BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
MAR 05 2019
WORKERS COMPENSATION

DARRYL W. GALLE, Claimant, vs. FLYNN COMPANY, INC., Employer, and MIDWEST BUILDERS CASUALTY MUTUAL COMPANY, Insurance Carrier, Defendants.	File No. 5058981 ARBITRATION DECISION Head Note Nos.: 1100, 1802, 1803, 2500

STATEMENT OF THE CASE

Darryl Galle, claimant, filed a petition in arbitration seeking workers' compensation benefits from his employer, Flynn Company, Inc. and their workers' compensation insurance carrier, Midwest Builders' Casualty Mutual Company. The matter proceeded to hearing on October 16, 2018. Defendants requested an extension of time to file post-hearing briefs. The parties submitted post-hearing briefs and the matter was considered fully submitted on December 3, 2018.

The evidentiary record includes: Joint Exhibits JE1 through JE7 and Claimant's Exhibits 1 through 6, and 9. Defendants initially offered Exhibits A, B and C. Claimant objected to Exhibits A and B. Ruling was reserved and the parties communicated to the undersigned post-hearing, that claimant withdrew his objection to Exhibit A and defendants withdrew their offer of Exhibit B, thereby resolving the objections and resulting in Defendants' Exhibits A and C being admitted. Claimant provided testimony at hearing.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury that arose out of and in the course of his employment with defendant employer on October 19, 2016.
2. Entitlement to temporary disability benefits for the period of June 29, 2017 through March 20, 2018, and proper commencement date of permanent partial disability (PPD) benefits, if any.
3. Whether the injury was the cause of permanent partial disability, and if so, the extent thereof.
4. Reimbursement of medical expenses.
5. Reimbursement of independent medical evaluation (IME), 85.39.

FINDINGS OF FACT

After a review of the evidence presented, I find as follows:

Darryl Galle, claimant, was 54 years old at the time of the hearing. (Tr. p. 17) He graduated from high school in 1982, and attended Lincoln Tech where he completed an automotive diesel course and graduated with a certificate. (Tr. p. 54)

Employment History

Claimant's work history involves primarily labor intensive employment. (Tr. p. 59) Claimant previously worked for Truck Country of Iowa, as the shop foreman. His job involved management duties, including but not limited to, assigning work and preparing billing statements, in addition to working as a mechanic. (Tr. p. 59) Claimant worked at Taylor Construction as a shop manager and lead mechanic working on heavy equipment. (Tr. p. 58) He also worked for Tschiggfrie Excavating as a heavy equipment specialist, similar to his job at Flynn Company, the defendant employer in the pending matter. (Tr. p. 55).

As a heavy equipment mechanic claimant lifted up to 150 pounds. (Tr. p. 56) He also did "[l]ots of bending, twisting, stooping, crawling, climbing," and "standing and walking." (Tr. p. 56)

Flynn Company, the defendant employer, is a portable concrete contractor engaged in building roads. They set up portable concrete plants and use heavy equipment such as pavers, loaders, earth movers and dump trucks. (Tr. p. 20) Claimant began working for Flynn Company in April 2016. (Tr. p. 20) He maintained and repaired the equipment, from pick-up trucks to heavy equipment. He worked about

60 to 70 hours per week in the field, except during the winter his hours were less. (Tr. pp. 20-21) He earned $23.97 per hour. (Tr. p. 21) Claimant testified that he was terminated on June 28, 2017, and was told it was due to downsizing, although he was not aware of any other employees terminated. (Tr. pp. 38-39) Claimant's last day of actual work for the defendant employer was about December 20, 2016. (Tr. p. 61)

On September 26, 2017, about nine months after his termination, claimant reported not working since the injury. (Ex. JE2-43) He stated that he looked for work unsuccessfully and eventually applied for Social Security Disability and was approved. (Tr. p. 53) However, he went off Social Security Disability because he "needed" to go back to work. (Tr. p. 53)

Claimant had surgery on his back in September 2017. (Ex. JE2-50) Following his release, he tried to return to Flynn Company. He filled out an application for the position of shop manager. He was told he would need a doctor's release. Claimant testified that he provided a doctor's release but was not offered the job nor was he contacted about his application. (Tr. pp. 43, 65)

After being terminated by the defendant employer, claimant worked for a short time at PMA Insurance, "trying to sell health insurance." (Tr. p. 62)

Claimant then worked for Kordell Truck and Trailer Sales as a mechanic. He worked about 45 hours per week, earning between $27.00 and $29.00 per hour. Claimant testified that "[b]efore my 90 days, I was told it wasn't working out and was let go." (Tr. p. 51) The job required prolonged standing, bending, twisting and lifting up to 100 pounds, which claimant said caused "[e]xtreme pain." (Tr. pp. 51-52)

Claimant was then hired by Ra-ly Transport, doing maintenance work on semis and trailers, earning $29.00 per hour. He continued to work for Ra-ly at the time of the hearing. (Tr. pp. 48-49, 76-77) He works 50 hours per week. (Tr. p. 49) Claimant testified that the job makes him "extremely sore before the end of the day," and when he gets home, he lies down. (Tr. p. 49) He is currently looking for other work, because he is concerned that he will not be able to continue doing the physical maintenance type work. (Tr. pp. 49-50)

At the time of the hearing, claimant had a job offer from Vspec in Cedar Rapids to work as a heavy equipment claims specialist, which is "a desk job." (Tr. p. 50) Claimant testified that this job would involve a significant pay cut and daily drive, but he felt that "physically, I pretty much have to take the job," although he had not done so at the time of the hearing. (Tr. p. 80)

The Alleged Injury

Claimant asserts injury to his low back with pain radiating into his left leg. (Tr. p. 27)

On October 19, 2016, claimant was at a job site working on a loader. He was going down a ladder attached to the loader and fell off. He testified that he fell about four feet to the ground and landed on hard packed gravel on his left foot, falling to his buttock and back. (Tr. pp. 22-23) No one witnessed the fall, which occurred before 7:00 a.m. Claimant's maintenance work had to be done before and after the regular work day, when the machines were not in use. (Tr. pp. 22, 24) After the fall, claimant described having pain, and sitting in his work truck for about ten minutes to gather himself. (Tr. pp. 24-25) He finished working his regular shift. (Tr. p. 25) He did not report the incident on the day that it happened, hoping he could "just walk it off and not have to see a doctor over it." (Tr. p. 25)

Claimant did not report the injury until "[a]fter I was recalled back to the shop," in November 2016. (Tr. p. 26) Claimant testified that he reported the injury to Jeff Schueller in November 2016. (Tr. p. 26)

I find that claimant testified credibly concerning the occurrence and mechanism of injury.

Prior Medical

While working for Taylor Construction in 2009, claimant had low back pain. He had physical therapy, chiropractic treatment, and saw several medical doctors. He received medical treatment including radiofrequency ablation. (Tr. p. 28) Claimant testified that the diagnosis was a strain and that he was told the symptoms should go away with time. (Tr. p. 29) Claimant testified that he did not have any pain radiating into his legs with this injury and no physician recommended surgery, but that after his release, his back pain never completely went away. (Tr. pp. 29, 31) He eventually returned to work with no restrictions. Claimant recalls filing a workers' compensation claim and reaching a settlement concerning this injury. (Tr. p. 29) Claimant testified that following this injury and his release to return to work, despite some lingering pain, he was able to do all of his work duties for the defendant employer without any trouble. (Tr. pp. 29, 31)

Claimant was taking anti-inflammatory medication during the time leading up to October 19, 2016, which was prescribed by Ryan Stille, M.D. of Medical Associates, claimant's family physician.

Post-Injury Medical

After the injury, claimant went to his family physician, Dr. Stille, at Medical Associates and reported pain in his left hand and back/leg. Claimant testified that his medial lower leg was falling asleep, which he noticed when he would stand for prolonged periods of time. (Ex. JE2-1) Claimant confirmed that his left hand complaints are not related to this claimed work injury. (Tr. p. 32)

Dr. Stille described claimant's back condition as chronic, but noted a "[p]robable exacerbation with new symptoms coming down on the left medial lower leg." (Ex. JE2-2) This is consistent with claimant's testimony that the left leg symptoms were new with this injury. Dr. Stille recommended an MRI.

The MRI obtained November 2, 2016, showed lumbar disk disease, more notably involving the L3-4 through L5-S1 and including mild L4-5 spinal stenosis, a relatively severe right L4-5 and left L5-S1 neural foraminal stenosis with impingement upon the right L4 and/or left L5 nerve roots. (Ex. JE2-7)

After reporting the injury to his employer, he was sent to Margaret Mulderig, M.D. on January 19, 2017. (Ex. JE2-11) He told Dr. Mulderig about getting injured at work when he fell off a machine and his pain on the left side of his back and numbness and pain down the left lateral leg to the ankle. (Ex. JE2-11) Dr. Mulderig diagnosed left lumbar radiculopathy. (Ex. JE2-12) Claimant was placed on work restrictions of no lifting, carrying, pushing or pulling more than ten pounds, no repetitive bending, lifting or twisting of his neck or back and no standing more than five minutes per hour. (Ex. JE2-15) Claimant testified that the employer could not accommodate these restrictions. (Tr. p. 35)

Following unsuccessful conservative care, Dr. Mulderig referred claimant to Michael Chapman, M.D., an orthopedist. (Ex. JE2-16, 25)

On March 27, 2017, claimant was seen by Dr. Chapman. Claimant described the work injury and pain in his back and left leg. (Ex. JE2-25) Before this work incident, claimant had back pain, but it was controlled with anti-inflammatory medication. (Ex. JE2-25) "Since this injury in October [he has] been unable to work and then he was laid off in December. His pain is no better today that it was at the time of injury." (Ex. JE2-25) Claimant's pain increased with walking and standing.

Dr. Chapman recommended decompression and fusion surgery. (Ex. JE2-26)

Claimant testified that he wanted to proceed with the surgery, but defendants denied authorization for surgery based on an opinion from Chad D. Abernathey, M.D. (Tr. p. 37; JE1-3)

On May 17, 2017, Dr. Abernathey stated that claimant's current condition of low back pain was "related to his 10-19-16 injury by history provided by the patient," but that "[t]here are no acute or objective changes on his imaging studies." (Ex. C-1) Dr. Abernathey stated that claimant had a "chronic history of intermittent low back pain . . . for many years." (Ex. JE1-3) Dr. Abernathey stated that claimant's "most recent event began on 10-19-16 when he was, once again, stepping down from a Caterpillar." (Ex. JE1-3) Dr. Abernathey does not describe claimant falling several feet and landing on his left foot, buttock and back on the hard packed ground. Dr.

Abernathey's description of merely "stepping down" does not demonstrate an understanding of the mechanism of injury involved in this matter.

Dr. Abernathey had seen claimant in 2009, when he injured his back previously, as discussed above. (Ex. JE1-1) However, unlike Dr. Chapman, Dr. Abernathey does not acknowledge an understanding that claimant had been working without restrictions prior to the October 19, 2016 fall at work and that he had been able to function in his job using only anti-inflammatories. However, Dr. Abernathey does note that after this October 19, 2016 fall, claimant had not been working. (Ex. JE1-3)

Dr. Abernathey refers to an undated MRI finding of a "pre-existing L4-5 spondylolisthesis and stenosis with broad based disc protrusion which is primarily right sided," and notes that claimant's symptoms are "primarily left sided." (Ex. JE1-3) Dr. Abernathey opined that claimant has no "new acute anatomic injury." (Ex. JE1-4) However, he does not address the new symptoms of left leg radiculopathy that developed following the October 19, 2016 injury.

Dr. Abernathey states that claimant advised that Dr. Chapman recommended surgery, but the only record made available to Dr. Abernathey was from 2011. Therefore, it appears that Dr. Abernathey did not have the opportunity to review all of the relevant medical records prior to issuing his opinion in this matter. (Ex. JE1-4)

On June 2, 2017, Dr. Abernathey wrote a letter to the insurance carrier stating that he did not believe claimant required any further medical care specifically concerning the October 19, 2016 incident, because he believed that claimant's condition and potential surgery was related to his pre-existing condition, not the work injury. (Ex. C-2) He also stated that claimant had no permanent restrictions related to the October 19, 2016 injury and he would have reached maximum medical improvement (MMI) on April 19, 2017. (Ex. C-2)

Claimant testified that his claim was denied by defendants after Dr. Abernathey's opinion was issued. (Tr. p. 38; Ex. JE2-29) On June 10, 2017, defense counsel wrote a letter to claimant's counsel to advise that because Dr. Abernathey believed that claimant required no further treatment as a result of the October 19, 2016 injury, that weekly benefits would cease in 30 days. (Ex. 4-1) There was no mention of any other basis for the denial. However, contained in the exhibits is correspondence dated July 12, 2017, from the claims adjuster to the medical provider denying further care based on Dr. Abernathey's opinion that claimant's ongoing complaints were due to his pre-existing condition. (Ex. 5-1) This letter was not directed to or copied to claimant.

Claimant's work restrictions were continued by Dr. Mulderig after defendants denied further medical care. (Ex. JE2-32)

Dr. Chapman commented that claimant's employer "sent him for another opinion and [he] was told that this is not work-related even though he wasn't having this pain until the work injury." (Ex. JE2-37)

On September 26, 2017, claimant underwent surgery with Dr. Chapman. The surgery involved decompression through laminectomy, medial facetectomy and foraminotomies at L4-S1 and an L4-S1 fusion. (Ex. JE2-50) Claimant was in the hospital about five days post-surgery. (Tr. p. 39)

Claimant testified that after the surgery, he still has back pain, but it helped with improving stability in his back and improved the radiating pain in his left leg. (Tr. p. 40)

Post-surgery, claimant continued to receive follow-up care with Dr. Chapman at Medical Associates, P.C.

On October 31, 2017, claimant saw Angel Keller, ARNP, at the Unity Point Pain Clinic upon a referral from Dr. Chapman. (Ex. JE6) Claimant continues to see a pain clinic doctor every five weeks. (Tr. p. 41)

On December 20, 2017, Dr. Chapman released claimant to return to work gradually, five to six hours per day, increasing two hours per day every two weeks. (Ex. JE2-73) However, on March 21, 2018, Dr. Chapman noted that claimant still had "too much pain to reliably work" and he was again taken off work. (Ex. JE2-81)

Additional Findings

On July 24, 2017, Dr. Mulderig confirmed her opinion by signing and dating a letter prepared by claimant's counsel, that claimant sustained injury to his low back causing radiation into his left lower extremity as a result of the October 19, 2016 work injury. She also opined that claimant had underlying spondylolisthesis and degenerative changes prior to the October 19, 2016 work injury and that said injury materially and permanently aggravated, worsened, or lit up the underlying condition, and that the medical care provided to claimant was reasonable and necessary due to the October 19, 2016 injury. (Ex. 1-1, 2)

On August 30, 2018, the treating surgeon, Dr. Chapman, confirmed his opinion by signing and dating a letter prepared by claimant's counsel, that claimant sustained an injury to his low back with radiation into his left leg as a result of the October 19, 2016 work injury. He also agreed that claimant had underlying spondylolisthesis and degenerative changes prior to the work injury, but the October 19, 2016 injury materially and permanently aggravated, accelerated, worsened, or lit up the underlying condition. (Ex. 2-1, 2) Dr. Chapman further opined that the "surgery [he] performed . . . on September 26, 2017 was directly related to and caused by Mr. Galle's work-related injury on October 19, 2016." (Ex. 2-2)

On August 28, 2018, Sunil Bansal, M.D., conducted an IME at the request of claimant's counsel. (Ex. 3) Dr. Bansal reviewed medical records and described both the present injury of October 19, 2016 and a prior injury that resulted in radiofrequency ablation. (Ex. 3-12) He noted that claimant did not report any pain going down his leg with the prior injury. Dr. Bansal reported claimant's current condition as ongoing low back pain, which "still radiates down his left leg into his toes." (Ex. 3-13) I note this may be in conflict with claimant's testimony that the surgery did "help with the radiating pain in [his] left leg." (Tr. p. 40) Dr. Bansal conducted a physical examination and opined that claimant permanently aggravated his lumbar spondylosis from the slip and fall on October 19, 2016, resulting in the new onset of left leg radiculopathy. (Ex. 3-14, 15, 16) He assigned 22 percent whole person impairment using Table 15-3 of the "AMA Guides to Permanent Impairment," and placement in Category IV impairment, based on continued pain and radiculopathy. (Ex. 3-16) Dr. Bansal assigned permanent restrictions of no lifting over 30 pounds occasionally or 20 pounds frequently, no frequent bending or twisting and no prolonged standing greater than 30 minutes. (Ex. 3-16, 17)

On October 5, 2018, Dr. Abernathey responded to a letter prepared by defense counsel, by marking "yes" and signing and dating the letter. (Ex. C-4) Dr. Abernathey was provided with Dr. Bansal's report and other "attached records." (Ex. C-3) It is not clear which records were provided beyond Dr. Bansal's report. Dr. Abernathey indicated it remained his opinion that claimant's condition was not related to the October 19, 2016 incident and any medical care claimant received and the impairment rating assigned by Dr. Bansal were also unrelated.

Considering the expert opinions in this case along with other evidence, including claimant's credible testimony, I give little weight to Dr. Abernathey's opinion because it is not based on a clearly stated understanding of the mechanism of injury and it is unclear whether he was provided with the relevant medical records to review before issuing his opinion.

I accept the opinions of the treating physician, Dr. Mulderig, and the treating surgeon, Dr. Chapman, and based on said opinions I find that claimant sustained an injury that arose out of and in the course of his employment on October 19, 2016, involving his low back and left leg. This is supported by the opinion of Dr. Bansal. I find the injury aggravated claimant's underlying condition and caused the need for the medical care claimant received as set forth in this matter. I likewise find that the surgery performed by Dr. Chapman was reasonably necessary and appropriate to treat claimant's condition and resulted in an improvement of his condition at a time when defendants had denied medical care.

Considering functional permanent impairment, I accept the opinion of Dr. Bansal that claimant has sustained 22 percent permanent impairment to the whole person. Dr. Abernathey opined on June 2, 2017, that claimant sustained no permanent

impairment from this work injury. (Ex. C-2) However, I have given little weight to Dr. Abernathey's opinions in this matter for the reasons stated above.

I note that claimant's current job requires him to perform tasks in excess of the restrictions assigned by Dr. Bansal, and he has demonstrated the ability to work beyond said restrictions. I therefore, reject the restrictions assigned by Dr. Bansal, but I also find that indeed, claimant does have reduced capacity to function and some restrictions would likely be appropriate, but not at the level suggested by Dr. Bansal.

At the time of the hearing, claimant continued to take methadone and fluoxetine for pain and depression. (Tr. pp. 41-42)

Regarding claimant's industrial disability, I note that his age, the length of his healing period, his medical condition, the multi-level fusion surgery, his impairment rating of 22 percent to the whole person, and his current condition and testimony concerning the difficulty with his present employment, would all tend to support a higher award of industrial disability. However, his work history including management experience, his motivation to return to work, and the fact that he is presently working in a job doing maintenance work on semis and trailers, not substantially different from the work he performed for the defendant employer prior to his injury, despite a pending offer of employment to a less physically demanding job that he has not yet accepted, would tend to support a lower finding of industrial disability.

Considering the above and all other appropriate factors for the assessment of industrial disability, I find that claimant has sustained 50 percent industrial disability.

The parties stipulated that claimant was paid temporary benefits until June 28, 2017, the date of his termination from employment with defendant employer. (Tr. pp. 5, 38)

The parties have stipulated that the correct rate in this case is $1,102.67 per week. (Hearing Report, p. 1) The parties also agree that claimant's rate was overpaid when he was paid at the rate of $1,324.42 for 23 weeks of temporary benefits prior to the hearing and that said overpayment would be applied as a credit to any award issued herein.

CONCLUSIONS OF LAW

1) <u>Whether claimant sustained an injury that arose out of and in the course of his employment with defendant employer on October 19, 2016.</u>

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).

When an expert opinion is based upon an incomplete history, the opinion is not necessarily binding upon the commissioner. The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence, together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire & Casualty Co., 526 N.W.2d 845 (Iowa 1995).

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. Quaker Oats Co. v. Ciha, 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 Elec. 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.

Claimant was performing his regular work duties when he fell off the ladder on the loader and was injured. I have accepted the opinions of the treating physician, supported by claimant's IME physician concerning causation of the lower back and left leg injury being related to the work injury. I conclude that on October 19, 2016, claimant sustained an injury that arose out of and in the course of his employment which permanently aggravated his pre-existing low back condition, resulting in injury to his low back and left leg.

2) Entitlement to temporary disability benefits for the period of June 29, 2017 through March 20, 2018, and the proper commencement date of PPD benefits, if any.

Healing period benefits are payable to an employee who has sustained a permanent partial disability "beginning on the first day of disability after the injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable

of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first." Iowa Code section 85.34(1).

The parties agree that claimant was off work from June 29, 2017 through March 20, 2018. (Hearing Report, p. 1)

Claimant was paid temporary benefits to June 28, 2017, the date that he was terminated from his employment. Claimant was not working at the time he was terminated, because the employer was unable to accommodate his restrictions.

Being terminated from employment is not one of the three triggers for ending healing period benefits found in Iowa Code section 85.34(1).

Dr. Chapman, the treating surgeon, returned claimant to work gradually beginning on December 20, 2017, but confirmed on March 21, 2018, that claimant was in too much pain to reliably work and took him off work. (Ex. JE2-73, 81)

Because the parties have stipulated that claimant was off work from June 29, 2017 through March 20, 2018, I conclude that claimant had not returned to work until after March 20, 2018.

Claimant was placed at maximum medical improvement (MMI) on March 21, 2018 by Dr. Bansal. (Ex. 3-15) Dr. Abernathey opined that claimant would have reached MMI on April 19, 2017. (Ex. C-2) However, I have given little weight to Dr. Abernathey's opinion for the reasons stated above. I therefore, conclude that claimant was at MMI on March 21, 2018, based on Dr. Bansal's opinion.

Dr. Chapman stated that claimant was in too much pain on March 21, 2018 to reliably work. Therefore, I conclude that as of March 21, 2018 and prior thereto, claimant was not yet medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury.

I therefore conclude that March 21, 2018, the date claimant reached MMI, was the first trigger under Iowa Code section 85.34(1) to bring an end to temporary benefits.

Claimant is entitled to healing period benefits from July 29, 2017 through March 20, 2018.

Commencement Date of PPD

Compensation for permanent partial disability shall begin at the termination of the healing period. Section 85.34.

However, the determination in Evenson v. Winnebago Industries, Inc., No. 14-2097 (Iowa 2016) concluded that the claimant's return to work established the

commencement of PPD benefits, which was not precluded by the fact that claimant was later entitled to additional temporary partial disability (TPD) benefits when he was assigned restrictions that prevented claimant from working his regular hours. Evenson v. Winnebago Ind., Inc., No. 14-2097 at 22 (Iowa 2016).

The evidence presented indicates that claimant was not immediately off work following the injury and that he continued to work and in fact did not report the injury until November 2016. Therefore, I conclude that because claimant returned to work the following day on October 20, 2016, that this return to work is the first trigger under Iowa Code section 85.34(1) and Evenson for the commencement of PPD benefits.

3) Whether the injury was the cause of permanent partial disability, and if so, the extent thereof.

Since 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, 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 workers' qualifications intellectually, emotionally and physically; the worker's earning 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).

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

I have found above for the reasons there stated that claimant has sustained 50 percent industrial disability.

4) Reimbursement of medical expenses.

The next issue for determination is whether claimant is entitled to payment of medical expenses contained in the attachment to the hearing report and also at Claimant's Exhibit 6.

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. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 16, 1975).

Prudent persons customarily rely upon their physician's recommendation for medical care without expressly asking the physician if that care is reasonable. Proof of reasonableness and necessity of the treatment can be based on the injured person's testimony. Sister M. Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963).

It is said that "actions speak louder than words." When a licensed physician prescribes and actually provides a course of treatment, doing so manifests the physician's opinion that the treatment being provided is reasonable. A physician practices medicine under standards of professional competence and ethics. Knowingly providing unreasonable care would likely violate those standards. Actually providing care is a nonverbal manifestation that the physician considers the care actually provided to be reasonable. A verbal expression of that professional opinion is not legally mandated in a workers' compensation proceeding to support a finding that the care provided was reasonable. The success, or lack thereof, of the care provided is evidence that can be considered when deciding the issue of reasonableness of the care. A treating physician's conduct in actually providing care is a manifestation of the physician's opinion that the care provided is reasonable and creates an inference that can support a finding of reasonableness. Jones v. United Gypsum, File No. 1254118 (App. May 2002); Kleinman v. BMS Contract Services, Ltd., File No. 1019099 (App. September 1995); McClellon v. Iowa Southern Utilities, File No. 894090 (App. January 1992). This inference also applies to the reasonableness of the fees actually charged for that treatment.

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. See, 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).

The Court in Bell Bros. stated:

> We do not believe the statute can be narrowly construed to foreclose all claims by an employee for unauthorized alternative medical care solely because the care was unauthorized. Instead, the duty of the employer to furnish reasonable medical care supports all claims for care by an employee that are reasonable under the totality of the circumstances, even when the employee obtains unauthorized care, upon proof by a preponderance of the evidence that such care was reasonable and beneficial. In this context, unauthorized medical care is beneficial if it provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer.

Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010).

I have found above that claimant sustained an aggravation of a pre-existing low back condition resulting in injury to his low back and left leg. Claimant's treatment for the injury has included multilevel fusion of the lumbar spine. I conclude that it was reasonable for claimant to proceed with the medical treatment as recommended by the treating physicians and that claimant testified that his surgery was helpful. I therefore find that the medical treatment claimant received as identified in the attachment to the hearing report (and at Claimant's Exhibit 6) was reasonable and beneficial and provided a better result than the lack of treatment offered by defendants. Defendants are therefore obligated to pay the same.

5. Reimbursement of IME, 85.39.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Claimant seeks reimbursement for the IME with Dr. Bansal on August 28, 2018. (Ex. 3-1) Dr. Bansal provided an invoice in the amount of $3,457.00 for the IME, including the examination and report. (Ex. 3-18)

Prior to Dr. Bansal's IME, claimant was sent by the defendants to Dr. Abernathey on May 17, 2017, after Dr. Chapman recommended lumbar decompression and fusion surgery. On June 2, 2017, Dr. Abernathey provided a written opinion that claimant's condition was due to pre-existing conditions and not due to the October 19, 2016 work injury, an opinion rejected by the undersigned above. (Ex. C-2) Dr. Abernathey also noted that claimant had no permanent restrictions related to the October 19, 2016 injury. (Ex. C-1) Dr. Abernathey was retained by the employer for the purpose of evaluating claimant. I conclude that Dr. Abernathey's opinion that claimant's current condition was not related to his employment, is his expression of a zero percent impairment. These facts are distinguishable from a treating physician that releases an injured worker to return to work with no restrictions and does not comment on the issue of permanent impairment as in Moffit v. Estherville Foods, Inc., Nos. 5029474, 5029475, 5029476 (App. Dec. September 21, 2011), which has been overturned by Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015).

Because the opinion of Dr. Abernathey, an employer retained physician, pre-dated the IME performed by Dr. Bansal on August 28, 2018, claimant is entitled to reasonable reimbursement. I conclude that defendants are obligated to reimburse claimant $3,457.00 for Dr. Bansal's IME.

Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I conclude that claimant was successful in this claim and therefore exercise my discretion and assess costs of $100.00 representing the filing fee, against the defendants in this matter.

ORDER

IT IS THEREFORE ORDERED

Defendants shall pay claimant permanent partial disability benefits of two hundred fifty weeks (250) weeks, beginning on October 20, 2016 until all benefits are paid in full.

Defendants shall pay claimant healing period benefits from June 29, 2017 through March 20, 2018.

Defendants shall be entitled to credit for all weekly benefits paid to date, including the overpayment of twenty-three (23) weeks of healing period benefits paid prior to the hearing per the parties' stipulation.

All weekly benefits shall be paid at the stipulated rate of one thousand one hundred two and 67/100 dollars ($1,102.67) per week.

All accrued benefits shall be paid in a lump sum.

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).

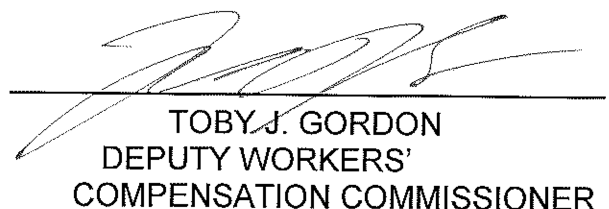
Defendants shall reimburse claimant for his out-of-pocket medical expenses set forth in Claimant's Exhibit 6 and shall pay, reimburse, and or otherwise satisfy all remaining medical expenses contained therein.

Defendants shall reimburse claimant three thousand four hundred fifty-seven and 00/100 dollars ($3,457.00) for the cost of Dr. Bansal's IME under Iowa Code section 85.39.

Defendants shall pay costs in the amount one hundred and 00/100 dollars ($100.00).

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 5th day of March, 2019.



TOBY J. GORDON
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TJG/srs

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.