BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROBERT SHRYOCK,

Claimant,

vs.

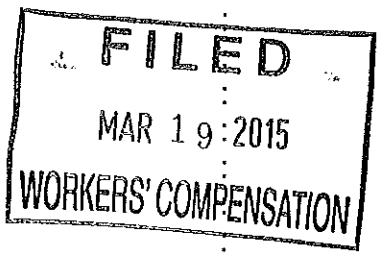
M.H. EBY, INC.,

Employer,

and

SENTINEL INSURANCE CO.,

Insurance Carrier,
Defendants.



File No. 5046715

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Robert Shryock, the claimant, seeks workers' compensation benefits from defendants, M.H. Eby, Inc., the alleged employer, and its insurer, Sentinel Insurance Co., as a result of an alleged injury on October 31, 2013. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An evidentiary hearing commenced on February 26, 2015. This matter was fully submitted at the close of that hearing. Oral testimonies and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Only joint exhibits, marked alphabetically, were offered and received at hearing. References in this decision to page numbers of an exhibit shall be made by citing the exhibit letter followed by a dash and then the page number(s). For example, a citation to claimant's exhibit A, pages 2 through 4 will be cited as, "Ex. A-2:4."

The parties agreed to the following matters in a written hearing report submitted at hearing:

1. On October 31, 2013, claimant received an injury arising out of and in the course of employment with defendant employer.

2. Claimant is not seeking additional temporary total or healing period benefits.

3. If the injury is found to have caused permanent disability, the type of disability is an industrial disability to the body as a whole.

4. If I award permanent partial disability benefits, they shall begin on January 30, 2014.

6. At the time of the alleged injury, claimant's gross rate of weekly compensation was $704.00. Also, at that time, he was married and entitled to three exemptions for income tax purposes. Therefore, claimant's weekly rate of compensation is $471.82 according to the workers' compensation commissioner's published rate booklet for this date of injury.

7. Medical benefits are not in dispute.

8. Prior to hearing, defendants voluntarily paid 50 weeks of permanent disability benefits for this work injury.

ISSUES

At hearing, the parties submitted the following issues for determination:

I. The extent of claimant's entitlement to permanent disability benefits; and,

II. The extent of claimant's entitlement to penalty benefits for any delay in paying weekly permanent disability benefits pursuant to Iowa Code section 86.13.

FINDINGS OF FACT

In these findings, I will refer to the claimant by his first name, Robert, and to the defendant employer as Eby.

Robert worked for Eby as a welder/fabricator from the summer of 2013 until January 29, 2014, at which time he was terminated after being asked to undergo a drug screening test. Robert told Eby management that the testing results would be "dirty" due to his prior use of marijuana. (Ex. C-3) There is nothing in the written record to show Robert was not performing his job adequately when he was fired, but Robert states that he was taking too many bathroom breaks as a result of his injury.

Robert's health history consists of a pectus excavatum which is a congenital deformity of the chest wall (sunken sternum). This was surgically addressed a number of years ago. Robert also has aortic regurgitation which is a defect in a heart value. The record does not demonstrate these conditions restrict Robert from performing manual labor. Robert also has a history of being treated of depression and anxiety.

The stipulated injury occurred when Robert was directed by his supervisor to crawl under a large platform weighing over 1000 pounds and remove some anchor bolts. When he removed the last bolt, the platform fell, causing him to fall backwards

and the platform landed on his abdomen. He did not strike his head or lose consciousness. After the platform was lifted off of Robert, he was transported to Mary Greeley Medical Center in Ames, Iowa for treatment.

Treatment at the hospital included surgery to remove two sections of bowel that were damaged in the accident. Following recovery from this surgery, Robert was discharged from Mary Greeley on November 8, 2013. (Ex. A) Thereafter, Robert was followed by providers at the McFarland clinic. His primary physician at this clinic was Jeremy Fields, M.D., a gastroenterologist. Robert was initially released to return to work with restrictions on lifting in November 2013, but subsequently allowed to return to full duty in December 2013. (Ex. B-2) As stated above, Robert was terminated on January 29, 2014.

After his discharge from the hospital, Robert continued to experience abdominal pain and severe diarrhea and he was encouraged to put more fiber in his diet. However, when Robert continued to experience watery bowel movements about 15 times a day, Robert was prescribed a powder, cholestyramine, to be taken three times a day to reduce his bowel movements. (Ex. B-9) The doctor also prescribed monthly Vitamin B-12 injections for the rest of Robert's life which the doctor causally relates to the work injury. (Ex. B-14)

Robert testified that the powder reduced his diarrhea, but he still has frequent bowel movements of up to 7-8 per day and bowel pain with these movements. He has bowel accidents every other day. He continues with the B-12 injections. Robert also reports back pain and hand/finger numbness which he also attributes to the injury.

After being released from the care of Dr. Fields in January 2014, defendants did not seek the opinion of Dr. Fields as to Robert's permanent impairment from the injury until their attorney did so on August 18, 2014. (Ex. B-15:16) Dr. Fields responded that he does not provide such opinions and he referred defense counsel to Charles Mooney, M.D., an occupational medicine physician at the McFarland clinic. (Ex. B-17) Defense counsel then sought a permanency opinion from Dr. Mooney, which was finally received on October 22, 2014. Dr. Mooney opines that due to the digestive problems, Robert suffered a 10 percent permanent partial impairment to the body as a whole from his injury pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Dr. Mooney reports that Robert told him that he has 3-5 bowel movements per day. Dr. Mooney opined that the work injury did not cause the back pain and hand/finger numbness. Dr. Mooney agrees with Dr. Field that work activity restrictions are unnecessary. (Ex. B-20:25)

At the request of his attorney, Robert was evaluated by Sunil Bansal, M.D., another occupational medicine physician. Dr. Bansal opines that under the AMA Guides, Robert has a 30 percent permanent partial impairment to the body as a whole from his digestive problems. Dr. Bansal explains that due to the resection of the bowel and the inability of drugs to fully control his bowel movements, Robert more appropriate

falls within Class 3 under the Table 6-3 in the Guides for rating digestive problems. Class 3 provides a range of impairment from 25-49 percent.

Dr. Bansal also opines the injury aggravated pre-existing mental depression which moderately impairs activities of daily living and markedly impairs adaption. The doctor did not explain what he meant by adaption. The doctor also mentions hand numbness in the same paragraph that he outlines his impairment rating. However, it is clear that a rating under Table 6-3 only relates to digestive conditions. Dr. Bansal also causally related Robert's back pain to the work injury. The doctor states that he is unable to provide an impairment rating for the back because the back condition requires further treatment. Dr. Bansal recommends physical therapy for the back pain and evaluation of Robert's mental state by a mental health specialist. (Ex. D-9)

Dr. Bansal also restricts Robert to a work environment that has ready access to a nearby restroom and to work that would allow him frequent restroom breaks without being overly disruptive to the work. (Ex. D-11)

I find the work injury of October 31, 2013 a cause of a 30 percent permanent impairment to the body as a whole. The 10 percent rating under Table 6-3, a page 121, of the Guides, would place Robert in Class 2 where drugs control symptoms. It is clearly shown that Robert's symptoms are only partially controlled by the prescribed powder medication. Therefore, Dr. Bansal's rating is more convincing.

Also, Dr. Bansal's restriction to certain work environments is logical as there is little dispute that Robert must be able to take restroom breaks more frequently than normal workers. Any employer will be required to accommodate for these restrictions. I am unable to find permanency due to the back problems, hand numbness and depression. Dr. Bansal felt all of these conditions require further treatment. A finding about the work relatedness of the low back problems, hand numbness and the worsening depression is not necessary as treatment has not been requested by Robert in this proceeding.

Robert is 25 years of age. He completed only 10th grade in high school, but he obtained a GED from DMACC. Robert asserts that he is a well-qualified welder and fabricator. He is able to read blueprints. He states he can weld any metal, including aluminum. Indeed, he has been a welder/fabricator since working with his father building race cars after leaving high school. He has worked for several employers as a welder and fabricator prior to his job at Eby.

Robert's problem is that so far he has not been able to obtain employment as a welder/fabricator since leaving Eby despite his expertise in such jobs. He states that he has applied to a large number of businesses in the Ames, Iowa metro area, but has received no job offers. Twice, he states, he was interviewed by employers and felt that he would be hired, but subsequently never heard back from them. He is physically qualified to perform most medium and heavy work, but frequent bathroom breaks would clearly be a significant concern to employers engaged in production activities.

Robert admits to past drug abuse problems when he was younger, but states he no longer uses drugs because he has a wife and child to support. Robert admits that he smoked marijuana less than 90 days before the testing request at Eby. Robert believes he now can pass drug screens required by prospective employers, but has not been asked to do so since Eby. Certainly, being fired for not submitting to drug screening in his last job would have some adverse impact his ability to obtain new employment. However, to his knowledge, he has not been rejected for his past drug use.

To obtain income, Robert does some taxidermy work and "scrapping." Robert explains scrapping as collecting scrap metal and selling it after it is cleaned. He states that he earns about $100.00 a week from this activity. He was making $15.00 dollars per hour at Eby.

I agree with Robert that he is highly qualified and should be able to obtain suitable employment, but his need for frequent bathroom breaks will require accommodation by an employer. This is a significant impediment to his re-employment. However, I do not find at this time that this impediment prohibits all employment.

From examination of all of the factors of industrial disability, it is found that the work injury of October 31, 2013 is a cause of a 60 percent loss of earning capacity.

According to defendants' records, on February 26, 2014, Robert was paid 14 weeks of permanent partial disability (PPD) benefits. On February 28, 2014, he was paid one more week of PPD. Lastly, on December 14, 2014, he again was paid PPD which brings the total PPD paid prior to hearing to 50 weeks.

CONCLUSIONS OF LAW

I. 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).

A treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2)(a-t), the disability is considered a scheduled member disability and measured functionally. If it is found that the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and measured industrially under Code subsection 85.34(2)(u). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 593; 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. However, consideration must also be given to the injured worker's medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured worker's qualifications intellectually, emotionally and physically; the worker's earnings before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted, Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616 (Iowa 1995); 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).

The parties agreed if I found that work injury caused permanent impairment, it shall be a nonscheduled loss of use or industrial disability. Consequently, this agency must measure claimant's loss of earning capacity as a result of this impairment.

A showing that claimant had no loss of his job or actual earnings does not preclude a finding of industrial disability. Loss of access to the labor market is often of paramount importance in determining loss of earning capacity, although income from

continued employment should not be overlooked in assessing overall disability. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991); Collier v. Sioux City Community School District, File No. 953453 (App. February 25, 1994); Michael v. Harrison County, Thirty-fourth Biennial Rep. of the Industrial Comm'r, 218, 220 (App. January 30, 1979).

A release to return to full duty work by a physician is not always evidence that an injured worker has no permanent industrial disability, especially if that physician has also opined that the worker has permanent impairment under the AMA Guides. Such a rating means that the worker is limited in the activities of daily living. See AMA Guides to Permanent Impairment, Fifth Edition, Chapter 1.2, p. 2. Work activity is commonly an activity of daily living. This agency has seen countless examples where physicians have returned a worker to full duty, even when the evidence is clear that the worker continues to have physical or mental symptoms that limit work activity, *e.g.* the worker in a particular job will not be engaging in a type of activity that would cause additional problems, or risk further injury; the physician may be reluctant to endanger the workers' future livelihood, especially if the worker strongly desires a return to work and where the risk of re-injury is low; or, a physician, who has been retained by the employer, has succumbed to pressure by the employer to return an injured worker to work. Consequently, the impact of a release to full duty must be determined by the facts of each case.

In this case, I found that claimant suffered a 60 percent loss of his earning capacity as a result of the work injury. Such a finding entitles claimant to 300 weeks of permanent partial disability benefits as a matter of law under Iowa Code section 85.34(2)(u), which is 60 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection.

II. Claimant seeks additional weekly benefits under Iowa Code section 86.13 (4). That provision states that if a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the industrial commissioner shall award extra weekly benefits in an amount not to exceed 50 percent of the amount of benefits that were unreasonably delayed or denied if the employee demonstrates a denial or delay in payment or termination of benefits and the employer has failed to prove a reasonable or probably cause or excuse for the denial, delay or termination of benefits. (Iowa Code section 85.13(4)(b)) A reasonable or probable cause or excuse must satisfy the following requirements:

> (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 of the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay or termination of benefits.

(Iowa Code section 86.13(4)(c))

The employer has the burden to show a reasonable and probable cause or excuse. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable." Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996); Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

In this case, defendants only began paying permanency benefits in February 2014 after claimant's attorney demanded them. There is no dispute that claimant returned to work and reached maximum medical improvement (MMI) on January 30, 2014. Consequently, claimant's healing period was over at that time and permanent partial disability benefits were to start from that time. A reasonable investigation into this injury requires defendants to timely inquire about permanency from the treating doctor at the end of treatment. Defendants waited until August 2014 to seek an impairment rating. No excuse was provided why that was not done earlier. Consequently, all of the payments made to claimant were late. There is no medical opinion in this record to suggest this work injury did not cause permanency. While limiting the voluntary payment prior to hearing to 50 weeks in permanency benefits was reasonable, all of these payments were unreasonably delayed due to the lack of a reasonable investigation.

The maximum penalty would be 25 weeks of benefits. However, there was no showing of any prior penalties imposed on these defendants. Therefore, the penalty shall be 12.5 weeks. At the stipulated rate of compensation, the monetary penalty is $5,897.75

ORDER

1. Defendants shall pay to claimant three hundred (300) weeks of permanent partial disability benefits at the stipulated rate of four hundred seventy-one and 82/100 dollars ($471.82) per week from the stipulated date of January 30, 2014. Defendants shall pay accrued weekly benefits in a lump sum and shall receive credit against this award for the fifty (50) weeks of benefits previously paid.

2. Defendants shall pay to claimant as a penalty for an unreasonable delay in permanency benefits, the sum of five thousand eight hundred ninety-seven and 75/100 dollars ($5,897.75).

3. Defendants shall pay interest on unpaid weekly benefits awarded herein pursuant to Iowa Code section 85.30.

4. Defendants shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33, including reimbursement to claimant for any filing fee paid in this matter.

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

Signed and filed this 19th day of March, 2015.

LARRY WALSHIRE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Christopher D. Spaulding
Attorney at Law
2423 Ingersoll Ave
Des Moines IA 50312-5233
chris.spaulding@sbsattorneys.com

Anthea T. Galbraith
Mark A. Woollums
Attorneys at Law
1900 E. 54th St.
Davenport, IA 52807-2708
atg@bettylawfirm.com
maw@bettylawfirm.com

LPW/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.