. Claimant avoids lifting more than 30 pounds whenever possible.

Dr. Garrels testified claimant informed him he was retiring from CenturyLink. However, claimant never attributed his retirement to issues with his back condition. Dr. Garrels related claimant's problems to his pre-existing degenerative disk disease. Dr. Neiman related claimant's problems to an acute trauma at work.

RATIONALE AND CONCLUSIONS OF LAW

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).

When an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522, 133 N.W.2d 867 (1965).

The weight to be given an expert opinion may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. St. Luke's Hospital v. Gray, 604 N.W.2d 646 (Iowa 2000).

Expert testimony may be buttressed by supportive lay testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 380; 101 N.W.2d 167, 170 (1960).

The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence. Together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire and Casualty Co., 526 N.W.2d 845 (Iowa 1995).

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Claimant testified credibly. He is an older individual who voluntarily decided to retire because of an incentive program offered by the company. He is not motivated to seek other employment, even part-time work. Claimant has some pain when bending, squatting and kneeling. He only takes over-the-counter medications for pain on an as-needed basis. He is a non-surgical candidate. No medical provider is recommending additional physical therapy or work hardening. Home stretching and exercises are advised, as well as weight loss. Dr. Garrels rated claimant's permanent impairment at 8 percent. Dr. Neiman rated the permanent impairment at 10 percent. There are not vast discrepancies between the two ratings.

After reviewing all of the factors involved in rendering a decision about industrial disability, it is the determination of the undersigned; claimant has sustained a permanent partial disability in the amount of fifteen (15) percent. Defendants shall pay unto claimant seventy-five (75) weeks of permanent partial disability benefits at the stipulated weekly benefits rate of $1,021.88. Said benefits shall commence from December 17, 2016, the date claimant retired from CenturyLink.

Defendants shall take credit for thirty-seven (37) weeks of permanent partial disability benefits paid at the incorrect rate of $766.22 per week.

In arbitration proceedings, interest accrues on unpaid permanent disability benefits from the onset of permanent disability. Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979); Benson v. Good Samaritan Ctr., File No. 765734 (Ruling on Rehearing, October 18, 1989).

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.

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).

The next issue is the matter of the payment for an independent medical examination pursuant to Iowa Code section 85.39. Iowa Code section 85.39, permits an employee to be reimbursed for a subsequent examination by a physician of the employee's choice when an employer-retained physician has previously evaluated "permanent disability" and the employee believes the initial evaluation is too low. Claimant is requesting reimbursement for the cost of the independent medical examination and report provided by Dr. Neiman. The total cost was $850.00. Claimant has complied with all of the requirements of Iowa Code section 85.39. Defendants shall reimburse claimant's counsel for the cost of the $850.00 independent medical examination.

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).

Claimant is requesting the payment of one medical bill in the amount of $334.00. The bill is for the Genesis Group for December 9, 2016. It is a bill that is related to claimant's treatment for his work injury. Defendants are liable for the cost of the bill.

The final issue is costs to litigate. 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:

> **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, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition

testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

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).

The following costs are assessed to defendants:

Filing fee $100.00

Service fee unknown

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant seventy-five (75) weeks of permanent partial disability benefits at the stipulated weekly benefit rate of one thousand twenty-one and 88/100 dollars ($1,021.88) and payable from December 17, 2016.

Defendants shall take credit for all benefits previously paid.

Accrued benefits shall be paid in a lump sum, together with interest, as provided by law.

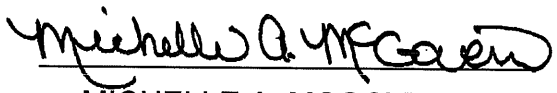
Defendants shall pay unto claimant's counsel the cost of the IME in the amount of eight hundred fifty and 00/100 dollars ($850.00).

Defendants shall pay a three hundred thirty-four and 00/100 dollars ($334.00) medical bill owned to the Genesis Group.

Costs are assessed to defendants as detailed in the body of this decision.

Defendants shall file all reports as required by law.

Signed and filed this 23rd day of March, 2018.



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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.