

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CHAD ALLRED,

Claimant,

vs.

ABF FREIGHT SYSTEM, INC.,

Employer,

and

ACE AMERICAN INSURANCE  
COMPANY,

Insurance Carrier,  
Defendants.

**FILED**

JUL 15 2019

WORKERS' COMPENSATION

File No. 5054119

ARBITRATION

DECISION

Head Notes: 1108.50, 1402.40, 2907

STATEMENT OF THE CASE

Chad Allred, claimant, filed a petition in arbitration seeking workers' compensation benefits from ABF Freight Systems, Inc., employer and Ace American Insurance Company, insurance carrier as defendants. Hearing was held on October 30, 2018 in Cedar Rapids, Iowa. The parties were unable to complete the hearing within the allotted three-hour time so the hearing was held in recess. The hearing reconvened on April 17, 2019 in Des Moines, Iowa.

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.

Chad Allred, Mary Allred, Terry Hindt, and Richard Parnell all testified live at trial. The evidentiary record also includes joint exhibits JE1-JE11, claimant's exhibits 1-30, and defendants' exhibits A-H. All exhibits were received without objection. The evidentiary record closed at the conclusion of the arbitration hearing.

The parties submitted post-hearing briefs on June 6, 2019, at which time the case was fully submitted to the undersigned.

## ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant sustained permanent disability as a result of the stipulated August 27, 2012 work injury? If so, the extent of industrial disability claimant sustained.
2. Whether claimant is entitled to be reimbursed pursuant to Iowa Code section 85.39 for the IME.
3. Assessment of costs.

## FINDINGS OF FACT

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

Claimant, Chad Allred, has alleged that he sustained permanent disability as the result of an August 27, 2012 injury he sustained while working for ABF Freight. Defendants dispute that Mr. Allred sustained any permanent disability as the result of the injury.

Prior to the August 27, 2012 work injury, Mr. Allred had experienced some back incidents over the years including 2002, 2004, 2008, and 2010. However, he had always been released back to work without restrictions. (Defendants' Exhibits B, page 2, F, pp. 4 & 7, Testimony)

On August 27, 2012, Mr. Allred was making a delivery using a pallet jack when the pallet jack stopped and sort of jerked him to a stop. Mr. Allred felt drastic pain in his lower back, right hip, and a little bit in his leg when the incident occurred and then he was sore. He was able to complete his work day. Mr. Allred testified that prior to the date of injury he had experienced low back symptoms, but nothing like the symptoms he had after the injury. He reported the incident to his immediate supervisor, Terry Hindt. (Claimant's Exhibit 6, pp. 7-8)

On September 4, 2012, William J. Manely, PA-C saw Mr. Allred at St. Luke's Hospital in Cedar Rapids. Mr. Allred reported that on August 27, 2012 he was pulling a pallet jack off of a truck when the dock plate shifted and caused his pallet jack to stop suddenly and caused discomfort in his right greater than left low back region. He self-treated and two to three days later he developed discomfort down into his right buttocks and right leg. Mr. Allred had pain in his lower back region, right greater than left, which radiated down his buttocks into his right leg down to his knee. He denied any numbness or tingling. The assessment was lumbar strain, low back pain with right leg radiculopathy. He was restricted to "max lift and carry a maximum 3 to 5 pounds; alternate walking, standing, sitting as tolerated for comfort; no climbing stairs and ladders; avoid prolonged sitting, or standing; no forceful pushing, pulling; avoid driving;

bend, stoop, kneel should be none; no work or driving where sedation would compromise safety.” (Joint Exhibit 1, p. 2)

Mr. Allred was seen again on September 6, 2012. His symptoms continued. He was told to continue working with restrictions. He was instructed to start physical therapy two to three times per week. By September 13, 2012, Mr. Allred's discomfort was localized more to his right buttocks region and did not extend below his knee. The assessment was lumbar strain, low back pain, and right radiculopathy. He was to continue to work with restrictions. By his October 4, 2012 appointment, Mr. Allred reported 80 percent improvement. He continued to have some low back discomfort that radiated down his right leg. PA Manely felt that Mr. Allred had plateaued with conservative treatment. He recommended an MRI of the lumbar spine. In the meantime, Mr. Allred was to continue restricted duty and physical therapy. (JE1, pp. 3-12)

An MRI was performed on October 9, 2012. The MRI revealed a right paracentral disk protrusion at the L5-S1 level which produced effacement of the thecal sac and displacement of the exiting right nerve root. At the L4-5 level there was a small central disk protrusion with mild effacement of the thecal sac. (JE2, p.1)

Mr. Allred returned to PA Manely on October 10, 2012. Given the findings on the MRI, a referral to a neurosurgical specialist was recommended. Mr. Allred was provided modified restrictions. (JE1, pp. 13-14)

On October 15, 2012, Mr. Allred saw Chad D. Abernathy, M.D., a board certified neurosurgeon. The doctor noted that Mr. Allred presented with recent low back pain and right sciatica that was consistent with small right L5-S1 disk extrusion. He recommended continued conservative management because his symptoms were well tolerated. However, if Mr. Allred were to develop any new neurologic symptoms or signs he was to contact Dr. Abernathy. (JE4, pp. 1-3)

Mr. Allred returned to see PA Manely on October 31, 2012. He reported that he felt significantly improved and requested a trial of regular duty. Mr. Allred reported that he had occasional stiffness in his right lower back region, but after stretching, it totally resolved. Mr. Allred stated, “I am sleeping like a rock and feel much better.” (JE1, p. 17) The assessment was low back pain and strain, improved. Mr. Allred was allowed a trial of regular duty work. He was instructed to notify his supervisor and medical provider immediately if he was not able to perform the essential functions of the job. (JE1, pp. 17-18)

Mr. Allred returned to PA Manely on November 7, 2012. He was still participating in a trial of regular duty work. He reported that overall his back continued to improve. He still had discomfort in his lower back and occasionally he had a twinge which seemed to occur when he was bouncing on his feet. He switched trucks and obtained a new seat and felt that this was helping his condition. He was instructed to continue his regular duty and to return in one month. (JE1, pp. 19-20)

On December 6, 2012, Mr. Allred returned to see PA Manely. He reported that on November 26, 2012 he was delivering a treadmill and developed increased discomfort in his right lower back. He reported a 4-5/10 discomfort. He noted tightness in his right lower back and into his right buttocks, but no radiation into his right leg and no left leg complaints. The assessment was low back pain, lumbar strain, exacerbation reported. Mr. Allred was given work restrictions. (JE1, pp. 21-22)

On March 29, 2013, Scott D. Murtha, M.D. performed lumbar interlaminar epidural steroid injection at the L5-S1 interspace towards the right. (JE6)

Mr. Allred returned to Dr. Murtha on May 21, 2013. He reported 40 percent improvement of his low back and right radicular symptoms. He was given a second injection. (JE7)

On July 19, 2013, Mr. Allred returned to Dr. Murtha. Mr. Allred reported that he had improvement of his pain, but he continued to be bothered with low back and right radicular symptoms to his knee. His second injection was not as effective as the first. He was given a third injection. (JE8)

Mr. Allred had another MRI on September 16, 2013. There was no significant change in the small right paracentral posterior disc protrusion at L5-S1 as compared with the prior study of October 9, 2012. A mild broad-based posterior disc bulging at L4-5 was noted. (JE2, p. 2)

On September 20, 2013, Mr. Allred returned to the office of Dr. Abernathy. Mr. Allred reported some improvement with conservative management and that ESIs had been helpful. He declined any surgical management at that time. (JE4, p. 5)

Dr. Abernathy saw Mr. Allred again on June 8, 2015. He reported chronic low back and right leg pain and paresthesia. Dr. Abernathy felt Mr. Allred could benefit from a new MRI of the lumbosacral spine. (JE4, p. 5)

On June 17, 2015, Mr. Allred returned to Dr. Abernathy's office. The doctor noted that the MRI of the lumbosacral spine demonstrated good decompression of the neural elements. There was a slight increase in neural foraminal narrowing on the right at the L4-L5 level. Dr. Abernathy did not recommend an aggressive neurosurgical stance due to a paucity of clinical and radiographic findings. Mr. Allred reported that epidural steroid injections were helpful in the past. Dr. Abernathy recommended continued conservative treatment. (JE3, JE4, pp. 5-6)

On September 11, 2015, Mr. Allred saw Shirley J. Pospisil, M.D. at the CRS Pain Clinic. He reported continuous pain as a numb, aching low back radiating into his posterior buttock. He reported numbness and tingling in his right posterior leg that had improved over the past three years. He also reported occasional electric shocks and muscle spasm in his right leg. Julie Saddler, M.D. administered a lumbar epidural steroid injection under fluoroscopy at the L5-S1 level. (JE9)

On September 15, 2017, Mr. Allred went to Mercy Family where he saw Christopher C. Schuster, M.D. for an annual physical. The note states that Mr. Allred had no complaints. He had lost weight and was eating a low-carb, high-protein diet. He reported feeling more lethargic than usual. The doctor noted no musculoskeletal or neurological symptoms. There was no mention of any low back or lower extremity symptoms at this visit. On the annual health history form Mr. Allred did not indicate that he had recent back pain. (JE11)

Mr. Allred saw Dr. Pospisil on October 21, 2015. He reported that since his last epidural he did not have any pain going down his leg. He did still experience pain in his lower back, greater on the right side. The assessment was low back pain with multiple exacerbations. Dr. Pospisil recommended a TENS unit. He was given no work restrictions. (JE1, p. 48)

On November 18, 2015, Mr. Allred returned to Dr. Pospisil. He had walked a lot over the weekend and his pain had increased. He denied any radiating pain. He was not given any work restrictions. (JE1, p. 49)

Dr. Pospisil saw Mr. Allred again on December 22, 2015. Mr. Allred still had not received the requested TENS unit. He reported stiffness in his back and denied any radiating pain. (JE1, p. 50)

Mr. Allred continued to follow-up with Dr. Pospisil. When he was seen at the March 16, 2016 appointment, he reported that he had finally received the TENS unit and it had helped tremendously. He did still experience pain in his right lower back that was fairly constant. (JE1, pp. 51-55)

At the request of his attorney, Mr. Allred saw David H. Segal, M.D. on April 13, 2018 for an independent medical evaluation. In addition to examining Mr. Allred, Dr. Segal also reviewed the medical records that were provided to him by counsel. At the time of the IME, Mr. Allred reported that his pain was a 3-4/10 but could be as high as 6 on a bad day. His pain was located in the right lower back, centered at L5-S1 facets, right sciatic notch. Mr. Allred reported that he had learned to adapt his work and lifestyle and babied his back in an attempt to keep the pain level under control. When his pain got out of control, the pain will shoot down his leg. Mr. Allred reported that he did not have right leg pain that went down past his knee for a few years. Dr. Segal's physical examination noted that the L5-S1 facet on the right was tender to palpation, there was mild right S1 dermatomal distribution sensory loss, and his straight leg raise was negative bilaterally. Dr. Segal opined that Mr. Allred had a lumbar disc herniation at L5-S1 level that was directly and causally related to the August 27, 2012 work injury. He also believed that Mr. Allred had a lumbar central bulge/herniation at L4-L5 which was directly and causally related to the work injury of August 27, 2012. Additionally, Dr. Segal noted that Mr. Allred had right lumbar radiculopathy. He diagnosed Mr. Allred with foraminal stenosis L4-L5 and L5-S1 that he felt was causally related to the work injury. The doctor believed the stenosis likely preexisted the work injury, but it was asymptomatic and was materially and permanently aggravated by the work injury. Dr.

Segal stated that in his review of the MRI, he felt there was very clearly a large annular tear that was present on the MRI of 2015; he causally connected this to the work injury. He noted that annular tears sometimes heal over time, sometimes only partially heal, and other times tears continually get re-aggravated and re-injured, and he believed that is what occurred in this case. Dr. Segal stated that the mechanical component of pain is consistent with mechanical traumatic facet arthropathy and the mechanism in this case would be consistent with an injury to the facets. He related the L5-S1 facet area of pain to the work injury. (Cl. Ex. 2)

Dr. Segal made some recommendations for future treatment. He recommended facet injections, possibly followed by radiofrequency ablation to reduce mechanical-type back pain. He also recommended a back brace for more strenuous parts of his job. He noted that additional testing may also be necessary. According to Dr. Segal, if Mr. Allred's symptoms were to get worse, he could be a candidate for a spinal cord stimulator. Dr. Segal placed Mr. Allred at MMI as of March 10, 2016. He placed Mr. Allred in the DRE Lumbar Category III, and assigned 12 percent impairment of the whole person. He also noted significant mechanical low back pain caused by traumatic L5-A1 facet arthropathy, which was not accounted for in the rating. Therefore, he assigned an additional 3 percent under the pain chapter. Thus, Mr. Allred's total functional impairment, according to Dr. Segal, is 15 percent of the whole person. (Cl. Ex. 2)

Dr. Segal assigned the following restrictions which he opined are necessitated by the work injury:

- Sitting limited to 4 hours per 8/hour day with short breaks for stretching/repositioning
- Standing limited to 4 hours per 8/hour day
- Walking limited to 4 hours per 8/hour day
- Bending – occasionally; repetitive bending limited to 10-20 consecutive minutes
- Climbing stairs/ladders – not restricted except needs to be slow and cautious
- Crouching – occasionally
- Kneeling – rarely
- Lifting 21-50 lbs. – frequently
- Lifting 51-100 lbs. – occasionally; repetitive lifting limited to 45 consecutive minutes

- Lifting >100 lbs. – never
- Carrying 21-50 lbs. – occasionally
- Carrying 51-100 lbs. – rarely
- Carrying >100 lbs. - never

(Cl. Ex. 2, p. 18)

On July 6, 2018, Dr. Abernathey authored a missive answering questions posed to him by the defendants. Dr. Abernathey opined that Mr. Allred did not have any permanent rating under the AMA Guidelines. He found no evidence of objective indication for a rating. Dr. Abernathey noted that Dr. Segal's record did not document any neurologic deficits and his examination did not document any significant abnormalities. Dr. Abernathey also noted that the 2015 MRI studies demonstrated minimal degenerative changes, without any significant neural compromise. He felt those were common findings that would be present in nearly every 45-year-old individual. He stated that Mr. Allred was not a surgical candidate. Dr. Abernathey opined that the references to medical literature made by Dr. Segal were all from what he considered to be second tier publications and that none of those references were from standard neurosurgical literature. (Def. Ex. A)

Mr. Allred testified that he has continuous pain that is the worst in the mornings. He noted that his pain is also bad at night after he has had to perform strenuous work. He continues to perform his home exercise program, ices, takes Aleve, and uses his TENS unit. Mr. Allred testified about numerous tasks that he feels he can no longer do around his home. Mrs. Allred also testified about Mr. Allred's inability to perform tasks around the home and difficulty he has traveling. (Testimony)

Although Mr. Allred testified that he has ongoing symptoms, I find the opinions of Dr. Abernathey are more consistent with the record as a whole and are more persuasive than those of Dr. Segal. Dr. Abernathey's opinions and findings are more consistent with the treatment records and with Mr. Allred's demonstrated abilities. I find the rationale provided by Dr. Abernathey to be persuasive. I give Dr. Abernathey's opinions greater weight than the opinions of Dr. Segal. Thus, I find that Mr. Allred does not have any permanent impairment under the AMA Guidelines as a result of the work injury.

Mr. Allred testified that PA Manely and Dr. Pospisil both told him he has the permanent restriction of working only "as tolerated." However, there is no documentation of any such restriction in any of their medical notes. Furthermore, under cross-examination, Mr. Allred admitted that it would be fair for the defendant-employer to assume he did not have any restrictions. (Testimony)

Based on the evidence as a whole, I find Mr. Allred does not have any permanent restrictions placed on his activities as a result of the August 27, 2012 work injury. He has been returned to work, full-duty without any restrictions. I do not find the restrictions of Dr. Segal to be persuasive or consistent with what Mr. Allred has demonstrated his abilities to be over the past six years.

To the credit of Mr. Allred and ABF Freight, Mr. Allred has continued to work full duty for the past six years. Mr. Allred testified he has found ways to modify his current full duty bid job in order to try to help control his pain symptoms. For example, he uses a seat cushion on his truck seat. He also testified that he utilizes hoists and straps more frequently than he did prior to the injury. (Testimony)

After Mr. Allred sustained his injury he was bumped from his route; however, this was due to seniority and not related to the work injury. He bid into his current job several years ago because the work was not as hard. He admitted that as drivers gain more seniority it is typical for them to leave the more physical routes, if possible. Also, Mr. Allred preferred early morning start times because it allowed him to be done earlier in the day for the benefit of his kids. He did this even though it meant earning less money. He started bidding into these jobs even before the injury because he prioritized time with his kids over money. (Testimony)

As of the time of the hearing, Mr. Allred was working approximately 47 to 50 hours per week. He testified that he declined overtime on the weekends to give his back an opportunity to recover. However, Mr. Allred admitted that he also typically declined weekend overtime prior to the injury. Mr. Allred is currently earning more than he ever has during his lifetime. (Testimony)

Defendants contend that Mr. Allred's work injury is minimal. In support of their position they point out that he has only missed four days of work due to the injury. They also argue that claimant was only on light duty for eleven weeks and that was back in the second part of 2012. He then returned to his full bid job without any restrictions in early 2013. Mr. Allred testified that he does not have any work restrictions from the medical providers who provided him with treatment. He also agreed that it would be fair for ABF to assume that he does not have any current restrictions placed on his activities. Furthermore, since Mr. Allred returned to work in early 2013, he has passed all of his DOT physicals. Mr. Allred has not been prescribed any medications for his back since 2013. Mr. Allred has been back performing his full duty job, which he admits is strenuous work, for approximately six years without any restrictions. (Cl. Ex. 29, p. 3; Def. Ex. F, Testimony)

Defendants' exhibit G is a surveillance report. During the hearing claimant questioned whether the surveillance was of his house or his neighbor's. He also questioned whether at least a portion of the surveillance was of him or a neighbor. Due to the poor quality of the photos, it is difficult for the undersigned to ascertain whether the person depicted in the photos is or is not Mr. Allred. Regardless, I find that the surveillance is not particularly impressive and is not persuasive.



Mr. Allred has worked for the defendant-employer since 1998. His prior work experience includes carrying out groceries, stocking retail shelves, iron worker, grinder, store clerk, over-the-road truck driver, and beer delivery driver. Because he has no restrictions placed on his activities, I find he is physically capable of returning to all of his prior positions.

At the request of claimant's counsel, Mr. Allred underwent an employability assessment with Barbara Laughlin, M.A. on August 24, 2018. Even claimant's own expert states that if Mr. Allred has no restrictions then there would be no resulting vocational impact. (Cl. Ex. 4) Because Ms. Laughlin was hired by the claimant, she can hardly be said to be biased against the claimant. I find her opinion to be persuasive.

Considering Mr. Allred's age, educational background, employment history, ability to retrain, motivation to maintain his job, length of healing period, lack of permanent impairment, and lack of permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that he has not sustained a loss of future earning capacity as a result of his work injury.

At the time of the hearing claimant was seeking reimbursement for the IME of Dr. Segal. However, in his post-hearing brief claimant withdrew his claim for reimbursement of the IME. Therefore, the issue of the IME reimbursement is deemed moot.

#### 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).

An impairment to the body as a whole would be an industrial disability claim. 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).

Based on the above findings of fact, I conclude claimant failed to carry his burden of proof to demonstrate that he sustained any permanent partial disability as the result of the stipulated August 27, 2012 work injury. As such, claimant failed to prove entitlement to any weekly permanent partial disability benefits.

The only remaining issue is costs. Claimant is seeking an assessment of costs. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. 876 IAC 4.33. I conclude that claimant was not successful in his claim. I exercise my discretion and do not assess costs against the defendants. Each party shall bear their own costs.

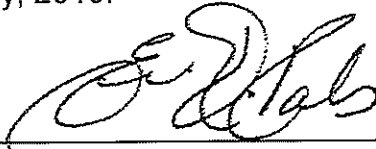
ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing further from these proceedings.

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 15<sup>th</sup> day of July, 2019.

  
ERIN Q. PALS  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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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.