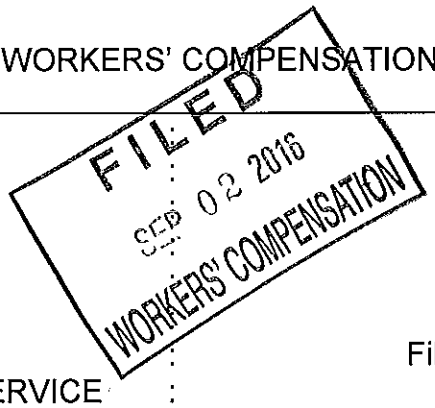
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



MONTE JIMMERSON,

Claimant,

vs.

ULTIMATE AUTOMOTIVE SERVICE CENTER, INC.,

Employer,

and

TECHNOLOGY INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5052541

ARBITRATION

DECISION

Head Note Nos.: 1803, 2500

STATEMENT OF THE CASE

Monte Jimmerson, claimant, filed a petition in arbitration seeking workers' compensation benefits from Ultimate Automotive Service Center, Inc. and its insurer, Technology Insurance Company, as a result of an alleged injury he sustained on February 24, 2014 that arose out of and in the course of his employment. This case was heard in Des Moines, Iowa and fully submitted on September 1, 2016 after receipt of briefs. The evidence in this case consists of the testimony of claimant and claimant's Exhibits 1 through 11 and defendants' Exhibits A through K. Exhibit 9, pages 102-104 and Exhibit D, pages 17 and 18 were excluded.

ISSUES

1. The extent of claimant's disability.

2. Whether claimant is entitled to payment of medical expenses, as itemized in Exhibit 11.

3. Assessment of costs.

STIPULATIONS

The parties agreed by stipulations contained in the Hearing Report and Order to the following:

1. The existence of an employer-employee relationship at the time of the alleged injury.

2. Claimant sustained an injury on February 24, 2014 which arose out of and in the course of employment.

3. The alleged injury is a cause of temporary disability during a period of recovery.

4. The injury is a cause of permanent disability.

5. Healing period benefits are not in dispute.

6. The disability is an industrial disability.

7. The commencement date for permanent partial disability benefits, if any are awarded is October 20, 2014.

8. At the time of the alleged injury, claimant's gross earnings were $750.00 per week and claimant was married and entitled to five exemptions.

9. The parties believe the weekly rate to be $512.28.

10. No affirmative defenses are being asserted.

11. With reference to the attached itemized list of disputed medical expenses:

    a. The fees or prices charged by providers are fair and reasonable.

    b. The treatment was reasonable and necessary.

    c. Although disputed, the medical providers would testify as to the reasonableness of their fees and/or treatment set forth in the listed expenses and defendants are not offering contrary evidence.

    d. The listed expenses are causally connected to the work injury.

    e. Although causal connection of the expenses to a work injury cannot be stipulated, the listed expenses are at least causally connected to the medical condition(s) upon which the claim of injury is based.

12. Defendants are entitled to a credit of 35 weeks of compensation at the rate of $512.28 per week.

13. The costs listed by the claimant have been paid.

The above stipulations are accepted by the undersigned.

FINDINGS OF FACT

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

Monte Jimmerson, claimant, was 45 years old at the time of the hearing. He dropped out of school after the tenth grade and eventually obtained a GED in 1987. He has no other post high school academic education. Claimant served 7½ years in the Army National Guard. He received training and performed welding while in the Army National Guard. He was honorably discharged due to a knee medical issue. (Exhibit D, page 12) Claimant's knee is not adversely impacting his ability to work.

For most of claimant's working life he has worked for Ultimate Automotive Service Center. This business is owned by claimant's father, Melvis Jimmerson. Claimant was working for Ultimate Automotive Service Center at the time of the hearing and expected to continue his employment there. He has not looked for work anywhere else. Claimant has been and currently is an auto tech and tow truck driver. He is paid salary of approximately $39,000.00 a year plus health insurance for himself and family. (Claimant's testimony) Claimant has worked as an auto tech for a Chrysler dealer and for Goodyear. (Exhibit 8, page 96) Since 1994 he has worked for Ultimate Automotive Service Center.

Prior to his injury in February 2014 he could perform heavy mechanical work as an auto tech such as working on transmissions. Claimant testified that since his injury he has limited his heavy mechanical work while on the job and at home. He did testify that he helped his son rebuild an engine and replaced the head gaskets on his daughter's car. He said it took him a long time to perform each job. Claimant testified that his productivity at work has decreased since the accident. He has been able to perform most of the jobs at Ultimate Automotive Service Center except for mechanical work that is heavy or requires prolonged use of his right arm in a raised position. He can do light work such as oil changes, diagnostics, belts, hoses, work orders, parts ordering and customer service. He is able to operate the tow truck and has been performing more tow truck work since his injury. He expects that he will be performing more tow truck work in the future for Ultimate Automotive Service Center.

A job duties form completed by Melvis Jimmerman for the position of mechanic/tow truck driver (sub) on July 30, 2014 reflected that the work required frequent use of dominant hand and frequent reaching above shoulder level. As far as weight that was involved in the job, the form stated that frequent lifting and carrying of up to 50 pounds was required and occasional lifting of up to 75 pounds. (Ex. 7, p. 86)

On February 24, 2014 claimant was hammering a king pin with one hand and using a torch with the other. While hammering with his right arm he felt a pop and burning sensation. He lost control of the hammer. He informed his employer. Claimant went to Mercy Clinic on February 27, 2014 and was assessed with right shoulder pain and provided a prescription of Toradol. (Ex. 1, p. 1) Claimant is requesting reimbursement for the remaining out-of-pocket cost of $133.68 for this medical treatment. (Ex. 11, p. 115)

Claimant received care from Brian Crites, M.D. for his right shoulder. On March 3, 2014 Dr. Crites assessed claimant with right shoulder pain and ordered an MRI. (Ex. 2, pp. 4, 5) On July 24, 2014 Dr. Crites performed surgery. His postoperative diagnosis was,

1. Full-thickness rotator cuff tear, right shoulder.

2. Anterior labrum tear, right shoulder.

3. Acromioclavicular joint arthropathy, right shoulder.

4. Partial tearing, biceps tendon, right shoulder.

(Ex. 2, p. 17)

Claimant said he was off work for about three months after the surgery. Claimant was recovering when he tripped at home and landed on his shoulder. Claimant said the fall caused considerable pain and set him back a while on his recovery. He testified that he was told the fall did not create new damage. (Claimant's testimony) Dr. Crites examined claimant on November 7, 2014 after his fall. He noted an exacerbation of pain with the slip and fall but did not believe clamant had ". . . retorn anything or undone any surgical repair." (Ex. 2, p. 29)

On January 12, 2015 Dr. Crites returned claimant to work without restrictions. He did not believe claimant was at maximum medical improvement (MMI) at this time. (Ex. 2, p. 33)

Claimant testified that at his last visit with Dr. Crites he told Dr. Crites he did not need any formal written restrictions, as he was working for his father. Dr. Crites did not provide any restrictions when he last saw claimant in April 15, 2015. Dr. Crites wrote, "In my opinion he is at MMI. I would not place him on any permanent restrictions. He will have permanent impairment due to his motion loss." (Ex. 2, p. 35)

On June 8, 2015 Daniel Miller, D.O. performed an independent medical examination (IME). (Ex. C, pp. 3 – 7) Dr. Miller provided a 7 percent whole body impairment rating. (Ex. C, p. 6) On June 29, 2016 Dr. Miller responded to an IME performed by Sunil Bansal, M.D. Dr. Miller did not agree with Dr. Bansal's inclusion of a 10 percent upper extremity impairment for a distal clavicle resection. (Ex. C, p. 8) He

also did not know of a physiologic explanation for a decreased range of motion. (Ex. C, p. 9)

On March 18, 2016 Dr. Bansal performed an IME. (Ex. 6, pp. 74 – 83) He opined that claimant had a 13 percent whole body impairment rating for his shoulder. He recommended no lifting overhead greater than 10 pounds. (Ex. 6, p. 82)

A functional capacity examination (FCE) was performed on May 5, 2016. (Ex. 5, pp. 62 – 70) The FCE was deemed valid. The FCE found claimant had generally the ability to lift in the medium category of front carry of 30 pounds. His crown lifting was limited to 15 pounds on an occasional basis and 20 pounds rarely. (Ex. 5, p. 63)

Dr. Crites has issued an impairment rating and restrictions after receiving additional information and a request from claimant's attorney on June 30, 2016. (Ex. G, p. 24) He found claimant to have a 13 percent impairment rating. (Ex. 2, p. 37) Dr. Crites noted he had not provided restriction previously, based upon conversations with claimant. However, based upon the FCE, he assigned permanent restrictions. He recommended lifting in the medium category and no repetitive overhead activities greater than 15 pounds. (Ex. 2, p. 38) I find that these are claimant's restrictions.

On June 17, 2016 Ronald Schmidt, M.S. performed a loss of earning evaluation. (Ex. D, pp. 11 – 16) This report found that using Dr. Crites and Dr. Miller's opinions that did not provide formal restrictions,[1] claimant had no loss of earning capacity. If he considered Dr. Bansal's restrictions he found a 10 percent loss of earnings. (Ex. D, p. 16)

On June 27, 2016 a vocational evaluation was performed by Carma Mitchell, M.S. The report finds that claimant had a 24.6 percent loss of access to the labor market. The report stated claimant would have difficulty in performing full-time work as a mechanic. (Ex. 9, p. 101)

Claimant testified that he is not as productive in his work post-accident: He believes he is two to three times slower. He has limited ability to lift his arm up and out to the side of his body and to reach overhead, with his right arm. Claimant is not taking any medication for his shoulder. Claimant is able to work around this, do laundry, mow and limited himself to lifting no more than 40 pounds when his family has moved post-accident. He has stopped riding his motorcycle to work, as his arm is too sore at the end of the day. Claimant does work with a friend driving a pickup truck with a snow plow and a 4-wheeler with a blade in the winter. Claimant said he has the ability to drive a tow truck and automotive transportation. Claimant has a limited education. He is now in accommodated work. He cannot perform many of the heavier and overhead tasks required of being an auto tech. I find that claimant has a 30 percent loss of earning capacity.

[1] Mr. Schmidt did not consider the restrictions that Dr. Crites recommended on June 30, 2016, after his report.

Claimant has requested costs in the amount of $1,871.96. (Ex. 10, pp. 105 – 114)

RATIONALE AND CONCLUSIONS OF LAW

Extent of disability

In this case the parties have stipulated the claimant had an industrial injury that arose out of and in the course of his employment with Ultimate Automotive Service Center. The primary issue in the case is the extent of his 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. 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's testimony about his inability to use his right dominant hand in overhead work was credible. It is consistent with Dr. Bansal and Dr. Crites' opinions, as well as his FCE. Claimant is generally limited to medium work below his shoulders and light and no repetitive work above his shoulder. Claimant is not able to perform all of the functions of a mechanic.

Claimant has not claimed that he is unable to use his right arm or that he cannot use his arm at work. Rather that he cannot perform heavy or repetitive work using his right shoulder. Claimant's education is limited. He is earning a salary due to the fact he is employed with his father. He has the ability to perform a number of tasks in a garage and tow truck driving, but has lost the ability to perform a number of jobs requiring the repetitive use of his shoulder or working with weight above shoulder height.

He is employed at the same job as he had before his injury. His job duties have changed to lighter work due to his injury. His employer has accommodated his limitations caused by his work injury.

I do not find the opinion of Mr. Schmidt to be convincing. Dr. Crites proved restrictions which he did not consider. He did not consider claimant's work was being accommodated.

I found that claimant has shown he has a 30 percent loss of earning capacity. Considering all of the factors of industrial disability, I find claimant has a 30 percent industrial disability entitling him to 150 weeks of permanent partial disability. The finding acknowledges the fact that claimant was still employed at Ultimate Automotive Service Center at the time of the hearing.

Costs

Iowa Code section 86.40 states:

> Costs. All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states in part:

> Costs. Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be ... (3) costs of service of the original notice and subpoenas, ... (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. Dec. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. Dec. December 8, 2010) The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. Dec. July 21, 2009).

Claimant has requested $1,871.86 for cost. Claimant has requested:

$100.00 filing fee;

Service Fee of $12.96;

Medical opinion of $500.00;

FCE of $960.00;, and

Vocational report of $299.00.

Defendants shall pay claimant the filing fee and service cost of $112.96. Defendants have objected to the payment of $500.00 for Dr. Crites' medical opinion.

Defendants rely upon Des Moines Area Regional Transit v. Young, 867 N.W.2d 839, 847 (Iowa 2015) for the position that claimant is not entitled to reimbursement. The Iowa Supreme Court provided a literal interpretation of the plain-language of Iowa Code section 85.39, stating that section 85.39 ". . . only allows the employee to obtain an independent evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer." Unlike the DART case, Dr. Crites did not perform an IME. This is not a "second" IME. The invoice submitted shows there was a 15 minute phone conference and a letter [report] that was the bases of the charge. I find that the defendants shall pay $400.00 for the report. See 17A.14(5). I also award $600.00 of the FCE report. Claimant is awarded a total of $1,112.96 in costs.

Medical expenses.

Claimant has requested reimbursement of medical expenses in the amount of $133.68. The expenses are listed as $39.82 for unpaid medical care: $25.00 for out-of-pocket expenses and: $ 68.86 for a United HealthCare lien. Claimant did not offer testimony about these bills. Claimant paid $25.00 and a private health care provider paid $68.86. (Ex. 11, p. 116) This is the first medical treatment claimant received for his injury. (Ex. 1, p. 1) The defendants assert that this care was not authorized. There was no testimony by claimant that the employer authorized this care. This was unauthorized care. As unauthorized care claimant must show that the care was more beneficial than the care provided by defendants. The medical care he received on February 27, 2014 was undoubtedly reasonable and necessary and the costs were appropriate. The claimant received pain medication and treatment that was beneficial for his condition. The defendants are responsible for these costs under Iowa Code 85.27. See Bell Bros. Heating v. Gwinn, 779 N.W.2d 193 (Iowa 2010). Defendants shall reimburse claimant his out-of-pocket expenses directly and pay the United HealthCare lien and outstanding balance — $133.68 in total.

ORDER

Defendants shall pay claimant one hundred fifty (150) weeks of permanent partial disability benefits at the weekly rate of five hundred twelve and 28/100 dollars ($512.28) commencing October 20, 2014.

Defendants shall pay claimant costs in the amount of one thousand one hundred twelve and 96/100 dollars ($1,112.96).

Defendants shall pay the medical expenses of one hundred thirty-three and 68/100 dollars ($133.68).

Defendants shall have a credit of thirty-five (35) weeks of benefits at the rate of five hundred twelve and 28/100 dollars ($512.28).

Defendants shall pay any past due amounts in a lump sum with interest.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Signed and filed this 2nd day of September, 2016.

JAMES F. ELLIOTT
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.