BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARC ZORZI,	:	
Claimant,	:	File No. 20700500.02
vs.	:	ARBITRATION DECISION
OSAGE RIVER CITY EGG CO.,	:	
Employer, Defendant.	:	Head Notes: 1108.50, 1402.20, 1402.40, 1801, 2501, 2907

STATEMENT OF THE CASE

Marc Zorzi, claimant, filed a petition in arbitration seeking workers' compensation benefits from Osage River City Egg Company, employer, as defendant. Hearing was held on May 27, 2021. This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the outbreak of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means, using CourtCall. Accordingly, this case proceeded to a live video hearing via CourtCall with all parties and the court reporter appearing remotely.

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.

Marc Zorzi was the only witness to testify live at trial. The evidentiary record also includes Joint Exhibits JE1-JE20. All exhibits were received without objection. The evidentiary record closed at the conclusion of the arbitration hearing.

The parties submitted post-hearing briefs on June 25, 2021, at which time the case was fully submitted to the undersigned.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant sustained an injury that arose out of and in the course of his employment on March 8, 2018.

2. Whether claimant is entitled to temporary disability/healing period benefits.

3. Whether the issue of permanent impairment is ripe for determination. If so, the nature and extent of disability, if any, claimant sustained as the result of the alleged work injury.

4. Whether defendant is liable for past medical expenses.

5. Whether claimant is entitled to an award of penalty benefits for an unreasonable delay or denial of weekly benefits.

6. Whether costs should be assessed against either party and, if so, in what amount.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Claimant, Marc Zorzi, was 58 years old at the time of the hearing. He is right-hand dominant. Mr. Zorzi graduated from high school in 1980. He described himself as an average student. (Testimony)

After high school Mr. Zorzi went to work at Cirsco Clutch and Brake. Mr. Zorzi ran a riveting press on the brake pads. He left this job after a couple of years for a better opportunity. Next, he joined the Teamsters as a PUD (pick up and deliver) driver. He loaded his own truck and made deliveries and pickups. He described this as physical work. He performed this work for approximately 18 years. Mr. Zorzi left this job in California to move to Iowa for family reasons. After moving to Iowa, Mr. Zorzi's first job was running a dredge at Shell Rock Enterprises. He performed this job for a few months, but left to go to work at Osage River City Egg ("Osage River"). (Testimony)

Mr. Zorzi began working for Osage River in 2004. At that time, the facility was owned by Ron McDonough. Mr. Zorzi was hired to perform mechanical work such as rebuilding the collectors. Approximately three months after he was hired, Mr. Zorzi became the plant manager. He was paid $90,000 per year. The plant was an automated facility that ran 24 hours a day, 7 days per week and required pretty much constant maintenance. As the plant manager his duties included maintaining the electrical gear boxes, motors, loading and unloading trucks, manure belts, auger troughs, augers, and cooling fans. Approximately three years after he was hired, Mr. McDonough offered Mr. Zorzi 49 percent of the company and a raise to $120,000 a year if he would stay with the company. Mr. Zorzi accepted the offer. He estimates he worked around 70 hours per week. (Testimony)

In June 2017, Mr. McDonough contacted Mr. Zorzi to advise him the bank was pulling the note. He wanted to know if Mr. Zorzi was interested in buying the company; Mr. Zorzi was not. Mr. McDonough and Mr. Zorzi decided to put the company up for sale. They sold the company to a company out of Houston. Mr. Zorzi did not receive any money from the sale of the company. He explained that Mr. McDonough was the majority owner and had a mountain of debt. As part of the sale, Mr. Zorzi agreed to stay for a year to run the place. He was contracted to be an employee through June 8,

2018. Mr. Zorzi met the new owners who were brothers with the last name Dang. The new owners were Vietnamese and Mr. Zorzi had a difficult time communicating with them; therefore, their communication went through an individual named Lily. (Testimony)

On the morning of March 8, 2018, Mr. Zorzi was at work repairing a gearbox that was 14 feet in the air. Mike Delpiano, an employee at River City, was also present. Mr. Zorzi was on a ladder, slipped, fell, and smashed his head and neck on auger trough returns. He hit the ground with his legs up in the air, and his lower back and buttocks were on the ground. Mr. Zorzi felt half-unconscious, he was not sure where he was for a bit and the wind was knocked out of him. His right hand and arm started to feel asleep and affect his motor skills and movement right after the fall. Mr. Zorzi lived right next to the plant, so he just went home after the fall. He reported the injury to Lily in the next workday or two. (Testimony)

Mr. Zorzi's condition did not improve. A couple of days after his fall he felt worse and he starting getting chills and headaches. He called Lily and advised her he was going to the emergency room and she told him to go. (Testimony)

On March 12, 2018, Mr. Zorzi went to the emergency room at Mercy Medical Center – North Iowa. He reported that he fell 10 feet at work on Thursday. He noticed tingling in his right arm and leg that night that was not getting any better. He also reported pain in his neck and back. The diagnoses were cervical strain, fall, and paresthesia of right arm. Mr. Zorzi was instructed to avoid lifting anything greater than 5 pounds, avoid twisting or sudden movements. He could take over-the-counter Tylenol or ibuprofen for pain as needed. (JE1, pp. 1-14)

On March 15, 2018, Mr. Zorzi saw Sandeep S. Bhangoo, M.D. Dr. Bhangoo examined Mr. Zorzi and reviewed his radiological findings. He did not see any acute traumatic injury that would be concerning for immediate gross instability. The doctor noted he was having a pretty significant amount of neck pain and it appeared he may have had an accident-induced radiculopathy on the right arm. Dr. Bhangoo did not feel this required immediate surgical intervention. He recommended resting his arm and neck to give his body some time to heal. He placed Mr. Zorzi in a Miami J collar for a minimum of 6 weeks. He restricted Mr. Zorzi to remain off work. (JE2, pp. 1-3)

By April 2018 Mr. Zorzi's right arm pain and neck pain had not improved. Dr. Bhangoo ordered a cervical MRI. He was to remain off work. (JE2, p. 4)

On May 1, 2018, Mr. Zorzi underwent a cervical MRI. The impression was multilevel degenerative changes. Mild to moderate spinal canal narrowing at C5-C6. High-grade foraminal narrowing was also noted. Dr. Bhangoo felt Mr. Zorzi had pretty significant bilateral foraminal stenosis at C4-C5 and C5-C6 and that was probably what was causing his problems. Dr. Bhangoo discussed a possible C4-C6 anterior cervical discectomy and fusion. It was decided he would try physical therapy. He was to remain off of work. (JE1, p. 19; JE2, pp. 5-6)

Mr. Zorzi attended physical therapy at Mitchell County Regional Health Center on May 7, 2018. (JE3, pp. 1-3) However, the physical therapy office told him they would have to stop seeing him because his bills were not being paid. (Testimony)

Mr. Zorzi returned to Dr. Bhangoo on May 15, 2018. His pain had not improved at all despite conservative management. Surgery was again discussed; he decided to proceed with surgery. (JE2, p. 7)

On June 6, 2018, Dr. Bhangoo performed a C4-C5 and C5-C6 anterior cervical diskectomy and fusion using Medtronic Zevo plate system, PEEK interbody cage and morcellized autograft. The postoperative diagnosis was bilateral cervical stenosis with radiculopathy. (JE1, pp. 24-25; JE2, pp. 8-9)

Mr. Zorzi returned to Dr. Bhangoo on June 28, 2018. He reported that he was doing great. Dr. Bhangoo prescribed physical therapy to begin at 6 weeks postop. (JE2, p. 10)

On August 16, 2018, Mr. Zorzi returned to Dr. Bhangoo. His neck was doing well and his arm strength on the right was improving markedly. Mr. Zorzi was continuing his physical therapy. He had a severe exacerbation of pain going down his back and into his right leg which was keeping him up at night. He also had intermittent numbness going down his legs. Dr. Bhangoo reviewed the x-rays of the lumbar spine. He noted Mr. Zorzi had lumbar spondylosis with likely stenosis at L5-S1. He ordered an MRI of the lumbar spine. (JE2, p. 11)

On October 2, 2018, Dr. Bhangoo noted that Mr. Zorzi was still having occasional tremor in his right arm which seemed to come and go. He believed Mr. Zorzi had essentially approached MMI as far as his neck. With regard to his low back, he essentially had a complete collapse at the L5-S1 disk with subsequent severe compression of the exiting L5 nerve roots. He had a radicular component going into his buttocks, but it did not extend all the way to his foot. Because it was not a clear radicular match with L5, Dr. Bhangoo recommended a diagnostic epidural steroid injection focused on L5-S1. If this improved his symptoms significantly, he might potentially be a candidate for an L5-S1 posterior lumbar interbody fusion. He was to remain off work. (JE1, pp. 12-15)

Mr. Zorzi had a lumbar epidural steroid injection on October 5, 2018. On October 18, 2018, he returned to Dr. Bhangoo. He reported that the injection helped him significantly to the point that he was almost better. He wanted to continue physical therapy. He was to remain off or work until therapy was completed. (JE2, pp. 16-19)

On October 30, 2018, Mr. Zorzi returned to Dr. Bhangoo and reported that shortly after the last appointment, his pain returned in the same distribution in his leg. Dr. Bhangoo advised that the surgical treatment would be an L5-S1 posterior lumbar interbody fusion, which is a rather involved surgery. The doctor recommended another ESI. Mr. Zorzi underwent a second ESI on November 7, 2018. He was to remain off work. (JE2, pp. 21-24)

On November 27, 2018, Mr. Zorzi reported to Dr. Bhangoo that the last epidural injection was not that successful at all. Dr. Bhangoo felt that because the first ESI was successful and the MRI showed a collapsed disc with foraminal stenosis, surgical treatment would be an L5-S1 posterior lumbar interbody fusion. Mr. Zorzi was rather hesitant to proceed with surgery given his activity level and the potential surgical complications. After considering the risk factors, Mr. Zorzi decided he would like to proceed with surgery. He was to remain off work. (JE2, pp. 25-26)

Defendant prepaid for a second opinion with Chad Abernathey, M.D., at Cedar Neurological Surgeons. Mr. Zorzi saw Dr. Abernathey on April 8, 2019. In the history section of his notes Dr. Abernathey states:

> Marc Zorzi is a 56 year old white male who presents with neck pain and low back pain with radiation into the right lower extremity and right arm. He reports pain, numbness, and tingling extending into the right forearm and hand involving the fourth and fifth digits with generalized weakness of the intrinsic hand muscles. He also reports right sciatica. The patient's symptoms began on 3/8/2018 when he fell approximately 10 feet from a feed bin at work. He has undergone extensive conservative medical and chiropractic management with surgical intervention under the care of Sandeep Bhangoo, MD and others. The patient underwent a two level cervical fusion at C4-5 and C5-6 on 6/6/2018. To date, medical and chiropractic management with epidural steroid injections and physical therapy have not alleviated his symptomatology. He is referred to me for a neurosurgical opinion.

(JE5, p. 2)

Based on his examination, Dr. Abernathey had the following impressions and recommendations:

> Marc Zorzi presents with chronic lumbosacral strain consistent with L5-S1 degenerative changes with osteophyte formation and stenosis aggravated by work related injury. I agree with Dr. Bhangoo that a single level fusion at L5-S1 may be a reasonable approach to ameliorate his discomfort. Additionally, I am concerned that he may have a right ulnar neuropathy or possibly C8 radiculopathy. I recommended to him that he undergo an EMG study. I gave his worker's compensation manager, Julie Nenow, RN a prescription for the procedure. I would be happy to review the results of that study after it has been completed."

(JE5, p. 2)

On April 23, 2019, Dr. Bhangoo saw Mr. Zorzi who reported that he had progressively increasing pain despite his hydrocodone usage. His pain is mostly in his legs. He saw Dr. Abernathey regarding his low back and he recommended the same surgical procedure. His back pain was similar; his leg pain had been getting progressively worse. His options now were to attempt gabapentin, referral to a pain specialist, proceed with an L5-S1 posterior lumbar interbody fusion. He elected to try

gabapentin, but Dr. Bhangoo was going to schedule him to undergo the surgery if that failed. Mr. Zorzi was restricted from work until further notice. (JE2, pp. 32-34)

On June 20, 2019, Mercy advised that they received notification of authorization for the L5-S1 lumbar fusion surgery as recommended by Dr. Bhangoo on April 23, 2019. The authorization was on behalf of David Dang and Lily Ngo with Four Seasons Food. However, due to outstanding balances of over $42,000 to Mercy Clinics and over $73,000 to MercyOne North the recommended surgery would not be scheduled until the balances were resolved. (JE2, pp. 36-37)

At some point Mr. Zorzi was told that Osage River did not have workers' compensation insurance. He was told they were self-insured. When Mr. Zorzi was part owner of the plant, they did have workers' compensation insurance. Mr. Zorzi contacted the insurance agent Osage River used when he was a part-owner. The agent informed Mr. Zorzi that when the agent gave the new owners the estimate for the insurance they said it was too much money. When Mr. Zorzi asked Lily about insurance, she informed him they were self-insured. (Testimony; JE11, p. 2) I find Osage River has not offered any evidence to demonstrate that they had workers' compensation insurance on March 8, 2018.

On March 1, 2021, at the request of his attorney, Mr. Zorzi saw Mark Taylor, M.D., for an independent medical examination (IME). Dr. Taylor's diagnoses included: history of C7-T1 laminectomy and discectomy in 2005; subsequent injury in March 2018, resulting in bilateral cervical stenosis and radiculopathy; surgery on June 6, 2018, C4-C6 anterior cervical discectomy and fusion by Dr. Bhangoo; and lumbar stenosis and radiculopathy, with symptoms into the left leg. Dr. Taylor estimated that Mr. Zorzi reached MMI for his cervical spine six months after the fusion procedure. Dr. Taylor noted that Dr. Abernathey recommended an EMG study of the right upper extremity. If the EMG occurred and further treatment was necessary, then the date of MMI would have to be revisited.

With regard to the lumbar spine, Dr. Taylor opined that Mr. Zorzi was not at MMI and therefore did not assign an impairment rating based on his condition at the time of the examination. With regard to the cervical spine Dr. Taylor assigned permanent impairment using both the DRE methodology and the range of motion methodology. He recommended the higher value. Dr. Taylor utilized multiple tables in chapter 15 of the AMA Guides to assign 24% impairment based on range of motion. Dr. Taylor also utilized chapter 15 of the Guides, to place Mr. Zorzi into DRE category IV and assigned 26% impairment. Dr. Taylor noted it was difficult to predict permanent restrictions because, due to the recommended surgery, he was not at MMI for the lumbar spine.

Dr. Taylor provided estimated permanent restrictions: Lifting limit of 20-25 pounds between the knee and chest level rarely. He needs to have the ability to alternate sitting, standing, and walking as needed. No ladders. He may rarely climb stairs. Rarely perform overhead tasks. He may travel occasionally, but his ongoing neck and right upper extremity issues could impact his ability to operate certain types of vehicles or equipment. If Mr. Zorzi does not have any changes to his right hand, he will have to avoid forceful gripping, grasping and pinching with his right hand. He may

tolerate non-forceful, occasional gripping, grasping and pinching with the right hand, and only rare use of vibratory or power tools. (JE6)

Mr. Zorzi has not worked since his injury at Osage River City Egg Company. He applied for social security disability after the owners of Osage River ended his weekly benefits. On October 19, 2019, Mr. Zorzi received notice that he qualified for SSD benefits effective September 2018. (JE18, p. 1)

The defendant disputes that Mr. Zorzi sustained an injury arising out of and in the course of his employment with Osage River City Egg Company on March 8, 2018. However, I find that the testimony, written evidence, and evidentiary record as a whole, support claimant's contention. I find Mr. Zorzi sustained a work-related injury on March 8, 2018, when he fell approximately 10 feet onto his back. The history Mr. Zorzi provided to medical providers is consistent throughout the records. Dr. Bhangoo, Dr. Taylor, and Dr. Abernathey all relate Mr. Zorzi's cervical and lumbar injuries to his fall at work on March 8, 2018. (JE2, pp. 2-3; JE 6; JE5, p. 2) These opinions are unrefuted. I find Mr. Zorzi has demonstrated by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment with Osage River City Egg Company on March 8, 2018.

We now turn to the issue of whether Mr. Zorzi sustained any permanent disability as the result of the work injury. First, we need to determine if the issue of permanent disability is ripe for determination at this time. Both Dr. Bhangoo and Dr. Abernathey have recommended a single-level fusion at L5-S1. This low back surgery was scheduled for June 2019. However, two days before the surgery, the doctor canceled the surgery due to the outstanding medical bills. At the hearing, Mr. Zorzi testified that he no longer intends to have the surgery because he is worried about his odds. Claimant contends that because he no longer intends to undergo the lumbar surgery, he should be found to be at maximum medical improvement as of May 27, 2021, the date of the arbitration hearing. However, this is not supported by the evidentiary record in this case. In his report, Dr. Taylor clearly opined that Mr. Zorzi "is not at maximum medical improvement with regard to the lumbar spine." (JE6, p. 6) No physician in this case has provided any contrary opinion. There is no medical opinion to support claimant's contention that he is at maximum medical improvement from the lumbar injury. I find that Mr. Zorzi has not reached maximum medical improvement from the injury and therefore, the issue of permanency is not ripe for determination at this time.

Claimant is seeking additional temporary benefits. Because claimant has not yet reached MMI at this point in time, he has only demonstrated entitlement to temporary total disability benefits. Claimant seeks temporary benefits beginning on June 9, 2018. Since June 9, 2018 continuing through the date of the hearing, Mr. Zorzi has had restrictions placed on his work activities because of the work injury. (JE2, p. 34; JE6) I find that since June 9, 2018 and up until and through the date of the arbitration hearing, Mr. Zorzi has not been medically capable of returning to employment substantially similar to the employment in which he was engaged at the time of the injury. (JE1-JE6; Hearing Report; Testimony)

Mr. Zorzi is also seeking payment of past medical benefits as set forth in Joint Exhibit 10. A review of the medical bills and records in this case demonstrate that the bills are for treatment of Mr. Zorzi's cervical and lumbar spine injuries. I find that the medical bills submitted by Mr. Zorzi are for treatment that was causally connected to the work injury.

Mr. Zorzi has alleged a penalty claim against Osage River City Egg Company for the unreasonable delay and/or denial of his claim. I find defendant has offered no evidence to rebut the expert opinions that Mr. Zorzi's cervical and lumbar injuries are related to the March 8, 2018 work injury. I further find defendant did not convey any basis for their denial that the March 8, 2018 injury arose out of and in the course of his employment.

Mr. Zorzi's injury occurred on March 8, 2018. I found claimant demonstrated entitlement to temporary total disability benefits beginning on June 9, 2018. Defendant did not pay temporary total disability benefits to Mr. Zorzi until September 5, 2018. Thus, I find defendant delayed or denied benefits from June 9, 2018 through September 4, 2018. Benefits were not paid from June 9, 2018 through September 4, 2018.

Additionally, claimant contends penalty benefits are appropriate because the defendant unilaterally decided to terminate Mr. Zorzi's weekly benefits at the same time they approved his surgical care. I found claimant is entitled to ongoing temporary total disability benefits. The last time defendant paid weekly workers' compensation benefits was on July 16, 2019. I conclude defendant denied or delayed weekly benefits from July 17, 2019 through the date of the hearing May 27, 2021.

CONCLUSIONS OF LAW

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" refer 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 Elec. 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.

Based on the above findings of fact, I conclude Mr. Zorzi has demonstrated by a preponderance of the evidence that he sustained cervical and lumbar injuries arising out of and in the course of his employment with Osage River City Egg Company on March 8, 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).

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).

Claimant is seeking permanent disability benefits in this case. However, before a determination regarding his entitlement to any permanency benefits may be made, we must first address whether the issue of claimant's entitlement to permanency benefits is ripe for determination.

Under Iowa law, compensation for permanent disability "shall begin when it is medically indicated that maximum medical improvement from the injury has been reached and that the extent of loss or percentage of permeant impairment can be determined by use of the guides . . ." Iowa Code section 85.34(2).

Based on the above findings of fact, I conclude that Mr. Zorzi has failed to demonstrate by a preponderance of the evidence that it is medically indicated that maximum medical improvement from the injury has been reached. Thus, the issue of permanency is not ripe for determination at this time.

We now turn to the issue of temporary benefits. With regard to temporary total disability benefits, Iowa law states:

> the employer shall pay to an employee for injury producing temporary total disability weekly compensation benefits, as provided in section 85.32, until the employee has returned to work or is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

Iowa Code section 85.33.

Based on the above findings of fact, I conclude that Mr. Zorzi is entitled to temporary total disability benefits as the result of his March 8, 2018 work injury. Claimant seeks temporary total disability benefits beginning on June 9, 2018. Since June 9, 2018 continuing through the date of the hearing, Mr. Zorzi has had restrictions placed on his work activities because of the work injury. (JE2, p. 34; JE6) I find that since June 9, 2018 and up until and through the date of the arbitration hearing, Mr. Zorzi has not been medically capable of returning to employment substantially similar to the employment in which he was engaged at the time of the injury. Prior to the hearing, defendant voluntarily paid 45 weeks of benefits at the stipulated weekly rate. These benefits were paid from September 5, 2018 until July 17, 2019. I find Mr. Zorzi has demonstrated entitlement to temporary total disability benefits from June 9, 2018 through September 4, 2018 and from July 18, 2019 until he returns to work or it is demonstrated that he is medically capable of returning to employment substantially similar to the employment in which he was engaged at the time of the injury. (JE1-JE6; Hearing Report; Testimony)

We now turn to the issue of past medical expenses. Mr. Zorzi is also seeking payment of past medical benefits as set forth in Joint Exhibit 10. Under Iowa law, 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).

A review of the medical bills and records in this case demonstrate that the bills in question are for treatment of Mr. Zorzi's cervical and lumbar spine injuries. I find that the medical bills submitted by Mr. Zorzi are for treatment that was causally connected to the work injury. I conclude defendant is responsible for the medical bills set forth in Joint Exhibit 10.

Mr. Zorzi has alleged that penalty benefits are appropriate in this case for unreasonable denial and delay of benefits. Iowa Code section 86.13(4) provides:

> *a.* If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> *b.* The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:

(1) The employee has demonstrated a denial, delay in payment, or termination of benefits.

(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

c. In order to be considered a reasonable or probable cause or excuse under paragraph *"b"*, an excuse shall satisfy all of the following criteria:

(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.

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Custom 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.

Weekly compensation payments are due at the end of the compensation week. 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).

The purpose of Iowa Code section 86.13 is both punishment for unreasonable conduct but also deterrence for future cases. The Commissioner is given discretion to determine the amount of the penalty imposed with a maximum penalty of 50 percent of the amount of the delayed, or denied, benefits. Christensen v. Snap-On Tools Corp., 554 N.W2d 254, 261 (Iowa 1996).

Mr. Zorzi's injury occurred on March 8, 2018. I found claimant demonstrated entitlement to temporary total disability benefits beginning on June 9, 2018. Defendant did not pay temporary total disability benefits to Mr. Zorzi until September 5, 2018. Thus, I find defendant delayed or denied benefits from June 9, 2018 through September 4, 2018. Benefits were not paid from June 9, 2018 through September 4, 2018. Claimant contends penalty benefits are appropriate in this case because the defendant offered no evidence of any investigation of Mr. Zorzi's claim prior to June 9, 2018. I find defendant has offered no evidence to demonstrate that they conducted a reasonable investigation. Additionally, I find the record is void of any evidence that Osage River contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to Mr. Zorzi at the time of the denial, delay, or termination of benefits. I conclude defendant unreasonably denied or delayed benefits from June 9, 2018 through September 4, 2018. I further conclude the employer failed to show reasonable cause or excuse for the delay or denial and therefore, penalty benefits are appropriate.

Additionally, claimant contends penalty benefits are appropriate because the defendant unilaterally decided to terminate Mr. Zorzi's weekly benefits at the same time they approved his surgical care. I found claimant is entitled to ongoing temporary total disability benefits. The last time defendant paid weekly workers' compensation benefits was on July 16, 2019. I find defendant has offered no evidence to demonstrate that they conducted a reasonable investigation. Additionally, I find there is no evidence that Osage River contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to Mr. Zorzi at the time of the denial, delay, or termination of benefits. I conclude defendant unreasonably denied or delayed weekly benefits from July 17, 2019 through the date of the hearing May 27, 2021. I further conclude the employer failed to show reasonable cause or excuse for the delay or denial and therefore, penalty benefits are appropriate.

Considering the length of the delay, the number of delays, the information available to the employer, and the other factors set forth by the Iowa Supreme Court, I exercise my discretion and find that a penalty in the ballpark of 50 percent is in order. I note the employer's complete failure to contemporaneously convey the basis for the denials and delays to Mr. Zorzi. I also note the lack of evidence to demonstrate that the employer conducted a reasonable investigation into Mr. Zorzi's entitlement to weekly workers' companion benefits. I hereby award penalty benefits against the employer in the amount of sixty thousand and no/100 dollars ($60,000.00).

Claimant is seeking an assessment of costs as set forth in Joint Exhibit 20. Costs are to be assessed at the discretion of the Iowa Workers' Compensation Commissioner or the deputy hearing the case. In this case, I conclude claimant was

generally successful in his case and therefore, I exercise my discretion and find that an assessment of costs is appropriate in this case.

Specifically, claimant is seeking costs in the amount of one hundred three and no/100 dollars ($103.00) for the filing fee and convenience fee incurred by using the WCES payment gateway. I find this is an appropriate cost under 876 IAC 4.33(7). Defendant is assessed costs in the amount of one hundred three and no/100 dollars ($103.00).

Next, claimant is seeking costs in the amount of thirty-six and 75/100 dollars ($36.75) for service fees. I find this is an appropriate cost under 876 IAC 4.33(3). Defendant is assessed costs in the amount of thirty-six and 75/100 dollars ($36.75).

Finally, claimant is also seeking costs in the amount of six hundred fifty and no/100 dollars ($650.00) for the IME with Dr. Taylor on April 1, 2021. Pursuant to Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015), I conclude that only charges related to drafting of a report to avoid the necessity of trial testimony are legitimately taxed as costs. I cannot decipher, and I am not willing to speculate, on the charges specifically attributed to the vocational expert's drafting of a report. Therefore, defendant is not assessed any costs associated with the IME of Dr. Taylor.

Thus, defendant is assessed costs pursuant to 876 IAC 4.33 totaling one hundred thirty-nine and 75/100 dollars ($139.75).

Finally, the employer has not filed a required First Report of Injury relative to this injury. There is no evidence that the employer purchased insurance in this case. Iowa Code section 87.14A. It may be appropriate for the Iowa Workers' Compensation Commissioner to investigate the status of the employer's insurance coverage further. Therefore, 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

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of one thousand two hundred eighteen and 81/100 dollars ($1,218.81).

Defendant shall pay temporary total disability benefits from June 9, 2018 through September 4, 2018 and from July 18, 2019 until he returns to work or it is demonstrated that he is medically capable of returning to employment substantially similar to the employment in which he was engaged at the time of the injury.

Defendant shall be entitled to credit for the 45 weeks of temporary total disability benefits they paid from September 5, 2018 through July 16, 2019.

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

Defendant shall pay medical providers directly, reimburse claimant for all charges, paid, and otherwise hold claimant harmless of all outstanding medical charges contained in Joint Exhibit 10.

Defendant shall pay penalty benefits in the amount of sixty thousand and no/100 dollars ($60,000.00).

Defendant shall reimburse claimant costs as set forth above.

Defendant 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.

This case is referred to the Iowa Workers' Compensation Commissioner for determination of whether further investigation or action is needed pursuant to Iowa Code section 87.19.

Signed and filed this 5th day of October, 2021.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James Fitzsimmons (via WCES)

David Scieszinski (via WCES)

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.