BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CARY STRAW, Claimant, vs. LARSON CONSTRUCTION CO., INC., Employer, and WEST BEND MUTUAL INSURANCE, Insurance Carrier, Defendants.	FILED APR 12 2019 WORKERS' COMPENSATION File No. 5057143 APPEAL DECISION Head Note Nos.: 1402.4, 1803, 2501

Defendants Larson Construction Company, Inc., employer, and West Bend Mutual Insurance, insurance carrier, appeal from an arbitration decision filed on November 15, 2017.

On March 29, 2019, the Iowa Workers' Compensation Commissioner delegated authority to the undersigned to enter a final agency decision in this matter. Therefore, this appeal decision is entered as final agency action pursuant to Iowa Code section 17A.15(3) and Iowa Code section 86.24.

Claimant sustained a work-related injury on August 15, 2015. The case went to hearing on August 15, 2017, and was considered fully submitted in front of the deputy commissioner on September 15, 2017. In her November 15, 2017 arbitration decision, the deputy commissioner determined claimant sustained a permanent disability as a result of his August 15, 2015 work injury that resulted in a 30 percent industrial disability. The deputy commissioner also determined defendants were responsible for all causally related medical treatment, including claimant's outstanding bill for an epidural steroid injection (ESI).

On appeal, defendants assert claimant did not meet his burden to prove his entitlement to permanent partial disability benefits or medical expenses. Defendants alternatively argue claimant's industrial disability is less than 30 percent.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal.

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 17A.15 and Iowa Code section 86.24, I affirm those portions of the proposed arbitration decision filed on November 15, 2017 that relate to issues properly raised on intra-agency appeal with additional findings, conclusions, and analysis, as set forth below.

FINDINGS OF FACT

I adopt the deputy commissioner's fact findings on pages 2 through 6 of the arbitration decision in their entirety. I make the following additional findings:

With respect to the nature of claimant's disability, I find a causal relationship between claimant's August 15, 2015 work injury and his permanent disability.

Defendants first argue Richard Neiman, M.D., who claimant obtained for his independent medical examination (IME) neglected to offer an opinion on causation. I disagree. While Dr. Neiman's report does not explicitly address causation in its own section or sentence, causation is clearly acknowledged in Dr. Neiman's report. Dr. Neiman's report indicates claimant's complaints go back to his work injury on August 15, 2015 when he stepped in a hole, and no other possible causes for claimant's disability are mentioned in the report. (Joint Exhibit 6, page 2) This is consistent with claimant's uncontroverted testimony that he never had any back problems before his work-related fall on August 15, 2015.

While I acknowledge the contrary opinion of defendants' authorized treating physician, Chad Abernathey, M.D., I do not find it to be convincing. Dr. Abernathey originally opined on July 1, 2016 that claimant's complaints were "consistent with a work injury of falling into a hole." (JE 5, p. 2) He also stated, "The patient tells me that his symptoms began on 8-15-15. Obviously, any discrepancy in the record purely raises the question of the veracity of the patient." (JE 5, p. 2) Dr. Abernathey eventually assigned a seven percent whole body impairment rating for claimant's spinal injury. (JE 5, p. 5)

Nearly a year after Dr. Abernathey's initial causation opinion, defendants presented Dr. Abernathey with evidence of what defendants described as "the significant lapse of time between [claimant's] injury and when he first began to seek

treatment for leg pain (without mentioning his back)." (JE 5, p. 7) In response, Dr. Abernathey changed his opinion. He opined, through a check-the-box letter drafted by defendants, that claimant sustained "at most a temporary soft-tissue strain and/or temporary aggravation of preexisting degenerative condition in relation to his alleged work incident of August 15, 2015, which would have healed within a time period of several months and which did not result in any permanent impairment." (JE 5, p. 7)

As correctly noted by defendants in their letter to Dr. Abernathey, claimant did not immediately seek treatment for leg or back pain, but this is not a fact claimant attempted to hide. Instead, claimant consistently reported to various individuals and medical providers that he felt a pinch or needle sensation immediately after his fall but did not develop pain until months later. (See JE 4, p. 1 ("Setting concrete walking backwards – slipped in a hole twisting back [and] had a needle pain in the low back . . . but few months later pain radiated to left leg to the foot."); JE 6, p. 2 ("He stepped in a hole and twisted. Felt a little twinge of discomfort. . . . Continued to work and about 2 months later, the left leg was painful.")) Most notably, claimant reported this delay in the onset of his leg symptoms to defendant-insurer on May 31, 2016, just one month before his evaluation with Dr. Abernathey. (JE 7, pp. 9, 11 ("And I was walking backwards with it and I fell into a hole and then I went to catch myself and I twisted and it kinda had a little pain to it but I continued working . . . . [L]ater through the year it just kept getting a little bit worse and a little bit worse and then I got this, started getting this pain down to my legs, to my butt and down my let leg.")) I find it very unlikely that claimant would present a different history to Dr. Abernathey at his evaluation on July 1, 2016.

Regardless, even assuming Dr. Abernathey was not previously aware of the delay in the onset of claimant's leg symptoms, Dr. Abernathey's revised opinion does not make sense when considered against the timeline of claimant's symptoms. Per Dr. Abernathey's revised opinion, claimant sustained a temporary injury that "would have healed within a time period of several months." (JE 5, p. 7) Claimant's symptoms, however, actually worsened over the course of several months, eventually requiring surgery. Further, if claimant's August 15, 2015 injury should have healed within several months, it does not make sense that claimant's complaints as of July 1, 2016 were "consistent with a work injury of falling into a hole." (JE 5, p. 2)

For these reasons, I do not find Dr. Abernathey's revised opinion to be persuasive. Instead, relying on Dr. Neiman's report and claimant's testimony, I affirm the deputy commissioner and find claimant sustained a permanent disability as a result of his August 15, 2015 work injury.

Regarding the extent of claimant's industrial disability, I adopt the following findings of the deputy commissioner:

> At the time of the hearing Straw was fifty-eight. (Tr., p. 6) Straw attended school through the eighth grade and he has not received any additional formal education. (Tr., pp. 6-7) Straw has worked in the concrete business for many years, and he has a significant criminal history. Following his work injury Straw returned to Larson Construction as a full-time employee. He continues to perform concrete work, but he cannot perform all the duties he used to perform. Straw can operate a skid loader and a mini hoe. He has also prepared bids for self-employment projects in the past. (Tr., p. 53) Straw is a hard worker who takes pride in his work.
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> (Arb. Dec., p. 9)

Ultimately, while claimant continued to be employed by defendant-employer at the time of the hearing, his August 15, 2015 work injury left him physically incapable of performing many of the duties he previously performed for defendant-employer and at least one of the prior jobs he previously held. (Tr., pp. 38-39, 54) I therefore affirm the deputy commissioner and find claimant sustained a 30 percent loss of earning capacity due to his August 15, 2015 work injury.

The final issue raised on appeal is the outstanding medical bill for claimant's ESI. Claimant returned to work with defendant-employer in the fall of 2016. (Tr., p. 35) By the spring of 2017, claimant was experiencing "[e]xtreme pain" in his lower back and into his leg. (Tr., p. 35) He tried contacting Dr. Abernathey's office, but he was told to get authorization through defendants. (Tr., p. 35) As a result, on April 14, 2017 and May 13, 2017, claimant's counsel sent letters to defendants' counsel asking defendants to authorize an appointment with Dr. Abernathey. (JE 11, pp. 1-2) Claimant testified he was eventually seen by Dr. Abernathey who then referred claimant for the ESI. (Tr. pp. 36-37) The ESI was apparently performed on June 1, 2017. (See Tr., p. 37; JE 11, pp. 3-4)

Before the ESI was performed, however, Dr. Abernathey issued his revised opinion in which he stated "no further medical treatment would be causally related to, or necessitated by, this alleged incident." (JE 5, p. 7) Thus, I find that at the time of claimant's ESI, defendants were contesting liability for claimant's ongoing complaints.

The ESI was in response to claimant's complaints of pain in his lower back and down his leg—the same complaints that I found were caused by his August 15, 2015 work injury. Thus, I find claimant's ESI was causally related to his August 15, 2015 work injury.

Claimant testified Dr. Abernathey recommended the ESI and that it reduced his pain by 60 percent. (Tr., pp. 37-38) I therefore find the ESI was reasonable.

CONCLUSIONS OF LAW

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).

Defendants argue on appeal that claimant cannot satisfy his burden to prove his entitlement to permanent partial disability benefits because he is "legally required" but does not have "an expert opinion that causally related his work injury to his claim of permanent disability." (Defendants' Appeal Brief, p. 8)

First, this is a misstatement of claimant's burden under the law. As discussed above, causation is ordinarily within the domain of expert testimony, but lay witness testimony is both relevant and material on the issue of cause and extent of an injury. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 273 (Iowa 1995). As explained by the Iowa Court of Appeals:

> While our case law emphasizes that expert opinion testimony is "ordinarily" necessary to establish causation, *e.g. Schutjer v. Algona Manor Care Ctr.,* 780 N.W.2d 549, 560 (Iowa 2010) ("*Ordinarily,* expert testimony is necessary to establish the causal connection between the injury and the disability for which benefits are claimed." (emphasis added)), there is nothing in our law that states expert opinion is the "sole" basis on which a causation finding must be made. Rather, our law allows the commissioner the option of wholly rejecting uncontroverted expert opinion testimony after considering *all* evidence that is relevant and material. In other words, the commissioner could find the nonmedical evidence sufficient to support a causation finding even in the face of uncontroverted expert medical opinion testimony to the contrary. Accordingly, we find expert witness evidence, although typically necessary to establish causation, is not required to establish causation in every workers' compensation case.

Martinez Const. v. Ceballos, 836 N.W.2d 152 (Iowa Ct. App. 2013) (table).

Further, claimant does have an expert opinion that causally relates claimant's work injury to his claim of permanent disability. While Dr. Neiman's report does not contain an explicit sentence or section on causation, I found Dr. Neiman's report implicitly recognizes causation given Dr. Neiman's reference to claimant's August 15, 2015 work injury and no other possible causes.

Relying on Dr. Neiman's report in tandem with claimant's credible and consistent testimony, I affirm the deputy commissioner and conclude claimant satisfied his burden to prove he sustained a permanent disability as a result of his August 15, 2015 work injury.

The parties stipulated in the hearing report that any permanent disability is industrial in nature. 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).

I adopted the deputy commissioner's fact findings regarding the extent of claimant's disability. I therefore affirm the deputy commissioner and conclude claimant satisfied his burden to prove he sustained a 30 percent industrial disability.

The final issue to be decided on appeal is whether defendants are responsible for the outstanding bill for claimant's ESI.

Generally speaking, Iowa Code section 85.27 gives defendants the right to control medical care. However, "the employer has no right to choose the medical care when compensability is contested." Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010). Defendants are also precluded from asserting an authorization defense as to any future treatment during their period of denial. Brewer-Strong v. HNI Corp., 913 N.W.2d 235, 243-45 (Iowa 2018); Bell Bros., 779 N.W.2d at 204.

If a claimant later "establishes the compensability of the injury at a contested case hearing, then the statutory duty of the employer to furnish medical care for compensable injuries emerges to support an award of reasonable medical care the employer should have furnished from the inception of the injury had compensability been acknowledged." Id.

In the instant case, I found defendants were contesting liability of claimant's condition at the time he received the ESI. Thus, I conclude defendants cannot assert (and do not appear to be asserting) an authorization defense for the ESI. Instead, I conclude claimant need only prove that the ESI was reasonable and causally related to his August 15, 2015 injury.

As discussed above, I found sufficient evidence that claimant's ESI was both causally related to his August 15, 2015 injury and reasonable. I therefore affirm the deputy commissioner and conclude defendants are responsible for payment of the ESI.

ORDER

THEREFORE, IT IS ORDERED:

The arbitration decision filed on November 15, 2017 is affirmed with my additional findings, conclusions, and analysis.

Defendants shall pay the claimant one hundred and fifty (150) weeks of permanent partial disability benefits at the rate of four hundred fifty-six and 74/100 dollars ($456.74), commencing on September 20, 2016.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten 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 percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

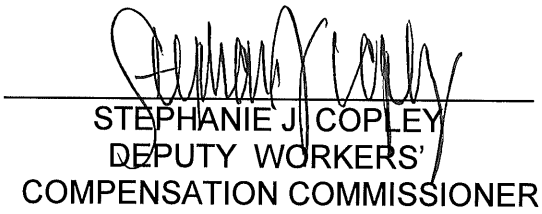
Defendants are entitled to a credit for benefits previously paid.

Defendants shall reimburse the claimant for all causally related medical bills totaling three thousand two hundred eighty-eight and 42/100 dollars ($3,288.42).

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

Defendants shall bear the cost of this appeal.

Signed and filed this 12th day of April, 2019.



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