BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GERALD S. AKES, Claimant, vs. DSM DESIGNS, LLC, Employer, and ACUITY, Insurance Carrier, Defendants.	FILED JAN - 9 2019 WORKERS' COMPENSATION File No. 5054074 APPEAL DECISION Head Note Nos: 1108; 1402.40

Defendants DSM Design, LLC, employer, and its insurer, Acuity, appeal from an arbitration decision filed on May 23, 2017. Claimant Gerald S. Akes responds to the appeal. The case was heard on May 18, 2016, and it was considered fully submitted in front of the deputy workers' compensation commissioner on June 10, 2016.

In the arbitration decision, the deputy commissioner found claimant carried his burden of proof that he sustained permanent disability of his back as a result of the stipulated injury which arose out of and in the course of claimant's employment with defendant-employer on July 7, 2014. The deputy commissioner found claimant sustained 50 percent industrial disability, which entitles claimant to receive 250 weeks of permanent partial disability (PPD) benefits commencing May 1, 2015. The deputy commissioner found claimant is entitled to receive healing period benefits commencing November 17, 2014, through April 30, 2015. The deputy commissioner found claimant's correct average gross weekly wage for the work injury is $776.00, and the deputy commissioner found claimant's weekly benefit rate for the injury, classification married with two exemptions, is $505.72. The deputy commissioner also found defendants are responsible for the requested past medical expenses and medical mileage itemized in Exhibits 15 and 17. The deputy commissioner found defendants are entitled to a credit for long-term disability payments as stipulated in the hearing report. The deputy commissioner ordered defendants to pay claimant's costs of the arbitration proceeding.

On appeal, defendants assert the deputy commissioner erred in finding claimant sustained permanent disability as a result of the work injury. Defendants assert the deputy commissioner erred in finding claimant sustained any industrial disability as a

result of the work injury. Defendants assert the deputy commissioner erred in finding defendants are responsible for the requested past medical expenses itemized in Exhibits 15 and 17. Defendants assert the deputy commissioner erred in ordering defendants to pay claimant's costs of the arbitration proceeding.

Claimant asserts on appeal that the arbitration decision should be affirmed in its entirety.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a 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 portions of the proposed arbitration decision relating to issues properly raised on intra-agency appeal are reversed. I provide the following analysis for my decision:

ISSUES ON APPEAL

1. Whether the Deputy Commissioner erred in finding claimant sustained permanent disability of his back as a result of the lifting incident that arose out of and in the course of his employment with defendant-employer on July 7, 2014.

2. Whether the deputy commissioner erred in awarding industrial disability for the July 7, 2014, work incident.

3. Whether the deputy commissioner erred in awarding claimant healing period benefits from November 17, 2014, through April 30, 2015.

4. Whether the deputy commissioner erred in awarding claimant requested past medical expenses and mileage expenses incurred after October 22, 2014.

FINDINGS OF FACT

At the time of the arbitration hearing, Claimant was 63 years old. (Hearing Transcript page 13) Claimant graduated from high school in 1970 and went on to obtain a bachelor of science degree from Northwest Missouri State University in secondary education. (Exhibit M, deposition transcript pp. 6-7) He obtained additional schooling through Indian Hills Community College where he took courses in computers, auto CAD, and truck driving. (Id. at pp. 7-8) He also received training in CNC programming through one of his employers. (Id. at p. 8) Claimant has a current commercial driver's license. (Tr. p. 88) Claimant's employment history includes working as an industrial arts teacher, a rural mail carrier, a draftsman, CNC programmer, cabinet maker, machine operator, and in retail sales for plumbing and appliances. (Ex. 20, pp. 1-2; Ex. M, depo. pp. 9-20)

Claimant began his employment with defendant-employer in October 2012. (Ex. 19, p. 2) He worked as a machine operator and cabinet maker. Claimant's primary duty was running an edge bander. (Tr. p. 23)

At the end of the day on July 7, 2014, Tim Steele, a co-worker of claimant, asked claimant to help him load a cabinet onto a trailer. (Tr. p. 59) They placed the cabinet on a four-wheel cart and wheeled it to the trailer. Then they lifted the cabinet off the cart, carried it into the trailer and lowered it to the floor. (Tr. p. 24) Claimant experienced pain in his left shoulder and right low back from lifting the cabinet. (Ex. A, p. 4; Jt. Ex. 2, p. 21; Ex. M, depo. p. 37) Mr. Steele was unaware claimant sustained any injury while lifting the cabinet as claimant said nothing to Mr. Steele about being injured. (Ex. M, depo. p. 30; Tr. p. 59)

The next day, claimant reported to Melissa Heins, defendant-employer's office manager, that he injured his back and shoulder the day before. (Tr. pp. 98-99) Ms. Heins offered medical treatment for claimant, but claimant declined saying he did not need any medical care at that time. (Id.) Claimant did not seek any medical treatment related to the July 7, 2014, work injury until September 2014. (Tr. p. 60)

In a recorded statement, taken by defendant-insurance carrier on November 19, 2014, claimant was asked whether his pain got better, stayed the same, or got worse between July and September 2014. (Ex. A, p. 5) Claimant stated his pain came and went, but never resolved completely. (Id.) Claimant contradicted that statement during his hearing testimony when he stated his pain stayed the same during that time period, and during his deposition testimony when he stated the pain got worse. (Tr. pp. 26-27; Ex. M, depo. p. 31)

There is a July 25, 2014, medical record where claimant went to his family physician. However, that medical record does not mention claimant's lifting incident on July 7, 2014, and instead reports middle back pain just below the shoulder blades since Monday with no known injury. (Jt. Ex. 1, p. 5) Claimant had full range of motion in his back and was diagnosed with a thoracic myofascial strain. (Id. at p. 6) It was reported that physical therapy would be considered if claimant did not improve in a week. (Id.) Claimant's pain improved and he did not return to the doctor for this. (Tr. p. 64)

Claimant went on his own to his family physician, John Zittergruen, D.O., on September 4, 2014, reporting lower back pain that went into his hips. (Jt. Ex. 1, p. 7) It was noted claimant had a history of previous low back problems, but not to the same degree. (Id. at p. 8) During the physical examination, Dr. Zittergruen reported claimant was tender to palpation over the lower lumbar area on the right. (Id.) There were no objective findings for any left low back problems. An x-ray of claimant's lumbar spine revealed degenerative disk disease at L4-L5 and L5-SI. (Id.) Claimant was diagnosed with right lumbar radiculopathy. (Id.) After this visit, claimant talked to Ms. Heins at defendant-employer again regarding the work injury. (Tr. pp. 28-29) Claimant was then sent by defendant-employer to Concentra for medical treatment through workers' compensation. (Tr. p. 29)

Claimant was first examined at Concentra on September 26, 2014, by Judith Nayeri, D.O. (Jt. Ex. 2, p. 21). Claimant reported the July 7, 2014, lifting incident and stated he had pain in his right low back and left shoulder. (Id.) Claimant rated his left shoulder pain as zero out of ten with only mild pain during certain movements. (Id.) Claimant described his back pain as mild. (Id.) Upon examination, Claimant had normal range of motion in his left shoulder with some minimal tenderness upon palpation. (Id. p. 22) With respect to claimant's lumbar spine, the examination noted some mild pain with right side bending and with palpation on the right around L5. (Id.) Claimant had a normal bilateral hip exam. (Id. p. 23) Claimant was diagnosed with left shoulder strain and right lumbar strain. (Id.) Claimant was provided conservative treatment including medication and physical therapy. (Id.) Claimant's initial physical therapy visit occurred the same day as his appointment with Dr. Nayeri and confirmed his injuries as right low back and left shoulder. (Id. pp. 24-27)

Claimant returned to Concentra for follow- up on October 1, 2014. At that time, it was reported claimant had been working regular duty and had increased his range of motion from his previous visit. (Id. pp. 29-30) Claimant's diagnoses and treatment remained the same. (Id. p. 30).

During physical therapy on October 6, 2014, claimant reported his back and shoulder were feeling better. (Id. p. 31) The medical records indicate when claimant returned to Dr. Nayeri on October 8, 2014, claimant was doing fine performing his regular job and had intermittent pain in his right low back and left shoulder. (Id. p. 34) It was also reported that claimant had full range of motion at physical therapy, but not at his doctor's visit. (Id. at pp. 34, 36) An x-ray of claimant's left shoulder was performed. (Id. p. 35) Conservative care was continued for claimant's left shoulder strain and right lumbar strain. (Id.)

Claimant reported improvement in his functional status from physical therapy when he returned to Dr. Nayeri on October 15, 2014. (Id. p. 39) Claimant's left shoulder range of motion had decreased, but his lumbar range of motion had increased from the previous office visit. (Id.) An x-ray of claimant's lumbar spine was taken to rule out possible arthritis. (Id. p. 40). Claimant was diagnosed with osteoarthritis in his left shoulder based upon the x-ray and he was discharged from care for his shoulder with respect to the work injury. (Id. pp. 40, 42) It was noted physical therapy would have minimal effect for his shoulder due to the arthritis in his glenohumeral joint and AC joint. (Id. p. 42) Claimant was to continue with physical therapy for his right low back, but the therapist reported on October 15, 2014, that he was unable to recreate claimant's current back pain, and testing was inconclusive. (Id. pp. 40, 42)

On October 22, 2014, claimant told the physical therapist his back felt much better, but he then reported to Dr. Nayeri on the same day that he felt his condition was unchanged. (Id. pp. 45, 47) Claimant returned to Dr. Nayeri on the same date for follow-up wherein Dr. Nayeri determined Claimant had returned to baseline. Claimant was placed at MMI for the work injury. (Id. p. 46) It was recommended that claimant follow-up with his family physician for chronic osteoarthritis treatment. (Id.)

Claimant went to his family physician on November 6, 2014, for follow-up of back pain and arthritis. (Jt. Ex. 1, p. 11) He was diagnosed with osteoarthritis in multiple sites and referred to Mercy Arthritis Center. (Id. at p. 12) It was also reported Claimant planned to file for social security disability. (Id.)

Claimant worked his regular full duty job at defendant-employer from July 7, 2014, through noon on November 13, 2014. In fact, he even worked overtime every day during the week of the work injury. (Ex. K, p. 35C). Claimant's timecard which he personally completed contradicts his deposition testimony that he cut back to 40 hours per week after the July 7, 2014, work injury. (Ex. M, depo p. 28)

Ms. Heins testified that overtime hours were never mandatory at defendant-employer and the availability of overtime varied based upon the work projects. (Tr. p. 98)

Claimant took off work the afternoon of November 13, 2014, and all day November 14, 2014, to help his son move into a new house. (Tr. pp. 33-34, 69) Claimant spent around 12 hours total helping his son move on those two days. (Tr. p. 69) Claimant testified that during the move he moved furniture, carried items to and from the moving truck, took beds apart, and took television brackets down. (Tr. pp. 34, 70) In his recorded statement, claimant said he "did a lot of lifting and going up and down the stairs." (Ex. A, p. 7)

On Saturday, November 15, 2014, claimant had some pain and stiffness. (Id.) Then on Sunday, November 16, 2014, when claimant woke up, he had such severe back pain that he was unable to get out of bed without assistance and had trouble walking. (Jt. Ex. 3, p. 50) Claimant testified the pain he had on November 16, 2014, was the most severe pain he had ever experienced and it was different than any pain he had following the work injury on July 7, 2014. (Tr. p. 93) Due to his severe back pain, claimant went to the emergency room at UnityPoint Health Iowa West. (Jt. Ex. 3, p. 50).

Once he was at the emergency room, claimant requested a bed while waiting to be seen. (Id. pp. 50, 53). Claimant could not recall this during his hearing testimony. (Tr. p. 71) Claimant was unable to stand because his back pain was so bad. (Tr. p. 71) Claimant was admitted to the hospital to receive pain control for his back. (Jt. Ex. 3, p. 55) While in the hospital, claimant reported left low back, hip, thigh, and knee pain and some weakness. (Id. at p. 58) Tenderness and muscle spasm were noted over claimant's left lower back and upper left buttock. (Id. p. 51)

Claimant underwent a lumbar MRI on November 17, 2014, which primarily revealed a left far lateral L3-4 disc bulge affecting the left L3 nerve root, moderate left neural foraminal stenosis, and degenerative disc disease. (Id. pp. 60, 65)

While in the hospital, claimant was evaluated by an orthopedic surgeon, Lynn Nelson, M.D., on November 18, 2014. A detailed history of present illness obtained by Dr. Nelson sets forth an account of claimant's condition from July 2014 to November 16, 2014. (Id. p. 58) Claimant reported right low back pain in July 2014 that improved with

time and medication. (Id.) Claimant reported a recurrence of his right low back pain in September 2014 which led to his treatment at Concentra. (Id.) He reported he received physical therapy and he was diagnosed with some arthritis, which improved. (Id.) Then on Sunday, November 16, 2014, two days after he helped his son move, he awoke with severe left low back, hip, thigh, and knee pain and weakness. (Id.) He stated he helped his son move on Thursday and Friday and "believes this may be related to the onset." (Id.) Dr. Nelson discussed potential treatment options with claimant, who decided to allow time to improve before seeking other treatment. (Jt. Ex. 3, p. 60)

Claimant was discharged from the hospital on November 18, 2014. On November 19, 2014, claimant gave a recorded statement to defendant-insurer wherein he described his work injury on July 7, 2014, and reported injuries to his left shoulder and right low back. (Ex. A, p. 4) He also reported having severe back pain when he woke up on November 16, 2014, and being admitted to the hospital. (Id. p. 7) He reported helping his son move the Thursday and Friday prior to going to the hospital, which involved a lot of lifting and going up and down stairs. (Id.) Claimant stated he assumed helping his son move is what set off his back pain on November 16, 2014. (Id.) Claimant's hearing testimony contradicts his recorded statement as well as his statement to Dr. Nelson because he testified at hearing he did not hurt himself while helping his son move. (Tr. p. 94).

After being discharged from the hospital, Claimant returned to his family physician, Dr. Zittergruen, for follow-up on November 24, 2014. (Jt. Ex. 1, pp. 13-15) Dr. Zittergruen's clinical note for that visit noted claimant was hospitalized (Id., p. 13) but nowhere in that note does it appear Dr. Zittergruen was made aware claimant helped his son move two days before the hospitalization. (Id., pp. 13-15) Dr. Zittergruen noted claimant was quite tender over his left lower lumbar area during his examination. (Jt. Ex. 1, p. 14) Claimant was diagnosed with left lumbar radiculopathy secondary to a herniated lumbar disk. (Id.) Claimant was provided medication and sent for physical therapy. (Id.)

Claimant was seen by Dr. Zittergruen for a well male exam on December 8, 2014. (Jt. Ex. 1, pp. 16-17) Dr. Zittergruen noted the following on that date: "Follow up with the work comp doctors after one month of therapy to see if he is progressing. If not progressing, consider epidural steroid injection." (Id., p. 17) Nowhere in the clinical note for December 8, 2014, does it appear Dr. Zittergruen was made aware claimant helped his son move two days before claimant was hospitalized. (Id., pp. 16-17)

Claimant returned for a recheck of his back and leg pain with Dr. Zittergruen on December 29, 2014. (Jt. Ex. 1, p. 19) Claimant reported some improvement with physical therapy. (Id.) However, he reported daily pain in his left low back and left leg. Claimant's diagnosis remained left lumbar radiculopathy. (Id.) Dr. Zittergruen referred Claimant for a lumbar epidural steroid injection. (Id.) Nowhere in the clinical note for December 8, 2014, does it appear Dr. Zittergruen was made aware claimant helped his son move two days before claimant was hospitalized. (Id.)

On January 8, 2015, claimant went to Mercy Arthritis Center where he was evaluated by Susan Jacobi, M.D., for his joint pain. (Jt. Ex. 5, pp. 81-87) While Dr. Jacobi's clinical note for that evaluation noted claimant was hospitalized in November 2014, for increasing low back pain, nowhere in that note does it appear Dr. Jacobi was made aware claimant helped his son move two days before the hospitalization. (Id.) Claimant reported problems with his left shoulder, left elbow and hand, low back, and his knees. (Id. p. 84) Claimant was diagnosed with degenerative disc disease, osteoarthritis, and rotator cuff dysfunction. (Id. p. 86) Dr. Jacobi reported it appeared claimant's main concern at the appointment was to discuss issues in applying for disability. (Id.)

On January 13, 2015, defendant-insurer issued a letter to claimant stating it had not received anything to support that the treatment claimant received for his back since November 16, 2014, was related to the July 7, 2014, work injury. (Ex. B, p. 11) In addition to not receiving any medical evidence, it was noted the denial of benefits was also based upon the facts that claimant was released from care for the work injury on October 22, 2014, he reported no new work injury prior to November 16, 2014, and he then had a sudden onset of low back pain at home on November 16, 2014. (Id.).

As recommended by Dr. Zittergruen, claimant was evaluated by Thomas Hansen, M.D., pain specialist at The Iowa Clinic on January 29, 2015, for left-sided low back pain radiating down his left lower extremity with numbness in his left knee. (Jt. Ex. 6, p. 95) As part of the evaluation, claimant completed a patient history form, which included a pain diagram. Claimant was instructed to mark all areas of pain and he marked his left shoulder, left low back, and left knee. (Id. p. 93) With respect to health conditions, claimant reported having arthritis. (Id. p. 94) It was noted Claimant had a history of left L3-4 disk affecting the left L3 nerve root with pain since November 2014. (Id. p. 95). While Dr. Hansen's clinical note for that evaluation noted claimant was hospitalized in November 2014, for increased low back pain, nowhere in that note does it appear Dr. Hansen was made aware claimant helped his son move two days before the hospitalization. (Id., pp. 93-96) Claimant was diagnosed with a L3-4 disk on the left and provided a left L3-4 epidural steroid injection. (Id., p. 95)

Defendants sent claimant for an independent medical evaluation (IME) with Daniel Miller, D.O., occupational medicine specialist, on February 25, 2015. In the history of present illness section of Dr. Miller's report, it was noted claimant sustained pain in his left shoulder and right low back while lifting a cabinet at work on July 7, 2014. (Jt. Ex. 7, p. 102) Dr. Miller also noted claimant's hospitalization for his back on November 16, 2014, after helping his son move for two days. (Id. p. 104) Dr. Miller opined within a reasonable degree of medical certainty that claimant's current back condition and symptoms were not causally related to the July 7, 2014, work injury, but rather were caused by claimant's pre-existing lumbar degenerative disk disease. (Id. p. 106) Dr. Miller agreed with the October 22, 2014, MMI date for the work injury issued by Dr. Nayeri. (Id.) Dr. Miller offered no opinion as to whether claimant's current condition was in any way related to helping his son move.

Defendant-insurer issued a second denial letter to claimant on March 20, 2015, stating it was denying payment of workers' compensation benefits for the July 7, 2014, injury after October 22, 2014, based upon the opinions issued by Dr. Miller. (Jt. Ex. B, p. 12).

Claimant returned to Dr. Hansen on April 6, 2015. At that time, claimant reported left low back, left leg, and right back pain. (Jt. Ex. 6, p. 100) This was the first mention of right low back pain by claimant since before November 16, 2014. Upon examination, it was noted claimant had diminished sensation in an L3 pattern to the left. (Id.) Claimant was provided with a repeat epidural at the left L3-4 level. (Id.)

Claimant was evaluated by Dr. Nelson, orthopedic surgeon, at DMOS on April 30, 2015. Dr. Nelson previously evaluated claimant on November 18, 2014, during claimant's hospitalization. Claimant's chief complaints to Dr. Nelson were right-sided low back pain, some intermittent left thigh cramping, and left knee numbness. (Jt. Ex. 8, p. 109) Dr. Nelson had a lengthy discussion with claimant regarding his reported symptoms and his radiographic findings. Specifically, Dr. Nelson stated claimant's lumbar MRI showed a focal left-sided L3-4 herniated disk, which did not match claimant's reported symptoms of right-sided low back pain. (Id.) Therefore, Dr. Nelson did not recommend any surgery or further injections. (Id.)

Claimant applied for social security disability benefits in early 2015. Claimant reported being disabled due to arthritis in multiple places and having a ruptured disk in his back. (Ex. C, p. 13) On April 30, 2015, Claimant's application for social security disability benefits was denied as it was stated claimant still has the capacity to do work similar to his past jobs of CAD draftsman and CNC programmer. (Id. pp. 13-14) Claimant applied for long-term disability benefits provided by defendant-employer in April 2015 and began receiving those benefits in May 2015. (Ex. 18, p. 1; Ex. D, p. 17) At the time of hearing, claimant was receiving long-term disability benefits and social security retirement benefits. (Tr. p. 49)

Claimant returned to Dr. Jacobi at Mercy Arthritis Center on August 3, 2015, for follow-up of his osteoarthritis, which claimant reported was essentially unchanged from January 2015. (Jt. Ex. 5, p. 88) It was noted there was not much more to offer from a rheumatology perspective. (Id. at p. 90) The health questionnaire completed by claimant at that appointment reported he retired from his job with defendant-employer in January 2015. (Id. at p. 92)

Claimant's attorney sent him for an IME with Sunil Bansal, M.D., occupational medicine specialist, on November 6, 2015. (Jt. Ex. 9) In his report, Dr. Bansal issued opinions regarding claimant's back and left shoulder and causally related claimant's current condition to the July 7, 2014, work injury. (Id at p. 121) Nowhere in his report did Dr. Bansal give any indication he was aware claimant helped his son move in November 2014, two days before claimant was hospitalized. Dr. Bansal offered no analysis or opinion as to whether claimant's condition is related to the moving incident.

Claimant's attorney also sent claimant for an IME with Daniel McGuire, M.D., on February 15, 2016. (Jt. Ex. 10) Dr. McGuire issued opinions regarding Claimant's left shoulder and back and causally related them to the July 7, 2014, work injury. (Id. p. 123) While Dr. McGuire did acknowledge he was aware claimant helped his son move in November 2014, Dr. McGuire offered no analysis or opinion as to whether claimant's condition is related to the moving incident.

Defendants sent claimant for an IME with Todd Harbach, M.D., orthopedic surgeon at Iowa Ortho, on April1, 2016. (Jt. Ex. 11). Dr. Harbach stated the following in his report, in pertinent part:

> **History of Present Illness**
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> 1. low back pain
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> Onset: on July 7, 2014. Severity level is 5. The problem is fluctuating. It occurs intermittently. Location of pain is lower back. Pain is radiated to the right thigh. The patient describes the pain as piercing, shooting, throbbing and pins and needles. Symptoms are aggravated by bending, sitting and walking. Symptoms are relieved by rest.
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> Gerald is a 63-year-old male who comes in for an IME of his low back pain. He was a cabinet maker for 30 years. On July 7, 2014, he was getting ready to leave work, went to help load a cabinet with another co-worker who insisted it be loaded prior to leaving, and he developed pain. The next morning he told the office manager about the injury and was told to see his primary care physician. He continued to have pain for about a month and did not see his PCP until his pain got worse and started radiating down his leg. He saw his PCP who suggested he get an MRI, so returned to his work who referred him to Concentra for treatment. He was prescribed Celebrex which was too expensive for him, so he stayed on Aleve and took hydrocodone during bad times. He continued to work. He states that in November, 2014, he woke up with a lot of pain on a Sunday, 2 days following helping his son move, so he went to the ER. In December, he was having some right buttock pain, which was helped with an anti-inflammatory. Today he is having 50% low back pain with 50% bilateral leg pain. States his pain is inconsistent. States the left leg pain is usually around his knee cap with numbness in the thigh as well. Bowel and bladder ok. He tries to walk 30 minutes a day; however, he has inconsistent pain throughout the walking. Walking, bending, lifting, prolonged sitting, sitting on a hard surface reproduces his pain. He has tried heat and ice with no relief. He is still taking the hydrocodone with some relief. He had been taking ibuprofen 700 mg 3 times a day until a few weeks ago when he switched to extra strength Tylenol; however, he states it does not work as well. He has been through physical therapy twice with no long-term relief. He had an epidural that helped his back pain but no relief of his leg pain.

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Assessment/Plan

Description
Low back pain at multiple sites (M54.5).
Herniated nucleus pulposus, lumbar (M51.26).
Radicular pain of lower extremity (M54.10).
Overweight (E66.3)

Clinically, the patient is about half back pain and half leg pain. The LEFT leg is more symptomatic than the leg on the RIGHT. He states that neither the back nor his leg pains are constant but rather they come and go frequently. He is better with rest and with anti-inflammatories and his hydrocodone. He had back pain and some leg pains after lifting at work in July but became much worse after helping a family member move in November which put him in the hospital and magnetic resonance imaging was performed at that time. It showed he had a herniated disk on the LEFT which corresponds with his new or worsening onset of LEFT lower extremity pain.

I will now answer questions provided to me in this independent medical evaluation to the best of my ability. My answers are my professional opinion and rendered with a reasonable degree of medical certainty based on my review of the records you provided, interview and examination of the patient, and my experience as a board certified orthopedic surgeon.

Question #1: What Is your diagnosis of Mr. Akes current back and left shoulder conditions?

Answer: Mr. Akes has degenerative changes of the L3-L4 and L4-L5 in his lumbar spine with a broad-based disk bulge at L4-L5 that causes right lateral recess stenosis that is fairly asymptomatic. He has an intraforaminal disk herniation on the left at L3-L4 that is compressing the left L3 nerve root, which is his most symptomatic problem. He also has mild left shoulder impingement syndrome that he states is still present after his lifting injury, but he also states it does not hurt all the time, and It hurts only in certain positions, which certainly makes It seem to be more chronic In nature.

Question #2: Did Mr. Akes' July 7, 2014, work Injury cause a temporary or permanent and material aggravation of his pre-existing lumbar degenerative disk disease? Please explain.

Answer: I believe with a reasonable degree of medical certainty that his lifting injury on July 7, 2014, caused a temporary aggravation of the preexisting lumbar degenerative disk disease problem and that was slowly

recovering until he helped a family member move in November 2014, at which time, within 48 hours, he was up with back pain that was so severe he was in the emergency department, admitted to the hospital, and had an MRI, which showed the herniated disk on the left intraforaminally at L3-L4. I also believe that his shoulder was a temporary aggravation as his exam of the shoulder and complaints today are minimal at worst.

Question #3: ***If Mr. Akes has sustained any permanent partial impairment as a result of his July 7, 2014, injury, please provide a permanent impairment rating. In responding to this question, please use and refer to any applicable tables set forth in the AMA Guides, 5th Edition?***

Answer: I believe that the patient's second injury helping a family member move household goods was his defining incident that caused the majority of his symptoms. I believe he was well on his way to healing his temporary aggravation when the second aggravation occurred. Therefore, I cannot, with a reasonable degree of medical certainty, give any partial impairment related to his first injury.

Question #4: ***Is it important for independent medical examiners to review and consider all medical records claimed to be related to an injury and potential subsequent causes of injury? If so why?***

Answer: Yes. Every piece of information regarding a patient's medical condition that is pertinent to that medical condition should be considered during any evaluation of cause either material or exacerbated.

Question #5: ***Please explain why you agree or disagree with the causation opinions of Dr. Bansal and Dr. McGuire with respect to Mr. Akes' current back and shoulder conditions and symptoms.***

Answer: As far as Dr. Bansal, I disagree with the way he feels that lifting a heavy cabinet caused the L3-L4 disk herniation. The patient's leg symptoms were not nearly so severe nor did they cause him to miss work or be hospitalized like they did after he lifted his family member's household goods. I believe that the second event is what caused the disk herniation and the subsequent hospitalization. Also, Dr. Bansal may not be aware that now the patient has returned almost to his baseline as far as his left shoulder goes. He does have significant osteoarthrosis of the glenohumeral joint and AC joint that was aggravated, but it was temporary in nature, and he is back to almost asymptomatic, just having symptoms that occur with certain positions of the shoulder. Therefore, I do not believe any impairment rating should be given for either his back or the shoulder related to the injury in July.

> Dr. McGuire's IME is similar in nature to the previous IME discussed in that he has failed to note that the patient had a lifting injury moving a family member's household goods, which within 48 hours had him in the emergency department and admitted with tremendous back and left lower extremity pain and that is the time that the MRI was ordered that showed the herniated disk. At no time prior to this November lifting incident was he in such significant pain or discomfort as to require admission or an MRI because there was suspected to be nerve irritation from a herniated disk. In fact, the patient stated that he did not feel that badly and wanted to see how he did on his own, so he did not even go to his primary care doctor as his work instructed him to, for more than a month. Dr. McGuire also noted that the patient probably had some rotator cuff inflammation and noted also the osteoarthritis, but again, did not think that was a permanent problem.
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> ***Question 6:*** ***Please feel free to comment upon any other items or information contained on the IME reports from Dr. Bansal and Dr. McGuire Including, but not limited to, medical history, impairment, medical treatment, and restrictions?***
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> ***Answer:*** I would not put any restrictions on this patient whatsoever. I do believe he had a temporary injury in both the shoulder and his lumbar spine on the job in July and that his shoulder is pretty much returned to its preinjury osteoarthritic state, and that his lumbar spine herniated disk was significantly caused and/or aggravated by the lifting injury moving his family member's household goods. Because of this, I do not believe that his work-related injury deserves any impairment rating or further medical treatment.

(Jt. Ex. 11, pp. 127-128, 131-133)

Most interestingly, nowhere in the arbitration decision is there any mention of Dr. Harbach's IME or of his report. It appears the deputy commissioner did not consider Dr. Harbach's opinions. Dr. Harbach's report is a key item of medical evidence in this case.

Claimant's hobbies and activities at the time of the arbitration hearing included fishing, home repairs such as fixing faucets, washing and waxing his car, changing the oil in his car, taking out the trash, cleaning windows, emptying the dishwasher, sweeping out the garage, filling the bird feeder, walking, using a computer for internet searches and games, getting items ready for a garage sale, and driving his car. (Tr. pp. 84-87).

Claimant has not worked following his hospitalization in November 2014. (Tr. p. 81) He applied for but was denied social security disability benefits. (Ex. C, pp. 13-14) At the request of claimant's attorney, Carma Mitchell prepared a vocational report which assessed claimant's loss of access to the job market. Ms. Mitchell determined claimant was restricted from 95 percent of the labor market due to the work injury. (Ex. 12, p. 5)

CONCLUSIONS OF LAW

The first issue to be decided on appeal is whether the admitted July 7, 2014, work incident is a cause of permanent disability, and if so, the extent of such disability. In order to resolve this issue, it is necessary to determine whether the incident in November, 2014, wherein claimant helped his son move and then experienced a severe increase in his pain two days later, is the cause of claimant's present disability.

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).

When an injury occurs in the course of employment, the employer is liable for all of the consequences that "naturally and proximately flow from the accident." Iowa Workers' Compensation Law and Practice, Lawyer and Higgs, section 4-4. The Supreme Court has stated the following. "If the employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury, such further disability is compensable." Oldham v. Scofield & Welch, 222 Iowa 764, 767, 266 N.W. 480, 481 (1936). The Oldham Court opined that a claimant must present sufficient evidence that the disability was naturally and proximately related to the original work injury.

I respectfully disagree with the deputy commissioner and I find claimant failed to prove by a preponderance of the evidence that he sustained permanent disability as a result of the July 7, 2014, work incident. I base my finding in this regard on the opinions of Dr. Harbach, which I find to be much more persuasive than the opinions of Dr. Bansal and Dr. McGuire.

As laid out above in detail, Dr. Harbach provides clear, concise and convincing opinions as to why the work incident caused claimant to sustain only a temporary injury and why the moving incident, which occurred more than four months after the work incident, was the cause of claimant's permanent disability. (Jt. Ex. 11) Dr. Bansal says nothing about the moving incident in his report. Once can only surmise Dr. Bansal either was not made aware of the moving incident or he simply chose not to address it. Either way, I find Dr. Bansal's opinions are fatally deficient because he does not provide any analysis as to whether the moving incident was a factor in causing claimant's permanent disability.

As for Dr. McGuire's opinions, at the very end of the clinical note for his IME, Dr. McGuire states the following: "I have 1 IME that makes mention that he helped his son move several days prior to this November episode. I was unaware of that situation." (Jt. Ex. 10, p. 126) It might be debated whether "several days" and "two days" are the same thing, but in any event I find Dr. McGuire's opinions are fatally deficient because he also fails to provide any analysis as to whether the moving incident was a factor in causing claimant's permanent disability.

I also find Dr. Zittergruen's causation opinion unconvincing because while he was aware of the sudden increase in claimant's symptoms in November 2014, nowhere in his records does he give any indication he was made aware of the moving incident. (Jt. Ex. 1, pp. 1-20) As a result, Dr. Zittergruen's causation opinion is fatally deficient because he also fails to provide any analysis as to whether the moving incident was a factor in causing claimant's permanent disability.

I find Dr. Harbach's opinion that the moving incident caused claimant's permanent disability to be most convincing because Dr. Harbach's opinion in that particular regard is unrebutted and because it makes the most sense in light of all of the medical evidence because claimant's pain increased dramatically in less than 48 hours after the moving incident and because claimant's left-sided pain complaints, which are by far the predominate complaint claimant had at the time of the hearing, were non-existent during the four months between the work incident and the moving incident.

Because I find claimant failed to prove by a preponderance of the evidence that he sustained any permanent disability as a result of the work incident, I reverse the award of 50 percent industrial disability. I find claimant is not entitled to receive any permanent disability benefits for the July 7, 2014, work incident.

I find claimant reached MMI on October 22, 2014, as determined by Dr. Nayeri and Dr. Miller. (Jt. Ex. 2, p. 46; Jt. Ex. 7, p. 106) Because I find claimant reached MMI for the work incident on October 22, 2014, I reverse the deputy commissioner's award of healing period benefits for the period beginning November 17, 2014, and ending on April 30, 2014. Because claimant never missed work due to the work incident before he reached MMI on October 22, 2014, I find claimant is not entitled to receive healing period benefits for the work incident.

Because I find claimant reached MMI for the work incident on October 22, 2014, I reverse the award for medical charges and for medical mileage incurred after October 22, 2014, itemized in Exhibits 15 and 17.

Because claimant has not prevailed on the issues raised in the arbitration proceeding and on appeal, I reverse the deputy commissioner's finding that claimant is entitled to payment by defendants of his costs of the arbitration proceeding. I order the parties to pay their own costs of the arbitration proceeding and I order claimant to pay the costs of the appeal.

ORDER

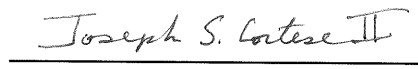
IT IS THEREFORE ORDERED that the arbitration decision filed on May 23, 2017, is reversed.

Claimant shall taking nothing from these proceedings.

Pursuant to rule 876 IAC 4.33, the parties shall pay their own costs of the arbitration proceeding, and claimant 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 9th day of January, 2019.



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