BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JON STEIMEL, Claimant, vs. PANTHER TRANSPORT, INC., Employer, and ACE AMERICAN INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5046555 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1803; 1700

STATEMENT OF THE CASE

Jon Steimel, claimant, filed a petition in arbitration seeking workers' compensation benefits against Panther Transport, Inc., employer, and ACE American Insurance Company, insurer, for an accepted work injury dated April 2, 2013. This case was heard on January 31, 2017, in Waterloo, Iowa.

The record was kept open for 30 days to allow the parties to submit documentation about the past benefit payments made to claimant and any underpayment owed. The case was considered fully submitted on March 3, 2017, upon the simultaneous filing briefs.

The record consists of claimant's exhibits 1-3-8, defendants' exhibits A-I, claimant's testimony and the testimony of Jeff Orr.

ISSUES

1. The nature and extent of any industrial disability;

2. Whether claimant is entitled to reimbursement for an independent medical examination pursuant to Iowa Code section 85.39;

3. Whether claimant is entitled to penalty for the defendants underpayment of permanent partial disability and healing period benefits and/or underpayment and lack of payment of temporary partial disability benefits;

4. Whether defendants are entitled to a credit of any overpayment of temporary or healing period benefits; and,

5. Whether claimant is entitled to an award of costs.

STIPULATIONS

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The parties stipulate the claimant sustained an injury on April 2, 2013, which arose out of and in the course of his employment with defendant employer. Claimant was off work entitled to healing, temporary total, or temporary partial disability benefits from June 24, 2013 through July 14, 2013 and then again on November 6, 2014, through November 23, 2014 and January 15, 2016 through May 30, 2016.

At the time of the injury the claimant's gross earnings were $1,442.08 per week. He was single and entitled to one exemption. Based on those foregoing numbers of the weekly benefit rate is $825.57 per week.

The commencement date for permanent partial disability benefits is September 14, 2016.

FINDINGS OF FACT

At the time of the hearing claimant, Jon Steimel, was a 59-year-old individual. Claimant graduated high school in 1975. Following graduation, he worked in a series of jobs involving construction, farming, and truck driving. He has limited computer skills, but is not familiar with basic programs such as Microsoft Word or Excel. He does have some experience with customer service.

Since August 2004, claimant has worked for the defendant employer. At the time of his injury, he was an over-the-road truck driver, delivering cabinets to different customers. His job as a truck driver included unstacking cabinets which are shipped three layers high. (Ex. A) Claimant testified during the hearing that the third tier of cabinets is above shoulder level. His responsibility would be to unload each cabinet and slide them to the rear of the trailer where the customer would remove the cabinet from the trailer.

At the time of his employment in August 2004, claimant underwent a DOT physical. He had no limitations or restrictions in August 2004 or any other time leading up to his injury.

On April 2, 2013, claimant was lifting a cabinet at or above shoulder height when he felt a sudden onset of pain in his left shoulder and across his chest.

After he was done unloading the truck, claimant reported his injury. He was sent for medical care and diagnosed with a degenerative rotator cuff tear in his left shoulder. He had surgery on June 24, 2013 with Gary Knudson M.D. (Exhibit H, pages 1-3)

Claimant continued to have ongoing pain, discomfort, and lack of motion. He was referred to James Nepola, M.D., at the University Iowa Hospital and Clinics. (Ex. H) Dr. Nepola performed a second rotator cuff repair to the claimant's left shoulder on November 6, 2014. (Ex. H, 16-19) Despite the second surgery, claimant continued to have problems with his left shoulder and then began to develop problems with his right shoulder. On January 15, 2016, Dr. Nepola performed rotator cuff repair on claimant's right shoulder. (Ex. H, pp. 20-23)

The defendants accepted and authorized all medical care and treatment for both shoulders.

Claimant underwent two different functional capacity evaluations, both which were deemed valid and both performed by therapist Jill Kuyava. (Ex. H, pp. 4-14; Ex. E)

The first functional capacity evaluation took place on September 10, 2014, and recommended the following physical work guidelines:

> The client is able to safely perform the following activities on the job.
>
> - Waist to floor lifting – 65 lbs., occasionally
> - Waist to crown lifting – 30 lbs., occasionally
> - Bilateral carry – 55 lbs., occasionally
> - Left unilateral carry – 40 lbs., occasionally
> - Left unilateral forward reaching – Constantly
> - Left unilateral overhead reaching – Frequently
> - Left unilateral elevated work - Occasionally

(Ex. H, p. 4)

The second functional capacity evaluation took place on October 3, 2016, with the following physical work guidelines. (Ex. E)

2. The client is able to safely perform the following activities on the job:

    - Floor to waist lifting – 83 lbs., Occasionally
    - Bilateral carrying – 42 lbs., Occasionally
    - Right and left unilateral carrying – 33 lbs., Occasionally
    - Waist to crown lifting – 28.19 lbs., Occasionally
    - Sustained overhead work – Occasionally
    - Forward and Overhead reaching - Constantly

(Ex. E, p. 1)

The October 3, 2016, figures allow claimant to work in heavy demand laboring positions so long as he limits his overhead working, forward and overhead reaching.

Claimant progressed to the point where he was able to regain the ability to participate in most activities of daily living. He even returned to participating in his leisure activities such as golf and kayaking. (Ex. H, p. 24)

Farid Manshadi, M.D., performed an independent medical examination on November 21, 2016. (Ex. H, p. 38) During this examination, claimant reported pain on a scale of 2/10 bilaterally that would increase to 6 or 8 upon use. (Ex. H, p. 41) The weather also adversely affected claimant's pain, but he was able to sleep on both sides. Claimant reported to Dr. Manshadi and during testimony that he is able to do most of the tasks that he was doing prior to the injury but that they all took longer to complete, often leaving him with increased pain and fatigue.

Dr. Manshadi determined the MMI date for claimant's bilateral shoulder injury was September 13, 2016. As a result of the reduced range of motion, as well as the surgery, he assigned an 8 percent impairment for the right upper extremity and a 7 percent impairment for the left upper extremity. (Ex. H, p. 42) He also adopted the functional capacity evaluation restrictions of October 3, 2016. (Ex. H, p. 43)

On November 21, 2016, Dr. Nepola set forth a 4 percent right upper extremity impairment and a 12 percent left upper extremity impairment as a result of loss of range of motion and the surgery. (Ex. H, p. 44) And, like Dr. Manshadi, Dr. Nepola adopted the October 3, 2016 functional capacity evaluation restrictions. (Ex. H, p. 44) He agreed that claimant could perform the duties of a truck driver as long as the lifting, carrying and sustained overhead work fell within the permanent restrictions of the October 3, 2016 FCE evaluation. (Ex. H, p. 45)

A vocational assessment was performed on November 18, 2016. Using the opinions of Dr. Nepola predating the November 21, 2016 report, and the restrictions of the functional capacity evaluation report of October 3, 2016, Ms. Sellner, a vocational case manager, concluded that the claimant was able to work in the trucking industry as a no touch driver or drop and hook along with office positions, such as safety inspector and dispatcher. (Ex. F, p. 6) She identified a number of positions that paid $8.85 per hour up to $27.86 per hour. (Ex. F, p. 4-5)

Occupations	Median Hourly Wages
Dispatcher, non-emergency	$19.73
Truck driver	$16.68
Transportation Manager	$27.86
Shipping, Receiving and Traffic Clerk	$14.65
First line of supervisor of transportation	$19.16
Team assembler	$14.87
Cashier	8.85
Security Guard	$12.66
Janitor	10.94
Parts sales person	$16.42
Mail Clerk	12.06
Packing and filling machine	$13.62
Machine feeders and offbearers	15.05

(Ex. F, p. 4-5) All positions paid less than claimant's pre-injury job which was approximately $39.00 per hour.

In a follow-up letter of December 19, 2016, Ms. Sellner penned an update indicating that she had learned that the defendant employer offered the claimant a permanent position at the rate of $19.25 per hour. This is approximately 45 to 50 percent lower than what claimant had earned in his truck driving position. Ms. Sellner noted that the claimant was "slightly frustrated as he thought he would be able to return to a driver's position, despite the admission by Mr. Steimel prior that he believed the Panther Transportation job was outside his restrictions." (Ex. F, p. 7) Despite the updated records from Dr. Nepola where he opined that claimant could perform a truck driver position so long as he observed the permanent restrictions of lifting, carrying and sustained overhead work, Ms. Sellner's position regarding claimant's employability was not was unchanged. (Ex. F, p. 7)

The position with defendant employer as a driver was not feasible due to his restrictions. Claimant's new position is a parts puller and stager. Claimant described this as ripping and cutting boards for the creation of cabinets. He uses saws and routers and engages in regular lifting, standing and material handling within his restrictions. (Ex. D)

The parties have agreed that the claimant's gross earnings at the time of his injury for the purposes of Worker's Compensation was $1,442.08 per week. However, defendants calculated the benefit rate on an average weekly wage of $1,293.06. (Ex. 3, p. 3) This discrepancy was due to a failure to include per diem. At hearing, defendant agreed to make up the difference and in a subsequent exhibit, the parties agreed that the underpayment of permanent partial disability benefits and healing period benefits was $4,335.13 and that the underpayment or lack of payment of temporary partial disability benefits was $15,200.30. (Ex. J)

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

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).

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.

The facts in this case are fairly undisputed. Claimant sustained a bilateral shoulder injury as a result of his work on April 2, 2013. The functional capacity evaluation of October 6, 2016 placed certain restrictions on the claimant which would prevent claimant from engaging in his pre injury position which required overhead work, extended lifting and reaching at or above chest level. Ms. Sellner, the defendant's proffered vocational expert, identified prospective trucking companies in the vicinity of the claimant that offered no touch load jobs. The defendant's proffered an exhibit A, which showed that Ruan truck drivers who are at home daily average between $55,000.00 and $65,000.00 per year while regional drivers could earn $65,000.00 and $70,000.00 per year. (Ex. B) In Ms. Sellner's reports, the medium hourly wages for a truck driver that were within claimant's restrictions was $16.68 per hour. A dispatcher position paid $19.73 per hour. (Ex. F, p. 4) Positions outside of the trucking industry range between $8.85 per hour up to $15.05 per hour. (Ex. F, p. 5) In summary, the positions suggested by the vocational expert paid substantially less than what claimant earned pre injury and all but two paid less than claimant's current employment at $19.25 per hour. The transportation manager position was the only position that paid close to claimant's over-the-road truck driving position. (Ex. F, p. 4)

If claimant left the company, he would lose accrued seniority and possibly other benefits. One benefits of seniority, as testified to by the defendants' witness, Jeff Orr, was to be considered for certain positions within the company over other applicants. It should also be noted that while the claimant is capable of doing office jobs as recommended by Ms. Sellner, those positions were not made available to him within his previous or current employment. In other words, the defendants have not made those positions such as safety inspector or dispatcher available to the claimant.

Using the vocational expert's medium hourly wage summary along with the pay at claimant's current work, combined with the work restrictions adopted by both Dr. Manshadi and Dr. Nepola, it is determined that claimant's industrial disability is 50 percent.

We now turn to the issue of penalty.

Claimant seeks additional weekly benefits pursuant to Iowa Code section 86.13(4). This particular provision requires that if a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the workers' compensation commissioner shall award additional weekly benefits in an amount not to exceed 50 percent of the amount of benefits that were unreasonably delayed or denied. Iowa Code section 85.13(4)(b). A reasonable or probable cause or excuse must satisfy the following requirements:

> (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 of the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay or termination of benefits.

Iowa Code section 86.13(4)(c)

Defendants have the burden to show compliance with this statutory provision in order to avoid the mandatory assessment of a penalty. The law requires proof of a prompt investigation and that factual basis be provided to the injured worker at the time of the denial, delay, or termination of benefits. Herein, defendant must show a timely investigation of the appropriate rate.

In this case claimant was under paid temporary and healing period benefits because of a mistake made in the rate. From the outset, the defendants claimed that the claimant's average weekly rate weight was $1,293.06. (Ex. 3, p. 3) Defendants agreed that the proper average weekly rate was $1,442.08 in December 2016. (Ex. 3, p. 7) The difference in the rate was due to the defendants failing to include per diem. (Ex. 7) The defendants have acknowledged that the underpayment of permanent partial disability benefits and healing period benefits was $4,335.13 and that the underpayment or lack of payment of temporary partial disability benefits was $15,200.30. (Ex. J)

Defendants argue that the initial miscalculation was not raised until December 9, 2016, when the issue was brought to their attention by the claimant's attorney. (Ex. 7) When the employer learned of the error, it conceded its mistake and worked to correct the underpayment shortly after the hearing. (Ex. I)

While the defendant did appear to be paying the claimant in good faith, the statute as written does not put the onus on the claimant to inform the defendant of the correct rate, but requires the defendant to appropriately calculate the rate. A trucking company, or an insurer that deals with trucking companies, should know that the average weekly wage should include per diem. Ignorance of the law is no excuse. However, because the defendants corrected their error shortly after learning of it, the penalty should only be modest. In this particular case a 5 percent penalty of all underpaid benefits is awarded.

The final issue is whether claimant is entitled to reimbursement of the independent medical examination. The defendants object to the payment of the independent medical examination on the basis that the triggering events not occur. Iowa Code section 85.39 requires the claimant to receive a low rating or no rating before they can pursue their own examination. Kohlhaas v. Hog Slat, Inc., 777 N.W. 2d 387, 393-395 (Iowa 2009).

Both Dr. Manshadi and Dr. Nepola's reports are dated November 21, 2016. Therefore the claimant is not entitled to reimbursement under 85.39.

The claimant argues that in the alternative the report of Dr. Manshadi should be allowed pursuant to Iowa Administrative Code 4.33. However, under Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, (Iowa 2015), the Iowa Supreme Court has declared that independent medical examinations are only reimbursable under Iowa Code section 85.39. Therefore, Dr. Manshadi's report cannot be assessed under 4.33. All other costs are awarded.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant two hundred fifty (250) weeks of permanent partial disability benefits at the rate of eight hundred and twenty-five and 57/100 dollars ($825.57) per week from September 14, 2016.

That claimant is entitled to a five (5) percent penalty award of all benefits underpaid.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants are to be given credit for benefits previously paid.

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

That defendant shall pay the costs of this matter pursuant to rule 876 IAC 4.33 except for the report and examination of Dr. Manshadi.

Signed and filed this 10th day of March, 2017.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
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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.