BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

EDWARD R. KIMM,

Claimant,

vs.

MIDWEST XPRESS, L.L.C., SAM COVIC, TATYANA COVIC, RASEMA COVIC,

Employer,

and

UNKNOWN,

Insurance Carrier,
Defendants.

File No. 5052563

ARBITRATION

DECISION

Head Note Nos.: 1802; 1803; 2501; 2502; 2907; 3003; 4000.2

STATEMENT OF THE CASE

Edward R. Kimm, claimant, filed a petition for arbitration against defendants, Midwest Xpress, L.L.C., Sam Covic, Tatyana Covic and Rasema Covic, as the alleged employers. None of the employers have filed answers, appearances, or responsive pleadings. On November 20, 2015, claimant filed a motion for default judgment and sanctions against employer, Midwest Xpress, L.L.C. Claimant has elected to proceed against this one alleged employer and has not sought default or an award against any of the other named defendants at this time.

Claimant does not allege an insurance carrier's involvement in this case. It is unknown whether Midwest Xpress, L.L.C., had required workers' compensation insurance coverage in effect on the alleged date of injury, November 25, 2014. No insurance carrier has appeared in this case.

On December 8, 2015, the undersigned issued a ruling on claimant's motion for default and sanctions. The undersigned found Midwest Xpress, L.L.C., to be in default, imposed sanctions that included findings that claimant's injury arose out of and in the course of employment on November 25, 2014. The undersigned scheduled this case for a default hearing on damages to occur on January 19, 2016.

As scheduled, a telephonic arbitration hearing occurred on January 19, 2016. Claimant appeared telephonically and through his attorney, Emily Anderson. Although it was given notice via United States Mail at its last known address, Midwest Xpress,

L.L.C., did not appear for the hearing or file any responsive pleadings with this agency before the hearing.

Claimant offered testimony at the evidentiary hearing. Claimant also introduced exhibits 1 through 6 into the evidentiary record. The evidentiary record closed on January 19, 2016, at the end of the telephonic hearing.

No pleadings, appearances, or other communications have been received by the undersigned from Midwest Xpress, L.L.C., since the January 19, 2016 hearing. Midwest Xpress, L.L.C., remains in default and it is appropriate to proceed to an award of benefits based upon the evidentiary record.

ISSUES

Issues pertaining to the date of injury, whether the alleged injury arose out of or in the course of claimant's employment with Midwest Xpress, L.L.C., or the industrial nature of the injury were all resolved in the December 8, 2015 ruling on motion for default and sanctions.

Claimant submitted the following issues for resolution:

1. The extent of claimant's entitlement to healing period, or temporary total disability, benefits.

2. The extent of claimant's entitlement to permanent disability benefits.

3. The applicable weekly rate at which benefits should be awarded.

4. Claimant's entitlement to payment or reimbursement of past medical expenses.

5. Whether claimant is entitled to reimbursement of his independent medical evaluation expense pursuant to Iowa Code section 85.39.

6. Whether claimant is entitled to an award of penalty benefits pursuant to Iowa Code section 86.13 for an unreasonable delay or denial of weekly benefits and, if so, the appropriate penalty to be imposed.

7. Whether costs should be assessed against either party.

FINDINGS OF FACTS

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

Edward Kimm worked as an over-the-road truck driver for Midwest Xpress, L.L.C., and commenced his employment on November 14, 2014. On November 25,

2014, Mr. Kimm was performing his employment duties in Cedar Falls, Iowa, when he slipped and fell on ice. He sustained a right shoulder injury as a result of that fall. He also struck his head as a result of the fall, but testified that his head pain and symptoms have resolved. (Claimant's testimony)

Mr. Kimm reported his work injury to the employer and requested medical treatment. He received no response or instructions from the employer pertaining to medical care. Mr. Kimm last worked for Midwest Xpress, L.L.C., on December 2, 2014. He sought medical attention from his personal physician on December 3, 2014 and never received additional work assignments, despite requests for work, thereafter. (Claimant's testimony)

Mr. Kimm testified that he was off work from December 3, 2014 through May 15, 2015 as a result of his work injury. He testified that he was taking medications during this period of time, as prescribed by his physicians, and was not allowed to drive while taking those medications. I find that Mr. Kimm was off work as a direct result of his November 25, 2014 work injury from December 3, 2014 through May 15, 2015. However, I also find that Mr. Kimm achieved maximum medical improvement on April 17, 2015, pursuant to the undisputed medical opinion of claimant's independent medical evaluator, Mark C. Taylor, M.D. (Ex. 3, p. 22)

Claimant has returned to work in a no-touch truck driving position. He is required to throw some straps but is able to perform that function without significant stress on his right shoulder. (Claimant's testimony) Claimant demonstrates the ability for continued and future employment and the capability to continue his truck driving occupation. Nevertheless, claimant has sustained a loss of future earning capacity and would not be capable of returning to other lines of work he has previously performed.

I accept the undisputed medical opinion of Dr. Taylor regarding permanent work restrictions. Pursuant to Dr. Taylor's opinions, claimant is only capable of lifting 30 pounds occasionally below chest height. Claimant is only capable of lifting 15-20 pounds at or above chest level. Mr. Kimm is supposed to keep his right arm close to his body when lifting and only perform overhead activities rarely. He is to use ladders only on a rare to occasional basis. (Ex. 3, p. 22)

Mr. Kimm is 56 years of age. His past work experience includes work in manufacturing, farming, meat packing, and trucking. His prior positions in manufacturing, farming, and meat packing involved physical activities that he likely could not perform in his current physical condition. Mr. Kimm admits that he could return to work as a forklift driver, a position he previously held. (Claimant's testimony)

It is unlikely that claimant could return to truck driving positions he has held that required him to manipulate freight or manually open hoppers or manipulate tarps on grain trucks. He is now likely relegated to "no-touch" truck driving positions. Nevertheless, it is apparent that claimant is capable of continued employment despite his injury.

Mr. Kimm is a high school graduate, but he was in special education when in school. He has difficulties reading. Claimant did obtain a welding certificate after high school. He has never used that welding certificate in an occupational pursuit. However, he is not likely to be able to pursue a career that involves welding given restrictions against overhead work or work away from his body. (Claimant's testimony)

Claimant is a right-hand dominant man, who has now sustained an injury to his right shoulder. (Claimant's testimony) He has sustained a 4 percent permanent impairment of the whole person as a result of his right shoulder injury.

Considering claimant's age, educational background, employment history, ability to return to certain types of work, inability to return to other types of prior employment, his permanent work restrictions, permanent impairment, motivation, and all of the other industrial disability factors outlined by the Iowa Supreme Court, I find that Mr. Kimm has sustained a 50 percent loss of future earning capacity as a result of his November 25, 2014 work injury.

Through the date of the hearing, the employer has not paid claimant any weekly benefits as a result of his November 25, 2014 work injury. The employer has not provided claimant with any explanation of the basis for its denial or delay in payment of benefits. I find that the employer has unreasonably delayed or denied all healing period and permanent partial disability benefits owed claimant through the date of the arbitration hearing.

Claimant asserts that his average gross weekly earnings prior to the date of injury were $641.25. Claimant provided wage information for the two pay periods immediately preceding his injury. (Ex. 6) Claimant urges that the pay issued December 2, 2014 is not representative because it is not customary of his anticipated or typical earnings. (Claimant's testimony) Claimant offers unrebutted testimony and evidence in this respect. I accept claimant's argument and find that claimant's typical or customary gross earnings prior to the date of injury were $641.25 per week. Claimant was single and entitled to only one exemption on the date of injury. (Hearing Report)

Mr. Kimm also seeks an award of past medical expenses. With respect to this claim, I find that the expenses summarized and contained at exhibit 4 were reasonable, necessary, and causally related to claimant's November 25, 2014 work injury. I find that the employer did not authorize any medical treatment for claimant's injury. The employer abandoned claimant's medical care and offered no care. The care sought by claimant was clearly superior to and had a more beneficial effect than the lack of medical care offered by the employer.

Claimant also seeks an award of reimbursement of his independent medical evaluation fee. I find that the employer did not obtain an evaluation with a physician of its choosing and that no physician selected by defendant offered a permanent impairment rating in this case.

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.

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).

Having previously entered an order of default that established claimant's injury arose out of and in the course of employment on November 25, 2014, I now conclude that claimant has proven entitlement to worker's compensation benefits for his right shoulder injury on that date.

Claimant seeks an award of healing period benefits from November 25, 2014 through April 17, 2015. Healing period compensation describes temporary workers'

compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

In this case, I found that claimant proved he last worked on December 3, 2014. Claimant did not prove he was off work or entitled to healing period benefits prior to December 3, 2014. Therefore, I conclude claimant's entitlement to healing period benefits commenced on December 4, 2014.

Although claimant proved he was off work until May 15, 2015, he also introduced undisputed medical evidence from Dr. Taylor that he achieved maximum medical improvement on April 17, 2015. Claimant's entitlement to healing period benefits terminates at the earliest of the events listed in Iowa Code section 85.34(1). Therefore, I conclude claimant's healing period terminated April 17, 2015.

Claimant sustained a right shoulder injury. When disability is found in the shoulder, a body as a whole situation may exist. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949). In Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Commissioner Report 281 (App. 1982), a torn rotator cuff was found to cause disability to the body as a whole.

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.

Having considered the relevant industrial disability factors outlined by the Iowa Supreme Court, I found that claimant proved a 50 percent loss of future earning capacity. Having reached that factual finding, I conclude that claimant is entitled to a 50 percent industrial disability award, or 250 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u).

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings that fairly represent the employee's customary earnings, however. Section 85.36(6).

Claimant established that the earnings contained in the December 2, 2014 paycheck were not typical, or representative, of his customary earnings prior to the date of injury. Therefore, I conclude that those earnings should be excluded and that the claimant's weekly benefit rate should be calculated using only the wages paid via check dated November 24, 2014 (Ex. 6)

The weekly benefit amount payable to an employee shall be based upon 80 percent of the employee's weekly spendable earnings, but shall not exceed an amount, rounded to the nearest dollar, equal to 66-2/3 percent of the statewide average weekly wage paid employees as determined by the Department of Workforce Development. Iowa Code section 85.37.

The weekly benefit amount is determined under the above Code section by referring to the Iowa Workers' Compensation Manual in effect on the applicable injury date. I found that claimant was single, entitled to only one exemption, and that his gross average weekly wage was $641.25. Using the Iowa Workers' Compensation Manual with effective dates of July 1, 2014 through June 30, 2015, I determine that the applicable weekly rate for both healing period and permanent partial disability benefits is $396.87.

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).

Having found that the medical expenses summarized and contained in exhibit 4, including the payments and lien asserted by a third-party payer, are reasonable, necessary and causally connected to the work injury, I conclude defendant should be ordered to pay, reimburse, or otherwise satisfy those medical expenses in a manner that will hold claimant harmless for those expenses. Iowa Code section 85.27; Krohn v. State, 420 N.W.2d 463 (Iowa 1988).

Mr. Kimm seeks reimbursement of his independent medical evaluation fee from Dr. Taylor. Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

In this instance, the employer did not retain a physician or obtain a permanent impairment rating from any physician. Claimant cannot establish the necessary prerequisites of Iowa Code section 85.39 to qualify for reimbursement of his independent medical evaluation. Therefore, I conclude that claimant's request for reimbursement of his independent medical evaluation fee should be denied. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 844 (Iowa 2015).

Ms. Kimm asserts that defendants unreasonably delayed and/or denied his weekly benefits in this case and that defendants should be ordered to pay penalty benefits pursuant to Iowa Code section 86.13.

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.

In this case, I found that the employer offered no explanation of its basis, if any, for denial. Defendant is in default and offered no evidence at the time of hearing to justify a denial of this claim. There is no evidence that a basis for denial was contemporaneously conveyed to claimant. I found that the defendant unreasonably delayed or denied all healing period and permanent partial disability benefits that accrued between the date of injury and the date of the hearing.

Healing period was owed from December 3, 2014 through April 17, 2015. This is a period of 19.429 weeks.

Claimant has been awarded 250 weeks of permanent partial disability benefits. Between April 18, 2015 and the hearing on January 19, 2016, an additional 39.571 weeks of permanent partial disability accrued and became due. In total, defendant unreasonably denied or delayed payment of 59 weeks of benefits between December 3, 2014 and the date of hearing.

Defendant offered no explanation for the delay or denial. None is found in the record. Defendant offered no evidence that it contemporaneously conveyed a basis for its delay or denial. Claimant specifically testified that he received no explanation. I found that defendant unreasonably delayed or denied the above benefits. Therefore, a penalty is appropriate in some amount. Iowa Code section 86.13.

The purpose of Iowa Code section 86.13 is both punishment for unreasonable conduct but also deterrence for future cases. Id. at 237. In this regard, the Commission is given discretion to determine the amount of the penalty imposed with a maximum penalty of 50 percent of the amount of the delayed, or denied, benefits. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 261 (Iowa 1996).

In exercising its discretion, the agency must consider factors such as the length of the delays, the number of delays, the information available to the employer regarding

the employee's injury and wages, and the employer's past record of penalties. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996). Having considered the relevant factors and the purposes of the penalty statute, I find that defendant had no basis for delay or denial of benefits. I conclude that a section 86.13 penalty in the amount of $11,700.00 is appropriate in this case.

Claimant also seeks an assessment of his costs. Costs are assessed at the discretion of the agency. Iowa Code section 85.40.

In this case, defendant failed to appear or offer any defenses. Claimant prevailed on the majority of the issues. Assessment of claimant's costs is appropriate in some amount.

Claimant seeks assessment of his one hundred dollar ($100.00) filing fee. Pursuant to 876 IAC 4.33(7), claimant's filing fee is a permissible cost and I conclude that it should be assessed.

Claimant also seeks assessment of his independent medical evaluation fees from Dr. Taylor in the amount of $1,425.00. (Ex. 5) Review of the billing statement from Dr. Taylor discloses that the physician does not break down his charges between the fee for his examination and the drafting of his report.

In Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 845 (Iowa 2015), the Iowa Supreme Court held that only the cost of drafting a report in lieu of testimony by a physician is taxable as a cost in a worker's compensation case. In other words, claimant cannot recover the cost of Dr. Taylor's examination but may recover the cost of having the physician draft a report following that examination. Id.

In this instance, it is apparent that Dr. Taylor spent time on both his examination and drafting his report. Dr. Taylor's report notes that he spent a total of 40 minutes working on his report. By contrast, he spent 70 minutes preparing for his examination or conducting his physical examination of claimant. Using this information, I gather that Dr. Taylor spent 36 percent of his time drafting his report. His total fees (not including his assistant's time preparing for the examination) were $1,400.00. Multiplying $1,400.00 by 36 percent renders a charge of $504.00 for Dr. Taylor's report. I conclude that it is appropriate to assess $504.00 for Dr. Taylor's report pursuant to 876 IAC 4.33(6) and Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015).

Claimant also seeks the assessment of two other medical charges for collection of medical records. Agency rule 876 IAC 4.33 permits only the assessment of two charges for medical records. I conclude it is appropriate; therefore, to award the Unity Point Belle Plain charges totaling twenty one and 42/100 dollars ($21.42) and deny the additional request from Marengo Memorial Hospital. 876 IAC 4.33(6).

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay claimant healing period benefits from December 3, 2014 through April 17, 2015.

Defendant shall pay claimant two hundred fifty (250) weeks of permanent partial disability benefits commencing on April 18, 2015.

All healing period and permanent partial disability benefits shall be paid at the rate of three hundred ninety-six and 87/100 dollars ($396.87) per week.

Defendant shall pay interest on all accrued weekly benefits pursuant to Iowa Code section 85.30.

Defendant shall pay all medical providers, reimburse claimant, reimburse all third party payers, or otherwise satisfy and hold claimant harmless for any medical expenses contained in exhibit 4.

Defendant shall pay a penalty to claimant totaling eleven thousand seven hundred and 00/100 dollars ($11,700.00).

Defendants shall reimburse claimant's costs totaling six hundred twenty-five and 42/100 dollars ($625.42).

Defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 8th day of March, 2016.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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WHG/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.