BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SEAN PAYNE,	:	File No. 5067024
Claimant,	:	A R B I T R A T I O N
vs.	:	D E C I S I O N
EARL'S BACKHOE SERVICE, INC.,	:	
Employer, Defendant.	:	Head Note Nos.: 1100, 1402, 1801, 1803, 2500, 2910

STATEMENT OF THE CASE

Sean Payne, claimant, filed a petition for arbitration against Earl's Backhoe Service, Inc., as defendant-employer.

On September 5, 2019, claimant filed a motion for entry of default against defendant-employer. On September 12, 2019, I entered an order giving defendant-employer 14 days to notify the agency of its proper insurance carrier, if any.

Defendant-employer did not respond to my order, nor did it respond to claimant's motion for default. As such, on October 10, 2019, I issued an order that found defendant-employer in default, and I scheduled the default hearing for November 15, 2019 at 9:00 a.m. in Des Moines, Iowa.

Claimant and claimant's counsel appeared telephonically for the default hearing on November 15, 2019. Claimant waived any right to a court reporter and the telephonic hearing was digitally recorded. That recording will constitute the official record of the hearing.

The evidentiary record includes Claimant's Exhibits 1 and 2, along with claimant's itemization of medical bills. Claimant testified on his own behalf. Again, defendant did not appear and no evidence was received on behalf of defendant. The evidentiary record closed at the conclusion of the arbitration hearing and the case was considered fully submitted to the undersigned.

ISSUES

Claimant seeks an award of workers' compensation benefits and placed the following issues into dispute:

1. Whether claimant sustained an injury that arose out of and in the course of his employment with defendant-employer on March 13, 2018.

2. The extent of claimant's entitlement to temporary disability benefits, if any.

3. The extent of claimant's entitlement to permanent disability benefits, if any.

4. The proper weekly rate for any benefits awarded.

5. Whether claimant is entitled to an award of medical expenses.

FINDINGS OF FACT

Having considered all of the evidence and testimony in the record, I find the following facts:

Claimant was working for defendant-employer on March 13, 2018, when he felt a sharp pain in his right shoulder as he was swinging a sledgehammer. Claimant was in the process of boring an underground sewer line and was instructed by defendant-employer's owner, John, to do the work manually with a sledgehammer instead of using equipment.

Claimant immediately reported the injury to John, but John told claimant they had to get the job done. Later that day, when claimant's symptoms persisted, claimant reported the injury to another owner, Chris. Although Chris told claimant they had workers' compensation insurance and would set up an appointment for him, no such appointment was ever communicated to claimant. As a result, claimant was forced to seek treatment on his own.

Claimant was initially evaluated on March 16, 2018. (Claimant's Exhibit 1, pages 2-5) Although claimant's x-ray was normal, claimant's medical provider was concerned about a rotator cuff injury. (Cl. Ex. 1, pp. 1, 5) As a result, claimant was taken off work for five days and informed that an MRI may be necessary. (Cl. Ex. 1, p. 5)

An MRI was ultimately performed on April 24, 2018, which revealed a partial rotator cuff tear. (Cl. Ex. 1, p. 6) Claimant elected to proceed with an injection and physical therapy. (Cl. Ex. 1, pp. 9-10) He was removed from work through May 14, 2018. (Cl. Ex. 1, p. 10)

Claimant completed a few sessions of physical therapy before his next examination on May 14, 2018. (Cl. Ex. 1, pp. 11-14) Based on his lack of improvement, he was referred for an orthopedic consultation. (Cl. Ex. 1, p. 17) Again, he was instructed not to return to work. (Cl. Ex. 1, p. 17)

Claimant was then evaluated by orthopedist Gregory Hill, M.D., who recommended surgery. (Cl. Ex. 1, pp. 26-29) That surgery—a right shoulder arthroscopic double row rotator cuff repair with extensive debridement—was performed on October 18, 2018. (Cl. Ex. 1, pp. 36-39)

After claimant's surgery, Dr. Hill restricted claimant to work with no use of the right arm. (Cl. Ex. 1, p. 30) This restriction remained in place until May 29, 2019, when

Dr. Hill assigned restrictions of lifting up to 50 pounds with the right arm. (Cl. Ex. 1, p. 32)

The May 29, 2019 appointment with Dr. Hill was the last time claimant received medical treatment to his right shoulder because claimant was unable to pay for additional treatment after this point. Thus, while Dr. Hill's 50-pound lifting restriction has never been formally rescinded, claimant has not returned to Dr. Hill to obtain his opinions regarding permanent restrictions or impairment. Based on his inability to pay, claimant likewise has no opinions regarding permanency from any other physicians.

Claimant went to work with another company doing maintenance work about two months before the hearing. Up until this point, claimant had not returned to work with defendant-employer or any other employer after he was initially taken off work on March 16, 2018. Based on Dr. Hill's 50-pound lifting restriction, I also find claimant was unable to return to substantially similar employment until he started his new maintenance job on or about September 15, 2019. Thus, I find claimant did not return to work and was unable to return to substantially similar work from March 16, 2018 through September 15, 2019 as a result of his March 13, 2018 work injury.

Claimant was earning roughly $15.00 per hour and working an average of 42 hours per week while working for defendant-employer in the 13 weeks preceding his injury. Thus, I find claimant's average weekly earnings were $630.00. He was married with three dependent children at the time of his injury.

In addition to being unable to pay for additional treatment or an impairment rating, claimant also incurred several thousands of dollars of outstanding medical bills as a result of his March 13, 2018 work injury, as set forth in Claimant's Exhibit 2 and his separate itemization. All of the expenses set forth in Claimant's Exhibit 2 and his itemization correlate with medical records set forth in Claimant's Exhibit 1 or with prescriptions that claimant testified were related to his right shoulder injury. I therefore find the medical expenses detailed in Claimant's Exhibit 2 are reasonable, necessary, and causally related to claimant's March 13, 2018 work injury.

CONCLUSIONS OF LAW

Claimant asserts he sustained an injury that arose out of and in the course of his employment with defendant-employer on March 13, 2018. The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury

occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

Claimant's injuries to his right shoulder clearly arose out of and in the course of his employment with defendant-employer. As discussed, he felt a sharp pain in his right shoulder as he was swinging a sledgehammer at the direction of defendant-employer's owner. When claimant did not improve, an MRI revealed a partial rotator cuff tear. Having determined claimant's right shoulder injury arose out of and in the course of his employment, I conclude that claimant has proven entitlement to workers' compensation benefits in some amount.

Claimant seeks an award of permanent partial disability benefits under Iowa Code section 85.34(2)(n) (2018). 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).

Unfortunately, while I believe the surgical repair of claimant's right shoulder resulted in some permanent impairment, claimant did not obtain an impairment rating from a physician under the AMA Guides to the Evaluation of Permanent Impairment. As part of the legislature's 2017 amendments to Iowa Code chapter 85, "the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association." Iowa Code § 85.34(2)(x) (2018) (emphasis added). The legislature indicated specifically that "[l]ay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment." Id.

Claimant testified he was unable to obtain an impairment rating because he was unable to pay for one. I believe claimant. However, based on the legislature's directive in Iowa Code section 85.34(2)(x), I conclude I am unable to determine claimant's permanent impairment without an impairment rating under the Guides. I recognize this is an unfair outcome for claimant, who was put in this predicament by his employer when it failed to compensate him for any of his work-related medical treatment or weekly disability benefits. However, this is the result mandated by Iowa Code section 85.34(2)(x). Thus, I reluctantly conclude claimant failed to satisfy his burden to prove his entitlement to any permanent partial disability benefits.

Because claimant was off work after his injury, he also seeks an award of temporary disability benefits. When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is

disabled by the injury. Those benefits are payable until the employee has returned to work or is medically capable of returning to work substantially similar to the work performed at the time of injury. Iowa Code § 85.33(1).

As discussed above, I found claimant did not work and was unable to return to substantially similar work from March 16, 2018 through September 15, 2019. I therefore conclude claimant satisfied his burden to prove his entitlement to temporary total disability benefits from March 16, 2018 through September 15, 2019.

Given that weekly benefits are being awarded, I must also determine the applicable weekly rate at which benefits should be paid. Iowa Code section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

As claimant was paid hourly, I conclude his rate should be determined by using the last 13 consecutive calendar weeks immediately preceding the injury under Iowa Code section 85.36(6). Relying on claimant's testimony regarding the 13 calendar weeks immediately preceding his injury, I found claimant's gross average weekly wage was $630.00.

The weekly benefit amount payable to an employee shall be based upon 80 percent of the employee's weekly spendable earnings, but shall not exceed an amount, rounded to the nearest dollar, equal to 66-2/3 percent of the statewide average weekly wage paid employees as determined by the Department of Workforce Development. Iowa Code § 85.37. This amount is determined by referring to the Iowa Workers' Compensation Manual in effect on the applicable injury date, which in this case is the manual with effective dates of July 1, 2017, through June 30, 2018. Using that manual, and having found that claimant was married and entitled to 5 exemptions, I conclude claimant's applicable weekly rate for temporary total disability benefits is $440.63.

Claimant seeks an award for past medical expenses. 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. Iowa Code § 85.27; Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Having concluded claimant satisfied his burden to prove he sustained a work-related injury, I further conclude defendant-employer is responsible for providing

claimant's medical care, including payment of past medical expenses as set forth in Claimant's Exhibit 2. Iowa Code § 85.27.

ORDER

THEREFORE, IT IS ORDERED:

Employer shall pay claimant temporary total disability benefits from March 16, 2018 through September 15, 2019.

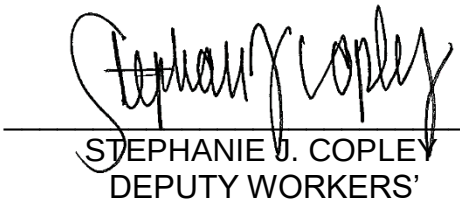
All weekly benefits shall be payable at the rate of four hundred forty and 63/100 dollars ($440.63) per week.

Defendant shall pay accrued weekly benefits, including but not limited to the underpayment of the weekly rate, in a lump sum together with interest. All interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Employer shall pay directly to the medical provider, reimburse claimant for any out-of-pocket expenses, and hold claimant harmless for all medical expenses contained in Claimant's Exhibit 2.

Employer 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 22nd day of November, 2019.



STEPHANIE J. COPLEY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Matthew Petrzelka (via WCES)

Earl's Backhoe Service, Inc. (via Regular and Certified Mail)
1200 – 11th St. NW
Cedar Rapids, IA 52405-2417

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.