BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GEORGE HEISS,

Claimant,

vs.

GENUINE PARTS COMPANY,

Employer,

and

SAFETY NATIONAL CASUALTY CO.

Insurance Carrier,
Defendants.

File No. 5054997

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

George Heiss, the claimant, seeks workers' compensation benefits from defendants, Genuine Parts Company, the alleged employer, and its insurer, Safety National Casualty Co., as a result of an alleged injury on August 11, 2015. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on March 7, 2017, and this matter was fully submitted at the close of that hearing. Oral testimony and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Only one set of joint exhibits, marked numerically, were offered and received at hearing. References in this decision to page numbers of an exhibit shall be made by citing the exhibit number or letter followed by a dash and then the page number(s). For example, a citation to exhibit 1, pages 2 through 4 will be cited as, "Ex 1-2:4".

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

At hearing, the parties submitted the following issues for determination:

I. The extent of claimant's entitlement to permanent disability benefits;

II. The extent of claimant's entitlement to medical benefits; and,

III. The extent of claimant's entitlement to penalty benefits for an unreasonable delay in paying temporary total/healing period benefits pursuant to Iowa Code section 86.13.

An issue concerning claimant's entitlement to an independent medical examination was resolved at hearing when defendants agreed to pay John Kuhnlein, D.O., the sum of $3,210.50.

FINDINGS OF FACT

In these findings, I will refer to the claimant by his nick name, Bill, and to the defendant employer as NAPA, as it is an authorized NAPA auto parts outlet.

From my observation of his demeanor at hearing including body movements, vocal characteristics, eye contact and facial mannerisms while testifying in addition to consideration of the other evidence, I found Bill credible.

Prior to his work injury in this case, Bill had significant health problems. He has had ankle and shoulder surgeries. He suffered a heart attack which resulted in the installation of a stent in his coronary artery. He has chronic kidney problems with a previous installation of a stent. He has abnormal brain CT as a side effect of a brain concussion and 10 day coma when he was struck by a car while riding a bicycle when he was 8 years old. He has COPD, a fatty liver, and Type II diabetes.

Bill, age 64 at hearing, worked for NAPA as a part-time parts delivery person, from March 2015 until he resigned in December 2016. His job consisted of delivering auto parts using the company vehicle to 35 customers. This job involved loading and carrying various sizes of auto parts and extended periods of driving either a small passenger car or small truck. Bill resigned over a dispute with NAPA's human resources manager concerning the time he took off work for his work injury. The manager claimed he was released to full duty. Bill asserted that he was told by the doctor that he could not drive a vehicle when he experienced his work-related migraine headaches that caused blurred vision and dizziness.

The stipulated work injury involved a head trauma when the company vehicle Bill was driving was rear-ended by another vehicle. There is no dispute that he lost consciousness for a time and suffered memory loss, headache, and confusion after the accident along with a laceration over his left eye where his head struck the steering wheel. He also suffered some back, neck, and hip pain. After being evaluated and released at a local emergency room, claimant obtained care from a family doctor, Jose Angel, M.D., an internal medicine physician. He later was referred by Dr. Angel to Irving Wolfe, D.O., a neurologist. Defendants subsequently authorized these physicians and paid for the care they provided.

Both treating doctors diagnosed a concussion with loss of consciousness and/or closed head injury along with post-concussion syndrome. This syndrome results in memory, language and attention impairment along with tinnitus, balance, headaches and emotional/behavioral problems. (Ex. 1-15; Ex. 3-1). Treatment remained conservative with medications. (Ex. 3-4:5) Claimant's initial physical pain complaints subsided, but over time he began to have increased headaches (which Bill describes as migraine headaches) causing blurred vision and dizziness along with sensitivity to light and sound. Bill states that he must end all activity, especially driving, when these headaches occur. (Id). These headaches were as frequent as 22 days each month. (Ex. 3-5) Bill stated that he also began having vivid nightmares of witnessing the death of his father when he was a child. In May 2016, Dr. Wolfe began treating Bill with Botox injections. These injections significantly improved Bill's symptoms and on June 16, 2016, Dr. Wolfe placed Bill at maximum medical improvement (MMI) and released Bill to full duty work, stating as follows:

> Although Mr. Heiss appears to be fit to work without restrictions or limitations based on history and objective medical findings noted on todays and past evaluation, there is no guarantee that he will not be injured or sustain a new injury upon returning to work or the performance of any social activities.

(Ex. 3-6)

Dr. Wolfe did not provide any written explanation for this statement in the record of this case. However, Bill testified that the doctor told him orally that he should not be driving when he was experiencing headaches that cause blurred vision and dizziness. Dr. Wolfe also opined that as a result of his work injury, Bill suffered a 3 percent permanent partial impairment to the body as a whole. Defendants paid Bill 15 weeks of permanent disability benefits based on Dr. Wolfe impairment rating.

The evidence does not show an impairment rating from Dr. Angel. Also, he has never lifted his activity restriction limiting lifting to 25 pounds that he imposed before referring Bill to Dr. Wolfe. (Ex. 1-17)

As to future treatment, Dr. Wolfe stated that claimant will require repeat Botox injections every 90 days to maintain his improved condition. Claimant also continues to take medications to address the headaches. Claimant states that he now is having 6-8 headaches each month which vary in severity. This is consistent with what he has told Dr. Wolfe. (Ex. 3-20)

At the request of his attorney, Bill was evaluated by John Kuhnlein, D.O., an occupational physician. Dr. Kuhnlein agreed with Dr. Wolfe's date claimant achieved MMI and agreed with Dr. Wolfe's impairment rating. Dr. Kuhnlein noted the differing views between Bill and Dr. Wolfe as to his release to full duty and stated that based only on his examination there is no need for specific restrictions, including the need for a lifting restrictions for his brain injury. (Ex. 5-9) However, based on Bill's explanation of

his headache events, Dr. Kuhnlein opines Bill would be capable of meeting his job demands at all times, except for about 6 days per month when Bill is experiencing his more significant headaches. (Ex. 5-10)

I find the work injury of August 11, 2015 to be a cause of a 3 percent permanent partial impairment to the body as a whole. More importantly, for industrial disability purposes, I find that the work injury of August 11, 2015 to be a cause of an inability to work for a few days per month due to severe headaches.

Bill was already semi-retired when the August 11, 2015 injury occurred. Following graduation from high school, Bill was a truck driver for a few years until he received formal training as a roofer and then spent 11 years working as a roofer through union Local 142. Initially, this work involved shingled roofs, but later on he moved to flat, commercial roofing. In 1985, he left roofing work and became an over-the-road trucker for 8 years running routes to/from Las Vegas and the East Coast. In 1993, he returned to roofing work. A year later he became the business manager of the roofing union from 1999 through November 2008, at which time he retired. As a business manager he was required to drive long distances across the state. After two years of retirement, he became bored, and starting driving a taxi for a friend who was suffering from cancer. He subsequently began working for NAPA part time delivering auto parts.

Bill states that he cannot return to any of his past jobs due to the inability to consistently work at heights or drive commercially due to his headache episodes. He states that he is unable to pass a physical to obtain a commercial drivers' license (CDL), but admits that he has not attempted to obtain such a license since leaving NAPA. I find that his prior health problems would likely have prohibited a return to heavy manual labor prior to his employment at NAPA. I find that he likely would pass a physical to obtain a CDL if he was not experiencing one of his severe headaches during the exam.

On the other hand, while he is physically capable of working in jobs such as the one he held at NAPA, the onset of his headaches is not predictable as to when or how often they occur and each varies in intensity. He likely would experience the type of problems he had at NAPA with other employers when he would take time off work on an intermittent basis to deal with his headaches. Neither party provided vocational expert evidence as to what problems he would experience with potential employers given his health conditions and he has not looked for any other work.

Therefore, I can only find that Bill has suffered a relatively modest 40 percent reduction in his earning capacity due to his work injury.

The requested medical expenses set forth in Exhibit 6 constitute reasonable and necessary treatment of the work injury of August 11, 2015. Due to the work injury of August 11, 2015, Bill will require future maintenance medical care, including medications and periodic Botox injections. The best provider of that treatment would be his current physician, Irving Wolfe, D.O.

Defendants offered no excuse or explanation for the late payment of healing period benefits of $$1,672.00 or for the last payment of temporary partial disability benefits of $1,371.84. (Ex. 11-1, 4)

CONCLUSIONS OF LAW

I. The parties agreed in the hearing report that the work injury is a cause of permanent, industrial disability to the body as a whole. Consequently, this agency must measure claimant's loss of earning capacity as a result of this impairment.

Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 593; 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. However, consideration must also be given to the injured worker's medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured worker's qualifications intellectually, emotionally and physically; the worker's earnings before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted, Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616 (Iowa 1995); 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).

Pursuant to Iowa Code section 85.34(2)(u) , Iowa has adopted the so-called "fresh start rule." Industrial loss now is no longer a measure of claimant's disability from all causes after which we then apportion out non-work causes and leave in work related causes under the full responsibility rule. The percentage of industrial loss now is the loss of earnings capacity from what existed immediately prior to the work injury. This means that an already severely disabled person before a work injury can have a high industrial loss because the loss is calculated in all cases from whatever his earning capacity was just before the injury and what it was after the injury, not the loss as compared to a healthy non-disabled person. In other words, all persons, start with a 100 percent earning capacity regardless of any prior health or disability conditions. The rationale for this approach is that an employer's liability for workers' compensation benefits is dependent upon that person's wages or salary. Consequently, the impact, if any, of any prior mental or physical disability upon earning capacity is automatically factored into a person's wages or salary by operation of the competitive labor market and there is no need to further apportion out that impact from any workers' compensation award. Roberts Dairy v. Billick, 861 N.W.2d 814 (Iowa 2015); Steffan v. Hawkeye Truck & Trailer, File No. 5022821 (App. September 9, 2009).

The facts of this case demonstrate clearly the application of the fresh start rule. Claimant's earning capacity was diminished prior to starting his job at NAPA as he was semi-retired. This lowered earning capacity is represented by his relatively low gross weekly earnings of $540.57 that was stipulated in the hearing report. Any award for lost earning capacity would be a percentage of that reduced earning capacity. Consequently, further apportionment of an award due to a pre-existing disability would be inappropriate.

A showing that claimant had no loss of his job or actual earnings does not preclude a finding of industrial disability. Loss of access to the labor market is often of paramount importance in determining loss of earning capacity, although income from continued employment should not be overlooked in assessing overall disability. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991); Collier v. Sioux City Community School District, File No. 953453 (App. February 25, 1994); Michael v. Harrison County, Thirty-fourth Biennial Rep. of the Industrial Comm'r, 218, 220 (App. January 30, 1979).

Although claimant is closer to a normal retirement age than younger workers, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). However, this agency does consider voluntary retirement or withdrawal from the work force unrelated to the injury. Copeland v. Boones Book and Bible Store, File No. 1059319 (App. November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

A release to return to full duty work by a physician is not always evidence that an injured worker has no permanent industrial disability, especially if that physician has also opined that the worker has permanent impairment under the AMA Guides. Such a rating means that the worker is limited in the activities of daily living. See AMA Guides to Permanent Impairment, Fifth Edition, Chapter 1.2, p. 2. Work activity is commonly an activity of daily living. This agency has seen countless examples where physicians have returned a worker to full duty, even when the evidence is clear that the worker continues to have physical or mental symptoms that limit work activity, *e.g.* the worker in a particular job will not be engaging in a type of activity that would cause additional problems, or risk further injury; the physician may be reluctant to endanger the workers' future livelihood, especially if the worker strongly desires a return to work and where the risk of re-injury is low; or, a physician, who has been retained by the employer, has succumbed to pressure by the employer to return an injured worker to work. Consequently, the impact of a release to full duty must be determined by the facts of each case.

Assessments of industrial disability involve a viewing of loss of earning capacity in terms of the injured workers' present ability to earn in the competitive labor market without regard to any accommodation furnished by one's present employer. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996); Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 617 (Iowa 1995). However, an employer's special accommodation for

an injured worker can be factored into an award determination to the limited extent the work in the newly created job discloses that the worker has a discerned earning capacity. To qualify as discernible, employers must show that the new job is not just "make work" but is also available to the injured worker in the competitive market. Murillo v. Blackhawk Foundry, 571 N.W.2d 16 (Iowa 1997)

In the case sub judice, I found that claimant suffered a 40 percent loss of his earning capacity as a result of the work injury. Such a finding entitles claimant to 200 weeks of permanent partial disability benefits as a matter of law under Iowa Code section 85.34(2)(u), which is 40 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection.

II. Pursuant to Iowa Code section 85.27, claimant is entitled to payment of reasonable medical expenses incurred for treatment of a work injury. Claimant is entitled to an order of reimbursement if he/she has paid those expenses. Otherwise, claimant is entitled only to an order directing the responsible defendants to make such payments directly to the provider. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988).

In the case at bar, I found that the requested expenses were related to the work injury and they shall be awarded. Also, I shall award continued treatment.

III. Claimant seeks additional weekly benefits under Iowa Code section 86.13 (4) for delays in payment of healing period and temporary partial disability benefits. That provision states that if a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the industrial commissioner shall award extra weekly benefits in an amount not to exceed 50 percent of the amount of benefits that were unreasonably delayed or denied if the employee demonstrates a denial or delay in payment or termination of benefits and the employer has failed to prove a reasonable or probably cause or excuse for the denial, delay or termination of benefits. (Iowa Code section 85.13(4)(b)) Iowa Code section 86.13(4)(c) provides that a reasonable or probably cause or excuse must satisfy the following requirements:

> (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.

The employer has the burden to show a reasonable and probable cause or excuse. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable." City of Madrid v. Blasnitz, 742 N.W.2d 77, 83 (Iowa 2007); Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996); Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

In this case, defendants offered no excuse for delays in paying healing period and temporary partial disability benefits. The full 50 percent penalty shall be awarded.

Finally, claimant shall be awarded costs. However, claimant seeks reimbursement for the costs of a consultation with Dr. Wolfe and a report from Dr. Wolfe. The consultation fee is not reimbursable under our rule, but the report is reimbursable. Unfortunately, there was no itemization for just the fee for preparing the report. The claimant can move for rehearing to obtain reimbursement for that cost upon providing that portion of the fee, if defendants refuse to pay it.

ORDER

1. Defendants shall pay to claimant two hundred (200) weeks of permanent partial disability benefits at the stipulated rate of two hundred three and 85/100 dollars ($203.85) per week from the stipulated date of June 16, 2016. Defendants shall pay accrued weekly benefits in a lump sum and shall receive credit against this award for the fifteen (15) weeks of benefits previously paid.

2. Defendants shall pay the medical expenses listed in Exhibit 6. Defendants shall reimburse Medicare in the amount of two hundred one and 20/100 dollars ($201.20) and shall hold claimant harmless from the charges by Mercy Clinics and Physicians set forth in Exhibit 6-3.

3. Defendants shall provide to claimant continued medical treatment of his headache condition by Irving Wolfe, D.O., including prescribed medications and injections, for so long as Dr. Wolfe deems necessary.

4. Defendants shall pay to claimant the sum of eight hundred thirty-six and no/100 dollars ($836.00) for delay in paying healing period benefits and the additional sum of six hundred eighty-five and 92/100 dollars ($685.92) for delay in paying temporary partial disability benefits.

5. Defendants shall pay interest on unpaid weekly benefits awarded herein pursuant to Iowa Code section 85.30.

6. Defendants shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33 set forth in the attachment to the hearing report except for the fees of Dr. Wolfe.

7. Defendants shall file subsequent reports of injury (SROI) as required by our administrative rule 876 IAC 3.1(2).

Signed and filed this 24th day of March, 2017.

LARRY WALSHIRE
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.