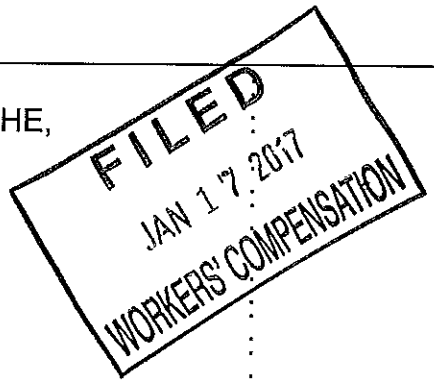
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



DAVID ALLEN VAN WYHE,

Claimant,

vs.

WILSON TRAILER,

Employer,

And

AMERICAN PROTECTIVE GROUP,

Insurance Carrier,
Defendants.

File No. 5049975

ARBITRATION

DECISION

Head Note No. 1803

STATEMENT OF THE CASE

David Allen Van Wyhe, claimant, filed a petition for arbitration seeking workers' compensation benefits from Wilson Trailer, and American Protective Group.

The matter came on for hearing on March 17, 2016, before Deputy Workers' Compensation Commissioner Joseph L. Walsh at Sioux City, Iowa. The record in the case consists of claimant's exhibits 1 through 11; defense exhibits A through F; as well the sworn testimony of claimant, David Allen Van Wyhe, and Carol LaBrune.

Marcia L. Mahon was appointed the official court reporter for this hearing. The parties briefed this case and the matter was fully submitted April 15, 2016.

ISSUES AND STIPULATIONS

The primary fighting issue in this case is whether the claimant's injury of May 1, 2014 is a cause of disability and the nature and extent of that disability. Claimant also seeks reimbursement for Iowa Code section 85.27 medical expenses with causation to the May 1, 2014 injury disputed. Claimant seeks treatment for mental health issues with causation disputed.

FINDINGS OF FACT

David Van Wyhe, claimant, is a 54-year-old gentleman from Sioux City, Iowa. He

is married to Judy, a nurse. Claimant has a high school diploma, yet is computer illiterate. Claimant does not do well when working with the public. Claimant also took a year of auto mechanics at Western Iowa Tech dating back to 1982. After graduating, he farmed with his father from 1987 until 1997. He fixed machinery, bailed hay, fed cattle, cultivated corn and other work necessary for the production of agricultural feedstuffs and grain. Claimant then went to work for Jolly Time (American Popcorn). He was primarily a laborer with some laboratory work. He unloaded trucks, scooped, test popped and checked moisture. This was a medium physical labor job held for approximately five months.

Claimant then went to Wilson Trailer. He began working at Wilson in April 1998 and worked through March 10, 2015. His starting wage was $9.55 and he eventually built that to $19.50 per hour. The Wilson Trailer work consisted of building tires and finishing out trailers for defects. The work was at the end of the production line to essentially check for mistakes made earlier in the production process. Claimant worked for 17 years at Wilson. He did a number of different jobs from heavy lifting with constant bending and twisting to application of decals on pin plates and lights. The duties had a significant bending component. His last job was final inspection work which had a lifting component of about 35 to 40 pounds.

On the day of the injury, May 1, 2014, while walking on the side of a machine claimant slipped and fell due to an oil patch on the floor. Claimant immediately called and reported the injury to the human resource manager.

Claimant had some prior back injuries and back treatment. The 2005 first work injury was of a temporary nature. Douglas Martin, M.D. placed claimant on pain medications and gave an epidural injection which worked. Claimant returned to work about a month later at full-duty.

In 2010 he sustained another lifting injury when moving heavy objects for a press. Dr. Martin again treated claimant with pain meds and an epidural flood. Claimant again returned to full-duty after approximately one month. Claimant eventually went to the receiving department.

The injury in question, May 1, 2014 caused a different symptom complex. This injury had symptoms of left-sided radiating pain into the leg. Claimant first saw Dr. Martin on May 20, 2014 and was given pain medication. It is noted that Dr. Martin reported an incorrect history in Defendants' Exhibit B, page 9. "Lumbar contusion. Previous history of low back issues with left lower extremity symptomology from 2005 and 2010".

An MRI report demonstrated that claimant had no significant changes since the last MRI of April 1, 2010. Dr. Martin who had initially been hesitant on doing an epidural finally changed his attitude. Claimant was given an epidural and ordered to continue with physical therapy. The 10-pound work restriction remained in place. The epidural was of no benefit and claimant was referred to the Center for Neurosciences. It was

decided that claimant was not a surgical candidate after examination at the center.

After the Neurosciences visit, a functional capacity evaluation was ordered. The results came back as invalid. Claimant testified that he was instructed to back off when movements became painful. The pain threshold ultimately created an invalid test. Dr. Martin used the failed FCE to return claimant to work without restrictions effective October 10, 2014. Dr. Martin refused to provide further treatment after the failed FCE. Dr. Martin further opined maximum medical improvement with a 5 percent impairment rating under the AMA guidelines, table 15-3, page 394. Dr. Martin persisted in his belief that claimant could return to work with no restrictions. While Dr. Martin initially opined that claimant sustained 5 percent permanent partial impairment, he later opined that due to a lack of objective changes on the MRI that claimant sustained an exacerbation but no aggravation of a pre-existing condition. He cited to other medical providers that released claimant to return to work with no restrictions. No significant consideration was given by Dr. Martin concerning the ongoing and difficult treatment regimen experienced by claimant after Dr. Martin returned claimant to work with no restrictions.

Dr. Martin's opinions do not coincide with the continued treatment modalities. It is found that Dr. Martin's causation opinion is not credible. The fact that claimant continued to seek treatment after the work release and received comfort from various injections and medication dispels Dr. Martin's causation opinion in its entirety.

Claimant refused to return to work due to the persistent pain which prevented him from working. He took medical leave due to his inability to work.

Since Dr. Martin was refusing to provide further treatment claimant went to his family physician who in turn referred him to Jeremy Paulsen, D.O. at Siouxland Pain Clinic. Claimant was injected into the facet joint. The treatment provided adequate pain relief allowing claimant to return to work. The treatment lasted until about February 24, 2015. Claimant was again forced to go on medical leave due to back pain. Claimant then returned to Dr. Poulsen who injected the left facet joint yet again. The relief was short lived. Claimant went on short-term disability because of continued back pain.

Claimant was discharged from Wilson Trailer March 10, 2015. After the injection claimant was instructed to take a few days off. The medical note had claimant returning to work the day of the injection. Claimant's wife changed the dates on the work restriction and claimant was discharged for falsification. (Tr., p. 111) Claimant's wife put a different date on the form. When they took the form to the employer, both the claimant and his wife testified that the employer knew that Mrs. Van Wyhe had made the changes. (Tr., pp. 111, 118) H.R. Manager, Carol LaBrune confirmed that the Van Wyhes vented to her for about 10 minutes when they turned in the form. (Tr., pp. 135-36) While she did not recall a specific conversation about Mrs. Van Wyhe changing the form, she did tell them that it was "okay" for him to return on Tuesday. (Tr., p. 136)

> A: David told me that he was going to return on Tuesday. I looked down at the form and saw the 27th. I said, then you'll need to call in,

> because he had an approved FMLA on file. Because the doctor is saying you can return the 27th. Neither one of them said anything about the other date that was written on there.

(Tr., p. 136) Mr. Van Whye did call in as he was instructed.

The unemployment decision was allegedly offered in an attempt to establish wrongdoing. Iowa Code section 96.6(4) provides:

> 4. *Effect of determination.* A finding of fact or law, judgment, conclusion, or final order made pursuant to this section by an employee or representative of the department, administrative law judge, or the employment appeal board, is binding only upon the parties to proceedings brought under this chapter, and is not binding upon any other proceedings or action involving the same facts brought by the same or related parties before the division of labor services, division of workers' compensation, other state agency, arbitrator, court, or judge of this state or the United States.

I do not find evidence in this file that claimant's termination was predicated upon dishonest conduct. The modified order was in compliance with the doctor's wishes and common sense. Mrs. Van Wyhe made no effort to forge the document. She merely wrote a note on it to reflect her understanding of the conversation with the physician. Altering the off work slip was, at worst, an isolated instance of poor judgment. It was not even really that. To the extent that there is a conflict in testimony, I find the Van Wyhes to be more credible. I believe they did tell Ms. LaBrune that they altered the form and she simply does not remember it. She actually conceded that Mrs. Van Wyhe vented and she did not recall everything that was discussed. It is found that the unemployment decision has no bearing on this case either factually or legally. Nor do I find there was any good basis for claimant's termination.

Dr. Poulsen no longer wanted to treat claimant due to the dispute that brought about the discharge. Claimant was then seen by the Mercy Pain Clinic. Claimant again received a facet injection with months of relief.

Claimant sought new employment with Wells Blue Bunny. Unfortunately, the physical examination testing required for the job exacerbated claimant's back pain and prevented him from actually starting the job. The Wells Blue Bunny job would have paid about $200.00 more per week had he been able to handle the physical nature of the assignment.

After the Wells Blue Bunny physical examination claimant received yet another facet injection providing only temporary relief. The most recent medical treatment was a medial branch block in the lumbar facet joint. As of the date of hearing the block had no appreciable effect.

Claimant on June 8, 2015 located a job at Mercy Medical Center as a housekeeper. He started at $10.50 and moved up to $12.50 per hour. His job assignments include cleaning rooms, wiping down doors, cleaning toilets, dusting and mopping. Claimant works at his own pace, which helps him maintain this employment. He has a self-imposed lifting restriction of 15 pounds while working at Mercy.

Claimant at Wilson Trailer earned about $45,000.00 per year. The Mercy job cut his pay significantly. Claimant wanted to retire from the Wilson Trailer job where he earned over $19.00 per hour. Wilson Trailer was the longest held job in claimant's career. Claimant also applied at Curly's Meat Processing. They did not call back after learning about the back injury.

Claimant continues use of medication such as tramadol and ibuprofen prescribed by Shauna Lafleur, M.D.

Claimant's avocational activities have been impacted by the injury. Claimant does not ride his motorcycle at all any longer, he cannot play baseball and spends more time in bed as compared to pre-injury.

Claimant's Exhibit 8 demonstrates the outstanding medical bills. When comparing the bills to the treatment received it follows that such is causally connected to the back injury for which claimant received treatment. There is no break in causation. Once discharged, the employer failed to provide ongoing care and treatment. The resulting treatment was continuous and entirely related to the same symptoms initiated by the May 1, 2014 injury. It is found that the medical expenses listed in Claimant's Exhibit 8 are causally connected to the May 1, 2014, work injury.

Sunil Bansal, M.D., conducted an independent medical examination on claimant September 28, 2015. Dr. Bansal opined that claimant reached maximum medical improvement September 11, 2014. Dr. Bansal opined that a tear of the annulus caused a chemical irritation of the nerve root resulting in the persistent pain symptoms. Dr. Bansal imposed work restrictions of no lifting of over 10 pounds frequently, 20 pounds occasionally and no frequent bending, squatting, climbing or twisting. Claimant can sit stand and walk as tolerated. Sitting for more than 60 minutes and standing for more than 90 minutes and walking for more than 2 hours is not suggested. Dr. Bansal's work restrictions coincide with claimant's ability to perform his work at Mercy.

Dr. Bansal also was very critical of the failed FCE and alleged positive Waddell's signs. Dr. Bansal opined that such are not credible indications of back pain and strength.

Dr. Bansal opined that the May 1, 2014 injury was the cause of 8 percent permanent partial impairment of the body as a whole according to the Fifth Edition of the AMA Guides. Dr. Bansal causally connected the injury of May 1, 2014, to the current symptomoloy, treatment, work restrictions and impairment.

Claimant did see a psychiatrist at defendant's request. Claimant's mental health symptoms were not causally connected to the Wilson Trailer injury as opined by the examining psychiatrist.

CONCLUSIONS OF LAW

The first question is whether the admitted May 1, 2014 injury is a cause of permanent disability, and if so, the extent of such disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

By a preponderance of evidence, I find that the May 1, 2014 injury is a proximate cause of disability in the claimant's back to the extent of 8 percent functional impairment. Having found this injury results in permanent impairment to the body as a whole it follows that the matter must be evaluated industrially.

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.

Claimant was 54 years old at hearing with a high school diploma and no appreciable computer skills. He has worked manual labor most of his life. His actual loss of hourly wage is close to one-third some two years after the injury. Claimant has demonstrated high motivation based on his current engagement with Mercy as a custodian. Claimant's work restrictions are very narrow. Claimant is limited to a 10 to 15-pound lifting category and must constantly alternate his activities. This lifting restriction precludes claimant from returning to the labor market for most jobs for which he has prior training and experience. The restrictions are daunting. The restrictions are credible based on treatment and claimant's current vocational endeavors. Claimant has maintained gainful employment primarily because the Mercy job allows modified and alternating movements.

Claimant's past post-high school training is far too stale to reduce the industrial disability.

The discharge from employment significantly enhances his industrial disability. It is obvious that the doctor did not intend for claimant to return the same day as an injection, yet employer seized the chance to push claimant out the door after claimant's spouse modified the off work note. The work restrictions and failure to re-employ the claimant in good faith weighs heavily toward a finding of high industrial disability. The impairment rating is, however, modest and as such weighs against significant industrial disability. Having considered all of the evidence and salient considerations it is held that claimant has sustained 70 percent industrial disability causally connected to the May 1, 2014, work injury. This entitles claimant to 350 weeks commencing October 10, 2014.

The next issue concerns entitlement to Iowa Code section 85.27 medical benefits.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code Section 85.27 (2013).

Evidence in administrative proceedings is governed by section 17A.14. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence. The rules of evidence followed in the courts are not controlling. Findings are to be based upon the kind of evidence on which reasonably prudent persons customarily rely in the conduct of serious affairs. Health care is a serious affair.

Prudent persons customarily rely upon their physician's recommendation for medical care without expressly asking the physician if that care is reasonable. Proof of reasonableness and necessity of the treatment can be based on the injured person's testimony. Sister M. Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963).

It is said that "actions speak louder than words." When a licensed physician prescribes and actually provides a course of treatment, doing so manifests the physician's opinion that the treatment being provided is reasonable. A physician practices medicine under standards of professional competence and ethics. Knowingly providing unreasonable care would likely violate those standards. Actually providing care is a nonverbal manifestation that the physician considers the care actually provided to be reasonable. A verbal expression of that professional opinion is not legally mandated in a workers' compensation proceeding to support a finding that the care provided was reasonable. The success, or lack thereof, of the care provided is evidence that can be considered when deciding the issue of reasonableness of the care. A treating physician's conduct in actually providing care is a manifestation of the physician's opinion that the care provided is reasonable and creates an inference that can support a finding of reasonableness. Jones v. United Gypsum, File 1254118 (App. May 2002); Kleinman v. BMS Contract Services, Ltd., File No. 1019099 (App. September 1995); McClellon v. Iowa Southern Utilities, File No. 894090 (App. January 1992). This inference also applies to the reasonableness of the fees actually charged for that treatment.

Claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. See, Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Defendants should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc., File No. 1020226 (App., February 27, 1995).

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay the claimant three hundred fifty (350) weeks of permanent partial disability benefits at the rate of five hundred fifty-seven and 03/100 dollars ($557.03) per week commencing October 10, 2014.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall be given credit for benefits previously paid.

Defendants shall pay Iowa Code section 85.27 medical benefits set forth in Exhibit 8.

Claimant's future need for treatment for his back disabilities shall be paid by defendants.

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

Costs are taxed to defendants.

Signed and filed this 17th day of January, 2017.

JOSEPH L. WALSH
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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.