

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JEFFERY B. SMITH,

Claimant,

vs.

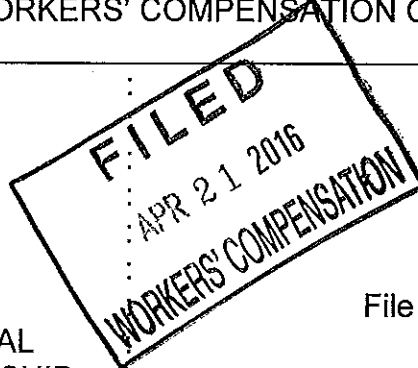
THE TERMINEX INTERNATIONAL
COMPANY, LIMITED PARTNERSHIP,

Employer,

and

AMERICAN ZURICH INSURANCE
COMPANY,

Insurance Carrier,
Defendants.



File No. 5050638

ARBITRATION
DECISION

Head Note Nos.: 1402.40, 1802, 1803

STATEMENT OF THE CASE

Jeffery B. Smith, claimant, filed a petition in arbitration seeking workers' compensation benefits from The Terminix International Company, Limited Partnership, and their workers' compensation carrier, American Zurich Insurance Company. Hearing was held on January 21, 2016. Presiding at the hearing was Deputy Workers' Compensation Commissioner Erin Q. Pals.

Claimant, Jeffery B. Smith, was the only witness who testified live at trial. The evidentiary record also includes claimant's exhibits 1-13 and defendants' exhibits A-K. Unfortunately, the parties offered duplicate exhibits; citation is only made to one of the exhibits. The parties submitted a hearing report at the commencement of the evidentiary hearing. On the hearing report, the parties entered into certain stipulations. Those stipulations are accepted and relied upon in this decision. No findings of fact or conclusions of law will be made with respect to the parties' stipulations. At the beginning of the hearing claimant withdrew his claim for penalty benefits.

The parties requested the opportunity for post-hearing briefs which were submitted on February 11, 2016.

ISSUES

The parties submitted the following issues for resolution:

1. Whether the August 30, 2013, work injury caused permanent disability. If so, the nature and extent of permanent disability.
2. Whether claimant is entitled to additional temporary total disability or healing period benefits.
3. Assessment of costs.

FINDINGS OF FACT

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

Smith has carried his burden of proof to show that he sustained permanent impairment and is entitled to additional healing period benefits as a result of the August 30, 2013 work injury with Terminix.

At the time of hearing Jeffery B. Smith (hereinafter "Smith") was 41 years of age. He was living with his girlfriend and her four children in Des Moines. Smith was not employed.

Smith grew up in Texas. He did not graduate from high school but he did obtain his GED in 1991. He enlisted in the Army where he worked as a cook. While in the Army he married his first wife and they had a daughter. Smith was honorably discharged from the Army in 1995. In 1996 he went through a divorce and moved to Ohio to work in the food service industry. He worked for the Ambassador Hotel as a sous chef and earned approximately \$28,000.00 per year. He testified that he also bought and sold restaurants. Smith returned to Texas for two years and started a restaurant. Smith worked in the food service industry from approximately 1996 to 2000. His earnings ranged from \$28,000.00 per year to \$62,568.00 per year. However, Smith felt that the food service industry was tough on his personal life. (Testimony; Exhibit 8 pages 6-8)

Smith then moved to Kansas and worked for Aramark in route delivery earning approximately \$800.00 per week, plus a bonus. In 2003 Smith went to work for Blue Sky Satellites (hereinafter "Blue Sky"). At Blue Sky he sold and installed satellite dishes where he earned from \$1,400.00 to \$1,800.00 per week. He worked at Blue Sky from 2003-2010. According to his answers to interrogatories he moved to Des Moines and began working for Tel Star Satellites in 2009. He was the Des Moines area manager. He earned between \$1,300.00 and \$1,500.00 per week. He left Tel Star to work for DirecTV. He worked there from 2010-2012 as a satellite tech. He earned \$800.00-\$1000.00 per week. Because he felt he was not making enough money he went to

work for White Communications, LLC as a regional manager. He earned approximately \$2,000.00 per week. His position was terminated in 2012. From 2012 to 2014 he was the owner of WCC73LLC. He owned and continues to own this business which fulfilled DirecTV in Arkansas. He earned \$20,000.00-\$30,000.00 and worked approximately 4 hours per week. He testified that this was a "sweet deal" because he just got paychecks. However, he testified that he could not afford the general liability and workers' compensation insurance so he ended the business. (Testimony; Ex. 8 pp. 6-8)

In June or July of 2013 he began working for Terminix. He initially worked as an outside sales representative. At Terminix's request Smith switched to the service division in August of 2013. Terminix made the request because they were shorthanded in the service division. He drove a company vehicle. His duties included making sales calls, inspecting clients' properties, and making product recommendations. He also mixed chemicals, went into customers' crawl spaces and attics, and dug multiple holes in the ground by hand. He was also required to carry a backpack with rodent/pest extermination chemicals; this weighed approximately 40 to 50 pounds. (Ex. 10)

Claimant testified that while working for Terminix around August 30, 2013, the company vehicle started to irritate his back. This was also around the time he was digging holes with a hand auger. Prior to this time his back had bothered him a bit so he went to his service manager who gave him some ibuprofen. However, in late August his back worsened so he went to Chris Brown, the manager who advised him to go see a chiropractor. (Testimony)

Smith treated with Tom Lloyd III, D.C. at Enhanced Health Chiropractic but he did not receive any significant relief. Smith was initially seen on September 9, 2013 and reported pain in his left lower back/SI region. The notes indicate that his gait was abnormal due to pain and muscle tightness. Dr. Lloyd treated Smith 12 times from September 9 through October 7, 2013. The chiropractor noted that at his last appointment with Smith the patient indicated he would seek treatment with the Veteran's Administration. (Ex. 1, pp. 1-6) Smith testified that prior to this he had never treated with a chiropractor.

Because Smith did not receive any relief from the chiropractic treatment he tried acupuncture in the hopes of being able to return to work. However, acupuncture also did not provide any significant relief. (Testimony; Ex. 2)

Smith was seen at the V.A. in Des Moines on October 11, 2013. He reported back pain which he attributed to doing a significant amount of physical labor, specifically digging post holes. It was recommended that he undergo physical therapy. (Ex. 6, pp. 1-3)

Smith also sought treatment from Kenneth Van Wyk, D.C. Smith saw Dr. Van Wyk one time and that was on October 29, 2013. He reported back pain that he believed was caused by driving and hand digging. (Ex. 3, pp. 1-2) Dr. Van Wyk noted that Smith's lumbar spine range of motion was extremely limited. He referred

Smith back to the VA for epidural and physical therapy. Smith testified that Dr. Van Wyk was really more of a liaison with the Veteran's Administration. (Testimony; Ex. 3)

Smith began physical therapy at the V.A. on October 17, 2013. He reported that he was trying to perform his job but he was unable. (Ex. 6, pp. 4-7)

On October 31, 2013, Smith underwent an MRI of the lumbar spine. The MRI revealed minimal left neural foraminal narrowing at L5-S1. (Ex. 6, pp. 8-9)

On November 19, 2013, Smith saw Nathan Hinkeldey, D.C. During testimony Smith referred to Dr. Hinkeldey as "Dr. Nate." He was assessed as having L5/S1 disc herniation without radiculopathy and hip flexor contracture. Dr. Nate felt that Smith's symptoms correlated with his MRI. Smith continued to treat with Dr. Nate. By the end of November Smith reported that his pain was 50 percent better. However, on December 18, 2013, Smith reported that he had a slight exaggeration which resulted in additional pain. On January 17, 2014, Smith reported he was 70 percent better and that he wanted to get back to work. During treatment Dr. Nate noted that Smith did not want pain medications because he had a coworker who had become addicted to pain medicine. Smith reported that he had been administratively let go by his employer. During this time Smith also received additional physical therapy at the V.A. On March 23, 2014, Smith reported that he was able to get approximately 5 hours of sleep each night and that there was no radiation in the left calf, the radiation only went to his knee. He was happy with his progress and was even able to practice with his son's baseball team. However, in April of 2014, Smith had an increase in pain. He said he overdid it by participating in a full three hour baseball practice. By May, Smith was tired and depressed, and sick of being in pain. Smith and Dr. Nate discussed how he had failed physical therapy twice, chiropractic care, and epidural. They also discussed neurosurgery but Smith continued to smoke and that made him a poor surgical candidate. Smith indicated he would begin the process of smoking cessation. (Ex. 6, pp. 11-39)

Smith saw David Boarini, M.D. at the Iowa Clinic on July 9, 2014. He reported back pain with radiation down the left leg which Smith attributed to his work digging holes. Dr. Boarini reviewed Smith's MRI and examined Smith. He felt he had a benign lumbar radiculopathy. Dr. Boarini did not think there was any urgency of surgical intervention. If symptoms worsened Smith was to call Dr. Boarini to consider a decompression. (Ex. 4)

On April 13, 2015, Smith returned to Dr. Boarini for neurosurgical follow up. He reported back pain with radiation down the left leg and wanted to discuss surgery. It is noted that Dr. Boarini states Smith's pain all started with some fairly serious weight lifting. (Ex. 4, p. 18) During his testimony at hearing Smith denied any such activity. Dr. Boarini again reviewed his MRI and noted a small disk defect at L5-S1. He noted Smith had normal strength and gait and that he had a positive straight leg raise on the left. Dr. Boarini explained to Smith that his chronic back issues probably would not get

better with a simple disk operation. Dr. Boarini felt Smith was really not doing "very badly" right now and Smith should call if his symptoms worsen. (Ex. 4, pp. 18-19)

The last note in evidence from the V.A. is dated June 22, 2015. Dr. Nate felt he had plateaued from the current plan and was being released from treatment. Dr. Nate noted Smith had resumed 90 percent of his previous function. He opined he should have a 50 pound lifting restriction. The notes also indicate that no further therapy was indicated and surgery was recommended against. (Ex. 6, pp. 40-44)

At the defendants' request claimant was seen at Iowa Ortho by Todd J. Harbach, M.D. for an independent medical examination (IME) on September 4, 2015. Following his examination of Smith and review of the medical records that were provided to him, Dr. Harbach issued a written report. Dr. Harbach noted that all Smith wanted to do is go back to work; however, he did not have a driver's license at that time. He reported that bending, lifting, and twisting reproduced pain. Smith described his low back pain as persistent and achy and sharp. Dr. Harbach assessed Smith as having low back pain, radicular pain of the left lower extremity, and pain in his limb. He agreed that Smith had reached MMI as of April 13, 2015, his last appointment with Dr. Boarini. Dr. Harbach opined that because Smith only had intermittent pain, which was non-verifiable on exam he had not sustained any permanent impairment. Dr. Harbach did not place any restrictions on Smith's activities, nor did he feel that he would require any future treatment. Dr. Harbach specifically stated that he believed Smith was fit to return to full work and full activities. (Ex. F)

At his attorney's request, claimant underwent an IME on October 7, 2015, with Jacqueline M. Stoken, D.O. Following her examination of Smith and review of the medical records that were provided to her, Dr. Stoken issued a written report. At the time of the examination Smith reported pain in his hip, leg, and back which he described as shooting, stabbing, sharp, nagging, and miserable. He estimated the pain ranged from 2 to 8 on a scale of 1 to 10. Dr. Stoken opined that she would award Smith 13 percent impairment of the whole person due to his chronic low back pain and radiculopathy which she related to his work for Terminix. She placed him at maximum medical improvement (MMI) as of August 1, 2014. She recommended work restrictions to avoid repetitive bending, twisting, and lifting. He was also to avoid lifting more than 10 pounds on a constant basis, 25 pounds on a frequent basis and 50 pounds on an occasional basis. She indicated that this placed him in the medium work category. She felt it reasonable future treatment would include pain management and estimated it could cost \$2,000.00 to \$10,000.00 annually. (Ex. 7)

The parties stipulated that Smith sustained an injury to his back which arose out of and in the course of his employment with Terminix on August 30, 2013. Smith contends that he has sustained permanent disability as a result of the work injury; defendants dispute any permanency. In the present case, Dr. Nate was the individual who primarily provided treatment to Smith for his work injury. Dr. Nate did not offer any opinions regarding permanent impairment. Dr. Nate did state that Smith should have a 50 pound lifting restriction.

Defendants obtained the opinion of orthopaedic surgeon, Dr. Harbach. Dr. Harbach concluded that due to the claimant's non-verifiable intermittent pain he did not sustain any permanent impairment. Additionally, he opined that once Smith healed after his herniated disk and once he returned to baseline he did not require any future restrictions placed on his activities.

Claimant obtained the opinion of Dr. Stoken who is board certified in physical medicine and rehabilitation. She assigned 13 percent impairment of the whole person and assigned restrictions which place Smith in the medium work category.

Smith testified that he continues to have back pain although it is no longer constant pain. He continues to have symptoms that shoot down his leg. A review of the medical evidence demonstrates that Smith's symptoms are consistent with the MRI findings. After consideration of the testimony and records, I find that Dr. Stoken's opinions are more consistent with the record as a whole. Based on her opinions I find that Smith has sustained 13 percent impairment to his body as a whole as a result of the work injury. I further find that as a result of the work injury he has the following permanent restrictions: avoid lifting more than 10 pounds on a constant basis, 25 pounds on a frequent basis and 50 pounds on an occasional basis. I find that Smith's job at Terminix required him to work outside of these restrictions.

As of September 2013, Smith was unable to perform his pre-injury job at Terminix. Since that time he has been unemployed. Smith testified that he looked for work at numerous Hy-Vee stores, in all departments. He has also looked into an assistant manager position at Panera. Additionally, he explored the possibility of a property management position and also working for the United States Postal Service. However, he has not had any job offers. He has not looked into getting his CDL. He also has not looked into owning another business such as WCC73LLC. Smith testified that his girlfriend is employed and he now cares for the children. Smith does not believe he could go back to satellite installation work due to the lifting and carrying that is required. While Smith has at least explored several potential jobs it does not appear that he has exerted much effort to try and return to the workforce. To his credit, Mr. Smith has numerous skills in a variety of fields, ranging from culinary to satellite to exterminating. He testified that although he cannot program a computer he can perform business tasks with a computer such as spreadsheets. I find that Mr. Smith has a number of transferable skills that would make him employable should he put forth greater effort in an attempt to gain employment.

Considering Smith's age, educational background, employment history, ability to retrain, numerous transferable skills in a variety of industries, length of healing period, permanent impairment, and permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that Smith has sustained a 20 percent loss of future earning capacity as a result of his work injury with Terminix. The parties have stipulated that the permanent partial disability benefits shall commence on April 15, 2015.

Smith is seeking healing period benefits. Defendants stipulate that the work injury was the cause of temporary benefits. Claimant contends he is entitled to healing period benefits from October 15, 2013 through April 15, 2015. This is the period of time wherein Smith was unable to work at Terminix, treating for injury, and had not yet reached MMI. It was during this time Dr. Nate indicated that Smith was unable to work and was treating in the hopes of being able to return to work. I find claimant has shown entitlement to healing period benefits from October 15, 2013, through April 14, 2015. Defendants shall receive a credit for the weekly benefits paid to date.

Finally, claimant is seeking an assessment of costs. Costs are to be assessed at the discretion of the deputy workers' compensation commissioner hearing the case. Specifically, claimant is seeking an assessment of costs for the petition filing fee in the amount of \$100.00 and the service of processing fees of \$12.98. Thus, defendants are responsible for costs in the amount of \$112.98.

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).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from

cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

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).

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.

Based on the above findings I conclude claimant has sustained 20 percent loss of industrial disability. Therefore, claimant is entitled to 100 weeks of permanent partial disability benefits commencing on the stipulated date of April 15, 2015.

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

Based on the above findings of fact I conclude claimant is entitled to healing period benefits from October 15, 2013 through April 14, 2015. Defendants shall receive a credit for the weekly benefits previously paid.

Costs are to be assessed at the discretion of the deputy commissioner hearing the case. Because claimant was generally successful in his claim I find it is appropriate to assess costs against the defendants as set forth above. Thus, defendants shall reimburse claimant costs in the amount of \$112.98.

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of two hundred ninety-eight and 94/100 dollars (\$298.94).

Defendants shall pay healing period benefits from October 15, 2013 through April 14, 2015.

That defendants are to pay unto claimant one hundred (100) weeks of permanent partial disability commencing on April 15, 2015.

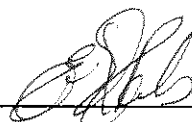
All past due weekly benefits shall be paid in lump sum with applicable interest pursuant to Iowa Code section 85.30.

Defendants shall be entitled to credit for all weekly benefits paid to date.

Defendants shall reimburse claimant's costs in the amount of one hundred twelve and 98/100 dollars (\$112.98).

Defendants 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 21st day of April, 2016.


ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Erik A. Luthens
Attorney at Law
1200 Valley West Dr., Ste. 304-01
West Des Moines, IA 50266
erikluthens@luthenslaw.com

Andrew D. Hall
Attorney at Law
PO Box 10434
Des Moines, IA 50306-0434
ahall@grefesidney.com

EQP/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.