BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



RICK C. LAW,

Claimant,

vs.

HY-VEE, INC. d/b/a HY-VEE DISTRIBUTION,

Employer,

and

EMC PROPERTY & CASUALTY CO.

Insurance Carrier,
Defendants.

File No. 5055461

ARBITRATION

DECISION

Head Note Nos.: 1402.40, 1803

## STATEMENT OF THE CASE

Rick Law, claimant, filed a petition for arbitration against Hy-Vee, Inc. d/b/a Hy-Vee Distribution, as the employer, and EMC Property & Casualty Company as the insurance carrier. The case was heard by the undersigned on March 14, 2017 in Sioux City, Iowa.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The evidentiary record includes claimant's Exhibits 1 through 13 and defendants' Exhibits A through I. Claimant testified live at trial. Defendants called Terry Graybill to testify. The evidentiary record closed at the conclusion of the evidentiary hearing and the case was considered fully submitted to the undersigned on that date.

## ISSUES

The parties submitted the following disputed issues for resolution:

1. The extent of claimant's entitlement to permanent disability benefits.

2. Defendants' entitlement to credit for benefits paid to date.

3. Whether costs should be assessed against either party.

With respect to the second disputed issue, the parties stipulated on the record that the benefits claimed as a credit by defendants have been paid. The dispute between the parties is how the benefits paid should be legally categorized, such as permanent partial or permanent total disability benefits. The undersigned understood that his determinations as to permanent disability would resolve any disputes and the parties would be able to accurately categorize the benefits paid to date based upon the ultimate award of permanent disability rendered in this decision. Therefore, no findings of fact or conclusions of law will be entered regarding the defendants' entitlement to credit for benefits paid. If the undersigned's understanding is not accurate or findings and conclusions are required, the parties should notify the undersigned via a request for rehearing and brief the issue.

## FINDINGS OF FACTS

The undersigned, having considered all of the evidence and testimony in the record, finds:

Rick Law is a 62 year old man, who lives in Hartley, Iowa. Mr. Law is a high school graduate, but has no additional higher education or training. He testified that he took special reading classes in high school and that he has reading comprehension issues. (Claimant's testimony; Exhibit 13, pages 2, 4)

While still in high school, Mr. Law worked for Mathias Electric as well as a local gas station pumping gas and performing oil changes. After graduating from high school, Mr. Law began farming with his father. He farmed with his father for a couple of years and then took a manufacturing job working for Simonson Manufacturing in Quimby, Iowa for approximately three years. In this position, claimant manufactured metal parts and performed some welding. His full list of employment prior to 1977 is contained at Exhibit 13, page 2. (Claimant's testimony; Ex. 13, p. 2)

In 1977, Mr. Law obtained employment with Hy-Vee in its distribution center in Cherokee, Iowa. He worked at the Hy-Vee distribution center for essentially 40 years (34 years on a full-time basis) as an order filler and building pallets. In his position as an order filler, claimant would use a fork lift and pallet jacks to move product. He would lift and move large bags and food items to fill specific orders for local Hy-Vee stores. Mr. Law explained that his primary job duties at Hy-Vee were as a forklift driver. Mr. Law also noted in answers to interrogatories that he held a few other part-time positions while working for Hy-Vee. (Claimant's testimony; Ex. 13, p. 3)

Mr. Law was in good physical health prior to September 10, 2013. His job was physically demanding and he was capable of performing all required tasks. However, on September 10, 2013, Mr. Law was performing his typical duties at Hy-Vee. He was throwing or moving bags of dog food weighing between 15 and 50 pounds. He

experienced three periods of sharp pains in his left side just above the groin area. (Claimant's testimony)

Mr. Law scheduled and submitted to an evaluation with a nurse practitioner at his personal physician's office on September 11, 2013. The nurse practitioner performed a physical examination and identified inguinal hernias on both the left and right side and noted that the left side was causing pain. (Claimant's testimony; Ex. 1, pp. 5-6) The nurse practitioner referred claimant for surgical evaluation.

Jason Dierking, M.D., a surgeon, evaluated claimant on October 3, 2013 and recommended surgical intervention. Dr. Dierking took claimant to surgery and performed a bilateral inguinal hernia repair. (Ex. 2) Unfortunately, surgery did not completely resolve claimant's symptoms. (Claimant's testimony)

Claimant was ultimately referred for a second opinion performed by Robert J. Fitzgibbons, M.D. (Ex. 6) Dr. Fitzgibbons recommended and performed a second hernia repair surgery on May 14, 2015. Dr. Fitzgibbons used mesh to repair claimant's hernias. (Ex. 5, pp. 2-3) Unfortunately, even the revision surgery performed by Dr. Fitzgibbons was not sufficient to alleviate claimant's symptoms. (Claimant's testimony)

Claimant sought a third surgical opinion from Mayo Clinic. Unfortunately, there are no further surgical procedures recommended or anticipated that may improve claimant's condition. He has been evaluated by pain specialists, who have recommended chronic pain clinic treatments, as well as spinal cord stimulators, to treat claimant's chronic pain. Claimant has declined either intervention.

Mr. Law has also obtained urology consults, treatment through his personal physician, and has submitted to numerous tests and injections. None of his treatment has been effective in relieving his symptoms. Mr. Law described significant and chronic symptoms involving his groin, genitals, abdomen and legs. (Claimant's testimony; Ex. 1, pp. 25, 31; Ex. 2, p. 8; Ex. 4)

At hearing, I observed Mr. Law standing and walking with trepidation. He sat for the majority of his testimony, but often was observed shifting in his seat and manually readjusting his genitals. Mr. Law's actions appeared to be legitimate and intended for relief of symptoms. I did not perceive that his actions were an effort at exaggeration.

Mr. Law submitted to a functional capacity evaluation (FCE) on January 10, 2017. In that FCE, Mr. Law demonstrated the ability to lift 40 pounds on an occasional basis, to sit constantly and to stand and walk frequently. However, the evaluating physical therapist recommended slightly lesser work restrictions that included sitting or standing for 30 minutes at a time, walking up to 40 minutes at a time, driving 15-20 minutes at a time, and lifting no more than 30 pounds. The therapist noted that claimant performed at a medium work category during the FCE but recommended light work category capabilities and restrictions. (Ex. 11)

Two physicians have offered opinions regarding claimant's work restrictions. Matthew P. West, M.D., appears to be a physical medicine and rehabilitation physician, though his specific credentials are not contained within this evidentiary record. Dr. West evaluated claimant on February 2, 2017, at the request of the defendants. (Ex. G)

Dr. West opines that claimant should submit to a spinal cord stimulator as well as a chronic pain rehabilitation program. However, given claimant's refusal of these treatment options, Dr. West opines that claimant has achieved maximum medical improvement. He also recommends work restrictions that place claimant in the light to medium work categories. Specifically, Dr. West opines that claimant could lift 35 pounds occasionally, must be allowed to change positions as needed, and only bend or lift on an occasional basis. (Ex. G, pp. 5-6)

Dr. West noted that claimant used a single-point cane when ambulating. Dr. West opined that use of the cane is not medically necessary or related to the September 10, 2013 work injury. (Ex. G, p. 6)

Claimant sought an independent medical evaluation, which was performed by Robin L. Sassman, M.D., on February 9, 2017. (Ex. 12) Dr. Sassman is an occupational medicine physician. She noted claimant's use of a single-point cane. Dr. Sassman recorded that "Mr. Law uses this to allow him to walk in a way that limits the movement of the scrotum when he ambulates. This, in turn, helps to limit the pain he feels in the groin when he ambulates." (Ex. 12, p. 14) Accordingly, she opined that the use of the cane is due to the work injury. However, Dr. Sassman did not opine that use of the cane was medically necessary. After considering the opinions of Dr. West and Dr. Sassman on this issue, I find that use of the cane may reduce some of claimant's symptoms but is not medically necessary to allow him to walk.

This becomes important when analyzing the restrictions offered by the competing physicians. Dr. West's restrictions are outlined above. Dr. Sassman imposed much more restrictive limits on claimant as a result of the use of the cane. Dr. Sassman opines that claimant may only perform sit down duties and that he should not lift, push, pull or carry more than 5 pounds due to the use of the cane. (Ex. 12, p. 15)

When considering the competing restrictions offered by Dr. West and Dr. Sassman, I note the findings of the FCE. The FCE findings and recommendations correspond much more closely to the restrictions outlined by Dr. West. Ultimately, I accept the restrictions offered by Dr. West as the most accurate and applicable in these circumstances. Specifically, I find that claimant remains capable of light to medium category work and that he could lift 35 pounds occasionally, must be allowed change positions as needed, and only bend or lift on an occasional basis. (Ex. G, pp. 5-6) While work duties performed at these levels may be uncomfortable, claimant is medically capable of performing work at these levels.

My finding is also supported and bolstered by claimant's admission that he continues a physical exercise routine and continues to perform housework and work around his acreage. Mr. Law acknowledged at trial that he continues to use an elliptical machine as well as a rowing machine. Although he has to limit his use of this exercise equipment, he remains capable of using it to some extent. He also acknowledges mowing on a riding lawn mower to some extent as well as watering animals, which requires him to lift and carry water short distances. (Claimant's testimony)

Mr. Law also presented at hearing and would belch frequently and certainly at least every minute. (Claimant's testimony) Dr. Sassman noted claimant's belching issues. She noted that a possible cause of this issue would be a surgery that involved the diaphragm. However, Dr. Sassman did not definitively causally connect claimant's belching to his September 10, 2013 work injury or any subsequent treatment. Rather, Dr. Sassman noted, "Mr. Law would benefit from an evaluation by a gastroenterologist to determine the cause and treatment options that may be of benefit for him for this issue." (Ex. 12, p. 14) No physician has specifically causally connected claimant's belching to the work injury or subsequent treatment. I find that claimant failed to prove a causal connection between his belching and his September 10, 2013 work injury.

Dr. Sassman is the only physician that has offered a permanent impairment rating for claimant's hernias and subsequent surgical treatments. Dr. Sassman opines that claimant sustained a 30 percent permanent impairment of the whole person as a result of the September 10, 2013 work injury and resulting hernias. Review of the AMA Guides Table referenced by Dr. Sassman demonstrates she applied the proper standards. Given that her analysis and assessment of the impairment rating is not rebutted, I accept Dr. Sassman's impairment rating and find that claimant has proven a 30 percent permanent impairment rating of the whole person as a result of the September 10, 2013 work injury.

Mr. Law attempted and did return to work for Hy-Vee after these injuries. Hy-Vee made realistic accommodations and attempts to permit claimant to return to work in a lighter capacity. Ultimately, claimant resigned his position, indicating that his symptoms were too great to continue working. Claimant has not sought alternate employment since leaving Hy-Vee. (Claimant's testimony; Terry Graybill testimony)

I find that claimant was motivated to return to work. He did return to work and attempted to continue working for Hy-Vee, even to the point of vomiting on occasion because of the severity of his symptoms. Yet, he ultimately resigned his position and has made no attempts to work since leaving Hy-Vee. Nevertheless, I find that Mr. Law remains medically capable of performing gainful employment. While I find that he has sustained a significant loss of future earning capacity as a result of his September 10, 2013 work injury, I find that he remains capable of employment within the competitive labor market.

Considering claimant's age, the situs and severity of his injury, as well as his educational background, employment history, permanent physical restrictions, permanent impairment, motivation, as well as all other factors of industrial disability for which there is evidence in this record, I find that claimant has proven a 55 percent loss of future earning capacity as a result of the September 10, 2013 work injury.

## CONCLUSIONS OF LAW

The parties stipulated that claimant sustained a work related injury on September 10, 2013. The parties further stipulate that the injury caused permanent disability and that the injury should be compensated industrially pursuant to Iowa Code section 85.34(2)(u). (Hearing Report) However, defendants disputed causal connection of claimant's belching issues.

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. Sanchez v. Blue Bird Midwest, 554 N.W.2d 283, 285 (Iowa App. 1996); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 152 (Iowa 1997). 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. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa App. 1997).

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).

I found that claimant did not prove a causal connection between his belching issues and the September 10, 2013 work injury or subsequent treatment. While it is possible that this is causally related, claimant did not prove the issue by a preponderance of the evidence. As such, claimant's belching issues are not compensable or considered in rendering this decision.

Claimant's bilateral inguinal hernias are clearly compensable on an industrial disability basis. (Hearing Report)

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Having considered all of the relevant industrial disability factors outlined by the Iowa Supreme Court, I found that claimant has proven a 55 percent loss of future earning capacity. This is equivalent to a 55 percent industrial disability and entitles claimant to an award of 275 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u).

Claimant seeks an assessment of costs and submitted a statement of costs he seeks to be awarded. Costs are assessed at the discretion of the agency. Iowa Code section 85.40. Exercising the agency's discretion and recognizing that claimant has prevailed on all the primary disputed issue, claimant's filing fee of $100.00 shall be assessed pursuant to 876 IAC 4.33(7).

Claimant attached two billing statements to the hearing report. The first is a statement for charges incurred as part of an independent medical evaluation performed by Robin Sassman, M.D. Defendants stipulated to payment of that expense pursuant to Iowa Code section 85.39 on the hearing report and should reimburse those charges pursuant to their stipulation. Accordingly, Dr. Sassman's charges are not assessed as a court cost.

The second billing statement attached to the hearing report is from Physiotherapy Associates and appears to be related to a January 10, 2017 FCE. (Ex. 11) The billing statement does not breakdown the charges between testing and preparation of a report. Arguably, it is possible that a report charge could be taxed as a cost pursuant to 876 IAC 4.33(6). However, there is no breakdown of charges and I conclude that the requested FCE charge is not taxable as a cost. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015).

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant two hundred seventy-five (275) weeks of permanent partial disability benefits commencing on January 10, 2017 at the stipulated weekly rate of five hundred ninety-four and 14/100 dollars ($594.14).

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

Defendants shall pay accrued weekly benefits, if any, in lump sum, along with applicable interest calculated pursuant to Iowa Code section 85.30.

Defendants shall reimburse the IME charges from Dr. Sassman pursuant to their stipulation on the hearing report.

Defendants shall reimburse claimant's costs totaling one hundred dollars ($100.00).

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

Signed and filed this 7th day of August, 2017.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Willis J. Hamilton
Attorney at Law
PO Box 188
Storm Lake, IA 50588
willis@hamiltonlawfirm.com

Dennis R. Riekenberg
Attorney at Law
9290 West Dodge Rd., Ste. 302
Omaha, NE 68114-3320
driekenberg@ctagd.com

WHG/kjw

**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.