BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

WILLIAM BURNS, Claimant, vs. PCA PAPERBOARD PACKAGING, Employer, and ZURICH INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5045187 A P P E A L D E C I S I O N Head Note Nos.: 1801, 3001, 1108, 1402.20

Defendants PCA Paperboard Packaging, and its insurer, Zurich Insurance Company, appeal from an arbitration decision filed on December 4, 2014. The case was heard on October 13, 2014, and it was considered fully submitted in front of the deputy workers' compensation commissioner on November 10, 2014.

The deputy commissioner found claimant carried his burden of proof that he sustained an injury that arose out of and in the course of his employment on August 6, 2013. The deputy commissioner awarded claimant temporary total disability benefits from August 11, 2013, through October 9, 2013. The deputy commissioner awarded claimant 30 percent industrial disability, which entitles claimant to 150 weeks of PPD benefits. The deputy commissioner also awarded claimant's costs in the amount of $100.00

Defendants assert on appeal that the deputy commissioner erred in finding claimant carried his burden of proof that he sustained an injury that arose out of and in the course of his employment. Defendants also assert the deputy commissioner erred in awarding claimant 30 percent industrial disability

Claimant asserts on appeal that the arbitration decision should be affirmed in its entirety.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner.

Pursuant to Iowa Code sections 17A.5 and 86.24, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on December 4, 2014, which relate to the issues properly raised on intra-agency appeal. I affirm the deputy commissioner's findings in the arbitration decision with the following analysis:

ISSUES ON APPEAL

(1) Whether the claimant sustained an injury that arose out of and in the course of his employment on August 6, 2013.

(2) Whether the claimant sustained 30 percent industrial disability, or any industrial disability at all, from the August 6, 2013, alleged injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The arbitration hearing was held on October 13, 2014. At that time, claimant was 65 years old, although he testified he was 63 years old. (Transcript page 18) Claimant was born June 29, 1948. (Tr. p. 18; Exhibit U, p. 8; Ex. 4, p. 41) Claimant finished the tenth grade and obtained a GED while serving in the U.S. Navy. (Tr. p. 19) Claimant served in the Navy from 1965 to 1969, including two tours of duty in Vietnam. He was honorably discharged. (Tr. p. 21)

Claimant began his employment at defendant-employer in 2007. (Tr. p. 30) Defendant-employer manufactures wax-covered cardboard boxes for meat processing companies. (Tr. p. 30) At the time of claimant's injury, he was working on a box machine. (Tr. pp. 33-34) This job required claimant to receive cardboard product from a conveyor, put the product together into a bundle of ten, and slide them into a machine which would strap the bundle together. (Tr. p. 34)

The facility where claimant worked had a network of rollers, just above floor height, which used a conveyor running underneath the rollers to make them turn. (Tr. pp. 79, 80; Ex. U, p. 26). The roller tracks were used to move stacks of boxes around the plant. (Tr. p. 79) Claimant slipped and injured his back when he was crossing the rollers on August 6, 2013. (Tr. pp. 38, 40)

Concerning the first of defendants' issues, they argue the record does not support the conclusion that claimant was injured on August 6, 2013. Defendants state claimant had a preexisting condition and the treatment required after August 6, 2013, was merely a continuation of care for a prior non-work-related injury. On April 26, 2013, claimant was seen at Dunham-Fritz Chiropractic and complained of "low back pain shooting down the right leg for 2 weeks." (Ex. B, p. 3) Claimant was seen again by the chiropractor on April 30, 2013, and advised that although the pain was "rated at 5," the

"symptoms are getting better." (Ex. B, p. 5) Then on August 6, 2013, claimant was seen at Primary Health Care and complained of right back pain, going down the right buttocks. (Ex. 3, pp. 27-30) Defendants argue that this is the same type of complaint claimant had in April 2013, and therefore his alleged work injury is a continuation of an earlier condition and not a work injury at all.

However, the deputy commissioner found claimant's back complaints for which he received chiropractic care had improved by early May, such that claimant "no longer required any formal care and he stopped seeing the chiropractor." (Arb. Dec., p. 3). The statement in the April 30, 2013, chiropractic record, combined with claimant's apparent willingness to seek medical attention when he felt it was necessary, and the lack of formal treatment from April 30, 2013, until August 6, 2013, support the deputy commissioner's conclusion that the symptoms in early May resolved to such a point that formal care was no longer required. (Arb. Dec., p. 3) I affirm this finding.

Claimant sought medical care on August 6, 2013, at Primary Health Care, Inc., his primary care physicians. (Ex. C, p. 1) Claimant reported on this date that he "had right back pain into buttocks for 3 weeks, would like referral to MMSC Rehab." (Id.) However, the record also states in another location that claimant had right sided "back pain down rt buttock 2 weeks." (Ex. C, p. 2) Defendants argue that the reference to onset of two or three weeks earlier prevents a finding that claimant sustained a work injury on August 6, 2013. However, the record does not report that claimant's pain began three to four months earlier in April, which suggests claimant did not perceive this injury to be a continuation of the episode that occurred in April, 2013. Second, the mere fact that claimant had symptoms which did not require treatment prior to August 6, 2013, does not negate the existence of the work injury or wipe away the events of August 6, 2013. I affirm the deputy's finding that "Mr. Burns was still experiencing some symptoms in the summer of 2013 but not to the point that he required treatment." (Arb. Dec., p. 3)

Defendants are critical of claimant for not reporting his symptoms as work-related to Dunham-Fritz Chiropractic on the April 26, 2013, or April 30, 2013, visit. (Def. Brief, p. 7) However, if the work injury had not yet occurred, there would be no basis for claimant to assert that his symptoms were work-related. This argument is not persuasive.

Defendants argue that the injury as reported by the claimant did not occur. In support of this position they point out that claimant did not report any connection to work when he was seen at Primary Health Care, Inc., on August 6, 2013. (Ex. C. pp. 1-4) Claimant testified he went to Primary Health Care hoping to get a referral for physical therapy. (Tr. p. 40) Claimant testified he had first gone directly to physical therapy and was told he would need to get a doctor's referral. (Id.) Therefore, it is understandable that claimant was likely not as detailed or thorough with the providers at Primary Health Care on August 6, 2013, because he was primarily seeking a referral and not treatment. When claimant was seen at MMSC Rehabilitation on August 12, 2013, it was recorded

that he "slipped at work." (Ex. 4, p. 53) Claimant reported slipping at work and/or slipping on the rollers at work each time the mechanism of injury is recorded. Claimant provided this same history of the injury when he received treatment at the VA in January, 2014. (Ex. A, p. 3) Claimant again reported the same mechanism of injury at his deposition in February 2014, (Ex. U, p. 32); at his FCE in July 2014, (Ex. 2, p. 16); at his IME with Dr. Stoken in July 2014, (Ex. 1, p. 1); and at the hearing in October 2014. (Tr. p. 38) The claimant's report of how the injury occurred has been consistent throughout this case.

Defendants argue that claimant's back condition was significant prior to August 6, 2013, and, as such, the treatment claimant received on that day, was again, simply a continuation of a prior problem. (Def. Brief, p. 8) The plant superintendent, Marc Gallentine, testified he saw claimant on July 23, 2013, "in a hunched-over manner." (Ex. Y, p. 5) Mr. Gallentine testified in a deposition that he asked claimant what was wrong and claimant responded that nothing had happened, but his back was just tight. (Ex. Y, p. 5) Claimant told Mr. Gallentine he was able to continue working and he just needed to get it loosened up. (Ex. Y, p. 6) But, Mr. Gallentine then testified claimant asked for time off work and he was approved for the balance of the week off, which was Wednesday, Thursday and Friday. (Id.) However, there does not appear to be any documentary evidence in the record identifying this time off work for claimant, which would have corroborated the date of the discussion described by Mr. Gallentine.

Claimant's attendance record submitted by defendants may be intended to identify only those dates missed from work for which points were assessed. (Ex. K, p. 1) However, the document also shows not only dates for which claimant received points for missing work, but also days claimant was off work and received zero points. (Ex. K, p. 1) For example, claimant received zero points for: August 9, 2013, February 14, 2014, and, February 17, 2014. (Ex. K, p. 1) This would indicate the document includes any time off work, whether or not points are assessed. (Ex. K) Therefore, the undersigned cannot reconcile the testimony of Mr. Gallentine concerning claimant being off work for a period of days immediately on and/or after July 23, 2013, with defendants exhibit K, which shows no time off for claimant from July 22, 2013, through August 8, 2013. Further, contrary to Mr. Gallentine's description of claimant being "hunched-over," Mr. Juan Lopez, claimant's supervisor, testified he was present at the time of the conversation between Mr. Gallentine and claimant and he did not have any reason to believe claimant was in any pain. (Ex. V, p. 9)

Mr. Gallentine also testified that claimant returned to work the week following July 23, 2013, he again said the matter was not work-related and he asked to take time off as needed. (Ex. Y, p. 8) Mr. Gallentine responded that he could complete paperwork for FMLA, which claimant did not do. (Id.) Mr. Gallentine stated it was after this time claimant began taking more time off work for his back and "he started missing quite a bit of work, and that's where he started getting into attendance issues." (Ex. Y, pp.7-8) However, according to the attendance record at defendants' Exhibit K, the dates off work after July 23, 2013, all occur after the date of injury alleged by claimant of

August 6, 2013. Claimant was ultimately terminated for attendance issues in June, 2014. (Ex. J)

Defendants argue that the finding by the deputy commissioner that claimant did not undergo treatment after April 30, 2013, until August 6, 2013, is not accurate. Defendants suggest claimant "treated with his son who is a sports therapist in July of 2013." (Def. Brief, p. 8) Defendants do not cite to any exhibit or portion of the transcript for this proposition. However, Mr. Gallentine did testify in his deposition that claimant told him his son was helping him with stretching in July, 2013. (Ex. Y, p. 6) In contrast, claimant described in his deposition that he received some assistance from his son, but what his son did for him was "pretty much what they told me at therapy . . . he just fine-tuned it a little bit. . ." (Ex. U, p. 45) This testimony would indicate the informal assistance claimant received from his son occurred during or after the formal physical therapy sessions which occurred at MMSC Rehab.

Further, when asked at hearing whether physical therapy helped, claimant stated his son was staying with him at that time and did help him with bending and exercises. (Tr. p. 45) Again, this testimony suggests the son's involvement was at about the same time as the formal physical therapy in August and September, 2013. There was no testimony from claimant's son or records which could be reviewed or relied upon to illuminate the timing and extent of the son's involvement. The undersigned cannot say with any certainty exactly when claimant's son provided informal assistance or suggestions for stretching, etc. However, the undersigned agrees with the deputy's finding that "the evidence shows that Mr. Burns was still experiencing some symptoms in the summer of 2013 but not to the point that he required treatment." (Arb. Dec., p. 3) Whatever the involvement of claimant's son, it is clear there are no records concerning formal medical care between April 30, 2103, and August 6, 2013.

Defendants also argue claimant never told his supervisor, Mr. Lopez, he slipped at work and injured his back prior to filing the workers' comp petition. (Ex. V, pp. 4 - 5) However, claimant testified he told Mr. Lopez on the day the incident occurred and on the next day as well. (Tr. p. 87) Mr. Lopez testified he was unaware of claimant's alleged work injury to his back until after litigation commenced. (Ex. V, p. 5) Likewise, Mr. Lopez testified in his deposition that the accident form was not filled out until after litigation began. (Ex. V, p. 7) Although work rules and employer preference would favor an immediate report of a work injury, the law requires a report within 90 days, per Iowa Code section 85.23. Clearly, by filing the petition on September 17, 2013, claimant has met his burden of providing notice within 90 days of the August 6, 2013, date of injury.

In support of claimant's testimony concerning the occurrence of the work injury, Ron Flathers, a co-worker testified that although he did not see claimant get injured on the job, claimant did mention to him shortly after the incident occurred that he had sustained an injury. (Ex. X, p. 6)

Most significantly, defendants argue the deputy's decision is based improperly on claimant's testimony. They argue claimant's recollection is poor, which the deputy readily acknowledged stating "during Mr. Burns' testimony his memory problems were evident." (Arb. Dec., p. 2). The deputy further found, "For example, he was not certain if he retired in the summer of 2013 or just a few months ago in 2014. He was also confused about his own age." (Id.) Claimant testified he has been diagnosed with the "start of Alzheimer's and dementia." (Tr. pp. 23-24) When asked if it affects his short-term memory, claimant responded, "Yes. Oh, yeah." (Tr. p. 24) As an example of claimant's memory difficulties, he testified that despite being at the office of his attorney four or five times in the past, he would not be able to find the office on his own. (Id.) Mr. Gallentine, the plant superintendent, confirmed claimant's memory was very poor. He testified in his deposition, "Every day we were out there having to show him how to more or less do his job all over again . . ." (Ex. Y. p. 12) This was in a job claimant held for years, and it was a job, according to Mr. Gallentine, which was not particularly complicated. (Id.) Juan Lopez, claimant's supervisor, corroborated claimant's difficulties with his memory when discussing the accident report stating, "I went down the paperwork [accident report] line by line." (Ex. V, p. 7) Mr. Lopez said he did this, "because I know he has a hard time understanding a lot of stuff." (Id.) When asked directly if he observed claimant's struggles with memory, Mr. Lopez responded: "Oh, yes, definitely." (Id.)

Defendants argue that claimant's memory is so unreliable the deputy should disregard claimant's testimony in its entirety, stating, "to rely on the claimant's memory for anything is not appropriate." (Def. Brief, pp. 5-6). However, defendants then encourage the undersigned to rely on records and information contained therein regarding the date of the onset of symptoms, which is based directly on claimant's self-report and recollection. (Def. Brief, p. 5) Therefore, defendant argues that the record made based on claimant's recollection, which was closer in time to the event is more reliable than the testimony provided at deposition or hearing. Ordinarily I would agree, but considering the fact that claimant could not recall how to do a relatively simple job he had held for years from one day to the next, his short term memory deficiencies are obvious and significant. Therefore, the usual distinction affording greater weight to facts recorded closer to an event than facts stated sometime thereafter, is significantly diluted. Furthermore, it must be noted that the undersigned concludes that claimant's memory difficulties, while significant, are clearly rooted in a medical diagnosis and do not represent a credibility issue reflecting on claimant's motive or intent to color testimony for his benefit.

When I review the evidence as a whole, I find the record supports the conclusion that claimant had complaints of low back pain and pain in the right leg in late April 2013, for which he sought chiropractic treatment. (Ex. B, p. 3) The symptoms resolved to a point such that continued formal medical care was no longer needed. Then, after claimant slipped on rollers while working for defendant-employer, his symptoms returned and/or increased to the extent he sought medical treatment. Claimant's poor short-term memory has affected his ability to recall the exact date of onset, but he has

repeatedly and consistently given the same answer when asked how the injury occurred after August 6, 2013.

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).

Turning to expert opinion in the record concerning causation, I find the August 6, 2014, report of Jacqueline Stoken, D.O., P.C., is the only such opinion. After obtaining a history of the current injury, reviewing medical records, requesting and reviewing the results of an FCE, and conducting a physical examination of claimant, Dr. Stoken found the claimant suffered from: "(1) Status post work injury on 8/10/13 with acute low back strain and right lower extremity radiculitis," and "(2) Chronic low back pain and right lower extremity radiculitis." (Ex. 1, p. 4) Dr. Stoken then finds these diagnoses to be "causally related to the work injury on 8/10/13." (Id.) I affirm the deputy commissioner's finding that "claimant has carried his burden of proof to show by a preponderance of the evidence that he sustained an injury to his back arising out of and in the course of his employment on August 6, 2013." (Arb. Dec., p. 2)

The second issue raised by defendants is the extent of permanency. Defendants argue claimant sustained no permanent impairment, or in the alternative, claimant sustained permanent impairment less than the 30 percent industrial disability assigned by the deputy commissioner.

Having found claimant sustained a work-related injury to his back, the injury is to claimant's whole body, and permanency is therefore considered under the framework of an industrial disability.

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).

The focus of an industrial disability analysis is on the ability of the worker to be gainfully employed and rests on comparison of what the injured worker could earn before the injury with what the same person can earn after the injury. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 266 (Iowa 1995), Anthes v. Anthes, 258 Iowa 260, 270, 139 N.W.2d 201, 208 (1965). Changes in actual earnings are a factor to be considered, but actual earnings are not synonymous with earning capacity. Bergquist v. Mackay Engines, Inc., 538 N.W.2d 655, 659 (Iowa Ct. App. 1995), Holmquist v. Volkswagen of America, Inc., 261 N.W.2d 516, 525, (Iowa App. 1977), 4-81 Larson's Workers' Compensation Law, §§ 81.01(1) and 81.03. The loss of earning capacity is not measured in a vacuum. Such personal characteristics as affect the worker's employability are considered. Ehlinger v. State, 237 N.W.2d 784, 792 (Iowa 1976). Loss of future earning capacity is measured by the employee's own ability to compete in the labor market.

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

Turning again to the only expert opinion in the record, I find Dr. Stoken found permanent impairment and assigned eight percent impairment to the whole person. (Ex. 1, p. 4) Considering the FCE, claimant was noted to be "pleasant and cooperative" and he was found to have provided "a maximal effort during the entire test and passed all validity criteria." (Ex. 2, p. 18) The FCE results placed claimant in the "upper end of the medium work category." (Id.) Dr. Stoken considered the FCE and assigned

restrictions "to avoid repetitive bending, lifting, and twisting, and avoid lifting more than 10 lbs. on a constant basis, 25 lbs. on a frequent basis, or 50 lbs. on an occasional basis which places him in the medium category of work." (Ex. 1, p. 5) The defendant is correct that Dr. Stoken's assessment of restrictions is more restrictive than the FCE recommendations, but they remain within the medium work category. Further, there is no other physician opinion in evidence concerning appropriate restrictions.

When assessing industrial disability, the deputy commissioner considered claimant's age, education, work experience, medical treatment for the injury, work performed post-injury, medical records from the various providers including the FCE and the report of Dr. Stoken. (Arb. Dec., p. 5) The deputy commissioner also considered claimant's skills, his motivation, and other appropriate factors for analysis of industrial disability. (Id.) The deputy determined claimant sustained industrial disability of 30 percent. (Id.) I therefore affirm the deputy's determination of industrial loss.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of December 4, 2014, is affirmed in its entirety.

1. Defendants shall pay claimant temporary weekly benefits from August 11, 2013, through October 9, 2013.

2. Defendants shall pay claimant one-hundred fifty (150) weeks of permanent partial disability benefits commencing on April 21, 2014.

3. Defendants shall pay all accrued weekly benefits in a lump sum, along with applicable interest pursuant to Iowa Code section 85.30.

4. Pursuant to rule 876 IAC 4.33, defendants shall pay the costs of the arbitration proceeding in the amount of $100.00 and defendant shall also pay the costs of the appeal, including the cost of the hearing transcript.

5. 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 16th day of May, 2016.

Joseph S. Cortese II

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WORKERS' COMPENSATION
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