BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOSE SANCHEZ,

Claimant,

vs.

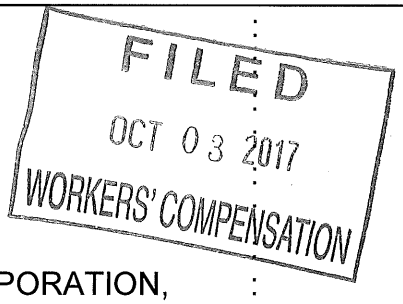
ALTER TRADING CORPORATION,

Employer,

and

ARCH INSURANCE COMPANY,

Insurance Carrier,
Defendants.



File No. 5053344

ARBITRATION DECISION

Head Note Nos.: 1108; 1703; 1803

STATEMENT OF THE CASE

Jose Sanchez filed a petition for arbitration seeking workers' compensation benefits from, the employer, Alter Trading Corporation, and Arch Insurance Company, the insurance carrier.

The matter came on for hearing on June 20, 2016, before deputy workers' compensation commissioner, Joseph L. Walsh, in Davenport, Iowa. The record in the case consists of Claimant's Exhibits 1 through 10; Defense Exhibits A through W; as well as the sworn testimony of claimant, Jose Sanchez. Alejandra Sosa was found to be a qualified Spanish-language interpreter and she served as the interpreter for the hearing. Heidi Kraftka was appointed court reporter. The parties argued this case and the matter was fully submitted on July 18, 2016.

ISSUES AND STIPULATIONS

Claimant sustained an injury which arose out of and in the course of employment on December 18, 2013. The defendants admit that an injury occurred on that date and that it caused some temporary disability. The defendants, however, dispute that the injury resulted in any permanent partial disability. The defendants therefore dispute the claimant's entitlement to any permanent partial disability benefits. The claimant alleges entitlement to permanent partial disability benefits. The disability, if there is any, is industrial. The commencement date for any benefits is stipulated to be November 20, 2014, if any such benefits are appropriate. The elements which comprise the rate of

compensation are stipulated and affirmative defenses are waived. The claimant does not seek medical expenses and there is no credit. Defendants allege entitlement to a credit section 85.34(7)(b)(1) for previous benefits paid.

FINDINGS OF FACT

Jose Sanchez was 72 years old as of the date of hearing. He suffered an injury while working for Alter Trading Corporation (hereafter, Alter) which arose out of and in the course of employment on December 18, 2013. The injury affected claimant's right shoulder. The parties have stipulated these facts.

Mr. Sanchez testified live at hearing through a Spanish language interpreter. I find his testimony to be credible. His testimony is generally consistent with the other evidence in the record, including his sworn deposition testimony taken June 3, 2016. (Defendants' Exhibit 10) There was nothing about his demeanor which caused the undersigned any concern regarding his veracity.

Mr. Sanchez was born in Mexico and was educated through the fourth grade there. He reads, writes and speaks some English, but his first language is Spanish. He has worked for Alter since 1983. (Transcript, page 7) Since he has worked for the employer for such an extended period of time, this is really his only relevant work experience.

Prior to this work injury, it is stipulated that claimant had suffered a work injury to his left shoulder in April 2003. He had surgery for his left shoulder and was ultimately released to return to work without any work restrictions. The facts of that case are set forth in the arbitration decision of January 30, 2006. (Def. Ex. B, pp. 1-7) Mr. Sanchez had returned to his same position following the injury as a heavy equipment operator. "He is able to work overtime hours as well. However, good sense dictates; claimant should not be lifting with his left shoulder above shoulder height." (Cl. Ex. B, p. 7) He was awarded a 20 percent disability for his loss of earning capacity. This decision was affirmed on appeal and became final agency decision. (Cl. Exs. C, D, E, H) A review of the file demonstrates the defendants never sought review-reopening.

Mr. Sanchez has continued working as a heavy equipment operator for the employer since this work injury. As expected, he has continued working overtime and receiving pay increases since his first injury.

On December 18, 2013, Mr. Sanchez was attempting to move a bucket cylinder pin when he slipped and fell from a step, striking his right shoulder on a loader. (Cl. Ex. 2, p. 3) He received treatment from the following providers, whose records are in evidence:

- Occupational Medicine Clinic, Camilla Frederick, M.D., December 18, 2013 through January 16, 2014. (Def. Ex. K, pp. 27-39)

- Quality Care Clinic, Abdul Foad, M.D., January 30, 2014 through March 16, 2015. (Def. Ex. M, pp. 42-62)

- Radiology Reports, January 10, 2014. (Def. Ex. L, pp. 40-41)

Mr. Sanchez underwent a surgery by Dr. Foad on February 24, 2014. The preoperative diagnosis was right shoulder large to massive rotator cuff tear including supraspinatus, subscapularis and infraspinatus. (Def. Ex. M, p. 45) He was provided extensive follow up treatment including restrictions, medications and physical therapy. His recovery was slow, however, on September 18, 2015, he was released to full-duty with no medical restrictions. (Def. Ex. M, p. 59) The following is documented at his November 20, 2014, visit.

> At this point he is doing very well. He has excellent strength, very minimal to no pain. He is sleeping well and he is able to perform his activities of daily living. He is able to perform his regular job duties without any restrictions. Therefore, I will place him at maximum medical improvement. He will return back to his regular job duties with no restrictions, and he may be discharged from my care. I will be happy to provide an impairment rating upon request.

(Def. Ex. M, p. 60)

In March 2015, Dr. Foad responded to a February 2015, letter from a claims representative from Gallagher Bassett, who adjusted the claim on behalf of defendants. He opined claimant suffered a 4 percent whole body impairment rating. (Cl. Ex. M, p. 62)

On April 27, 2015, defense counsel provided notice to claimant's counsel that no disability benefits were owed for the December 2013, work injury. He justified this position as follows:

> Enclosed please find additional records we received from Dr. Foad's office, including Dr. Foad's permanency rating of March 16, 2015. Pursuant to the attached Arbitration Decision filed January 30, 2006, Alter previously paid Claimant Sanchez 100 weeks of PPD benefits (20% industrial disability) for a left shoulder injury that occurred on April 29, 2003. Therefore, pursuant to Iowa Code section 85.34(7), given both injuries are industrial disability (whole person) injuries, Alter is entitled to accredit for the previous 100 weeks of PPD benefits paid to Claimant Sanchez. Therefore, Alter will not be paying any additional PPD benefits based on Dr. Foad's March 16, 2015 rating. See Iowa Code § 85.34(7) Drake v. McComas-Lacina Construction and United Heartland, 2014 WL1102017 (Iowa Workers' Comp Com'n 2014). Thanks.

(Def. Ex. O, p. 64)

On May 29, 2015, claimant submitted a voluntary resignation. (Def. Ex. P) He retired. (Def. Ex. Q)

In March 2016, claimant was evaluated by Richard Kreiter, M.D. Dr. Kreiter opined claimant suffered a 20 percent whole person impairment rating as a result of the right shoulder injury and recommended permanent restrictions of no overhead work on the right and bench level activity. (Cl. Ex. 3, p. 6) He also recommended that he limit any lifting away from his body, as well as pushing and pulling with the right arm. "Since he is retired, he has been limiting his activity." (Cl. Ex. 3, p. 6)

CONCLUSIONS OF LAW

The first question is whether the admitted December 18, 2013, injury is a cause of permanent disability, and if so, the 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).

There is really no doubt that claimant suffered permanent functional impairment as a result of his stipulated work injury. This is proven by both the opinions of Dr. Foad, as well as those of Dr. Kreiter. The defendants are really claiming that the claimant did not suffer any additional industrial disability from the amounts he was paid on the April 2003 claim. This is an interesting, and somewhat more complex, legal issue. I find, however, that the claimant has proven by a preponderance of evidence that his stipulated December 2013 right shoulder injury did result in permanent functional loss and disability.

The next issue is the extent of industrial disability benefits. Claimant argues he has suffered a significant and severe industrial disability, while defendants argue that his total industrial disability, when considering his December 2013, work injury in conjunction with his April 2003, work injury, is less than 20 percent.

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.

Although claimant is close to a normal retirement age, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund v. Nelson, 544 N.W. 2d 258 (Iowa 1995). However, this agency does consider voluntary retirement or withdrawal from the work force unrelated to the injury. Copeland v. Boones Book and Bible Store, File No. 1059319, Appeal Decision (November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

Having reviewed the entire record as a whole, and appropriately applying Section 85.34(7)(b), I find that the claimant has suffered a 40 percent loss of earning capacity as a result of his December 2013 work injury.

The claimant was 72 at the time of hearing. He has a fourth grade education from Mexico. He has worked a number of manual labor jobs, but his true, relevant work history is as an equipment operator for Alter. He chose to retire in May 2015.

Claimant had a very good result from the right shoulder surgery. I find that Dr. Foad's four percent whole body rating is an accurate assessment of claimant's loss of function resulting from his work injury. Dr. Foad provided no formal work restrictions. While I find that Dr. Kreiter's impairment rating is not particularly well-supported in the AMA Guides, I do find his recommendations for some limitations on the use of his right

arm compelling. Even so, had the claimant not chosen to retire, he could have continued working as a heavy equipment operator. Mr. Sanchez was a highly-motivated, hard-working man for his entire career.

The claimant's left shoulder was also surgically repaired as a result of an earlier injury for the same employer.

Iowa Code section 85.34(7) states:

> 7. Successive disabilities.
>
> a. An employer is fully liable for compensating all of an employee's disability that arises out of and in the course of the employee's employment with the employer. An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment with a different employer or from causes unrelated to employment.
>
> b. (1) If an injured employee has a preexisting disability that was caused by a prior injury arising out of and in the course of employment with the same employer, and the preexisting disability was compensable under the same paragraph of subsection 2 as the employee's present injury, the employer is liable for the combined disability that is caused by the injuries, measured in relation to the employee's condition immediately prior to the first injury. In this instance, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer.
>
> (2) If, however, an employer is liable to an employee for a combined disability that is payable under subsection 2, paragraph "u", and the employee has a preexisting disability that causes the employee's earnings to be less at the time of the present injury than if the prior injury had not occurred, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer minus the percentage that the employee's earnings are less at the time of the present injury than if the prior injury had not occurred.

Section 85.34(7) requires the agency to consider the combined industrial disability of his earlier shoulder injury since it was with the same employer. There is no evidence that the claimant suffered an actual loss of earnings as a result of the 2003, left shoulder disability. He had an excellent result from the 2003 left shoulder surgery. Therefore, section 85.34(7)(b)(1) applies, as opposed to section 85.34(7)(b)(2). When considering both of claimant's shoulder disabilities under the facts provided at the time

of hearing, I find that claimant's total industrial disability is 40 percent.

I reject the defendants' argument that the claimant's total disability does not exceed 20 percent. The defendants offered the following arguments in brief. "The combined disability caused by the left shoulder injury of April 29, 2003 and the right shoulder injury of December 18, 2013 is not more than 20% industrial disability." (Def. Brief, p. 8) The defendants then went on to argue the facts of each of the shoulder injuries had minimal industrial value, individually.

I reject this argument both as a matter of fact and law. As a matter of fact, I find that the claimant's total disability is 40 percent based upon all of the relevant factors. This is a factual finding which is independent from the legal findings set forth below.

As a matter of law, I find that the claimant's disability could not possibly be less than 20 percent. It was previously adjudicated in Sanchez v. Alter Scrap Processing, File No. 5014460, that claimant's industrial disability was 20 percent as a result of his 2003 work-related left shoulder injury. That decision was appealed through the District Court level and became a final decision. Defendants did not seek review-reopening of this decision and it became final. It is the law of the case that his loss of earning capacity, from his left shoulder condition alone, was 20 percent. It is difficult or impossible to imagine that the combined disability between both of his shoulders could be less than the industrial disability in the left shoulder alone. Defendants appear to be taking a second bite at this apple by arguing that the award for the left shoulder was too high.

In any case, both of the claimant's shoulders are surgically repaired as a result of work-related injuries. The defendants point out that he did have relatively good outcomes on both sides. Nevertheless, his residual functional impairments and limitations, combined with his advanced age, limited education, English proficiency and transferrable skills lead me to find that he has suffered an industrial disability of 40 percent.

I agree with defendants, however, that they are entitled to a credit under section 85.34(7)(b)(1).

For successive injuries with the same employer, the provisions provide a method of providing a "credit" to an employer for past compensation it paid for prior disabilities. The method of calculation of a credit was explained in Steffen v. Hawkeye Truck & Trailer, File No. 5022821 (Appeal, Sept. 9, 2009). I find that the employer's liability for the combined disability is partially satisfied in the amount of 20 percent as a result of his earlier left shoulder injury. Consequently, the employer is now liable for a 20 percent industrial disability at the stipulated weekly compensation rate.

The final issue is penalty.

Claimant's penalty benefit claim is based upon the statutory language contained at Iowa Code section 86.13(4), which 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.
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> 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 contemporaneously relied to deny, delay payment of, or terminate benefits.
>
> (3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

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.

Under the current statutory framework, the burden is on the claimant to demonstrate when a payment is due and that the payment was not made on time. Once the claimant has proven the delay or denial, the burden shifts to the defendants to provide a reasonable excuse.

In this case, the defendants did perform a contemporaneous investigation and basis for denial. Shortly after the impairment rating was sent from the treating physician in March 2016, the defendants informed claimant's counsel that no benefits were owed because the employer "is entitled to a credit for the previous 100 weeks of PPD benefits paid to Claimant Sanchez." (Def. Ex. O, p. 64) While this is a creative legal argument, for the reasons set forth above, I find that it is not reasonable. The combined disability between the two separate disabilities cannot possibly be less than the disability for the 2003 left shoulder injury by itself. It was determined that his loss of earning capacity for the 2003 left shoulder injury alone was 20 percent. I am precluded from reversing or altering that decision at this time. That is a final agency decision and is, therefore, the floor. In order for it to be reasonable to pay no benefits, I would have to find that it is reasonable to conclude that the December 2013, right shoulder injury contributed nothing to the claimant's overall industrial disability. I find that this is an unreasonable position. The defendants were aware in March 2015, that claimant had a permanent functional disability of four percent of the whole body as a result of his December 2013, right shoulder condition. The defendants were required to pay the rating at that time.

Considering the relevant factors in assessing the amount of penalty owed, I assess a penalty of $3,000.00 to deter defendants from engaging in this type of conduct in the future.

ORDER

THEREFORE IT IS ORDERED

All weekly benefits shall be paid at the rate of four hundred thirty-four and 51/100 dollars ($434.51) per week.

Defendants shall pay the claimant one hundred (100) weeks of permanent partial disability commencing November 20, 2014.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall pay a penalty of three thousand and 00/100 dollars ($3,000.00).

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

Costs are taxed to defendants.

Signed and filed this 3rd day of October, 2017.

JOSEPH L. WALSH
DEPUTY WORKERS'
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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.