

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TODD BRIGHAM,

Claimant,

vs.

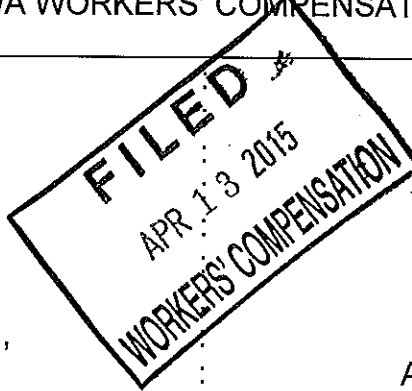
MORTON BUILDINGS INC.,

Employer,

and

AMERICAN ZURICH INSURANCE
COMPANY,

Insurance Carrier,
Defendants.



File No. 5047272

ARBITRATION
DECISION

Head Note No.: 1802

STATEMENT OF THE CASE

Todd Brigham, claimant, filed a petition in arbitration seeking workers' compensation benefits from Morton Buildings, Inc., as his employer, and American Zurich Insurance Company, as the insurance carrier. This case proceeded to an arbitration hearing on March 5, 2015, in Des Moines, Iowa.

Claimant was the only witness that testified live. Claimant offered exhibits 1 through 23. Defendants offered exhibits A through G. All exhibits were received into the evidentiary record without objection.

The parties also submitted a hearing report, which contains stipulations. The parties' stipulations are accepted and relied upon in entering this decision. No findings or conclusions will be entered with respect to the parties' stipulations, and the parties are bound by those agreements.

Counsel for the parties requested the opportunity to file post-hearing briefs. This case was considered fully submitted upon the simultaneous service of post-hearing briefs on March 13, 2015.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant's healing period has terminated.
2. If claimant's healing period has terminated, the extent of claimant's entitlement to permanent partial disability benefits.
3. Whether costs should be assessed against either party.

FINDINGS OF FACT

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

Claimant, Todd Brigham, sustained a stipulated low back injury while working at Morton Buildings, Incorporated on August 13, 2013. Mr. Brigham was hospitalized for five days after the injury occurred. (Claimant's Exhibit 1) After his release from the hospital, Mr. Brigham was evaluated by an orthopaedic surgeon, William O. Shaffer, M.D., who determined that surgical intervention was not warranted for his injury. (Ex. 2)

Dr. Shaffer was scheduled to retire shortly thereafter, so claimant was referred to a physical medicine and rehabilitation expert, Robert D. Rondinelli, M.D. (Ex. 2, p. 45) Dr. Rondinelli initially evaluated claimant on November 14, 2013 and recommended MRIs of claimant's cervical and thoracic spine, electrodiagnostic testing, and laboratory blood work. (Ex. 3, pp. 46-49) Following receipt of all the diagnostic testing, Dr. Rondinelli recommended evaluation by a neurosurgeon, Joseph Sherrill II, M.D. (Ex. 3, p. 49)

Dr. Sherrill evaluated Mr. Brigham on December 19, 2013 and concluded that none of the diagnostic testing or his clinical evaluation revealed a surgical problem. (Ex. 4) Therefore, Dr. Rondinelli recommended work hardening and a functional capacity evaluation (FCE). (Ex. 3, p. 51) Mr. Brigham participated in both. (Ex. 1, pp. 29-40; Ex. 10)

Unfortunately, Mr. Brigham was not able to rehabilitate sufficiently to return to work at Morton Buildings. (Ex. 3, p. 54) He was terminated by Morton Buildings effective January 7, 2014. (Ex. 16) Mr. Brigham has not returned to work for any employer since August 13, 2013. (Claimant's testimony) He is not medically capable of returning to work that is substantially similar to the position he held at Morton Buildings on August 13, 2013.

Following work hardening and the FCE, Dr. Rondinelli declared maximum medical improvement and released claimant from his care. (Ex. 3, p. 54) Dr. Rondinelli

opined that claimant sustained an 8 percent permanent impairment of the whole person as a result of the August 13, 2013 work injury. (Ex. 3, p. 56) Dr. Rondinelli imposed work restrictions consistent with the FCE, specifically work at the medium work category pursuant to the findings and conclusions of the FCE. (Ex. 3, p. 56; Ex. 10)

Mr. Brigham exercised his rights to seek an independent medical evaluation and selected Mark C. Taylor, M.D. Dr. Taylor evaluated claimant on August 18, 2014, and concurred that claimant achieved maximum medical improvement on February 14, 2014 and agreed with Dr. Rondinelli that claimant sustained an 8 percent permanent impairment. (Ex. 7, pp. 88-89) Dr. Taylor imposed work restrictions similar to the findings of the FCE, but imposed restrictions that were slightly more restrictive than those outlined in the FCE and by Dr. Rondinelli. (Ex. 7, p. 89) Nevertheless, under either Dr. Rondinelli's restrictions or under Dr. Taylor's restrictions, claimant was not able to return to work at Morton Buildings or in a substantially similar employment.

Although he concurred on most issues with Dr. Rondinelli, Dr. Taylor recommended evaluation by a pain specialist to help manage claimant's symptoms. (Ex. 7, p. 88) Defendants consented to Dr. Taylor's recommendation and scheduled claimant to be evaluated by Esther M. Benedetti, M.D., at the University of Iowa Hospitals and Clinics Pain Clinic. Dr. Benedetti evaluated Mr. Brigham on November 4, 2014 and recommended modification of claimant's medication regimen as well as lumbar facet joint injections. (Ex. 5, p. 68)

Defendants again consented to additional care and transferred pain management to Jeremy B. Poulsen, D.O., in Dakota Dunes, South Dakota, which was much closer to claimant's residence than the University of Iowa. Dr. Poulsen evaluated Mr. Brigham initially on January 21, 2015 and continues to treat claimant as of the date of this arbitration hearing. (Ex. 6)

Dr. Poulsen concurred with the recommendations made by Dr. Benedetti and attempted both medication modifications and lumbar facet joint injections. (Ex. 6, pp., 75-77) Unfortunately, the facet joint injections were not helpful, and the medication modifications allowed claimant better sleep but did not resolve his symptoms entirely. (Ex. 6, p. 78)

Dr. Poulsen's last evaluation of claimant before this hearing occurred on February 18, 2015. At that appointment, Dr. Poulsen recommended claimant undergo a discogram of his lumbar spine and told claimant that he might recommend another surgical consultation depending on the results of the discogram. (Claimant's testimony; Ex. 6, p. 79)

The results of the discogram were not known at the time of the arbitration hearing. Similarly, it was unknown whether Dr. Poulsen recommended additional surgical consultation or other treatment based upon the results of the discogram.

The parties introduced competing vocational expert reports, wage information, employment and educational background information, as well as information pertaining to claimant's job search since the date of injury. While all of that evidence is relevant to determining claimant's industrial disability, or loss of future earning capacity, related to the August 13, 2013 work injury, I find that claimant has not yet achieved maximum medical improvement and decline to enter findings of fact relevant to determination of claimant's industrial disability until that claim is ripe for determination.

CONCLUSIONS OF LAW AND REASONING

The initial dispute between the parties is whether claimant's healing period has terminated. Claimant contends that additional diagnostic testing has been completed and further surgical consultation may be required in the very near future based upon the medical opinions of Dr. Poulsen. Therefore, claimant contends that he remains within a healing period and should be awarded running healing period benefits.

Defendants contend that claimant achieved maximum medical improvement (MMI) as of the last appointment with Dr. Rondinelli on February 11, 2014. Defendants note that Dr. Rondinelli confirmed MMI as of that date. Defendants further point out that claimant's independent medical evaluator, Dr. Taylor, agreed that MMI was achieved on February 14, 2011. Defendants argue that there has not been ongoing treatment since the date of MMI, that all physicians to date have concluded there is no surgical remedy for claimant's injury. Defendants note that permanent work restrictions have been assigned and implicitly argue that ongoing pain management is insufficient to continue claimant's healing period.

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

In this case, I found that claimant has not returned to work since the date of injury. Similarly, I found that he is not medically capable of returning to substantially similar work at this time. Therefore, claimant's healing period only terminates once it is medically indicated that significant further improvement from the injury is no longer anticipated. Iowa Code section 85.34(1). This is often referred to as achieving maximum medical improvement (MMI). Waldinger Corp. v. Mettler, 817 N.W.2d 1, 6 (Iowa 2012).

Defendants appropriately and correctly urge that a healing period is not extended by maintenance medical care or ongoing pain or symptoms. However, when ongoing care "will provide relevant evidence to make a full and fair assessment of conflicting medical opinions over the existence of a permanent impairment, the decision must not be made until maximum medical improvement has occurred." Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 201 (Iowa 2010). "[A] procedure that allows for the adjudication of issues before the relevant evidence is known could undermine the entire system of workers' compensation by creating the risk of either denying permanent disability benefits to a deserving claimant or requiring an employer to pay permanent disability benefits to a worker who did not suffer a permanent impairment." Id.

Although not on all fours, this case is analogous to the factual scenario set forth in Gwinn. In Gwinn, all of the physicians asked opined that claimant achieved maximum medical improvement until very shortly before trial. Then, on the eve of trial, a physician recommended and performed surgery on claimant. The Iowa Supreme Court reversed the agency's assessment of permanent disability, noting, "the commissioner knew evidence would be forthcoming relevant to the nature and extent of Gwinn's permanent impairment and a resolution of the conflicting medical opinions. The commissioner also knew no award of permanent disability could be made until maximum medical improvement had been achieved." Id. at 201-202.

This case is analogous in that shortly before this trial, claimant's treating pain specialist recommended and performed a discogram on claimant's low back. At the time of this hearing, the results of that discogram were unknown. However, claimant testified that the pain specialist told him a surgical referral may be necessary depending on the outcome of the discogram. Much like Gwinn, I would necessarily have to ignore the fact that there is relevant evidence being developed after the date of this trial that would likely impact the nature and extent of claimant's entitlement to permanent disability benefits. The outcome of that testing and potential further treatment may also make a difference as to which medical opinions are accepted or found most credible.

Therefore, I conclude that the record is not yet complete with respect to claimant's entitlement to permanent disability. The outcome, findings, recommendations, and actual treatment following the discogram are important factors in determining claimant's permanent disability. Therefore, I conclude that claimant has not yet achieved maximum medical improvement as of the date of this hearing. Any claim for permanent disability should be determined on review-reopening after claimant has achieved maximum medical improvement. Bell Bros. Heating v. Gwinn, 779 N.W.2d 193 (Iowa 2010).

Since claimant has not yet achieved maximum medical improvement and none of the other factors of Iowa Code section 85.34(1) have occurred, I conclude that claimant is entitled to a running healing period award from the date of injury through the date of the arbitration hearing and continuing into the future until such time as one of the factors of Iowa Code section 85.34(1) occurs.

Mr. Brigham seeks assessment of his costs and attached a specific list of requested costs as Exhibits 22 and 23. Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40. Claimant has prevailed on his request for a running healing period. Therefore, I conclude it is reasonable and appropriate to assess costs against defendants.

Agency rule 876 IAC 4.33(6) permits the assessment of costs that include "the reasonable costs of obtaining no more than two doctors' or practitioners' reports." Claimant seeks assessment of the charges of his vocational expert, Philip Davis, M.S. (Ex. 22) I did not rely upon claimant's vocational expert report, and it ultimately was not necessary at this stage of litigation because claimant has been determined to have not yet achieved maximum medical improvement. Therefore, I conclude that claimant should be permitted to submit this as a cost in any review-reopening proceeding to determine permanent disability. However, exercising the agency's discretion, I conclude this is not a proper cost to be awarded in this proceeding.

Claimant also seeks assessment of the cost of medical records and reports from Anliker Chiropractic Clinic. I find that these charges are reasonable and were necessary to prosecute this claim. Therefore, I conclude that it is appropriate to assess defendants \$42.00 in costs pursuant to 876 IAC 4.33(6).

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant healing period benefits from August 14, 2013 through the date of the arbitration hearing and continuing into the future until the first factor of Iowa Code section 85.34(1) is achieved.

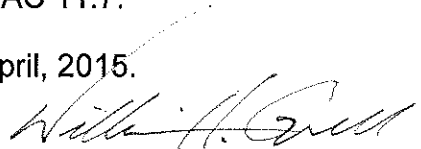
Defendants shall pay any accrued weekly benefits in lump sum with applicable interest pursuant to Iowa Code section 85.30.

Defendants shall be entitled to a credit for all weekly benefits paid to date.

Defendants shall reimburse claimant's costs totaling forty-two and 00/100 dollars (\$42.00).

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 13th day of April, 2015.


WILLIAM H. GRELL
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.