BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROGER NOURIE, Claimant, vs. ACH FOOD CO. INC. a/k/a TONE'S SPICES, Employer, and SENTRY INSURANCE, Insurance Carrier, Defendants.	:	File Nos. 5058447, 5058770 ARBITRATION DECISION Head Note Nos.: 1803, 2907

STATEMENT OF THE CASE

Roger Nourie, claimant, filed two petitions for arbitration against ACH Food Company, Inc., as the employer and Sentry Insurance as the insurance carrier. This case came before the undersigned for an arbitration hearing on July 1, 2019, in Des Moines.

The parties filed hearing reports in each of the arbitration files at the commencement of the hearing. On the hearing reports, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Medical Exhibit 1, Claimant's Exhibits 2 through 4, and Defendants' Exhibits A through D. As a result of an evidentiary ruling at the time of trial, defendants were permitted to obtain and file Exhibit D, which was filed timely via WCES.

Claimant testified on his own behalf. No other witnesses were called to testify. As noted, the evidentiary record was suspended at the conclusion of the arbitration hearing. Defendants' Exhibit D is formally received into the evidentiary record and the record is closed to further evidence.

Claimant filed a hearing brief at the time of trial. Defense counsel requested an opportunity to file a post-hearing brief. This request was granted and both parties were permitted to file any desired post-hearing briefs. Counsel electronically filed those briefs simultaneously on August 20, 2019, at which time the case was considered fully submitted to the undersigned.

ISSUES

The parties completed one hearing report for both asserted dates of injury. The parties submitted the following disputed issues for resolution:

1. The extent of claimant's entitlement to permanent disability.

2. Whether costs should be assessed against either party.

FINDINGS OF FACT

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

Roger Nourie is a 60-year-old gentleman. He graduated from high school in Illinois in 1977 and attended Southern Illinois University for two semesters. He also attended a junior college in Danville, Illinois to purse general studies. Mr. Nourie also attended Parkland Junior College in Champaign, Illinois to obtain training in construction drafting. He testified that he has college credits equivalent to just over two semesters of studies, but has not obtained any advanced degrees. (Claimant's testimony)

Mr. Nourie has worked several different jobs during his career. He has worked restaurant and hotel type positions, including positions as a desk clerk, cook, bartending, housekeeping, banquet work, and managing a fast-food restaurant. Mr. Nourie has also worked several factory positions, requiring manual labor, and a short stint in a coal mine. Claimant also has experience roofing and as a stagehand, setting up large stages and facilities for concerts and larger events. (Claimant's testimony)

In 2013, Mr. Nourie relocated to Des Moines. He started working as a stagehand for Well Fargo Arena. He also obtained employment through a temporary agency was assigned to work at Tone's Spices. After working for Tone's for a period of time, Mr. Nourie was transferred by the temporary agency to work for SERVPRO performing cleaning duties after fire and water damage occurred to various properties. Claimant then applied for and was hired directly by Tone's as a full-time employee. (Claimant's testimony)

Mr. Nourie initially started in the dry sauce area at Tone's. He packed powder packets for gravy mixes in this position. After about six months, he transferred to the warehouse. In the warehouse, claimant loaded cases of items onto pallets and manually moved the product, lifting up to 50-60 pounds at a time. (Claimant's testimony)

Claimant later bid to a mill job in the processing department. (Claimant's testimony) In that position, claimant was required to manually move product, utilize a forklift, and perform inventory recordkeeping duties. (Claimant's Exhibit 4, page 105)

On November 13, 2014, Mr. Nourie was moving product and operating an electric pallet jack. As he pulled the pallet jack, he backed into some drums. Although the pallet jack was equipped with an emergency reverse mechanism, the mechanism did not engage immediately. Instead, the pallet jack pinned claimant between the pallet and the bins and pushed into his left hip. Mr. Nourie estimates that he was pinned for several seconds before the pallet jack reversed and released him.

Claimant immediately fell to the ground and advised co-workers that he needed an ambulance. Tone's called an ambulance to transport claimant. Mr. Nourie spent three days in the hospital after this event. Initially, claimant reported left flank pain as his primary complaint. (Exhibit 1, p. 5)

Initial physicians referred claimant for evaluation by an orthopaedic specialist, Jason Sullivan, M.D. Dr. Sullivan assumed care. By February 26, 2015, Dr. Sullivan was recording that claimant's hip "is feeling good." Dr. Sullivan noted that claimant "has no complaints today" and released him to return to work at full duty. Dr. Sullivan declared maximum medical improvement as of February 26, 2015. (Exhibit 1, p. 6)

Unfortunately, claimant's symptoms did not entirely resolve and he continued to experience symptoms in his left hip. (Claimant's testimony) On July 12, 2016, Mr. Nourie continued to work for the employer. On that date, he experienced an increase in symptoms as he was bent over a dump bin. He was attempting to pull a heavy bag up out of the blender and experienced significant increase in his left hip symptoms. (Defendants' Ex. C, pp. 73-74)

Mr. Nourie returned to Dr. Sullivan for further care in September 2016. He reported that he had "never felt completely normal" since the work injury in November 2014. (Exhibit 1, p. 8) Dr. Sullivan obtained an MRI of claimant's left hip and noted that it showed degenerative changes and a labrum tear. (Exhibit 1, p. 8)

Dr. Sullivan attempted an injection of claimant's left hip and ultimately took claimant to surgery on February 20, 2017. (Exhibit 1, pp. 9, 12) Dr. Sullivan performed a labral debridement and chondroplasty as well as an os acetabuli removal. (Exhibit 1, p. 12) Surgery relieved claimant's sharp hip pains. By July 11, 2017, Dr. Sullivan was again declaring maximum medical improvement in spite of ongoing left hip pain. (Exhibit 1, p. 14)

Dr. Sullivan imposed permanent work restrictions at the conclusion of his July 11, 2017 evaluation of Mr. Nourie. Specifically, Dr. Sullivan opined that claimant should perform mostly sedentary work, limiting his standing and walking to 20 minutes at a time, not lift more than 50 pounds to waist level on an occasional basis and not more than 25 pounds from waist to shoulder. (Exhibit 1, p. 15)

Dr. Sullivan ordered a functional capacity evaluation (FCE) and claimant submitted to that testing. The FCE demonstrated residual physical capabilities higher than those estimated by Dr. Sullivan. (Exhibit 1, p. 44) In fact, the FCE demonstrated the ability to lift 87 pounds occasionally from floor to waist, lift 46 pounds occasionally from waist to head-level, carry 53 pounds occasionally, as well as sit or walk stairs constantly. The FCE also documented the ability to walk and stand frequently, among other physical capabilities. (Exhibit 1, p. 44) Dr. Sullivan later adopted the FCE abilities as claimant's permanent work restrictions. (Exhibit 1, p. 18) Dr. Sullivan opined that claimant sustained a 7 percent impairment of the whole person as a result of his November 13, 2014 left hip injury at work. (Exhibit 1, p. 18)

Unfortunately, claimant's symptoms persisted and he returned for further evaluation by Dr. Sullivan in November 2017. He reported hip pain that was worse than ever. (Exhibit 1, p. 19) Dr. Sullivan referred claimant to a hip replacement specialist, Christopher D. Nelson, D.O. for further evaluation and recommendations. (Exhibit 1, p. 20)

Dr. Nelson evaluated claimant in January 2018. He diagnosed claimant with a calcification in the left hip, which developed after Dr. Sullivan's surgery. (Exhibit 1, p. 23) Dr. Nelson recommended surgical intervention to remove the calcification. (Exhibit 1, p. 25) Surgery was performed on July 26, 2018. (Exhibit 1, p. 26)

Once again, surgery was beneficial for claimant's symptoms. (Exhibit 1, p. 29) On May 14, 2019, Dr. Nelson re-evaluated claimant. On that date, Dr. Nelson noted ongoing left hip pain but noted that Mr. Nourie would be returned to work without permanent restrictions. Dr. Nelson's note indicated, "there would be no restrictions at this time in regards to work. Furthermore, there are no indications to change his permanent partial impairment rating as it relates to his most recent procedure." (Exhibit 1, p. 32) In June 2019, Dr. Sullivan authored a formal report, accepting Dr. Nelson's recommendations and release for claimant to return to work without restrictions. (Exhibit 1, p. 35)

Mr. Nourie sought an independent medical evaluation, performed by Sunil Bansal, M.D., on February 22, 2018. Dr. Bansal diagnosed claimant with the left hip issue as a result of the November 2014 work injury. Dr. Bansal also diagnosed claimant with the left hip issue after the second injury in July 2016. However, Dr. Bansal also diagnosed claimant with an aggravation of sacroiliitis of the low back after the July 12, 2016 work injury. (Claimant's Ex. 2, p. 89)

Interestingly, in his deposition taken in November 2017, claimant denied any claims for a back injury resulting from the November 2014 work injury. (Defendants' Ex. C, p. 58) None of the treating physicians were documenting low back symptoms or providing treatment for a suspected injury to the low back after either the November 13, 2014 work injury or the July 12, 2016 work injury. Dr. Nelson specifically denied any mention of low back symptoms by claimant. (Exhibit 1, p. 36)

Dr. Bansal opined that claimant sustained a three percent permanent impairment of the whole person as a result of his back issues and an additional eight percent permanent impairment of the whole person as a result of the left hip injury. (Claimant's Ex. 2, p. 89) In total, Dr. Bansal opines that Mr. Nourie sustained an 11 percent permanent impairment of the whole person as a result of the combined effects of the left hip and low back injuries. (Claimant's Ex. 2, p. 90)

Dr. Bansal adopts the work restrictions offered by Dr. Sullivan on November 9, 2017 as applicable and adds restrictions that preclude frequent bending, twisting, or squatting. Dr. Bansal also recommended avoidance of multiple steps, stairs, ladders, or uneven terrain. (Claimant's Ex. 2, p. 90)

Claimant's counsel provided Dr. Bansal additional records that were generated after his evaluation and solicited a supplemental report from Dr. Bansal. Dr. Bansal noted the full duty release by Dr. Nelson and the supplemental report from Dr. Sullivan accepting the full duty release. Dr. Bansal replied, reiterating his restrictions as outlined by Dr. Sullivan in November 2017 to include a 50-pound occasional lifting limit to waist level, a 25-pound lift limit from waist to shoulder, as well as limits on standing and walking, bending, twisting, squatting, stairs, steps, ladders and uneven terrain. (Claimant's Ex. 2, pp. 93-94) This last minute report is the reason for defendants' objection and subsequent filing of Defendants' Exhibit D. In Exhibit D, Dr. Nelson opines that claimant does not require permanent work restrictions either for the surgery he performed or for the prior surgery Dr. Sullivan performed.

Claimant urges rejection of the full duty work releases from Dr. Nelson and Dr. Sullivan and acceptance of the restrictions outlined by Dr. Bansal. I concur with claimant that the full duty release is not realistic. Claimant provided credible testimony that he has significant ongoing symptoms. It is unlikely that he is able to work without any restrictions given his potential need for a future hip replacement and his ongoing symptoms.

On the other hand, claimant's reliance upon Dr. Bansal is also not terribly credible. Dr. Bansal accepts restrictions from Dr. Sullivan in November 2017 that were disproved during a FCE and modified by Dr. Sullivan. Dr. Bansal mentions the FCE results but provides no explanation why those should not apply for claimant. During his deposition, claimant testified that he agreed with the restrictions imposed by the FCE. (Defendants' Ex. C, p. 80)

I find the full duty release offered by Dr. Nelson to be unrealistic but I also find the restrictions offered by Dr. Bansal to be unduly restrictive of claimant's physical abilities. It is likely that the FCE abilities are closest to claimant's functional abilities than either Dr. Nelson or Dr. Bansal's restrictions or release from restrictions.

Subsequent to this injury, the employer terminated claimant. Claimant believes that termination was the result of miscommunication and his attempt to use Family and Medical Leave Act (FMLA) leave. Defendants dispute the basis or reason for the termination. Defendants documented dishonesty and intentional falsification of

company records as the reason for termination on August 19, 2016. (Defendants' Ex. A, p. 4)

Regardless, claimant is no longer employer by ACH Food Co. He has not worked since his termination in August 2016. Mr. Nourie's efforts to secure alternate employment have not been terribly motivated, though he was pursuing additional treatment for much of the period of time since August 2016.

I find that Mr. Nourie sustained a left hip injury on November 13, 2014. That left hip injury resulted in surgery and subsequent development of the calcification in his left hip. That calcification caused the second surgery by Dr. Nelson.

I accept Dr. Sullivan's impairment rating as most credible in this situation. Defendants urge that Dr. Nelson later rescinded the impairment rating. He did not. Dr. Nelson declined to add any further impairment after the second surgery.

I reject Dr. Bansal's impairment rating because he includes an impairment rating for sacroiliitis. Claimant has not proven a low back injury as a result of either injury date at work. I accept Dr. Nelson's statement that no low back symptoms were ever reported by claimant. I find that claimant sustained an aggravation of his left hip symptoms as a result of the July 12, 2016 work injury. However, I find that Mr. Nourie did not prove an increase in his impairment rating, worsening of his restrictions, or a permanent aggravation of the prior left hip injury as a result of the events of July 12, 2016. Therefore, I find no permanency related to the July 12, 2016 date of injury.

That being said, claimant has clearly proven permanent disability was sustained a result of the November 13, 2014 date of injury. I accept the impairment rating from Dr. Sullivan and find that claimant has proven a seven percent permanent impairment of the whole person as a result of the November 13, 2014 injury date. Again, I find the FCE limitations to be most accurate as to claimant's abilities. Claimant's work history includes mostly manual labor. Some of the jobs previously performed remain within the FCE limits, but manual labor will be more difficult for claimant with his permanent left hip injury and symptoms.

Mr. Nourie is an aging worker. It is not realistic or economically feasible for him to pursue further education or training at this juncture of his career. Mr. Nourie has made some inquires for job searches, but these appear mainly related to receipt of unemployment benefits. Claimant apparently was reporting his injury and need for a second surgery when making these job inquiries. Not surprisingly, he was not hired.

Claimant reports that he continues to want to work. His job search has not been extensive or motivated. Claimant testified he does not believe he can return to any of his prior employment. Mr. Nourie describes some internet jobs that he would like to pursue. I find that Mr. Nourie remains capable of gainful employment.

Considering claimant's age, the situs and severity of his injury, his ongoing symptoms and limitations, his permanent impairment, his educational and employment

background, his motivation, his ability to find subsequent employment, his loss of earnings since the injury, as well as all other factors of industrial disability outlined by the Iowa Supreme Court, I find that Mr. Nourie has proven a 35 percent loss of future earning capacity as a result of the November 13, 2014 work injury.

CONCLUSIONS OF LAW

The primary dispute in these cases is the extent of claimant's entitlement to permanent disability benefits. (Hearing Report) 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 hip injury is generally an injury to the body as a whole and not an injury to the lower extremity. The lower extremity extends to the acetabulum or socket side of the hip joint. For a hip injury to be industrially ratable, disability in the form of actual impairment to the body must be present. Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943).

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, 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.

In this case, the parties stipulate that claimant is entitled to an award of permanent disability benefits. Claimant's injury involves his left hip and is an unscheduled injury. Therefore, I conclude that the injury should be compensated with industrial disability benefits. Iowa Code section 85.34(2)(u).

I considered all of the relevant factors outlined by the Iowa Supreme Court to assess industrial disability. I found that Mr. Nourie proved a 35 percent loss of future earning capacity. This is equivalent to a 35 percent industrial disability and entitles claimant to an award of 175 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u).

Finally, claimant seeks assessment of his costs. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. Claimant has prevailed. Therefore, I conclude it is appropriate to assess claimant's costs in some amount.

Specifically, claimant seeks assessment of his filing fees ($200.00). These are reasonable and permitted costs. 876 IAC 4.33(7). The employer will be ordered to reimburse claimant's filing fees ($200.00).

Claimant seeks service fees. Again, this is a reasonable cost and is permitted by 876 IAC 4.33(3). Defendants will be ordered to reimburse claimant's service fees in the amount of $12.94.

Finally, claimant seeks assessment of the cost of Dr. Bansal's report or reports. I did not find Dr. Bansal's opinions to be convincing or rely upon them in fashioning my award. I decline to assess Dr. Bansal's report expenses as costs.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant one hundred seventy-five (175) weeks of permanent partial disability benefits commencing and payable pursuant to the parties' stipulations in the hearing report.

All weekly benefits shall be payable at the stipulated weekly rate of five hundred thirty-six and 39/100 dollars ($536.39) per week.

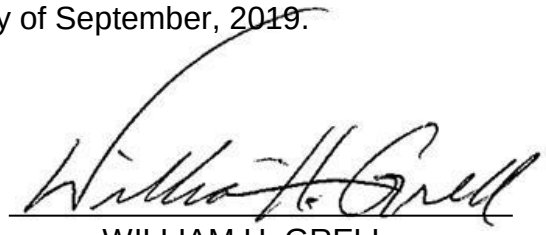
Defendants shall be entitled to the stipulated credit in the hearing report against this award of benefits.

Defendants shall pay accrued weekly benefits in a lump sum together with interest 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, as required by Iowa Code section 85.30.

Defendants shall reimburse claimant's costs totaling two hundred twelve and 94/100 dollars ($212.94).

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 _____27th_____ day of September, 2019.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Channing Dutton (via WCES)

Michael Roling (via WCES)