BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CHAD WOOD, Claimant, vs. VERMEER MANUFACTURING COMPANY, Employer, and EMPLOYERS MUTUAL CASUALTY COMPANY, Insurance Carrier, Defendants.	:	File No. 5061583 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1402.40, 1803

STATEMENT OF THE CASE

Claimant Chad Wood filed a petition in arbitration seeking workers' compensation benefits from defendants Vermeer Manufacturing Company, employer, and Employers Mutual Casualty Company, insurer. The hearing occurred before the undersigned on April 18, 2019, in Des Moines, Iowa.

The parties filed a hearing report at the commencement of the arbitration hearing. In 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 consists of: Joint Exhibits 1 through 8, Claimant's Exhibits 1 through 5, and Defendants' Exhibits A, C (pages 8, 9, and 12) and D. Claimant testified on his own behalf, and no additional witnesses were called to testify. The evidentiary record closed on April 18, 2019. The case was considered fully submitted upon receipt of the parties' briefs on May 28, 2019.

ISSUES

The parties submitted the following disputed issue for resolution:

The extent of claimant's industrial disability due to claimant's stipulated back injury.

FINDINGS OF FACT

On August 28, 2017, claimant was welding the hood of some of defendant-employer's equipment when the hood fell off its hoist onto claimant. (Hearing Transcript, pp. 21-22) The hood itself weighed roughly 1,200 pounds, and it took three employees to pull it off of claimant's body. (Hrg. Tr., p. 23) Claimant felt immediate pain in his lower back. (Hrg. Tr., p. 22)

After being evaluated by on-site medical providers, claimant was sent by ambulance to Pella Regional Hospital. (Hrg. Tr., pp. 23-24) Claimant underwent x-rays and was told he had hairline fractures in his lower back, though as will be discussed below, subsequent MRIs revealed no such findings. (Hrg. Tr., p. 24; Joint Exhibit 1, p. 3; JE 2, p. 2)

Claimant's care was then transferred to David Hatfield, M.D., at Des Moines Orthopaedic Surgeons, P.C. (See Hrg. Tr., p. 24-25; JE 3, p. 2) At his initial evaluation of claimant on September 6, 2017, Dr. Hatfield reviewed the MRI performed on August 30, 2017, which revealed some stenosis and mechanical changes but no fractures or herniations. (See JE 3, p. 3; JE 2, p. 2) Dr. Hatfield recommended conservative care in the form of bracing, epidural steroid injections (ESIs), and work restrictions, though he also indicated surgery may be necessary. (JE 3, p. 3) Claimant was assigned a five-pound lifting restriction with alternating and standing as needed and no welding. (JE 3, p. 3)

Claimant received the recommended ESI sometime thereafter. Notably, while claimant testified at hearing that the ESI provided no relief, he reported to Dr. Hatfield that the ESI helped his bilateral radicular pain and to Matt Doty, M.D., that the ESI provided "significant improvement" leaving him "40-50% better." (Hrg. Tr., p. 25; JE 3, p. 8; JE 1, p. 4)

Despite these improvements, claimant was still experiencing pain in his back at his December 11, 2017 appointment with Dr. Hatfield. (JE 3, p. 8) In fact, claimant reported a "marked worsening" in his symptoms in the week leading up to the appointment, though Dr. Hatfield did "not have a distinct explanation" for this change. (JE 3, p. 8) Due to claimant's ongoing symptoms, Dr. Hatfield renewed claimant's work restrictions and again mentioned the possibility of surgery. He also indicated, however, that claimant would need to lose weight before he would perform the surgery. (JE 3, p. 8) Claimant was told to return to Dr. Hatfield's office pending weight loss. (JE 3, pp. 8-9)

Instead, claimant was evaluated by Dr. Doty, defendant-employer's on-site physician, on February 7, 2018. (JE 1, p. 4) At that appointment, claimant reported "he really feels like he can do more at work now as he is feeling better and would like to get back to welding." (JE 1, p. 4) In response, Dr. Doty increased claimant's work duties and placed him on a 20-pound lifting restriction with occasional bending, squatting, and kneeling. (JE 1, p. 4) Claimant then returned to his regular welding job. (See Hrg. Tr., p. 27)

Just days later, however, claimant returned to Dr. Doty "with concern of an exacerbation of pain last week" after he returned to welding. (JE 4, p. 1) Claimant told Dr. Doty "that he was welding 8 hours a day and feels that it was just too much." (JE 4, p. 1) Dr. Doty restricted claimant to welding 4 hours per shift. (JE 4, p. 1)

Defendant-employer terminated claimant on February 19, 2017, one week after Dr. Doty limited claimant's welding to four hours per shift. (Hrg. Tr., pp. 29-30) Claimant was told by his supervisor that he was being terminated for quality issues. (Hrg. Tr., p. 30) Although claimant testified on direct examination that he had never received any prior reprimands for poor welds, he acknowledged on cross examination that he received verbal warnings for quality on March 11, 2016 and October 25, 2017. (Hrg. Tr., pp. 30-31, 55-56) When asked about several additional verbal warnings for attendance, safety, and quality both before and after his work injury, he testified he could not recall. (Hrg. Tr., pp. 55-56) In light of his inconsistent testimony, I do not find claimant's assertion that he was terminated due to his inability to weld for a full shift to be persuasive. Instead, I find claimant was terminated for quality issues, as was communicated to claimant by his supervisor.

After claimant's termination, his care was transferred to Trevor Schmitz, M.D., at Iowa Ortho. (See Hrg. Tr., p. 31; JE 5, p. 1) At his initial evaluation of claimant on March 7, 2018, Dr. Schmitz noted claimant "nearly jumps off the table" with "exquisitely painful" hip range of motion testing. (JE 5, p. 2) Due to claimant's significant hip pain, Dr. Schmitz referred claimant for a hip evaluation before proceeding with treatment for his back pain. (JE 5, p. 2) Claimant's hip was eventually "ruled out" as a pain source. (JE 5, p. 5)

Interestingly, when claimant returned to Dr. Schmitz after his hip evaluation, claimant's hip was no longer painful with range of motion testing. (JE 5, p. 5) Claimant still complained of right-sided low back pain, however, and Dr. Schmitz recommended surgery. (JE 5, p. 5) Claimant underwent an L3-L4, L4-L5, and L5-S1 posterior lumbar decompression and discectomy on May 31, 2018. (JE 6; Hrg. Tr., p. 32)

By July 15, 2018, roughly six weeks after claimant's surgery, claimant reported his leg symptoms were drastically better than they were prior to surgery, but he continued to experience 6 out of 10 back pain. (JE 5, pp. 9-10) Then, at claimant's appointment one month later on August 15, 2018, claimant described "whole body spine pain that radiates up into his neck" to the point that "even light stroking of his low back" produced tenderness. (JE 5, p. 12) Dr. Schmitz ordered an MRI. (JE 5, p. 12)

When claimant returned to Dr. Schmitz on September 5, 2018, Dr. Schmitz described the MRI as "unremarkable" and claimant's condition as "diffuse nonanatomic low back pain." (JE 5, p. 14) Dr. Schmitz recommended initiating physical therapy. (JE 5, p. 14)

In the notes for claimant's follow-up appointment on October 10, 2018, Dr. Schmitz indicated as follows:

> [Claimant] has several findings on examination consistent with a nonanatomic source for his pain. This includes pain with simulated trunk rotation, pain with even light pressure on the top of his head, diffuse pain and shaking with even light simulated stroking of his back. He is not describing pain that radiates up and down his entire spine. I do not have a good explanation for this based on anatomic source. . . .

(JE 5, p. 16)

Of note, claimant was discharged from physical therapy just days before the October 10, 2018 appointment after he was "[u]nable to tolerate lifting 1 lbs from floor to waist and waist to overhead and 3 lbs carrying." (JE 7, p. 3)

Based on claimant's plateau in therapy and unexplained symptoms, Dr. Schmitz indicated he would place claimant at maximum medical improvement (MMI) pending a functional capacity examination (FCE).

The FCE, performed on October 26, 2018, was deemed invalid due to claimant's inconsistent performance. (JE 8, p. 1) However, based on the material handling testing that was done, including a maximum lift of roughly 28 pounds at waist height, claimant was found to have met the material handling demands for a medium demand vocation. (JE 8, pp. 1-2)

Claimant's inconsistent reports and testimony regarding the effectiveness of his ESI, the unexplained elimination of his severe hip pain, his inability to lift one pound at his final physical therapy appointment, his sensitivity to even "light simulated stroking of his back" at his appointments with Dr. Schmitz, and his invalid FCE all raise concerns about the credibility of claimant's ongoing symptoms. While claimant exhibited no particular behaviors at hearing that made me question his credibility, the above-mentioned irregularities suggest claimant is exaggerating the severity of his ongoing complaints.

Regardless, following the invalid FCE, Dr. Schmitz indicated he believed a medium physical demand category was appropriate and thus gave him "permanent medium physical demand category restrictions." (JE 5, p. 19) Claimant was also placed at MMI and released from Dr. Schmitz's care at the October 31, 2018 appointment. (JE 5, p. 19)

In a letter to defendants on November 12, 2018, Dr. Schmitz indicated he would place claimant in the DRE Lumbar Category III and assigned a 10 percent whole body impairment pursuant to Table 15-3 in the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition. (Defendants' Ex. D, p. 14) Dr. Schmitz clarified this opinion in a subsequent February 18, 2019 letter, in which he addressed claimant's prior decompression surgery in 2013:

> I do think that given the fact that he had pre-existing disability arising from his previous surgery including the development of a spondylolisthesis at this L4-L5 level he likely would have qualified for a 10% impairment rating in 2013, using Table 15-3 of those guides. Given this, I would apportion the rating 50/50 between the two surgeries and give [claimant] a 5% impairment rating for my August 18, 2017 surgery . . . .

(Def. Ex. D, p. 15) Claimant received no additional care from Dr. Schmitz. (Hrg. Tr., p. 32)

Claimant was evaluated for purposes of an independent medical examination (IME) by Jacqueline Stoken, D.O., on February 4, 2019. Like Dr. Schmitz, Dr. Stoken used Table 15-3 of the Guides and placed claimant in DRE Lumbar Category III. (Claimant's Ex. 1, p. 12) She assigned a slightly higher impairment rating than Dr. Schmitz—13% whole person—but she failed to address how claimant's prior decompression surgery in 2013 affected this rating, if at all. (Cl. Ex. 1, p. 12) Dr. Stoken also recommended permanent work restrictions including avoiding repetitive bending, twisting, lifting, and avoiding lifting more than 10 pounds on a frequent basis and 20 pounds on an occasional basis. (Cl. Ex. 1, p. 12) These restrictions put claimant in the light physical demand category. (Cl. Ex. 1, p. 12)

I appreciate the fact that claimant was able to perform his regular job at Vermeer without restrictions or accommodations after his 2013 decompression surgery. (Hrg. Tr., p. 34) Dr. Schmitz, however, offered an unrebutted opinion that claimant would have qualified for the DRE Lumbar Category III in 2013 despite his unrestricted return to work. (See Def. Ex. D, p. 15) Dr. Stoken failed to address the 2013 surgery. For these reasons, I find Dr. Schmitz's apportionment of claimant's 10 percent whole body rating to be most persuasive. In other words, I find claimant sustained a 5 percent whole body impairment due to his August 28, 2017 work injury.

Regardless of whether claimant's whole person impairment is 5 percent, 10 percent, or 13 percent, however, the fact remains that his August 28, 2017 work injury left him unable to perform his job for a full eight-hour shift. (See JE 4, p. 1) The August 28, 2017 work injury also left claimant with permanent work restrictions that were not previously necessary. As discussed above, Dr. Schmitz opined claimant was capable of working in the medium physical demand category, while Dr. Stoken opined claimant was capable of working in the light physical demand category. Because the medium physical demand category restrictions were based off of at least some objective testing, I find these restrictions to be most persuasive.

Despite his permanent restrictions, claimant obtained employment at the end of 2018 through the Iowa DNR as a manager of a shooting range. (Hrg. Tr., pp. 35, 71) This position was the first job claimant applied for after being terminated by defendant-employer. (Hrg. Tr., p. 57)

Claimant's job at the shooting range is "fairly sedentary," and does not require lifting over 20 pounds, repetitive lifting, or standing. (Hrg. Tr., pp. 35-36) Claimant was working 22 to 24 hours per week at the time of the hearing because these were the maximum hours claimant was permitted to work, though he acknowledged at hearing he could work more hours if they were available. (Hrg. Tr., p. 36) Claimant was earning $13.10 per hour at the time of the hearing. (Hrg. Tr., p. 13) Claimant's earnings upon his return to work with the shooting range on a less than full-time basis were less than his earnings at the time of his injury.

After obtaining employment at the shooting range, claimant applied for a director position in the Scholastic Clay Target Program and a management position at New Pioneer Gun Club. (Hrg. Tr., pp. 37-38) While he testified he "intend[ed] to continue to apply for jobs that fit into [his] work restrictions as opined by Dr. Stoken" (Hrg. Tr., p. 39), I do not find this testimony to be genuine. These are the only two other jobs for which claimant has applied, and these applications were not made until March of 2019, roughly three months after seeing Dr. Stoken and just weeks before hearing. (See Hrg. Tr., p. 68) Furthermore, although claimant testified he looks for jobs "daily," his explanation regarding where he looks for jobs was vague and ambiguous. (Hrg. Tr., pp. 63-64) For these reasons, I find claimant was not particularly motivated in the months leading up to the hearing to find full-time employment.

Claimant is a high school graduate and completed several semesters at DMACC. (Hrg. Tr., pp. 40-41) He acknowledged at hearing that he is capable of being retrained and learning new skills, as was demonstrated by his ability to learn to read prints and perform calculations necessary for welding when he was hired by defendant-employer. (Hrg. Tr., p. 43-44) Claimant also has managerial experience, including keeping inventory, working with customers, and scheduling. (Hrg. Tr., pp. 44-48) Thus, despite his age of 50, I find claimant is likely capable of retraining.

At the age of 50, it is reasonable to anticipate claimant will continue to work for a decade or more.

Both claimant and defendants obtained vocational reports. Claimant's vocational expert, Lewis Vierling, M.S., opined that claimant "has a severely diminished work capacity" due to his work-related injury. (Cl. Ex. 4, p. 3) More specifically, Mr. Vierling opined claimant sustained an 80 percent loss of access to jobs for which he was qualified and were part of his pre-injury occupational profile. (Cl. Ex. 4, p. 3)

There are several issues with Mr. Vierling's report, however. First, in his analysis, Mr. Vierling considered claimant's ongoing subjective complaints (Cl. Ex. 4, p. 4), but I found these ongoing complaints to be exaggerated. It also appears that Mr.

Vierling considered only Dr. Sassman's recommended restrictions (see Cl. Ex. 4, p. 9), while I found Dr. Schmitz's restrictions to be more persuasive. Mr. Vierling additionally opined that claimant had the ability before his injury to work at the heavy to very heavy physical demand level (Cl. Ex. 4, p. 20), but as noted by defendants' vocational expert Vanessa May, M.S., claimant's pre-injury work was not consistent with the very heavy physical demand level. (Def. Ex. D, p. 27) Placing claimant's pre-injury profile at the very heavy demand level would thus skew claimant's loss of access analysis. (See Def. Ex. D, p. 28) For these reasons, I am not persuaded by Mr. Vierling's report.

Ms. May opined that claimant, at the medium physical demand category, would be able to return to some of his past welding work "and a variety of occupational possibilities" between the light and medium level. (Def. Ex. D, p. 21) Ms. May then identified several jobs within these physical demand levels. (See Def. Ex. D, pp. 21-27)

In summary, claimant sustained a low back injury for which he now has permanent impairment and permanent work restrictions limiting him to the medium physical demand category. When he was terminated from his job with defendant-employer, claimant was incapable of welding for an entire eight-hour shift, though I agree with Ms. May that it is likely claimant could return to welding in some capacity. I found claimant is capable of retraining and has transferrable skills from his past employment, but I also found claimant appeared to be exaggerating his ongoing symptoms and did not appear motivated in the months leading up to the hearing to find full-time employment. Claimant is clearly capable of returning to the workforce, as was demonstrated when he was hired for the first job he applied for after being terminated by defendant-employer. The fact remains, however, that claimant's work injury and resulting impairment and restrictions have negatively impacted his earning capacity. For these reasons, I find claimant sustained a 35 percent loss of earning capacity due to his August 28, 2017 work injury.

CONCLUSIONS OF LAW

Claimant's injury occurred on August 28, 2017, meaning the 2017 amendments to Iowa Code Chapter 85 are applicable. The parties in this case stipulated at the outset of the hearing that claimant's injury resulted in an industrial disability. Iowa Code section 85.34(v) now provides that an employee who sustains an unscheduled injury, like in this case, is eligible for compensation in relation to 500 weeks industrial disability benefits unless that employee "returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury." Iowa Code § 85.34(v) (2017). In such a scenario, "the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity." Id. While claimant in the instant case had returned to work at the time of the hearing, I found he was earning less than what he was earning at the time of his injury. Thus, pursuant to Iowa Code section 85.34(v), it is appropriate to award compensation for claimant's loss of earning capacity and not just his functional loss.

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).

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). Consideration must now also be given to the number of years in the future it was reasonably anticipated that claimant would work at the time of the injury. Iowa Code § 85.34(v) (2017).

As discussed above, I considered all factors appropriate for the industrial disability analysis and found claimant sustained a 35 percent loss of earning capacity due to his work-related injury. A 35 percent industrial disability entitles claimant to 175 weeks of permanent partial disability (PPD) benefits.

Amended Iowa Code section 85.34(2) provides that PPD benefits shall begin when MMI is reached and the extent of loss can be determined by use of the Guides.

Iowa Code § 85.34(2) (2017). In this case, the parties stipulated claimant reached MMI as of October 31, 2017. Thus, I conclude claimant's commencement date for PPD benefits is October 31, 2017.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant one hundred seventy-five (175) weeks of permanent partial disability benefits commencing on the stipulated date of October 31, 2017 at the stipulated weekly rate of seven hundred thirteen and 78/100 dollars ($713.78).

Defendants are entitled to a credit for weekly benefits previously paid.

Defendants shall pay accrued weekly benefits, including but not limited to the underpayment of the weekly rate, in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

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 June, 2019.

STEPHANIE J. COPLEY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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SJC/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.