BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CHARLES WINFREY, Claimant, vs. JOHN DEERE DUBUQUE WORKS, Employer, Self-Insured, Defendant.	:	File No. 5067878.01 ARBITRATION DECISION Head Note No.: 1108

STATEMENT OF THE CASE

The claimant, Charles Winfrey, filed a petition for arbitration and seeks workers' compensation benefits from John Deere Dubuque Works, a self-insured employer. The claimant was represented by Tom Wertz. The defendant was represented by Arthur Gilloon.

The matter came on for hearing on March 28, 2023, before deputy workers' compensation commissioner Joe Walsh via Zoom videoconferencing. The parties did an excellent job of narrowing the issues and submitting a clean record. The record in the case consists of joint exhibits 1 through 4; claimant's exhibits 1 through 4; and defense exhibits A through H. The claimant testified under oath at hearing. Gina Castro served as court reporter for the proceedings. The matter was fully submitted on April 28, 2023, after helpful briefing by the parties.

ISSUES

The parties submitted the following stipulations and issues for determination:

The parties have stipulated that Mr. Winfrey sustained an injury which arose out of and in the course of employment on June 6, 2017. The parties stipulate that this injury is a cause of some temporary disability. The primary dispute in the case is whether this stipulated injury is a cause of any permanent disability, and if so, the nature and extent of the disability.

The parties have also stipulated to all of the elements comprising the claimant's rate of compensation and submit the correct rate is $650.17. Affirmative defenses have been waived and credit is not in dispute.

Claimant is seeking a penalty on underpaid benefits.

FINDINGS OF FACT

Claimant Charles Winfrey was 52 years old as of the date of hearing. He testified live and under oath at hearing. I find him to be generally credible. His testimony generally matches up with other portions of the record including the contemporaneous medical documentation. There was nothing about his demeanor which caused me any concern for his truthfulness.

Mr. Winfrey sustained a cumulative trauma injury while working for John Deere Dubuque Works (Deere) which manifested on or about June 6, 2017. He worked as an assembler. Specifically, he developed bilateral carpal tunnel syndrome from his cumulative work activities. Deere provided and directed medical care.

Joseph Buckwalter, M.D., became Mr. Winfrey's treating physician in October 2017. He is a respected specialist at the University of Iowa Hospitals and Clinics. Dr. Buckwalter has examined Mr. Winfrey on a number of occasions since the original injury and provided a variety of treatment modalities. (*See* Joint Exhibit 1) Dr. Buckwalter diagnosed bilateral carpal tunnel following various diagnostic tests at the October 17, 2017 office visit. (Jt. Ex. 1, p. 3) A steroid injection was considered at that time, combined with splints, restrictions and medications. He continued conservative care throughout 2017, including injections. In December 2017, Dr. Buckwalter documented significant improvement following injections. "Pain and paresthesias are 85-100% improved after injection and Mr. Winfrey reports that he has been working his regular job for 9 days without difficulty." (Jt. Ex. 1, p. 20) Dr. Buckwalter placed him at maximum medical improvement and assigned no restrictions.

Unfortunately, this is not the end of the story. In March 2019, symptoms returned. (Jt. Ex. 1, p. 25) Mr. Winfrey had continued to perform fairly heavy assembly work during the interim. He returned to Dr. Buckwalter who began another round of conservative treatment, including injections, medications and activity restrictions. (Jt. Ex. 1, p. 26) By April 30, 2019, Dr. Buckwalter documented "complete relief of symptoms." (Jt. Ex. 1, p. 35) He again placed Mr. Winfrey at MMI and assigned no restrictions or impairment. (Jt. Ex. 1, p. 36) "I told him to return if symptoms were to return and I may recommend carpal tunnel release at that point." (Jt. Ex. 1, p. 35)

In June 2019, symptoms had returned on the right and included symptoms into his elbow. (Jt. Ex. 1, p. 45) At that time, the left side was still doing well. He was given an injection for the right side at that time. In August 2019, the left sided symptoms had returned and Dr. Buckwalter recommended surgery. (Jt. Ex. 1, p. 52) Surgery was performed in September 2019 on the left. (Jt. Ex. 1, p. 84) The surgery was successful and Mr. Winfrey had a relatively normal, albeit lengthy course of healing which included some physical therapy. In March 2020, Dr. Buckwalter placed Mr. Winfrey at MMI again, assigning a zero rating on the left side. (Jt. Ex. 1, pp. 114-115)

Mr. Winfrey testified at hearing that he continues to have symptoms in his bilateral wrists. He testified he has numbness, sharp pains and pinching symptoms. (Tr., p. 11) He testified his current work activities do aggravate his symptoms and he

uses the weekends to rest. He treats his pain with over-the-counter medications such as Tylenol and ibuprofen.

At hearing the defendant presented video evidence of Mr. Winfrey shopping at Menard's in January 2020. (Def. Ex. D) He is shown on the video lifting a 40 pound bag of ice melt with his right arm. The defendant contends this supports its position that Mr. Winfrey has no loss of function in his right arm. Defendant further presented a statement from a physician who described the incident. (Def. Ex. E, p. 32) Mr. Winfrey did, in fact, carry a bag of ice melt on January 12, 2020. I find that this has little impact on the case, other than to show that his ongoing symptoms are mild to moderate.

In November 2020, Sunil Bansal, M.D., examined Mr. Winfrey for purposes of an independent medical examination. Dr. Bansal reviewed appropriate medical records and performed a thorough examination of Mr. Winfrey in addition to taking history. (Claimant's Ex. 1, pp. 4-19) The examination thoroughly documented mild to moderate deficits in both hands. (Cl. Ex. 1, pp. 19-20) Dr. Bansal opined that Mr. Winfrey had sustained a permanent impairment of 3 percent of the right upper extremity and 5 percent of the left. (Cl. Ex. 1, pp. 21-22) These ratings combine and convert to a 6 percent whole body rating.

In April 2022, Mr. Winfrey returned to Dr. Buckwalter for evaluation. Dr. Buckwalter examined Mr. Winfrey and noted the development of trigger finger symptoms in both hands. Following his evaluation, he opined that there is no impairment in either upper extremity. (Jt. Ex. 1, pp. 120) Mr. Winfrey testified that he spent about 5 minutes with Dr. Buckwalter at this exam. (Tr., pp. 21-22)

CONCLUSIONS OF LAW

The first issue is whether the claimant sustained any permanent disability as a result of the stipulated work injury, and, if so, the nature and extent of such disability.

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).

Deere argued strenuously that Dr. Buckwalter is much more qualified than Dr. Bansal particularly regarding his causation opinions. Dr. Buckwalter is the treating surgeon who has evaluated Mr. Winfrey numerous times over many years. He is a specialist. Dr. Bansal is a claimant's IME physician with a specialty in occupational medicine. Deere further argues that the Menard's video evidence demonstrates claimant is not credible and that his hands are fine.

Mr. Winfrey argues that Dr. Bansal performed a more thorough evaluation and issued opinions which are more in line with his actual ongoing symptoms.

I find the greater weight of evidence supports a finding that, while Mr. Winfrey's treatment has been excellent and his recovery has been good under the circumstances, he does have a functional loss in his bilateral hands and wrists from his stipulated work injury. While his functional loss is mild, it is not zero. A zero rating for a worker who has permanent ongoing symptoms, albeit mild to moderate, is simply not believable.

Mr. Winfrey's case is complicated by the fact that he continues to perform relatively heavy assembly work for Deere. He testified that he rests his hands and arms over the weekend and is usually feeling pretty good by Monday morning. Through the course of the work week, however, he testified that his symptoms worsen and during this period of worsening, his hands and arms are definitely not 100 percent. (Tr., pp. 11-16) He still uses his splints at night for pain and takes over the counter medications as well.

I have found Mr. Winfrey to be a credible witness. I believe him that he continues to be symptomatic. This is important. If Mr. Winfrey were asymptomatic, the defendant's position would be more believable. But Mr. Winfrey is not asymptomatic. While his symptoms are manageable to the point where he is able to perform fairly heavy assembly work, I believe him that he has ongoing symptoms associated with his conditions. While I suspect that his symptoms would lessen were he to switch to lighter work, the greater weight of evidence in this record supports a finding that he has permanent functional losses associated with the conditions in his bilateral wrists and arms.

As mentioned previously, I give very little weight to the video evidence. The video does show Mr. Winfrey moving a bag of ice melt in January 2020. At that time, he was working without restrictions at Deere performing fairly heavy assembly work. Mr. Winfrey is obviously a strong man and the video does demonstrate that his condition is not severe. His condition is mild to moderate. I find nothing in this record that Mr. Winfrey was exaggerating his condition to his physicians. This may be a different case if Mr. Winfrey had claimed to his physicians that he had severe ongoing symptoms in

his bilateral hands and could not use them for any tasks. This is not the case. The video simply shows an unrestricted grown man going about his daily life.

Since I have found that the claimant has sustained a permanent functional loss/impairment, I turn to the issue of the extent of his disability.

Since Mr. Winfrey has sustained a permanent impairment in his bilateral wrists and hands, his disability is evaluated under Iowa Code section 85.34(2)(t) (2021).

> x. In all cases of permanent partial disability described in paragraphs "a" through "u", or paragraph "v" 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 "u", or paragraph "v" when determining functional disability and not loss of earning capacity.

Iowa Code section 85.34(2)(x) (2019).

Thus, the law, as written, is not specifically concerned with an injured worker's actual functional loss or disability as determined by the evidence, but rather the impairment rating as assigned by the adopted version of the AMA Guides to the Evaluation of Permanent Impairment. The only function of the agency is to determine which impairment rating should be utilized.

The statute itself provides no guidance whatsoever on how to determine which impairment rating should be utilized. I interpret the statute to mean that the impairment rating which most closely assesses the injured worker's actual functional disability is the rating which should be adopted by the agency.

The only rating other than zero in the record (which is reflective of Dr. Buckwalter's opinion that Mr. Winfrey sustained no permanent disability) is the rating of Dr. Bansal. I find Dr. Bansal's combined rating of 6 percent of the whole body is the rating under the AMA Guides, 5th edition, which most closely assesses his actual functional disability. Consequently, I find that claimant has sustained a 6 percent whole body impairment. I conclude this entitles him to 30 weeks of compensation under section 85.34(2)(t).

The next issue is whether claimant is entitled to an IME.

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.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991).

Based upon the record before the undersigned, I find that Dr. Bansal's fees are reasonable and claimant is entitled to full reimbursement for the amounts set forth in Claimant's Exhibit 4, page 3.

The next issue is penalty.

"Because penalty benefits are a creature of statute, our discussion begins with an examination of the statutory parameters for such benefits." Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299, 307 (Iowa 2005). Under Iowa Code section 86.13(4)(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.

This provision "codifies, in the workers' compensation insurance context, the common law rule that insurers with good faith disputes over the legal or factual validity of claims can challenge them, if their arguments for doing so present fairly debatable issues." Covia v. Robinson, 507 N.W.2d 411, 412 (Iowa 1993) (citing Dirks v. Farm Bureau Mut. Ins. Co., 465 N.W.2d 857, 861 (Iowa 1991) and Dolan v. Aid Ins. Co., 431 N.W.2d 790, 794 (Iowa 1988)). "The purpose or goal of the statute is both punishment and deterrence." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 237 (Iowa 1996).

The legislature established in Iowa Code section 86.13(4)(b) a burden-shifting framework for determining whether penalty benefits must be awarded in a workers' compensation case. See 2009 Iowa Acts ch. 179, § 110 (codified at Iowa Code § 86.13(4)(b)); see also Pettengill v. Am. Blue Ribbon Holdings, LLC, 875 N.W.2d 740, 746–47 (Iowa App. 2015) as amended (Feb. 16, 2016) (discussing the burden-shifting required by the two-factor statutory test). The employee bears the burden to establish a prima facie case for penalty benefits. See Iowa Code § 86.13(4)(b). To do so, the employee must demonstrate a denial, delay in payment, or termination of workers' compensation benefits. Iowa Code § 86.13(4)(b)(1). If the employee fails to prove a denial, delay, or termination, there can be no award of penalty benefits and the analysis stops. See id. at § 86.13(4)(b); see also Pettengill, 875 N.W.2d at 747. However, if the

employee makes the requisite showing, the burden of proof shifts to the employer. See id. at § 86.13(4)(b); see also Pettengill, 875 N.W.2d at 747.

To avoid an award of penalty benefits, the employer must "prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits." Iowa Code§ 86.13(4)(b)(2). An excuse must meet all of the following criteria to be "a reasonable or probable cause or excuse" under the statute.

The defendant initially underpaid benefits based upon an erroneous rate calculation. The burden of proof shifts to the defendant to justify the erroneous calculation as reasonable and demonstrate contemporaneous documentation for this. The defendant has not submitted any evidence of the reasonableness of the rate calculation. A penalty is mandatory. I find a penalty of $500.00 is sufficient to deter defendant from such conduct in the future.

ORDER

THEREFORE IT IS ORDERED:

Defendant shall pay thirty (30) weeks of permanent partial disability benefits commencing on March 13, 2020, as stipulated.

Defendant shall reimburse claimant for Dr. Bansal's IME.

Defendant shall pay a penalty of five hundred and no/100 dollars ($500.00).

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

Costs are taxed to defendant.

Claimant may file a new petition when the bifurcated issue of permanency is ripe.

Signed and filed this 31st day of August, 2023.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Thomas Wertz (via WCES)

Arthur Gilloon (via WCES)

Stephanie Marett (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.