BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHAEL HECHT,

Claimant,

vs.

HIGHLINE CONSTRUCTION, INC.,

Employer,

and

WESTERN NATIONAL MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

FILED

JUL 06 2016

WORKERS COMPENSATION

File No. 5052175

ARBITRATION DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Michael Hecht, the claimant, seeks workers' compensation benefits from defendants, Highline Construction, the alleged employer, and its insurer, Western National Mutual Insurance Company as a result of an alleged injury on August 13, 2014. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on May 12, 2016, but the matter was not fully submitted until the receipt of the parties' briefs and argument on May 25, 2016. Oral testimony and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Claimant's exhibits were marked numerically. Defendants' exhibits were marked alphabetically. Joint Exhibits were marked with double letters. 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 claimant's exhibit 1, pages 2 through 4 will be cited as, "Ex 1-2:4."

The parties agreed to the following matters in a written hearing report submitted at hearing:

1. On August 13, 2014, claimant received an injury arising out of and in the course of employment with defendant employer.

2. Claimant was not seeking additional temporary total or healing period benefits.

3. If I award permanent partial disability benefits, they shall begin on August 27, 2014.

4. At the time of the alleged injury, claimant was married and entitled to two exemptions for income tax purposes.

5. Medical benefits are not in dispute.

6. Prior to hearing, defendants voluntarily paid 20 weeks of permanent disability benefits for this work injury.

ISSUES

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

I. The extent of claimant's entitlement to weekly permanent disability benefits and the rate of weekly compensation for such benefits;

II. The extent of claimant's entitlement to reimbursement for an independent medical evaluation (IME) by Sunil Bansal, M.D.

III. The extent of claimant's entitlement to penalty benefits for an unreasonable delay or denial of weekly benefits pursuant to Iowa Code section 86.13.

FINDINGS OF FACT

In these findings, I will refer to the claimant by his first name, Mike, and to the defendant employer as Highline.

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 Mike credible.

Mike is a 28-year-old resident of Traer, Iowa, a small town about 20 miles south of Waterloo. He testified the job market in the area is not good as there are not many employment opportunities in the area. He is a high school graduate with some technical school education. Mike's job history is entirely manual labor, mostly involving mechanical-type work, his entire life. (Exhibit 2-7)

Mike began with Highline Construction around April of 2013 as a mechanic working on their equipment. That job ended in December of 2014 when no more work was available in Iowa. At Highline, Mike worked 40-50 hours per week making $24 per hour plus $50 per day of per diem for travel expenses. The per diem was not

connected to any actual expense and receipts were never tracked or submitted. This per diem amount was paid whether Mike was traveling or not. The employer did not include the per diem in his taxable wages. Defendants offered no evidence of any actual travel expenses incurred by Mike.

On August 13, 2014, Mike was working to fix some equipment and the air brake system exploded about 6 inches from his right ear. (Ex. 2-8) The pressure was 150 psi and made a very loud noise. Mike instantly felt nauseous, dizzy, and vomited several times. Mike received immediately medical treatment at Allen hospital. The assessment was traumatic hearing loss and tinnitus in his right ear from this incident. Mike had no hearing loss or ringing in his right ear at any time until his August 14, 2014 work injury. There is no evidence in the record suggesting otherwise.

Mike was followed after the injury by providers at Allen Hospital through October 9, 2014. The assessment was a total loss of hearing along with constant bothersome tinnitus (ear ringing) in the right ear. (Ex. CC-1:17) Mike was also followed by a Joseph Hart, M.D., an ENT specialist, who referred claimant to the University of Iowa Hospitals and Clinics (UIHC). Further audiograms were done at UHIC. (Ex. CC-1:6)

In a letter report to Highline dated October 21, 2014, Kenneth McMains, an occupational medicine physician at Allen Hospital, opined that Mike suffered a ten percent whole person impairment "for the hearing loss from the injury to his right ear resulting in damage to the nerve with tinnitus." (Ex. AA-18:19) Dr. McMains' letter was solicited by defendants and his clinic was an authorized provider, although the records do not show Dr. McMains as a treating physician for the injury.

Defendants did not pay compensation to Mike based on Dr. McMains' rating. On December 2, 2014, claimant's counsel requested defendants pay that rating and defendants responded they would volunteer 4 percent or 20 weeks of benefits. (Ex. 2-3) Those weeks were paid on December 3, 2014. (Ex. 3-13)

Mike was evaluated by audiologist Rich Tyler, Ph.D., on September 22, 2015. Dr. Tyler found both hearing loss and the presence of tinnitus causing problems with Mike's daily living activities, including sleep problems. Dr. Tyler assigned a 4 percent occupational hearing loss using the Iowa statutory formula as well as a 22 percent impairment to the body as a whole for the tinnitus. The doctor recommended permanent restrictions of no work around loud noise, no work around unpredictable noise, no work requiring accurate concentration, and no work in stressful situations. (Ex. DD-8:9)

Mike was further evaluated on September 22, 2015 by Marlan Hansen, M.D., an otolaryngologist from the UIHC. In a report to defense counsel, dated October 10, 2015, Dr. Hansen noted inconsistencies between the initial audiograms and the later ones done by Dr. Hart and at UIHC. He explained that they staff then perform other

hearing testing procedures which did not rely upon subjective responses from the patient. These tests indicated that claimant had no hearing loss in the right ear. Consequently, the doctor opined that claimant has no permanent impairment. The doctor also stated that inconsistencies in the audiogram were possibly due to functional reasons and due to these inconsistencies he could not opine as to the existence of tinnitus. The doctor did not explain what he meant by "functional reasons." I assume he meant malingering or psychosomatic problems, but this is not clear, because he admits that tinnitus can aggravate mental problems such as depression, a condition Mike had before the injury. Dr. Hansen provided no impairment rating for the tinnitus because Mike had not reported any significant impact on his daily living activities. (Ex. CC-16:18) Dr. Hansen also issued another report in March 2016 to defense counsel indicating that the testing done was accurate. (Ex. CC-19:20)

When provided the views of Dr. Hansen, Dr. McMains in October 2015 withdrew his prior impairment rating and opined that Mike did not suffer permanent impairment form the injury. (Ex. AA-21)

Mike was finally evaluated by Sunil Bansal, M.D., another occupational medicine physician, on March 28, 2016. Dr. Bansal also assigned 22 percent impairment to the whole person for the tinnitus condition and recommended permanent restrictions of avoiding safety sensitive jobs impacted by loss of hearing and no driving a commercial vehicle. (Ex. EE-7:8) Dr. Bansal's evaluation cost is $2,350 and defendants have not reimbursed Mike that cost of his IME. (Ex. 6, p. 16)

Mike testified he agrees with Dr. Bansal's restrictions and thinks they make sense for him. Mike returned to full duty work at Highline after the injury and continued in the same job until December 2014 when this employment ended for reasons unrelated to the injury. He then began working for Telecom as a commercial truck driver, making the same money of $24 per hour. However, his per diem was $30-35 per day and it was only paid while traveling.

Mike testified that he left Telecom in April 2016 and took a job with Pyramid Network making about $45,000 per year which is about $30,000 less per year than he made at Highline and Telecom. Mike explained that he believed he was not physically able to safely perform commercial driving due to his hearing loss and tinnitus. He described one incident that scared him when he ran another vehicle off the road due to his ear problems. He then took the advice of Dr. Bansal and left commercial truck driving.

Mike testified he continues to experience right ear hearing problems and tinnitus. He must turn the volume up on his Bluetooth when driving in the car just to hear, he avoids crowded places and attempts to position people he needs to hear on his left side, he asks people to repeat themselves frequently, and he shies away from management-type positions because of his hearing loss/tinnitus. Finally, he testified to

sleep issues he has because of his work injury and his need for listening to a sound application on his phone at night as recommended by Dr. Bansal.

I find that the work injury is a cause of a 22 percent permanent partial impairment to the body as a whole based on the views of Drs. Tyler and Bansal. The views of Dr. Hansen on Mike's tinnitus condition are not found credible or convincing. Dr. McMains only changed his mind based on the views of Dr. Hansen. Dr. Hansen was apparently unaware of the problems tinnitus has caused in disrupting Mike's daily living activities. Whether functional or not, claimant has problems hearing, whether directly or indirectly caused by the tinnitus, for which there is no effective medical treatment. Mike had no such problems before his work injury. The tinnitus has aggravated his depression and impacts his concentration and ability to sleep.

From examination of all of the factors of industrial disability, it is found that the work injury of August 13, 2014 is a cause of a 30 percent loss of earning capacity. While claimant has not shown medical evidence of hearing loss, Mike's hearing and functional problems are found to be the result of the constant tinnitus. Dr. Tyler was the only physician to opine as to the extent of the impact of Mike's tinnitus on his activities of daily living. The fact that Mike has voluntarily chosen to not risk the lives of others on the open road and take a 30 percent cut in income to take a job he safely can perform is clear evidence of the extent his tinnitus has impacted his life.

The evaluation by Dr. Bansal was subsequent to the evaluation by an employer-retained physician, Dr. McMains. Dr. Bansal's fee of $2,350 is reasonable and in line with similar fees approved by this agency. Defendants offered no evidence to show that such a fee is unreasonable and out of line with past agency precedent.

Following the opinion of Dr. McMains on October 21, 2014 that Mike suffered a ten percent permanent impairment from the injury, there was no further medical opinion on permanency until Dr. Hansen issued his report on October 27, 2015.

CONCLUSIONS OF LAW

I. 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).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is

also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

A treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2)(a-t), the disability is considered a scheduled member disability and measured functionally. If it is found that the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and measured industrially under Iowa Code subsection 85.34(2)(u). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133; 106 N.W.2d 95, 98 (1960).

On the other hand, 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. However, consideration must also be given to the injured workers' 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).

In this case, I found that the work injury was a cause of permanent tinnitus, which alone is sufficient to compensate the injury industrially. Tinnitus is to be compensated as an unscheduled body as a whole or industrial disability under Iowa Code section 85.34(2)(u). It is neither an occupational hearing loss under Iowa Code section 85B.4, nor a scheduled hearing loss under Iowa Code section 85.34(2)(r). Ehteshamfar v. UTA Engineered Systems, 555 N.W.2d 450 (Iowa 1996). I frankly was unable to understand defendants' argument that this case can be distinguished from Ehteshamfar.

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).

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 the Evaluation of Permanent, 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 worker's 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 worker's 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).

A change or expected change in an employee's actual earnings is strong evidence of the extent of the change in earning capacity. The factor should be considered and discussed in cases where the extent of industrial disability is adjudicated. Webber v. West Side Transport, Inc., File No. 1278549 (App. December 20, 2002)

In the case sub judice, I found that claimant suffered a 30 percent loss of his earning capacity as a result of the work injury. Such a finding entitles claimant to 150 weeks of permanent partial disability benefits as a matter of law under Iowa Code section 85.34(2)(u), which is 30 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection.

The amount paid as per diem in this case is to be included in claimant's gross weekly earnings for the purposes of determining his weekly rate of compensation. Defendants failed to carry their burden to prove the portion of the per diem is related to actual work-related expenses that would not be incurred if not for the work. Berst v. TTC, Inc., File No. 1053524 (App. Dec. November 30, 1994).

In calculating gross weekly earrings over the previous 13 weeks, weeks should be excluded from the calculation which are not representative of hours typically or customarily worked during a typical or customary full week of work. Jacobson Transp. Co. v. Harris, 778 N.W.2d 192 (Iowa 2010); Griffin Pipe Products Co. v. Guarino, 663 N.W.2d 862 (Iowa 2003). Consequently, I agree with claimant's calculations on rate in Exhibit 4 which excluded atypical weeks. Claimant's gross weekly rate is $1,331.43. Given the stipulations in the hearing report as to marital status and entitlement to 2 exemptions, claimant's rate of weekly compensation is $820.19.

II. 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. Dr. Bansal's evaluation was after Dr. McMains and Drs. Hansen's evaluations, which were solicited by defendants. His fee was found reasonable and will be awarded.

III. Claimant seeks additional weekly benefits under Iowa Code section 86.13(4). 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 probable cause or excuse for the denial, delay or termination of benefits. (Iowa Code section 85.13(4)(b)). A reasonable or probable cause or excuse must satisfy the following requirements under Iowa Code section 86.13(4)(c)):

> (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 refused to pay benefits based on the impairment rating by Dr. McMains. Only 20 weeks of the 50 weekly allowed for such a rating was paid. There was no medical opinion that claimant had a permanent loss of less than 10 percent until a year later. No longer can employers use a subsequent investigation to justify a prior denial or delay of weekly benefits. Pettengil v. American Blue Ribbon Holdings, LLC, File No. 5038552 (Remand Dec., March 29, 2016). This remand decision was based on a prior holding in that case by the Court of Appeals.

In this case, defendants unreasonably delayed payment of 30 weeks of permanency benefits. An additional 15 weeks shall be awarded in this case.

ORDER

1. Defendants shall pay to claimant one hundred fifty (150) weeks of permanent partial disability benefits at a rate of eight hundred twenty and 19/100 dollars ($820.19) per week from the stipulated commencement date of October 25, 2014. Defendants shall receive a credit against this award in the amount of twenty (20) weeks that was previously paid.

2. Defendants shall pay to claimant an additional fifteen (15) weeks of benefits at the rate of eight hundred twenty and 19/100 dollars ($820.19) per week as a penalty for unreasonable claims activity.

3. Defendants shall reimburse claimant the sum of two thousand three hundred fifty and 00/100 dollars ($2,350.00) for the fees of Dr. Bansal.

4. Defendants shall pay accrued weekly benefits in a lump sum.

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, including reimbursement to claimant for any filing fee paid in this matter.

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

Signed and filed this 19th day of July, 2016.

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.