BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
FEB 18 2015
WORKERS' COMPENSATION

JOSEPH MILLER, Claimant, vs. LENNOX INTERNATIONAL, INC., Employer, and ESIS/ACE AMERICAN INSURANCE, Insurance Carrier, Defendants.	File Nos. 5044856, 5044857, 5044858, 5044859 ARBITRATION DECISION Head Note No.: 1803

STATEMENT OF THE CASE

Joseph Miller, claimant, filed a petition in arbitration seeking workers' compensation benefits from Lennox International, Inc. and its insurer, ESIS/ACE American Insurance as a result of a cumulative injury he allegedly sustained on October 28, 2011, April 24, 2012, December 21, 2012 and January 8, 2013 that allegedly arose out of and in the course of his employment. This case was heard in Des Moines, Iowa and fully submitted on February 10, 2015. The evidence in this case consists of the testimony of Mr. Miller, Courtney Bauman and Mr. Miller's Exhibits 1 through 12, defendants' Exhibits A through D and joint Exhibits 1 through 5.

ISSUES

For File No. 5044856 (D/O/I: October 28, 2011):

1. Whether claimant sustained an injury on October 28, 2011 which arose out of and in the course of employment;

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

3. Whether the alleged injury is a cause of permanent disability and, if so;

4. The extent of claimant's disability.

5. Whether defendants are liable for payment of certain medical mileage, medical expenses, costs and an independent medical examination.

6. Whether defendants are entitled to a credit of $9,489.99.

7. Whether claimant's case is barred by untimely notice and/or the statute of limitations.

8. Whether a penalty should be assessed.

The parties stipulated claimant's weekly wage rate is $470.65 per week.

For File No. 5044857 (D/O/I: April 24, 2012):

1. Whether claimant sustained an injury on April 24, 2012 which arose out of and in the course of employment;

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

3. The extent of claimant's disability.

4. Whether defendants are liable for payment of certain medical mileage, medical expenses, costs and an independent medical examination.

5. Whether defendants are entitled to a credit of $9,489.99.

6. Whether claimant's case is barred by untimely notice and/or the statute of limitations.

7. Whether a penalty should be assessed.

The parties stipulated claimant's weekly wage rate is $482.54 per week.

For File No. 5044858 (D/O/I: December 21, 2012):

1. Whether claimant sustained an injury on December 21, 2012 which arose out of and in the course of employment;

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

3. Whether the alleged injury is a cause of permanent disability and, if so;

4. The extent of claimant's disability.

5. Whether defendants are liable for payment of certain medical mileage, medical expenses, costs and an independent medical examination.

6. Whether defendants are entitled to a credit of $9,489.99.

7. Whether claimant's case is barred by untimely notice and/or the statute of limitations.

8. Whether a penalty should be assessed.

The parties stipulated claimant's weekly wage rate is $598.03 per week.

For File No. 5044859 (D/O/I: January 8, 2013):

1. Whether claimant sustained an injury on January 8, 2013 which arose out of and in the course of employment;

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

3. Whether the alleged injury is a cause of permanent disability and, if so;

4. The extent of claimant's disability.

5. Whether defendants are liable for payment of certain medical mileage, medical expenses, costs and an independent medical examination.

6. Whether defendants are entitled to a credit of $9,489.99.

7. Whether claimant's case is barred by untimely notice and/or the statute of limitations.

8. Whether a penalty should be assessed.

The parties stipulated claimant's weekly wage rate is $598.03 per week.

FINDINGS OF FACT

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

Claimant, Joseph Miller, was 57 years old at the time of the hearing. He graduated from high school. Mr. Miller attended community college, but earned no degree or certification. Mr. Miller has received a CNA certification. Mr. Miller served in the Army and was honorably discharged in 1977. His employment history is detailed in Exhibit 1, pages 3 and 4.

Mr. Miller had back surgery in January 1990. Mr. Miller said he had a fusion of the L4-L5 level. (Exhibit B, page 50) He said he has not had any problems with his lower back since his surgery. Mr. Miller has received treatment for depression since the 1980s. (Ex. B, p. 58)

Mr. Miller began his employment at Lennox International, Inc. (hereinafter Lennox) in November 1999. He was employed at Lennox at the time of the hearing. Mr. Miller testified that he first noticed neck pain while at work when he was working brazing. Mr. Miller said that while he noticed the pain he worked through it. Mr. Miller had a number of different jobs at Lennox. He stated that he worked the Packer/Tugger job in June 2011. (Ex. B, p. 55) He said that while he was working the Packer/Tugger job he believed he irritated his neck. He testified that the pain in his neck was one of a number of factors that aggravated his depression. (Ex. B, pp. 57, 58) In an answer to interrogatories he stated that not being able to work and the loss of his family home were the biggest stressors he faced. (Ex. C1, p. 68) Mr. Miller took time off work in September 2008 due to his depression. (Ex. A1, p. 1)

Mr. Miller testified he informed the company nurse, his immediate supervisor, Kenny Zahnd, and the Fab Supervisor, B.J. Carson that his work was increasing his pain. (Transcript, pp. 34, 35) Mr. Miller was certain his supervisors knew that work was causing his neck pain. (Tr. p. 36) Defendants did not offer specific or credible evidence in opposition to Mr. Miller's testimony as to notice. Given Mr. Miller's sworn testimony that he notified Lennox about his work injury I find that defendants have failed to show they did not receive notice under Iowa Code section 85.23.

On December 12, 2012, Mr. Miller left work due to his pain and stress. Mr. Miller said he was asked to perform certain work, and he did not feel he could do it and asked his supervisor for FMLA leave.

Mr. Miller said that he obtained care for his neck at the VA and that he trusted the VA more than the company doctor, Dr. Mooney. Mr. Miller had one encounter with Dr. Mooney when he had a crush injury at Lennox that was work related.

Mr. Miller eventually had neck surgery. Mr. Miller said his depressive symptoms improved after the surgery, as he was not in as much pain. Mr. Miller said the surgery helped his range of motion in his right arm, shoulder and neck. Mr. Miller testified he is not currently receiving treatment for his neck, and he was released to return to work with no restrictions. (Ex. A13, pp. 38, 39) Mr. Miller returned to his Packer/Tugger position on April 14, 2014. Mr. Miller said Lennox had modified how the Packer/Tugger job is performed and that he was able to perform this job. Mr. Miller said he has difficulty reaching his right arm behind his head and has some right arm pain. He also experiences a Charlie horse type of pain in his right arm. (Ex, B, p. 61) He stated that his depression is controlled with medication and does not currently interfere with his ability to work. (Ex. B, p.63)

Mr. Miller admitted that in 2008 and 2009 he was having pain in his neck while at work and had an MRI on January 6, 2009. (Ex. A3, p. 7) Multilevel degenerative changes at C4-C5, C5–C6, C6–C7 were noted. (Ex. A3, p. 10) Mr. Miller also had an EMG of his right arm on February 26, 2010 that did not show evidence of radiculopathy. (Ex. A4, p. 11)

On May 27, 2011 Steve Scurr, D.O. examined Mr. Miller. He noted that the VA had recommended surgery, but Mr. Miller did not want to pursue surgery. (Ex. A7, p. 21)

Mr. Miller testified that in February 2012 he knew that his neck was hurting from his work at Lennox.

On December 21, 2012 David Bethel, M.D. saw Mr. Miller and assessed Mr. Miller with major depression, recurrent. (Ex. A8, p. 25) Dr. Bethel completed some FMLA forms for Mr. Miller.

On February 6, 2014 Olatilewa Omosayobomi Awe, M.D. noted that Mr. Miller had presented to the clinic with complaints of neck and right shoulder pain for several years. Dr. Awe offered Mr. Miller right-sided foraminotomies at C4-5 and C5–6. (Jt. Ex. 4, p. 8) On March 7, 2014 Dr. Awe and Hiroto Kawasaki, M.D. performed this surgery. (Jt. Ex. 4, pp. 11, 12)

On April 17, 2014 Dr. Awe released Mr. Miller with no physical restrictions. Dr. Awe wrote, "Mr. Miller has recovered well from neurosurgery and he can return to work with no restrictions. His degenerative spine disease is as likely as not to have been caused by his work activities." (Ex. A14, p. 39) On April 21, 2014 Dr. Awe wrote that Mr. Miller had elective surgery, right-sided C5 and C6 foraminotomies and that from a neurosurgery standpoint he could return to work without restrictions. (Ex. A13, p. 38)

Courtney Bauman, a legal assistant to defendants' attorney testified that she sent all of the medical records in possession of defendants' attorney to Joshua Kimelman, D.O.

On October 1, 2014 John Kuhnlein, D.O. performed an independent medical examination. (Jt. Ex. 5, pp. 1 – 11) Dr. Kuhnlein's diagnosis of Mr. Miller's injury was,

> a. Right C5-C6 Foraminal stenosis with clinical radiculopathy, and degenerative disc disease of the cervical spine unresponsive to conservative treatment measures. He had surgery on March 7, 2014, with right C5-C6 foraminotomies performed by Dr. Kawasaki. Mr. Miller is fairly adamant that his symptoms significantly improved with the surgery, and the records would agree with him. His right arm symptoms were related to his neck, not the shoulder.
>
> b. He has a history of depression and anxiety.

(Jt. Ex. 5, pp. 8, 9) Dr. Kuhnlein's opinion as to causation was,

> **2. The causal connection of Mr. Miller's injury to his right upper extremity, neck and depression symptoms to his work activities at Lennox.**

> Mr. Miller's neck symptoms were aggravated by his work activities, with the cervical rotation he described, and other brazing activities. Over time, these work-related activities would also have served as a substantial more than minor factor to aggravate the degenerative disc disease of the neck. His work was by no means the sole factor, but it was more than a minor factor in the aggravation of the cervical degenerative disc disease. Initially, Mr. Miller's symptoms improved when he was off work, as noted in the record. Ultimately, his symptoms did not change significantly when he was off work, as he noted here to me today. By this time the disease had progressed where rest from work no longer improved his symptoms. Even though the work was not the sole factor, it was more than a minor factor in aggravating his cervical spine degenerative disc disease.
>
> With respect to the depression and anxiety, I would defer to the mental health professionals as to the relationship of these diagnoses to his work for Lennox.

(Jt. Ex. 5, p. 9) Of the four injury dates asserted by Mr. Miller he found that December 21, 2012 was most likely the date of injury. I find that this is the date of Mr. Miller's injury.

Dr. Kuhnlein also wrote,

> **3. Whether you agree with the claimed dates of injury or exacerbations noted on 10/28/2011, 4/24/2012, 12/21/2012, or 1/8/2013, for Mr. Miller' [sic] material aggravation to his cumulative injuries to his right upper extremity, cervical neck and depression symptoms.**
>
> Mr. Miller described a change in his symptoms when he was bumped to the forklift job in October 2011, related to the cervical rotation. Mr. Miller relates that doing this job particularly increased his symptoms over time. There were no other significant job changes related to the April 24, 2012, injury date, or the December 21, 2012, injury date. He was off work and not working on the January 8, 2013, injury date. Given that these symptoms increased with the job changed to the forklift job, and they persisted thereafter, it appears that the most reasonable date of injury would be December 21, 2012. However, he was exposed to ongoing work stressors after that date, leading up to going off work in December 2012.

(Jt. Ex. 5, p. 9) He recommended restrictions of occasionally lifting 50 pounds floor to waist and 30 pounds above the shoulder, provided a 10 percent whole body impairment rating and said Mr. Miller was at MMI on September 7, 2014, six months after his surgery. (Jt. Ex. 5, p. 10) I find Mr. Miller is limited to occasionally lifting 50 pounds floor to waist and 30 pounds above the shoulder.

Mr. Miller is requesting reimbursement of his October 1, 2013 independent medical evaluation with Dr. Kuhnlein in the amount of $ 2,705.00. (Ex. 5, p. 1) 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.

Dr. Kimelman performed an independent medical examination on November 19, 2014. (Ex. A15, pp. 40 – 42) Dr. Kimelman noted Mr. Miller had returned to work and was not having any difficulties performing his work due to neck pain and was doing well with his depression. (Ex. A15, p. 11) Regarding impairment and causation he wrote,

> IMPRESSION:
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> He has some degree of impairment according to the AMA Guides to Evaluation of Permanent Impairment, Fifth Edition, because he has had previous treated radiculopathy, even though he is relatively asymptomatic regarding his spine and would be, I believe, DRE category 2 for cervical spine evaluation from the Fifth Edition, 5%.
>
> Regarding causation, if this were a thoracic or lumbar spine issue, I would say that his job is not related to his degenerative arthritis in his neck because degenerative arthritis of the lumbar spine has been shown in the literature to be largely a function of genetic predisposition as opposed to activity level. However, I do not know that that literature could be extrapolated to include the cervical spine.

(Ex. A15, p. 41)

On December 3, 2014 Dr. Kimelman provided answers to questions posed by defendants' attorney. Dr. Kimelman did not believe Mr. Miller had any permanent disability to his neck or right upper extremity as a result of work injuries. He said Mr. Miller was at MMI three months from his neck surgery and had no work restrictions. Dr. Kimelman finally wrote,

> In my original IME report to you dated November 19, 2014, under the Impression section at the bottom of page 2, I indicated in the second paragraph, last sentence that "However, I do not know that that literature could be extrapolated to include the cervical spine." This is an erroneous statement and should be removed from that original report.

(Ex. A 15, p. 44)

Mr. Miller was back at his position at Lennox at the time of the hearing doing the Packer/Tugger job. While the job was modified when he was absent from work so that it is now easier for him to perform, it was not a modification provided just to him. He testified to very modest limitations in reaching and some right bicep pain. His

depression is not causing him any work-related limitations. Considering Mr. Miller's age, employment history, educational background, motivation, ability to find alternate employment, his actual return to work as with Lennox, as well as all other industrial disability factors outlined by the Iowa Supreme Court, I find that Mr. Miller has proven a 10 percent loss of future earning capacity as a result of the December 21, 2012 work injury to his neck.

Mr. Miller was paid a gross benefit of $9,489.99 and a net benefit of $7,775.70 in short-term disability for the period of December 21, 2012 through June 20, 2013. (Ex. D, p. 77) No testimony was provided as to why there is a difference between the net and the gross payments. More importantly, no evidence was provided as to whether the group plan covered non-occupational injuries, and no information was provided that the employer either wholly or partially contributed to the plan. In the absence of such evidence defendants have not shown entitlement to a credit under Iowa Code 85.38(2).

CONCLUSIONS OF LAW

Defendants raised two affirmative defenses. I found above defendants were provided notice of Mr. Miller's injury, so that the defendants' notice defense under Iowa Code 85.23 fails.

No benefits have been paid, so the two-year statute of limitation applies in these claims. Iowa Code 85.26(1). The date of injury may not control for notice purposes. Herrera v. IBP, Inc., 633 N.W.2d 284, 287 (Iowa 2001). "[A]lthough an injury may have occurred, the [notice] period does not commence until the employee, acting as a reasonable person, recognizes its 'nature, seriousness and probable compensable character.'" Id. In other words, the notice period "will not begin to run until the employee also knows that the physical condition is serious enough to have a permanent adverse impact on the claimant's employment or employability." Id. at 288; see also Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842, 855 (Iowa 2009).

All four files were filed on October 8, 2013. In order for the defendants to prevail on the affirmative defense of the statute of limitation, defendants must prove that Mr. Miller should have discovered his work-related injury on or before October 7, 2011 and recognized its nature, seriousness and probable compensable character.

Mr. Miller has had neck pain for many years. He had an MRI in January 6, 2009. He has had depression since the mid-1980s. The time period for giving notice filing a claim does not begin to run until Mr. Miller, as a reasonable person, should recognize the nature, seriousness, and probable compensable character of the injury. Mr. Miller was able to work for many years with his neck and depression. The first medical report that Mr. Miller directly relates his work to increase neck pain is January 20, 2012, where Mr. Miller complains of increased neck pain while operating a fork truck to Dr. Scurr. (Jt. Ex. 2, p. 2) Defendants have disputed all along that Mr. Miller's neck injury is work related. At the same time asserting Mr. Miller should have recognized his neck injury was work related. Mr. Miller left work in December 2012 because of his depression and

anxiety. It was his psychologist that provided Mr. Miller with his FMLA paperwork. While Mr. Miller was having significant neck pain at this time, it was the psychological factors that overwhelmed Mr. Miller in December 2012.

Defendants have failed to prove the affirmative defense of statute of limitations.

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).

It is well-established that to prove medical causation, an injured worker need not prove that his work activities were the sole cause or even the primary cause of the disability. The worker only must prove that the work activities were a substantial cause of the disability. "The incident or activity need not be the sole proximate cause, if the injury is directly traceable to it." Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296, 297 (Iowa 1974).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa

1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

There are two IME opinions in this case concerning causation, Dr. Kimelman's and Dr. Kuhnlein's.

I find Dr. Kunhlein's opinion more convincing. Dr. Kimelman's IME does not answer the question as to whether Mr. Miller's cervical condition was caused by work activities. He answered a causation question for lumbar or thoracic spine but did not come to a conclusion about causation concerning the cervical spine in his IME. (Ex. A 15, p. 11) His subsequent report does not address whether Mr. Miller's work activities permanently aggravated his degenerative cervical condition.

Dr. Kuhnlein did address the issue of causation forthrightly. (Jt. Ex. 5, p. 9) His IME was more thorough than Dr. Kimelman's. Dr. Kuhnlein's evaluation is more consistent with the medical records and Mr. Miller's credible testimony.

In this case, Mr. Miller has alleged a cumulative injury to his neck as well as aggravation of his depression. Mr. Miller has submitted four possible dates for the manifestation of his injury. I find that Mr. Miller has proven by a preponderance of the evidence that he suffered an injury to his cervical spine due to the cumulative effect of his work for Lennox. I agree with Dr. Kuhnlein that the date of his injury is December 21, 2012. I also agree with Dr. Kuhnlein that Mr. Miller was at MMI six months from his neck surgery, September 7, 2014. I also adopt his restrictions. As an occupational physician, Dr. Kuhnlein is well acquainted with appropriate work restrictions.

Mr. Miller was not arguing the he has incurred four separate and discrete injuries, but rather that one of the four dates plead was the appropriate date to determine the date he sustained a work injury. I have found that the December 21, 2012 date is the date of Mr. Miller's cumulative injury.

Mr. Miller has not prevailed on File Nos. 5044856, 5044856 and 5044859, and Mr. Miller will take nothing for those files.

Dr. Awe stated Mr. Miller's degenerative spine disease was not caused by his work. However, the issue is whether his work materially aggravated his condition. I have found that it did. Mr. Miller's degenerative cervical spine condition and depression were substantially aggravated by his work at Lennox.

I find that Mr. Miller's neck pain also temporarily aggravated Mr. Miller's depression. This temporary aggravation lasted from December 21, 2013 through March 7, 2014.

Since Mr. Miller 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.

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck

Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

Assessments of industrial disability involve a viewing of loss of earning capacity in terms of the injured workers' present ability to earn in the competitive labor market without regard to any accommodation furnished by one's present employer. Quaker Oats Co. v. Ciha 552 N.W.2d 143, 158 (Iowa 1996); Thilges v. Snap-On Tools Corp., 528 N.W. 2d 614, 617 (Iowa 1995).

In this case, I found that Mr. Miller proved that the December 21, 2012 neck injury caused a 10 percent loss of future earning capacity. Therefore, I conclude that Mr. Miller is entitled to an award of 50 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u).

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

Mr. Miller is entitled to healing period benefits from the day he left work, December 21, 2012, and until he was released to return to work by Dr. Awe on April 17, 2014.

Iowa Code section 85.38 provides in part,

> 2. Benefits paid under group plans.
>
> *a.* In the event the employee with a disability shall receive any benefits, including medical, surgical, or hospital benefits, under any group plan covering nonoccupational disabilities contributed to wholly or partially by the employer, which benefits should not have been paid or payable if any rights of recovery existed under this chapter, chapter 85A, or chapter 85B, then the amounts so paid to the employee from the group plan shall be credited to or against any compensation payments, including medical, surgical, or hospital, made or to be made under this chapter, chapter 85A, or chapter 85B. The amounts so credited shall be deducted from the payments made under these chapters. Any non-occupational plan shall be reimbursed in the amount deducted. This section shall not apply to payments made under any group plan which would have been payable even though there was an injury under this chapter or an occupational disease under chapter 85A or an occupational hearing loss under chapter 85B. Any employer receiving such credit shall keep the employee safe

> and harmless from any and all claims or liabilities that may be made against them by reason of having received the payments only to the extent of the credit.
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> In SKW Biosystems v. Wolf, (Unpublished)(Iowa, Ct. App. 2006) the court held,
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> SKW had the burden of proving it was entitled to a credit. See Iowa R. App. P. 6.14(6)(e) (noting the burden of proof on an issue is upon the party who would suffer a loss if the issue were not established). SKW did not present the short- or long-term disability policies, and we determine it failed to present sufficient evidence to show it was entitled to the credit.

Mr. Miller disputed that defendants were entitled to a credit. The defendants in this case have not shown that they are entitled to a credit under 85.38. They have not provided the policy, nor have they shown that they contributed to the policy.

Claimant has requested costs of his filing fee of $100.00 and the cost of a copy of his deposition of $156.95. (Ex. 12, pp. 1, 2) The deposition was an exhibit in the hearing. In my discretion, I award these costs to Mr. Miller under 876 IAC 4.33.

Mr. Miller has requested unpaid mileage expense. Mr. Miller is entitled to medical mileage for treatment of his cervical neck and depression due to his work injury. Mr. Miller offered no testimony or exhibit which lists the amount of the expense. As such, I cannot award any specific amount.

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).

Evidence in administrative proceedings is governed by section 17A.14. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence. The rules of evidence followed in the courts are not controlling. Findings are to be based upon the kind of evidence on which reasonably prudent persons customarily rely in the conduct of serious affairs. Health care is a serious affair.

Prudent persons customarily rely upon their physician's recommendation for medical care without expressly asking the physician if that care is reasonable. Proof of reasonableness and necessity of the treatment can be based on the injured person's

testimony. Sister M. Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963).

It is said that "actions speak louder than words." When a licensed physician prescribes and actually provides a course of treatment, doing so manifests the physician's opinion that the treatment being provided is reasonable. A physician practices medicine under standards of professional competence and ethics. Knowingly providing unreasonable care would likely violate those standards. Actually providing care is a nonverbal manifestation that the physician considers the care actually provided to be reasonable. A verbal expression of that professional opinion is not legally mandated in a workers' compensation proceeding to support a finding that the care provided was reasonable. The success, or lack thereof, of the care provided is evidence that can be considered when deciding the issue of reasonableness of the care. A treating physician's conduct in actually providing care is a manifestation of the physician's opinion that the care provided is reasonable and creates an inference that can support a finding of reasonableness. Jones v. United Gypsum, File 1254118 (App. May 2002); Kleinman v. BMS Contract Services, Ltd., File No. 1019099 (App. September 1995); McClellon v. Iowa Southern Utilities, File No. 894090 (App. January 1992). This inference also applies to the reasonableness of the fees actually charged for that treatment.

Mr. Miller requested that his medical bills incurred at the VA hospital and clinics be paid by the defendants. (Ex. 6, pp. 1 – 38) As I have found Mr. Miller to have a work injury, and these costs are related to his medical treatment, I order the defendants to pay these costs. At the time of the hearing the total of these bills was $27,056.47. (Ex. 6, p. 4) Included with the medical bills are pharmacy records from a Hy-Vee pharmacy and Medicap pharmacy. (Ex. 6, pp. 13 - 18) It is unclear as to whether the VA expenses include these amounts. Defendants should pay these amounts and reimburse directly any out-of-pocket expenses Mr. Miller has paid.

I find that Dr. Kuhnlein performed his IME before the defendants had obtained an evaluation of permanent disability. As such, reimbursement under 85.39 is not permitted. In Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 139 (Iowa Ct. App. 2008) the court held that an IME expense could be awarded or denied in a claim where the claimant did not prevail before the agency. The court noted that Fleetguard had agreed that claimant met all the criteria under Iowa Code 85.39. Dodd, p. 139. Mr. Miller's request for the IME expense of Dr. Kuhnlein is denied. I also decline to award these expenses in the guise of awarding them as costs. The report by Dr. Kuhnlein is clearly an IME. Awarding this expense as a cost under Iowa Code section 86.40 and 876 IAC 4.33 would make 85.39 superfluous. No award of cost for Dr. Kuhnlein's report is made in this case.

Mr. Miller seeks an award of penalty benefits against the defendants for unreasonable delay or denial of benefits.

Defendants argue that it did not know that claimant was asserting a work injury until he filed his petitions and then they filed an answer denying the petitions.

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.
>
> 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 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.

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

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

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if

viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

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

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

In this case claimant has asserted four different injury dates. Claimant was not certain to the injury date of his injury. It was not unreasonable for defendants to deny the claim and to provide notice that they were denying the claim in their answer given the facts of this case.

The request for penalty is denied.

ORDER

For File No. 5044856 (D/O/I: October 28, 2011):

The claimant shall take nothing.

For File No. 5044857 (D/O/I: April 24, 2012):

The claimant shall take nothing.

For File No. 5044859 (D/O/I: January 8, 2012):

The claimant shall take nothing.

For File No. 5044858 (D/O/I: December 21, 2012):

Defendants shall pay claimant fifty (50) weeks of permanent partial disability benefits at the weekly rate of five-hundred eighty-nine and 03/100 dollars ($589.03) commencing April 18, 2014.

Defendants shall pay claimant healing period benefits from December 21, 2012 through April 17, 2014 at the weekly rate of five-hundred eighty-nine and 03/100 dollars ($589.03).

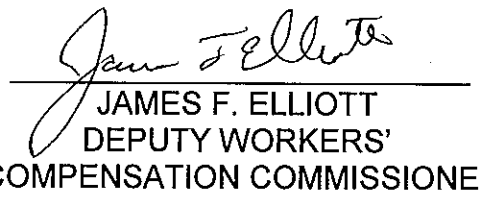
Defendants shall pay medical costs as set forth in this decision, including the twenty-seven thousand fifty-six and 47/100 dollars ($27,056.47) for VA expenses.

Defendants shall pay claimant's costs of two-hundred fifty six and 95/100 dollars ($256.95).

Defendants shall pay all accrued weekly benefits in lump sum with applicable interest pursuant to Iowa Code section 85.30.

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 18th day of February, 2015.



JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFE/sam

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.