BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DANIEL MORENO ORTIZ, a/k/a GUILLERMO BONILLA PEREZ,

Claimant,

vs.

DORMARK CONSTRUCTION,

Employer,

and

BITCO GENERAL INSURANCE CORPORATION, f/k/a BITUMINOUS CASUALTY CORPORATION,

Insurance Carrier,
Defendants.

File No. 5055146

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Daniel Moreno Ortiz, a/k/a Guillermo Bonilla Perez, filed a petition in arbitration seeking workers' compensation benefits from Dormark Construction, (Dormark), employer, and Bitco General Insurance Corporation, f/k/a Bituminous Casualty Corporation, insurer, both as defendants. This matter was heard on December 12, 2016 in Des Moines, Iowa with a final submission date of January 17, 2017.

The record in this case consists of claimant's exhibits 1-11, defendants' exhibits A through H, and the testimony of claimant. Serving as interpreter was Patricia Vargas-VerPloeg.

ISSUES

1. Whether the injury is a cause of permanent disability; and if so
2. The extent of claimant's entitlement to permanent partial disability benefits.

FINDINGS OF FACT

Claimant was 40 years old at the time of hearing. Claimant was born in El Salvador. He completed the 10th grade in El Salvador. Claimant migrated to the United States in 2000. Claimant has taken ESL classes. Claimant testified he can speak in English but has difficulty reading and writing in English.

Claimant testified he obtained a work permit when he came to the United States. He has worked at Tyson on the kill floor. He was also employed doing general maintenance. Claimant said he tried to start a landscaping business, but was not successful. (Exhibit 4, pages 4-5; Ex. E, p. 37)

Claimant testified that, prior to working at Dormark, his work visa expired because of a misunderstanding with his attorney. Claimant testified he used the alias of Daniel Ortiz, to obtain work with Dormark.

Claimant began with Dormark in 2011 using the identity of Daniel Ortiz. (Ex. E, p. 37)

At Dormark, claimant worked on a crew making highway bridges. Claimant said his job required him to lift, carry and lay rebar for bridges. Claimant said the job required him to lift over 50 pounds, stand and bend. (Ex. 7, p. 1)

On October 29, 2013 claimant and four coworkers were driving to a job site in South Dakota when the van they were riding in lost control and rolled. Claimant wore a seatbelt. Exhibit 3 is a photo of the van claimant was in. The photo shows a part of the roof of the van caved in. Claimant testified he believes he was knocked unconscious from the accident.

A report from the South Dakota Highway Patrol indicated claimant was not ejected from the van. (Ex. 2, p. 4) Claimant testified he has little recollection of the accident, but recalls being at the hospital.

Claimant was taken to Prairie Lakes Healthcare System by ambulance. Claimant denied having pain. Claimant was assessed as having a minor contusion and superficial abrasion on the right side of his forehead. Claimant denied experiencing dizziness or pain. He was discharged at 10:30 a.m. on October 29, 2013. (Ex. A, pp. 1-3)

Claimant was evaluated on November 7, 2013 by Judith Nayeri, D.O. Claimant indicated he had loss of consciousness. Claimant complained of headaches. Claimant was assessed as having headaches and cervical strain. He was returned to work and restricted from lifting over 20 pounds. (Ex. B, pp. 4-7)

Claimant returned to Dr. Nayeri on November 11, 2013. Claimant was undergoing physical therapy. He was continued on lifting restrictions. (Ex. B, pp. 8-10)

Claimant continued in followup with Dr. Nayeri in November and December of 2013. Claimant was kept on lifting restrictions until December 12, 2013. (Ex. B, pp. 11-18)

On December 13, 2013 claimant returned to Dr. Nayeri in followup. Claimant no longer had significant pain or discomfort. He was returned to work at full duty and released from medical care. (Ex. B, pp. 20-22)

Claimant returned to work at Dormark and performed full-time job duties until the winter of 2013 layoff. (Ex. H, Deposition p. 35)

Claimant testified he did not contract to return to Dormark in the spring of 2014. Claimant testified he did not return to work at Dormark, as he did not believe he could do the work.

In 2014 or 2015 claimant received training in Peosta, Iowa to become a pressure washer technician. Claimant testified he began his own business, Hydro Express, in 2015. Claimant says he contracted initially with Washer Systems of Iowa, in Des Moines, Iowa. Claimant said he stopped working with Washer Systems and began working for Valo. Claimant testified he currently works full time for Valo operating and maintaining pressure washer equipment. Claimant says he earns approximately $15.00 an hour with Valo.

On May 6 and May 7 of 2016 claimant was put under surveillance. Surveillance footage and reports are found at Exhibit G. Claimant was surveilled carrying boots and shirts, driving, walking, and sitting on the front porch of his home. (Ex. G)

In a September 30, 2016 report Sunil Bansal, M.D., gave his opinions of claimant's condition following an independent medical evaluation (IME). Claimant complained of intense headache pain with cold weather. He complained of headaches 1 to 2 times a month. Claimant indicated he had difficulty with concentration and reading. Claimant said he returned to work for Dormark but was unable to continue work due to continued pain. Dr. Bansal opined claimant had a 5 percent permanent impairment for the cervical spine. He opined claimant's neck pain was caused by his October of 2013 accident. He limited claimant to lifting up to 30 pounds. (Ex. 5)

In a December 8, 2016 report, Daniel Miller, D.O., gave his opinions of claimant's condition following an IME. Claimant complained of mild headaches and neck pain. Dr. Miller had claimant undergo an MRI of the brain, and of the cervical and thoracic spine. The MRI of the brain showed no abnormalities. An MRI of the cervical spine showed spondylosis with a mild annular bulge at C4-C5. Dr. Miller assessed claimant as having chronic myofascial pain in the neck causing headaches. He found claimant had a 3 percent permanent impairment to the body as a whole based on Table 15-5 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. He opined claimant's pain was due to the October of 2013 accident. (Ex. D, pp. 29-35)

Claimant testified he has limitations due to his headaches and neck pain. He testified he no longer plays sports due to his limitations. Claimant said he does not think he could return to work at Tyson given his limitations.

CONCLUSIONS OF LAW

The first issue to be determined is if claimant's injury resulted in a permanent disability.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

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 contends he still has headaches and neck pain approximately 2 ½ years after the date of injury. Both Dr. Bansal and Dr. Miller found claimant had a permanent impairment caused by the October 29, 2013 injury. Given this record, claimant has carried his burden of proof his October 29, 2013 injury resulted in a permanent impairment.

The next issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

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.

Two physicians have given opinions regarding the extent of claimant's permanent impairment attributed to the October 29, 2013 injury. Dr. Miller found claimant had a 3 percent permanent impairment to the body as a whole. Dr. Miller used MRI of claimant's head, and of the cervical and thoracic spine to form his opinions. (Ex. D, pp. 29-35)

Dr. Bansal did not have access to diagnostic imaging for his opinion. His opinion is based, in part, on understanding that claimant left Dormark as he was unable to physically return to work. (Ex. 5, p. 6) The record suggests claimant did return to work at Dormark full time in December of 2013. The evidence suggests claimant left Dormark due to a winter layoff, not due to his inability to perform work duties.

Because of his access to imaging diagnostics, and the discrepancies in Dr. Bansal's report, it is found Dr. Miller's opinion that claimant has a 3 percent permanent impairment to the body as a whole is more convincing.

Dr. Miller did not give claimant any permanent restrictions. Dr. Bansal did impose permanent restrictions on claimant. The record indicates that for approximately 2 years, after claimant was allowed to return to work full duty, claimant worked without any permanent restrictions. Based on this, it is found Dr. Bansal's opinion that claimant has permanent restrictions is not convincing.

Claimant has a 3 percent permanent impairment to the body as a whole. It is found he has no permanent restrictions. Claimant still has symptoms due to his October 29, 2013 injury. There is little evidence claimant has sustained a loss of earnings due to his October 29, 2013 injury. Given this record, it is found claimant has a 5 percent industrial disability or loss of earning capacity.

ORDER

THEREFORE IT IS ORDERED:

That defendants shall pay claimant twenty-five (25) weeks of permanent partial disability benefits at the rate of six hundred eighty and 88/100 dollars ($680.88) per week commencing on October 29, 2013.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits as ordered above and as set forth in Iowa Code section 85.30.

That defendants shall pay costs.

That defendants shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

Signed and filed this 9th day of February, 2017.

JAMES F. CHRISTENSON
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.