

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHAEL MCBURNEY,

Claimant,

vs.

AGRI STAR MEAT & POULTRY,

Employer,

and

INSURANCE COMPANY OF THE  
STATE OF PENNSYLVANIA,

Insurance Carrier,  
Defendants.

**FILED**

AUG 10 2017

WORKERS' COMPENSATION

File No. 5049533

A P P E A L

D E C I S I O N

: Head Note Nos: 1402.30, 1801, 1801.1,  
: 1803, 2206

Defendants Agri Star Meat & Poultry, employer, and its insurer, Insurance Company of the State of Pennsylvania, appeal from an arbitration decision filed on December 23, 2015. Claimant Michael McBurney responds to the appeal. The case was heard on November 4, 2015, and it was considered fully submitted in front of the deputy workers' compensation commissioner on November 24, 2015.

The deputy commissioner found claimant carried his burden of proof that the stipulated injury which arose out of and in the course of claimant's employment with defendant-employer on December 26, 2012, caused claimant to sustain an aggravation of his pre-existing low back condition which made it necessary for claimant to undergo surgery. The deputy commissioner awarded claimant healing period benefits from May 16, 2013, through July 22, 2013. The deputy commissioner awarded claimant temporary partial disability (TPD) benefits in the amount of \$918.00 for the period of July 23, 2013, to September 10, 2013, as set forth in Exhibit C. The deputy commissioner awarded claimant 45 percent industrial disability, which entitles claimant to 225 weeks of permanent partial disability (PPD) benefits commencing on September 11, 2015. The deputy commissioner found claimant is entitled to reimbursement in the amount of \$795.68 for requested medical mileage. The deputy commissioner ordered defendants to pay claimant's costs of the arbitration proceeding.

Defendants assert on appeal that the deputy commissioner erred in finding claimant to be a credible witness. Defendants assert the deputy commissioner erred in finding the work injury caused claimant to sustain an aggravation of his pre-existing low

back condition which made it necessary for claimant to undergo surgery. Defendants assert the deputy commissioner erred in awarding claimant healing period benefits and in awarding claimant TPD benefits. Defendants assert the deputy commissioner erred in awarding claimant any industrial disability. Defendants assert the deputy commissioner erred in awarding claimant reimbursement for medical mileage. 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.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner.

Pursuant to Iowa Code sections 86.24 and 17A.15, I affirm and adopt as the final agency decision most of those portions of the proposed arbitration decision filed in this matter on December 23, 2015, which relate to issues properly raised on intra-agency appeal.

I find the deputy commissioner provided sufficient analysis of most of the issues raised in the arbitration proceeding. I affirm the deputy commissioner's finding that claimant carried his burden of proof that the December 26, 2012, work injury caused claimant to sustain an aggravation of his pre-existing low back condition which made it necessary for claimant to undergo surgery. I affirm the deputy commissioner's award of healing period benefits from May 16, 2013, through July 22, 2013. I affirm the deputy commissioner's award of TPD benefits in the amount of \$918.00 for the period of July 23, 2013, to September 10, 2013. I affirm the deputy commissioner's award of 45 percent industrial disability which entitles claimant to 225 weeks of PPD benefits commencing on September 11, 2013. I affirm the deputy commissioner's finding that claimant is entitled to reimbursement in the amount of \$795.68 for requested medical mileage. I also affirm the deputy commissioner's order taxing defendants with claimant's costs of the arbitration proceeding. I affirm the deputy commissioner's findings, conclusions and analysis regarding those issues with the following analysis:

I disagree with the deputy commissioner's finding that claimant is a credible witness, at least as it pertains to claimant's honesty regarding his medical history. However, my finding that claimant is not a credible witness does not lead me to reverse the deputy commissioner's award contained in the arbitration decision.

Claimant sustained a significant work-related injury to his low back on February 19, 2008, while employed by U.S. Corrugated, Inc. (Exhibit L. p. 22; Ex. N, p. 33; Hearing Transcript p. 66) Following that injury, Claimant experienced intermittent pain

in his low back and his left leg. Claimant was treated for that injury by Chad Abernathy, M.D., neurosurgeon, who stated in his clinical note for January 12, 2009, less than a year after that injury occurred, "Of note, the patient has been to the ER approximately 22 times and has been evaluated extensively by Dr. Kim, and Dr. Westpheling." (Ex. 11, p. 2) Dr. Abernathy recommended against surgery on March 3, 2008, March 19, 2008, September 22, 2008, and January 12, 2009. (Ex. 11, pp. 1-2) After January 12, 2009, claimant had additional treatment for his low back and left leg pain on the following dates before the occurrence of the December 26, 2012, work injury:

January 16, 2009 – St. Luke's Hospital Cedar Rapids (Ex, N, p. 57)

January 19, 2009 – St. Luke's Hospital Cedar Rapids (Ex, N, p. 58)

February 2, 2009 – St. Luke's Hospital Cedar Rapids (Ex, N, p. 59)

February 26, 2009 – St. Luke's Hospital Cedar Rapids (Ex, N, p. 60)

April 7, 2009 – St. Luke's Hospital Cedar Rapids (Ex, N, pp. 61-62)

August 31, 2009 – Mercy Medical Center Cedar Rapids (Ex. P, pp. 81-82)

October 13, 2009 – Mercy Medical Center Cedar Rapids (Ex. P, pp. 83-84)

May 27, 2010 – Palmer Lutheran Health Center. (Ex. L, pp. 22-23)

December 1, 2011 – Palmer Lutheran Health Center. (Ex. L, pp. 24-25)

February 16, 2012 – Palmer Lutheran Health Center. (Ex. L, pp. 26-27)

May 29, 2012 – Central Community Hospital. (Ex. M, pp. 28-30)

Apparently on none of the above-referenced treatment dates did any medical provider recommend that claimant undergo surgery for his low back and left leg pain.

On at least six occasions, claimant gave false information regarding his past medical history as it pertains to his low back condition:

On February 13, 2012, more than ten months before the December 26, 2012, work injury, claimant had a pre-employment physical at Gunderson Lutheran Medical Center in La Crosse, Wisconsin, for a job with Gencor. It was noted in the report for that evaluation, "He denies any previous injuries or problems to his spine and/or extremities." (Ex. 8, p. 1) That information provided by claimant was false.

On December 31, 2012, five days after the December 26, 2012, work injury, defendants sent claimant to the Winneshiek Medical Center Emergency Department for treatment of the work injury. During that evaluation, claimant indicated to the doctor he

had "no prior history of back pain." (Ex. 5, p. 1) That information provided by claimant was false.

At his physical therapy initial assessment evaluation at the Winneshiek Medical Center Rehabilitation and Sports Medicine Center on January 7, 2013, claimant told the physical therapist his prior medical history was "unremarkable." (Ex. R, p. 89) That information provided by claimant was false.

During an evaluation for the December 26, 2012, work injury at the Winneshiek Medical Center Occupational Health Department on January 24, 2013, claimant told Kristen Heffern, ARNP, "He had a back problem a long time ago, between his shoulder blades. He has never had symptoms into his leg." (Ex. 6, p. 8) That information provided by claimant was false.

On February 11, 2013, at the request of defendants, claimant was evaluated by Bruce Wulfsberg, M.D., at the Winneshiek Medical Center Decorah Clinic for the December 26, 2012, work injury. Dr. Wulfsburg noted, "On evaluation, he denied pre-existing problems or injuries to his back. I do not have his medical records other than for this visit to review." (Ex. Q, p. 87) That information provided by claimant was false.

On March 8, 2013, when claimant had a surgical consultation with Mark Stevens, M.D., Ph.D., neurosurgeon, for the December 26, 2012, work injury, claimant did not disclose the 2008 work-related low back injury and the treatment he received after that injury for his low back condition. (Ex. T, p. 103)

Despite the fact that claimant is lacking in credibility, at least with regard to his medical history prior to the December 26, 2012, work injury, he did prove that the December 26, 2012, work injury resulted in an aggravation of his pre-existing low back condition which made it necessary for him to undergo surgery.

When claimant was evaluated by Dr. Wulfsberg on February 11, 2013, despite claimant denying prior back problems, Dr. Wulfsberg noted claimant's MRI films indicated pre-existing problems:

#### ADDENDUM

There were some pre-existing problems noted on his MRI with dehydration and disc degeneration. I feel these are pre-existing, but he did have the injury, which has aggravated this pre-existing problem.

...

An MRI was done and I have reviewed that. The x-rays were pretty much negative. The MRI did show disc degeneration and dehydration of the L5-S1, suggesting a prolonged and/or pre-existing problem.

(Ex. Q, pp. 87-88)

Because Dr. Wulfsberg felt the December 26, 2012, work injury aggravated claimant's pre-existing condition, Dr. Wulfsberg referred claimant to Dr. Stevens, neurosurgeon, for a surgical consultation. (Ex. S, p. 96) When Dr. Stevens evaluated claimant on March 8, 2013 (Ex. T, p. 103), Dr. Stevens recommended surgery. (Ex. S, pp. 95-96) This apparently was the first time any medical provider recommended claimant undergo surgery for his low back condition. On May 16, 2013, Dr. Stevens performed a disectomy with anterior lumbar interbody fusion at the L5-S1 level. (Ex. S, pp. 94-95)

Claimant does not contend that the December 26, 2012, work injury caused his low back condition. Claimant concedes the condition pre-existed the work injury. (Tr. pp. 8-9) Claimant contends the December 26, 2012, work injury aggravated the pre-existing condition (Tr. p. 52) such that he then required surgery. Dr. Wulfsberg's causation opinion contained in his February 11, 2013, clinical note (Ex. Q, p. 87) supports claimant's argument that he sustained an aggravation of his pre-existing condition as a result of the December 26, 2012, work injury which made it necessary for him to have surgery. Dr. Wulfsberg's opinion that the work injury aggravated claimant's pre-existing condition is unrebutted by defendants.

On October 2, 2015, defendant's counsel drafted a letter for Dr. Stevens to sign which states the following, in pertinent part:

Thank you for visiting with me about Michael McBurney. As you know, I represent AgriStar and its insurance carrier in Mr. McBurney's 12/26/12 work injury claim. I am writing to summarize our conference.

You treated Mr. McBurney for low back and left leg pain with the first visit on 3/08/13 and the last one on 7/10/13, and you performed surgery on 5/16/13.

Mr. McBurney never disclosed his prior history of treatment for similar complaints to you, including no mention of the fact he had seen a doctor for low back and left leg pain on several occasions in 2012 before the work incident.

An MRI showed degenerative changes at L5-S-1 and a disc protrusion at the left S1 nerve root. You indicated the radiographic findings were not the result of any acute trauma or any new/recent changes in Mr. McBurney's spine, and it is your opinion the condition for which you treated Mr. McBurney would not have been caused by the work incident.

I [Dr. Stevens] agree with the contents of this letter.

(Ex. T, pp. 103-104) Dr. Stevens signed the letter on October 12, 2015, to indicate his agreement with everything it states. (Ex. T, p. 104)

While Dr. Stevens stated by signing Exhibit T that he believes claimant's low back condition was not caused by claimant's December 26, 2012, work injury, he did not address whether the pre-existing condition was aggravated by the injury such that claimant then needed surgery. I find Exhibit T cannot be interpreted to mean Dr. Stevens believes claimant's pre-existing low back condition was not aggravated by the work injury. Therefore, I find Dr. Wulfsberg's causation opinion, that the December 26, 2012, work incident aggravated claimant's pre-existing low back condition, is unrebutted and I find that opinion to be convincing.

The incident report filled out on December 26, 2012, the date of the injury, indicates claimant's allegation that he was knocked to the floor when he was hit by the pallet jack was substantiated by witness Dan Meyer. (Ex. 1, p.1) There is no indication anywhere in the record that Mr. Meyer provided incorrect information in that regard. I therefore affirm the deputy commissioner's factual finding that claimant was knocked to the concrete floor when he was hit by the pallet jack, notwithstanding the self-serving comments to the contrary contained in the undated recorded statement apparently taken from the driver of the pallet jack who did not even stop when he struck claimant with the pallet jack. (Tr. p. 33; Ex. H)

Based on the following factors:

1. Claimant was knocked to the concrete floor when he was struck by the pallet jack,
2. No medical providers recommended surgery for claimant's low back condition until after the December 26, 2012, work incident occurred,
3. Dr. Wulfsberg believed the December 26, 2012, work incident aggravated claimant's pre-existing low back condition,
4. Dr. Stevens did not address whether the December 26, 2012, work incident aggravated claimant's pre-existing low back condition,

I affirm the deputy commissioner's finding that claimant carried his burden of proof that the December 26, 2012, work incident caused an aggravation of claimant's pre-existing low back condition which necessitated the surgery claimant underwent on May 16, 2013. I therefore affirm all of the other findings made by the deputy commissioner in the arbitration decision.

#### ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on December 23, 2015, is affirmed in its entirety.

Defendants shall pay claimant healing period benefits from May 16, 2013, to July 22, 2013, at the rate of four hundred one and 02/100 dollars (\$401.02) per week.

Defendants shall pay claimant temporary partial disability benefits in the amount of \$918.00 for the period commencing on July 23, 2013, through September 10, 2013, as set forth in the arbitration decision and in Exhibit C, page 3.

Defendants shall pay claimant two hundred twenty-five (225) weeks of permanent partial disability benefits at the rate of four hundred one and 02/100 dollars (\$401.02) per week commencing on September 11, 2013.

Defendants shall pay accrued weekly benefits in a lump sum together with interest pursuant to Iowa Code section 85.30.

Defendants shall be entitled to a credit for all weekly benefits paid to date.

Defendants shall pay the claimant's prior medical expenses submitted by claimant at the hearing.

Defendants shall reimbursement claimant in the amount of \$795.68 for requested medical mileage.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding, 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 10<sup>th</sup> day of August, 2017.



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JOSEPH S. CORTESE II  
WORKERS' COMPENSATION  
COMMISSIONER

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