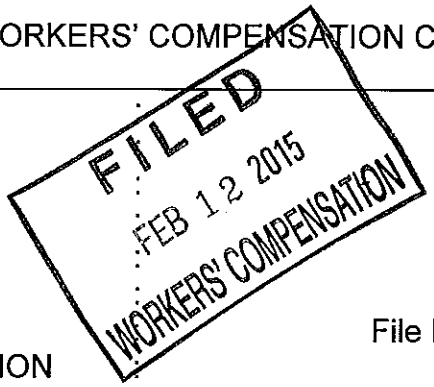
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



WENDELL MALLETT,

Claimant,

vs.

EMPIRE FOUNDRY PRODUCTION AND RECLAIM, INC.,

Employer,

and

LIBERTY MUTUAL GROUP,

Insurance Carrier,
Defendants.

File No. 5046086

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Wendell Mallett, has filed a petition in arbitration and seeks worker's compensation benefits from Empire Foundry Production and Reclaim, Inc., employer, and Liberty Mutual Group, insurance carrier, defendants.

Deputy Workers' Compensation Commissioner, Stan McElderry, heard this matter in Waterloo, Iowa on October 27, 2014.

ISSUES

The parties have submitted the following issues for determination:

1. Whether the work injury of December 5, 2012 is the cause of permanent disability, and if so, the extent;

2. Medical expenses;

3. Independent medical evaluation (IME); and

4. Alternative medical care.

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, but earned a GED in 1979. The claimant's work history consists of unskilled to semi-skilled labor and various telemarketing, manufacturing, and forklift positions. His work history was interrupted by jail in 2000, and prison from 2003-2011 for second-degree robbery. He began working for the employer herein as a fork truck driver in January of 2011.

On December 5, 2012 the claimant suffered a stipulated injury arising out of and in the course of his employment with Empire Foundry when the forklift he was driving fell over a loading dock. Whether he went over the dock with the forklift or was able to jump out first is not clear; there is conflicting evidence. The early reports are that the claimant jumped out. He went to Allen Occupational Health, and the medical impression noted was acute lumbar strain. (Exhibit 3, pages 1-3) He missed work on December 6, 2012, the only day he had missed work to the date of hearing due to the December 5, 2012 injury.

On December 7, 2012 x-rays showed no fracture, mild spondylolisthesis at L3-4, L4-5 degenerative disc disease (DDD), and bilateral sacroiliitis. (Ex. 4, p. 1) On January 17, 2013 Kenneth McMains, M.D. noted an impression of chronic L3-4 spondylolisthesis and chronic SI arthropathy. (Ex. 3, p. 26) On February 1, 2013 Dr. McMains made a diagnosis of DDD/DJD (degenerative joint disease) with spondylolisthesis L3-4 and bilateral SI joint arthritis, and released the claimant to full-duty work. (Ex. 3, p. 30) On June 21, 2013 Dr. McMains opined that the work injury caused a temporary aggravation of the underlying chronic degenerative process, and that the claimant would have returned to baseline in a couple of weeks and certainly by February 1, 2013. (Ex. A, pp. 3-4) Dr. McMains confirmed this on October 7, 2013. (Ex. A, p. 5)

On December 5, 2013 the claimant went to the ER for flu-like symptoms. (Ex. A, p. 6) The examination in the ER found normal range of motion (ROM) in all extremities and no tenderness. (Ex. A, p. 8)

Craig Dove, D.O. performed an independent medical evaluation of the claimant on December 18, 2013 at claimant's counsel's request. (Ex. 7) Dr. Dove noted tenderness and restricted ROM. Dr. Dove opined that the claimant's current symptoms were a result of the work injury. (Ex. 7, p. 4) On February 13, 2014 Dr. Dove opined a body as a whole (BAW) impairment of 10 percent and recommended further treatment including the possibility of surgery. (Ex. 7, pp. 7-8)

Dr. McMains reviewed Dr. Dove's first independent medical examination (IME) report on February 10, 2014 and remained of the opinion that the claimant's complaints were not due to the work injury, but rather due to a chronic, degenerative condition. (Ex. A, p. 9) On July 9, 2014 Dr. McMains again reiterated that his opinions had not changed. (Ex. A, pp. 11-12) Dr. McMains also again opined that the claimant had fully recovered from any exacerbation by February 1, 2013. (Ex. A, pp. 11-12)

On July 28, 2013 Dr. Igram performed an IME. (Ex. B) Dr. Igram opined that the claimant had been at MMI since February 1, 2013, had a zero percent impairment rating, and no permanent restrictions. (Ex. A, p. 20) He also opined that no further medical treatment was necessary.

On August 11, 2014 David Segal, M.D. performed an IME. Dr. Segal recommended injections be given, and if they failed, surgery. (Ex. 8, p. 3) Dr. Segal opined a 12 percent BAW impairment rating. (Ex. 8, p. 3) On September 11, 2014 Farid Manshadi, M.D. issued an IME and opined that the work accident caused or contributed to the claimant's ongoing symptoms. (Ex. 10, p. 4) Dr. Manshadi agreed with the impairment rating of Dr. Dove. (Ex. 10, p. 14) Claimant seeks payment/reimbursement of the IME fees of Drs. Manshadi and Segal.

The claimant was hurt and suffered permanent impairment and loss of industrial capacity. His degree of loss is not extreme. He continues to work at the same position as he did prior to the injury, and continues to work 40 or more hours per week. Given the claimant's pain, claimant's medical impairment, training, permanent restrictions, as well as all other factors of industrial disability, the claimant has suffered a 20 percent loss of earnings capacity.

On the date of injury, based on the claimant's gross earnings of $523.13, single status, and entitlement to one exemption, his weekly benefit rate is $336.72. The parties stipulated that the commencement date for permanency benefits is February 1, 2013. Claimant also seeks payment of the medical expenses detailed in Exhibit 15, which were reasonable and necessary for the treatment of the work injury.

REASONING AND CONCLUSIONS OF LAW

Permanent disability.

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.

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). 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).

Based on the finding that the claimant has suffered a 20 percent loss of earning capacity, he has sustained a 20 percent permanent partial industrial disability entitling him to 100 weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(u).

Medical

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

The claimant seeks medical expenses which are detailed in Exhibit 15. Those expenses are causally connected to the work injury per this decision, and were reasonable and necessary for treatment of the work injury. Defendants shall pay/reimburse as appropriate those expenses.

Independent Medical Examination.

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.

The claimant seeks reimbursement for a second and third IME. Iowa Code section 85.39 authorizes one IME. The request must be denied.

Alternative medical care.

Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Iowa R. App. P. 14(f)(5); Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Id. The employer's obligation turns on the question of reasonable necessity, not desirability. Id.; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983). In Pirelli-Armstrong Tire Co., 562 N.W.2d at 433, the court approvingly quoted Bowles v. Los Lunas Schools, 109 N.M. 100, 781 P.2d 1178 (App. 1989):

> [T]he words "reasonable" and "adequate" appear to describe the same standard.

> [The New Mexico rule] requires the employer to provide a certain standard of care and excuses the employer from any obligation to provide other services only if that standard is met. We construe the terms "reasonable" and "adequate" as describing care that is both appropriate to the injury and sufficient to bring the worker to maximum recovery.

The commissioner is justified in ordering alternate care when employer-authorized care has not been effective and evidence shows that such care is "inferior or less extensive" care than other available care requested by the employee. Long; 528 N.W.2d at 124; Pirelli-Armstrong Tire Co.; 562 N.W.2d at 437.

The claimant requests additional medical care that the doctors herein do not agree is necessary, or that it would even be beneficial. As such, the claimant has not at this time met his burden of establishing the need for alternative medical care. The request must therefore be denied.

ORDER

Therefore it is ordered:

That the defendants pay the claimant one hundred (100) weeks of permanent partial disability commencing October 21, 2013 at the weekly rate of three-hundred sixty and 93/100 dollars ($360.93).

That defendants shall pay/reimburse claimant's medical expenses, as detailed above.

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.

Defendants shall receive credit for all benefits previously paid.

Costs are taxed to the defendants pursuant to 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 12th day of February, 2015.

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.