

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROBERTO AYARD,

Claimant,

vs.

CRYSTAL DISTRIBUTING
SERVICES, INC.,

Employer,

and

LE MARS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

FILED

JAN 24 2019

WORKERS COMPENSATION

File No. 5054030

REVIEW-REOPENING

DECISION

Head Note Nos.: 1803, 2403

Claimant Roberto Ayard filed a petition in arbitration on April 30, 2015, alleging he sustained an injury to his back and body as a whole while working for the defendant, Crystal Distributing Services, Inc. ("Crystal Distributing"), on July 25, 2014. An arbitration hearing was held on May 20, 2016, in Waterloo, Iowa. Exhibits 1 through 9 were admitted into the record, and the record was held open until June 13, 2016, for the receipt of post-hearing briefs. On August 11, 2016, an arbitration decision was issued: (1) finding Ayard had sustained a permanent impairment to his lumbar spine; (2) holding Ayard's major depression was a sequela of the work injury, but the record did not support Ayard had sustained a permanent mental health impairment as a result of the work injury; (3) finding Ayard had sustained a twenty-five percent industrial disability and awarding Ayard 125 weeks of permanent partial disability benefits commencing on September 25, 2014, at the rate of \$439.09 per week; (4) ordering Crystal Distributing and its insurer, Le Mars Insurance Company ("Le Mars") to pay all medical bills causally related to the claimant's mental health sequela injury and to pay for future treatment necessitated by the work injury; and (5) assessing costs to Crystal Distributing and Le Mars. Neither party appealed the decision.

On June 30, 2017, Ayard filed a review-reopening petition alleging his condition warrants an increase in compensation. Crystal Distributing and Le Mars filed an answer on July 14, 2017.

The hearing on the review-reopening action was held on October 26, 2018, at Iowa Workforce Development in Waterloo, Iowa. Attorney James Byrne represented

Ayard. Ayard appeared and testified. Interpreter Veronica Merced provided Spanish interpretation services during the hearing. Prior to the hearing the parties removed pages 15, 16, 19-21, 24, 26, 27, 30, 32-34, 37, 38-40, 43, 44, 48, 50, and 51 from Joint Exhibit ("JE") 2, pages 59, 60, 70, 73, 77, 80, 82 through 86, 89, 90 from JE 3, pages 143, 152, 153, and 160 from JE 7, and pages 26, 29, and 30 from Exhibit 2. JE 1 through 4, 6 through 7, Exhibits 2 through 4, 5 through 7, and Exhibits A and B were admitted into the record. The record was held open through November 19, 2018, for the receipt of post-hearing briefs and JE 8. JE 8 was received and admitted into the record. The briefs were received and the record was closed.

At the start of the hearing the parties completed a hearing report, listing stipulations and issues to be decided. Crystal Distributing and Le Mars waived all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between Crystal Distributing and Le Mars at the time of the alleged injury.
2. Ayard sustained an injury on July 25, 2014, which arose out of and in the course of his employment with Crystal Distributing.
3. Temporary benefits are no longer in dispute.
4. The alleged injury is a cause of permanent disability.
5. The disability is an industrial disability.
6. The commencement date for permanent partial disability benefits, if any are awarded is February 17, 2017.
7. At the time of the alleged injury, Ayard's gross earnings were \$628.86 per week, Ayard was married and entitled to five exemptions, and his weekly benefit rate is \$439.09.
8. Prior to the hearing Ayard was paid 125 weeks of compensation at the rate of \$439.09 per week.

ISSUES

1. Has Ayard sustained a change of condition warranting an award of additional industrial disability benefits?
2. If Ayard has sustained a change of condition warranting an award of additional industrial benefits, what is the extent of disability?
3. Is Ayard entitled to recover the cost of an independent medical examination?

4. Should costs be assessed against either party?

FINDINGS OF FACT

Ayard was born in Michoacan, Mexico. (2016 Arbitration Decision) Ayard is married and is the father of five children. (2016 Arbitration Decision) At the time of his injury, Ayard had three dependent children living with him. (2016 Arbitration Decision) Ayard attended school through the third grade in Mexico. (2016 Arbitration Decision) Ayard does not use tobacco. (2016 Arbitration Decision) At the time of the review-reopening hearing Ayard was fifty-four. (Transcript, page 19)

In 1986, Ayard moved to the United States and lived in California. (2016 Arbitration Decision) Ayard has taken English classes, but he is not able to read or write in English. (2016 Arbitration Decision) Ayard is able to understand simple instructions in English. (2016 Arbitration Decision) Ayard does not know how to type or how to use a computer. (2016 Arbitration Decision)

Before moving to the United States, Ayard worked in agriculture planting beans and corn and as a fisherman. (2016 Arbitration Decision) When he worked in agriculture, Ayers lifted containers of beans and corn weighing ten to twelve pounds each throughout the day and often had to bend and squat. (2016 Arbitration Decision) Ayard was not paid wages and he received food in exchange for his labor. (2016 Arbitration Decision) As a fisherman, Ayard lifted stones weighing sixty to eighty pounds used with fishing nets, and he was paid the equivalent of \$20.00 per day in pesos. (2016 Arbitration Decision)

After moving to California, Ayard worked in agriculture picking grapes, chavacano, and peaches for one to two years. (2016 Arbitration Decision) Ayard climbed ladders to pick the fruit and he placed the fruit in containers he carried on his chest. (2016 Arbitration Decision) Ayard reported the ladders weighed sixty to eighty pounds and the containers weighed fifty to sixty pounds. (2016 Arbitration Decision) Ayard left agriculture and accepted a position in a furniture factory where he assembled, pushed, and lifted furniture for one to two years. (2016 Arbitration Decision) The furniture weighed between fifty and sixty pounds. (2016 Arbitration Decision)

After leaving the furniture factory, Ayard accepted a position with American Racing where he manufactured rims for car wheels. (2016 Arbitration Decision) Ayard worked for American Racing for approximately four years. (2016 Arbitration Decision) Ayard reported the rims came in different sizes and some weighed between thirty and fifty pounds. (2016 Arbitration Decision)

Ayard left American Racing and returned to Mexico where he owned a retail car business and a grocery store. (2016 Arbitration Decision) Ayard reported the beans and corn he sold at the store came in boxes weighing between fifty and sixty pounds, and he also moved bags weighing between eighty and 100 pounds. (2016 Arbitration Decision)

Ayard moved back to the United States and he accepted a position with Swift peeling pig legs. (2016 Arbitration Decision) Ayard left Swift to work for Crystal Distributing in November 2001. (2016 Arbitration Decision)

Crystal Distributing hired Ayard to pack fresh meat and to stack boxes. (2016 Arbitration Decision) Ayard continued with the position for four to five years until he moved into the forklift driver position he was working in at the time of his work injury in 2014. (2016 Arbitration Decision) The forklift driver position required Ayard to drive a forklift, unload trucks, run the line, lift boxes, move pallets, and lift trash containers. (2016 Arbitration Decision) Ayard testified the position required him to lift boxes weighing sixty to seventy pounds, containers weighing between fifty and sixty pounds, and pallets weighing different amounts. (2016 Arbitration Decision)

On July 25, 2014, Ayard was stacking boxes of frozen meat at work. (2016 Arbitration Decision) Ayard testified during the original hearing, “[w]hen I grabbed a box, I twisted to the left. That’s when I felt a pull and very severe pain in my back. And I dropped the box. It fell to the ground.” (2016 Arbitration Decision) Ayard reported the box weighed between sixty and seventy pounds and the pain he experienced was in his low back. (2016 Arbitration Decision)

Ayard injured his back on two other occasions. He first injured his back sometime twenty-four to twenty-seven years before the 2016 arbitration hearing, when he was pushing furniture. (Tr., p. 24) Ayard could not recall receiving treatment and reported he resumed his normal duties. (Tr., p. 24) Ayard testified he recovered from the injury. (Tr., p. 48) And approximately five to eight years before the 2016 arbitration hearing when he was working for Crystal Distributing, Ayard slipped and fell backwards. (Tr., p. 24) Ayard testified he received medication and therapy for approximately two months and he was released without restrictions and returned to his normal job duties. (Tr., pp. 24-25, 48-49)

After reporting his 2014 work injury, Ayard left work and went to Allen Hospital where he received treatment from Lloyd Luke, M.D., with Allen Occupational Health Services. (2016 Arbitration Decision) Dr. Luke imposed restrictions of no lifting greater than fifteen pounds, no excessive bending or twisting, limited pushing, pulling, and reaching, and no lifting below knee/above the shoulder. (2016 Arbitration Decision) Ayard continued to treat with Dr. Luke and reported his pain remained the same. (2016 Arbitration Decision) Ayard later reported his pain had improved some, but was worse with physical therapy, and with hard and fast movements. (2016 Arbitration Decision) Dr. Luke released Ayard to full-duty without restrictions on September 24, 2014. (2016 Arbitration Decision) During the 2016 arbitration hearing Ayard testified when he returned to work without restrictions his back continued to hurt and he “had a lot of pain.” (2016 Arbitration Decision)

Ayard continued to complain he was experiencing back pain to his supervisor. (2016 Arbitration Decision) Ayard testified during the 2016 arbitration hearing his

supervisor told him the doctor had released him and he was fine. (2016 Arbitration Decision)

Ayard retained Sunil Bansal, M.D., to perform an independent medical examination. (2016 Arbitration Decision) Dr. Bansal examined Ayard in January 2015 reviewed his medical records, and issued his report on March 4, 2015. (2016 Arbitration Decision) Dr. Bansal diagnosed Ayard with lumbar myofascial pain and opined Ayard's back pain was related to the July 25, 2014 work injury. (2016 Arbitration Decision) Using Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Bansal found Ayard qualified for a DRE Category II impairment because he had radiculopathic complaints, guarding, and loss of range of motion, assigned a five percent permanent impairment rating to Ayard, and recommended permanent restrictions of no lifting over thirty-five pounds, and no frequent bending or twisting, noting Ayard may need intermittent trigger point injections and NSAIDs in the future. (2016 Arbitration Decision)

Ayard sought additional care from Jeffrey Guse, ARNP, on his own, after Dr. Luke released him from care. (2016 Arbitration Decision) Guse ordered imaging, including magnetic resonance imaging. (2016 Arbitration Decision) The reviewing radiologist listed an impression of a posterior annular tear with diffuse disc bulges at L4-L5, and L5-S1, moderate bilateral neural foraminal stenosis at L5-S1, and a probable right renal cyst. (2016 Arbitration Decision)

During an appointment on August 31, 2015, Guse diagnosed Ayard with back pain, depression, and anxiety, and documented,

[p]atient states that he is still experiencing extreme difficulty with the pain in his spine which is leading to depression as he is trying hard to do a good job at work, but is severely limited by his back injury. Patient states that he is feeling very depressed today and would like some medication to help with his [sic]. At his last visit we tried Lexapro but, but [sic] the patient states he does not want to take that medication a longer period instead we will try Zoloft.

(2016 Arbitration Decision) Ayard testified during the 2016 hearing he was having mental health issues, noting, "I couldn't sleep, depression, nerves." (2016 Arbitration Decision) Ayard reported, "I wasn't comfortable at work. I couldn't focus." (2016 Arbitration Decision)

Ayard testified during the 2016 hearing he had been experiencing problems with depression for three years before his work injury because his supervisor was mistreating him, by yelling at him and blaming him for things he had not done. (2016 Arbitration Decision) Ayard reported after his injury his depression became worse, he could not sleep, and he was scared to return to work. (2016 Arbitration Decision)

Guse referred Ayard to Mary Hlavin, M.D., for a neurosurgical consultation on September 10, 2015. (2016 Arbitration Decision) Dr. Hlavin examined Ayard and reviewed the magnetic resonance imaging, found he was not a surgical candidate, and recommended a referral to a pain clinic. (2016 Arbitration Decision)

Ashar Afzal, M.D., a pain specialist, examined Ayard and listed an impression of chronic low back pain, bilateral lumbar facet arthropathy, and bilateral lumbar radicular symptoms, L4 and L5. (2016 Arbitration Decision) Dr. Afzal offered Ayard an epidural injection, which he deferred until a later date. (2016 Arbitration Decision)

Crystal Distributing and Le Mars retained David Segal, M.D. to conduct an independent medical examination and to provide treatment to Ayard. (2016 Arbitration Decision) Dr. Segal found that Ayard's back pain was causally related to his July 25, 2014 reinjury, and recommended epidural steroid injections. (2016 Arbitration Decision) Dr. Afzal administered an injection, which provided Ayard with some pain relief for two or three days. (2016 Arbitration Decision) Ayard reported Dr. Afzal administered more injections, and the injections "relieved the pain for about five days for about 50 percent." (2016 Arbitration Decision)

Ayard attended an appointment with Patricia Nelson, L.I.S.W., with Black Hawk-Grundy Mental Health on December 30, 2015. (2016 Arbitration Decision) Nelson documented Ayard told her he "[f]eels nervous, isn't sleeping, gets mad over small things. This has been going on for a couple of years and has been having problems at work the last couple of years." (2016 Arbitration Decision) Nelson recommended a psychiatric evaluation. (2016 Arbitration Decision)

Ayard received treatment from Jamey Gregersen, PMHNP-BC, a psychiatric nurse practitioner with Black Hawk-Grundy Mental Health, beginning in February 2016. (2016 Arbitration Decision) Ayard complained of difficulty sleeping, problems with his mood, and irritability, and while the problems had been present for the past few years, the problems had become worse and were affecting his relationships with family and friends. (2016 Arbitration Decision) Ayard reported he had low energy and was more withdrawn. (2016 Arbitration Decision) Gregersen documented:

[p]t feels much of the problem is triggered by his work environment. He does not speak English, and nearly all of his coworkers and supervisor [sic] do, and he feels that he is not treated fairly. He states he often gets blamed for mistakes made by others, and isn't able to even defend himself because he can't express himself in a way they can understand. He has been working at this job for 16 years, and has been fairly miserable for the past few years, but doesn't feel he has much opportunity to go elsewhere due to his limited communication skills and education. He reports poor sleep and nightmares most nights, poor injury, negative thoughts, and decreased appetite for the past 3 weeks.

(2016 Arbitration Decision) Gregersen prescribed Cymbalta and gabapentin “for mood, anxiety, and chronic pain” and also prescribed duloxetine and diagnosed Ayard with an unspecified depressive disorder and low back pain. (2016 Arbitration Decision) Ayard continued to treat with Gregersen for depression and anxiety. (2016 Arbitration Decision)

Ayard’s attorney sent Guse a letter on April 13, 2016, and Guse agreed he had treated Ayard on several occasions in 2015 for back pain and “resultant Depression.” (2016 Arbitration Decision) Guse agreed Ayard sustained a work injury to his back on July 25, 2014, and he likely sustained a mental sequela as a result of his ongoing pain and physical limitations. (2016 Arbitration Decision)

Ayard’s attorney also sent Dr. Segal a letter on April 19, 2016. (2016 Arbitration Decision) Dr. Segal agreed Ayard sustained disk herniations at L4-L5 and L5-S1 with associated lumbar radiculopathy that either directly caused or substantially aggravated an underlying degenerative condition in his low back. (2016 Arbitration Decision) While Dr. Segal did not issue a permanent impairment rating using the AMA Guides, Dr. Segal agreed Ayard had sustained a permanent impairment to his back as a result of the work injury, which was likely at least thirteen percent to his whole person, that permanent restrictions were in order, and he noted he would assign a twenty pound lifting restriction with no repetitive bending or twisting, or standing for more than one hour, followed by a fifteen minute break before standing again. (2016 Arbitration Decision)

During the 2016 hearing Ayard testified he was no longer performing any heavy lifting, frequent twisting, or bending at work and he was only driving a forklift. (2016 Arbitration Decision) Ayard reported the cold, unloading or loading trucks, and pushing things aggravated his back, and he still had numbness all the time in his left leg. (2016 Arbitration Decision) Ayard continued to take pain medication and medication to treat his depression, but reported the main problem was his back. (2016 Arbitration Decision) Ayard had additional appointments with Dr. Segal and with his mental health provider. (2016 Arbitration Decision)

On August 11, 2016, I issued an arbitration decision: (1) finding Ayard had sustained a permanent impairment to his lumbar spine; (2) holding Ayard’s major depression was a sequela of the work injury, but the record did not support Ayard had sustained a permanent mental health impairment as a result of the work injury; (3) finding Ayard had sustained a twenty-five percent industrial disability and awarding Ayard 125 weeks of permanent partial disability benefits commencing on September 25, 2014, at the rate of \$439.09 per week; (4) ordering Crystal Distributing and Le Mars to pay all medical bills causally related to the Ayard’s mental health sequela injury and to pay for future treatment necessitated by the work injury; and (5) assessing costs to Crystal Distributing and Le Mars. Neither party appealed the decision.

On June 30, 2017, Ayard filed a review-reopening petition, alleging a change in his condition warrants an increase in compensation. Crystal Distributing and Le Mars

filed an answer on July 14, 2017. The review-reopening hearing was held on October 26, 2018, in Waterloo, Iowa.

After the 2016 arbitration hearing Ayard continued to treat with Gregersen and Guse, complaining of mental health difficulties, and ongoing low back pain with radiculopathy. (JE 1; JE 2) On October 11, 2016, Guse imposed a restriction of no working over eight hours per day until November 11, 2016. (JE 2, p. 25) During an appointment on November 11, 2016, Guse noted he had tried to refer Ayard to Dr. Segal for treatment, but he was no longer practicing. (JE 2, p. 28) Guse released Ayard to return to work on November 14, 2016. (JE 2, p. 31) Ayard continued to complain to Guse about pain, and depression and anxiety, and Guse referred him for psychiatry. (JE 2, pp. 52-53)

Crystal Distributing and Le Mars referred Ayard to Mohammed Iqbal, M.D., a psychiatrist, for treatment of his depression. (Tr., p. 30) On October 31, 2016, Dr. Iqbal examined Ayard, and listed the following diagnosis, "AXIS I: MDD, moderate, recurrent. Anxiety disorder, NOS. PTSD. Depersonalization/Derealization. Rule out malingering," continued Ayard's prescriptions for Seroquel and Prazosin, and recommended Ayard undergo psychotherapy. (JE 3, p. 56) Dr. Iqbal ordered MMPI-2 testing for Ayard. (JE 3, p. 57) Dr. Iqbal documented Ayard's profiles were likely invalid because Ayard had responded to items in "an extremely inconsistent manner," and noted it was possible Ayard misunderstood the directions. (JE 3, p. 58)

Ayard continued to treat with Dr. Iqbal, reporting he was experiencing horrible dreams where someone was trying to kill him, he was hearing things that were not there, he thought people were laughing at him and trying to attack him, and he felt overwhelmed, hopeless, helpless, and worthless, with decreased energy and concentration. (JE 3, p. 61) Dr. Iqbal documented Ayard exhibited poor hygiene, he was unshaven, he had poor eye contact, and he was paranoid, tearful, and anxious. (JE 3, p. 62) Dr. Iqbal prescribed Ambien, and continued Ayard's medications. (JE 3, p. 62) Ayard received psychotherapy from Paul Wehrman, LMHC, at Dr. Iqbal's direction for major depressive disorder. (JE 3, pp. 63-64, 66, 68-69, 71-72)

On December 21, 2016, Jonathan Fields, M.D., an occupational medicine physician conducted an independent medical examination for Crystal Distributing and Le Mars, and issued a two page opinion letter. (JE 4, pp. 104-05) Dr. Fields examined Ayard, but his report does not indicate what, if any medical records he reviewed, or provide any objective measurements he took from his examination of Ayard. (JE 4, pp. 104-05) Dr. Fields documented Ayard informed him his back pain had been "unchanged" ever since he injured it back in 2014" and noted Ayard was uncertain why he was at the clinic that day. (JE 4, p. 104) Dr. Fields further documented Ayard reported he had experienced no further material aggravation or exacerbation in his condition since he had been placed at maximum medical improvement. (JE 4, p. 105) Dr. Fields opined "[i]t is my medical opinion to a reasonable degree of medical certainty that his current pain is unrelated to his prior work related injury. His current pain symptoms are likely related to chronic spinal stenosis and are not work related in

nature” and recommended Ayard receive follow-up care with his primary care provider regarding his chronic spinal condition. (JE 4, p. 105)

Ayard testified after Dr. Fields offered his opinion, Crystal Distributing and Le Mars refused to authorize any additional care for his low back condition. (Tr., pp. 33-34) Ayard continued to seek treatment for his back condition from Guse. (Tr., pp. 39-40)

Ayard underwent additional MMPI-2 testing, which was again invalid. (JE 3, p. 74) Both MMPI-2 tests were performed by Dan Ekstrom, a psychologist, for Dr. Iqbal. (Ex. B, p. 8) During his deposition on August 30, 2017, Dr. Iqbal noted after receiving the second invalid MMPI-2 report,

we looked into it a little further, and the rationale behind it, these testings were made not looking at the cultural value of one person. So these are older testings that were done not including the cultural. But Mr. Ayard being Hispanic, and the cultural sensitivities are a little skewed, that's why thus he was seeing more high F values on these and inconsistencies with these testings, at least that's what we – looking at it at different testings from a psychologist's perspective.

(Ex. B, p. 8) No contrary evidence concerning cultural sensitivity issues with the MMPI-2 was produced at hearing.

Ayard returned to Dr. Iqbal following the second invalid MMPI-2 test. (JE 3, p. 75) Dr. Iqbal noted Ayard was being treated for depression, anxiety, possible PTSD, and possible “Malingering Depersonalization/Derealization Disorder.” (JE 3, p. 75) Ayard continued to receive psychotherapy with Wehrman. (JE 3, pp. 78-79, 87-88)

Daniel Tranel, Ph.D., with the University of Iowa Hospitals and Clinics, conducted a neuropsychological and psychological evaluation of Ayard on April 19, 2017. (JE 6) Dr. Tranel examined Ayard and reviewed neuropsychological testing performed on Ayard. (JE 6) Dr. Tranel opined,

[o]ur neuropsychological examination of Mr. Ayard indicates variability in his performances. Also, there are many elevations on symptom validity measures in our test battery. Overall, his cognitive performances are consistent with his educational and occupational history. There is no indication that he has cognitive problems that would prevent him from continuing to work. However, our psychological evaluation indicated that Mr. Ayard is reporting pain, depression, anxiety, and general demoralization and poor psychological adjustment. He is reporting moderate to severe severity of such problems. The results of our psychological evaluation are consistent with his two previous evaluations.

(JE 6, p. 137) Dr. Tranel then addressed causation with respect to the 2014 work injury, and opined,

there is no indication that the July 25, 2014 work accident contributed significantly to Mr. Ayard's post-accident psychological problems. The July 25, 2014 accident did not cause any mental health injury or cognitive injury. We would add that his relationship with his supervisor appeared to have major problems well before the 2014 accident, making it very unclear whether the July 25, 2014 accident contributed materially to his workplace stress and conflict.

(JE 6, p. 138) Dr. Tranel recommended Ayard continue to receive psychotherapy, psychiatric consultation and pharmacological management, and noted Ayard may benefit from participation in a comprehensive, multidisciplinary pain management program. (JE 6, p. 138)

On May 26, 2017, Dr. Bansal conducted an independent medical examination for Ayard for the review-reopening action, and he issued his report on June 26, 2017. (Ex. 2) Dr. Bansal examined Ayard and reviewed his medical records. (Ex. 2) Dr. Bansal opined,

[s]ince last seen by me, Mr. Ayard has had deterioration of his low back condition. His pain levels have increased, and his functional ability has decreased. He has had further work-up since last seen, indicating lumbar disc bulging and annular tearing, consistent with his continual low back pain with left leg radiculopathy. For maintenance he has been receiving pain management, including epidural injections. This is consistent with his pathology relating to the July 25, 2014 injury. Secondary to his decreased functional ability, there are changes to his impairment and restrictions.

(Ex. 2, p. 24) Using the AMA Guides, Dr. Bansal found Ayard meets the criteria for a DRE Category II impairment, with radicular complaints, guarding, and loss of range of motion. (Ex. 2, p. 24) Dr. Bansal assigned a seven percent permanent impairment rating, and recommended restrictions of no lifting over twenty pounds occasionally, no lifting over ten pounds frequently, no frequent bending or twisting, and sitting, standing, and walking as tolerated with no sitting, standing, or walking for more than sixty minutes at a time. (Ex. 2, pp. 24-25) Dr. Bansal recommended for maintenance Ayard would benefit from medications, injections, or other treatment recommended by a pain specialist, and he also recommended a neurosurgical consultation for arthrodesis at L4-L5 and L5-S1. (Ex. 2, p. 25)

On June 19, 2017, Ayard's attorney sent Dr. Iqbal a check the box letter, asking him to agree or disagree with statements he proposed. (JE 3, pp. 95-103; JE 8) Dr. Iqbal responded on June 19, 2017, agreeing with all of the statements, and he did not provide any handwritten comments. (JE 3, pp. 101-02; JE 8) Dr. Iqbal agreed Ayard's work injury substantially aggravated his preexisting mental health condition, causing major depressive disorder, moderate, anxiety, post-traumatic stress disorder, and chronic pain disorder with associated psychological symptoms, and his conditions are at least in substantial part related to his work injury and are likely to be long-term, and thus

permanent. (JE 3, pp. 101-02; JE 8) Dr. Iqbal further agreed due to his work injury and resultant mental health conditions, Ayard will be more prone to having long-term attendance issues at work, he will likely suffer from distraction at work, and he will require long-term mental health treatment for his work injury, including, but not limited to psychotherapy, psychiatric consultations, and pharmacological management and participation in a comprehensive, multidisciplinary pain management program due to his chronic pain caused by the work injury. (JE 3, p. 102; JE 8)

During his August 30, 2017, deposition, counsel for Crystal Distributing and Le Mars asked Dr. Iqbal if he disagreed with Dr. Tranel's report, and Dr. Iqbal responded,

[t]here are a few concerns I had with Dr. Tranel's report. It would relate back to – if you give me one second? And I think the question goes back to on page 8, whether the impressions indicating whether – if the pre-accident records indicate whether or not there's a relationship to his current state of depression. From my perspective – I think, you know, Dr. Tranel also kind of indirectly says there is still ongoing depression. But I think – I feel there was depression prior to his injury. And I think it was exacerbated from that point on.

The severity of the depression prior to the injury, I'm unable to tell you exactly what it was. He's never sought attention at that moment for it, so my guesstimation would be it was a more milder form. But I think the severity had increased, and thus requiring more attention to his mental illness at that moment.

And there was superimposing factors with chronic pain. And I think one of my diagnosis [sic] was chronic pain disorder with psychological symptoms.

And that's where I would differ. But overall, I think Dr. Tranel is also indicating that he needs to continue going for therapy and medication management. He said that at least in his conclusion.

(Ex. B, p. 7) Dr. Iqbal noted that while he did not examine Ayard prior to his work injury, Ayard did not require medication for a mental health condition prior to his work injury, and after his work injury he needed medication for his mental health condition. (Ex. B, pp. 7-8) Dr. Iqbal agreed Ayard needs ongoing treatment for his mental health condition, which relates back to his July 2014 work injury, and agreed with the medical conclusions he provided to Ayard's attorney on June 19, 2017. (Ex. B, pp. 10, 12-13)

Ayard attended counseling with Yance Childs, LMHC, with WAT Waterloo Psych on January 29, 2018. (JE 7, p. 139) Childs diagnosed Ayard with moderate episode of recurrent major depressive disorder, and recommended Ayard's medication be managed by Mariah Fury-Swisher, ARNP, a psychiatric nurse practitioner. (JE 7, pp. 139, 142) Ayard continued to treat with Childs and he received medication

management from Fury-Swisher, reporting ongoing problems with depression, anxiety, and nightmares. (JE 7, p. 144-68)

Ayard's counsel sent Fury-Swisher a letter on September 10, 2018, asking her to agree or disagree with statements posed by counsel. (Ex. 7) Fury-Swisher wrote she examined Ayard on four occasions in 2018, and she agreed Ayard's 2014 work injury was a substantial contributing factor in aggravating Ayard's underlying mental health condition, causing major depressive disorder, anxiety, post-traumatic stress disorder, and chronic pain disorder with associated psychological symptoms, and that the conditions and resulting symptoms are likely to be long-term and permanent. (Ex. 7, pp. 91-92) Fury-Swisher further agreed due to his work injury and resultant mental health conditions, Ayard will be more prone to having long-term attendance issues at work, and he will likely suffer from distraction at work, and he will require long-term mental health treatment for his work injury, including, but not limited to psychotherapy, psychiatric consultations, and pharmacological management and participation in a comprehensive, multidisciplinary pain management program due to his chronic pain caused by the work injury. (Ex. 7, p. 92)

At the time of the hearing on the review-reopening action Ayard was still working for Crystal Distributing driving a forklift. (Tr., p. 24) Before his work injury Ayard also lifted boxes and trash containers weighing sixty to seventy pounds. (Tr., p. 25) At the hearing Ayard testified he only drives the forklift. (Tr., p. 25) Ayard testified he could not return to his lifting duties. (Tr., p. 25) Ayard reported he works slower than he did before and he feels very uncomfortable at work. (Tr., p. 49)

Ayard testified he has not sustained any other injuries or traumas to his back since the 2016 arbitration hearing. (Tr., p. 48) Ayard testified that since the 2016 hearing his depression is worse and he has severe and constant pain, and anxiety. (Tr., p. 23) Ayard reported his back is worse than ever, "[i]t's constant. Bending down, twisting, lifting heavy things. Any movement that I make, it hurts." (Tr., p. 43) Ayard testified on cross-examination his pain is the same. (Tr., p. 48)

Ayard noted his mental condition is "really bad, also." (Tr., p. 43) Ayard reported he had bad thoughts, a lot of fear, depression, difficulty sleeping and with anxiety, and concentration and memory. (Tr., pp. 43-45) Ayard noted he is easily distracted and it makes it difficult to work and he is worried he will have an accident. (Tr., p. 45)

CONCLUSIONS OF LAW

Iowa Code section 86.14 governs review-reopening proceedings. When considering a review-reopening petition, the inquiry "shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded." Iowa Code § 86.14(2). The deputy workers' compensation commissioner does not re-determine the condition of the employee adjudicated by the former award. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391 (Iowa 2009). The deputy workers' compensation commissioner must determine "the condition of the

employee, which is found to exist subsequent to the date of the award being reviewed.” Id. (quoting Stice v. Consol. Ind. Coal Co., 228 Iowa 1031, 1038, 291 N.W. 452, 456 (1940)). In a review-reopening proceeding, the deputy workers’ compensation commissioner should not reevaluate the claimant’s level of physical impairment or earning capacity “if all of the facts and circumstances were known or knowable at the time of the original action.” Id. at 393.

The claimant bears the burden of proving, by a preponderance of the evidence that, “subsequent to the date of the award under review, he or she has suffered an *impairment or lessening of earning capacity proximately caused by the original injury.*” Simonson v. Snap-On Tools Corp., 588 N.W.2d 430, 434 (Iowa 1999) (emphasis in original).

In the original August 11, 2016 arbitration decision, I found Ayard sustained a permanent impairment to his lumbar spine, and while Ayard’s major depression was a sequela of the work injury, I concluded the record did not support Ayard had sustained a permanent mental health impairment as a result of the work injury. I also found Ayard had sustained a twenty-five percent industrial disability. The parties did not appeal the August 11, 2016 decision.

In the review-reopening action Crystal Distributing and Le Mars assert there is no causation between the 2014 work injury and Ayard’s major depressive disorder, relying on Dr. Tranel’s opinion after the August 2016 decision. Causation was determined in the August 2016 decision and the finding on causation is law of the case.

What is to be determined is whether Ayard has established a change in condition following the 2016 hearing. Two physicians have given opinions concerning Ayard’s physical condition, Dr. Fields, and Dr. Bansal, both occupational medicine physicians. When considering expert testimony, 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 Ct. App. 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). I find the opinion of Dr. Bansal more convincing than the opinion of Dr. Fields.

Dr. Bansal examined Ayard both during the original arbitration proceeding, and again in 2017, as part of the review-reopening action. Dr. Bansal reviewed Ayard’s medical records for both examinations. Dr. Bansal’s 2017 opinion provides he observed a deterioration in Ayard’s low back condition, noting Ayard’s pain level had increased, his functional ability had decreased, and he was receiving pain management, including epidural injections. (Ex. 2, p. 24)

When he performed his examination of Ayard's lumbar spine in 2015, Dr. Bansal noted Ayard's range of motion for flexion was 66 degrees, extension was 37 degrees, left lateral flexion was 36 degrees, right lateral flexion was 28 degrees, and found sensation in the right and left lower extremities was intact. (2016 Ex. 2, p. 131) When he performed his examination of Ayard's lumbar spine in 2017, Dr. Bansal noted Ayard's range of motion for flexion was 61 degrees, extension was 25 degrees, left lateral flexion was 23 degrees, right lateral flexion was 26 degrees, and he found sensation in the right lower extremity was intact, and there was a loss of two-point sensory discrimination over the lateral foot of the left lower extremities was intact. (Ex. 2, p. 23) Dr. Bansal's objective findings show a decline in range of motion and sensory discrimination loss in 2017 from his 2015 examination of Ayard.

Dr. Fields opined Ayard's current back pain is not related to his work injury. Dr. Fields did not examine Ayard during the original arbitration proceeding. Dr. Fields's report does not indicate what medical records he reviewed, if any, and his report does not contain any findings concerning range of motion or other objective measurements from his examination of Ayard. (JE 4, pp. 104-05) Dr. Fields brief, summary opinion, does not explain the basis for his determination. Based on the foregoing, I find the opinion of Dr. Bansal more convincing than the opinion of Dr. Fields.

When he provided his opinion in 2015, Dr. Bansal recommended permanent restrictions of no lifting over thirty-five pounds, and no frequent bending or twisting and noted Ayard may need intermittent trigger point injections and NSAIDs in the future. Ayard continued to receive treatment for chronic pain related to his back condition following the original hearing. Following his examination of Ayard in 2017, Dr. Bansal recommended new restrictions of no lifting over twenty pounds occasionally, no lifting over ten pounds frequently, no frequent bending or twisting, and sitting, standing, and walking as tolerated with no sitting, standing, or walking for more than sixty minutes at a time. (Ex. 2, pp. 24-25) The record evidence supports a slight worsening in Ayard's physical condition, based on the opinion of Dr. Bansal. I accept his restrictions and opinions.

After the original arbitration decision was issued, Crystal Distributing and Le Mars selected Dr. Iqbal, a psychiatrist, to provide treatment for Ayard's depression. Fury-Swisher, an advanced registered nurse practitioner licensed to provide psychiatric care in Iowa, has also provided treatment to Ayard, and he has received psychotherapy as well.

At the conclusion of the arbitration hearing I determined Ayard had sustained major depressive disorder as a result of the work injury, but I also found Ayard had not established he had sustained a permanent mental health impairment. After providing treatment to Ayard, Dr. Iqbal and Fury-Swisher both agreed Ayard's work injury substantially aggravated his preexisting mental health condition, causing major depressive disorder, moderate, anxiety, post-traumatic stress disorder, and chronic pain disorder with associated psychological symptoms, and his conditions are credible, and at least in substantial part related to his work injury and are likely to be long-term, and

thus permanent. (JE 3, pp. 101-02; JE 8; Ex. 7, pp. 91-92) Dr. Iqbal and Fury-Swisher further agreed due to his work injury and resultant mental health conditions, Ayard will be more prone to having long-term attendance issues at work, and he will likely suffer from distraction at work, and he will require long-term mental health treatment for his work injury, including, but not limited to psychotherapy, psychiatric consultations, and pharmacological management and participation in a comprehensive, multidisciplinary pain management program due to his chronic pain caused by the work injury. (JE 3, p. 102; JE 8)

In this review-reopening action, Crystal Distributing and Le Mars aver Ayard has not sustained a mental health sequela injury, relying on the report of Dr. Tranel. Dr. Tranel's report addresses causation with respect to the 2014 work injury. As noted above, I determined causation with respect to Ayard's major depressive disorder in the 2016 decision. The 2016 decision was not appealed and became a final decision. My finding on causation is law of the case. Springer v. Weeks & Leo Co. Inc., 450 N.W.2d 630, 632 (Iowa 1991). Based on the opinions of Drs. Iqbal and Fury-Swisher, I find Ayard has met his burden of proving he has sustained a change of condition with respect to his sequela mental health condition.

Given Ayard has met his burden of proving a change in condition, it is necessary to consider the extent of his disability. "Industrial disability is determined by an evaluation of the employee's earning capacity." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 852 (Iowa 2011). In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u).

In the 2016 arbitration decision, I found Ayard has sustained a twenty-five percent industrial disability, based on his lumbar spine condition only. At the time of the original hearing Ayard was fifty-two. (2016 Arbitration Decision) At the time of the review-reopening action Ayard was fifty-four. (Tr., p. 19) Ayard attended school through the third grade in Mexico. (2016 Arbitration Decision) He had taken English classes, but he could not read or write in English. (2016 Arbitration Decision) Ayard has not completed any additional schooling. (Tr., pp. 19-20) Ayard did not know how to type or how to use a computer during the original hearing, or at the time of the review-reopening hearing. (Tr., p. 14; 21) Given his age and limited education, I again find Ayard would have a difficult time with retraining.

In 2015, Dr. Bansal recommended permanent restrictions of no lifting over thirty-five pounds, and no frequent bending or twisting. In 2017, following his personal examination, Dr. Bansal increased Ayard's restrictions. Dr. Bansal has recommended no lifting over twenty pounds occasionally, no lifting over ten pounds frequently, no frequent bending or twisting, and sitting, standing, and walking as tolerated with no sitting, standing, or walking for more than sixty minutes at a time. (Ex. 2, pp. 24-25) I find Dr. Bansal's restrictions appropriate.

Ayard has also developed problems with his concentration and memory related to depression, which he testified impairs his ability to work. Dr. Iqbal and Fury-Swisher agreed Ayard will be more prone to having long-term attendance issues at work, and he will likely suffer from distraction at work due to his depression. (JE 3, p. 102; JE 8) There was no evidence presented at hearing Ayard's job is in jeopardy because of his absences or distraction problems.

At the time of the original hearing Ayard was working for Crystal Distributing. At the time of the reviewing-reopening hearing Ayard was still working for Crystal Distributing, performing the same job he was performing at the time of the 2016 hearing. Ayard is certified to drive a forklift, but he has no other specialized training. Ayard has maintained his employment at Crystal Distributing since his injury and he has no loss of earnings. Crystal Distributing has followed Ayard's permanent restrictions and he no longer engages in heavy lifting, bending, or twisting. I do believe if Ayard were to lose his employment with Crystal Distributing, he would likely have difficulty securing employment consistent with his past-relevant work, functional limitations, and residual capacities.

Based on the factors for determining industrial disability, I conclude Ayard has sustained an additional fifteen percent industrial disability. He is entitled to an additional seventy-five weeks of permanent partial disability benefits, at the stipulated rate of \$439.09 per week.

II. Medical Bills

Ayard seeks to recover medical bills totaling \$12,299.66, for treatment of his lumbar back condition and depression. (Ex. 5, p. 61) Crystal Distributing and Le Mars contested the bills at hearing, but did not address the medical bills in their post-hearing brief.

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).

I conclude the treatment Ayard received for his lumbar spine condition and mental health condition was reasonable and necessary. Crystal Distributing and Le Mars are responsible for the causally related medical bills set forth in Exhibit 5 and for all causally connected medical care needed for Ayard’s work injury in the future.

III. Costs

Ayard seeks to recover \$100.00 for the filing fee, \$20.13 for service, \$500.00 for Dr. Bansal’s independent medical examination and report, \$450.00 for Dr. Iqbal’s report, and \$120.00 for Fury-Swisher’s report.

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,

[c]osts 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.

A. Independent Medical Examination

Ayard seeks to recover the \$500.00 cost of Dr. Bansal’s independent medical exam and report. Dr. Bansal’s bill is not itemized.

After receiving an injury, the employee, if requested by the employer, is required to submit to examination at a reasonable time and place, as often as reasonably requested to a physician, without cost to the employee. Iowa Code § 85.39. If an evaluation of permanent disability has been made by a physician retained by the

employer and the employee believes the evaluation is too low, the employee “shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee’s own choice” Id.

On December 21, 2016, Dr. Fields issued an opinion for Crystal Distributing and Le Mars opining Ayard’s “current pain is unrelated to his prior work related injury. His current pain symptoms are likely related to chronic spinal stenosis and are not work related in nature” and recommended Ayard received follow-up care with his primary care provider regarding his chronic spinal condition. (JE 4, p. 105) Dr. Fields did not issue an impairment rating, instead finding Ayard’s current condition is not work-related. Ayard disagreed with Dr. Fields’ opinion and requested Dr. Bansal perform an independent medical examination. No impairment rating had been issued by a physician retained by the employer at the time Ayard retained Dr. Bansal to conduct an independent medical examination. Under the statute, Ayard is not entitled to recover the cost of Dr. Bansal’s independent medical examination.

In the case of Des Moines Area Regional Transit Authority v. Young, the Iowa Supreme Court held:

[w]e conclude section 85.39 is the sole method for reimbursement of an examination by a physician of the employee’s choosing and that the expense of the examination is not included in the cost of a report. Further, even if the examination and report were considered to be a single, indivisible fee, the commissioner erred in taxing it as a cost under administrative rule 876-4.33 because the section 86.40 discretion to tax costs is expressly limited by Iowa Code section 85.39.

867 N.W.2d 839, 846-47 (Iowa 2015). Dr. Bansal’s bill is not itemized. (Ex. 6, p. 78) Under Young, Ayard is not entitled to recover the \$500.00 cost of Dr. Bansal’s independent medical examination and report. Id.

B. Costs

876 IAC 4.33(6), allows for the recovery of two practitioners’ or doctors’ reports, for the filing fee, and service fees. Crystal Distributing and Le Mars are assessed \$100.00 for the filing fee, \$20.13 for service, \$450.00 for Dr. Iqbal’s report, and \$120.00 for Fury-Swisher’s report.

ORDER

IT IS THEREFORE, ORDERED:

Defendants shall pay the claimant an additional seventy-five (75) weeks of permanent partial disability benefits, at the stipulated weekly benefit rate of four hundred thirty-nine and 09/100 dollars (\$439.09 per week).

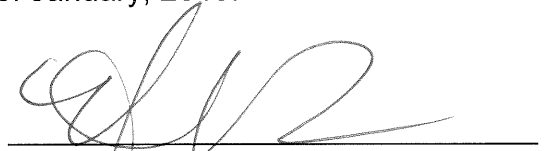
Defendants are entitled to a credit for benefits previously paid.

Defendants are responsible for the medical bills set forth in Exhibit 5 totaling twelve thousand two hundred ninety-nine and 66/100 dollars (\$12,299.66), and for all causally related future medical care.

Defendants shall pay the claimant four hundred fifty and 00/100 dollars (\$450.00) for Dr. Iqbal's report, one hundred twenty and 00/100 dollars (\$120.00) for Fury-Swisher's report, one hundred and 00/100 dollars (\$100.00) for the filing fee, and twenty and 13/100 dollars (\$20.13) for service costs.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 24th day of January, 2019.


HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876 4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.