

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ESTATE OF BRIAN TONEY,
By RONALD TONEY, JR., Estate
Administrator,

Claimant,

vs.

BENTON COUNTY,

Employer,

and

MIDWEST EMPLOYERS CASUALTY
COMPANY,

Insurance Carrier,
Defendants.

File No. 19700455.02

ARBITRATION DECISION

Head Note No.: 1108

STATEMENT OF THE CASE

Claimant, Brian Toney filed a petition for arbitration against Benton County, employer, and Midwest Employers Casualty Company, insurance carrier on July 13, 2021. The claimant was represented by Tom Wertz. The defendants were represented by Anne McAtee.

Brian passed away on October 19, 2021. Subsequently, the petition was amended to name his Estate with claimant's brother, Ronald Toney, Jr., as the Executor.

The matter came on for hearing on May 17, 2022, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa via Zoom videoconferencing system. The record in the case consists of Joint Exhibits 1 through 12; Claimant's Exhibits 1 through 4; and Defense Exhibits A through F and H through J; Defendants' Exhibit I was removed and shall not be considered herein. Ronald Toney testified at hearing on behalf of the claimant. Nancy Kay Jorgenson testified on behalf of the employer. Janice Doud served as court reporter. The matter was fully submitted on June 6, 2022, after helpful briefing by the parties.

The parties submitted a hearing report which was amended orally during the course of the hearing on the record.

ISSUES

The parties submitted the following issues for determination:

1. Whether claimant's injury is a cause of any temporary or permanent disability, and if so, the nature and extent of such disability.
2. Whether the claimant is entitled to temporary disability benefits.
3. Whether the claimant is entitled to permanent partial disability benefits. If the claimant is entitled to permanency, the commencement date is disputed, as is the nature of the disability (i.e., industrial vs. scheduled).
4. Whether claimant is entitled to medical expenses as set forth in Claimant's Exhibit 3.
5. Whether defendants are entitled to a credit for group medical payments under Iowa Code section 85.38(2).

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship.
2. Claimant sustained an injury which arose out of and in the course of employment on July 16, 2019.
3. The weekly rate of compensation is \$580.09.
4. Affirmative defenses have been waived.
5. Defendants have agreed to pay the IME expenses of Dr. Bansal.

FINDINGS OF FACT

Brian Toney passed away on October 19, 2021. He worked for Benton County at the time of his death. His brother, Ronald Toney, Jr., testified live and under oath at hearing. I find his testimony to be highly credible. It appears he was an excellent historian. There was nothing about his demeanor which caused any concern for his truthfulness.

Ronald testified that he resides in Elberon, Iowa and his brother Brian resided in Belle Plaine, Iowa, with his youngest daughter. They lived 15 minutes apart. He has another brother and two sisters. Brian was the youngest. They are a close knit family. (Transcript, page 22) Ronald testified he was close with Brian and communicated with him frequently both before and after his workplace injury. Ronald testified that he is

retired. He testified that his brother Brian passed away on October 19, 2021, from COVID, and that he has been appointed Executor of Brian's Estate.

The parties have stipulated that Brian worked for Benton County in July 2019. Ronald testified that he operated a motor grader, which he described as a large piece of machinery which moves rock from one side to the other on gravel roads. He testified that prior to his work injury, Brian was in good health. (Tr., p. 26) He testified that Brian was highly motivated and he stayed busy. Brian's home was heated exclusively by firewood and he spent a substantial amount of time preparing wood for heating. (Tr., pp. 28-29)

The parties have stipulated that Brian sustained an injury which arose out of and the course of his employment with Benton County on July 16, 2019. Ronald testified that on that date Brian called him and asked him to come take him to the emergency room. "Brian called me, asked me if I'd be able to take him to the emergency room because he just got sprayed by the crop duster." (Tr., p. 29) Ronald met him at his work location and took him to the hospital in Vinton, Iowa. (Tr., p. 30) He testified that Brian was dizzy, light-headed, and was having a difficult time breathing. He was upset. (Tr., p. 31)

Medical records from Virginia Gay Hospital document the following:

This is a 55 y.o. year old [sic] male who presents to the VGH ER by PV with complaints of a crop duster exposure. It came on just prior to presentation. Patient reports that he was in a road maintainer, sitting in the enclosed cabin, when a crop duster plane flew over him and sprayed the vehicle he was in. He reports that he did not receive a direct exposure, but that he noticed shortly after the plane sprayed his vehicle, that he began having nausea and abdominal cramping. He also reported that he began having a dull headache and that his eyes were irritated. Reports feeling short of breath initially, but that this has subsided.

(Joint Exhibit 8, page 109) Brian was given treatment including telemetry and medications and he was monitored for over three hours. The following is noted: "After communicating with Benton County Secondary Roads, they verbalized that the crop duster that was spraying over the patient was spraying a nitrogen based fertilizer." (Jt. Ex. 8, p. 112) It was determined he was stable for discharge and he was encouraged for follow up with his primary physician.

Ronald testified that after this incident, Brian was never really the same. He testified Brian always seemed fatigued and appeared to have difficulty breathing, as well as other symptoms such as headaches. (Tr., p. 33) He testified that the fatigue was highly unusual, as prior to this incident Brian was always working on something, such as preparing wood to heat his home. (Tr., pp. 34-35)

Brian did, in fact, continue to treat for these symptoms. On July 29, 2019, Brian followed up with his primary care provider. The following symptoms were documented: body aches, shortness of breath, diarrhea, headache, and vision changes. (Jt. Ex. 1, p. 7) Importantly, Brian had just been to the same clinic on July 12, 2019, following up for hypertension and hyperlipidemia. At the July 12, visit, prior to the work injury, Brian's examination was negative for shortness of breath, abdominal pain, myalgias, dizziness, light-headedness and headaches. (Jt. Ex. 1, p. 5)

On July 29, 2019, after documenting his new symptoms, labs were taken and he was placed on amoxicillin. (Jt. Ex. 1, p. 9) He was diagnosed with chemical exposure and acute serous otitis media of left ear. (Jt. Ex. 1, p. 8)

A few days later, on August 2, 2019, the insurance carrier arranged an appointment with Ernest Perea, M.D. After arriving for the appointment, however, Brian began having worsening symptoms, particularly shortness of breath and chest pain. He was transported by ambulance to the emergency room at the University of Iowa Hospitals and Clinics. There, he was admitted and a host of serious and unpleasant symptoms were documented, however, the primary focus became the abdominal pain. (Jt. Ex. 7, p. 90) He was released on August 3, 2019, with no "definite etiology" of his condition. (Jt. Ex. 7, p. 93)

Brian returned to Dr. Perea on August 8, 2019. Dr. Perea documented the following:

7/16/19 indirect exposure to irritant nitrogenous fertilizer in a closed cab road maintainer is improved. I have reviewed the U of Iowa ER records and agree with their assessment that pulmonary consult/cardiac stress test and Cardiology follow up ... is indicated. No acute injury has been detected on CT of abdomen and pelvis, also visualizing the lung bases/a normal CXR/copious metabolic labs/only abnormal finding is spirometry which indicates a restrictive pattern which is not an acute feature. . . .

I offered Mr. Toney complete reassurance and feel he can return to full duties at work.

(Jt. Ex. 2, p. 53) Dr. Perea did diagnose "dyspnea" which I understand to mean "shortness of breath", however, he opined "is not causally related to above exposure." (Jt. Ex. 2, p. 55) In this record, I am unclear how Dr. Perea reached this medical opinion. I do not find it convincing in light of the underlying facts.

Brian stayed off work for a short time and continued to follow up with his primary care provider. He continued to complain of fatigue, shortness of breath, and body aches. On examination he had decreased breath sounds. (Jt. Ex. 1, p. 13) He was prescribed an albuterol inhaler and had further testing including spirometry testing and a pulmonology work up. Pulmonary function testing on August 28, 2019, revealed normal lung volumes with mild restrictions. (Jt. Ex. 6, p. 88) He followed up on September 4,

2019, still complaining of diarrhea, dyspnea, headaches and nausea, as well as intermittent chest pain. (Jt. Ex. 1, p. 24) Further testing was recommended and medications were prescribed. The following was documented on September 12, 2019:

Brian is here today for a release to return to work. He was exposed to a chemical by a crop duster while working in an enclosed cabin of a vehicle on 7/16/19. He has had muscle aches, headaches, diarrhea and shortness of breath since. He feels he is a 3rd better with his symptoms. He reports today blood in his stool that has been present for the past week. He states the blood is bright red. He denies any rectal pain, rectal itching, fever or chills. He is still having diarrhea. He has pending imaging and procedures with GI and Cardiology.

(Jt. Ex. 1, p. 26)

On September 19, 2019, he reported his symptoms were improving. The following is documented: "We believe the chemical exposure he had on 7/16/19 created side effects of the chemicals and reactive airway. Patient has been otherwise healthy up until 7/16/19." (Jt. Ex. 1, p. 29) He remained off work through September 22, 2019, returning on September 23, 2019.

Thereafter, Brian essentially stopped receiving treatment for any of these symptoms until he had a similar accident a year later. Ronald testified, however, that Brian's condition had not completely resolved during this period.

Q. And over that period of time [between July 16, 2019, and his second accident], what did you observe of him with regard to his condition?

A. That he was having trouble breathing, just - - it was like he was wore out. He couldn't do the stuff that he did before. I don't know. He was just - - just wore out. If he - - If he went for even a fourth of a block walk to get the truck, he'd have to stop and take a break to catch his breath.

(Tr., p. 33) Ronald testified that Brian complained about headaches, fatigue and repeated difficulties with diarrhea during this period. (Tr., pp. 33-35) As set forth previously, I believe Ronald's testimony.

As mentioned above, Brian did have a second incident where he was sprayed by a crop duster at work in approximately July 2020, which is not involved with this claim. Brian did return to his primary care provider for more treatment following this incident complaining of similar symptoms. (Jt. Ex. 1, p. 44) He was also diagnosed with Parkinson's at some point and it began advancing rather rapidly in June 2021. (Jt. Ex. 12, p. 151)

In reviewing all of the evidence submitted, I find that the Brian sustained an injury on July 16, 2019, wherein he was sprayed with a nitrogen based fertilizer. He suffered immediate symptoms from this exposure which caused him dyspnea, bowel irritability,

fatigue, body aches and nausea. He used an inhaler to address his shortness of breath. These symptoms improved over the next couple months, however, they never completely resolved, in particular his shortness of breath and fatigue.

Prior to his death, Brian was evaluated by Sunil Bansal, M.D., in January 2021. Dr. Bansal took history from Brian, reviewed his extensive medical file, and other documents including a four page history from claimant's counsel, and examined him. (Cl. Ex. 1, pp. 1-18) Dr. Bansal diagnosed chemical exposure to nitrogen-based fertilizer (potassium thiosulfate and methylene urea). (Cl. Ex. 1, p. 18) He assigned a 10 percent whole body rating for this condition and opined that the rating was related to his work incidents, opining that he reached maximum medical improvement on August 21, 2019. (Cl. Ex. 1, pp. 19-20)

Brian continued working up through the date of his second injury in July 2020. He suffered no loss of pay from his work injury. Nancy Kay Jorgenson testified on behalf of the employer. She is the Deputy Auditor in Benton County. Her testimony is generally credible. Brian received a pay increase in July 2020. Sometime in 2021, Brian took leave of absence due to his Parkinson's. (Tr., p. 48) She testified that while he was off work following his July 2019, work injury, he was paid his full salary in lieu of workers' compensation. (Tr., pp. 60-61; Def. Ex. I)

CONCLUSIONS OF LAW

The primary question submitted is whether the stipulated work injury on July 16, 2019, is a cause of any temporary or permanent 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 parties have stipulated that Brian was sprayed with a nitrogen based fertilizer on July 16, 2019. The evidence is overwhelming that he suffered an immediate onset of unpleasant and disabling symptoms following this exposure. He never fully recovered from these symptoms, although his condition stabilized within a few months and he continued working, earning the same or better compensation following his return to work in September 2019.

The next issue is whether claimant's Estate is entitled to the medical expenses set forth in Claimant's Exhibit 3.

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).

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).

The defendants rely upon the opinion of Dr. Perea to challenge these expenses. I do not find his opinion persuasive. His conclusion is completely unexplained in this record, leading me to believe that he did not understand the underlying facts of the situation. Specifically, he did not seem to understand that prior to his exposure to nitrogen based fertilizer on July 16, 2019, Ronald was generally healthy and not having breathing difficulties of any kind, as documented by his July 12, 2019, visit to his family doctor. The exposure appears to have been a substantial contributing factor to all of the treatment he underwent in July, August and September 2019. (Cl. Ex. 1, p. 20)

I find that the claimant is entitled to the unreimbursed medical expenses set forth in Claimant's Exhibit 3. Defendants are entitled to a credit for all benefits paid under their group policy under Iowa Code section 85.38(2). The claimant's Estate is entitled to reimbursement for any of claimant's out of pocket expenses for treatment paid, in the amount of \$218.50. (Cl. Ex. 3)

The next issue is whether the claimant is entitled to any temporary disability benefits.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

By a preponderance of evidence, the evidence reflects that Brian was off work as a result of his work injury on July 16 and 17, and then August 2, 2019, through September 22, 2019. Dr. Bansal, however, opined that Brian reached maximum medical improvement on August 21, 2019. Brian is entitled to healing period benefits from July 16-17, 2019, and August 2, 2019, through August 21, 2019.

The defendants contend that they paid his full wages during this period, or a portion of this period. If this is true, this was possibly the payment of wages in lieu of workers' compensation benefits. The defendants, however, did not assert a credit in the Hearing Report.¹ Moreover, even if the employer did claim a credit for these payments, I find that they did not meet their burden of proof. It is unclear to me in this record whether claimant utilized any of his accumulated paid time off during the specific periods in question. It does not appear that the defendants ever filed a Subsequent Report of Injury as required in 876 IAC section 3.1(2), asserting that any weekly benefits were ever paid to the claimant.

The next issue is whether claimant is entitled to permanent partial disability benefits. Claimant contends that his disability is industrial and must be evaluated under Iowa Code section 85.34(2)(v). Defendants contend that subsection (x) applies.

x. In all cases of permanent partial disability described in paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment pursuant to paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity

Iowa Code section 85.34(2)(x) (2019).

¹ The hearing report was amended on the record to include a claim for credit under Iowa Code section 85.38(2). I understood this amendment to pertain to the claimant's claim for medical expenses under Iowa Code section 85.27 and clarified this with the parties on the record. (Tr., pp. 6-7)

Thus, the law, as written, is not concerned with an injured worker's actual loss of use or functional disability as determined by the evidence, but rather the impairment rating as assigned by the adopted version of the AMA Guides to the Evaluation of Permanent Impairment. The only function of the agency is to determine which impairment rating should be utilized. While no explicit guidance is provided in the statute for this analysis, presumably the rating which most closely aligns with the worker's actual functional disability.

The evidence in the record is that claimant's disability affects his "whole body" under subsection (v). Following his healing period, however, Brian returned to Benton County at the same or higher wages and he continued to work up until he went on a leave of absence for his rapidly deteriorating Parkinson's. I find that claimant's disability must be calculated under Iowa Code section 85.34(2)(v). I further find that Iowa Code section 85.34(2)(x) is applicable and claimant is only entitled to the impairment rating.

I find that claimant sustained an impairment of 10 percent of his whole body based upon the rating of Dr. Bansal. The defendants have presented no evidence of impairment other than Dr. Perea's unexplained conclusion that none of Brian's symptoms in August 2019, were causally connected to his work injury. I have rejected this opinion. Therefore, I conclude that claimant is entitled to 50 weeks of compensation at the stipulated rate.

ORDER

THEREFORE IT IS ORDERED

Defendants shall pay healing period benefits from July 16, 2019, through August 21, 2019.

Defendants shall pay the claimant fifty (50) weeks of permanent partial disability benefits at the rate of five hundred eighty and 09/100 (\$580.09) per week commencing August 22, 2019.

Defendants shall pay medical expenses set forth in Claimant's Exhibit 3, consistent with this decision.

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 are not entitled to any credit for wages paid.

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 22nd day of December, 2022.



JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Thomas Wertz (via WCES)

Valerie Landis (via WCES)

M. Anne McAtee (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.