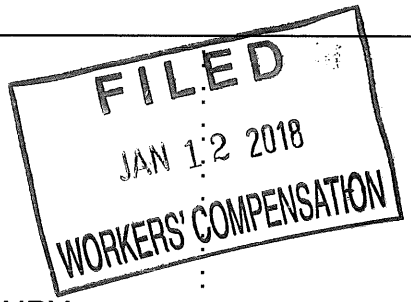
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



WILLIAM L. SEARCY, Claimant, vs. ANDERSON ERICKSON DAIRY, Employer, and TRAVELERS INDEMNITY CO. OF CT., Insurance Carrier, Defendants.	File No. 5056942 A R B I T R A T I O N D E C I S I O N Head Notes: 1402.40, 1801, 2501 2502, 2907

STATEMENT OF THE CASE

Claimant, William Searcy, filed a petition in arbitration seeking workers' compensation benefits from Anderson Erickson Dairy (AE), employer, and Travelers Indemnity Company of Connecticut, insurance carrier, both as defendants. This case was heard on September 26, 2017 in Des Moines, Iowa with a final submission date of October 18, 2017. The record in this case consists of Joint Exhibits 1 through 6, Claimant's Exhibits 1 through 12, Defendants' Exhibits A and B and the testimony of claimant.

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 the injury is a cause of permanent disability; and if so
2. The extent of claimant's entitlement to permanent partial disability benefits.
3. Commencement date for payment of permanent partial disability benefits.
4. The extent of claimant's entitlement to temporary benefits.

5. Whether there is a causal connection between the injury and the claimed medical expenses.

6. Costs.

FINDINGS OF FACT

Claimant was 46 years old at the time of hearing. Claimant has a GED. Claimant has a commercial driver's license (CDL).

Claimant has worked at fast food restaurants. He has worked framing houses. Claimant has worked as a heavy equipment operator. Claimant began employment with AE in 2003.

Claimant worked a number of different jobs while employed with AE. They include, but are not limited to, loading trucks, driving a delivery route, and operating a molding machine that made plastic gallon jugs for milk. Claimant testified all his jobs with AE were very physical.

Claimant's prior medical history is relevant. Claimant testified he had prior work-related back injuries with AE in 2007 and 2008. (Exhibit A, page 2; Deposition pp. 7-8)

Claimant testified that at the time of the injury he was working molding machines with AE. On August 5, 2014 claimant was injured while working overtime in cooler relief. Claimant testified he was loading gallons of milk on trucks, when he stood up, and felt a sharp pop in his lower back. Records indicate pain caused claimant to drop to his knees. The accident happened at the end of the shift and claimant went home from work. (JE3-19-22)

On August 6, 2014 claimant was evaluated by Dale Grunewald, D.O. for lower back pain. Records from that date indicate this type of injury had happened ". . . 3 times in the past and typically takes 3 days of rest to resolve." (JE 1-a-1) Claimant was assessed as having a lower back sprain and was to have x-rays and provided medication. (JE1-a-1-3)

Claimant returned in followup the next day with Dr. Grunewald with continued complaints of pain. An x-ray showed degenerative changes at L5-S1. Claimant was prescribed physical therapy, medication, and taken off work until August 10, 2014. (JE1-a-4-10; JE1-b)

Claimant began attending physical therapy on August 8, 2014. Claimant's pain at the first physical therapy appointment was at a level 7 on a scale where 10 is excruciating pain. (JE1-e-1)

Physical therapy notes from August 18, 2014 note claimant's pain had improved by 70 percent. (JE1-c-5)

In an August 22, 2014 physical therapy visit claimant noted he was feeling 90 to 95 percent better. Claimant was doing all work and daily activity without increase in symptoms. Claimant indicated a zero level of pain on a scale of 10. Claimant was discharged from physical therapy. (JE1-c-6) At discharge it was noted that on August 8, 2014 claimant had an Oswestry score of 74. On August 22, 2014 claimant's Oswestry score was 6.

According to the Journal of Physiotherapy, the Oswestry disability questionnaire (ODQ) is used to assess disability with people with lower back issues. The questionnaire is scored from 0-100. A higher Oswestry score is indicative of a higher disability. Scores from 0-20 indicate minimal disability. Journal of Physiotherapy, Owestry Disability Questionnaire available at http://www.journalofphysiotherapy.com/article/S0004-9514(05)70016-7/pdf See also Oswestry Low Back Pain Disability Questionnairehttp://www.rehab.msu.edu/_files/_docs/oswestry_low_back_disability.pdf

On October 29, 2014 claimant was evaluated by Richard Bratkiewicz, M.D. Claimant indicated ". . . he is back to his baseline having minimal pain and feels he can do the full duties of his job as he has been doing." (JE1-d-1) Claimant was assessed as having a lower back strain with resolution. Claimant was found to be at maximum medical improvement (MMI). Claimant was released to full duty. (JE1-d-1-2)

Claimant testified in deposition he told Dr. Bratkiewicz he was at baseline and had minimal pain. Claimant also testified in deposition that at that time he told Dr. Bratkiewicz he felt he could return to work at full duty. (Ex. A, p. 13; Depo. pp. 39-40) Claimant testified he returned to work and worked full time until November 30, 2015.

Claimant testified at hearing he re-aggravated his back on June 23, 2015. (Tr. pp. 36, 84)

On June 23, 2015 claimant was evaluated by Dr. Grunewald. Claimant was seen for a flare-up of lower back pain. Claimant was assessed as having a low back strain. He was recommended to have an MRI and treated with medication. (JE1-a-12-14)

On June 25, 2015 claimant had a lumbar MRI. It showed degenerative changes in the lumbar spine. (JE1-c)

Claimant returned to Dr. Grunewald. Claimant's symptoms had improved. Claimant was assessed as having lower back strain. He was referred to an orthopedic specialist. (JE1-a-15-18)

On October 21, 2015 claimant was seen by John Rayburn, M.D. with complaints of lower back pain. Claimant had 1-1/2 years of lumbar back pain. Claimant's back pain had been more constant as of late. The nerve block was recommended as a treatment option. (JE1-f-1-5)

On November 3, 2015 claimant underwent a bilateral L2-L5 medial branch block. The procedure was performed by Dr. Rayburn. (JE1-f-8-9)

On November 10, 2015 claimant had a second medial branch block. (JE1-f-12-13)

On November 12, 2015 claimant underwent a right L2-L5 medial branch radiofrequency ablation. The procedure was performed by Dr. Rayburn. (JE1-f-15) Claimant underwent a second ablation on December 1, 2015. (JE1-f-16)

In letters dated February of 2017 and April of 2017 claimant's counsel requested authorization for treatment for claimant. In emails dated February of 2017 and April of 2017 defendants' counsel denied authorization, as defendants believed the August of 2014 injury was temporary in nature. (Claimant's Exs. 9, 10, 11)

In a May 22, 2017 report, Farid Manshadi, M.D. gave his opinions of claimant's condition following an independent medical evaluation (IME). Claimant had continued lower back pain. Claimant worked as a chauffeur. Claimant took over-the-counter medication for pain. Dr. Manshadi opined claimant's back pain was related to his work at AE and to his injury of August 5, 2014. He found claimant at MMI as of May 3, 2017. He recommended claimant not lift more than 20-30 pounds. He also restricted claimant from repetitive twisting, bending or stooping. He opined claimant had a 5 percent permanent impairment to the body as a whole based on a finding that claimant fell under the DRE Category II of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Claimant's Ex. 1)

In deposition, Dr. Manshadi indicated he did not reference claimant's prior back injuries of 2007 and 2008 because he did not believe he was furnished with that information. (Ex. A; Depo. pp. 11-16) Dr. Manshadi testified he thought claimant had back problems between October of 2014 and June of 2015, but he could not recall any specific documents regarding treatment during these periods. Dr. Manshadi testified he had no recollection if claimant had any treatment between October of 2014 and June of 2015. (Ex. A; Depo. pp. 20-22)

On May 31, 2017 claimant underwent a functional capacity evaluation (FCE). Claimant was found to give consistent effort. Claimant was found to be able to work in the mid-medium work category and to lift up to 35 pounds occasionally. (Ex. 2)

In a July 10, 2017 report Phil Davis, M.S., gave his opinions of claimant's vocational opportunities. He opined claimant's ability to obtain or maintain employment was reduced by greater than 70 percent. (Ex. 3)

Claimant testified he was terminated from AE from a drug screen testing issue, unrelated to his workers' compensation claim. He said his last day of work was November 30, 2015, and that he was terminated from employment on December 4, 2015.

Claimant testified that after leaving AE he worked for approximately 1-1/2 months for Courier Concepts delivering medical supplies. Claimant said he left Courier over a dispute in pay. (Ex. A; Depo. pp. 49-50) Claimant said he later worked for Luxor Limo. He said he worked for Luxor as a driver until approximately April of 2017. He said he left Luxor over a dispute in pay. (Ex. A; Depo. pp. 57-60)

Claimant testified, at hearing, that at the time of hearing he was working for Majestic as a driver. At hearing claimant said he earned between $14.00 to $16.00 an hour depending upon the vehicle he drove. In answers to interrogatories, claimant indicated in 2011 through 2013 he earned between $17.00 to $20.00 an hour for Majestic. Claimant testified he thought his answers to interrogatories were incorrect regarding hourly wages. (Tr. pp. 90-92)

CONCLUSIONS OF LAW

The first issue to be determined is whether claimant's injury resulted in a permanent disability.

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 as a result of his August 5, 2014 date of injury. Records from Dr. Grunewald indicate claimant had prior temporary back problems that took three days of rest to resolve. (JE1-a-1-3)

As noted in the finding of facts, claimant underwent physical therapy for his August 2014 injury. Physical therapy records indicate claimant's symptoms improved with treatment over time. On an August 22, 2014 physical therapy visit, claimant noted a 90 to 95 percent improvement in pain. Claimant had a zero level of pain, on a level where 10 was excruciating pain. On discharge, claimant was found to have an Oswestry score of 6 percent. (Ex. 1-C-6)

On October 29, 2014 claimant was evaluated by Dr. Bratkiewicz. Claimant indicated he had returned to work. Claimant was assessed as having a lower back strain with resolution. He was found to be at MMI. (Ex. 1-D, pp. 1-2)

Claimant testified he aggravated his back in June of 2015. (Tr. pp. 36, 84)

Claimant did not receive treatment for his lower back until he was seen by Dr. Grunewald on June 23, 2015. (Jt. Ex. 1-A, pp. 12-14)

Only one expert has opined that claimant has a permanent disability from the August 5, 2014 injury. That is Dr. Manshadi who evaluated claimant one time for an IME. Dr. Manshadi indicated: ". . . I believe Mr. Searcy's back injury is related to his work activities while he was working at AE Dairy and specifically on 08/05/14." (Claimant's Ex. 1, p. 3)

There are some problems with Dr. Manshadi's opinion. First, as noted, claimant testified an aggravation of his back injury in June of 2015. (Tr. pp. 38, 94) Dr. Manshadi relates claimant's permanent impairment to his back to an August 5, 2014 date of injury, and makes no mention of a re-aggravation from June of 2015.

Second, Dr. Manshadi's opinions offer no explanation or analysis, in either his report or his deposition, regarding gaps in treatment. There is no explanation why claimant went for approximately eight months, from October 29, 2014 when his back problems were found to be resolved, to treatment on June 23, 2015, and yet claimant's permanent impairment related to the August 2014 event.

Dr. Manshadi gives no explanation why claimant had a 6 percent Oswestry score in October 2014, had no treatment for eight months, and yet his permanent impairment relates to an August 5, 2014 incident.

Dr. Manshadi offers no explanation why claimant had an eight-month lapse in treatment, yet his permanent impairment relates to an August 5, 2014 incident. Dr. Manshadi's opinions do not take into account that claimant had a June of 2015 aggravation of back pain. Dr. Manshadi offers no explanation why all objective evidence indicates claimant's back symptoms resolved by October 29, 2014, and yet his back pain in June of 2015 relates to an August 5, 2014 injury. Because of this lack of explanation, and inconsistencies, Dr. Manshadi's opinions regarding permanent impairment and causation of permanent impairment are found not convincing.

Claimant testified he had an aggravation of his back condition in June of 2015. All objective evidence from October 2014 indicates claimant's back condition, from the August of 2014 incident, had resolved. Dr. Manshadi's opinion regarding claimant's permanent impairment and cause of permanent impairment are found not convincing. Based upon these facts, it is found claimant has failed to carry his burden of proof he sustained permanent impairment related to the August 5, 2014 date of injury.

As claimant has failed to carry his burden of proof he sustained a permanent impairment from the August 15, 2014 date of injury, the issues regarding claimant's entitlement to permanent partial disability benefits and the commencement date of benefits are moot.

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

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1).

Claimant was off work from August 6, 2014. He did not return to work until August 14, 2014. (JE1-b) Claimant is due temporary total disability benefits from August 6, 2014 through August 14, 2014.

Claimant is not due any temporary benefits for the periods of time off work in 2015. This is because claimant has failed to carry his burden of proof that time taken off in 2015 relates or was caused by the August 5, 2014 date of injury.

The next issue to be determined is whether there is a causal connection between the injury and the claimed medical expenses.

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).

As noted, claimant failed to carry his burden of proof his August 5, 2014 injury resulted in a permanent disability. Facts in this case indicate claimant's temporary disability was resolved on or about August 29, 2014. As a result, defendants are not liable for any medical charges incurred after October 29, 2014.

The final issue to be determined is costs. The claimant has attached his request for costs to the hearing report. Claimant seeks $4,588.29 in costs. A number of these costs that are sought are not recoverable costs. For example, claimant seeks reimbursement for a filing fee for a date of injury of June 23, 2015. Claimant seeks $100.00 for an opinion letter from Dr. Manshadi that was not made a part of the record. Claimant also seeks $200.00 for a pre-deposition conference with Dr. Manshadi. None of these are recoverable costs.

Dr. Manshadi's IME report is not a recoverable cost under Iowa Code section 85.39. This is because the physician retained by defendants did not give an opinion of permanent impairment prior to Dr. Manshadi's IME opinion. (See Des Moines Area Regional Transport Authority v. Young, 867 N.W.2d 839, 847 (Iowa 2015). (Section 85.39 only allows the employee to obtain an IME after the employer's exam if to satisfy with the evaluation arranged by the employer).

The FCE expense is not a recoverable expense, as it was not requested by a treating or an IME physician. See 876 IAC 4.33.

Claimant failed to prove he had a permanent impairment caused by the August 2014 date of injury. For this reason the costs associated with the vocational expert are not recoverable costs.

Rule 876 IAC 4.33 indicates costs are to be assessed at the discretion of the deputy commissioner or the workers' compensation commissioner at hearing. With that in mind, defendants are liable only for the costs of the transcript and the filing fee.

ORDER

Therefore it is ordered:

That claimant shall take nothing in the way of permanent partial disability benefits from this matter.

That defendants shall pay claimant temporary benefits from August 6, 2014 through August 14, 2014 at the rate of six hundred twenty-six and 05/100 dollars ($626.05) per week.

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

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

That defendants shall receive credit for benefits previously paid.

That defendants shall only pay costs as detailed above.

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

Signed and filed this 12th day of January, 2018.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Stephen D. Lombardi
Katrina M. Phillip
Attorneys at Law
5000 Westown Pkwy., Ste. 440
West Des Moines, IA 50266
sdlombardi@aol.com
katrina.phillip8@gmail.com

James W. Bryan
Attorney at Law
1089 Jordan Creek Pkwy., Ste. 360
West Des Moines, IA 50266
jbryan@travelers.com

JFC/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.