BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ONOFRE MONSALVO LOPEZ, Claimant, vs. SEABOARD TRIUMPH FOODS, INC., Employer, and CCMSI, Insurance Carrier, Defendants.	File No. 21006717.01 A P P E A L D E C I S I O N Head Notes: 1402.20; 1402.40; 1403.10; 2501; 2701; 2907

Claimant Onofre Monsalvo Lopez appeals from an arbitration decision filed on January 5, 2023. Defendants Seaboard Triumph Foods, employer, and its insurer, CCMSI respond to the appeal. The case was heard on October 5, 2022, and it was considered fully submitted in front of the deputy workers' compensation commissioner on November 11, 2022.

In the arbitration decision, the deputy commissioner found claimant is not entitled to temporary benefits for the stipulated October 14, 2020, work injury because claimant refused suitable work when he failed to return to work from a medical condition unrelated to the stipulated work injury. The deputy commissioner found claimant is not entitled to permanent partial disability benefits because no expert has opined whether the October 14, 2020, work injury is the cause of permanent disability. The deputy commissioner found claimant is not entitled to alternate care with the previously authorized medical providers. The deputy commissioner found claimant is not entitled to reimbursement from defendants for his costs of the arbitration proceeding.

On appeal, claimant asserts the deputy commissioner erred in finding he is not entitled to permanent partial disability benefits, and claimant asserts he has not reached maximum medical improvement (MMI). Claimant asserts the deputy commissioner erred in finding he is not entitled to alternate medical care with the previously authorized medical providers. Claimant asserts the deputy commissioner erred in finding he is not entitled to reimbursement from defendants for his costs of the arbitration proceeding.

Defendants assert on appeal that the arbitration decision should be affirmed in its entirety.

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

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.15 and 86.24, the arbitration decision filed on January 5, 2023, is affirmed in part, and is reversed in part, with my additional and substituted analysis.

Without further analysis, I affirm the deputy commissioner's finding that claimant is not entitled to temporary benefits for the stipulated October 14, 2020, work injury because he refused suitable work when he failed to return to work from a medical condition unrelated to the stipulated work injury.

With my additional and substituted analysis, I reverse the deputy commissioner's finding that claimant did not prove he is entitled to permanent partial disability benefits. I find claimant has not reached MMI and the issue of whether claimant is entitled to receive permanent disability benefits is not ripe for adjudication. I reverse the deputy commissioner's finding claimant is not entitled to alternate care with the previously authorized medical providers. I reverse the deputy commissioner's finding claimant is not entitled to reimbursement from defendants for his costs of the arbitration proceeding.

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Willis, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

> it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer.

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979).

The parties stipulated claimant sustained an injury to his low back while working for defendant-employer on October 14, 2020. The parties dispute whether claimant has sustained permanent impairment. At hearing, claimant alleged he had not reached MMI and he sought a running award of temporary benefits. Defendants alleged claimant failed to prove he sustained permanent impairment caused by the stipulated work injury.

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa 1997). When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

It is well-established in workers' compensation that "if a claimant had a preexisting condition or disability, aggravated, accelerated, worsened, or 'lighted up' by an injury which arose out of and in the course of employment resulting in a disability found to exist," the claimant is entitled to compensation. Iowa Dep't of Transp. v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held:

> a disease which under any rational work is likely to progress so as to finally disable an employee does not become a "personal injury" under our Workmen's Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause.

Musselman v. Cent. Tel. Co., 261 Iowa 352, 359-60, 154 N.W.2d 128, 132 (1967).

In 2017, the Iowa Legislature modified Iowa Code section 85.34(2) governing the commencement date for permanency, as follows:

> Compensation for permanent partial disability shall begin when it is medically indicated that maximum medical improvement from the injury has been reached and that the extent of loss or percentage of permanent impairment can be determined by use of the guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A.

Under the plain meaning of the statute, permanent partial disability benefits commence when the claimant has reached MMI and when the extent of loss can be determined under the AMA Guides.

Defendants authorized treatment for claimant with Pedro Ricart-Hoffiz, M.D., an orthopedic surgeon. (Ex. 6) In a letter sent by facsimile to defendants' representative on March 23, 2021, Dr. Ricart-Hoffiz noted claimant had undergone magnetic resonance imaging on November 19, 2020, and his injury correlated with an exacerbation of his preexisting disease. (Ex. B, p. 10) Dr. Ricart-Hoffiz documented:

> Subsequently, he responded to conservative care and during physical therapy, re-aggravated this injury. Again, he does not show any fractures or significant disc herniation. He has moderate degenerative disc disease mostly at L5-S1 which is likely related to an aggravation of his pre-existing disease at baseline related to his work comp injury.

(Ex. B, p. 10)

Dr. Ricart-Hoffiz recommended pain management treatment. Defendants authorized pain management treatment for claimant with two physicians, first with Jery Inbarasu, M.D., with Momenta Pain Care, and then with Andrew Huff, M.D., with Bluffs Pain Management. (Exs. A and C)

During a follow-up appointment on October 25, 2021, Dr. Ricart-Hoffiz noted claimant was undergoing pain management treatment with Dr. Huff, he was responding to conservative care, and he could return for follow-up care as needed. Dr. Ricart-Hoffiz noted he was deferring to Dr. Huff for "current pain management control" and if claimant's symptoms worsened, he could discuss surgical options at a later date. (Exs. B, p. 13; 6, p. 51)

In a letter Dr. Ricart-Hoffiz sent by facsimile to defendants' representative on January 28, 2022, Dr. Ricart-Hoffiz opined claimant sustained "an exacerbation of his preexisting disease with findings of degenerative disc disease at L5-S1" caused by the work injury. (Ex. B, p. 15) Dr. Ricart-Hoffiz opined claimant's referral to pain management was causally related to the stipulated October 14, 2020, work injury. (Ex. B, p. 15) Dr. Ricart-Hoffiz recommended a follow up letter to Dr. Huff regarding claimant's treatment plan and stated "[w]e cannot place any permanent impairment at this time as patient has not achieved maximum medical improvement." (Ex. B, p. 15)

In a letter dated to defendants' representative dated February 1, 2022, Dr. Huff summarized the treatment he had provided since October 12, 2021, and noted,

> There are 2 treatments currently available, from my standpoint, for the patient's axial low back pain I would recommend starting with an injection of VIA disc. This is a cadaver disc emulsion which can provide replacement of disc height and improvement of function and pain with 1 simple injection. An alternative treatment, which is more invasive, would be

> a basivertebral nerve ablation of L5 and S1. Otherwise, from my standpoint the patient will have reached MMI. He should continue on anti-inflammatory medication and nonopioid pain medication and possibly back bracing.

(Ex. A:9)

On May 10, 2022, Dr. Ricart-Hoffiz responded to a check-the-box letter, agreeing it was undetermined whether claimant is a surgical candidate, and to determine if he is a surgical candidate, he would need to reexamine claimant. (Ex. 7, p. 52) Dr. Ricart-Hoffiz agreed claimant sustained a work injury that aggravated his preexisting lumbar spine condition and recommended reexamination and a functional capacity evaluation. (Ex. 7, p. 52) Dr. Ricart-Hoffiz wrote:

> Depending on main complaint or ongoing issue would determine candidacy for one procedure or the other, given he has shown both radicular and axial back pain as complaint in the past.
>
> If only radicular symptoms, repeat MRI for up-to-date assessment of lateral recess stenosis to discuss laminotomy.
>
> If axial back pain major component, then ALIF would be an option.

(Ex. 7:52)

Anke Horacek, M.D., an emergency medicine physician, conducted an independent medical examination (IME) for claimant and she made additional treatment recommendations, including surgery. (Ex. 8) I find the opinions of Dr. Ricart-Hoffiz, the treating orthopedic surgeon, and Dr. Huff, the treating pain management specialist, should be given more weight than Dr. Horacek's opinion. I agree with the deputy commissioner Dr. Horacek's opinion is not entitled to weight on the issue of whether claimant is at MMI and whether claimant needs additional treatment.

While Dr. Ricart-Hoffiz deferred to Dr. Huff on the issue of claimant's pain control, he did not defer to Dr. Huff on treatment generally or causation. (Ex. 6, p. 51) Dr. Huff recommended additional treatment for claimant. Defendants did not schedule the recommended care for claimant. Dr. Ricart-Hoffiz also recommended claimant be re-examined. Defendants did not schedule an appointment for claimant with Ricart-Hoffiz. Claimant testified he continues to experience low back problems at hearing. I find claimant is not at MMI and the issue of whether he is entitled to permanency benefits is not ripe for adjudication.

At hearing claimant requested alternate care with the previously authorized treating physicians. An employer is required to furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, hospital services and supplies, and transportation expenses for all conditions compensable under the workers' compensation law. Iowa Code § 85.27(1). The employer has the right to choose the provider of care, except when the employer has

denied liability for the injury. Id. "The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." Id. § 85.27(4). If the employee is dissatisfied with the care, the employee should communicate the basis for the dissatisfaction to the employer. Id. If the employer and employee cannot agree on alternate care, the commissioner "may, upon application and reasonable proofs of the necessity therefor, allow and order other care." Id. The statute requires the employer to furnish reasonable medical care. Id. § 85.27(4); Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995) (noting "[t]he employer's obligation under the statute turns on the question of reasonable necessity, not desirability"). The Iowa Supreme Court has held the employer has the right to choose the provider of care, except when the employer has denied liability for the injury, or has abandoned care. Iowa Code § 85.27(4); Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010).

Dr. Ricart-Hoffiz and Dr. Huff recommended additional treatment for claimant. I find claimant's request for alternate care to return to Dr. Ricart-Hoffiz and Dr. Huff should be granted. Defendants shall promptly authorize appointments for claimant with Dr. Ricart-Hoffiz and Dr. Huff and follow their treatment recommendations.

Claimant asserts the deputy commissioner erred in finding claimant is not entitled to reimbursement from defendant for his costs of the arbitration proceeding. Claimant seeks to recover the $103.00 cost of the filing fee.

Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 IAC 4.33(6), provides

> Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

Claimant was successful in proving he has not reached MMI following the work injury, and in proving he is entitled to alternate medical care. Using my discretion, I find defendants should reimburse claimant $103.00 for the cost of the filing fee.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on January 5, 2023, is affirmed in part, and is reversed in part, with my additional and substituted analysis.

Claimant is not at MMI and the issue of whether he is entitled to permanency benefits is not ripe for adjudication.

Claimant's request for alternate care is granted. Defendants shall promptly authorize care for claimant with Dr. Ricart-Hoffiz and Dr. Huff.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding in the amount of one hundred three and 00/100 dollars ($103.00) and defendants shall pay the costs of the appeal, including the cost of the hearing transcript.

Pursuant to rule 876 IAC 3.1(2), defendants shall file subsequent reports of injury as required by this agency.

Signed and filed on this 21st day of June, 2023.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Steven Howard (via WCES)

Steven Brown (via WCES)