BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SCOT SPENCER, Claimant, vs. ST. PIUS CHURCH, Employer, and DUBUQUE ARCHDIOCESAN PROTECTION PROGRAM, Insurance Carrier, Defendants.	File Nos.: 5058037, 5053747 ARBITRATION DECISION Head Note No.: 1803

FILED
FEB 16 2018
WORKERS' COMPENSATION

STATEMENT OF THE CASE

Scot Spencer, claimant, filed petitions in arbitration seeking workers' compensation benefits from St. Pius Church (St. Pius) and its insurer, Dubuque Archdiocesan Protection Program as a result of injury he sustained on February 6, 2014 that arose out of and in the course of his employment and an injury he allegedly sustained on January 5, 2015 that allegedly arose out of and in the course of his employment. This case was heard in Des Moines, Iowa, and fully submitted on July 18, 2017. The evidence in this case consists of the testimony of claimant, Melanie Martin-Trainor, Michael Jasudowicz and Claimant's Exhibits 1 – 7, Joint Exhibit 1 – 7 and Defendants' Exhibits A – G and I – M. Both parties submitted briefs.

Defendant's submitted exhibit H, which was objected to by the claimant. A ruling on the admissibility of Defendants' Exhibit H was reserved until the time of the arbitration decision. Upon review of the claimant's motion and affidavit to exclude, the hearing transcript and briefs, Exhibit H is not admitted into the record. Exhibit H was untimely disclosed and obtained after an agreement not to conduct additional discovery. The claimant is unfairly prejudiced by this exhibit.

ISSUES

For File No. 5053747 – date of injury February 6, 2014:

1. Whether claimant sustained a permanent injury on February 6, 2014 and, if so; the extent of any impairment.

2. Whether claimant is entitled to payment of medical expenses.

3. Whether claimant is entitled to payment of an independent medical examination.

4. Whether claimant is entitled to payment of penalty benefits.

5. Assessment of costs.

For File No. 5058037 – date of injury January 5, 2015:

1. Whether claimant sustained an injury on January 5, 2015 which arose out of and in the course of employment;

2. Whether the alleged injury is a cause of permanent disability and, if so; the extent of any impairment.

3. Whether claimant is entitled to payment of medical expenses.

4. Whether claimant is entitled to payment of an independent medical examination.

5. Assessment of costs.

STIPULATIONS

The parties filed hearing reports at the commencement of the arbitration hearing. On the hearing reports, 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.

FINDINGS OF FACT

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

Scot Spencer[1], claimant, was 55 years old at the time of the arbitration hearing. Claimant completed the 10th grade of high school and then obtained a GED. (Transcript, page 13) Claimant took one course at a community college.

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[1] Defendants indicate in their brief that claimant may have passed away in June 2017. The claimant's right (or his estates' right) to indemnity benefits last only as long as he lives. Any benefits owed until the time of his death are payable. Any indemnity benefits that have not accrued at the time of death are not payable and are extinguished. (See. Iowa Code 85.31 (4). "Where an employee is entitled to compensation under this chapter for an injury received, and death ensues from any cause not resulting from the injury for which the employee was entitled to the compensation, payments of the unpaid balance for such injury shall cease and all liability therefor shall terminate.")

Claimant had two periods of employment with defendant St. Pius Church. His first time with St. Pius Church was from January 1992 to November 2007. Claimant was terminated due to alcoholism. Claimant went through a treatment program and returned to St. Pius Church in March 2008. Claimant did janitorial work for St. Pius. Claimant quit his job at St. Pius Church in January 2015. (Tr. pp. 13, 14)

On February 6, 2014, claimant was shoveling snow at St. Pius felt pain in his lower back. (Tr. p. 56; Ex. M, p. 42) The next day he felt severe pain in his back. (Tr. pp. 16, 58) Claimant said that prior to February 6, 2014 he had pain in his back, but not as severe and pain in his legs. (Tr. p. 16) Claimant reported his injury to his supervisor, Matt Eulberg, who took claimant to see a physician. (Tr. p. 17) In the hearing claimant was asked by defendants about the February 6, 2014 injury.

> Q. And you went to the doctor?
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> A. I didn't that day. I believe the next day I may have.
>
> Q. Okay. The next day you went to the doctor, and the doctor gave you some medication?
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> A. I believe so.
>
> Q. And the medication helped the pain?
>
> A. Briefly.
>
> Q. Then the pain came back?
>
> A. No. I mean, after a time it, you know, went away. It wasn't constant up and down.
>
> Q. Okay. And so the pain went away after that first episode?
>
> A. Right.

(Tr. p. 52)

Claimant said in his deposition that the numbness in his legs became intensified after the February 2014 injury. (Ex. M, p. 49)

Claimant reported that on January 5, 2015 he was sweeping steps and salting steps when he slipped on some ice and fell and hurt his back and neck. (Tr. pp. 19. 52, 53) Claimant testified he felt some numbness in his on his right leg before the January 5, 2015 fall and it started in 2006. (Tr. p. 54)

After the February 6, 2014 injury St. Pius prohibited claimant from shoveling snow and claimant signed an agreement to that effect on November 18, 2014. (Tr. pp. 36, 93: Exhibit C, page 7) Claimant testified that when it snowed he would go to St. Pius regardless of the day of the week to help with snow removal. (Tr. p. 76)

Claimant said he was informed by Kevin Eck, M.D., in April 2014 that back surgery was not an option. (Tr. pp. 21, 63) Claimant was evaluated by Loren Mouw, M.D., in August 2014 and was told he was not a surgical candidate. (Tr. p.67) Claimant went to pain management and had epidural and nerve blocks. Claimant testified the injections and nerve blocks helped for a short period of time. (Tr. p. 22) At the time of the hearing claimant anticipated receiving radio frequency ablation. (Tr. p. 22) Claimant said he did not believe he could lift up to 20 – 30 pounds that Robin Sassman, M.D., recommended in her independent medical examination (IME). (Tr. p. 24)

Claimant described that currently he has difficulty getting out of a tub, showering, riding long distances and sitting through a movie due to his back pain. (Tr. p. 27) Claimant said that had did not have any ongoing back problems due to falls in 2006 and an assault in 2012. (Tr. pp. 28, 29) In his deposition claimant said he would occasionally work out lifting weights between 2007 until February 2014. (Ex. M, p. 42)

Claimant applied for and was denied Social Security disability benefits in 2008. The 2008 application listed pain in legs and pain that went to his right thigh. Claimant also reported some pain in the lower back. (Ex. I, p. 18) Claimant applied again and started to receive Social Security disability in September 2017. (Tr. p. 23)

Claimant's vocational history shows he worked seasonally for a golf course from 1978 through 1983. (Tr. p. 33) He worked as a youth service worker at an adolescent facility for about five years. (Tr. p. 35) Claimant did not believe he could now perform either job due to his back condition. Claimant testified in 1980, when he was 19, he injured his back by weight lifting. (Tr. p. 47) He also saw his family physician in 1991 for back pain. (Tr. p. 49)

Claimant was working part-time for St. Pius as well as for a part-time custodian for G & M Cleaning in 2014 and 2015. (Tr. pp. 38, 47) Claimant resigned his position with St. Pius on January 12, 2015 and G & M Cleaning on April 8, 2015. (Ex. E, p. 9; Ex. F, p. 11) Claimant was homeless for a while and stayed at a shelter from December 2015 through June 30, 2016. (Ex. M, p. 41) He worked part-time in the shelter from December 2015 through June 2016. (Tr. pp. 40, 69; Ex. G, p. 12) In June of 2016 claimant was moving a couch that was donated to the shelter and caused a spike in his pain in his back. Claimant was off work for 11 days due to this incident. (Tr. p. 74; Ex. G, p. 14) The emergency department of that visit noted no new neurological findings and a work release was given. (JEx 3, p. 189) Claimant said that his pain returned to his baseline. (Tr. pp. 43, 72; Ex. M. p. 47)

Erin Martin-Trainor is the business administrator for St. Pius. In the position of business administrator she oversees all operations in regards to building and grounds. (Tr. p. 86) Ms. Martin-Trainor would see claimant at work most days. Claimant told her that he had back problems before the February 2014 incident. (Tr. pp. 89, 90) Ms. Martin-Trainor did not notice that claimant had any change in his ability to do work at St. Pius after the February 2014 incident and would tell claimant not to over exert himself. (Tr. p. 92) Ms. Martin-Trainor said that claimant was not authorized to be at work on Sunday, January 5, 2015. Ms. Martin-Trainor said that claimant had his keys taken away due to the fact that he would sometimes use St. Pius to sleep at night and he was not authorized to sleep on the premises. (Tr. p. 95)

Michael Jasudowicz is a maintenance supervisor at St. Pius and worked with claimant for a number of years. (Tr. p. 100) Mr. Jasudowicz did not witness either the February 2014 or January 2015 incidents. Mr. Jasudowicz was told by claimant that claimant had back issues. (Tr. p. 103) Mr. Jasudowicz said that claimant would not complain about back problems while lifting items at work. (Tr. p. 104)

Claimant was seen by Stephen Runde, M.D., on February 7, 2014. Dr. Runde noted claimant injured his back shoveling snow at St. Pius and that claimant had a history of back pain. Claimant told him that it had been several years since he had a bad flair-up. (JEx. 3, p. 111) Dr. Runde's assessment was, "Acute lumbosacral strain." And recommended claimant take it easy for several days. (JEx. 3, p. 111) Dr. Runde decided due to abnormal x-rays and persistent pain to refer claimant to Dr. Eck. (JEx.3, p 115) On April 9, 2014, Dr. Runde's assessment was "Follow up with what has become chronic low back pain." (JEx. 3, p. 118)

On March 30, 2014, claimant went to the emergency department at St. Luke's for back pain. Claimant reported moving a file cabinet last week. (JEx.. 1, p. 9) He was evaluated as having low back pain and discharged. (JEx. 1, p. 8)

On April 24, 2014, Dr. Eck examined claimant. Claimant reported to Dr. Eck that he had intermittent back pain and a worsening of low back pain in February 2014 after shoveling snow. (JEx. 4, p. 198) Dr. Eck's assessment was,

> ASSESSMENT
>
> - Lower back pain
> - Lumbar spondylosis
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> Multiple level decreased vertebral body height/wedging possibility developmental/degenerative in nature. I cannot rule out the possibility of subacute versus acute vertebral body compression fractures.
>
> Nonspecific lower extremity subjective altered sensation, and weakness, possibly due to neurogenic claudication from spinal stenosis.

(JEx. 4, p. 199) On May 6, 2014, Dr. Eck reviewed MRI and did not advise additional diagnostic studies or surgery. Dr. Eck recommended exercise, possible TENS unit or possibly injections. (JEx. 4, p. 202) On June 26, 2014, claimant received an epidural injection at the L4-L5 level. (JEx. 3, p. 127)

On August 28, 2014, claimant was examined by Dr. Mouw. Dr. Mouw's assessment was degeneration of the lumbar intervertebral disc and lumbar spondylosis. Dr. Mouw did not believe claimant was a surgical candidate and referred claimant to his primary physician for conservative care. (JEx. 5, p. 220)

Claimant went to the Cedar Rapids Pain Associates for treatments. On November 13, 2014, the assessment noted that claimant said that he had throbbing back pain that started in the winter of 2013 when he was shoveling snow. On that day claimant was provided a lumbar medial branch nerve block. (JEx. 7, pp. 230, 231) Claimant reported immediately relief on the day of the injection. His pain returned to the same level as before the injection by the time of his November 21, 2014 appointment. (JEx. 7, p. 232) Cedar Rapids Pain Associates performed right sided lumbar radiofrequency ablation on December 4, 2014. (JEx. 7, p. 6) Claimant reported that his pain returned after this procedure on December 10, 2014. (JEx. 7, p. 240)

Dr. Eck saw claimant on October 12, 2015. Claimant was complaining of increased low back and lower extremity pain in the last 2-3 months. Dr. Eck ordered an MRI. (JEx. 4, p. 213) On November 16, 2015, after reviewing the MRI, (JEx. 3, pp. 171, 172), Dr. Eck recommended a referral to a pain clinic. (JEx. 4, p. 217)

On January 5, 2015, claimant went to the emergency department at St. Lukes after falling at St. Pius and landing on his back. (JEx. 1, p. 10) Claimant reported no numbness or radiating pain. (JEx. P. 10) Examination showed,

> Impression:
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> 1. Diffuse degenerative disc disease and multilevel degenerative facet arthropathy.
>
> 2. Prominent lumbar vertebral spondylosis.
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> 3. Diffuse mild compression deformities. No acute fracture is evident.

(JEx. 1, p. 14)

On September 9, 2015, claimant received an epidural injection into the L4-L5 and L5-S1 due to low back pain. (JEx. 1, p. 27) On September 19, 2015, claimant returned to St. Lukes due to acute back pain. Claimant reported that being on his feet for 45 minutes exacerbated his back pain and that it was radiating to both legs. (JEx. 1, p. 52) On November 29, 2015, claimant reported to the emergency department of left-sided

back pain that started suddenly after he got up from kneeling at church. (JEx. 1, p. 71) On December 12, 2015, claimant was seen at the emergency department for flair up of his back pain. Claimant reported he was working and lifting boxes at the shelter when his pain got worse. (JEx1, p. 75) Claimant again reported acute pain on December 20, 2015 and was assessed with chronic back pain. (JEx. 1, p. 82)

Robin Sassman, M.D., performed an independent medical examination (IME) on January 18, 2016 and issued her report on February 18, 2016. Dr. Sassman performed a second IME on December 1, 2016 and issued her IME report on December 21, 2016. Dr. Sassman stated that due to the fact that claimant had denied any previous radiating symptoms prior to February 2014 that the February 6, 2014 snow shoveling incident was directly and causally related to his current symptoms. (Ex. 1, p. 7) Dr. Sassman found claimant to be at MMI as of September 24, 2015. She provided a 22 percent whole body impairment rating and recommended restrictions of 20 pounds rarely from floor to waist, 30 pounds occasionally waist to shoulder and 20 pounds rarely above shoulders. (Ex. 1, p. 9)

In her second IME of December 21, 2016, Dr. Sassman included the incident where claimant was moving a couch in June 2016 at the shelter and injured his back. (Ex. 1, p. 17) Dr. Sassman said that she has not changed her original opinion. She also noted she has reviewed claimant's deposition testimony where he testified to radicular symptoms prior to the February 2014 injury. Dr. Sassman stated that if claimant did have radicular symptoms, "[T]hey have certainly worsened since the injury in question based on his history, the deposition testimony, the medical records and my examination." (Ex. 1, p. 20) Dr. Sassman opined that the June 2016 injury did not cause any additional permanent impairment. She placed claimant at MMI as of August 17, 2016. Dr. Sassman kept claimant's restrictions the same as well as her 22 percent whole body rating. (Ex. 1, pp. 20, 21) In her February 2016 IME report, Dr. Sassman refers only to back injuries prior to the February 2014 injury: An injury claimant had when he was 18 year old weight lifting and injury in 2006 which she said had resolved. (Ex. 1, p. 7)

Claimant went to an emergency department on August 8, 2016 for a head injury that occurred when he fell off a chair. He was assessed with cervical strain and closed head injury. (JEx. 3, p. 197)

Claimant has requested payment/reimbursement and payment to a Medicaid lien for his back injury. A number of medical bills and lien are found in Exhibit 6, pages 40 – 65. A summary of the outstanding bills list a total of $210.77 for services at St. Luke's on May 30, 2015 and Cedar Neurological Surgeons (Dr. Mouw) on August 28, 2014. (Ex. 6, p 40)

Claimant has requested costs. Claimant request $3,885.00 for Dr. Sassman's IME and $2,867.50 for Sunil Bansal's [sic] IME. Claimant is requesting $1,771.47 for medical records. Claimant is requesting $200.00 in filing fees and $95.15 for the cost of

claimant's deposition. In total claimant is requesting $8,819.12 in costs. (Ex. 7. pp. 66, 67)

I find that claimant fell at work on January 5, 2015 and that he suffered a temporary aggravation of his back condition. There is no convincing evidence that the work incident on January 5, 2015 caused anything more than a temporary aggravation of claimant's back condition.

I find the claimant did incur a permanent work injury on February 6, 2014 that arose out of and in the course of his employment with St. Pius. I find that claimant permanently aggravated a preexisting back condition while shoveling snow at work at St. Pius on February 6, 2014. I find that claimant has the restrictions by Dr. Sassman in her IME reports.

Claimant has a limited education and not an extensive vocational history. His physical limitation and psychological limitations restrict the number of positions he can perform. I find that claimant has a 60 percent loss of earning capacity.

I find that for the February 6, 2014 injury, File No. 5053747, claimant's gross earnings were $492.00 per week, that he was single, entitled to one exemption and his weekly workers; compensation rate is 311.00.

RATIONAL AND 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" referred 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 Electric 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. See also: Lakeside Casino v. Blue, 743 N.W.2d 169 (Iowa 2007) (Holding that the element of "arising out of" requires proof "that a causal connection exists between the conditions of [the] employment and the injury" – "In other words, the injury must not have coincidentally occurred while at work, but must in some way be caused by or related to the working environment or the conditions of employment.")

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).

The Iowa Supreme Court has adopted the full-responsibility rule. Under that rule, where there are successive work-related injuries, the employer liable for the current injury also is liable for the preexisting disability caused by any earlier work-related injury if the former disability when combined with the disability caused by the later injury produces a greater overall industrial disability. Venegas v. IBP, Inc., 638 N.W.2d 699 (Iowa 2002); Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 265 (Iowa 1995); Celotex Corp. v. Auten, 541 N.W.2d 252, 254 (Iowa 1995).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

The defendants took the keys to St. Pius away from claimant so that he would not sleep there at night and work regular hours. Claimant credibly testified that he would help with snow removal regardless of the day of the week and had done so over the years. On January 5, 2015, Matt Eulberg a supervisor was there and knew he was working. The cases cited by defendants about denial of workers' compensation benefits for deliberate violation of a rule are inapplicable under the facts of this case. Claimant was performing work with the knowledge of his supervisor on January 5, 2015. The fall on the stairs on that date arose out of and in the course of his employment at St. Pius. I found that this incident was a temporary aggravation of claimant's back condition. Claimant is not awarded any indemnity benefits for the January 5, 2015 injury. Claimant's medical care for the injury is covered under the law and pursuant to Iowa Code section 85.27 defendants shall pay medical costs related to this injury.

I find claimant permanently aggravated a preexisting back condition while shoveling snow at work on February 6, 2014. Claimant has met his burden of proof to show he has a permanent impairment due to his work injury in File No. 5053747. The first IME by Dr. Sassman did not fully consider claimant's prior numbness and radiating pain in his legs. In her second IME, Dr. Sassman noted the claimant's prior history and still concluded that the incident of February 6, 2014 permanently aggravated his back condition. Defendants refer to Exhibit H as support that claimant's condition was not related to this incident, but Exhibit H was excluded for evidence and is not part of the record.

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.

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).

I previously found that the lifting restrictions recommended by Dr. Sassman are claimant's restrictions. Claimant was not precluded from all work. He was able to continue to work for St. Pius and other employers doing some janitorial work. He quit his work with St. Pius. With his restrictions there are many types of janitorial work he could not perform and many other types of medium to heavy work he cannot perform.

I find that claimant has a 60 percent industrial disability entitling claimant to 300 weeks of benefits.

Iowa Code section 86.40 states:

Costs. All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states in part:

Costs. Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be ... (3) costs of service of the original notice and subpoenas, ... (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, ...The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery.

I award claimant the cost if Dr. Sassman's first IME in the amount of $3,885.00. While claimant mistaken listed the second IME was performed by Dr. Bansal, it was not. It was a second IME by Dr. Sassman. I decline to award cost for a second IME. I decline to award the costs for medical records as they are not listed as allowable costs in 876 IAC 4.33. I award the $200.00 in filing fees and $95.15 for the deposition costs of the claimant. Total costs awarded are $4,180.15 ($3,885.00 + $295.15 = $4,180.15).

The hearing report lists penalty as an issue in this case. Claimant asserts a penalty for failure to pay rating of Dr. Sassman and failure of the defendants to convey the reason for the denial of the payment of benefits. Neither party raised this issue in their brief. Claimant has proven that he did not receive payment of workers' compensation benefits. The case was denied by defendants.

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 in 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.

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

While I have held that claimant is entitled to permanent partial disability benefits, the defendants had reasonable grounds to deny benefits. I deny the request for penalty benefits. The defendants had reasonable grounds to deny the claimant.

I would be remiss if I did not comment on the fact that the employer, St. Pius and staff, took extra care and efforts to support claimant while he was having personal, financial and substance abuse difficulties. It is clear that the staff at St. Pius truly cared about the welfare of Scot Spencer.

ORDER

For File No. 5058037 – date of injury January 5, 2015:

The claimant shall take no additional benefits.

Defendant shall pay the medical expenses for this incident.

Defendants 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.

For File No. 5053747 – date of injury February 6, 2014:

Defendants shall pay claimant three hundred (300) weeks of permanent partial disability benefits at the weekly rate of three hundred eleven and no/100 dollars ($311.00).

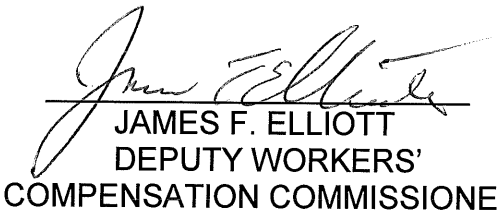
Defendants shall pay any past due amount in a lump sum with interest provided by law.

Defendants shall pay the medical costs related to the work injury of February 6, 2014 injury.

Defendants shall pay costs and IME fees of four thousand one hundred eighty and 15/100 dollars ($4,180.15).

Defendants 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.

Signed and filed this 16th day of February, 2018.



JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFE/kjw

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.