BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
APR 10 2018
WORKERS' COMPENSATION

ANTHONY JOSEPH CASTELLANO, Claimant, vs. MONARCH FOUNDATION, Employer, and NATIONWIDE INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5051971 ARBITRATION DECISION Head Notes: 1803, 1804, 3701

STATEMENT OF THE CASE

Anthony Castellano, claimant, filed a petition in arbitration seeking workers' compensation benefits from Monarch Foundation (Monarch) and its insurer, Nationwide Insurance Company as a result of an injury he sustained on September 2, 2014 that arose out of and in the course of his employment. This case was heard in Des Moines, Iowa and fully on September 2, 2017. The evidence in this case consists of the testimony of claimant, Marjory Castellano, Frank Lindsey and Joint Exhibits 1 – 11, Claimant's Exhibits 1 – 13 and Defendants' Exhibits B - F.

Defendants' Exhibit A was excluded for failure to timely disclose this exhibit. Claimant requests penalty benefits in the hearing report. This claim was not allowed, as the claim for penalty was not timely disclosed to defendants and no request for bifurcation was made. (Transcript, page 9)

ISSUES

1. Whether the alleged injury is a cause of permanent disability and, if so;
2. The extent of claimant's disability.
3. Assessment of costs

STIPULATIONS

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.

FINDINGS OF FACT

The deputy workers' compensation commissioner having heard the testimony and considered the evidence in the record finds that:

Anthony Castellano, claimant, was 55 years old at the time of the hearing. Claimant's formal education ended in the 11th grade. He does not have a GED. (Joint Exhibit 8, p. 124) Claimant had a number of different jobs before his work with Monarch. (Ex. D, p. 18) Claimant worked assembling large parts for dental machines prior to 1984. (JE 8, p. 124) From 1984 through 2000 he assembled parts and was a line leader, which included some supervisory responsibilities. He was self-employed in Georgia framing and building decks. Claimant did that for about a year and then returned to Iowa and worked with his brother pouring concrete for less than a year. He was responsible for hiring/firing, some bidding and sales. (JE 8, p. 125; Tr. p. 55)

Claimant began his employment with Monarch in March 2011. (Ex. D, pp. 18, 19) With Monarch claimant worked setting up pans (forms) for pouring concrete walls. He also poured concrete. (JE 8, p. 126)

On September 2, 2014 claimant was at a Monarch work site. He was operating a wall puller when something broke and a pan hit his head. (JE 8, p. 126) Claimant received a large gash in his forehead. (Ex. 1, pp. 1, 2) Some co-workers took claimant to Family Care Clinic. Claimant was in the hospital from Tuesday September 2, 2014 through Saturday September 6, 2014. (JE 9, p. 148) He was sent to plastic surgeon Eugene Cherny, M.D. (Tr. pp. 42, 43)

Claimant testified that bright lights and noise caused him discomfort. (Tr. p. 20; JE 8, p. 128) He testified that he has a pain in his forehead 24/7, with good days and bad days: More bad days than good. (Tr. p. 26) Claimant also testified that he had difficulty sleeping. (Tr. p. 28) Claimant said he tried to return to work at Monarch, but could not do so because his head was "exploding." (Tr. pp. 33, 34) Claimant did not believe he could return to any 40-hour a week job due to his head injury. (Tr. p. 33) He could not return to work at Monarch. Claimant testified in his deposition that he had recently attended a wedding reception in Northeast Iowa and could only stay for a short time due to the noise and lights. (JE 8, p. 129) At the time of his deposition he said he did not go out without his sunglasses. (JE 8, p. 130)

Claimant testified that he had ten season tickets for the University of Iowa football team and would attend the home games and some away games. (Tr. pp. 21, 22) Claimant now has two season tickets. Since the injury claimant has attended two Iowa football games. Claimant also went and tailgated at another game. (JE 8, p. 131) Claimant testified that he was not able to stay to the end of games due to the noise. (Tr. p. 30) Claimant testified that he is able to drive and that on longer trips he has his wife drive after a while. (Tr. p. 36) Claimant testified that he went to Las Vegas with his wife when she was on a business trip, as his wife did not want to leave him at home. (Tr. p. 77) He also testified he went to Mexico and had to cancel a trip to Jamaica due to his health. (Tr. p. p. 72)

Claimant testified that he has not been headache free since his injury. Claimant did not remember that after he had an injection he was headache free for 24 hours. (Tr. p. 46) Claimant testified that he had an adverse reaction to a Botox injection and he "...flew off the table." (Tr. p. 47) Claimant became aware that surveillance had been performed when he went to Irving Wolfe, M.D. in November 2015. (Tr. p. 62)

Throughout claimant's testimony at the arbitration hearing, claimant was unable to remember details of his deposition testimony and many details of his treatment. (See for example, Transcript pages 49 – 57, 73 – 77) Claimant was deposed on November 4, 2015. (JE 8)

Claimant's wife, Marjory Castellano, testified at the hearing. She has been married to the claimant for 33 years. She testified that before the injury they would travel extensively and socialize and that they went to every Iowa football home game. (Tr. pp. 89, 90) Ms. Castellano said that both before and after the work injury claimant has only a basic reading level of first or second grade, however he has more difficulty focusing due to an eye post-injury. (Tr. pp. 98, 99) Ms. Castellano said that before claimant's injury her husband would bring home paperwork for Monarch and she would complete it for him. (Tr. p. 137) Ms. Castellano said that after claimant's injury she had a conference in Las Vegas for her work. She testified that she did not feel comfortable leaving claimant at home while she was on this trip, so that while he went, claimant stayed in his room. (Tr. p. 84) Ms. Castellano said the claimant has good and bad days – with no predictability. (Tr. p. 86) She said that over the course of three years they have limited the things that claimant tries to do. (Tr. p. 87) She said that post-injury claimant went to two Iowa football games after the injury and would only stay inside the stadium a short time for one game and went to a restaurant to watch at the second game. Claimant drove to these games. (Tr. pp. 91, 92) She said that post-injury claimant's memory is worse, and three to four times a week he will thrash around in bed and she has to hold him. (Tr. pp 119, 120) Ms. Castellano assisted her husband on some attempts to return to work. On the first occasion claimant planned to return to work in October 2014, but felt too sick to attend, and she texted Monarch and let them know. (Tr. pp. 105, 113) On the second occasion, November 16, 2015 Ms. Castellano went with her husband to Monarch and looked at the office area that he was going to work in. (Tr. p. 106; Ex. B, p. 7) Ms. Castellano then talked to Frank Lindsey and

discussed her husband's limitations and need for accommodations. (Tr. p. 109) She said claimant would need accommodations in lighting and number of hours he could work. (Tr. pp 109) Claimant worked for about two hours. (Tr. p. 110) At the time of the arbitration hearing claimant's application for Social Security disability had been denied. He had an appeal pending. (Tr. p. 122)

Ms. Castellano was deposed on November 4, 2015. (JE 9) In this testimony she stated claimant's condition of dizziness, headaches, pain, sensation of worms in his head, sensitivity to light and not as mentally capable was the same as when claimant was in the hospital after the accident. (JE 9, p.148)

Frank Lindsey, Vice President of Monarch, was called by claimant to testify. He was also deposed. (JE 10) Mr. Lindsey said that when claimant was hired he was a good worker and had a good personality. (Tr. pp. 141, 143) Claimant supervised a crew. (JE 10, p. 171) Monarch put claimant in a position claimant did not necessarily have the skill set for because of the personal relationship with Frank Lindsey's father. (Tr. p. 143) Mr. Lindsey said in his deposition that he was trying to find a job that claimant could do. Mr. Lindsey offered dispatcher, going over invoices, check pricing or operating a machine in the field as potential jobs that claimant could perform. (JE 10, 176) Mr. Lindsey testified that he believed that claimant was lying and was not significantly disabled. (Tr. p. 152)

There was surveillance used in this case. (Ex. E – report; Ex. F - DVD) The extensive video surveillance was reviewed by the undersigned. The surveillance was conducted in September and October 2015. The surveillance shows claimant on his lawn with his dogs. Claimant occasionally was reported and shown driving. Claimant drove to Albert Lea, Minnesota. The surveillance shows sometimes he is wearing sun glasses, sometimes not in all of his activities. The surveillance does show two tailgating events. There is no vigorous effort shown by claimant, but claimant is able to help set up the tailgating parties. (Ex. E, pp. 23, 28, 34, 35, 43)

Dr. Wolfe first examined claimant on September 17, 2014. Claimant reported headaches, dizziness and light sensitivity. (JE 1, p. 1) Dr. Wolfe's impression was, "A mild traumatic brain injury with postconcussive symptoms and a normal CAT scan of the brain." (JE 1, p. 2) Dr. Wolfe recommended a burst taper of prednisone and limit the use of narcotic medications. He also informed claimant that the vast majority of patients with mild traumatic brain injury have all symptoms resolve in three to six months. (JE 1, p. 3) Claimant reported intractable headaches to Dr. Wolfe on September 24, 2014. A CAT scan was ordered. (JE 1, p. 6) On September 29, 2014 Dr. Wolfe noted the CAT scan did not show any new problems. (JE 1, p. 8) Dr. Wolfe's impression was,

> Mild traumatic brain injury as the result of a work-related injury which occurred on September 2, 2014, while preforming his job duties in the employ of the Monarch Corporation. Mr. Castellano has resultant posttraumatic headaches and postconcussive symptoms of disequilibrium

> and intermittent blurred vision. An urgent CAT scan of the brain performed on September 25, 2014, revealed no hemorrhage, mass effect, midline shift, or hydrocephalus. Further, it revealed near complete resolution of the extracranial soft tissue swelling and subcutaneous emphysema in the frontal region that were noted on Mr. Castellano's CAT scan of the brain performed on September 2, 2014, at the time of his work-related mild traumatic brain injury.

(JE 1, p. 9) On October 30, 2014 Dr. Wolfe's impressions also included insomnia and difficulty with attention and concentration, which he thought to be related to claimant's headaches. (JE 1, p. 20) On January 26, 2015 Dr. Wolfe's impression was

> Mild traumatic brain injury while in the employ of Monarch Foundations 09/02/2014 with resultant chronic post traumatic headaches, sizziness/disequilibrium, [sic] photophobia and blurred vision, torn iris, insomnia and difficulty with attention and concentration.

(JE 1, p. 34) On February 18, 2015 Dr. Wolfe administered the Sullivan Catastrophizing Scale, the PHQ-9 Depression questionnaire which showed that psychological evaluation was appropriate. (JE 1, p. 38) On March 23, 2015 Dr. Wolfe stated, "At this time it is my opinion that Mr. Castellano is unable to return to work performing sedentary duties such as sitting at a desk and answering phones in an environment of dimmed lighting, due to Mr. Castellano's current somatic and psychological issues." (JE 1, pp. 40, 41) Claimant reported to Dr. Wolfe on May 18, 2015 that after he had Botox injections claimant felt like his face was ripped off. (JE 1, p. 45) Dr. Wolfe found claimant to be at maximum medical improvement as of May 18, 2015 for the traumatic brain injury of September 2, 2014. (JE 1, p. 46) On July 1, 2015 Dr. Wolfe provided a 31 percent whole person impairment rating. Dr. Wolfe wrote,

> DX: Mild Traumatic Brain Injury with Post-Concussion Syndrome with Somatic, Cognitive and Emotional Symptoms: Headaches, Fatigue, Anxiety, Depression, Irritability, Anger, Nausea, Light Sensitivity, Concentration/Attentions and Memory Problems, Difficulty with Judgment, Dizziness and Difficulty with Balance, Insomnia.
>
> Traumatic right pupillary sphincter (Iris) tear.
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> Partial Permanent Impairment AMA Guides 5th edition. Chapter 13 "The Central and Peripheral Nervous System". Chapter 13.3 pages 309-316. Table 13-3 Criteria for Rating Impairment Due to Episodic Loss of Consciousness or Awareness. (Mr. Castellano has suffered a closed head injury with Post-Concussion Syndrome, see above chronic symptoms.) Class 2: 15%-29% Impairment of the Whole Person. Paroxysmal Disorder that interferes with some daily activities.

Mr. Castellano is assigned 29% Impairment of the Whole Person.

(JE 1, p. 47) Based upon claimant's otherwise unrateable pain Dr. Wolfe using Chapter 18 of the AMA Guides, provided an additional 3 percent rating for claimant for a 31 percent impairment. (JE 1, p. 47) On May 18, 2015 Dr. Wolfe recommended claimant return to work in a gradual manner starting at two hours and increasing each day until he reaches eight hours. Dr. Wolfe noted that Mr. Castellano had no objective physical findings that required restrictions and noted parenthetically, "(This is however the case in almost, if not all patients with mild traumatic brain injury.)" (JE 1, p. 54) Dr. Wolfe noted that subjective symptoms did, from a psychophysiological perspective, present certain tolerances (subjective limitations) for claimant's ability to work. (JE 1, p. 54) On November 18, 2018 Dr. Wolfe noted that based upon some surveillance video it appeared claimant was able to perform more activity than he had told him he could perform. Dr. Wolfe recommended a neuropsychological evaluation to objectively evaluate presence or absence of feigning or exaggeration of symptoms. Dr. Wolfe discussed returning to work with claimant. (JE 1, pp. 57. 58)

On November 18, 2015 Dr. Wolfe wrote defendants' attorney after reviewing the surveillance DVD. Dr. Wolfe noted the activities shown in the DVD was not consistent with the information claimant had provided him. Dr. Wolfe noted claimant had told him he was very restricted in the amount of driving he could do, activities he could engage in and that he spent most of his time wearing his dark glasses, cannot tolerate noise and spends most of his day with a headache sitting in a chair. (JE 1, p. 59) Dr. Wolfe noted the surveillance video showed claimant engaging in some activities like driving, walking his dogs, converse with a utility employee, carry items, and engage in some tailgating. He also noted claimant was able to visit Mexico and went to Las Vegas among other activities. Dr. Wolfe noted that his impairment rating was based upon the symptoms that claimant reported to him. (JE 1, pp. 59, 60)

On February 18, 2016 Dr. Wolfe discussed with claimant the surveillance videos he had reviewed. Dr. Wolfe's impression was mild traumatic brain injury and post-concussion syndrome. (JE 1, p. 66) Dr. Wolfe wrote to defendants' attorney [Letter date stamped October 7, 2016] stating he had read Robert Jones Ph.D.'s neuropsychological report and did not change his impairment rating of July 1, 2015. (JE 1, p. 76) In an undated letter Dr. Wolfe wrote a nurse case manager and provided a 17 percent whole person impairment rating. (JE 1, p. 77)

Claimant's attorney wrote Dr. Wolfe on May 18, 2017 and requested that he consider additional information about claimant's activities. (Ex. 7, pp. 1 - 3) On May 22, 2017 Dr. Wolfe wrote claimant's attorney. Dr. Wolfe provided the following diagnosis,

1. Mild traumatic brain injury with postconcussive syndrome with somatic, cognitive, and emotional symptoms including headache, fatigue, anxiety, depression, irritability, anger, nausea, light sensitivity, concentration, attention, and memory problems,

difficulty with judgment, dizziness, difficulty with balance, and insomnia,

2. Traumatic right papillary sphincter (iris) tear.

(JE 1, p. 78) Dr. Wolfe provided a 31 percent impairment rating referencing his July 1, 2015 impairment rating with a maximum medical improvement (MMI) date of May 18, 2015. Dr. Wolfe noted that claimant would have, "... moments, hours, and days where he is able to function to a 'higher' degree and moments, hours, and days where he will function at a 'lesser' degree." (JE 1, p. 79) Dr. Wolfe noted that the higher or lower functioning days were unpredictable. (JE 1, p. 79)

Dr. Wolfe was deposed on June 22, 2017. (JE 10) Dr. Wolfe is a neurologist. Dr. Wolfe provided treatment of the claimant. On claimant's first visit Dr. Wolfe diagnosed claimant with mild traumatic brain injury and post-concussive syndrome. (JE 11, p. 182) Dr. Wolfe testified on June 22, 2017 that claimant's condition was worse since his initial treatment. (JE 11, p. 184) Dr. Wolfe stated that when he was provided surveillance of the claimant, the activities claimant was performing were more than the claimant reported he could do. (JE 11, p. 185) Dr. Wolfe recommended an evaluation for a psychological or cognitive impairment. An evaluation was performed and Dr. Wolfe noted the report was not consistent with mild traumatic brain injury. (JE 11, p. 185) Dr. Wolfe acknowledged that he issued a number of impairment ratings. He stated in his deposition that the rating of 31 percent to the whole body of May 22, 2017 was his current rating for the claimant. (JE 11, p. 189)

Claimant's eyes were examined by Ryan Vincent, M.D. In a check box letter signed September 21, 2015, to defendants' attorney Dr. Vincent agreed that claimant had a partially torn sphincter of his iris in his right eye, which limits claimant's pupil from completely and symmetrically constricting. Dr. Vincent agreed that this was a minimal disability ant that it would require claimant to wear sunglasses on bright sunny days. (JE 2, p. 89)

On October 28, 2016 DeAnn Fitzgerald, O.D. examined claimant. Dr. Fitzgerald's exam noted the following in the Functional Examination and Recommendations,

Functional Exam

1) Post Trauma Vision Syndrome (see sheet)

2) Left Visual field defect OU

3) Left field neglect OU

4) Double vision-prism 6th nerve palsy

5) Cognition-delay, not able to do multi-tasking, encoding problem

6) Light sensitive-needs tint

Recommendations:

1) Vision rehab therapy

2) Visual informational processing disorder with cognitive overlay

3) Multi sensory systems therapy

(Ex. 2, p. 1)

On April 24, 2015 Robert Straight, Ph.D. examined claimant. Dr. Straight recommended pain management. His diagnosis was,

AXIS 1: Adjustment Disorder with Depressed Mood

AXIS II: Deferred

AXIS III: Post-concussion syndrome

AXIS IV: Health, mood, employment, interpersonal, and financial issues

AXIS V: Current GAF: 60-65, Past year: same since injury

(JE 3, p. 91) Dr. Straight saw claimant two other times for treatment, the last being on September 30, 2015. At that time due to the pain claimant presented with Dr. Straight did not have any treatment for claimant. (JE 3, p. 93)

Claimant was seen at the University of Iowa Hospitals and Clinics (UIHC) for a neuropsychological assessment. A report was issued on June 22, 2016 by R.D. Jones, Ph.D. (JE 3A, pp. 93a – 93A) The UIHC performed a number of tests. The surveillance tapes were provided to the UIHC. Dr. Jones noted that responses to a questionnaire assessing highly unusual cognitive and physical symptoms were extremely elevated. (JE 3A, p. 93F) Dr. Jones commented that this was a highly unusual case that did not fit the neuropsychological profile following a mild traumatic brain injury. Dr. Jones wrote,

> Our impression is that non-neurological causes are salient in this case, and a diagnosis of malingering must be strongly considered. Of relevance to these considerations, our findings are very difficult to reconcile with observations from the videotapes. In particular, his ability to go outside without dark glasses, drive, go to tailgate paries [sic] at football games, and to interact at length with others, would be highly atypical given

> the nature of his clinical complaints and the level of impairment on these tests.

(JE 3A, p. 93G)

Carma Mitchell, M.S., C.R.C, C.D.M.S., provided a vocational report on August 21, 2015. She noted that the claimant was 53 years old and had worked in construction for the past 15 years, had a limited education and had difficulty with reading and writing. (Ex. 3, p. 4) Based upon claimant's reports of having to spend 90 percent of his day in a quiet darkened room, sitting or laying down she opined claimant had lost 100 percent access to the labor market and a 100 percent loss of earnings. (Ex. 3, p. 4) On March 25, 2017 Ms. Mitchell issued another report after reviewing additional records, including an evaluation from Marc Hines, M.D. and talking to claimant and his wife. She was still of the opinion that claimant was not competitively employable at that time. (Ex. 4, p. 5)

On October 28, 2016 Dr. Hines performed an independent medical examination (IME). Dr. Hines' impression was,

> This is a patient who, without a doubt, has a very severe post-traumatic headache syndrome. It is somewhat difficult to discern from his situation how much of his problem below this is related to head injury versus the marked difficulties that he has with cognitive performance secondary to medication, secondary to the headache, secondary to severe depression and severe anxiety, though I suspect given the findings on Dr. Jones' examination that there is significant decrement in cognitive performance. If we look at this IQ testing in school and compare it to the testing which was shown by Dr. Jones, there is a very significant decrement in the patient's performance on many components of the exam. Some of what Dr. Jones has said about the exaggeration of responses seems to be actually more consistent with the severity of the headache situation and the evolution of these difficulties over time with the patient not responding to medications and the family not being able to comprehend the marked difficulties which the patient is experiencing. In their experience he is, unfortunately, a changed person who has marked irritability, difficulty with constant sleepiness, unsteadiness of gait, falls and an utterly changed person with regards to his physical abilities. This has presented his wife with the unfortunate dilemma of how much to push him versus how much to allow him to remain sedentary. It is clear that there is no real opportunity to push him particularly far, as any activity seems to increase his pain. The patient, unfortunately failed any attempt at work hardening. Virtually every attempt at re-socialization has lead to the same difficulty. Surveillance aside, the findings by all of the history suggests that the patient has a very detailed history suggesting failure to successfully be

> able to re-enter not only the work force, but all of the other activities of his life without current difficulties with the headache returning and increasing dysfunction. 2) The patient has nighttime sleep disorder, nighttime behavioral disorder that should be followed up with a sleep study. 3) The patient has significant anxiety, this is actually out of proportion even to the depression, though the depression is quite severe.

(Ex. 5, pp. 12, 13) Dr. Hines provided a 34 percent whole person impairment and stated that at the present time claimant had no practical means of being employed in a sedentary or other job. (Ex. 5, p. 14) On February 8, 2017 Dr. Hines provided another report after being provided a report from Dr. Fitzgerald. Dr. Hines wrote,

> Your question in the letter which accompanies this report of Dr. Fitzgerald is whether this would merit amending my IME findings. This does merit amending the IME findings. The visual impairment previously given at Wolfe Eye Clinic of 3% for the iris tear is not changed. However, the present study demonstrates a significant cognitive impairment that cannot be and was not checked by the neuropsychological studies, but were found with the optometric studies, but involve much more than visual impairment. They are in fact cognitive impairments in the sense that is the coordination of eye movement and vision with other aspects of brain balance function that caused the primary difficulties. As such, these are primarily cognitive impairments and related to mental status, though expressed through vision and the cognitive impairments accompanying them.
>
> I am rating them with the Fifth Edition Guides using table 13-6, page 320, for a class 2 whole person impairment of 20%, the patient requiring some direction of activities of daily living as described by his wife, now understood to be more clearly related to the cognitive dysfunction combined with the visual system dysfunction. In that regard then, I would return to combined values tables, page 604, and combine the previously obtained 34% whole person impairment with a 20% whole person impairment, giving a 47% whole person impairment to this patient.

(Ex. 6, p. 2)

Claimant has requested costs for the deposition of claimant and his wife, $200.80, Dr. Wolfe of $128.80 and Jerry Martin and Frank Lindsey of $219.80. (Ex. 9, p.1; Ex. 10, p. 1; Ex. 11, p. 1) Claimant has requested expenses of Ms. Mitchell for two reports; The first report of $260.00 and second report of $331.50. (Ex. 12, p. 1: Ex. 13, p. 1)

I find claimant's gross earnings to be $1,087.00 per week, and he was married and entitled to four exemptions. Claimant's weekly rate is $700.37 per week according to the rate book in effect at the time of the work injury.

RATIONALE AND CONCLUSIONS OF LAW

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).

Claimant's testimony was evasive and somewhat inconsistent with his deposition and some medical records. Whether this was the result of his injury or his intellectual functioning, I am not able to determine. I am not able to rely upon his testimony.

I do find the demeanor and testimony of Marjory Castellano credible. She has observed her husband since the work injury and has participated in many of the medical appointments claimant attended. I found her voice, facial expressions, gestures, and carriage to be credible. I am able to rely upon her testimony concerning the claimant's ability to function. She described a very limited lifestyle that claimant has now. She acknowledged that claimant could sometimes do driving and go on trips but noted the majority of time claimant is not capable of anything more than a very sedentary lifestyle.

Claimant's symptoms manifested very shortly after his work injury. While they have waxed and waned they are still present and are present more often than they are not. Claimant worked for most of his adult life. There is no pattern of claimant trying to get out of employment or malingering. Since the work injury of September 2, 2014 claimant has not been able to consistently engage in gainful activities.

I did not find the testimony of Frank Lindsey to assist in determining causation or extent of disability issues. His testimony about the attempts by Monarch to accommodate was consistent with the evidence and credible concerning the offer of accommodated work.

It is the medical evidence that is the most convincing in this case. I find the opinions of Dr. Wolfe to be the most persuasive in this case. Dr. Wolfe has seen claimant numerous times, is a neurologist, and is very familiar with the symptoms claimant has shown since his work injury of September 2, 2014. Dr. Wolfe has reviewed the information concerning claimant's surveillance and travel to Mexico as well as in Iowa. Dr. Wolfe's conclusion about causation is reinforced by Dr. Hines. Dr. Fitzgerald's report also supports that claimant's current symptoms are related to his work injury of September 2, 2014. Dr. Hines noted that Dr. Fitzgerald's finding of post trauma vision syndrome could help explain claimant's balance, gait, vision and possibly his headache symptoms. (Ex. 6, p.1)

Neuropsychological testing at the UIHC did not support claimant's position. This testing was reviewed and considered by Dr. Wolfe and Dr. Hines who still attribute claimant's current symptoms to his work injury.

Certainly the surveillance evidence is relevant in this case. It does show that claimant can on occasion do more than sit in a darkened room and do nothing, as he had told his physician's at one time. I consider surveillance evidence with caution.

In Cedar Rapids Community School Dist. v. Pease, 807 N.W.2d 839, 848 (Iowa, 2011) the court held;

> Third, video surveillance footage depicting a claimant performing tasks inconsistent with the claimed disability is hardly a smoking gun. "Although on the surface it might appear that nothing could be more cogent and a more dramatic refutation of a disability claim than motion pictures of a claimant jacking up a car or playing tennis," Professor Larson explains, "the courts have rightly observed that such evidence must be used with great caution." 7 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 127.10, at 127-46 (2010). In Gagliano v. Boh Brothers Construction Co., 44 So.2d 732, 735 (La.Ct.App.1950), the Court of Appeal of Louisiana cautioned the use of motion pictures and noted that a "spirit of fair play" requires motion pictures to "reflect all activities of the subject of the pictures, and not merely snatches or fragments." Also, in Ferraro v. Zurcher, 12 N.J.Super. 231, 79 A.2d 473 (N.J.Super.Ct.App.Div.1951), the Superior Court of New Jersey cautioned against the use of heavily edited motion pictures that consolidate isolated incidents taken over a span of three years into a fifteen minute film. "This

> presentation of isolated incidents occurring at widely separated times," the Ferraro court explained, "gives the deceptive impression of a continuing performance and tends to cause the viewer to infer that petitioner has a capacity for sustained effort, which clearly is not the fact." Ferraro, 79 A.2d at 478; see also Lambert v. Wolf's, Inc., 132 So.2d 522, 527 (La.Ct.App.1961) (admitting motion picture evidence with caution because it failed to show rest periods, did not reflect pain, and did not show the after effects of the subject's activities); DeChandt v. N.D. Workers Comp. Bureau, 452 N.W.2d 82, 85 (N.D.1990) (holding workers' compensation bureau's reliance on audio and videotapes failed to adequately explain reasons for disregarding medical evidence).

As Dr. Wolfe noted, claimant could have the ability to function at times, but it is unpredictable and episodic in nature. (JE 1, p. 79) I do not see evidence that claimant could consistently or regularly engage in work activities. I do not view the surveillance DVD and investigation report as a "smoking gun." It is possible that from time to time he might be able to function in a non-physical job, but his injury and symptoms do not allow competitive and gainful employment. Claimant had assistance from his wife on performing paperwork even before his work injury. His ability has decreased since his work injury. Claimant's work history is in construction. His photophobia, headaches and current intellectual functioning do not allow him to work in that field. Ms. Mitchell opined that claimant was not capable of employment as well.

I find that claimant has proven by a preponderance of the evidence that he has a permanent disability that arose out of and in the course of his employment at Monarch due to the September 2, 2014 injury.

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.

In assessing an unscheduled, whole-body injury case, the claimant's loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

Looking at the evidence at the time of the arbitration hearing I find that claimant is permanently and totally disabled. The episodic and unpredictable nature of the current symptoms makes competitive work not possible. He has a limited education, limited intellectual abilities, recurrent headaches and light sensitivity that make it not possible for claimant to return to any of his past occupations and limits his ability to obtain other types of employment.

As claimant has prevailed in this case in my discretion I award claimant costs pursuant to Iowa Code section 86.40 and 876 IAC 4.33. Claimant is awarded deposition costs for claimant, Ms. Castellano, Dr. Wolfe, Mr. Martin and Mr. Lindsey for a total of $549.40 and the costs of Ms. Mitchell's reports for a total of $591.50. Filing fee of $100.00 is awarded to claimant. Total costs awarded to claimant are $1,240.90.

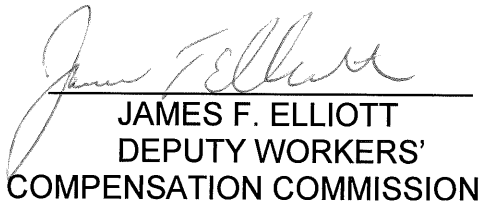
ORDER

Defendants shall pay claimant permanent and total disability benefits for so long as he is permanently and totally disabled at the weekly rate of seven hundred and 37/100 dollars ($700.37) commencing on May 18, 2015.

Defendants shall pay claimant costs in the amount of one thousand two hundred forty and 90/100 dollars ($1,240.90).

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 10th day of April, 2018.



JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFE/sam

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.