BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOSEPH DeFALCO, Claimant, vs. DUBUQUE RESCUE MISSION, Employer, and LIBERTY MUTUAL INS.CO., Insurance Carrier, Defendants.	:	File No. 5024695 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1801.1, 1802, 1803; 4000.2

STATEMENT OF THE CASE

This is a proceeding in arbitration that claimant, Joseph DeFalco, has brought against the employer, Dubuque Rescue Mission, and its insurance carrier, Liberty Mutual Ins. Co., to recover benefits under the Iowa Workers' Compensation Act as a result of an injury claimant sustained on June 28, 2006.

This matter came on for hearing before the undersigned deputy workers' compensation commissioner at Des Moines, Iowa on June 5, 2009. The record consists of the testimony of claimant as well as claimant's exhibits 1 through 11 and defendants' exhibits A through F. Briefs as submitted were reviewed. The matter was fully submitted as of June 13, 2009.

ISSUES

The stipulations of the parties contained within the hearing report filed at the time of hearing are accepted and incorporated into this decision by reference to that report. Pursuant to those stipulations, claimant was single on the date of injury. Gross weekly earnings were $400.00, which results in an applicable weekly compensation rate of $255.92.

The issues remaining to be decided are:

1) Whether the injury is a cause of claimant's claimed permanent disability;

2) If so, the extent of any permanent disability benefit entitlement under Iowa Code section 85.34(2)(u); and

3) Whether pursuant to Iowa Code section 86.13, claimant is entitled to additional benefits as a penalty for defendant's unreasonable delay or denial of benefits.

FINDINGS OF FACT AND ANALYSIS

The undersigned deputy workers' compensation commissioner, having heard the testimony and considered the evidence, finds:

Claimant, Joseph DeFalco, (Joseph) was 63 years old on the date of hearing. He completed eighth grade and later attained a GED. He also completed three months training in order to become certified as a store detective/security officer in 1974.

Joseph's work history is varied. Besides store security work, he also had worked as a store stocker, a food delivery truck driver, a cement truck driver, an aircraft refueler, a route sales driver and a cab and shuttle service driver before being hired to do donation pickups for the Dubuque Rescue Mission in 1995. The Rescue Mission is a charitable organization that, among other things, provides meals and sleeping quarters for transient men. Its work is supported by donations of money and used goods. To that end, it operates a thrift store, in which donated merchandise is resold.

In approximately 1997, Joseph became the Mission's thrift store manager. His salary was based on a 40 hour week and was $400.00 at the time of injury. Joseph testified that he generally worked more than 40 hours. The store was open for customers from 9:00 a.m. to 4:00 p.m. Monday through Friday and from 9:00 a.m. to 2:00 p.m. on Saturdays. Joseph's duties included opening and closing the store, handling cash register transactions, recording telephone calls requesting that items be picked up for donation, helping unload donated items, and helping store customers place purchased goods into their vehicles.

Goods donated to and sold from the Mission store included furniture, appliances, electronics, shoes, and clothing. Excess cotton clothing was sorted, sacked, and stacked for resale to rag vendors. Joseph's duties could include lifting the sacked clothing. Additionally, Joseph supervised volunteers, community employment placement individuals, and Mission residents who assisted in the store operation. As store manager, Joseph reported to and was subordinate to the Mission's Executive Director.

On June 28, 2006, Joseph was at work when he attempted to lift a full garbage container weighing approximately 150 pounds and empty it into a dumpster. While doing so, pain shot through his right arm. Joseph is left hand dominant, but testified that he had screwed up his left shoulder approximately a year earlier in another work incident.

When his right upper extremity pain did not resolve with self-care, including over-the-counter medications, and after initially seeking evaluation at a local free clinic, Joseph saw Frederick Isaak, M.D., at Tri-State Occupational Health on July 26, 2006. Claimant's right shoulder abduction was limited to about 40 degrees. Forward flexion was limited as well. Dr. Isaak assessed claimant with right shoulder tendinitis, rotator cuff tendinitis, bursitis, and right shoulder impingement syndrome. The doctor prescribed narcotic pain and anti-inflammatory medication and right shoulder physical therapy was initiated. The doctor restricted Joseph from right shoulder overhead activities and from right arm lifting, pushing, or pulling of more than 10 pounds. (Exhibit 3, page 1) Joseph remained at work with these restrictions.

With physical therapy, Joseph's right shoulder abduction and forward flexion improved. He continued to have limitations on internal rotation and mild tenderness near the rotator cuff insertion. Dr. Isaak ordered a right shoulder MRI. (Ex. 3, pp. 3-4) The MRI study performed on August 31, 2006 revealed a partial thickness tear of the supraspinatus tendon. (Ex. 2, p. 2) Dr. Isaak referred Joseph to orthopedic surgeon, Judson Ott, M.D., for further evaluation.

Dr. Ott first saw Joseph on March 18, 2006. The doctor treated claimant conservatively for approximately another six months, but claimant's right shoulder discomfort persisted. (Ex. 6, pp. 1-5) Therefore, on March 6, 2007, Dr. Ott performed a right shoulder arthroscopy, which revealed partial thickness tears of both the supraspinatus and the biceps tendons, as well as superior labrum fraying and shoulder impingement. Dr. Ott debrided the partial thickness rotator cuff tear but did not repair it, as there was not "enough evidence or thickness of the cuff tear to recommend a rotator cuff repair." Acromioplasty was performed, given findings of significant shoulder impingement. The biceps and labrum also were debrided. (Ex. 6, pp. 10-11)

Dr. Ott released claimant to return to work as of March 16, 2007 with no use of his right arm. Joseph's return to work was at his pre-injury wage, although with accommodations from his employer. In other words, Joseph did not have a temporary reduction in his earning ability while performing accommodated work for the employer. For that reason, his March 16, 2007 return to work represented the end of his healing period and did not constitute a period of temporary partial disability.

On April 6, 2007, Dr. Ott restricted claimant to no lifting above chest level and no lifting above 10 pounds. (Ex. 6, p. 13) Dr. Ott modified these restrictions on May 7, 2007 to no lifting above 25 pounds and no overhead lifting. (Ex. 6, p. 14) Joseph continued under these restrictions through the summer of 2007. As of September 17, 2007, claimant continued to have some difficulty lifting above shoulder level. (Ex. 6, p. 17)

To that point, the Mission generally was accommodating Joseph's restrictions by providing help with heavier and overhead lifting. And, overall he apparently had a good relationship with his employer.

A different executive director was hired for the Mission in October 2007. Unfortunately, that individual and Joseph clearly had different management styles and perceptions about Joseph's job performance. The director gave Joseph a verbal warning regarding the tone and matter that Joseph had used with a store patron. He disagreed with Joseph's service to two African-American women. He was concerned because a church volunteer believed Joseph had treated her rudely when she attempted to donate books. He felt Joseph had disregarded the director's instructions regarding clearing fire exits and keeping them unlocked during store hours. Additionally, the director instructed Joseph that Joseph could only leave the store during work hours as the director authorized. On October 11, 2007, the director placed Joseph on probationary work status and advised Joseph in writing that any further violations of what the director perceived as Mission policy would result in claimant being fired. (Ex. C, pp. 1-2)

Joseph continued as the Mission store manager through November 14, 2007. On that date, a dispute arose between the director and Joseph regarding whether Joseph had made sexually explicit comments to an AARP placement store employee. Joseph denied making the comments and stated that he refused to continue working in the thrift store if the AARP placement continued to work there. Joseph turned over his keys and left his thrift store management job the following morning. (Ex. C, pp. 3-4)

Joseph continued right shoulder treatment with Dr. Ott through January 23, 2008. Dr. Ott then characterized Joseph as doing well but as having some residual discomfort when he used the [right] arm overhead repetitively. Dr. Ott reported that Joseph's external rotation with symmetric at 15 degrees, forward flexion was 135 degrees, and abduction 90 degrees. Internal rotation was limited to hip pocket. On February 8, 2008, Dr. Ott assigned Joseph 12 percent [right] upper extremity or 7 percent whole person permanent partial impairment under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, and basing the rating on Joseph's "residual motion loss combined with symptoms." (Ex. 6, pp. 19-21)

Thomas J. Hughes, M.D., performed a claimant initiated independent medical evaluation on July 1, 2008. Right shoulder motion measurements were flexion 110 degrees, extension 40 degrees, abduction 130 degrees, abduction 30 degrees, external rotation 70 degrees, and an internal rotation 40 degrees. Dr. Hughes assigned 12 percent upper extremity permanent impairment based on range of motion criteria. Additionally, extrapolating from the Guides, Fifth Edition, Dr. Hughes assigned claimant 5 percent upper extremity impairment for the acromioplasty Dr. Ott had performed. The combined value rating was 16 percent upper extremity impairment or 10 percent whole person impairment. (Ex. 7, pp. 4-6)

Dr. Hughes opined that Joseph's surgery, other medical treatment, and continuing right shoulder difficulties were causally related to the work injury. The doctor further opined that the work injury apparently set up substantially symptomatic subacromial impingement problems, which surgery only partially relieved. For that reason, Dr. Hughes opined the June 2006 work injury also had aggravated a pre-

existing degenerative condition. (Ex. 7, pp. 7-8) Dr. Ott's surgical report is consistent with Dr. Hughes' opinion that the work injury aggravated pre-existing right shoulder degeneration. Additionally, this record is devoid of any medical evidence suggesting that Joseph needed right shoulder medical care before the work injury.

Dr. Hughes characterized Joseph's fundamental work restriction as an inability to do any significant right arm reaching or forceful activities above shoulder level. The doctor opined that Joseph could right arm lift 20 pounds to chest level on an infrequent basis and 10 pounds on an occasional basis. (Ex. 7, pp. 7-8)

Joseph testified that his right shoulder symptoms make washing his hair, bowling, and shooting pool difficult. He also stated that right shoulder pain interferes with his sleep.

After leaving the Dubuque Mission job, Joseph worked briefly as a movie theater janitor earning $7.00 per hour for three or four hour shifts. He testified that he left this job after three months because his arm was "killing" him.

Joseph then left the Dubuque area and settled in the Marquette-McGregor, Iowa area. In August 2008, he took a job that paid $8.00 per hour as a firearms department customer greeter at a Cabela's retail store. Joseph's initial duties were to check and lock any firearms customers brought into the store. These physical demands were within his post injury restrictions and capabilities. He voluntarily quit this job in November 2008, however, because he felt a store assistant manager was demanding that he perform heavier duties. Joseph testified that he has applied for other jobs without success.

His restrictions make it unlikely that Joseph can return to the heavy manual labor work he performed as a younger man. Additionally, he has no computer or secretarial skills. Nevertheless, his most recent work experience was in retail store management. He has employee management and supervision experience as well as retail store merchandising skills that, even with his restrictions, should be able to provide him employment at a wage near the salary he earned when injured.

Joseph began receiving Social Security retirement benefits in July 2008. He has never inquired to the Social Security administration as to whether and how having paid employment might impact those benefits. Such inquiry would seem reasonable for an individual actively seeking postretirement employment. Joseph's failure to so inquire suggests that his motivation to find work and continue as a wage earner is somewhat limited, even when his modest whole person impairment and his right upper extremity work restrictions are considered. Joseph is found to have 30 percent loss of earning capacity.

Dr. Ott communicated Joseph's permanent impairment rating and work restrictions to the insurance claim representative on or about February 6, 2008. (Ex. 6, p. 21) The insurance carrier paid no permanent partial disability benefits until it made a

lump sum payment of 37 weeks of benefits on October 7, 2008. (Ex. F, p. 1) Even then, it chose to use January 23, 2008 as the commencement date for permanent partial disability.

The carrier was clearly aware that claimant had returned to work as of March 16, 2007, as it had ceased to pay any form of temporary benefit to claimant after March 15, 2007. The carrier also was clearly aware that claimant was receiving his pre-injury wage on his return to work on March 16, 2007, as the carrier never paid claimant temporary partial disability benefits and was not liable for them, as claimant had returned to accommodated work at his pre-injury earnings.

Under those circumstances, a reasonable insurance carrier would have understood that Joseph's entitlement to temporary disability benefits ceased on March 15, 2007, and his entitlement to permanent partial disability benefits commenced on March 16, 2007. Likewise, as of its receipt of Dr. Ott's impairment rating and work restrictions for Joseph, a reasonable insurance carrier would have acknowledged that Joseph was entitled to permanent partial disability, given that the combination of permanent bodily impairment and work restrictions routinely decreases a worker's capacity to earn wages in the general labor market. In this case, a reasonable carrier would have recognized that Joseph had permanent partial disability at least equal to the 7 percent whole person impairment rating Dr. Ott had assigned.

At minimum on or before March 1, 2007, the carrier should have completed any administrative investigation of the facts of this claim relative to permanent partial disability, and commenced paying Joseph permanent partial disability benefits equal to its authorized physician's 7 percent whole person impairment rating. Likewise, a reasonable carrier would have recognized that under the applicable Iowa law, the 35 weeks of benefits would have commenced on March 16, 2007 and had all accrued as of November 14, 2007. A reasonable insurance carrier that had paid no temporary partial benefits after the injured worker had returned to light-duty work at the preinjury wage would not have concluded that the time frame from the return to work to the assignment of a impairment rating constituted a period of temporary partial disability and not a period of permanent partial disability.

It is expressly found that the employer and carrier unreasonably delayed paying Joseph 35 weeks of permanent partial disability benefits. Given the significant period during which benefits were delayed, penalty near the 50 percent maximum that Iowa Code section 86.13 permits is appropriate. A penalty in the monetary amount of $4,425.00 is appropriate.

CONCLUSIONS OF LAW

The above findings of fact and analysis lead to the following conclusions of law:

First considered is a question of whether claimant's injury has caused permanent disability.

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 R. App. P. 6.14(6).

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).

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).

The examining physician, Dr. Hughes, expressly relates claimant's right shoulder condition, his medical treatment, his impairment, and his restrictions to the June 2006 work injury. The authorized treating surgeon relates those sequela and residuals to the injury by history. There is no contrary medical evidence in the record.

Wherefore, it is concluded that claimant has established causal relationship between his June 26, 2006 injury and his permanent disability.

The extent of claimant's permanent disability related to loss of earning capacity is addressed.

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.

Claimant has restrictions on the use of his right upper extremity. Both the treating and examining doctor have assigned modest impairment ratings that relate to his right shoulder condition. Claimant is precluded from a number of the heavier, manual labor jobs he performed in the more distant past. The work injury and the resulting restrictions also preclude his performing some retail services jobs, for which his recent work experience would otherwise qualify him. Nevertheless, claimant has meaningful residual work experience and skills, with which he could secure employment providing an income at or near that which he received in the 10 years he served as store manager of the Mission retail thrift shop. The record does not suggest that claimant is aggressively seeking employment within his work experience and skills, however. Claimant's loss of earning capacity that results from his injury is 30 percent.

Wherefore, it is concluded that claimant has established 30 percent permanent partial disability, for which he is entitled to 150 weeks of benefits, payable at the applicable rate of $255.92 and commencing on March 16, 2007.

Claimant seeks additional benefits as a penalty under Iowa Code section 86.13 because defendants failed to pay any permanent partial disability benefits until October 7, 2008, and then commenced those benefits as January 23, 2008 and not March 16, 2007.

Iowa Code section 86.13 provides the pre-requisites for the imposition of penalty benefits. A penalty is appropriate when there has been a delay in the commencement of benefits or when benefits are terminated “without reasonable or probable cause or excuse.” Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299, 307 (Iowa 2005).A reasonable cause or excuse exists if either the delay was necessary for the insurer to investigate the claim or the employer had a reasonable factual or legal basis to contest the employee’s entitlement to benefits. City of Madrid v. Blasnitz, 742 N.W. 2d 77 (Iowa

2007); Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996). Appropriate considerations in determining the amount of the penalty are the length of the delay, the number of delays, the information available to the employer and its carrier regarding the employee's injuries and wages, and prior penalties imposed against the employer or its carrier. Robbennolt v. Snap-On Tools Corp., 555 N.W. 2d 229 (Iowa 1996)

Defendants failed to commence permanent partial disability benefits at least commiserate with Dr. Ott's 7 percent whole person impairment rating when those benefits were accrued and payable. They did so without reasonable cause or excuse. They delayed a significant amount of benefits for a significant period of time. A significant award of additional benefits pursuant to Iowa Code section 86.13, as a penalty for defendants unreasonable delay in paying 7 percent permanent partial disability benefits under Iowa Code section 85.34(2)(u), is compelled.

Wherefore, it is concluded that claimant has established entitlement to additional benefits as a penalty in the monetary amount of $4,400.00

ORDER

THEREFORE, IT IS ORDERED THAT:

Defendants pay claimant one hundred fifty (150) weeks of permanent partial disability benefits at the applicable rate of two hundred fifty-five and 92/100 dollars ($255.92), with those benefits to commence on March 16, 2007.

Defendants pay accrued amounts in a lump sum and pay interest as Iowa Code section 85.30 provides.

Defendants receive credit for the amounts previously paid.

Defendants pay claimant additional benefits in the monetary amount of four thousand four hundred and no/100 dollars ($4400.00) as a penalty pursuant to Iowa Code section 86.13.

Defendants file subsequent reports of injury as this division requires.

Defendant pay costs of these proceedings pursuant to rule 876 IAC 4.33.

Signed and filed this __21st__ day of July, 2009.

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HELENJEAN M. WALLESER
DEPUTY WORKERS'
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