

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KELLY KOHRS-MANRIQUES,

Claimant,

vs.

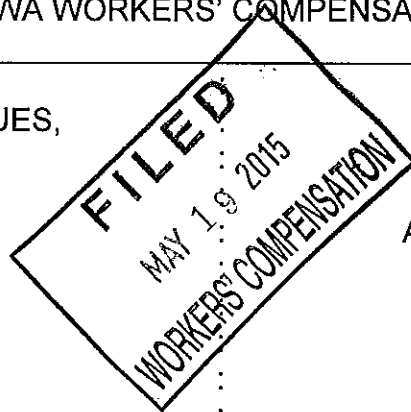
TAMMY BROWN, d/b/a  
TRURO TAVERN,

Employer,  
Uninsured,  
Defendant.

File No. 5048116

ARBITRATION  
DECISION

Head Note No.: 1803



STATEMENT OF THE CASE

Claimant, Kelly Kohrs-Manriques, has filed a petition in arbitration and seeks workers' compensation benefits from Tammy Brown, d/b/a Truro Tavern, employer, defendant. The claimant applied for a default ruling on March 13, 2014. Default was entered on April 2, 2014. The record reflects that the employer is uninsured.

Deputy Workers' Compensation Commissioner Joe Walsh heard this matter on April 28, 2015, in Des Moines, Iowa. The hearing was digitally recorded.

ISSUES

The claimant has submitted the following issues for determination:

1. Whether the claimant is entitled to healing period benefits as a result of her September 21, 2013 work injury;
2. Whether the claimant is entitled to permanent partial disability as a result of her September 21, 2013 work injury;
3. Whether the claimant is entitled to payment of medical expenses; and
4. Whether a penalty should be assessed against the defendant.

FINDINGS OF FACT

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

In September 2013, Kelly Kohrs-Manriques (hereafter, "Kelly") was employed by the Truro Tavern as a part-time bartender. She is 46 years old and left-hand dominant.

Tammy Brown owned Truro Tavern in September 2013. Kelly was also employed as a residential supervisor for Genesis Development. Kelly's gross wages for Truro Tavern were \$192.00 per week. Her gross wages for Genesis were \$538.00 per week. (Claimant's Exhibit 8) In September 2013, Kelly was single and entitled to two exemptions.

On September 21, 2013, Kelly fell while at work. It was a very busy night. After closing the bar, she slipped in some liquids and fell on her left hand and arm. She immediately identified that the injury was relatively serious and she sought treatment at Mercy Hospital in Des Moines.

She eventually saw Benjamin Paulson, M.D. at Iowa Ortho. He diagnosed left distal radius fracture and performed surgery on October 1, 2013. (Cl. Ex. 2)

Kelly never returned to work for Truro Tavern. The employer did not reemploy her.

After the surgery, Kelly underwent a significant amount of physical therapy. (Cl. Ex. 7) On May 12, 2014, Dr. Paulson released Kelly with no work restrictions. In January 2015, Dr. Paulson documented Kelly's functional losses and opined that her total impairment to her left arm was 11 percent. Kelly testified that she believes her actual functional loss exceeds 11 percent. Kelly has difficulty performing a number of activities as a direct result of the loss of function in her left arm.

The employer has not paid for any of Kelly's medical bills. A portion of her bills have been paid by her insurance, and she has paid some herself. Some may be outstanding. The total medical bills are approximately \$8,464.09. (Cl. Ex. 4-7) In addition, claimant has driven a total of 1,990 miles while seeking her medical treatment.

#### REASONING AND CONCLUSIONS OF LAW

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Ciha v. Quaker Oats Co., 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.

I find that on September 21, 2013 Kelly suffered an injury which arose out of and in the course of her employment with Truro Tavern.

The next issue is whether the claimant is entitled to temporary total, temporary partial, or healing period benefits.

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, Iowa App., 312 N.W.2d 60 (1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

I find Kelly is entitled to healing period benefits from September 21, 2013 through February 24, 2014, when Dr. Paulson released her to work. Kelly's rate of compensation is \$459.02. Kelly is entitled to weekly benefits from September 21, 2013 through February 24, 2014 at the rate of \$459.02 per week.

The next issue is Kelly's entitlement to permanent partial disability. Under the Iowa Workers' Compensation Act permanent partial disability is categorized as either to a scheduled member or to the body as a whole. See section 85.34(2). Section 85.34(2)(a)-(t) sets forth specific scheduled injuries and compensation payable for those injuries. The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). Compensation for scheduled injuries is not related to earning capacity. The fact-finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

In making an assessment of the loss of use of a scheduled member, the evaluation is not limited to the use of a standardized guide such as the AMA Guides to the Evaluation of Permanent Impairment. Lay testimony and demonstrated difficulties from claimant must be considered in determining the actual loss of use so long as loss of earning capacity is not considered. Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420, 421 (Iowa 1994); Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936). Notwithstanding suggestions to the contrary in the AMA Guides, this agency has a long history of recognizing that the actual loss of use which is to be compensated is the loss of use of the body member in the activities of daily living, including activities of employment. Pain which limits use, loss of grip strength, fatigability, activity restrictions, and other pertinent factors may all be considered when determining scheduled disability. Bergmann v. Mercy Medical Center, File Nos. 5018613 & 5018614, (App.

March 14, 2008); Moss v. United Parcel Service, File No. 881576 (App. September 26, 1994); Greenlee v. Cedar Falls Community Schools, File No. 934910 (App. December 27, 1993); Westcott-Riepma v. K-Products, Inc., File No. 1011173 (Arb. July 19, 1994); Bieghler v. Seneca Corporation, File No. 979887 (Arb. February 8, 1994); Ryland v. Rose's Wood Products, File No. 937842 (Arb. January 13, 1994); Smith v. Winnebago Industries, File No. 824666 (Arb. April 2, 1991).

Kelly testified that she believed the functional loss of her left arm exceeds 11 percent. She testified regarding a number of activities she can no longer perform as a result of the damage to her left arm. Most notably, Kelly discussed that her arm becomes fatigued when writing for a significant length of time.

I find that Dr. Paulson's rating accurately reflects Kelly's functional loss of her left arm. I find that this functional loss is permanent and Kelly is entitled to 27.5 weeks of benefits at the rate of \$459.02.

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. Iowa Code section 85.27 (2013). For all claimed medical expenses, the claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Defendants should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc., File No. 1020226 (App., February 27, 1995).

Kelly is entitled to her medical expenses as outlined in Exhibits 4 through 7.

The next issue is penalty. Kelly'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.

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).

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).

The defendant has paid no benefits in this case because it had no insurance. There is no other reason articulated in this record. This is not a reasonable excuse for delay. Utilizing all of the appropriate factors allowed under section 86.13, I find that a penalty of \$10,000.00 is appropriate.

#### ORDER

Therefore it is ordered:

The defendant shall pay the claimant twenty-two point two eight five seven (22.2857) weeks of healing period benefits at the rate of four hundred fifty-nine and 02/100 dollars (\$459.02) commencing on September 21, 2013 through February 24, 2014.

The defendant shall pay the claimant twenty-seven point five (27.5) weeks of permanent partial disability at the rate of four hundred fifty-nine and 02/100 dollars (\$459.02) commencing on February 25, 2014.

Defendant shall pay accrued weekly benefits in a lump sum.

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

The defendant shall pay the claimant's medical expenses outlined in claimant's Exhibits 4 through 7.


The defendant shall pay the claimant's mileage for one thousand nine hundred ninety (1,990) miles traveled while seeking medical treatment at the rate of point five six five (.565) per mile.

The defendant shall pay the claimant a penalty of ten thousand and 00/100 dollars (\$10,000.00).

The defendant shall file subsequent reports of injury as required by this agency.

The costs of this action are taxed to the defendant pursuant to 876 IAC 4.33.

Signed and filed this 19<sup>th</sup> day of May, 2015.

  
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JOSEPH L. WALSH  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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REGULAR AND CERTIFIED MAIL

JLW/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.