BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARIO ORTEGA,

Claimant,

vs.

KOENEN DAIRY & GREGORY KOENEN,

Employer,
Defendant.

File No. 5057405

ARBITRATION

DECISION

Head Notes: 1801, 1803, 4000

STATEMENT OF THE CASE

Mario Ortega, claimant, filed a petition in arbitration seeking workers' compensation benefits from defendant employer, Koenen Dairy & Gregory Koenen. The arbitration hearing was held on August 17, 2017. The parties submitted post-hearing briefs on September 14, 2017, and the matter was considered fully submitted on that date.

The evidentiary record includes: Joint Medical Exhibits JE 1 through JE 4, Claimant's Exhibits 1 through 7 and Defendants' Exhibits A through L.

At hearing, claimant, Mario Ortega, Suleiman Hernandez, Gregory Koenen, Molly Bixenman and Neri Rodriguez, provided testimony.

The hearing was interpreted by Ms. Janeth Murillo.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Extent of Healing Period.

2. Entitlement and extent of permanent partial disability benefits.

3. Entitlement to penalty benefits.

4. Costs.

FINDINGS OF FACT

After a review of the evidence presented, I find as follows:

I note that both employers are identified in the Hearing Report as defendants and the parties have stipulated therein to the existence of the employer-employee relationship at the time of the injury. There was no issue presented in the Hearing Report and no argument made in post-hearing briefs concerning who claimant's employer was on the date of the injury or challenging the employer-employee relationship of either named defendant. Therefore, this decision is made with the understanding that both Koenen Dairy and Greg Koenen were claimant's joint employers on the date of the stipulated work injury.

Mario Ortega, claimant, was 19 years old at the time of the hearing and resided in Rock Valley, Iowa. (Transcript page 8) He testified that he attended school in Mexico for just three (3) years, and did not attend middle school or high school. (Transcript page 8) However, his answers to interrogatories indicate that claimant "finished" primary school in 2008 and secondary school in 2012. (Ex. 1, p. 1) In 2012, when claimant finished secondary school, he would have been about 15 years old.

Claimant arrived in the United States in 2013 at age 15 or 16. (Tr. pp. 8-9)

While in Mexico, claimant worked with horses from 2012 to 2013, the details of which are unclear. After arriving in the United States, claimant worked for a pig facility in Inwood, Iowa, where he fed and cleaned pigs. (Ex. 1, p. 2) Claimant went to work at Koenen Dairy in 2014. (Id.) He worked for defendants for about four to five months before the injury occurred on October 19, 2014. (Tr. pp. 8-9) Koenen Dairy is a dairy farm and claimant was hired to work as a milker. (Ex. 4, p. 3; Ex. 3, p. 12) The job required the use of a mechanical milking machine and is described by the employer as involving "very minimal physical labor." (Id.)

On October 19, 2014, claimant fell onto a cement step or wall attached to or near a water trough. (Tr. pp. 9-10; Ex. JE1, p. 2; Ex. JE 3, p. 2) He had pain in his abdomen. (Tr. p. 10; Ex. JE 1, p. 2) The pain was significant enough that claimant reported passing out. (Tr. p. 11) Claimant believes that an individual named Alfredo alerted Mr. Koenen of the incident. (Tr. p. 11) Following the injury, a co-worker transported claimant to the hospital emergency room in Rock Valley, Iowa. (Tr. pp. 11-12; Ex. JE 1, pp. 2-3) Claimant was diagnosed with a lacerated liver and a lacerated adrenal gland. The medical staff was concerned about possible internal bleeding and possible need for surgery. (Ex. JE 2, p. 2) Claimant was then transported by ambulance to a hospital emergency room in Sioux Falls. (Ex. JE 1, p. 3) It is recorded that "Greg Koenen O.K. with transfer per phone call 10/20/14 04:05 A." (Ex. JE1, p. 7) Mr. Koenen testified that he did not recall this telephone conversation concerning claimant's transfer to the hospital in Sioux Falls, South Dakota. (Tr. pp. 44-45)

Claimant was transferred to Avera McKennan Hospital and University Health Center in Sioux Falls, South Dakota, on October 20, 2014, and a history was obtained through a Spanish interpreter. (Ex. JE 3, p. 12) He was noted to have a grade 3 liver laceration and a right adrenal hemorrhage with retroperitoneal hemorrhage. (Id.) He was admitted for "further management" of his injuries. (Ex. JE 3, p. 13) The plan was to keep patient on bed rest, provide fluids and control his pain. (Ex. JE 3, p. 17) At the time of his discharge from the hospital, his pain was controlled with oral narcotics, he was tolerating his diet, and he was ambulating on his own. (Ex. JE 3, pp. 19-20) Upon his release from the hospital on October 22, 2014, claimant was told to not work for at least one (1) month and not to engage in contact sports for six (6) weeks, however ambulation was encouraged. (Ex. JE 3, p. 20)

On December 26, 2014, a little over two months after his release from the hospital, claimant was seen at Promise Community Health Center and reported that concerning the work injury, "he has no complaints at this time." (Ex. JE 4, p. 7) It is recorded that he was "feeling well now. No abdominal pains," concerning the liver laceration and adrenal hematoma. (Id.)

On March 16, 2017, C. Robert Adams, M.D., authored a letter to claimant's counsel following an independent medical evaluation (IME) of claimant. At the time of the evaluation on March 10, 2017, claimant reported continued pain in his right upper abdomen. (Ex. 2, p. 1) He indicated that the pain grew worse as the day went on. (Id.) He reported that he was working at a dairy farm at the time of the evaluation, which involved applying and removing milking machines, moving the cows from one location to another, and using a Bobcat to clean manure. Claimant reported that the work made him tired and that he fatigued more quickly than he did prior to the work injury. (Id.) He reported bowel urgency and cramping, and not having bowel urgency before the work injury. (Ex. 2, p. 2) Dr. Adams recommended a follow up CT scan. (Id.) He also suggested calcium and trying other prescription meds to address his bowel cramping and loose stools. (Ex. 2, p. 4) Dr. Adams stated that claimant reached maximum medical improvement (MMI) about six (6) months after the injury, which would be about April 19, 2015. (Ex. 2, p. 4) He assigned an impairment rating of six (6) percent based on recurrent abdominal pain that is worse with activity and bowel urgency and diarrhea. (Ex. 2, p. 4) Dr. Adams relied upon Table 6-3 and 6-4 "and other examples and suggestions given in The American Medical Association Guides to the Evaluation of Permanent Impairment." (AMA Guides) (Id.) Dr. Adams then assigned restrictions of no lifting over 50 pounds higher than shoulder level on an occasional basis.

Concerning causation, I note that Dr. Adams stated that it is the persistent "right upper quadrant pain after significant abdominal trauma" that was "caused by a fall in a work-related injury." (Ex. 2, p. 3) He does not specifically state a causation opinion concerning claimant's complaints of bowel urgency, cramping or loose stools. I further note that Table 6-3 of the AMA Guides relates to impairment concerning the upper digestive tract and Table 6-4 discusses impairment due to colonic and rectal disorders. It is not clear to the undersigned from Dr. Adams' written opinion that either of these

areas involve the lacerated liver or adrenal gland that claimant sustained as a result of the work injury, or the abdominal pain that Dr. Adams believes is causally related to the work injury.

Sunil Bansal, M.D., issued a report on June 30, 2017, following an IME of claimant. (Ex. B) Although claimant complained of abdominal pain, Dr. Bansal found that claimant had no abdominal tenderness with palpation, no guarding and "normoactive bowel sounds." (Ex. B, pp. 4, 5) Dr. Bansal disagreed with the impairment rating assigned by Dr. Adams, noting that Table 6-3 and 6-4, involve organs that were not implicated by the work injury. (Ex. B, p. 5) Dr. Bansal notes that the "liver is the only regenerative organ in the body," and that a laceration to the liver "is not expected to cause permanent damage." (Id.) Dr. Bansal notes that Table 6-7 of the AMA Guides provides the rating methodology for liver pathology and that claimant does not meet the criteria for any permanent impairment. (Id.) Dr. Bansal opined that claimant could have returned to full-duty work as of December 26, 2014, the date of his last appointment when he had no complaints. (Ex. B, p. 6; Ex. JE 4, p. 7) Finally, Dr. Bansal opines that increased bowel frequency, urgency, and diarrhea are not related to his work injury of a lacerated liver and adrenal hemorrhage and that his current need for medical treatment, if any, is not due to his work injury. (Ex. B, p. 6)

Considering the expert opinions in this matter, I find the opinion of Dr. Bansal to be more persuasive. As I noted above the impairment rating assigned by Dr. Adams does not appear to be based on the parts of the body affected by the work injury and he provides no clear causation opinion that would correlate those parts of the body to the work injury. This conclusion is supported by Dr. Bansal's opinion. Dr. Bansal concluded that concerning those parts of the body affected by the work injury that there is no applicable permanent impairment. I find that claimant failed to carry his burden of proof that he sustained permanent impairment as a result of the work injury.

After being released from the hospital, claimant did not return to work at Koenen Dairy. (Tr. p. 14) Claimant was not paid weekly benefits during the period that he was hospitalized or during the one (1) month that he was taken off work following his release from the hospital. (Ex. JE 3, p. 20) The parties nevertheless agree in the Hearing Report that claimant is entitled to temporary total disability benefits for the period of October 19, 2014 through November 19, 2014. (Hearing Report p. 1)

Claimant's injury occurred on October 19, 2014. He was released from the hospital on October 22, 2014 and was told not to work for one (1) month. On December 16, 2014 claimant reported no complaints and he returned to work three (3) months after the injury. (Tr. p. 15) Claimant stated that his pain was so significant that he was unable to work from April 2015 until February 19, 2016. (Tr. pp. 4, 32) This does not fit with his return to full-duty work about 3 months after the injury. (Tr. p. 15) Also, it does not fit with his report to Promise Community Health Center on December 26, 2014, wherein he stated that he had no complaints, no abdominal pains and was feeling well. Claimant disputes that he reported no pain at that time. (Ex. JE4, p. 7; Tr. p. 32)

About three (3) months after the injury claimant did return to full-duty work at Hull Dairy for about two months, working 11 hours per day. (Ex. 1, p. 2) He reported quitting that job because he felt fatigued. (Id.) Claimant then went to work at Shep, which was also a dairy farm. (Ex. 1, p. 2; Tr. p. 16) He worked there for about one month. (Ex. 1, p. 2) Claimant quit this job, because he found the work to be too difficult. (Id.) Claimant then went to work on a dairy farm in Maurice, Iowa in February, 2016 and remained employed there. (Ex. 1, p. 2; Tr. p. 17)

Claimant testified that he played soccer both before and after the injury. (Tr. pp. 19-20) However, on cross examination claimant initially denied playing soccer after the injury, but then agreed that the photo contained at Exhibit H, page 1, was him playing soccer, and he estimated that photo was taken in July 2017. (Tr. p. 22) Molly Bixeman, a private investigator testified that she saw claimant playing soccer for about 45 minutes and described him as one of the faster players on the team and that there was no indication that he was in any pain. (Tr. p. 65) Neri Rodriguez testified that he played soccer with claimant. (Tr. p. 70) The undersigned reviewed two short video clips of claimant playing soccer, wherein he is seen walking, jogging and sprinting. Watching the video, it does not appear that claimant is in any kind of distress or pain and he does not appear to be limited in his movement. (Ex. F; Ex. G) There was a substantial amount of testimony and evidence related to claimant playing soccer. I find that based on the evidence presented claimant played soccer both before and after the work injury.

The parties agree that claimant is entitled to temporary total disability benefits for the period of October 19, 2014 through November 19, 2014, however, there does not appear to be any evidence that these benefits were paid. The medical record from the Sioux Falls hospital of October 22, 2014, instructed claimant to remain off work for at least one (1) month. (Ex. JE 3, p. 20) I therefore accept the parties' stipulation of temporary total benefits as due and owing from the date of injury of October 19, 2014 through November 19, 2014, but extend the period to November 22, 2014, to reflect the one (1) month off work instruction provided by the physician at the Sioux Falls Hospital. (Id.) Therefore, defendants shall pay temporary total disability to claimant for the period of October 19, 2014 through November 22, 2014. There is no medical opinion or instruction for claimant to be off work beyond November 22, 2014. On December 26, 2014, claimant stated to Promise Community Health Center that he had no pain and was feeling well. (Ex. JE 4, p. 7) Claimant returned to work in January 2015 in Hull, Iowa. No temporary total disability benefits after November 22, 2014 can reasonably be supported from the evidence presented.

Defendants assert that an investigation occurred, yet defendants also appeared to have avoided any proactive investigation, choosing instead to wait and see and hope that the matter simply went away. This may have been related to defendants' admission that they had no workers' compensation insurance in place at the time of the injury. Greg Koenen claimed that having workers' compensation insurance was contrary to his religion and confirmed that there was no insurance. (Tr. p. 59) Interestingly, Mr. Koenen stated that he maintains automobile liability insurance

because he was told that he had to have it by law to keep his driver's license. (Tr. p. 61) He was apparently unconcerned with Iowa Code section 87.14A.

Defendants acknowledged that Greg Koenen was aware of claimant's injury within days following the injury. (Tr. p. 54) But, because Greg Koenen did not speak Spanish, he inquired with another employee, Neri Rodriguez, who eventually told him that claimant found a job elsewhere and would not be coming back. (Id.) Greg Koenen stated that within a week to ten days after the injury, claimant was going to seek work elsewhere. (Id.) However, I found above that claimant had been taken off work until November 22, 2014, more than 30 days after the injury. I find that defendants were aware that claimant was taken to the emergency department of the local hospital and was then transferred to the Sioux Falls hospital, based on the note contained in the medical records stating that "Greg Koenen O.K. with transfer per phone call 10/20/14 04:05 A." (Ex. JE1, p. 7)

Defendants agreed that claimant was entitled to temporary total disability benefits from October 19, 2014 through November 19, 2014, and yet failed to pay the same. A mere cursory investigation would have revealed the physician's restriction to not work for one month from October 22, 2014 through November 22, 2014. It is unclear why temporary benefits were not timely paid.

There was no evidence that defendants communicated their denial of temporary total disability benefits, and their failure to pay benefits for the period that they now agree was due and owing is inexplicable. I find that defendants failed to conduct a reasonable investigation and failed to contemporaneously communicate the basis of their denial of benefits to claimant. The failure to pay healing period benefits from October 19, 2014 through November 22, 2014 is unreasonable. I find a delay of temporary total disability benefits has occurred and defendants have failed to conduct a reasonable investigation and contemporaneously communicate the basis of the denial to claimant.

CONCLUSIONS OF LAW

The first issue is the extent of temporary total disability benefits.

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).

Claimant argues in his post-hearing brief that he is entitled to 40.85 weeks of benefits. (Cl. Post-Hearing Brief, p. 2) However, in the Hearing Report claimant alleges entitlement to healing period from October 19, 2014 through November 19, 2014 (4.571 weeks) and April 19, 2015 through February 19, 2016 (43.857 weeks),

which the undersigned calculates to actually be 48.428 weeks. It is unknown to the undersigned how the 40.85 weeks claimed in claimant's post-hearing brief is calculated.

In support of his claim for temporary total benefits, claimant improperly relies upon Alonzo v. IBP, Inc., File No. 5009878 (App. Dec. 10/31/06). The Alonzo case addresses Iowa Code section 83.33(3) and factors relating to a defendant's affirmative defense of claimant's refusal to accept suitable work and is misplaced in the case at bar.

Claimant's argument in his post-hearing brief for temporary total disability acknowledges that Dr. Bansal confirmed MMI and claimant's ability to return to full-duty work about two months after the injury when he reported no pain on his December 26, 2014 medical visit. Claimant also acknowledges that even his own IME physician stated that claimant would have reached MMI just 6 months after the work injury. Also, claimant provides no cogent argument for why temporary total disability should not cease upon his return to full-time work, which he testified occurred about three months after the injury. Claimant's assertion of entitlement to temporary total disability benefits is perplexing and well exceeds the facts and law applicable in this case.

Claimant was injured on October 19, 2014. He was hospitalized until his discharge on October 22, 2014. Upon his discharge, he was told by the hospital physician that he was not to work for at least one (1) month, which would be November 22, 2014. There is no additional doctor's note or medical record taking claimant off work at any time thereafter. There is no additional medical evidence to support claimant's continued status off work past November 22, 2014. The evidence supports the conclusion that claimant was medically capable of returning to work substantially similar to the work performed at the time of injury on and after November 23, 2014.

Defendants shall pay claimant temporary total disability benefits for the period of October 19, 2014 through November 22, 2014.

The second issue is the extent of permanent partial disability, if any.

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).

When an expert opinion is based upon an incomplete history, the opinion is not necessarily binding upon the commissioner. 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 & Casualty Co., 526 N.W.2d 845 (Iowa 1995).

Above, I accepted the opinion of Dr. Bansal finding that claimant had no permanent impairment for the reasons there stated. I conclude that claimant failed to carry his burden of proof that he sustained any permanent impairment as a result of the work injury pled.

The next issue is penalty.

Iowa Code section 86.13(4) provides that:

> (a) If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, of chapter 85, 84A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed or terminated without reasonable or probable cause or excuse.
>
> (b) The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination of benefits.
>
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.
>
> (c) In order to be considered a reasonable or probable cause or excuse under paragraph "b", an excuse shall satisfy all the following criteria:
>
> (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 for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Weekly compensation payments are due at the end of the compensation week. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229, 235 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commission must impose a penalty in an amount up to fifty percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

I have found above that claimant has established a delay/denial in payment of temporary total disability benefits for the period of October 19, 2014 through November 22, 2014 and that defendants have failed to establish reasonable cause for the delay/denial. This period of delay/denial is particularly perplexing because defendants acknowledge that the vast majority of the period in question (October 19, 2014 through November 19, 2014) is due and owing and have yet failed to pay the same.

I conclude that penalty in the amount of approximately 50 percent is appropriate. The stipulated weekly rate is $381.42. The number of weeks from October 19, 2014 through November 22, 2014 is four weeks and six days or 4.857 weeks, which multiplied by the rate of $381.42, is $1,852.56. Approximately 50 percent of $1,852.56 is $925.00.

Costs are a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I conclude that defendants shall pay the cost of the filing fee of $100.00 and the cost of service of the original notice and petition of $6.47 for a total of $106.47.

A copy of this decision is being provided to the workers' compensation commissioner to determine whether further action should take place under Iowa Code section 87.19 for failure to have workers' compensation insurance.

ORDER

IT IS THEREFORE ORDERED:

Defendants shall pay claimant healing period benefits from October 19, 2014 through and including November 22, 2014 at the stipulated rate of three hundred eighty-one and 42/100 dollars ($381.42) per week.

All accrued benefits shall be paid in a lump sum.

Defendants shall pay interest on any accrued weekly benefits pursuant to Iowa Code section 85.30

Defendants shall pay claimant nine hundred twenty-five and 00/100 dollars ($925.00) in penalty for failure to pay temporary total disability benefits.

Defendants shall pay costs in the amount of one hundred six and 47/100 dollars ($106.47).

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 26th day of December, 2017.

TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Judy L. Freking
Attorney at Law
PO Box 1208
Le Mars, IA 51031
judycfreking@gmail.com

Kley B. De Jong
Bradley K. De Jong
Attorneys at Law
P.O. Box 405
Orange City, IA 51041
kbdejong@klaylaw.com
bkdejong@klaylaw.com

TJG/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.