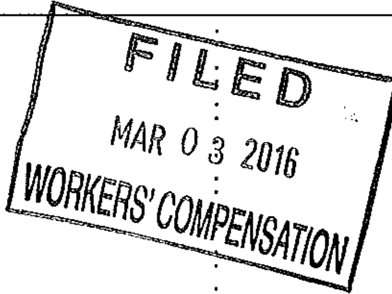
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



BRANDON VALENTI,	:	
Claimant,	:	File No. 5049719
vs.	:	ARBITRATION
CITY OF DES MOINES,	:	DECISION
Employer, Self-Insured, Defendant.	:	Head Note Nos.: 1803, 2500, 2707

STATEMENT OF THE CASE

Claimant, Brandon Valenti, filed a petition in arbitration seeking workers' compensation benefits against City of Des Moines, a self-insured employer, for an alleged work injury date of August 27, 2014.

This case was heard on December 10, 2015, in Des Moines, Iowa. The case was considered fully submitted on January 4, 2016 upon the simultaneous filing briefs.

The record consists of claimant's exhibits 1-15, defendant's exhibits A-C and the testimony of claimant.

ISSUES

1. Extent of industrial disability;

2. Reimbursement of medical expenses;

3. Costs of the transcription of the deposition of claimant.

STIPULATIONS

The parties stipulated that the claimant sustained a work related injury on August 27, 2014, while in the employ of the defendant. The parties further stipulated that the injury was a cause of temporary and permanent disability. The parties agree that the claimant's disability is industrial in nature, and that the commencement date for the payment of permanent partial disability benefits was September 22, 2015, payable at the stipulated weekly rate of $567.14.

FINDINGS OF FACT

Claimant, Brandon Valenti, was a 36 year old person at the time of the hearing. He has a GED and education through the ninth grade, having dropped out around grade ten. He completed a program at Motorcycles & Mechanics Institute between 2002-2003.

His past work history includes working as a motorcycle technician, construction worker, bartender, bouncer, laborer, and driver. (Exhibit 14)

He alleged to have sustained a work related injury on August 27, 2014, while shoveling a pile of asphalt.

Claimant was terminated on October 3, 2014. He was a probationary employee and was late to work on April 15, 2014, and then again on October 2, 2014. (Ex. 12, p. 85) Claimant admitted he overslept on his first day of work.

Claimant's past medical history is significant for a motorcycle accident in 2002. He fractured his left shoulder and both hands. In 2003, he had an injury to his back and in 2012, he suffered pain in his back for which he received treatment. Claimant testified that he was pain free upon the start of his employment with the defendant employer.

On March 27, 2014 claimant underwent a post-offer medical examination which cleared him to do the essential functions of his job. (Ex. 1, page 1)

On September 2, 2014 claimant was seen at the Unity Point Family Medicine clinic for follow-up of complaints of low back pain which radiated into the left leg. This visit was not authorized nor was the Toradal injection he received. Defendant disputes claimant's entitlement to reimbursement.

He exhibited positive straight leg raise on both legs with the last being at approximately 25 degrees. His strength was diminished in his left leg and he has an absent left patellar reflex. (Ex. 2, p. 2) An MRI was recommended but the claimant declined due to finances. He was provided some form of pain relief and recommended that he follow up. He was provided a work release due to the acute injury to his back. (Ex. 2, p. 3)

On September 4, 2014, claimant was seen at Methodist Occupational Medicine for pain in his lower back by Richard S. McCaughey, D.O. (Ex. 3, p. 5) He exhibited moderate pain behaviors with palpation and during range of motion testing. His straight leg tests were negative bilaterally. Dr. McCaughey took claimant off regular duties and prescribed Flexeril. (Ex. 3, p. 6) Six weeks of physical therapy was ordered.

On September 22, 2014, claimant returned to Dr. McCaughey with reports of improvement. He still had some achiness and stiffness in the low back, primarily on the left side. He was no longer taking Flexeril as it made him tired.

Claimant was able to navigate from the chair to the table and back again without difficulty and walked with a normal gait. Dr. McCaughey recommended he return to physical therapy and to continue with ibuprofen as necessary. He was to observe a 10-pound lifting limit and avoid repetitive bending and twisting. (Ex. 3, p. 8)

He returned on October 3, 2014 with complaints of no improvement. He reported pain radiating down the left leg with some into the right thigh. Dr. McCaughey was not able to detect any deficits of the lower extremities and observed claimant moving about the room without difficulty and with a normal gait. Dr. McCaughey changed claimant's prescriptions and recommended claimant undergo an MRI. (Ex. 3, p. 10)

The results of the MRI revealed moderately advanced degenerative disc disease in the L4 – S1 region along with a broad-based left paracentral herniated nucleus pulposus which had suspected mass effect on the left L5 nerve root. (Ex. 3, p. 12; Ex. 9) Dr. McCaughey recommended the claimant remain on the same restrictions and that he should follow up with pain management for a steroid injection.

He was seen at pain management on November 6, 2014 for a injection with Dana L. Simon, M.D. (Ex. 4, p. 18)

On December 8, 2014, claimant reported an increase in pain despite the injection and now reported that the pain radiated into the left heel. Dr. McCaughey's examination was unremarkable although a straight leg test on the left caused claimant to report low back pain with radiation down the left leg. (Ex. 3, p. 14) Dr. McCaughey kept claimant's same restrictions and recommended claimant seek a second opinion with a spine surgeon.

On January 6, 2015, claimant was seen again by Dr. McCaughey for nagging low back pain with radiation to the left foot. He exhibited a positive straight leg test on the left. Claimant was continued with a 10-pound weight limit and he was urged again to seek treatment with a spine doctor. (Ex. 3, p. 15)

On January 13, 2015, claimant underwent an examination by Lynn Nelson, M.D. (Ex. 5, p. 37) He reported pain in his back which worsened at night and with activity. (Ex. 5, p. 37) His radiographs showed a small central to left sided L4-5 disk protrusion and a very small central L5-S1 disk protrusion. On examination, he exhibited pain on palpation to the left PSIS area. Lumbar flexion and extension were limited due to pain. (Ex. 5, p. 37) Dr. Nelson did not recommend surgery due to the fact that he did not have relief with previous epidural injections.

Claimant received another injection on March 17, 2015. (Ex. 4, p. 25) He then started aquatic therapy but it did not help him. He returned to The Iowa Clinic where he was seen by Todd C. Troll, M.D. (Ex. 6, p. 41) A straight leg test on the left was positive and he had guarding with standing lumbar flexion and extension. (Ex. 6, p. 41) Dr. Troll recommended more aqua therapy and another injection. He underwent the injection on April 15, 2015. (Ex. 4, p. 28) A third injection was administered on May 29,

2015. (Ex. 4, p. 33) It was recommended claimant continue with a warm water pool program and a trial of dorsal and plantar technique. (Ex. 4, p. 34)

On July 1, 2015, claimant consulted with David J. Boarini, M.D., for a neurological consult. (Ex. 7, p. 43) He exhibited a mild antalgic gait favoring the left side and a positive straight leg raise test on the left. Based on the supporting radiography, Dr. Boarini recommended a L4-5 left hemilaminotomy and disk excision. (Ex. 7, p. 45) The surgery took place on July 9, 2015. (Ex. 7, p. 46) A month after the surgery, claimant reported excellent results. (Ex. 7, p. 53) He attended approximately a month or so of physical therapy. (Ex. 8. p. 61) Dr. Boarini released claimant to return to work on September 21, 2015, over claimant's objection. (Ex. 7, p. 54-55)

In response to an inquiry from defendant about claimant's impairment, Dr. Boarini penned a medical note wherein he proclaimed there was no further surgical care he could provide. "We have gone over the pros and cons of his job," wrote Dr. Boarini, "and I think he can try working full duty and see how it goes. Certainly, if he has ongoing difficulties and doesn't feel he can work, a formal functional capacity evaluation could be performed." (Ex. 7, p. 59) Dr. Boarini marked claimant as due to return to work without restrictions as of September 21, 2015. (Ex. B, p. 7) He later assigned a 8 percent impairment. (Ex. B, p. 9)

In a post surgical IME with Sunil Bansal, M.D., claimant demonstrated a positive straight leg test and limited range of motion on both the left and the right along with a loss of sensory discrimination over the lateral upper and lower leg. (Ex. 10, p. 77)

Dr. Bansal made a causal connection between the claimant's work and the back injury by citing to articles regarding improper lifting and the claimant's occupation. Claimant's injury, as described to Dr. Bansal, did not include the lifting of heavy objects. Claimant described shoveling asphalt in an awkward position using the back of the shovel. There was no indication that claimant had engaged in heavy lifting and thus the articles cited appear to have no relevance to the present case. Dr. Bansal writes "[A]n acute mechanical load such as that caused by heavy lifting while twisting would place tremendous pressure to the L4-L5 and L5-S1 region, easily capable of aggravating any underling spondylosis." (Ex. 10, p. 79)

Because of the heavy lifting that Dr. Bansal presumed claimant was doing, he agreed that the work activities performed on August 27, 2014, were a substantial contributing factor for the "development of his L4-L5 herniation and the need for surgery." (Ex. 10, p. 79) The claimant's job description does not include any lifting minimums but does say that the worker must have the ability to perform heavy manual work.

Using the AMA Guides, Dr. Bansal assigned a 10 percent impairment of the body as a whole due to the loss of "relevant reflexes and strength." (Ex. 10, p. 79) He recommended restrictions of no lifting over 50 pounds occasionally, no lifting over 25

pounds frequently and no frequent bending, climbing and twisting. Claimant should also avoid sitting or standing more than 60 minutes at a time. (Ex. 10, p. 80)

Claimant currently takes several over-the-counter pain relievers each day. He cannot do Ragbrai, ride in a boat, ride a motorcycle or play softball. He has applied to various construction firms but has not been able to get an interview. He would like to be a foreman or run a crew which would mean less manual labor. He does not believe he could lift kegs or engines as he had in the past.

CONCLUSIONS OF LAW

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

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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.

The parties have stipulated that claimant sustained a back injury. The dispute is over the extent of the injury. Dr. Bansal placed it at 10 percent and Dr. Boarini at 8 percent. Claimant's testimony is that he can do very little of the work that he has done in the past including bartending, bouncing, construction work.

The work restrictions of Dr. Bansal included limited bending, twisting, sitting and standing but a lifting restriction of no more than 50 pounds occasionally and 25 pounds frequently.

Claimant argues that Dr. Bansal had a better understanding of claimant's work duties than that of Dr. Boarini. Yet Dr. Bansal focused on claimant's heavy lifting despite none of the work claimant described doing on the date of his injury appeared to include heavy lifting tasks. Dr. Bansal did not exhibit a better understanding of claimant's work duties.

Claimant testified that lifting heavy material, shoveling asphalt, concrete and bending, stooping, kneeling and twisting were involved in almost all previous positions he held and that he would not be able to work as a motorcycle mechanic, bartender or bouncer.

The experts largely agree to the claimant's extent of impairment; however, the restrictions imposed by Dr. Bansal limit claimant's employment opportunities. Claimant's attempts to find new work were fairly anemic. He testified that he applied for a few construction jobs but was not able to get an interview. This might be due to the fact that he was seeking a foreperson's position without the experience. He did not apply for any position as a cook, bouncer, mechanic, or bartender. Admittedly claimant does not feel he can do those past jobs given his back condition.

Claimant appeared a credible witness. His testimony buttressed the restrictions set forth by Dr. Bansal. At the time that Dr. Boarini returned claimant to work, claimant had continued to complain of pain and discomfort. Dr. Boarini did not rule out restrictions but recommended claimant try to work full duty and then return for a functional capacity evaluation if full duty work could not be accomplished. Based on the foregoing evidence, it is determined that claimant has sustained at 17 percent industrial disability.

The next issue is whether claimant is entitled to a reimbursement of medical expenses for a visit to Unity Point-Family Medicine Merle Hay on September 2, 2014. (Ex. 13, p. 86) Bell Brothers v. Gwinn, 779 N.W. 2d 193 (Iowa 2010) sets for the standards under which unauthorized medical can be reimbursed.

> The duty of an employer to furnish medical care following notice of injury, prior to an order by the commissioner, is predicated on the employer's acknowledgement that the employee sustained an injury compensable under the workers' compensation statute. Iowa Code § 85.27. Once compensability is acknowledged, the statute contemplates the employer will furnish reasonable medical care and supplies following an injury and will subsequently pay the workers' compensation benefits described in the statute. Id. See generally id. §§ 85.33, 85.34.
>
> The obligation of the employer to furnish reasonable medical care produced an understandable controversy between employers and employees over who should select the physician to provide the care. See 5 Larson § 94.02[2], at 94-13. This "choice of doctor" debate aligned the value of allowing the injured worker, derived from the nature and closeness of the doctor-patient relationship, to self-select a care provider against the value "of achieving the maximum standards of rehabilitation by permitting the compensation system to exercise continuous control of the nature and quality of medical services from the moment of injury." Id.

(Id. at 202)

Claimant testified that he was hurt on a Wednesday. He did not work the following day as it was a rain day. He returned on Friday but the pain was not significant enough to prevent him from doing his job. He testified that he attempted to speak with his crew leader but the crew leader was busy. Over the long holiday weekend, his condition worsened. On Tuesday when he returned to work, he informed his crew leader of his injury.

Therefore, the claimant's visit to Unity Point would not fall under the employer's responsibility because claimant had not informed his employer of the injury at that time. When claimant reported the injury, he was directed to Dr. McCaughey who saw claimant on September 4, 2014. Dr. McCaughey immediately restricted claimant's activity and prescribed medication and physical therapy.

The final issue is that of claimant's deposition expense. Claimant testified at hearing and the deposition was not used during the hearing. Iowa Administrative Code Rule 876-4.33 allows for the deputy to assess costs.

"This rule is intended to implement Iowa Code section 86.40." The rule contains numerous subsections detailing items that "shall be" taxed as costs by the commissioner or deputy, including:

(2) transcription costs when appropriate

(4) witness fees and expenses as provided by Iowa Code sections 622.69[[2]] and 622.72,[[3]]

Rule 876 IAC 4.33. The claimant did not show the appropriateness of the deposition costs and therefore it will not be awarded.

ORDER

THEREFORE, it is ordered:

That defendant are to pay unto claimant eighty-five (85) weeks of permanent partial disability benefits at the rate of five hundred sixty-seven and 14/100 dollars ($567.14) per week from September 22, 2015.

That defendant shall pay accrued weekly benefits in a lump sum.

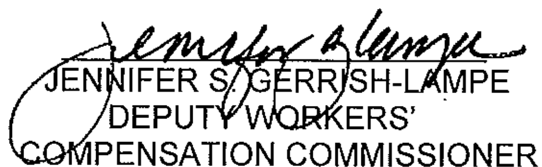
That defendant shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendant are to be given credit for benefits previously paid.

That defendant shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

That defendant shall pay the costs of this matter pursuant to rule 876 IAC 4.33 except for the deposition fees of the claimant.

Signed and filed this 3rd day of March, 2016.



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Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876 4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.