BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| JASON P. DRURY,<br><br>Claimant,<br><br>vs.<br><br>W-S INDUSTRIAL SERVICES, INC.,<br><br>Employer,<br><br>and<br><br>COMMERCE AND INDUSTRY INSURANCE COMPANY,<br><br>Insurance Carrier,<br>Defendants. | File No. 5055775<br><br>ARBITRATION<br><br>DECISION<br><br>Head Note Nos.: 1402.40, 1403.10, 2501, 3400 |

FILED
JUN 22 2017
WORKERS' COMPENSATION

## STATEMENT OF THE CASE

Jason Drury, claimant, filed a petition for arbitration against W-S Industrial Services, Inc., as the employer and Commerce and Industry Insurance Company, as the insurance carrier. The case came on for hearing before the undersigned on February 14, 2017.

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 Joint Exhibits A through W. All exhibits were received without objection. Claimant testified on his own behalf and called his mother, Deborah Drury, and his friend and former neighbor, Dan Powers, to testify. Defendants called Dan Kane to testify.

The evidentiary record closed at the conclusion of the arbitration hearing. However, counsel for the parties requested the opportunity to file post-hearing briefs. Their request was granted and the parties filed their briefs simultaneously on February 28, 2017. The case was considered fully submitted to the undersigned upon filing of the parties' briefs.

## ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether the alleged injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits.

2. The proper rate at which weekly benefits are payable.

3. Whether claimant is entitled to payment or reimbursement for past medical expenses.

4. Whether the third-party settlement claimant entered into is enforceable.

5. Whether defendants are entitled to credit or indemnification pursuant to Iowa Code section 85.22(1) up to the amount of the third-party settlement totaling $20,000.00.

6. Whether costs should be assessed against either party.

## FINDINGS OF FACT

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

Jason Drury is a 42-year-old gentleman, who sustained stipulated left knee and left shoulder injuries as a result of a motor vehicle accident on July 14, 2014. On that date, Mr. Drury was driving a semi for his employer, W-S Industrial Services, Inc. A passenger car traveling in the opposite direction on US Highway 67 in Clinton County, Iowa, crossed the center line and struck Mr. Drury's vehicle head-on. (Exhibit K; Claimant's testimony)[1]

Following the accident, Mr. Drury was transported to the emergency room via ambulance. He reported a headache, as well as left shoulder and left knee pain. He was discharged with instructions to follow-up for further care. (Ex. B, p. 9)

The employer directed claimant for care through Medical Associates and claimant was evaluated by Xerxes R. Colah, M.D. on July 16, 2014. Dr. Colah initially evaluated claimant on July 16, 2014 and diagnosed claimant with a contusion of the left

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[1] Coincidentally, the investigating officer for the July 14, 2014 motor vehicle accident was Brian Grell. (Ex. K, p. 2) The undersigned is not aware of any familial relationship with Brian Grell and does not know Brian Grell, despite sharing the same surname.

shoulder, a thoracic back strain, and a minor abrasion of the left prepatellar area. (Ex. D, pp. 1-6) Dr. Colah initiated some medication management and conservative care.

By August 6, 2014, claimant was reporting that his back and knees "feel just fine." (Ex. D, p. 14) This same history was reported by claimant to Dr. Colah on August 26, 2014. (Ex. D, p. 20) Although claimant testified about ongoing symptoms in his left knee at the time of trial and offered testimony from his mother and friend about ongoing left knee symptoms, Dr. Colah's records contradict this testimony.

Claimant sought an independent medical evaluation, performed by Richard L. Kreiter, M.D. on September 7, 2016. Dr. Kreiter also noted that claimant's left knee symptoms have resolved and that claimant voiced no complaints relative to the left knee. (Ex. G, p. 8) I find that claimant's left knee injuries and symptoms resolved by August 26, 2014. I similarly find that claimant has not proven any permanent disability relative to his left knee injuries.

Unfortunately, claimant's left shoulder did not respond as favorably to conservative treatment. Dr. Colah ordered an MRI of the left shoulder, which occurred on October 6, 2014. (Ex. B, p. 14) The MRI demonstrated a probable labral tear and Dr. Colah referred claimant for orthopaedic evaluation by Abdul Foad, M.D.

Dr. Foad evaluated claimant initially on October 21, 2014. He diagnosed claimant with a labral tear in his left shoulder and recommended surgical intervention. (Ex. E, pp. 1-2) Dr. Foad performed a biceps tenolysis on claimant's left shoulder on October 24, 2014. (Ex. E, p. 3)

Following appropriate post-operative care, including physical therapy, claimant demonstrated a good recovery. By November 18, 2014, claimant was noted to exhibit no pain in his left shoulder except with physical therapy. (Ex. E, p. 6) Dr. Foad documented full range of motion in claimant's left shoulder with no pain and excellent strength on January 6, 2015. (Ex. E, p. 8) Dr. Foad released claimant from his care with no restrictions and declared claimant to have achieved maximum medical improvement by January 6, 2015. (Ex. E, p. 8) Dr. Foad opined that claimant has no permanent impairment as a result of his left shoulder injury on July 14, 2014. (Ex. E, p. 9)

Mr. Drury has not sought or requested any further medical treatment of his left shoulder since his release from care by Dr. Foad in January 2015. (Claimant's testimony) However, as noted above, he did seek an independent medical evaluation with Richard Kreiter, M.D., who evaluated claimant on September 7, 2016. Dr. Kreiter diagnosed claimant with the biceps tenolysis, labral tears, adhesive capsulitis, as well as shoulder instability. Dr. Kreiter also identified restrictions in claimant's left shoulder range of motion. (Ex. G)

Dr. Kreiter opined that claimant sustained permanent impairment equivalent to 8 percent of the upper extremity as a result of reduced ranges of motion as well as an

additional 6 percent of the upper extremity due to shoulder instability. In total, Dr. Kreiter opined that claimant sustained 13 percent of the upper extremity, or 8 percent of the whole person, as a result of his July 14, 2014 left shoulder injury. (Ex. G, p. 8)

Dr. Kreiter disagreed with the full duty work release offered by Dr. Foad. Instead, Dr. Kreiter recommended claimant not perform any overhead work that involved lifting. He recommended claimant not perform any throwing with his left arm and that claimant lift with his arms at his side and not away from his body. Dr. Kreiter further recommended that claimant lift up to 40-45 pounds with two hands and that he not perform any excessive pulling such as starting a lawn mower with his left arm or shoulder. (Ex. G, p. 9)

There is an obvious difference in the clinical findings and ultimate conclusions of Dr. Foad and Dr. Kreiter. Both physicians were asked to comment on these differences. Dr. Kreiter opined in his initial report that Dr. Foad's impairment rating was invalid because it was not rendered for more than a year after he last evaluated claimant. Dr. Kreiter criticized Dr. Foad for not requesting an updated examination of claimant before rendering an impairment rating. (Ex. G, p. 8)

Dr. Foad reviewed Dr. Kreiter's report and issued a supplemental report. Dr. Foad noted that there was a significant change in claimant's left shoulder symptoms and significant changes in his ranges of motion between the date that Dr. Foad declared maximum medical improvement and Dr. Kreiter's examination. Dr. Foad opined that these changes were due to one of three things: (1) a new intervening injury; (2) lack of effort by claimant in the testing performed by Dr. Kreiter; or (3) misuse or abuse of the AMA Guides by Dr. Kreiter. (Ex. E, p. 11)

Dr. Kreiter took umbrage with the suggestion that he misused or abused the AMA Guides. He issued a supplemental report and opined, "It would appear there have been changes in Mr. Drury's condition over a one year period. With the humeral head pathology, as described by Dr. Foad, this may well be an acceleration and permanent aggravation of a condition (as described in the operative report), which is progressing to an arthritic condition." (Ex. G, p. 13) Dr. Kreiter noted his offense at Dr. Foad's comments and asserted that his opinions "are unbiased, and come from years of orthopedic surgical experience." (Ex. G, p. 13)

Review of Dr. Kreiter's initial report, however, reveals no comments or suggestion that claimant's condition represented an aggravation or acceleration of some underlying process toward an arthritic condition. Arthritis was not Dr. Kreiter's diagnosis in his initial report. I do not find Dr. Kreiter's explanation of the progression or deterioration of claimant's left shoulder condition to be convincing.

As I consider the medical opinions of Dr. Foad and Dr. Kreiter, I do so in light of other evidence in the record. First, claimant offered testimony and the testimony of his mother and a friend to suggest that he never experienced significant benefit from treatment and never had resolution of symptoms after the July 14, 2014 accident. The

testimony of these witnesses seems to be in direct contradiction with the contemporaneous medical records.

Interestingly, on cross-examination, claimant conceded that he does not consider himself to be under any permanent work restrictions and that he does not use any medications for symptoms as of the date of trial. Mr. Drury has not informed Behr that he has work restrictions and he has not requested accommodations of any kind from his current employer. (Claimant's testimony)

It is possible that Dr. Foad overestimated claimant's recovery and under-recorded claimant's ongoing symptoms. However, I note that there are physical therapy records in this evidentiary record from December 2014, which also report that claimant had no concerns or pain as he neared his maximum medical improvement date. (Ex. F, pp. 3-4) Ultimately, I find the contemporaneous medical notes of Dr. Foad, as corroborated by a physical therapist, to be more accurate and convincing than the subjective perceptions of interested witnesses offering testimony approximately three years after the events recorded in the medical notes.

Claimant resigned his position with W-S Industrial Services, Inc. because he was disgruntled about his pay and lack of a raise. (Ex. I, pp. 3-4) He ultimately found a new job with Behr Iron & Metal (hereinafter referred to as "Behr") running an excavator. Mr. Drury submitted to and passed a pre-employment physical with Behr. He required no accommodations to perform his job duties at Behr and has worked for them employed full duty since June 2015. (Ex. N, p. 13; Ex. P) Claimant's job as a heavy equipment operator at Behr requires him to utilize hand tools and to lift or move 50 pounds. (Ex. V, p. 1)

According to Dr. Kreiter's restrictions, claimant would not be capable of performing his required job duties at Behr. Yet, claimant certified on his job application with Behr that he was capable of performing all essential functions and requested no accommodations. (Ex. P, p. 1) Similarly, an independent physician hired by the subsequent employer certified claimant was capable of performing all of the essential functions of his job with Behr. Clearly, given claimant's ability to continue in the Behr job for over a year without restrictions or accommodations, Dr. Kreiter's restrictions are not accurate.

Dr. Foad was the treating surgeon. He performed surgery on claimant's left shoulder. He inspected that shoulder joint intra-operatively and is familiar with the injury, treatment, and recovery phases. Dr. Foad evaluated clamant more times than Dr. Kreiter and over a several month period of time. Dr. Kreiter evaluated claimant once for purposes of litigation.

Ultimately, I find the medical opinions of Dr. Foad to be most convincing in this evidentiary record. Claimant provides no convincing explanation why his symptoms resolved, his range of motion improved, and how he was able to reach a full duty work

release by January 2015 and then demonstrated significant shoulder instability and reduced range of motion by Dr. Kreiter's evaluation in September 2016.

Having found Dr. Foad's medical opinions to be most convincing and most consistent with other evidence in this record that I also found to be credible, I find that claimant sustained no permanent impairment and required no permanent work restrictions as a result of the left shoulder injury he sustained on July 14, 2014. I find that claimant failed to prove that his July 14, 2014 work injury caused permanent disability.

The parties submitted a dispute about claimant's entitlement to past medical expenses. Claimant submitted a medical bills summary in lieu of actual medical bills. The summary is attached to the hearing report. Review of the summary demonstrates that the medical expenses all appear to have occurred after the work injury of July 14, 2014. The claimed expenses all appear to be from medical providers authorized to provide care for claimant's work injury. Defendants stipulate that the charges were reasonable and fair. Defendants stipulate that the treatment was reasonable, necessary, causally related to the work injury, and authorized by defendants. (Hearing Report)

Claimant entered into a settlement agreement with the third-party tortfeasor that caused the July 14, 2014 motor vehicle accident that injured claimant. Mr. Drury accepted the $20,000 liability policy limits of the third-party tortfeasor's insurance coverage to settle his potential third-party claim. The settlement proceeds from the third-party settlement were paid directly to claimant. Claimant has not reimbursed defendants for any of their expenditures related to his worker's compensation claim.

I find that claimant did not secure authorization of the employer and insurance carrier in this proceeding before entering into the third-party settlement. Nevertheless, the evidence is clear that claimant recovered the liability policy limits of the third-party tortfeasor in his third-party settlement. To the extent that defendants may now refuse to give consent to the third-party settlement, I find that the settlement was reasonable and should be approved and be effective under the facts and circumstances of this case.

Claimant contends that the defendants failed to preserve their statutory lien because they did not file a notice of lien. Claimant's contention is accurate that defendants did not file a formal notice of lien. However, I also find that claimant did not file a formal lawsuit against the third-party tortfeasor.

## CONCLUSIONS OF LAW

Claimant asserts a claim for permanent disability benefits as a result of the July 14, 2014 work injury. Defendants admit that claimant sustained a work related injury. However, defendants dispute whether the work injury caused any permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits. (Hearing Report)

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).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

In this case, I found the medical opinions of Dr. Foad to be most convincing and credible evidence in the record. Having accepted Dr. Foad's opinions, I found that claimant failed to prove he sustained any permanent impairment or required any permanent restrictions as a result of the July 14, 2014 work injury. Having found that claimant failed to prove he sustained any permanent disability as a result of the July 14, 2014 work injury, I conclude that claimant failed to prove entitlement to any permanent disability benefits. Having awarded no permanent disability benefits and no other weekly benefits being sought, I conclude that the issue of the applicable weekly rate is moot and enter no findings or conclusions on that issue.

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. Section 85.27. Holbert v.

Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Moreover, Iowa Code section 85.27(4) provides: "If the employer chooses the care, the employer shall hold the employee harmless for the cost of care until the employer notifies the employee that the employer is no longer authorizing all or any part of the care and the reason for the change in authorization."

Mr. Drury submitted a medical bill summary. Defendants stipulated as to the compensability of the medical expenses contained in that billing summary by offering stipulations that the treatment was reasonable and necessary, that the charges were reasonable and fair, that the treatment was causally related to the work injury, and that the treatment was authorized by defendants. (Hearing Report) Having authorized claimant's medical treatment, as summarized in the medical bill summary, defendants are liable for the expenses noted in the medical bill summary. Iowa Code section 85.27(4).

Defendants asserted a claim for indemnification from the proceeds of the third-party settlement pursuant to Iowa Code section 85.22(1). Claimant contends that defendants lost any lien rights they had because they did not file a notice of lien prior to his entry into a third-party settlement. In response to this contention, defendants asserted that claimant did not secure defendants' authorization of consent to the third-party settlement. Therefore, defendants contend that the third-party settlement is not effective pursuant to Iowa Code section 85.22(3).

Iowa Code section 85.22(3) provides:

> Before a settlement shall become effective between an employee or an employer and such third party who is liable for the injury, it must be with the written consent of the employee, in case the settlement is between the employer or insurer and such third person; and the consent of the employer or insurer, in case the settlement is between the employee and such third party; or on refusal of consent, in either case, then upon the written approval of the workers' compensation commissioner.

In this situation, I found that claimant did not secure the consent of the employer or insurance carrier before entering into the third-party settlement agreement. Therefore, defendants may refuse consent to the settlement. Nevertheless, I found that claimant received a $20,000.00 settlement, which was equal to the full limits of the third-party tortfeasor's liability policy. I find that the proposed settlement, even if consent is refused, is reasonable. I conclude that the third-party settlement should be approved and is effective. Iowa Code section 85.22(3).

Having determined that the third-party settlement is fair and should be approved and be effective, I must also determine the respective rights arising from or flowing from the third-party settlement. Iowa Code section 85.22(1) provides:

> If compensation is paid the employee ... under this chapter, the employer by whom the same was paid, or the employer's insurer which paid it, shall be indemnified out of the recovery of damages to the extent of the payment so made, with legal interest, except for such attorney fees as may be allowed... and shall have a lien on the claim for such recovery and the judgment thereon for the compensation for which the employer or insurer is liable. In order to continue and preserve the lien, the employer or insurer shall, within thirty days after receiving notice of such suit from the employee, file, in the office of the clerk of the court where the action is brought, notice of the lien.

Claimant contends that the employer lost its statutory lien because it did not give formal notice of its lien. Pursuant to the plain language of Iowa Code section 85.22(1), defendants possessed an automatic statutory lien against the proceeds of a third-party settlement. Nothing in Iowa Code section 85.22(1) requires defendants to give notice of the lien or file any notices unless and until claimant gives defendants notice of filing suit against the third-party tortfeasor.

If and when claimant filed a formal lawsuit against the third-party tortfeasor and gave notice of the suit to defendants, then defendants are obligated to file a notice of lien with the clerk of court where the third-party action is filed. Iowa Code section 85.22(1). In this instance, claimant settled with the third-party tortfeasor and her insurance carrier before a formal lawsuit was filed. By definition, claimant did not and could not give defendants notice of the filing of a lawsuit against the third-party tortfeasor because claimant did not file such a suit. Therefore, defendants' obligation to file a notice of lien to preserve their statutory lien was never triggered and their automatic statutory lien remained effective at the time of the third-party settlement. Iowa Code section 85.22(1).

However, even if a reviewing authority were to disagree with my analysis of the lien issue, claimant's argument fails to respond to defendants' request for indemnification out of the third-party settlement proceeds. There is a difference between a statutory lien and indemnification rights. Armour Dial, Inc. v. Lodge & Shipley Co., 334 N.W.2d 142 (Iowa 1983). "The problem ... with the employee's position is that []he has equated the right to indemnification with the right to enforce a lien; []he contends that a failure of the lien also causes the right of indemnification to fail." Id. at 145.

"The lien is incident to and dependent upon the right of the employer to recover, but the right to recover provided by indemnification is not dependent upon the lien. Section 85.22(1) initially provides the employer the right to be indemnified out of the recovery and then further provides for the employer to have a lien on the recovery. The

right to continue or preserve the lien is conditional, however. The conditions of timely notice are directed solely to the preservation of the lien, not to the right of indemnification." Armour Dial, Inc., 334 N.W.2d at 145.

The Iowa Supreme Court has specifically held that "the proper filing of the lien is not a condition precedent to the right of indemnification from recovery proceeds held by the employee. Accordingly, the employer is entitled to recover from the employee an amount equal to the amount of workers' compensation payments." Id. In this instance, claimant attempts to equate the alleged failure to preserve the statutory lien provided for in Iowa Code section 85.22(1) with the loss of the right to indemnification. Claimant's argument is not well-supported in existing law and is rejected. Even if defendants did not possess a statutory lien pursuant to Iowa Code section 85.22(1), they retained the right of indemnification and are entitled to recovery from the third-party settlement proceeds up to the amount of benefits they are obligated to pay under Chapter 85.

I conclude, pursuant to Iowa Code section 85.22(1), that defendants had an automatic statutory lien against the proceeds of the third-party settlement under the facts of this case. Claimant never gave notice of filing suit against the third-party tortfeasor. Therefore, defendants had no obligation to file a formal notice of lien. Defendants' retained a statutory lien against the third-party settlement proceeds at all times.

Regardless of whether the lien was preserved or effectual at the time of the third-party settlement, I conclude that defendants were and are entitled to indemnification from claimant for any amounts owed or paid to claimant under Chapter 85 of the Iowa Code up to the full amount of the $20,000.00 third-party settlement. Iowa Code section 85.22(1); Armour Dial, Inc. v. Lodge & Shipley Co., 334 N.W.2d 142 (Iowa 1983).

Finally, claimant submitted a statement of costs. Costs are assessed at the discretion of the agency. Iowa Code section 85.40. Exercising the agency's discretion and recognizing that neither party has prevailed in the entirety, I conclude that neither party's costs should be taxes as part of this case.

## ORDER

THEREFORE, IT IS ORDERED:

Defendants are liable for the medical expenses contained in the medical bill summary attached to the hearing assignment order.

Defendants are entitled to a statutory lien against and to indemnification from the $20,000.00 third party settlement up to the amount of any medical expenses or weekly benefits paid to claimant to date or into the future, including any expenses contained on the medical bill summary noted above.

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 22nd day of June, 2017.

WILLIAM H. GRELL
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.