BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DONALD HOUSTON,

Claimant,

vs.

HARDING ENTERPRISES, LLC, d/b/a TUFFY AUTO SERVICE CENTER,

Employer,

and

ACCIDENT FUND NATIONAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5052683

ARBITRATION DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Donald Houston, Jr., has filed a petition in arbitration and seeks workers' compensation benefits from, Harding Enterprises LLC, d/b/a Tuffy Auto Service Center, employer, and Accident Fund National Insurance Company, insurance carrier, defendants.

Deputy workers' compensation commissioner, Stan McElderry, heard this matter in Cedar Rapids, Iowa.

ISSUES

The parties have submitted the following issues for determination:

1. The extent of permanent industrial loss from an injury arising out of and in the course of employment on or about September 26, 2014, if any;
2. Rate;
3. Medical expenses; and
4. Penalty.

FINDINGS OF FACT

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

The claimant was 55 years old at the time of hearing. He is not a high school graduate, having left school in the 11th grade. He did obtain a GED approximately 20 years later. He received an automotive service excellence (ASE) certification from Kirkwood Community College in 2008. His work history is almost entirely comprised of heavy physical labor jobs. He is also a felon, having spent nearly 8 years in a federal prison. The claimant has a very lengthy history of work injuries predating the injury herein. There are at least 10 previous workers' compensation injuries. (Exhibit 4, pages 7-8) One involved a neck injury severe enough to have resulted in cervical surgery with ongoing chronic neck pain and headaches. (Ex. M, p. 2) Another was a right biceps tear where the treating physician advised a change in occupation or rehabilitation. (Ex. K, p. 1) Another work injury resulted in 2 right shoulder surgeries. (Ex. B, p. 3) Then there were left shoulder surgeries and 2 left elbow surgeries. (Exs. M and N)

On September 26, 2014, the claimant suffered a stipulated injury arising out of and in the course of employment when he fell backwards over a motor. He first was seen at urgent care, where an X-ray ruled out any fracture. (Ex. 3, p. 2) He also saw a chiropractor. (Ex. 3, p. 1) The claimant saw David H. Segal, M.D., on October 9, 2014. (Ex. 3, p. 3) The claimant told Dr. Segal about the work accident and reported that prior to the injury he "had no major back problems." (Ex. 3, p. 3) Dr. Segal noted that the X-ray did show a T7 anterior wedge compression fracture. (Ex. 3, p. 4) An MRI on October 22, 2014 showed a small left foraminal to left far lateral L3-4 disc protrusion/annular tear that approached the distal portion of the left L3 nerve root without exerting a significant mass effect on it. (Ex. 3, p. 8) An MRI of the thoracic spine showed the T7 fracture could be an old injury. (Ex. 3, pp. 9-10) Dr. Segal noted that the T7 fracture could be from the injury herein. (Ex. 3, p. 12) The small herniation at L3-4 was the biggest concern. Dr. Segal recommended no surgery and recommended physical therapy (PT) or injections. (Ex. 3, p. 12)

The claimant received an epidural steroid injection on November 20, 2014. (Ex. 3, p. 25) Then PT was ordered. (Ex. 3, p. 30) An injection was performed on December 23, 2014. (Ex. 3, 31) The claimant started PT twice but never finished; the second time stopping because of reported worsening symptoms. (Ex. 3, p. 42) The claimant was referred to Chad Abernathey, M.D. The claimant saw Dr. Abernathy on January 15, 2015. He ordered a repeat MRI and did not recommend surgery. (Ex. V, p. 8) He placed the claimant at maximum medical improvement (MMI) on October 16, 2015 and saw no need for additional treatment. (Ex. V, p. 12)

Laura Sellner, a vocational counselor selected by the defendants, attempted to work with the claimant. (Ex. J) The claimant did not follow through. She concluded there was no loss of earning capacity from the work injury. (Ex. J, p. 9)

There is surveillance video in the record. The defendants assert it is of the claimant and the claimant asserts it is of a neighbor. It is not particularly helpful as it shows video at times of a residence as the claimant's when it is clearly not the claimant's residence. The report generated by the surveillance contains numerous errors and inaccuracies. At least part of the time the individual referred to as the claimant is not him.

The claimant had an independent medical examination (IME) with Mark Taylor, M.D. (Ex. 1) Dr. Taylor opined that the claimant had an 8 percent body as a whole (BAW) impairment from the back injury herein. (Ex. 1, pp. 8-9) He also opined restrictions that include lifting limited to 15 pounds preferably at waist level, or as least between knee and chest level. No tolerance of squatting or bending, and overhead work/lifting. He should alternate sitting, standing, walking as needed for comfort. (Ex. 1, p. 9)

The claimant's counsel had the claimant reviewed by Steve Jayne, a vocational consultant. (Ex. 2) Mr. Jayne opined that even with accommodations, and excluding the claimant's non-work related cardiac condition, that the claimant was precluded from competitive employment. (Ex. 2, p. 12)

The claimant was injured at work on September 26, 2014. Although he had a lengthy history of prior work injuries, he had always managed to come back to the competitive work world before. The opinions of Dr. Taylor are accepted as more consistent with the claimant's state following the work injury herein. The vocational view of Laura Sellner that there is no loss of earning capacity is rejected. Given the totality of the claimant's injuries over the years, this injury can only be seen as the final straw. Before it he had industrial earning capacity. After the injury herein, considering the claimant's medical impairments, training, permanent restrictions, cognitive disorder, daily pain, as well as all other factors of industrial disability, the claimant has suffered a 100 percent loss of earning capacity.

On the date of injury the claimant was married, and entitled to 2 exemptions. Claimant believes that his weekly gross earnings were $1,058.74 for a weekly benefit rate of $666.53. The defendants believe the earnings are $904.00 per week for a weekly benefit rate of $578.95. The difference is that the claimant was paid salary and commission. Claimant believes that those weeks where claimant worked 50 to over 60 hours but earned only around $600.00 should be excluded. Defendants believe that there is no cause to exclude any weeks.

The claimant also seeks payment/reimbursement of medical bills. Those expenses are detailed in Exhibits 13 and 14. Those expenses were reasonable and

necessary for the treatment of the work injury. Claimant also seeks payment of the Dr. Taylor IME of $3,062.50. He also seeks penalties on underpayment of rate and late payments. Thirteen point seven one four (13.714) weeks of temporary/healing benefits from May 29, 2015 was paid late. Three (3) weeks of temporary/healing benefits from October 23, 2015 through November 12, 2015 were paid late. Six point four two nine (6.429) weeks of temporary/healing benefits was paid late. (Ex. 10) A total of 23.143 weeks of benefits were paid late. Commencement date is the date of injury in the case of total loss of earning capacity.

REASONING AND CONCLUSIONS OF LAW

The first issue is permanent disability.

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).

An employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity, and the length of the healing period; the work experience of the employee prior to the injury and after the injury and the potential for rehabilitation; the employee's qualifications intellectually, emotionally, and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. Likewise, an employer's refusal to give any sort of work to an impaired employee may justify an award of disability. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980). These are

matters which the finder of fact considers collectively in arriving at the determination of the degree of industrial disability.

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 State of Iowa Industrial Commissioner Decisions 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 State of Iowa Industrial Commissioner Decisions 654 (App. February 28, 1985).

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.

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 29, 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. 1982).

It was found above that the claimant met his burden of proof that the work injury is causally connected to any permanent disability. He has permanent impairment and loss of earning capacity from the injury. Due to the finding of a 100 percent loss of earning capacity, the claimant is entitled as a matter of law to permanent total industrial disability pursuant to Iowa Code section 85.34(3). This entitles the claimant to weekly benefits for life absent a change of condition

Medical.

The next issue is the claimant's entitlement to medical expenses set forth in claimant's Exhibit 13 and 14.

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 16, 1975).

Evidence in administrative proceedings is governed by section 17A.14. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence. The rules of evidence followed in the courts are not controlling. Findings are to be based upon the kind of evidence on which reasonably prudent persons customarily rely in the conduct of serious affairs. Health care is a serious affair.

Prudent persons customarily rely upon their physician's recommendation for medical care without expressly asking the physician if that care is reasonable. Proof of reasonableness and necessity of the treatment can be based on the injured person's testimony. Sister M. Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963).

It is said that "actions speak louder than words." When a licensed physician prescribes and actually provides a course of treatment, doing so manifests the physician's opinion that the treatment being provided is reasonable. A physician practices medicine under standards of professional competence and ethics. Knowingly providing unreasonable care would likely violate those standards. Actually providing care is a nonverbal manifestation that the physician considers the care actually provided to be reasonable. A verbal expression of that professional opinion is not legally mandated in a workers' compensation proceeding to support a finding that the care provided was reasonable. The success, or lack thereof, of the care provided is evidence that can be considered when deciding the issue of reasonableness of the care. A treating physician's conduct in actually providing care is a manifestation of the physician's opinion that the care provided is reasonable and creates an inference that can support a finding of reasonableness. Jones v. United Gypsum, File No. 1254118 (App. May 2002); Kleinman v. BMS Contract Services, Ltd., File No. 1019099 (App. September 1995); McClellon v. Iowa Southern Utilities, File No. 894090 (App. January 1992). This inference also applies to the reasonableness of the fees actually charged for that treatment.

The medical expenses claimed are in Exhibits 13 and 14. Those expenses were reasonable and necessary for the treatment of the work injury. The defendants are responsible for them. The defendants shall pay/reimburse those expenses are appropriate.

IME

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). Defendants' liability for claimant's injury need not ultimately be established before defendants are obligated to reimburse claimant for an independent medical examination.

After the defendants got opinions of no permanent impairment or injury, the claimant chose to get an evaluation/examination to establish whether the injuries arose out of and in the course of employment, and whether they caused permanent impairment or disability. The claimant got that exam from Dr. Taylor, who charged a reasonable fee of $3,062.50 for the ratings. Defendants are responsible for paying/reimbursing that fee.

Rate

Iowa Code section 85.36 states:

> The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee's employer for the work or employment for which the employee was employed, computed or determined as follows and then rounded to the nearest dollar . . . .

"Gross earnings" is defined as:

> Recurring payments by employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits.

Iowa Code section 85.61(3).

In Burton v. Hilltop Care Center, 813 N.W.2d 250, 258 (Iowa 2012), the Iowa Supreme Court determined that the Noel v. Rolscreen Co., 475 N.W.2d 666 (Iowa Ct. App.1991) case did not contain an exclusive and exhaustive list of factors for determining whether a bonus is regular. Whether a bonus should be included in the rate calculation is determined on a fact-by-fact basis and any conclusion reached by the commissioner will be overturned by the Supreme Court only if the finding is "irrational, illogical, or wholly unjustified." Burton at p. 266. In Burton, the Supreme Court stated:

> In light of the applicable standard of review, we do not feel a strict reading of Noel is appropriate. The question before the district court was whether the commissioner's decision that Burton's bonus was "regular" was irrational, illogical, or wholly unjustified. (Iowa Code § 17A.19(10)(m)) The factors listed in Noel were relevant to the commissioner's conclusion in that case. However, their relevance to any other case depends solely on the facts of that case. The true nature of the inquiry requires a reviewing court to look at those facts that were and were not considered by the agency in applying law to fact and then to determine whether, on the whole, the agency's application of law to fact was irrational, illogical, or wholly unjustified. Since no two cases present the same set of facts, we will not handcuff the agency by limiting its inquiry. So long as the application of law to fact is not illogical, irrational, or wholly unjustified; the agency's decision will be upheld on judicial review.

Id. at 266.

Burton is not totally apposite as the issue is not a bonus, but commissions. The purpose is to recreate average earnings. However commissions varied greatly and thus the better approach is to exclude no weeks as the defendants have proposed. As such, the weekly benefit rate is $578.95.

The final issue is whether the claimant is entitled to penalty benefits.

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."

Christensen, 554 N.W.2d at 260.

The supreme court has stated:

> (1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.
>
> (2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.
>
> (3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).
>
> (4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).
>
> > If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.
>
> Id.

(5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.

(6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

(7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 593 N.W.2d 833, 840 (Iowa App. 1999). Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008).

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

The defendants paid over $10,000.00 in benefits late and without excuse. This insurer has a history of penalties. A penalty of $5,000.00 which is under, but in the range of 50 percent, is appropriate on this record.

ORDER

THEREFORE IT IS ORDERED:

That the defendants pay claimant permanent total disability benefits commencing September 26, 2013 at the rate of five hundred seventy-eight and 95/100 dollars ($578.95), and continuing for all periods of disability.

That the defendants shall pay/reimburse medical expenses as detailed in Exhibits 13 and 14.

Defendants shall pay/reimburse the three thousand sixty-two and 50/100 dollar ($3,062.50) IME fee of Dr. Taylor.

Defendants shall pay a penalty of five thousand and 00/100 dollars ($5,000.00), all of which is accrued.

Defendants shall receive credit for all benefits previously paid.

Costs are taxed to the defendants pursuant to rule 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 15th day of July, 2016.

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.