BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

NICK LOVE, Claimant, vs. EFCO CORP., INC., Employer, and SENTRY INSURANCE, Insurance Carrier, Defendants.	:	File No. 5061762 ARBITRATION DECISION Head Note Nos.: 1800, 1803, 2501, 2502

STATEMENT OF THE CASE

Nick Love, claimant, filed a petition in arbitration seeking workers' compensation benefits against EFCO Corp., Inc., employer, and Sentry Insurance, insurer, for an accepted work injury date of January 8, 2014.

This case was heard on June 18, 2019, in Des Moines, Iowa. The case was considered fully submitted on July 8, 2019, upon the simultaneous filing of briefs.

The record consists of Joint Exhibits 1-5; Claimant's Exhibits 6-10; Defendants' Exhibits A-C, and the testimony of claimant.

ISSUE

The extent of claimant's disability.

STIPULATIONS

Whether claimant is entitled to reimbursement of the second independent medical examination (IME) according to Iowa code section 85.39.

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.

The parties agreed that the claimant sustained an injury on January 8, 2014, which arose out of and in the course of his employment. The injury was the cause of some temporary disability, entitlement to which is no longer in dispute.

The parties agree that some amount of permanent benefits are owed for an industrial disability, but dispute the extent of that disability. The commencement date for permanent benefits is December 5, 2014.

At the time of claimant's injury, his gross earnings were $971.38 per week. He was single and entitled to 2 exemptions. Based on the foregoing figures, the weekly benefit rate is $590.66.

Prior to the hearing, the claimant was paid 55 weeks of compensation at the rate of $590.66 per week. The defendants are entitled to a credit of that amount against any award of permanent partial disability benefits.

FINDINGS OF FACT

Claimant was a 60 year old person at the time of the hearing. His past education includes high school diploma achieved in 1977. Following high school, he attended Lincoln Technical Institute for a year where he was taught to repair automobiles. He received a certificate around 1979.

His employment history includes work in auto repair, meat processing, construction of gas stations, and fabricator. Prior to joining defendant employer, claimant worked for Ramark Industries, a fabrication plant. As part of his employment, he became a registered welder. He constructed iron elements such as railings. Since 2010, he has been employed with defendant employer.

His past work required a lot of lifting, climbing, bending, and standing for long periods of time. Currently he feels comfortable lifting approximately 30 pounds. He walks frequently to help ease the back pain. He alternates sitting and standing. He wore a back brace at one time but discontinued after the advice of John Kuhnlein, M.D.

For his first position at EFCO, he was assigned as a general laborer. He worked on the paint line, loading parts onto the painting rail and into carts. After approximately a year, he moved to welding where he worked on a variety of projects, some of which were small and some of which were large and required him to crawl.

He is now a machinist and has been for some time. He works with restrictions. He no longer does the 3.5 pipe and is limited to lifting 50 pounds.

He does not believe he could return to past positions such as meat processing or construction work due to the heavy lifting and physical exertion required in those positions.

At one point he detailed cars and while the bending and stretching might present some physical challenges, he testified he believed he could do that job again, albeit at a slower pace. Bending, stretching, and standing in one spot is also difficult for him.

The stipulated injury occurred on January 8, 2014, when he was moving a large pipe and felt a pain in his back which radiated down into his buttock and posterior leg. (JE 1:1) The MRI of January 22, 2014, showed extensive degenerative changes throughout the entire spine but a substantial disc impingement at L3-L4. (JE 2:22) His care was referred to Lynn M. Nelson, M.D. for an orthopedic consult. (JE 3) Dr. Nelson scheduled claimant for surgery but before that could be performed the defendant carrier requested a causation opinion, asking whether the back injury and subsequent need for surgery was related to claimant's work. (JE 3:28-29) Dr. Nelson affirmed that the lumbar spine problem and need for surgery was related to employment. (JE 3:35)

> 1. Mr. Love's lumbar spine problem (right L3-4 herniated nucleus pulposus) and need for surgical treatment is related to his employment/job duties with EFCO.
>
> 2. While his personal conditions may be a factor in regards to his lumbar spine problem, as above, his work at EFCO is the material factor.
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> 3. Mr. Love's current employment likely caused the L3-4 HNP rather than work being a simple exacerbation of it.
>
> 4. As above, I do not believe Mr. Love sustained a temporary aggravation.
>
> 5. Current work restrictions of ten pounds lifting, pushing and pulling, no repetitive bending or twisting, and alternate sitting and standing as necessary, are appropriate.

(JE 3:35)

Claimant underwent surgical repair of his extruded disc on April 19, 2014. (JE 3:37) He progressed slowly but on May 12, 2014, requested a return to work form which was given with some restrictions. (JE 3:44) On June 2, 2014, during a follow-up visit with Dr. Nelson, the progress was described as "adequate." (JE 3:47) Claimant still had lower extremity pain, ongoing right buttock and low back pain that increased throughout the day. (JE 3:47) Dr. Nelson felt that this ongoing pain was myofascial in nature. Id. Claimant continued to work but with restrictions. His condition did not improve. Upon his return to Dr. Nelson on September 11, 2014, claimant was reporting low back pain, greater on the right than the left. (JE 3:52) Dr. Nelson referenced claimant's degenerative condition and the two discussed treatment options. Id. It was decided that claimant would undergo a baseline functional capacity evaluation (FCE) to determine the next steps for care. (JE 3:52)

On November 20, 2014, claimant underwent the FCE, which placed him in the medium work category. (JE 4:60)

> The overall classification of effort is Valid due to the client, Nick Love, performing consistently during a repeated measures protocol. The client meets the material handling demands for a Medium demand vocation, per the Dictionary of Occupational Titles.
>
> - The client is able to safely perform the following activities on the job.
> - Waist to floor lifting – 50 lbs., occasionally
> - Waist to crown lifting – 35 lbs., occasionally
> - Carrying – 45 lbs., occasionally
> - Sitting/standing work – Constantly with positional changes as required to maintain a reasonable level of comfort throughout the workday.
> - Squatting – Frequently, within available range of motion.
> - Bending – Frequently
> - Stooping – Occasionally

(JE 4:60)

After the FCE, claimant returned to Dr. Nelson who recommended no further invasive treatment but rather the occasional use of over-the-counter medications, tramadol and/or Robaxin, and working within reasonable restrictions. (JE 3:54)

Claimant's pain persisted, however, and he returned to Dr. Nelson in February 2015. (JE 3:56) Claimant was sent for a repeat MRI which revealed a small central disc protrusion at L3-4 as well as a tiny right subarticular disc protrusion at L5. (JE 3:57) No treatment changes were advised and on May 12, 2015, Dr. Nelson issued an opinion that claimant's impairment rating was 11 percent of the whole body with a lifting restriction of 50 pounds. (JE 3:59)

Over time, claimant experienced flare ups with his low back pain and was treated by the company doctor. In 2018, however, the complaints were serious enough to return to UnityPoint Health where he was seen by David T Berg, D.O. (JE 1:7) Eventually he was sent for a repeat MRI which showed multilevel degenerative arthritis. (JE 1:12; JE 5:71) During a post-MRI visit with Dr. Berg, claimant's lifting restrictions were noted to be 30 pounds. (JE 1:12) Claimant refused physical therapy and denied that his job required any heavy lifting. (JE 1:12) Dr. Berg returned claimant to his previous position with restrictions. (JE 1:12) Claimant continued to complain of low back pain and limited range of motion and on July 23, 2018, agreed to return to physical therapy. (JE 1:14) Per the report of Dr. Kuhnlein, therapy was helpful although it was with the TENS unit

that claimant found the most relief. (Ex. 6:84) His lifting restrictions were noted to be 50 pounds at that time. Id.

> By December 19, 2018, claimant was considered fully recovered. (JE 1:19)
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> On exam, he is alert and oriented x3. No acute distress. Skin is warm and dry. No erythema, edema, or ecchymosis. Range of motion sitting pushing and pulling with both legs is strong, bilaterally equal. DTRs are bilaterally equal. Straight leg raising 90 degrees with each leg and 90 degrees together. Standing flexion, extension, sidebending, and rotation are all good range of motion without pain. Supine straight leg raising 90 degrees with each leg and 90 degrees with legs together without pain.

(JE 1:19) He was released without any restrictions including the 50 pound lifting restriction. Claimant disagrees with the medical record. (See, e.g., Ex. 6:84) He did not indicate that there was a new injury and that he was pain free and wished to return to work without restrictions.

Claimant underwent an IME with John Kuhnlein, M.D. on April 30, 2015. (Ex. 6:73) Claimant reported to Dr. Kuhnlein that he was not pre-injury pain free and that his soreness and pain increased as the workday goes on. (Ex. 6:75) He still had problems with lifting, pushing, pulling, carrying, walking, sitting, standing, stooping, kneeling, working at all levels from floor to over shoulder height, using his legs to go up and down the stairs. (Ex 6:76)

During the physical examination, claimant walked with a normal gait, squatted without problems, was able to walk on his heels, and had normal straight leg tests. (Ex 6:77) He had some reduced range of motion in his low back and pain with flexion. (Ex 6:77) He was not tender to palpation nor did he have percussive costovertebral angle tenderness or sciatic notch tenderness. (Ex. 6:77)

Dr. Kuhnlein diagnosed claimant as post-surgical repair of his disc herniation and disc compression, currently suffering chronic nonradicular musculoskeletal low back pain. (6:77) Dr. Kuhnlein recommended additional therapy in the form of core strengthening and advised claimant to abstain from wearing the back brace. (JE 6:78) Based on claimant's personal opinions, Dr. Kuhnlein recommended the following restrictions:

> At this point, given his response to duty under the restrictions outlined by the functional capacity evaluation, I believe that Mr. Love requires different restrictions. He should lift 40 pounds occasionally from floor to waist and waist to shoulder, and 20 pounds occasionally over the shoulder.
>
> With respect to nonmaterial handling, Mr. Love could sit, stand or walk on an as needed basis, changing positions for comfort. He can squat frequently. He can bend at the waist occasionally. He can crawl occasionally. He can keel without restrictions. He can work on ladders or

> height without restrictions as long as he is not taking more significant medication for his back condition. He can go up and down stairs. He can work occasionally at or above shoulder height, to avoid the "moment arm" phenomenon in the lumbar spine. He can use vibratory or power tools occasionally at or above shoulder height for the same reason. There are no environmental restrictions. If he is working on uneven surfaces, he needs to wear good footgear.

(Ex 6:78)

On April 17, 2019, claimant underwent another IME with Dr. Kuhnlein. (Ex. 6:82) The date of injury was identified as January 8, 2014. (Ex. 6:82) Claimant acknowledged that he returned to his previous baseline but that his symptoms increased although there was no new injury. (Ex 6:84) He maintained that he had constant pain in the low back area that radiated into the left or right buttock and the medial aspect of either leg to the knees. (Ex. 6:84) During the examination portion, claimant was able to move about the room with a normal gait, walk on his heels and toes without difficulty. (Ex. 6:86) He complained of back and knee pain upon squatting and related pain with flexion and extension. (Ex. 6:86) Dr. Kuhnlein's diagnosis was unchanged from the April 30, 2015, examination. (Ex. 6:87) Dr. Kuhnlein did explicitly state that in addition to the acute injury, the degenerative condition was "lit up" by the acute trauma, producing chronic pain that had not previously existed. (Ex 6:87)

Dr. Kuhnlein assigned an 11 percent whole person impairment and recommended the following restrictions:

> Mr. Love relates that he has no significant problems lifting up to 50 pounds, but also describes problems with this weight below waist level. I would suggest fine-tuning his restrictions. Material handling restrictions would include lifting 35 pounds occasionally from floor to waist, 50 pounds occasionally from waist to shoulder when work is kept close to the axial plan of his body. He can lift 35 pounds occasionally from waist to shoulder if lifting more than elbows distance away from his body, and 35 pounds occasionally over the shoulder.
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> Nonmaterial handling restrictions would include sitting, standing, or walking on an as needed basis with the ability to change positions for comfort. He can stoop or squat frequently. He can occasionally bend at the waist. He can occasionally crawl. He can kneel without restrictions. Mr. Love can work on ladders or at height as long as he can maintain a three-point safety stance and is not on any medication that would impair his safety. Mr. Love can occasionally climb stairs. He can work at or above shoulder height occasionally. He can grip or grasp without restrictions when only the back condition is considered. There are no lower extremity restrictions.

> There are no vision, hearing or communication restrictions. Mr. Love can travel for work, as long as he can take stretch breaks from time to time. He can use hand or power tools occasionally at or above shoulder height to avoid the "moment arm" phenomenon in the lumbar spine. There are no environmental restrictions. If working on uneven surfaces, good footgear would be appropriate. There are no personal protective equipment restrictions. Mr. Love can work on production lines as long as he can keep moving and is not in any static postures for more than a few minutes at a time. There are no shiftwork issues.

(Ex. 6:88)

Claimant currently makes approximately $22.44 per hour. He does not believe there is comparable employment available to him outside of his current position with his current employer. He testified that he experiences daily discomfort that can vary in intensity with some days more painful than the others. On the worse days, his pain radiates into his buttocks and legs. He takes ibuprofen daily. He participates in the same activities and hobbies he did pre-injury but he has modified his behaviors to accommodate his back pain. He earns more today than he did at the time of his injury.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

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 Electric 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.

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).

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).

This case involves a question of extent. The parties agree the claimant sustained a work related injury arising out of and in the course of his employment. That injury has resulted in some impairment for the claimant. Based on claimant's own testimony, he engages in primarily the same activities today as he did prior to his injury both in his work and his personal recreational hobbies. However, how he carries out the essential elements of his job and how he participates in his recreational activities have been changed to accommodate his post-injury status.

Dr. Nelson, his treating doctor, did not give an impairment rating. He did agree that permanent work restrictions of no lifting over 50 pounds was reasonable and appropriate. This opinion was given 2015. Claimant's condition has worsened as time went on. There is no updated opinion from Dr. Nelson and therefore the opinion of Dr. Kuhnlein is given more weight.

All of claimant's past work history has involved manual labor, most of it heavy-duty manual labor. He cannot engage in the same type of heavy-duty manual labor as he was able to perform pre-injury. According to Dr. Kuhnlein, Claimant was asymptomatic prior to his injury but his pre-existing degenerative condition was lit up by the work injury. Based on this work injury, claimant has some limited range of motion of his back and some pain with movement. Based on these deficits along with the surgical repair of the lumbar spine, Dr. Kuhnlein assessed 11 percent whole person impairment.

Claimant asserts that his permanent disability is substantial given the fact that there are a few of his past jobs that he could return to. Claimant is motivated to return to work and has worked continuously since he was a teenager. He had to undergo surgical repair of his lumbar spine as a result of his work injury. He has experienced ongoing pain associated with his back injury that waxes and wanes in intensity.

Fortunately, he is able to continue to work at his current employer doing a job similar to that what which he had done before. He is making more money today than he was at the time of his injury. He is not taking any prescription medications at this time nor is he receiving any treatment.

Based on the impairment rating of Dr. Kuhnlein, along with the testimony evidence that the claimant is working primarily the same position that he had had prior to the injury with some modification as well as partaking in the same types of hobbies he had prior to the injury with some modification, it is found that claimant has sustained a 25 percent industrial disability.

The claimant has requested reimbursement for a second independent medical examination from Dr. Kuhnlein. While it was useful to obtain an updated report from Dr. Kuhnlein, there is no law that allows for a reimbursement of a second IME. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 395 (Iowa 2009). In the alternative, the claimant argues that the report of Dr. Kuhnlein is permissible as a recoverable cost pursuant to Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 846-847 (Iowa 2015) (DART).

Rule 876 IAC 4.33 indicates, in relevant part:

> 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

When 85.39 is not triggered, a report can be assessed under rule 876 IAC 4.33. Therefore, the report fee of Dr. Kuhnlein can be assessed as a cost. According to Exhibit 8:98, $1,673.40 was charged by Dr. Kuhnlein for the report itself.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant one hundred twenty-five (125) weeks of permanent partial disability benefits at the rate of five hundred ninety and 66/100 dollars ($590.66) per week from December 5, 2014.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants are to be given credit for benefits previously paid.

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

That defendants shall pay the costs of this matter pursuant to rule 876 IAC 4.33 including the filing fee and one thousand six hundred seventy-three and 40/100 dollars ($1,673.40) of Dr. Kuhnlein's charges.

So ordered.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Delivered by WCES to all parties of record.