BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SETH SHERWOOD,

Claimant,

vs.

EAST PENN MANUFACTURING,

Employer,

and

SENTENIAL INSURANCE,

Insurance Carrier,
Defendants.

File No. 5057989

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

The claimant, Seth Sherwood, filed a petition for arbitration and seeks workers' compensation benefits from East Penn Manufacturing, employer, and Sentinel Insurance, insurance carrier. The claimant was represented by H. Edwin Detlie. The defendants were represented by Tiernan Siems.

The matter came on for hearing on May 31, 2018, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa. The record in the case consists of joint exhibits 1 through 7, claimant's exhibit 1 and defense exhibits A through I. The claimant testified under oath at hearing. Kristi Miller was appointed to serve as the official reporter. The matter was fully submitted on June 25, 2018, after helpful briefing by the parties.

ISSUES

The parties submitted the following issues for determination:

1. Whether the claimant's injury is a cause of permanent disability.

2. If so, the nature and extent of such disability.

STIPULATIONS

Through the hearing report, the parties stipulated to the following. These stipulations have been accepted by the agency and are deemed binding:

1. The parties had an employer-employee relationship.

2. Claimant sustained an injury which arose out of and in the course of employment on December 28, 2014.

3. Temporary disability/healing period and medical benefits are no longer in dispute.

4. If the claimant has sustained any permanent partial disability, the disability is industrial.

5. The commencement date for any permanent disability benefits is October 28, 2015.

6. The weekly rate of compensation is $435.81.

7. Defendants have paid and are entitled to a credit of 41.145 weeks of compensation (permanent partial disability).

8. Affirmative defenses have been waived.

9. Medical expenses are not in dispute.

10. There is no disputed issue involving credit.

FINDINGS OF FACT

Claimant, Seth Sherwood, was 24 years old as of the date of hearing. He testified live and under oath at hearing. Mr. Sherwood is a generally credible witness. His testimony was generally consistent with the other evidence in the record. He appears to be a reliable historian. There was nothing about his demeanor at hearing which caused me to question his truthfulness.

Mr. Sherwood graduated from high school in 2011. He began taking classes through Indian Hills Community College in the Spring semester of 2015. His plan is to eventually get a four year degree in Education and become a teacher and coach. He started working on a plan for a career change prior to his work injury.

He began working for East Penn Manufacturing (hereafter, "East Penn") in September 2011, as a machine operator. His starting pay was around $12.00 per hour. By the time of his employment separation, he was earning $16.00 per hour plus incentives based upon production. On December 28, 2014, Mr. Sherwood suffered an injury while off-loading batteries onto a shipping pallet. The pain was in his left lower back through his left buttock and into the left thigh. The injury itself is stipulated. He was able to complete his shift that day and reported the injury the following morning when it had not improved.

Mr. Sherwood first received treatment from Wayne County Hospital where he was diagnosed with a back strain. He was prescribed Naprosyn and a heating pad. He was next evaluated by Nicole Ruble, PA-C, at South Central Iowa Medical. She recommended conservative care, including physical therapy and an MRI. The MRI was completed on January 27, 2015. (Joint Exhibit 1) He remained off work through February 20, 2015, when Ms. Ruble recommended he attempt to return to four-hour shifts with restrictions. Mr. Sherwood complained of pain when he returned.

He continued treatment following up with Ms. Ruble and physical therapy. In March 2015, he was referred to Ojiaku Ikezuagu, M.D. Dr. Ikezuagu saw him for the first time on March 11, 2015, concluding his "examination appears discordant with the findings on recent MRI OF THE LUMBAR SPINE REVIEWED." (Jt. Ex. 2, p. 7) He noted, however, that all options had not been exhausted and referred him to Mercy Spine for further evaluation.

He followed up with Dr. Ikezuagu shortly thereafter. His medications were altered some and the diagnosis of facet joint arthropathy was discussed. Dr. Ikezuagu, however, opined that he could not account for his persistent pain. (Jt. Ex. 2, p. 10) He next attempted aqua therapy, combined with some injections, which did not lead to any lasting benefit. He was released to perform light work on June 18, 2015, lifting no more than 10 pounds.

For some reason, claimant's care was transferred to Daniel Miller, D.O., an occupational medicine physician, in June 2015. Dr. Miller released claimant back to light-duty work and was assigned to the Finishing Department. (Def. Ex. D, pp. 2-3) Unfortunately, his back flared up in early July and he returned to Dr. Miller on July 8, 2015. Dr. Miller expressed that he was perplexed that the condition had not improved since his diagnosis was a back strain. Dr. Miller referred him to a pain specialist, Matthew Doty, M.D., in July 2015.

Mr. Sherwood apparently did not return to work after his flare up and he was eventually terminated. (Def. Ex. D, p. 5) The basis of the termination is somewhat unclear but it appears to have to do with the fact that no doctor would excuse him from work following his work for the flare up. No witnesses testified for defendants. Some type of nurse's notes from the employer's personnel file regarding the separation state the following.

> Phone call from Mark Stewart in Iowa with the employee in his office. The employee is there to work his light-duty shift today. He states he had an injection in his back on August 14 by Dr. Miller in Ottumwa. He states that he has not had any relief from the injection as of yet. He was given a prescription for a medication to help with the pain after the injection. He states that he did not fill the prescription and does not know what the name of the medicine was. He states he thinks it was an anti-inflammatory medicine and that pharmacy at Hyvee is closed on Saturday. Mark states that pharmacy at this store is opened on Saturdays and that

> there is also a Wal-Mart that is open on Saturdays too. The employee states that his mom is picking up the prescription for him today.
>
> As far as his status at this time, I question if he would bear to report to light duty today and he states yes. I asked him about the last several weeks since he was to return to work light duty on August 31. He states that his doctor is not covering him for that time out of work. He states he feels that they are railroad in him and telling him that he needs to go to work when he feels he can't.
>
> Seth states that he does not have a note to cover this time and he currently has over 20 on excuse [sic] days in his record. I asked that they holds him in marks office [sic] for now and not have report out on the plan floor until we get a hold of someone in the personnel department.
>
> At 1545 which called back and had a conference call with Bob Mericle, Toni DeBenedetto, and Mark Stewart. The employee was told that he is terminated from employment by Tony and Tony reviewed his insurance coverage to the end of the month. Bob escorted into his walker to get his personal effects. Of note is the fact that the employee to drive his truck today with a lift kit. Laurie Heagy RN BS.

(Def. Ex. D, p. 5) Mr. Sherwood testified that he was told by East Penn that they had no work for him due to his injury. (Def. Ex. I, Sherwood Depo, p. 35)

Before seeing the pain specialist, Mr. Sherwood was evaluated at the University of Iowa Hospitals and Clinics by Tejinder Swaran Singh, M.D. (Jt. Ex. 5) Dr. Swaran Singh diagnosed mysofascial pain and lumbar sprain. (Jt. Ex. 5, p. 3) On July 30, 2015, Dr. Doty indicated that the pain was most likely coming from his sacroiliac joint and recommended an SI joint injection, which was performed that day. (Jt. Ex. 6, p. 1)

By his next appointment in August 2015, Dr. Doty noted that he had made great improvement. He continued work hardening thereafter and continued to improve.

On October 27, 2015, Dr. Doty released the claimant, noting that he was no longer having any pain in his back. He recommended a return to work without restriction. (Jt. Ex. 6, p. 5) He did note that claimant still had some symptoms at this time which he attributed to deconditioning. Mr. Sherwood was still taking over-the-counter medications and doing a home exercise program.

Defendants had claimant evaluated by Dr. Miller for an impairment rating in November 2015. Dr. Miller reviewed the records in this case and examined Mr. Sherwood. "Currently and at today's visit, Mr. Sherwood states that his back pain his nominal. He is working full duty without restrictions. He has no limitations with his activities of daily living." (Def. Ex. G, p. 2) He ultimately provided a zero impairment rating. "Based on the history of back pain resolved with normal function and normal

physical examination, I am in agreement with the other physicians that Mr. Sherwood is at MMI . . . there is no partial permanent impairment in this case." (Def. Ex. G, p. 3)

Claimant arranged an independent medical evaluation (IME) with Mark Taylor, M.D., in March 2016. Dr. Taylor performed a thorough review of the records and examined Mr. Sherwood. He documented the following regarding his current complaints.

> **Current Symptoms** – He noted that the symptoms improved quite a bit compared to when the pain was at its worst. The pain still occurs over the left low back and into the left buttock and he describes it as an "aching" or a "pressure". The pain now averages between a 3 and a 4/10 whereas back in December the pain, although present, was minimal. He still infrequently notices symptoms into the left posterior thigh, especially with certain positions. He cannot sit for very long but has found that he can sit for up to one or two hours.

(Cl. Ex. 1, p. 5)

Dr. Taylor diagnosed low back injury with chronic low back pain and SI dysfunction. (Cl. Ex. 1, p. 6) He opined that Mr. Sherwood's chronic low back pain and SI dysfunction was "directly and causally related to his December 28, 2014 work injury." (Cl. Ex. 1, p. 7) He recommended further pain management treatment and assigned a 6 percent whole person impairment. (Cl. Ex. 1, pp. 7-8) Dr. Taylor recommended restrictions of no lifting more than approximately 50 pounds. He also advised that claimant should alternate standing, sitting and walking as needed. (Cl. Ex. 1, p. 8)

Since being terminated from East Penn, Mr. Sherwood obtained employment with Bemis Company in Centerville as a press helper earning $14.57 per hour. (Def. Ex. E) He performed a preemployment physical wherein he indicated he had no disabilities. (Def. Ex. E, p. 2) He did, however, inform his new employer of the old back injury. (Def. Ex. E, p. 4) His physical required lifting. (Def. Ex. E, p. 3) He began working for Bemis in September 2016 and left that job in approximately July 2017. He left so he could pursue his education to become a teacher. He then began working for the local YMCA as desk staff. This employment was part-time (20 to 30 hours per week) at around minimum wage. This employment fit better with Mr. Sherwood's efforts to return to school.

At hearing, Mr. Sherwood testified he still has back pain which sometimes interfere with his activities of daily living. He does not believe he could go back to lifting batteries at East Penn and he testified that Dr. Taylor's restrictions were generally accurate.

CONCLUSIONS OF LAW

The first question submitted is whether the injury is a cause of any permanent industrial 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).

The medical experts are conflicted. The defendants have opinions from Dr. Miller and Dr. Doty which suggest Mr. Sherwood essentially fully healed from the effects of his work injury. They both released him without any impairment or restrictions. The claimant has an expert opinion from Dr. Taylor opining claimant suffered a 6 percent whole body impairment.

The greater weight of evidence supports the opinion of Dr. Taylor. When combined with Mr. Sherwood's credible testimony, Dr. Taylor's opinion is the most believable medical opinion in the record. Dr. Doty last saw the claimant in October 2015, just a month after his successful injection which substantially limited claimant's pain. Dr. Miller saw claimant shortly after that. Both physicians noted Mr. Sherwood still had some ongoing symptoms associated with his low back even at that time. They simply opined that these symptoms were not ratable per The AMA Guides. Dr. Doty related these symptoms to "deconditioning".

Importantly, the greater weight of evidence supports the finding that claimant's diagnosis is SI joint dysfunction. Dr. Doty and Dr. Taylor both rendered this diagnosis and Dr. Doty successfully treated this condition with an injection. Dr. Miller diagnosed

low back strain and repeatedly expressed confusion as to why the condition had not healed up. Dr. Doty has not seen Mr. Sherwood since October 2015, which was just shortly after the injections had worked successfully. The greater weight of evidence supports the finding that Mr. Sherwood suffered SI joint dysfunction from the work injury and the treatment by Dr. Doty improved the symptoms temporarily, however, he does have a minor amount of permanent functional impairment associated with this condition based upon the claimant's credible testimony corroborated by Dr. Taylor's medical opinions.

The next issue is extent of disability. Since the condition is located in claimant's low back, the disability is 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 Ry. Co. of Iowa, 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.

Considering all of the relevant factors of industrial disability, I find claimant has suffered a minor loss of earning capacity as a result of his work injury. He is young (24, at the time of hearing) and bright. He is on a career path of returning to school to become a teacher and coach. He has a minor impairment in his low back (6 percent of the body). He has not utilized Dr. Taylor's restrictions in looking for work as evidenced by his employment with Bemis, although it would probably be advisable to do so. While he may be able to technically return to work in manufacturing, his back condition makes his decision to seek further education a wise one. Claimant was terminated from East Penn. The circumstances surrounding the termination are not entirely clear in this record. Claimant argues that he was let go because the employer did not have work for him due to his disability. It appears there is more to the story. Nevertheless, the employer did terminate the claimant. Claimant, however, proved that he is capable of obtaining and performing manufacturing work by securing employment with Bemis

thereafter. Considering all of the relevant factors, I find claimant has suffered a 15 percent industrial disability. This entitles claimant to 75 weeks of benefits at the stipulated rate of compensation.

ORDER

THEREFORE IT IS ORDERED

Defendants shall pay the claimant seventy-five (75) weeks of permanent partial disability benefits at the rate of four hundred thirty-five and 81/100 ($435.81) per week from October 28, 2015.

Defendants shall pay accrued weekly benefits in a lump sum.

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

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 15th day of April, 2019.

JOSEPH L. WALSH
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.