BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

HECTOR LUIS DELEON, Claimant, vs. KINGDOM CARGO, LLC, Employer, Defendant.	:	File No. 19700319.01 ARBITRATION DECISION Head Notes: 1802, 1803, 2910, 4000

STATEMENT OF THE CASE

Hector Luis DeLeon, claimant, filed a petition in arbitration seeking workers' compensation benefits from Kingdom Cargo, LLC (Kingdom Cargo) as a result of an injury he sustained on July 15, 2019 that arose out of and in the course of his employment. This case was heard via conference call on March 16, 2020 and fully submitted on April 8, 2020. The evidence in this case consists of the testimony of claimant and Claimant's Exhibits 1-9. Claimant submitted a brief.

A default judgment was entered against the defendant Kingdom Cargo on November 12, 2019. This proceeding was to determine the type and amount of workers' compensation benefits claimant is entitled to receive.

The default judgment established claimant has an injury that arose out of and in the course of his employment with Kingdom Cargo. The default judgment established defendant is liable for workers' compensation benefits. A hearing report was filed and approved. The hearing report identified issues as needing to be decided in this case.

ISSUES

1. The amount of temporary benefits.
2. The extent of permanent partial disability benefits,
3. Whether claimant's injury is to the shoulder or to the body as a whole.
4. Whether claimant is entitled to payment of certain medical expenses.
5. Whether claimant is entitled to payment for an independent medical examination.
6. Whether penalty should be assessed.

7. Assessment of costs.

FINDINGS OF FACT

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

Hector DeLeon, claimant, was 57 years old at the time of the hearing. Claimant completed the ninth grade in high school. Claimant received his GED around 1989. Claimant's prior work history included performing shipping and receiving for about a year. Claimant was a manager on the graveyard shift at a Denny's for about two years. Claimant worked construction as a laborer, a paving laborer, landscape laborer, as an assistant in transmission repairs and worked in a dry cleaner.

Claimant was trained by his brother to be an over-the-road truck driver. Claimant worked for about three years for Supreme Trucking. Claimant's brother worked for the defendant Kingdom Cargo and claimant then started to work for defendant Kingdom Cargo. Claimant testified that Kingdom Cargo operated 15 cabs and had 18 trailers. Kingdom Cargo was based in Texas. Claimant said he would haul auto parts and large rolls of plastic. Claimant said he drove frequently to Wisconsin. Claimant testified that he drove in Iowa two or three times a week.

On July 15, 2019 claimant was driving a semi for Kingdom Cargo in Coralville, Iowa. Claimant was traveling on I80 and going to northbound Highway 281. Claimant's truck and trailer flipped and the cab ended on its side. (Exhibit 6, page 2; Ex. 7, pp. 1-3)

Claimant testified that he had numerous cuts and bruises and injuries to his knee and thigh and displaced his shoulder. Claimant was taken by ambulance to the University of Iowa Hospitals and Clinics (UIHC). Claimant said he was stitched up at the UIHC.

Claimant said Kingdom Cargo did not arrange or pay for his medical care. Claimant's brother picked claimant up and took him home to North Carolina when he was released from UIHC.

Claimant returned to North Carolina. At this time claimant had no health insurance and Kingdom Cargo was not providing medical coverage. Claimant said it took him about two months until he became eligible for Title XIX (Medicaid) in North Carolina.

Claimant went to an emergency room in North Carolina, Atrium Health, and was sent to a shoulder specialist. Claimant initially saw a physician assistant (P.A.) and was referred for physical therapy. Claimant then saw Scott O'Neal, M.D. Claimant said he was told by Dr. O'Neal that he had a displaced bone in his left shoulder and that given his age, surgery would be a risk. Claimant was released with restriction by Dr. O'Neal as of January 8, 2020. Claimant said he was told by Dr. O'Neal not to lift over 30 pounds and to be careful. Claimant said his collarbone sticks up about an inch.

Claimant started working at Wal-Mart on October 26, 2019 as a stocker. Claimant said that he is sore after work when he works above shoulder height. Claimant said he could not return to past work. Claimant said he can perform normal household activities such as vacuuming. Claimant said he cannot swing a bat to play softball with his daughter.

On July 15, 2019 the EMT who was at the scene of the accident reported claimant was bleeding from several lacerations. Claimant was noted to have a deformed left shoulder. (Ex. 1, p. 18) Claimant was examined at the UIHC Emergency Department on July 15, 2019. Imaging did not show any bony injuries. ENT repaired a nasal laceration. (Ex. 1, p. 7) After several hours of observation claimant was provided medications and discharged. (Ex. 1, p. 7)

On August 18, 2018 claimant went to the emergency department at Atrium Health Waxhaw. Claimant was reporting left shoulder pain. X-rays showed a separated AC joint. The x-ray findings were, "This is positive grade 1 acromioclavicular joint separation dislocation, acute/subacute." (Ex 2, p. 11) Claimant was referred for an orthopedic follow-up. (Ex. 2, p. 3) Claimant was provided patient education information concerning his injury. The information described the acromioclavicular joint as,

> The AC or acromioclavicular joint is at the end of the collar bone, or clavicle, near the shoulder. The AC joint is made of 4 ligaments that hold the collar bone to the shoulder blade, or scapula. With an AC joint sprain, these ligaments may be partly or fully torn. In both cases, this causes pain and swelling at the end of the collar bone. If the ligaments are completely torn, the collar bone will rise up.
>
> Grade 3. The most severe kind of sprain. The ligaments are completely torn. The collar bone is no longer joined to the shoulder blade. The collar bone rises up. This creates a bump on top of the shoulder. The ligaments heal in this position, so the bump does not go away. It is possible to have surgery to correct the bump. But normal shoulder function will usually return even without surgery.

(Ex. 2, p. 13)

On October 2, 2019 Christopher Powers, P.A. examined claimant. P.A. Powers noted claimant had a grade 3 AC joint separation and deformity to the left AC joint. (Ex. 3, p. 1) P.A. Powers provided restrictions on no lifting above 10 pounds. (Ex. 3, p. 6)

On October 21, 2019 an MRI showed AC joint type 3 separation. Dr. O'Neal did not recommend surgery. (Ex. 3, p. 11) On January 8, 2020 claimant was seen by Dr. O'Neal. Dr. O'Neal's assessment was, "Left shoulder type 3 AC joint separation with improved range of motion and strength." (Ex. 3, p. 4) Dr. O'Neal returned claimant to work and recommended that claimant continue his rotator cuff exercises. (Ex. 3, p. 4) Dr. O'Neal stated it was "Ok to drive truck." (Ex. 3, p. 7)

On March 6, 2020 Dr. O'Neal responded to a series of questions from claimant's counsel. Dr. O'Neal stated that claimant's left shoulder injury was causally related to his July 15, 2019 work injury and the treatment he provided was necessitated by his work-related injury. (Ex. 3, p. 26) Dr. O'Neal found claimant at maximum medical improvement as of January 8, 2020. (Ex. 3, p. 26) Dr. O'Neal provided a 10 percent upper extremity rating for claimant's injury. Dr. O'Neal recommended claimant avoid pressing exercises. (Ex. 3, p. 27)

Claimant was off work on July 16 2019 and started full-time employment with Wal-Mart on October 26, 2019.

At the time of the hearing claimant was working as a stocker. Claimant has pain in his shoulder when he uses his arm above his head, especially when lifting any weight. I find that claimant has a 15 percent loss of earning capacity.

Claimant has incurred medical expenses and medical mileage that are causally related to his work injury. (Ex. 4, pp. 1-19) I find the expenses were reasonable. The defendant Kingdom Cargo is liable for the medical expenses and mileage.

Claimant has incurred $494.80 in costs, which includes a $100.00 filing fee, $14.80 postage for service, $80.00 for personal service of the petition and $300.00 for a report by Dr. O'Neal. (Ex. 5, p. 1)

Based upon the claimant's earnings I find claimant's weekly workers' compensation rate to be $715.50. (Ex. 8, pp. 1–4)

CONCLUSIONS OF LAW

A default judgment was entered against Kingdom Cargo which established liability for claimant's July 15, 2019 injury. The primary issues to be determined are the extent of temporary and permanent benefits, medical expenses and costs.

Claimant asserts his injury is to the body as a whole and should be considered an industrial disability.

In March 2017, the legislature enacted changes (hereinafter "Act") relating to workers' compensation in Iowa. 2017 Iowa Acts chapter 23 (amending Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.45, 85.70, 85.71, 86.26, 86.39, 86.42, and 535.3). Under 2017 Iowa Acts chapter 23 section 24, the changes to Iowa Code sections 85.33 and 85.34 apply to injuries occurring on or after the effective date of the Act.

The Iowa Legislature modified Iowa Code section 85.34 in 2017. Subsection 85.34(2) (On) was added. The subsection is now renumbered to 85.34(2)(n) (2018). It reads:

> For the loss of a shoulder, weekly compensation is paid based on four hundred weeks.

The Iowa Legislature also added Iowa Code section 85.34(2)(w). It provides the manner for determining functional disability or loss of percentage of permanent impairment. The subsection provides:

> w. In all cases of permanent partial disability described in paragraphs “a” through “f”, or paragraph “u’ when determining functional disability and not loss of earning capacity, 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, as adopted by the workers’ compensation commissioner by rule pursuant to chapter 17A. Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment pursuant to paragraphs “a” through “t”, or paragraph “u” when determining functional impairment and not loss of earning capacity.

If claimant’s injury is to the shoulder it would be evaluated as a functional disability pursuant to the AMA Guides. Dr. O’Neal provided a 10 percent rating to the claimant’s upper extremity. The AMA Guides 5th Edition has no specific definition or ratings for shoulders.

Claimant’s injury is to his acromioclavicular joint. He has a grade 3 type of injury. Claimant has a bump at the site where his ligaments have torn so that the collarbone is not joined to the shoulder blade.

In Chavez v. MS Technology, File No 5066270 (Arb. February 5, 2020) the deputy did an extensive survey of how this agency has treated and defined shoulders. The Chavez decision held the injury in that case, an injury to the infraspinatus and supraspinatus and surgical repair impacted the body as a whole and evaluated the injury to the body as a whole. Chavez page 13.

In this case, claimant did not have an injury to his glenohumeral joint, but to the acromioclavicular joint. The torn tendons are on the proximal side of the glenohumeral joint.

I find that claimant has an injury to the body as a whole and his injury is an industrial 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 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.

In assessing an unscheduled, whole-body injury case, the claimant's loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

Claimant is working as a stocker at Wal-Mart at the time of the hearing. Claimant credibly testified that he has pain due to his injury and is not able to perform the heavy physical demands of some of his past work.

Claimant was returned to work with minor restrictions by Dr. O'Neal. Claimant's age and education are not positive vocational factors. Claimant is motivated to work. Claimant is earning much less now than when he worked for Kingdom Cargo. No physician has opined that he could not return to driving a semi.

Considering all the factors of industrial disability I find that claimant has a 15 percent industrial disability. This entitles claimant to 75 weeks of permanent partial disability.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Claimant was off work on July 16 2019 and started full-time employment with Wal-Mart on October 26, 2019. I find claimant is entitled to healing period benefits from July 16, 2019 through October 25, 2019: Fourteen weeks plus five days.

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. Section 85.27. Holbert v.

Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Where medical payments are made from a plan to which the employer did not contribute, the claimant is entitled to a direct payment. Midwest Ambulance Service v. Ruud, 754 N.W.2d 860, 867-68 (Iowa 2008) ("We therefore hold that the commissioner did not err in ordering direct payment to the claimant for past medical expenses paid through insurance coverage obtained by the claimant independent of any employer contribution.")

Claimant has incurred substantial medical expenses and medical mileage that are a direct result of his work injury. Defendant is responsible for the medical costs and medical mileage found in Exhibit 4.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

Claimant clearly had a work-related injury. The defendant has provided no reasonable excuse for not paying claimant indemnity benefits

I find that a penalty of approximately 50 percent of the healing period benefits and 50 percent of the permanent partial disability benefits is appropriate in this case. I consider the lack of any response to this claim and the harm to the claimant in assessing penalty. I also determined the amount of penalty to provide reasonable

incentive for defendant to comply with Iowa workers' compensation laws. I award claimant $31,839.75 in penalty benefits [PPD 75 weeks x $715.50 = $53,662.50 x 50% = $26,831.25 //HP 14 weeks x $715.50 = $10,017 x 50% = $5,008.50 // $26,831.25 + $5,008.50 = $31,839.75].

A copy of this decision is being provided to the workers' compensation commissioner to determine whether further action should take place under Iowa Code section 87.19 for failure to have workers' compensation insurance.

ORDER

Defendant shall pay claimant healing period benefits from July 16, 2019 through September 25, 2019 at the weekly rate of seven hundred fifteen and 50/100 dollars ($715.50).

Defendant shall pay claimant seventy-five (75) weeks of permanent partial disability at the weekly rate of seven hundred fifteen and 50/100 dollars ($715.50) commencing on September 26, 2019.

Defendant shall pay claimant costs in the amount of four hundred ninety-four and 80/100 dollars ($494.80).

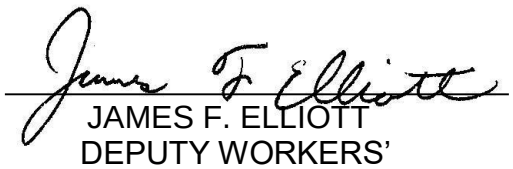
Defendant shall pay claimant the medical expenses and medical mileage found at Exhibit 4.

Defendant shall pay claimant thirty-one thousand eight hundred thirty-nine and 75/100 dollars ($31,839.75) in penalty benefits.

Defendant shall pay accrued weekly benefits in a lump sum together with interest at the 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).

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

Signed and filed this 6th day of May, 2020.



JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Dennis Mahr (via WCES)

Kingdom Cargo, LLC
5903 Riverside Dr.
Laredo, TX 78041
(via certified and U.S. mail)

Joseph Cortese, Workers' Compensation Commissioner

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.