BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| RICHARD POSTEL,<br><br>Claimant,<br><br>vs.<br><br>MATHESON TRI GAS, INC.,<br><br>Employer,<br><br>and<br><br>ACE AMERICAN INSURANCE COMPANY,<br><br>Insurance Carrier,<br>Defendants. | : | File No. 5068407<br><br>ARBITRATION DECISION<br><br>Head Note Nos.: 1402.40, 1802, 1803 |

Claimant Richard Postel filed a petition in arbitration seeking workers' compensation benefits from defendants Matheson Tri Gas, Inc., employer, and Ace American Insurance Company, insurer. The hearing occurred before the undersigned on October 21, 2020, via CourtCall video conference.

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 6, Claimant's Exhibits 1 through 5, and Defendants' Exhibits A through F. Claimant testified on his own behalf. The evidentiary record was closed at the end of the hearing, and the case was considered fully submitted upon receipt of the parties' briefs on November 20, 2020.

## ISSUES

The parties submitted the following disputed issues for resolution:

1. The extent of claimant's industrial disability.

2. Whether claimant is entitled to healing period benefits from February 15, 2018 to July 1, 2018.

3. Whether claimant is entitled to reimbursement for his independent medical examination (IME) pursuant to Iowa Code section 85.39.

## FINDING OF FACT

Claimant, who was 65 years old at the time of the hearing, was employed by defendant-employer as a delivery driver. (Hearing Transcript, pages 12-13) On July 18, 2016, claimant was injured when one of the cylinders he loaded came loose and struck him as he bent over to tie his shoe. (Tr., pp. 16-17) Claimant was knocked onto his buttocks by the blow and the cylinder ultimately landed on his shoulder. (Tr., pp. 16-17)

Claimant was then taken by a co-worker to the hospital with neck and left shoulder pain. (Tr., pp. 17-18) When x-rays were unremarkable, he was discharged with a cervical strain. (Joint Exhibit 1, pp. 4-6)

Claimant continued to experience left arm pain, however, so he presented to Timothy Lowry, M.D., at McFarland Clinic on August 2, 2016. (JE 2, pp. 7-9) After an EMG and a cervical MRI, which revealed cervical disc disorder, Dr. Lowry referred claimant to Sarkis Kaspar, M.D., for a spine surgery consultation. (JE 2, p. 21)

Dr. Kaspar ultimately performed a cervical fusion surgery on claimant on December 5, 2016. (JE 4, pp. 127-28) Claimant testified the surgery relieved some of his left-sided symptoms but caused new symptoms in his right arm. (Tr., p. 20) Despite ongoing symptoms, Dr. Kaspar released claimant to return to full-duty work on February 6, 2017. (Tr., p. 21; JE 2, p. 41)

When claimant returned to Dr. Kaspar in April of 2017, he continued to experience "residual weakness" in his left arm. (JE 2, p. 42) Claimant, however, did not want to miss work to participate in physical therapy, so Dr. Kaspar placed him at maximum medical improvement (MMI). (JE 2, p. 42) Dr. Kaspar assigned a 26 percent whole person impairment rating and indicated clamant may need future treatment including physical therapy or injections, but he did not assign any permanent restrictions. (JE 2, p. 47)

Unfortunately, claimant continued to experience symptoms in his shoulders and neck. (See Tr., pp. 21-22; JE 2, pp. 48-80; JE 4, pp. 132-33) Over the next year, updated imaging was requested and claimant was provided with several injections.

When claimant returned to Dr. Kaspar on February 15, 2018, Dr. Kaspar signed a "work status report" indicating claimant could not return to work until an MRI of claimant's cervical spine was completed. (JE 2, p. 82)

Dr. Kaspar reviewed the MRI during claimant's appointment on April 3, 2018 and indicated claimant had "symptomatic C3-7 neuro-foramenal [*sic*] spinal stenosis" that could be addressed surgically . (JE 2, p. 85) Dr. Kaspar continued to restrict claimant from returning to work through surgery. (JE 2, p. 91)

That surgery, a C3-7 decompression, was performed on April 16, 2018. (JE 4, p. 144-45) After the surgery, Dr. Kaspar released claimant to light duty work as of June 4, 2018. (JE 2, p. 102)

Claimant, however, did not return to work for defendant-employer. (Tr., pp. 26) On July 1, 2018, he began working for the City of State Center—a job he described as "less physical." (Tr., p. 26) But his symptoms persisted. In fact, he testified he did not benefit from the second surgery. (Tr., p. 26)

Based on his claimant's ongoing symptoms, claimant underwent an additional EMG and cervical MRI before returning to Dr. Kaspar in October of 2018. Dr. Kaspar indicated there was "no further neck explanation" for claimant's symptoms, so he placed him at MMI for the cervical spine. (JE 2, pp. 93-94) In terms of restrictions, Dr. Kaspar indicated claimant could "continue where he's at[;] he has accommodations for his weak hands." (JE 2, p. 114)

Claimant was last seen by Dr. Kaspar on November 8, 2018. Dr. Kaspar again provided there was "nothing treatable in c-spine," so he instructed claimant to "[p]rogress gradually to activities as tolerated and follow up as needed." (JE 2, pp. 115-116) He stated he could do "an updated MMI" as of November 8, 2018 to "close things up." (JE 2, p. 116) Dr. Kaspar, however, did not offer an updated impairment rating.

After claimant's final appointment with Dr. Kaspar, he underwent an IME at his attorney's request with John Kuhnlein, M.D on February 12, 2019. In a report dated April 15, 2019, Dr. Kuhnlein opined claimant's injury "'lit up' the pre-existing degenerative changes in the cervical spine and made them symptomatic." (Claimant's Ex. 1, p. 20) Dr. Kuhnlein also causally related claimant's bilateral arm symptoms, though he did not causally relate claimant's right shoulder pathology, his peripheral mononeuropathy or his arm anesthesia. (Cl. Ex. 1, pp. 20-21) For his work-related injuries, Dr. Kuhnlein assigned a 28 percent whole person impairment rating and lifting restrictions of 10 to 20 pounds. (Cl. Ex. 1, p. 22) Claimant testified he believes these lifting restrictions are appropriate. (Tr., pp. 45-46)

Defendants then sent claimant to Todd Harbach, M.D., for an IME on October 3, 2019. Dr. Harbach opined claimant's shoulder pain, bilateral upper extremity neuropathic pain, cervical pain, bilateral median neuropathy and left-sided ulnar neuropathy were causally related to his work injury. (JE 6, p. 164)

Defendants sent claimant for a second IME on July 9, 2020, with Charles, Mooney, M.D., Dr. Mooney opined that claimant's work injury "result[ed] in his

subsequent cervical spine surgeries." (Defendants' Ex. A, p. 12) He assigned a 28 percent whole person impairment rating for claimant's neck condition and recommended a 50-pound lifting restriction. (Def. Ex. A, p. 13) Claimant testified he could lift 50 pounds off of the floor but not to his waist. (Tr., p. 46)

As mentioned above, claimant began working for the City of State Center on July 1, 2018. This job entails mowing, picking up garbage, driving a skid loader and dump truck, and occasional snow shoveling. (Tr., pp. 30-31) Claimant testified his co-workers help him load and unload any heavy items. (Tr., pp. 47, 64-65)

At the time of the hearing, he continued to be employed by the City of State Center at an hourly rate of $16.11. (Tr., p. 33) Claimant was earning roughly $18.20 per hour on his date of injury. (Tr., p. 33) The parties agreed claimant's average weekly wage while working for defendant-employer was $965.10 per week. (Hrg. Report, p. 2) Claimant's weekly earnings at the time of the hearing were roughly $670.00 per week ($16.11 x 41.5 = $668.57). (Tr., pp. 33, 58) Thus, claimant was experiencing around a 30 percent loss of actual loss of earnings at the time of the hearing.

Claimant testified he does not believe he could return to his regular job with defendant-employer or many of his prior jobs. (Tr., pp. 31, 34-42)

Claimant's treating and IME physicians agreed claimant sustained either a 26 or 28 percent whole person impairment, and all agreed claimant requires some form of permanent restrictions. Based on claimant's testimony, I find the lifting restrictions of Dr. Kuhnlein to be the best representation of claimant's physical abilities. These restrictions would prevent claimant from returning to his regular job with defendant-employer and would likewise preclude claimant from returning to many of his prior positions.

Though claimant was working at the time of the hearing, this position was less physically demanding than his job with defendant-employer, he was being accommodated, and he was earning significantly less per week—roughly 30 percent less.

Considering these facts, including claimant's functional impairment, work restrictions, loss of actual earnings, age, and inability to return to employment for which he was suited, I find claimant sustained a 45 percent loss of earning capacity.

As discussed above, claimant initially returned to work after his first surgery with Dr. Kaspar. On February 15, 2018, however, Dr. Kaspar restricted claimant from working. This restriction continued through June 4, 2018, when Dr. Kaspar released claimant to return to modified work.

Though Dr. Kaspar did not check any of the boxes indicating whether claimant's restriction on the February 15, 2018 work status report was work related, I find it was. Dr. Kaspar was the authorized treating physician and the restriction was related to

treatment of claimant's cervical spine—a condition every physician, including defendants' IME providers, opined to be work related.

Claimant testified he provided Dr. Kaspar's light duty restrictions to defendant-employer but was told he would "have to do the same work" as his regular duty job, including picking up tanks and delivering wire. (Tr., pp. 26, 53-54) Claimant testified he was told he "could not come back to work unless [he] could do the job," and that he was not offered the up-front office work. (Tr., pp. 53-55) Defendants offered no testimony or other evidence to refute claimant's testimony. I therefore find defendants failed to offer claimant suitable work through July 1, 2018, when he began his new job with the City of State Center.

## CONCLUSIONS OF LAW

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).

Because 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 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 (PPD) 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. Iowa Code § 85.34.

In this case, I considered all the relevant industrial disability factors and found claimant sustained a 45 percent loss of earning capacity. Claimant is therefore entitled to 225 weeks of permanent partial disability benefits commencing on the stipulated date of October 11, 2018 at the stipulated rate of $614.25.

Claimant also asserts he is entitled to healing period benefits from February 15, 2018 through July 1, 2018.

I found claimant was medically restricted from returning to work due to his work-related injury from February 15, 2018 through June 4, 2018.

Iowa Code 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, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

I therefore conclude claimant is entitled to healing period benefits from February 15, 2018 through June 4, 2018.

After June 4, 2018, claimant was released to return to modified duty, but I found defendants failed to offer claimant suitable work consistent with those restrictions.

Iowa Code section 85.33(3) provides:

> If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employee refuses to accept the suitable work with the same employer, the employee shall not be compensated

with temporary partial, temporary total, or healing period benefits during the period of the refusal.

I therefore conclude claimant is entitled to healing period benefits from June 5, 2018 through July 1, 2018 when he started his job with the City of State Center. Ultimately, therefore, I conclude claimant is entitled to healing period benefits from February 15, 2018 through July 1, 2018.

Lastly, claimant seeks reimbursement for Dr. Kuhnlein's IME pursuant to Iowa Code section 85.39. The reimbursement provisions of Iowa Code section 85.39 are triggered when an evaluation of permanent disability has been made by a physician retained by the employer. In this case, Dr. Kaspar, the authorized treating physician, assigned an impairment rating in 2017. Claimant obtained an IME with Dr. Kuhnlein in 2019. Because claimant's IME with Dr. Kuhnlein occurred after Dr. Kaspar's evaluation of permanent disability, I conclude the reimbursement provisions of Iowa Code section 85.39 were triggered and claimant is entitled to reimbursement for the entirety of Dr. Kuhnlein's IME in the amount of $5,480.00. (Cl. Ex. 3)

## ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant healing period benefits from February 15, 2018 through July 1, 2018.

Defendants shall pay claimant two hundred twenty-five (225) weeks of PPD benefits commencing on October 11, 2018.

All weekly benefits shall be paid at the stipulated rate of six hundred fourteen and 25/100 dollars ($614.25) per week.

Defendants shall pay accrued weekly benefits 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 be entitled to the stipulated credits against this award.

Pursuant to Iowa Code section 85.39, defendants shall reimburse claimant for Dr. Kuhnlein's IME in the amount of five thousand four hundred eighty and 00/1100 dollars ($5,480.00).

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 4th day of January, 2021.

STEPHANIE J. COPLEY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Erik Bair (via WCES)

Robert C. Gainer (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.