BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
FEB 13 2017
WORKERS' COMPENSATION

CARL HALTOM, Claimant, vs. JBS USA, LLC, Employer, and AMERICAN ZURICH INSURANCE COMPANY, Insurance Carrier, Defendants.	File Nos. 5054528, 5054529 ARBITRATION DECISION Head Note Nos.: 1108.50, 1402.40, 1803

STATEMENT OF THE CASE

Claimant, Carl Haltom ("Carl") has filed two petitions in arbitration against employer, JBS USA, LLC ("JBS") and American Zurich Insurance Company ("Zurich"), both as defendants. Hearing was held before the undersigned on November 10, 2016 in Des Moines, Iowa.

Claimant, Carl Haltom testified live at trial. The evidentiary record also includes claimant's exhibits 1-23 and defendants' exhibits A-G. The parties filed a hearing report at the commencement of the arbitration hearing. On 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 parties requested the opportunity for post-hearing briefs which were submitted on December 9, 2016.

STIPULATIONS

File No. 5054528 (DOI: 12/02/12)

The parties stipulate to the following matters in a written hearing report submitted at hearing:

1. On December 2, 2012, claimant sustained an injury arising out of and in the course of employment with defendant employer.

2. Claimant is not seeking additional healing period benefits.

3. The injury caused some degree of permanent disability and the disability is an industrial disability.

4. All issues regarding the rate of compensation.

5. Claimant is not seeking additional medical benefits.

6. Prior to hearing defendants voluntarily paid weekly benefits for this work injury as set forth in the hearing report.

7. Defendants are entitled to apportionment credit pursuant to defendants" Exhibit D. (Hearing report & claimant's post-hearing brief).

File No. 5054529 (DOI: 9/23/14)

1. On September 23, 2014, claimant sustained an injury arising out of and in the course of employment with defendant employer.

2. Claimant is not seeking additional healing period benefits.

3. If the injury is a cause of some degree of permanent disability, the disability is an industrial disability.

4. All issues regarding the rate of compensation.

5. Prior to hearing defendants voluntarily paid weekly benefits for the December 2, 2012, work injury as set forth in the hearing report.

6. Defendants are entitled to apportionment credit pursuant to defendants" Exhibit D. (Hearing report & claimant's post-hearing brief)

7. Defendants are entitled to a credit for benefits paid for agency File No. 5054528. (Hearing report & claimant's post-hearing brief)

ISSUES

The parties submitted the following issues for resolution:

File No. 5054528 (DOI: 12/02/12)

1. The extent of industrial disability, if any, claimant sustained as a result of the stipulated December 2, 2012, shoulder injury.

2. Whether claimant is entitled to reimbursement for an IME pursuant to section 85.39.

File No. 5054529 (DOI: 9/23/14)

1. Whether the September 23, 2014, back injury is the cause of permanent disability? If so, the extent of claimant's industrial disability.

2. Whether claimant is entitled to payment of past medical expenses?

3. Whether claimant is entitled to alternate medical care under section 85.27?

4. Whether claimant is entitled to reimbursement for an IME pursuant to section 85.39?

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

At the time of hearing Carl was in his late 50's and still employed with JBS. He has been employed with JBS for 17 years. Carl is right-hand dominant. He typically works fulltime; 10 to 12 hours per day for 6 or 7 days per week. He hopes to continue working for JBS until he is 70 or 80 years old. (Testimony)

The parties have stipulated that Carl sustained a compensable injury to his left shoulder on December 2, 2012, while working for JBS. At that time he was working as a rendering mechanic. His duties included replacing motors and gearboxes, repairing equipment and making certain all the equipment was working correctly. On December 2, 2012, he was moving a gearbox across the floor when it became wedged on something on the floor. When he went to un-wedge the gearbox he felt something in his left shoulder give. It was not until hours later that he realized something was really wrong with his left shoulder. He reported the injury to his supervisor, Tim Stern; this occurred on a Sunday. He also reported the injury to the health services department on Monday. He received conservative treatment from the health services department at JBS. (Testimony; Ex. 1)

Carl's left shoulder continued to worsen. Eventually, JBS Health Services sent Carl to Daniel C. Miller, M.D. at Occupational Medicine, Plus, PC. Carl saw Dr. Miller on December 18, 2012. Dr. Miller treated Carl conservatively. On January 11, 2013, Dr. Miller referred Carl to see a specialist. (Ex. 2; Testimony)

On February 4, 2013, Carl saw Timothy Vinyard, M.D. at Iowa Orthopaedic Services in Marshalltown. The doctor assessed Carl with left shoulder pain, and there was concern for impingement versus rotator cuff tear. He also noted that Carl had symptomatic acromioclavicular degenerative changes. The doctor ordered an MRI, injection, physical therapy, and work restrictions. The MRI was performed on February

6, 2013, and demonstrated mild supraspinatus and infraspinatus tendinopathy without full-thickness rotator cuff tear. There was also evidence of type 2 acromion and biceps tendinosis. The report also noted moderate acromioclavicular degenerative changes and evidence of bursitis. The doctor recommended subacromial injection and additional therapy, and restrictions. The injection provided excellent temporary relief. It was decided that he would undergo surgery. (Ex. 4, pp. 20-28)

Dr. Vinyard performed arthroscopic supra-pectoral biceps tendinosis and distal clavicle excision on May 22, 2013. He was released to return to work on May 27, 2013 with no use of his left upper extremity. (Ex. 4, pp. 29-31) Carl returned to work the following Monday, working in the supply room folding gloves. Carl folded gloves for approximately two months. On July 1, 2013, Carl was put out of the plant on workers' compensation. He still had restrictions on his activities at that time. Carl testified he was not allowed to continue light duty work. He began receiving workers' compensation benefits. He continued to treat with Dr. Vinyard. Treatment consisted of physical therapy, an additional injection, and work restrictions. On December 17, 2013, Dr. Vinyard removed his work restrictions. Carl returned to his job as a rendering mechanic. He continued to experience pain, limited strength, and limited range of motion. He was still having a lot of pain and was unable to lift or carry heavy parts. (Ex. 4, pp. 32-50; Testimony)

Carl returned to see Dr. Vinyard. Another MRI was performed which demonstrated a nearly 90 percent tear of the supraspinatus and subscapularis. (Ex. 3, p. 18; Ex. 4, pp. 51-53) Dr. Vinyard performed an arthroscopic rotator cuff repair with subacromial decompression on March 10, 2014. Dr. Vinyard assigned work restrictions. After the second surgery Carl again had work restrictions. He was not allowed to return to work. He continued with physical therapy; his shoulder was sore for quite some time. On September 2, 2014, pursuant to Carl's request, Dr. Vinyard returned him to work without restrictions. Carl informed Dr. Vinyard he was still struggling with overhead lifting and lifting away from his body. However, he had to return to work without restriction or be terminated.

I find that Carl returned to work without restrictions on September 3, 2014; thus, ended his healing period. Dr. Vinyard discharged Carl from his care without restrictions and placed him at maximum medical improvement on September 30, 2014. Dr. Vinyard assigned 1 percent functional impairment to the whole person. Carl returned to work. He testified that he had difficulty performing his job; particularly with lifting over his head and away from his body. (Testimony; Ex. 4, pp. 54-70)

At the request of his attorney, Carl underwent an independent medical evaluation by John D. Kuhnlein, D.O. on April 21, 2015. In addition to examining Carl, Dr. Kuhnlein also reviewed the medical records provided to him. Dr. Kuhnlein's diagnoses included left shoulder impingement, with rotator cuff tendinosis and acromioclavicular osteoarthrosis. He opined that the left shoulder injury was directly and causally related to the December 3, 2012, work injury. He placed him at MMI as of September 2, 2014. Dr. Kuhnlein assigned 4 percent whole person functional impairment. He

recommended restrictions of lifting no more than 50 pounds from floor to waist and waist to shoulder, and 20 pounds occasionally over the shoulder when considering only his left shoulder injury. He also restricted him to work only occasionally at or above shoulder height and occasionally at or above shoulder height with vibratory or power tools. (Ex. 5)

Carl had only been back to work full-duty for approximately three weeks when he injured his back. On September 23, 2014, Carl fell 6 or 7 feet off of a ladder. He landed on his buttocks on the ladder with his legs extended. He had pain in his buttocks, back, hips, and feet. Initially, he treated with health services. Then he saw Dr. Miller who ordered an MRI and work restrictions. The MRI was performed and Dr. Miller felt that the findings did not explain Carl's foot numbness. EMG testing confirmed that the foot numbness was not back-related. Carl received conservative treatment. Dr. Miller referred him to Arnold. Parenteau, M.D., for pain management. Carl underwent an injection which did not provide substantial relief. Carl was then referred to David Boarini, M.D., who did not recommend any surgery or additional treatment. (Testimony; Exs. 7-12)

Carl was still in severe pain but was not being offered any treatment from JBS. His primary care physician referred him to Sarkis Kaspar, M.D. at McFarland Clinic, PC. Carl first saw Dr. Kasper on July 23, 2015. Dr. Kasper ordered an MRI which revealed mild degenerative change of the lumbar spine at L4-L5, mild right foraminal disc herniation. The doctor noted that Carl had described to him an exact L4 pattern of radiculopathy and had a right L4-5 herniation. Dr. Kasper prescribed Gabapentin and recommended surgery. Claimant has not undergone the surgery. (Testimony; Exs. 13 & 14) The last time Carl saw Dr. Kasper was in December of 2015; this was the last date he received any treatment for his back. (Testimony)

In September of 2015, then defense counsel, Mark King, wrote to Dr. Kasper and provided him with some additional medical information. Defense counsel asked the doctor to "please indicate whether it is your opinion that Mr. Haltom is in need of surgery for the low back in connection with his alleged injury of 9/23/14." (Ex. 13, p. 148) Dr. Kasper responded by stating in pertinent part:

> Dr. Boarini's opinion rests mainly on him not being impressed with the MRI, but that is subjective; the patient described to me an exact L4 pattern of radiculopathy and has a right L45 herniation, so a surgeon cannot simply discern on their own opinion that the herniation probably shouldn't bother the patient-the patient already says it bothers him and he is debilitated in large part by the corresponding symptoms. So yes, I would still recommend surgery if the patient wants it.

(Ex. 13, p. 150)

On December 9, 2015, Dr. Boarini signed a letter authored by defense counsel. By signing the letter Dr. Boarini indicated that the letter accurately recounted his

opinions. Dr. Boarini indicated that the lower back surgeries recommended by Dr. Kaspar would not be medically indicated for the alleged work injury. There was no evidence that the disc bulge was pressing on any of Carl's nerve structures and therefore surgery would not relieve the discomfort in his legs. Dr. Boarini felt Mr. Haltom had neuropathic pain which was not associated with the low back injury of September 23, 2015. Dr. Boarini opined that Carl had a temporary aggravation of his pre-existing underlying degenerative condition of the lumbar spine that has not resulted in permanent functional impairment or permanent restrictions. (Ex. 12, pp. 136-37)

Carl underwent another IME with Dr. Kuhnlein on August 1, 2016; this time for his back. Dr. Kuhnlein's diagnosis included lumbar strain, chronic low back pain with radiculitis. Based on the history provided to him, Dr. Kuhnlein opined that the lumbar strain was directly and causally related to the September 22, 2014, work injury. Dr. Kuhnlein noted that he felt this was more of a radiculitis and not a radiculopathy. Dr. Kuhnlein advised against surgery due to the lack of evidence of nerve damage or radiculopathy on examination. He placed him at MMI at July 23, 2015, which was the date of his last visit with Dr. Kaspar. He placed Carl in the DRE lumbar category II, and assigned 8 percent whole person functional impairment. He recommended restrictions for his back of 20 pound lifting restriction from floor to waist and over the shoulder. He may lift 40 pounds occasionally from waist to shoulder, as long as he keeps weights close to the axial plane of his body. If Carl is lifting more than an elbow's distance from the body, he should lift 30 pounds occasionally from waist to shoulder. He can sit, stand, walk, or squat on an occasional basis; crawl, kneel, or bend at the waist occasionally. He can work occasionally at or above shoulder height, including with tools. (Ex. 15)

On November 4, 2016, Dr. Miller signed a letter authored by defense counsel. By signing the letter Dr. Miller indicated that he agreed with the attorney's statements set forth in the letter. He placed Carl at MMI by March 17, 2015. Dr. Miller opined that Carl did not sustain a permanent injury to his back, nor was the condition of his back materially aggravated as a result of the September 22, 2014 injury. He felt Carl sustained a temporary aggravation of his preexisting degenerative condition which resulted in no permanent impairment and no need for restrictions. (Ex. A, pp. 49-52)

Since the time Dr. Miller put Carl on restrictions he has been performing a job that was created for him. In this untitled position Carl rebuilds shackles and performs light fabrication work. Carl testified that this is an accommodated position. He is currently working with restrictions of push, pull 20 pounds, and avoid repetitive bending, twisting and 20 pound lifting. Although Carl has not been able to perform his rendering mechanic job since the time of his back injury, he has not missed time from work due to his back injury. (Testimony)

The record and Carl's testimony demonstrates that Carl has had prior injuries. He had a prior work related injury to his back in 2007. A beam that weighed approximately 250 lbs. fell on him. He treated with Dr. Mooney who recommended physical therapy, work restrictions, and an MRI. He did not have any injections and

treated for approximately eight months. At that time, he continued to work as a rendering mechanic. (Testimony; Ex. A)

In 2012, Carl had another work injury. He was bending over to pick up a screwdriver and felt a sharp pain. Carl testified that it took a bit after his 2012 treatment but his symptoms eventually cleared up and he had very little problems with his hip or leg; he felt very good. In 2012, Carl treated for approximately 4½ months and was released without restrictions. His pain was much more severe after the injury in 2014. (Testimony; Exs. A & B)

At the time of hearing Carl was concerned about being terminated from JBS. He previously received a letter from JBS stating that if he cannot work without restrictions then he will be terminated. (Ex. 23) He is currently working with restrictions. The day before the arbitration hearing, he went to human resources at JBS and was informed he had enough points to be terminated. However, upon further investigation it was determined he should only have one point instead of nine. (Testimony)

Carl graduated from Ames High School but has no further formal education. Prior to his employment with JBS Carl had pumped gas, worked as a vehicle mechanic, worked in auto body repair, delivered gas, repaired furnaces, and installed insulation. (Ex. 20) He testified that it would be hard to return to some of his pre-injury employment due to his shoulder injury. He has pain in his shoulder when he moves it in the wrong position. His shoulder hurts when he tries to pick something up and go up over his head, off to the side, or to the front of his shoulder. Also, if he lies on his shoulder then the pain will wake him. (Testimony)

The disputed issues concerning the left shoulder injury will be addressed first. The first dispute is what, if any, industrial disability Carl sustained as a result of the stipulated December 2, 2012 injury. As a result of the injury Dr. Vinyard performed two shoulder operations, including arthroscopic repair of a large rotator cuff tear and a subacromial decompression. Following the operations Dr. Vinyard restricted Carl's activities. The restrictions continued until Carl requested the restrictions be lifted so that he did not lose his job. At that time, Dr. Vinyard released him to return to work without any restrictions.

Carl did return to his pre-injury job of rendering mechanic. He testified he was able to perform his job but it was difficult. It is not known whether Carl would have been able to continue to perform that job on a long-term basis because he sustained an injury to his back approximately three weeks later. With regard to the December 2, 2012 work injury I find the opinions of Dr. Vinyard carry the greatest weight. Dr. Vinyard is in the unique position of seeing Carl on several occasions and actually seeing the condition of the inside of his shoulder. Thus, I find that as a result of his injury to the left shoulder Carl has a 1 percent whole person functional impairment. Although he was released to return to work without restrictions, Carl testified that he did continue to have difficulty with his left shoulder. Thus, considering Carl's age, educational background, employment history, ability to retrain, motivation to maintain his employment with JBS,

length of healing period, permanent impairment, and lack of permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that he has sustained a 20 percent loss of future earning capacity as a result of his December 2, 2012 injury with JBS.

Permanent partial disability benefits are to commence at the end of claimant's healing period. I conclude that Carl's permanent partial disability benefits should commence on September 3, 2014.

The second issue regarding the December 2, 2012 injury is whether claimant is entitled to reimbursement under Iowa Code section 85.39 for the IME conducted by Dr. Kuhnlein on May 6, 2015. (Ex. 5) On October 21, 2014, Dr. Vinyard assigned 1 percent whole person impairment for the shoulder. (Ex. 4, p. 69) This was prior to Dr. Kuhnlein's rating. I find the amount charged by Dr. Kuhnlein to be reasonable. I find that claimant is entitled to reimbursement for the IME with Dr. Kuhnlein in the amount of $1,562.50. (Ex. 6) Defendants offered no explanation or reason as to why claimant had not already been reimbursed for the IME or why it should not be defendants' responsibility to reimburse clamant for the examination. Defendants shall reimburse claimant for the May 6, 2015, IME in the amount of $1,562.50.

We now turn to the issues concerning the second date of injury, September 23, 2014. The first issue that must be addressed is what, if any, permanent partial disability claimant sustained as a result of his back injury. Defendants contend that the September 23, 2014, back injury was merely a temporary aggravation. I do not find defendants' argument to be convincing. There are several experts who have offered their opinions regarding Carl's back injury. Both Dr. Boarini and Dr. Miller have opined that the work injury did not result in any permanent impairment, nor did it result in the need for any permanent restrictions. The doctors indicated that the injury was merely a temporary aggravation of his preexisting degenerative condition. However, these opinions are not consistent with the medical evidence in this case. Although claimant did have prior back problems, the record is void of him seeking treatment for his back from 2012 until the 2014 work injury. Furthermore, after Carl sustained his September 23, 2014 back injury, JBS never returned him to his pre-injury, full-duty job of rendering mechanic; the job he was performing the very day of his back injury. Thus, I find the opinions of Dr. Kuhnlein to be most consistent with the record as a whole and the most persuasive. I find that as a result of the September 2014 work injury Carl sustained 8 percent whole person permanent functional impairment. I further find that as a result of the injury he has permanent restrictions as set forth by Dr. Kuhnlein. These restrictions include: 20 pound lifting restriction from floor to waist and over the shoulder. He may lift 40 pounds occasionally from waist to shoulder, as long as he keeps weights close to the axial plane of his body. If he is lifting more than an elbow's distance from the body, he should lift 30 pounds occasionally from waist to shoulder. He can sit, stand, walk, or squat on an occasional basis; crawl, kneel, or bend at the waist occasionally. He can work occasionally at or above shoulder height, including with tools. Considering Carl's age, educational background, employment history, ability to retrain, motivation to maintain his employment with JBS, length of healing period,

permanent impairment, and permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that he has sustained 70 percent loss of future earning capacity as a result of his September 23, 2014 back injury with JBS.

Permanent partial disability benefits are to commence at the end of claimant's healing period. Because Carl did not miss any time from work as a result of his back injury permanent partial disability benefits shall commence on the date of injury, September 23, 2014.

With regard to the back injury, claimant is seeking payment of past medical expenses as set forth in Exhibit 17. These expenses were incurred as a result of Carl's unauthorized treatment at McFarland Clinic with Dr. Kasper for his back injury. Carl testified his primary care physician referred him to Dr. Kasper. Carl first saw Dr. Kasper on July 23, 2015. Carl last saw authorized treater, Dr. Miller on March 17, 2015. At that time Dr. Miller recommended over-the-counter Tylenol and an FCE. Carl was to follow-up with Dr. Miller after the FCE. Dr. Miller also recommended Carl see a spine specialist. Defendants sent Carl to see Dr. Boarini, a spine specialist. On April 13, 2015, Dr. Boarini determined that surgical treatment was not indicated. Carl testified that after he saw Dr. Boarini he wanted a second opinion even though he knew Dr. Kasper was not authorized he went to see him. There is no evidence that Carl requested additional treatment from the defendants after he saw Dr. Boarini and before he sought treatment with Dr. Kasper. Rather than requesting additional treatment from the defendants, either a return visit to Dr. Miller or treatment with another provider, Carl simply sought treatment on his own. I find that it was not reasonable for claimant to seek treatment on his own with Dr. Kasper. Because it was not reasonable for claimant to seek treatment on his own I find that defendants are not responsible for the expenses of said treatment.

Furthermore, the only treatment that Dr. Kasper provided to Carl was to prescribe Gabapentin. The evidence does not demonstrate that the Gabapentin provided any lasting or significant benefit to Carl. Rather, the record shows that Carl continued to complain of persistent symptoms. (Ex. 13, p. 149) Therefore, I find that the treatment provided by Dr. Kasper was not beneficial. Because claimant failed to prove by a preponderance of the evidence that the unauthorized treatment was reasonable and beneficial I find that claimant's request for past medical expenses is denied.

The next issue that must be addressed is whether claimant is entitled to alternate medical care. Claimant is requesting that Dr. Kasper become the authorized treating physician. Dr. Kasper has recommended surgical treatment options. Carl would like to undergo surgery but he has not done so because he is concerned that his health insurance will not pay for procedure. (Testimony) Dr. Boarini, a neurosurgeon, has not recommended any surgical intervention. (Ex. 12) Dr. Miller agreed that surgical treatment is not indicated for Carl. (Ex. A, p. 51) Even the claimant's own IME doctor, Dr. Kuhnlein, has recommended against the treatment. Dr. Kuhnlein noted that Carl did not have evidence of nerve damage or radiculopathy that would benefit from surgical treatment. Additionally, Dr. Kuhnlein expressed concern that Carl would have a

complicated recovery from the surgery due to his weight, smoking, and diabetes. (Ex. 15, p. 159) I find that Carl has failed to show by a preponderance of the evidence that the treatment recommended by Dr. Kasper is reasonable and necessary treatment for the work injury. Furthermore, claimant has failed to carry his burden of proof to show that the care offered by defendants was not reasonable. Defendants provided claimant with an abundance of care reasonably suited to treat his back injury. Even the recommendations for further care in Dr. Kuhnlein's IME report support defendants' position that they provided reasonable care. For these reasons, claimant's request for alternate care and treatment with Dr. Kasper is denied.

Claimant is also seeking reimbursement for the IME he underwent with Dr. Kuhnlein for his back on August 1, 2016. On December 9, 2015, Dr. Boarini opined that Carl had not sustained any permanent impairment as a result of his work injury. I find that this is the equivalent of a zero percent impairment rating. Dr. Kuhnlein's examination took place after Dr. Boarini's impairment rating. I find Dr. Kuhnlein's IME was related to the back and that the charge was reasonable. Defendants offered no explanation or reason as to why claimant has not been reimbursed for the IME or why it should not be defendants' responsibility to reimburse claimant for the examination. I find that defendants shall reimburse claimant for the full amount of Dr. Kuhnlein's examination. Thus, defendants shall reimburse claimant in the amount of $2,715.00.

CONCLUSIONS OF LAW

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

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).

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. Based on the above findings of fact, I concluded that claimant sustained 20 percent industrial disability as a result of the December 2, 2012, left shoulder injury. Defendants shall pay claimant 100 weeks of permanent partial disability benefits commencing on September 3, 2014.

Claimant is also seeking reimbursement for an IME conducted by Dr. Kuhnlein. Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. Based on the above findings of fact, I conclude that claimant is entitled to reimbursement from defendants for the IME conducted by Dr. Kuhnlein on April 21, 2015 for claimant's shoulder injury. Thus, claimant is entitled to reimbursement in the amount of one thousand five-hundred sixty-two and 50/100 dollars ($1,562.50).

With regard to claimant's injury of September 23, 2014, I concluded that Carl sustained 70 percent loss of future earning capacity as a result of his September 23, 2014 back injury with JBS. Therefore, defendants shall pay claimant 350 weeks of permanent partial disability benefits for the September 23, 2014 work injury. Permanent partial disability benefits are to commence at the end of claimant's healing period. Because Carl did not miss any time from work as a result of his back injury permanent partial disability benefits shall commence on the date of injury, September 23, 2014.

Claimant has requested that defendants be responsible for past medical expenses incurred as the result of unauthorized medical treatment he sought for the

September 23, 2014 work injury. 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).

Under Iowa Code section 85.27, the employer has the right to choose medical care as long as it is offered promptly and is reasonably suited to treat the injury without undue inconvenience to the employee. An employer is not responsible for the cost of medical care not authorized by section 85.27. A claimant can seek payment of unauthorized medical care by a preponderance of the evidence that the care was reasonable and beneficial. Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010). To be beneficial, the medical care must provide a more favorable medical outcome than would likely have been achieved by the care authorized by the employer. Id. at 206. The claimant has a significant burden to prove the care was reasonable and beneficial. Id. at 206.

Defendants provided medical care to the claimant. After his authorized appointment with Dr. Boarini claimant chose to seek treatment on his own. In order for Carl to receive reimbursement for the unauthorized expenses he would need to demonstrate that he had a more favorable outcome than the care being provided by the defendants. I concluded that he has not done so and is not entitled to reimbursement for those past medical expenses.

Claimant has requested alternate medical care. Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not

reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

"Determining what care is reasonable under the statute is a question of fact." Long v. Roberts Dairy Co., 528 N.W.2d 122, 123 (Iowa 1995).

Based on the above findings of fact, I conclude that Carl has failed to show by a preponderance of the evidence that the treatment recommended by Dr. Kasper is reasonable and necessary treatment for the September 23, 2014 work injury. Furthermore, claimant failed to carry his burden of proof to show that the care offered by defendants was not reasonable. Defendants provided claimant with care that was reasonably suited to treat his back injury. Even the recommendations for further care in Dr. Kuhnlein's IME report support defendants' position that they provided reasonable care. For these reasons, claimant's request for alternate care and treatment with Dr. Kasper is denied.

Finally, claimant is seeking payment for the IME performed by Dr. Kuhnlein. Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. Based on the above findings of fact, I conclude that claimant is entitled to reimbursement from defendants for the IME conducted by Dr. Kuhnlein on August 1, 2016 for claimant's back injury. Thus, claimant is entitled to reimbursement in the amount of $2,715.00.

ORDER

THEREFORE, IT IS ORDERED:

File No. 5054528 (DOI: 12/02/12)

All weekly benefits shall be paid at the rate of six hundred ninety-four and 43/100 dollars ($694.43).

Defendants shall pay claimant one hundred (100) weeks of permanent partial disability benefits commencing on September 3, 2014.

All past due weekly benefits shall be paid in lump sum with applicable interest pursuant to Iowa Code section 85.30.

Defendants shall reimburse claimant for Dr. Kuhnlein's independent medical evaluation fee in the amount of one thousand five-hundred sixty-two and 50/100 dollars ($1,562.50).

Defendants shall be entitled to credit for all weekly benefits paid to date.

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.

File No. 5054529 (DOI: 9/23/14)

All weekly benefits shall be paid at the rate of six hundred seventy-seven and 41/100 dollars ($677.41).

Defendants shall pay claimant three hundred fifty (350) weeks of permanent partial disability benefits commencing on September 23, 2014.

Defendants shall be entitled to credit for all weekly benefits paid to date.

All past due weekly benefits shall be paid in lump sum with applicable interest pursuant to Iowa Code section 85.30.

Defendants shall reimburse claimant for Dr. Kuhnlein's independent medical evaluation fee in the amount of two thousand seven-hundred fifteen and 00/100 dollars ($2,715.00)

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 13th day of February, 2017.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Joanie Grife
Attorney at Law
PO Box 492
Marshalltown, IA 50158
Joanie@walklaw.com

Patrick V. Waldron
Julie C. Gray
Attorneys at Law
505 - 5th Ave., Ste. 729
Des Moines, IA 50309
pwaldron@pattersonfirm.com
jgray@pattersonfirm.com

EQP/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.