BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



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| RODOLFO GARCIA,<br><br>Claimant,<br><br>vs.<br><br>BHJ USA, INC.,<br><br>Employer,<br><br>and<br><br>THE PHOENIX INSURANCE COMPANY,<br><br>Insurance Carrier,<br>Defendants. | File No. 5062598<br><br>A R B I T R A T I O N<br><br>D E C I S I O N<br><br>Head Notes: 1402.40, 1403, 2502, 2701, 2907 |

## STATEMENT OF THE CASE

Claimant, Rodolfo Garcia, filed a petition in arbitration seeking workers' compensation benefits from BHJ USA, Inc. (BHJ), employer and The Phoenix Insurance Company, insurer, both as defendants. This matter was heard in Des Moines, Iowa on November 13, 2017 with a final submission date of December 11, 2017.

The record in this case consists of Joint Exhibits 1 through 6, Claimant's Exhibits 1 through 4, Defendants' Exhibits A through C, and the testimony of claimant.

Serving as interpreter for the hearing was Ana Pottebaum.

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.

## ISSUES

1. Whether claimant's injury resulted in a permanent disability; and if so
2. The extent of claimant's entitlement to permanent partial disability benefits.

3. Whether claimant is entitled to reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39.

4. Whether claimant is entitled to alternate medical care under Iowa Code section 85.27.

5. Costs.

## FINDINGS OF FACT

Claimant was 50 years old at the time of hearing. Claimant was born in Mexico. Claimant went up to, but did not complete, the sixth grade in Mexico. Claimant came to the United States in 1981.

Claimant can read and write in Spanish. Claimant can speak, read and write a little English.

Claimant has worked in road and concrete construction. Claimant has done carpentry work. Claimant has also worked in meat production facilities. (Exhibit 4, pages 4-7)

Claimant began with BHJ in 2016. Claimant testified BHJ produces chicken and turkey meat to be used in pet food. Claimant's job duties at BHJ included, but were not limited to, putting meat on a plate freezer with a hose for freezing, and stacking frozen blocks of meat on pallets.

A description of claimant's job duties are found at Exhibit 3. According to the job description, claimant had to carry between 31 and 50 pounds for 3 feet. (Ex. 3, p. 3) Claimant testified he occasionally had to carry up to 100 pounds.

On April 2, 2016 claimant slipped and fell at work. Claimant landed on his back. Claimant was taken to the hospital that day. (Joint Ex. 1, pp. 1-8)

On April 2, 2016 claimant was seen at UnityPoint Health Emergency Department for back pain caused by a fall at work. Claimant had landed on his back. Claimant was assessed as having spondylolisthesis and degenerative disc disease. Claimant was returned to work at light duty. (Jt. Ex. 1, pp. 1-12)

While on light duty claimant received a favorable job performance review. (Ex. C, p. 9)

Claimant was evaluated by Phuong Nguyen, M.D. on April 12, 2016. Claimant complained of severe lower back pain. Claimant was prescribed medication and told to use heat on his back. He was returned to work with no lifting over 10 pounds and no stooping or bending. (Jt. Ex. 2, pp. 1-3)

Claimant returned to Dr. Nguyen on April 26, 2016. Claimant indicated his condition had not improved. He was continued on medication. He was again returned to work with no lifting over 10 pounds. (Ex. 2, pp. 4-6)

Claimant continued to have followup care with Dr. Nguyen in April and June of 2016. Claimant continued to indicate his pain had not improved. Claimant was recommended to have an MRI. He was kept on restricted duty. (Jt. Ex. 2, pp. 7-15)

Claimant was evaluated by Bushra Nauman, M.D. at FDT Pain Management on July 16, 2016. Claimant had lower back pain continually from the date of injury. He was assessed as having multilevel degenerative changes in the lumbar spine, a grade I anterolisthesis at the L3 level and an annular tear at L4 through S1. Claimant was given an L5-S1 epidural steroid injection (ESI). (Jt. Ex. 3, pp. 1-8)

Claimant returned in followup with Dr. Nguyen on July 28, 2016. Claimant indicated the injections had helped for one week and then returned to the same pain level. Claimant was advised to return to the pain clinic. (Jt. Ex. 2, pp. 16-18)

Claimant returned in followup with Dr. Nauman on September 9, 2016. Claimant declined to have a second ESI. (Jt. Ex. 3, pp. 9-13)

On December 13, 2016 claimant underwent a second L5-S1 ESI. (Jt. Ex. 3, pp. 14-18)

On October 10, 2016 claimant was terminated from work at BHJ for no call no show. (Ex. C, p. 12)

Claimant returned to Dr. Nguyen on January 9, 2017. Claimant indicated the second injection actually increased his pain. Claimant was recommended to continue with a third injection. (Jt. Ex. 2, pp. 22-24)

On February 4, 2017 claimant was evaluated by William Boulden, M.D. Claimant was assessed as having lower back pain and disc degeneration in the lumbar spine. Dr. Boulden believed claimant's problems were at the L3-4 levels. Facet joint injections were recommended. A lumbosacral corset and stabilizing exercises were recommended. (Jt. Ex. 4, pp. 1-4)

In a March 13, 2017 letter Dr. Boulden recommended an L3-4 facet block and a German-type stabilization program. He opined claimant was not at maximum medical improvement (MMI). (Jt. Ex. 4, p. 5)

On March 31, 2017 claimant underwent bilateral L3-S1 lumbar facet joint injections with Daniel Moyse, M.D. (Jt. Ex. 5, pp. 4-5)

Claimant returned to Dr. Boulden on April 18, 2017. Claimant noted improvement in pain. Claimant was doing physical therapy. Claimant had yet to get his back brace as recommended. (Jt. Ex. 4, p. 6)

Claimant returned to Dr. Moyse on May 17, 2017. Claimant noted little relief in back pain due to exercises and physical therapy. He did note a 75 percent improvement in back pain following injections. (Jt. Ex. 5, pp. 6-7)

Claimant saw Dr. Boulden on May 18, 2017. Claimant had continued complaints of back pain. Dr. Boulden refers in his report to an invalid functional capacity evaluation (FCE), done prior to May 18, 2017. That FCE is not in the record. Claimant had limited range of motion with no radiculopathy. Claimant was found to be at MMI. Dr. Boulden did not believe claimant was a surgical candidate. Claimant was continued to doing exercises and icing his back. Dr. Boulden did not give claimant any permanent restrictions. He released claimant from care. He returned claimant to work as of May 22, 2017. (Jt. Ex. 4, pp. 10-11)

In a June 1, 2017 note, Dr. Boulden found claimant had no permanent impairment and again opined claimant reached MMI as of May 22, 2017. (Jt. Ex. 4, p. 12)

In a July 20, 2017 report, Marlon Gasner, PT, gave his opinions of claimant's abilities following an FCE. Claimant exhibited consistent performance throughout testing. Claimant had the ability to lift up to 39 pounds from floor to waist, 34 pounds from waist to shoulder, carry up to 41 pounds, and push up to 51 pounds. (Claimant's Ex. 2)

In a September 28, 2017 report, Sunil Bansal, M.D. gave his opinions of claimant's condition following an IME. Claimant had continued back pain. Dr. Bansal assessed claimant as having an aggravation of an L3-4 spondylolisthesis and an L5-S1 disc bulge with an annular tear. He found claimant had a 5 percent permanent impairment to the body as a whole, based on a finding that claimant fell into DRE Category II under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. He limited claimant to lifting up to 30 pounds. (Claimant's Ex. 1)

Claimant testified he was arrested on two occasions for public intoxication and for driving while intoxicated. At the time of hearing, claimant was on probation. Claimant testified he does not have a valid driver's license.

Claimant testified he has problems with sitting for an extended period of time. Claimant said he has continued lower back pain that limits his abilities.

Claimant says he works part time with a friend, Carlos Ceballos, doing roofing and sheetrock. Claimant said this is only part-time work at approximately two times a week for five hours a day. Claimant said he worked for Mr. Ceballos since July of 2017. Claimant testified he did not believe he could return to work doing concrete or carpentry work. Claimant has not applied for any other jobs.

## CONCLUSIONS OF LAW

The first issue to be determined is whether or not claimant sustained a permanent impairment from his April 2, 2016 injury.

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 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).

Claimant contends he sustained a permanent disability from his April 2, 2016 fall. Defendants claim claimant's fall resulted in only a temporary aggravation of a preexisting condition. After his fall, claimant underwent an MRI. The MRI was not made a part of the record. However, numerous references to the MRI in the record indicate claimant had an annular tear at the L4-S1 levels. (Jt. Ex. 1, pp. 10-12; Jt. Ex. 2, p. 14)

Claimant underwent two ESIs. Claimant also had lumbar facet injections. (Jt. Ex. 3, pp. 1-7; Jt. Ex. 5, pp. 4-5)

Before his release from treatment, both Dr. Boulden and Dr. Moyse discussed claimant undergoing radiofrequency ablation as a treatment option for claimant. (Jt. Ex. 4, p. 2; Jt. Ex. 5, p. 7)

Two physicians have opined regarding the permanent nature of claimant's injury. Dr. Boulden treated claimant for an extended period of time. Dr. Boulden ultimately

released claimant to return to work with no permanent impairment. This appears to be based, in part, on a finding that claimant had an invalid FCE. (Jt. Ex. 4, p. 10) This FCE is not made a part of the record. It is impossible to determine or analyze why the FCE was invalid, and who performed the FCE. Other than the alleged invalid FCE, Dr. Boulden gives little analysis as to why claimant has no permanent impairment.

Claimant underwent a second FCE that is made a part of the record. That FCE found claimant gave valid effort in the evaluation and had permanent restrictions. (Claimant's Ex. 2)

Dr. Bansal evaluated claimant one time for an IME. Dr. Bansal found claimant had a permanent impairment. This is based, in part, on range of motion studies detailed in Dr. Bansal's report. Dr. Bansal's opinions regarding permanent impairment are more detailed than the opinions given by Dr. Boulden. I am able to follow and understand how Dr. Bansal arrived at finding that claimant had a permanent impairment.

Claimant underwent three courses of injections for his lumbar spine. Dr. Boulden opined claimant had no permanent impairment based, in part, on a record not in evidence. Dr. Bansal's opinions regarding permanent impairment are more detailed than those of Dr. Boulden. Claimant has been found to have permanent restrictions based upon a valid FCE. Based on the above detailed factors, it is found claimant has carried his burden of proof he sustained a permanent impairment from his April 2016 fall.

The next issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

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.

A loss of earning capacity due to voluntary choice or lack of motivation to return to work is not compensable. Rus v. Bradley Puhrmann, File No. 5037928 (Appeal Decision December 16, 2014); Gaffney v. Nordstrom, File No. 5026533 (App. September 8, 2011); Snow v. Chevron Phillips Chemical Co., File No. 5016619 (App. October 25, 2007). Copeland v. Boone Book and Bible Store, File No. 1059319 (App. November 6, 1997). See also Brown v. Nissen Corp., 89-90 IAWC 56, 62 (App. 1989) (no prima facie showing that claimant is unemployable when claimant did not make an attempt for vocational rehabilitation).

Claimant was 50 years old at the time of hearing. He did not complete the sixth grade. Claimant has done road and concrete construction and carpentry work. Claimant has also worked in meat production facilities. Claimant has worked mostly in manual labor jobs. He has a valid FCE that would restrict him from returning to work to most of his prior jobs.

The record indicates BHJ was accommodating claimant's work restrictions. Claimant was terminated from BHJ after he failed to show up to work, and did not contact his employer. Claimant has not looked for work since leaving BHJ. Claimant has no driver's license, which limits his ability to work. Claimant was also under probation for alcohol related offenses at the time of hearing, which also limits his ability to find work. At the time of hearing claimant was working part time for a friend doing roofing and hanging sheetrock. Claimant testified he only did a minimal amount of light work while doing roofing and hanging sheetrock. The very nature of those jobs suggests claimant is not working within his lifting, and other restrictions, detailed in the FCE. When all relevant factors are considered, it is found claimant has a 20 percent industrial disability or loss of earning capacity.

The next issue to be determined is if claimant is due reimbursement for Dr. Bansal's IME.

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. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

In a note dated June 1, 2017, Dr. Boulden, the employer-retained expert, opined claimant had no permanent impairment. (Jt. Ex. 4, p, 12) In a September 28, 2017 report, Dr. Bansal, the employee-retained physician, gave his opinions of claimant's permanent impairment. Given the chronology of the reports, it is found claimant has carried his burden of proof he is due reimbursement for Dr. Bansal's IME.

The next issue to be determined is whether claimant is entitled to 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).

Claimant has been found to have a permanent impairment. Claimant was released from care by Dr. Boulden in May of 2017. Claimant testified he has continued lower back pain. Given this record, it is found claimant has carried his burden of proof he is entitled to alternate medical care. Defendants shall provide reasonable care for claimant's lower back pain.

The final issue to be determined is whether claimant is due reimbursement for costs. Specifically, claimant seeks reimbursement for his FCE with Integrity Physical Therapy.

876 IAC 4.33 indicates, in relevant part:

Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees

and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

Rule 4.33 allows for the taxation of reasonable costs associated with obtaining two reports of medical providers. The relevant inquiry with regard to taxation of the FCE costs in question is whether the FCE was required by a medical provider as necessary for the completion of a medical report. In this instance, if the FCE was ordered to evaluate the claimant's permanent disability and need for restrictions, the cost is a reasonable cost under Rule 876 IAC 4.33. If it is not, taxation of costs of the FCE is inappropriate.

Dr. Bansal did not order the FCE with Integrity Physical Therapy. The FCE does not fall under a reimbursable cost under Rule 876 IAC 4.33. Given this, claimant is not due reimbursement for the FCE.

ORDER

Therefore it is ordered:

That defendants shall pay claimant one hundred (100) weeks of permanent partial disability benefits at the rate of three hundred four and 77/100 dollars ($304.77) per week commencing on May 18, 2017.

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

That defendants shall pay interest on unpaid weekly benefits as ordered above and as set forth in Iowa Code section 85.30.

That defendants shall receive a credit for benefits previously paid.

That defendants shall provide claimant with reasonable medical care for his lower back condition.

That defendants are not liable for costs related to the Integrity Physical Therapy FCE.

That defendants shall pay all other costs.

That defendants shall file subsequent reports of injury as required by this agency under Rule 876 IAC 3.1(2).

Signed and filed this 23rd day of February, 2018.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.