BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

WILLIAM PECKHAM, Claimant, vs. ROGER ROBERTS d/b/a ROBERTS CONSTRUCTION, Employer, and AUTO-OWNERS INSURANCE GROUP, Insurance Carrier, Defendants.	File No 5056939 A P P E A L D E C I S I O N Head Note Nos: 1108.50; 1402.30; 1803; 1803.1; 2907

Claimant William Peckham appeals from an arbitration decision filed on May 31, 2018. Defendants Roger Roberts, d/b/a Roberts Construction, employer, and its insurer, Auto-Owners Insurance Group, respond to the appeal. The case was heard on September 7, 2018, and it was considered fully submitted in front of the deputy workers' compensation commissioner on October 13, 2017.

In the arbitration decision, the deputy commissioner found claimant sustained permanent injuries to his bilateral lower extremities. The deputy commissioner determined these simultaneous injuries should be compensated on a 500-week schedule pursuant to Iowa Code section 85.34(2)(s). More specifically, the deputy commissioner, relying on the 20 percent whole body impairment rating offered by Joshua Kimelman, D.O., found claimant was entitled to 100 weeks of permanent partial disability benefits.

The deputy commissioner, however, found claimant failed to prove he sustained any permanent disability relating to his alleged head, mental, nose, back, shoulder, and let hip injuries.

On appeal, claimant asserts the deputy commissioner erred in her determination that claimant did not sustain any permanent injuries that extended into the body as a

whole. Claimant also asserts the deputy erred by not finding him to be permanently and totally disabled.

I performed a de novo review of the evidentiary record before the presiding deputy workers' compensation commissioner and the detailed arguments of the parties. Pursuant to Iowa Code section 86.24 and 17A.15, those portions of the proposed arbitration decision filed on May 31, 2018, that relate to issues properly raised on intra-agency appeal are affirmed in part, reversed in part, and modified in part.

I affirm the deputy commissioner's finding that claimant failed to prove he sustained any permanent disability relating to his alleged head, mental, nose, and left hip injuries. I find the deputy commissioner provided a well-reasoned analysis regarding these alleged injuries. I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to these injuries.

However, for the reasons that follow, I modify the deputy commissioner's reliance on Dr. Kimelman's rating for claimant's bilateral lower extremity injuries, and I respectfully reverse the deputy commissioner's determination regarding claimant's alleged back injury. In doing so, I make the following findings of fact and conclusions of law:

FINDINGS OF FACT

Turning first to claimant's bilateral lower extremity injuries, Dr. Kimelman did not offer an impairment rating for claimant's left ankle because claimant had "well-preserved joint spaces." (Exhibit A, page 4) However, according to Jon Gehrke, M.D., claimant's treating surgeon, claimant's left ankle talus fracture left him with mild degenerative changes resulting in a two percent whole person impairment rating. (Joint Exhibit 3, p. 64) Given the severity of claimant's left ankle injury and the necessity of surgical repair, I find Dr. Gehrke's left ankle impairment rating more persuasive than the opinions offered by Dr. Kimelman. I therefore find claimant sustained a permanent injury to his left ankle, which resulted in a two percent whole body impairment.

While Dr. Kimelman gave an impairment rating for claimant's right lower extremity, he failed to identify which tables or sections of the AMA Guides to the Evaluation of Permanent Impairment, he relied upon in assigning his ratings. He offered only, "[Claimant] has permanency because of the meniscectomy performed to his RIGHT knee and the RIGHT intra-articular ankle injury with avascular necrosis . . . " (Ex. A, p. 4) Dr. Gehrke, on the other hand, identified clearly the table and page of the Guides which he relied upon to formulate his impairment ratings. For this reason, I find

Dr. Gehrke's rating for claimant's right lower extremity to be more persuasive than that assigned by Dr. Kimelman.

Dr. Gehrke assigned two separate impairment ratings for claimant's right lower extremity: a six percent whole body rating for claimant's subtalar joint changes and a two percent whole body rating for claimant's ankle joint changes. Using the Combined Values Chart in the Guides, this amounts to an eight percent whole body impairment for the right lower extremity.

Combining the eight percent whole body impairment for claimant's right lower extremity with the two percent whole body impairment for claimant's left ankle, I find claimant sustained a combined ten percent whole body impairment for his bilateral lower extremity injuries. The deputy commissioner's finding that claimant sustained a 20 percent impairment to the body as a whole for a right leg injury only is therefore modified.

Turning next to claimant's back injury, Dr. Kimelman opined, "While he has a herniated disc on magnetic resonance imaging, his original complaint was a hip injury that was established January 8, 2016, evaluated by Dr. Beecher. I cannot say with certainty that that was a posttraumatic event related to the accident." (Ex. A, p. 4) Apparently, relying on Dr. Kimelman's report, the deputy commissioner in her decision stated, "Claimant did not seek treatment for his back until the latter part of 2015 and the early part of 2016," and as a result "[t]he back and hip complaints were just too far removed in time from the work injury to have been causally connected." (Arbitration Decision, p. 15)

The medical records, however, reveal complaints of hip pain as early as July 17, 2013, at claimant's initial appointment with Daniel Miller, D.O., his occupational medicine doctor. (See JE 2, p. 12) These complaints continued, and by October 7, 2013, claimant told Dr. Miller he had "constant" pain in his bilateral hips. (JE 2, p. 23)

Through the remainder of 2013, claimant was instructed by Dr. Gehrke to walk at progressive levels of weight bearing after claimant's ankle surgeries. (See JE 3, pp. 45-53) At claimant's appointment on November 8, 2013, Dr. Gehrke recommended "progressive weight-bearing, perhaps using a cane," until claimant's right knee surgery. (JE 3, p. 53)

Claimant then underwent right knee surgery in early 2014. The records during claimant's recovery from knee surgery do not mention hip or back pain. (See JE 3, pp. 55-67)

However, upon returning to Dr. Gehrke in August of 2015, claimant again reported "hip pain bilaterally," though it was "primarily on the left side and seems to radiate from the low back into the back of the left leg." (JE 3, p. 69) It does not appear Dr. Gehrke offered any specific treatment for claimant's hip complaints.

On November 20, 2015, claimant presented at Madison County Memorial Hospital with pain that "start[s] in his buttock and radiates all the way down his leg." (JE 7, p. 90) He told the physician, Benjamin Beecher, M.D., that "the pain about the lateral aspect of his hip has been worse ever since" his fall at work on July 6, 2013. (JE 7, p. 90) Because Dr. Beecher was concerned claimant's pain was "coming from his back," he ordered an MRI of the lumbar spine. (JE 7, p. 91)

The MRI revealed "[b]road based left paracentral disc herniation with mild caudal extent at L5-S1" that "may affect the left S1 nerve root." (JE 7, p. 92)

After the MRI, claimant followed up with Matthew Biggerstaff, D.O., at Broadlawns Medical Center. Claimant reported back and left lower extremity pain since his fall at work in January of 2013. (JE 6, p. 85) Dr. Biggerstaff recommended an epidural steroid injection (ESI). (JE 6, p. 87)

Claimant underwent his first ESI on January 18, 2016. (JE 7, p. 93) He reported 80 percent relief for more than 4 weeks before the pain started to increase. (JE 6, p. 88) Claimant then had a repeat ESI on March 7, 2016. (JE 7, pp. 93-94)

At hearing, claimant was asked when he first started having problems with his low back. He explained:

> Well, I was complaining of my hip in the hospital and everything and come to find out, after - - after going through some doctors, that my back is what was actually making me think it was my hip. It's pinching a nerve that goes - - runs through my hip.

(Hearing Transcript, pp. 75-76)

This testimony is consistent with Dr. Beecher's concerns, the MRI, and the relief claimant experienced after his initial ESI.

Thus, while Dr. Kimelman was unable to relate claimant's back complaints to his work injury, his opinion is problematic for two reasons. First, he relied on the incorrect assumption that claimant did not complain of hip pain until January of 2016, when in fact claimant complained of hip pain within weeks of his work-related injury. Second, it does

not appear Dr. Kimelman considered the possibility that claimant's hip complaints were actually related to his back and herniated disc, as suggested by Dr. Beecher. For these reasons, I am not persuaded by Dr. Kimelman's opinion regarding claimant's back.

For these same reasons, I respectfully reverse the deputy commissioner's determination that claimant's back complaints were not causally related to his work injury. Like Dr. Kimelman, the deputy commissioner stated claimant did not seek treatment for his back until the latter part of 2015. Again, however, claimant complained of hip pain just weeks after his injury - hip pain that Dr. Beecher believed could be related to claimant's back.

Sunil Bansal, M.D., claimant's independent medical examiner, diagnosed claimant with an L5-S1 disc herniation consistent with the MRI. (Ex. 1, p. 23) Dr. Bansal stated the "mechanism of violently falling is also consistent with an acute L5-S1 disc herniation" and that such a fall would be "easily capable of aggravating any underlying spondylosis." (Ex. 1, p. 26) Dr. Bansal went on to assign a five percent whole body impairment rating for claimant's back injury. (Ex. 1, p. 28)

Consistent with Dr. Bansal's causation opinion is claimant's testimony regarding his back and hip symptoms before and after his July 6, 2013 work injury. Claimant acknowledged he had been diagnosed with, and treated for, hip bursitis before his July 6, 2013, fall, but he testified that prior to July 6, 2013, it did not prevent him from performing his construction work and was well controlled with medication. (Tr., pp. 60-61) His symptoms after the fall, however, were "worse" and "totally different than bursitis." (Tr., p. 76)

For these reasons, I find Dr. Bansal's opinion most persuasive with respect to claimant's back injury. I therefore find claimant sustained a five percent whole body impairment as a result of his work-related back injury. The deputy commissioner's finding that claimant did not sustain a permanent work-related back injury is therefore respectfully reversed.

Claimant at the time of the hearing was 46 years old. (Tr., p. 12) Claimant's career has consisted primarily of manual, physical labor primarily in the construction and carpentry field. (See Tr., pp. 18-33) He was hired by defendant-employer as a carpenter in 2013 and was working on an addition to a farmhouse when he was injured. (Tr., p. 37)

Due to his work-related injury, Dr. Gehrke initially opined claimant could only return to work in "a sedentary type capacity." (JE 3, p. 61) Dr. Gehrke subsequently

clarified this opinion, stating claimant was limited to "[s]it down duty on a permanent basis." (JE 3, p. 75)

This restriction significantly limits claimant's ability to return to the physical labor for which he was suited prior to his work-related injury. This is evidenced by claimant's failed attempts to return to the workforce in jobs that required standing, climbing ladders, and lifting and carrying trash bags and construction materials. (Tr., pp. 53-55) As discussed above, claimant has a five percent whole body impairment for his work-related back condition, along with a ten percent whole body impairment for the injuries to his bilateral lower extremities. The severity of claimant's work-related injuries and resulting permanent work restriction is supportive of a significant loss of earning capacity.

At the time of the hearing, however, claimant had not yet applied for any sedentary jobs. (Tr., p. 87) Defendants obtained a report from Tom Karrow, an independent vocational evaluator, and Mr. Karrow identified several job openings in the sedentary-to-light duty levels of work activity. (Ex. I, pp. 57-58) While I acknowledge some of these jobs may require claimant to be on his feet, claimant offered no evidence that there is not sedentary work available. Furthermore, claimant offered no evidence he would be physically incapable of performing sit-down work.

Ultimately, while I find claimant sustained a significant loss of earning capacity as a result of his work injury, he has not demonstrated a total loss of earning capacity. Considering claimant's age, educational background, employment history, work restrictions, failure to apply for work within his restrictions, as well as all other relevant industrial disability factors, I find claimant has sustained 75 percent industrial disability as a result of the July 6, 2013, work injury.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6)(e).

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).

In this case, I found the opinion of Dr. Bansal to be more convincing than that of Dr. Kimelman with respect to claimant's back injury. As a result, I found claimant sustained a five percent whole body impairment as a result of his work-related back injury.

Having determined claimant sustained a permanent disability to his back, claimant has an impairment to the body a whole. Iowa Code § 85.34(2)(u) (2013). The deputy commissioner's determination that claimant's disability should be compensated pursuant to Iowa Code section 85.34(2)(s) is therefore reversed.

Because 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).

Claimant asserts he is permanently and totally disabled under the traditional industrial disability analysis.

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work

that the employee's experience, training, education, intelligence and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disabilty, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 29, 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. 1982).

In this case, I found claimant sustained a significant loss of earning capacity, but not a total loss of earning capacity. Of great relevance was the fact that claimant's permanent work restrictions preclude him from returning to much, if not all of his prior employment. Claimant, however, failed to attempt to return to work within his restrictions. Considering these and all of the other relevant industrial disability factors, I find claimant sustained 75 percent industrial disability as a result of the work injury.

Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Iowa Code § 85.34. 75 percent industrial disability entitles claimant to 375 weeks of permanent partial disability benefits. The deputy commissioner's award of 100 permanent weeks of permanent partial disability benefits is therefore modified.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on May 31, 2018, is affirmed in part, reversed in part, and modified in part.

Defendants shall pay claimant, three hundred seventy-five (375) weeks of permanent partial disability benefits at the stipulated weekly benefit rate of three hundred sixty-one and 52/100 dollars ($361.52) commencing on June 28, 2014.

Defendants shall receive credit for all benefits paid to date.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten (10) percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two (2) percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding in the amount of one hundred twelve and 93/100 dollars ($112.93), and defendants shall pay the costs of the appeal, including the cost of the hearing transcript.

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

Signed and filed on this 1st day of November, 2019.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

David D. Drake (Via WCES)

Eric T. Lanham (Via WCES)