BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DANIEL ZEHR, Claimant, vs. LOECKE BUILDING SERVICE, Employer, and NATIONWIDE INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5053442 ARBITRATION DECISION Head Note Nos.: 1803; 2907

STATEMENT OF THE CASE

Daniel Zehr, claimant, filed a petition in arbitration seeking workers' compensation benefits against Loecke Building Service, employer, and Nationwide Mutual Insurance Company, insurer, for an accepted work injury date of September 23, 2013.

This case was heard on March 3, 2017, in Cedar Rapids, Iowa. The case was considered fully submitted on March 24, 2017, upon the simultaneous filing briefs.

The record consists of claimant's exhibits 1-7, the testimony of Donald Loecke, the claimant, and his wife, Shannon Zehr.

ISSUES

1. The extent of claimant's industrial disability;

2. The commencement date of permanent partial disability, if any.

3. Whether claimant is entitled to an assessment of costs.

STIPULATIONS

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of

those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The parties agree claimant sustained an injury arising out of and in the course of his employment on September 23, 2013. They agree that if there is a permanent disability found it is industrial in nature. They further stipulate that at the time of the injury, claimant's gross earnings were $853.47 per week and that the claimant was married and entitled to four exemptions. Based on those foregoing numbers, the weekly benefit rate is $567.03.

FINDINGS OF FACT

Claimant was a 46 year old person at the time of the hearing. His educational background consists of high school diploma followed by some agricultural studies at UNI. He quit after three years to begin farming full time. For twelve years, he raised hogs and crop farmed. He left farming to go into construction work.

He started with defendant employer in 2005 as a foreperson. The defendant employer is a small company specializing in light commercial building such as school work, hospital, some multi-residential and healthcare construction. During the time claimant worked at defendant employer, he was promoted from foreperson to superintendent.

In his capacity as a superintendent, claimant would be involved in all aspects of running a crew including concrete work, framing and finishing work.

The owner acknowledged that claimant was a good employee who had never been disciplined or reprimanded. Claimant eventually left defendant employer in May 2015 after the injury to take a management-level position that would not require as much hands-on physical work. Unfortunately, at claimant's new company, he is still required to engage in physical activity that aggravates his work injury. He has low back pain that radiates into his right leg and left buttocks.

He testified that he is not able to participate in physical leisure activities such as kayaking and cannot attend wrestling meets. Sitting and standing for any significant periods of time results in pain. His wife testified similarly.

He does not believe he could return to farming and has some doubts as to whether he can continue in his current position. He is currently earning more today at his new position than when he was employed with defendant employer.

Mr. Loecke testified that claimant did not complain about the weight of his tool belt, nor did he indicate that there were job duties he could not do. However, Mr. Loecke acknowledged that claimant continued to complain of pain after his injury and that there were discussions about work restrictions and how to avoid aggravating claimant's condition:

A. Correct. We had conversations about recognizing and avoiding the things that would aggravate it.

Q. Tell me about those conversations.

A. I think it was a matter of, you know, make sure we're letting the other guys do those tasks that are going to – you know, the heavy lifting and those type of things.

Q. I assume it's because you wanted to keep him on, if you could?

A. Absolutely.

(Ex. 2, p. 5)

On September 23, 2013, claimant was gluing a pad onto a subfloor when he felt something go wrong in his back. Claimant initially sought treatment at Manchester Chiropractic. He had previously had back pain which he treated with chiropractic care but when the pain did not abate and began to radiate into the right leg, he sought out additional treatment.

On October 1, 2013, claimant was seen by Michelle Radloff, nurse practitioner. (Ex. 5, p. 3) Claimant had radiating pain down the right side past the knee. Ms. Radloff documented paravertebral tenderness, more so on the right than the left. She gave claimant a prescription for Naproxyn and a prednisone burst. She also imposed work restrictions.

Claimant followed up with Ms. Radloff on October 9, 2013. (Ex. 5, p. 5) He reported mild improvement but continued to have radiating pain. Ms. Radloff ordered an MRI.

The MRI was conducted on October 10, 2013, and the results showed a central to right paracentral disk protrusion at L5-S1 with effacement of the thecal sac and narrowing of the right lateral recess. (Ex. 5, p. 7)

Claimant was sent to anesthesiology for an epidural steroid injection that was completed on October 22, 2013. (Ex. 5, p. 10) A second injection was administered on November 6, 2013. (Ex. 5, p. 11)

Claimant continued to have pain. William Barnill, the nurse anesthetist, recommended claimant undergo a surgical evaluation. (Ex. 5, p. 14) On November 22, 2013, Ms. Radloff made the same recommendation. (Ex. 5, p. 15)

Claimant was then seen by Robert Broghammer, M.D., on December 30, 2013, for an IME. (Ex. 4, p. 2) During the examination, he exhibited slight right leg symptomotology. Dr. Broghammer concluded claimant had a proven low back strain, ongoing lumbago, right sacroiliac joint dysfunction, and right-sided lower extremity

radiculopathy. (Ex. 4, p. 2) Dr. Broghammer affirmed that a neurosurgical consult was appropriate. (Ex. 4, p. 3) H

The neurosurgical evaluation took place on January 22, 2014, wherein Chad D. Abernathey, M.D., did not find claimant to be a surgical candidate and recommended claimant continue with conservative care. (Ex. 7, p. 1)

Claimant returned to Dr. Broghammer's office on February 19, 2014. At that time, he had completed 8 sessions of physical therapy with some improvement. (Ex. 4, p. 11) Dr. Broghammer adjusted the work restrictions and ordered more physical therapy. (Ex. 4, p. 11)

> PLAN: I have advanced Mr. Zehr's restrictions to 25-30 pound lift limit, continue on limited lifting below knee and above shoulder level, and no excessive bending. I told him to advance his activities as tolerated through physical therapy. We will continue physical therapy at this time for another 3-4 weeks. We will plan on seeing the worker back in 3-4 week's time, at which time I anticipate he will be ready for discharge or close to being ready for discharge. I don't anticipate treating Mr. Zehr beyond the next six week's timeframe. I did discuss his anticipated clinical course with Mr. Zehr today. He hopes to be back at a full go at his next appointment with us.

(Ex. 4, p. 11)

On March 17, 2014, there was a discussion between the case manager and Dr. Broghammer about returning claimant to work. Dr. Broghammer did not feel it was wise to return claimant to work at the time. (Ex. 4, p. 16)

Ultimately, Dr. Broghammer released claimant from care on April 9, 2014.

> PLAN: As before, Mr. Zehr still believes he needs further treatment. I did try and reassure him today; however, he is requesting ongoing therapy and in order to effectively close his case, I have asked therapy to continue through this week and next week for a total of no more than 4 additional visits. I have maintained Mr. Zehr on a 50 pound lifting restriction with no excessive bending and advance as tolerated. I did discuss with Mr. Zehr today to plan to return him to full duty at some point. I told him at some time we need to simply close his case due to the fact that we are simply treating the subjective symptoms with no objective findings. To that end, I have returned Mr. Zehr to return to work full duty as of April 17, 2014. The reason for choosing this date is it will allow Mr. Zehr approximately 1-2 days of normal full work activities to see how he tolerates this. I have no return appointment scheduled for Mr. Zehr in our clinic.

> I did instruct Mr. Zehr if he has increased symptoms, he could contact your office. As of April 17, 2014, he will be considered at maximum medical improvement with no permanent partial impairment and no further treatment expected, recommended or warranted based on the remote history of lumbar strain with a negative neurosurgical opinion and normal physical examinations.
>
> I anticipate Mr. Zehr may have some increased symptomatology but I cannot reasonably continue to treat him given the remote history of lumbar strain with 18 physical therapy visits occurring thus far, with an anticipated additional 4 physical therapy visits for a total of 22. For a simple lumbar strain, this goes a bit beyond what one would normally expect to be the maximum amount of treatment. Hopefully this will help to close his case.

(Ex. 4, p. 20)

Because he continued to have symptomatology, claimant returned to his primary care provider for treatment. Mr. Barnhill provided injections and after the facet periarticular block at L4-L5 and L5-S1, claimant described approximately 75 percent relief. (Ex. 5, p. 18) Claimant told Mr. Barnhill that he was very active and "doing everything that he needs to do and he is not taking any medications." (Ex. 5, p. 18)

Claimant was not permitted additional injections as insurance has not been willing to pay for these.

Defendants then directed claimant to see Kenneth McMains, M.D. (Ex. 4, p. 33) Dr. McMains reviewed some of the records and had a face to face interview as well as an examination. (Ex. 4, p. 33) Dr. McMains concluded that claimant had full range of motion and normal results for all objective tests. (Ex. 4, p. 34) He also documented that claimant was "pain free, with no leg involvement and no back pain." (Ex. 4, p. 34) As a result, Dr. McMains concluded:

> Following today's examination, it appears the worker has had several episodes of recurrent lumbar spondylosis, with some nerve root irritation, especially at the L5-S1 area on the right. Based on his MRI and his history, it appears likely that Mr. Zehr will have multiple episodes of recurrent back pain at different times, based on day-to-day activities, as well as work. The worker understands that if he can avoid lifting and twisting that will give him some protection against increased symptoms. We did spend some time discussing importance of treating the leg if it becomes more of an issue, especially if he starts tripping, based on any weakness of the ankle area on the right.
>
> From records, interview, and exam, it appears that on the date of 09/23/13, the worker experienced an acute exacerbation of a chronic condition that responded to conservative treatment but has experienced

> occasional flare ups since. This led to a second exam in our clinic in 2014, with advice that with continued activity his low back pain should improve. The worker had a neurosurgical consult showing that he is a nonsurgical candidate, with no evidence of radicular symptoms at this time.
>
> Mr. Zehr is aware that at some future date he may need surgery if he has further involvement of the S1 nerve on the right, but it would be due to a chronic degenerative condition and not related to any specific event occurring in the past, such as the 09/23/13 event.
>
> There would be no permanent partial impairment and no restrictions based on the 09/23/13 event. If the worker develops increased low back pain with his day-to-day activities, he may need to have his primary care provider write him some permanent restrictions, based on a chronic degenerative process.

(Ex. 4, p. 34)

Claimant was then seen for an IME with Mark Taylor, M.D., on January 5, 2017. (Ex. 3) Dr. Taylor documented that claimant had mild to moderate tenderness in his low back and reduced range of motion. Straight leg testing was positive on the right. (Ex. 3, p. 6) Dr. Taylor concluded claimant sustained a spinal injury in the low back with persistent pain and right lower extremity paresthesias. (Ex. 3, p. 7) He attributed this to claimant's work injury and assigned the maximum medical improvement (MMI) date as of March 10, 2015, when claimant received his last injection from Mr. Barnhill. Dr. Taylor believed claimant should be seen for pain management and assigned a 7 percent whole person impairment and recommended the following restrictions:

> Recommendations for Further Care
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> Mr. Zehr apparently benefited from the injections provided by Mr. Barnhill and therefore he could return to Mr. Barnhill or he could undergo referral to another pain management specialist in Cedar Rapids, or even Dubuque. Another option would be the Cedar Falls/Waterloo area. He would benefit from following with a physiatrist, or a pain management specialist, who could also assist with medication management and could also order additional physical therapy, if indicated. If the symptoms improve further with additional injections or procedures, he may then be able to participate more consistently with a physical therapy program in order to maximize his core strength and range of motion.
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> Maximum Medical Improvement Status

Assuming no further medical care, I would recommend a date of maximum medical improvement of March 10, 2015. At that point, he was still receiving benefit from the most recent injection with Mr. Barnhill.

Impairment rating

Based upon the reasonably demonstrable objective findings, and using the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition*, I would assign impairment as follows:

In this circumstance, I would recommend the use of the DRE Methodology for an impairment rating, which can be identified in Table 15-3, on page 384. Mr. Zehr would fall within DRE Lumbar Category II due to his nonverifiable radicular complaints as well as his asymmetric loss of motion and persistent, and now chronic, low back pain. I would assign a 7% whole person impairment rating.

Restrictions

Mr. Zehr has performed physically demanding work for quite a few years, including dating back to his farming activities. Presently, absent additional treatment, I would recommend that he try and avoid lifting or carrying more than approximately 35-40 pounds at waist level, 30 pound between knee and chest level, and 20 to 25 pounds or less below knee level or above chest level, all on a rare to occasional basis, or up to one to two lifts per hour.

He should have the ability to alternate sitting, standing and walking as needed for comfort. He complained on several occasions that he finds it difficult to remain in one spot for very long, which is a common complaint among individuals with chronic back conditions. I would recommend squatting, kneeling, and bending on a rare to occasional basis. He can climb ladders rarely but I would recommend only two or three steps, if at all possible. He can climb stairs on an occasional basis. He can travel occasionally but should have the ability to stop and get out of the vehicle as needed to stretch and move around.

(Ex. 3, p 8)

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 injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only

cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

The primary issue to be resolved is the extent of claimant's disability. The workers' compensation doctors have all concluded that claimant has no residual impairment arising out of the September 23, 2013, work injury. However, the doctors also expressed no surprise at lingering symptoms and even anticipated claimant may have increased symptoms as time went on.

Dr. Barnhill wrote "I anticipate Mr. Zehr may have some increased symptomatology..." (Ex. 4, p. 20) Dr. McMains wrote that "Mr. Zehr will have multiple episodes of recurrent back pain at different times, based on day-to-day activities, as well as work. The worker understands that if he can avoid lifting and twisting that will give him some protection against increase symptoms." (Ex. 4, p. 34)

Claimant did, in fact, have increased symptomatology as was evidenced by his recent examination by Dr. Taylor. Claimant testified credibly that he cannot continue to do the physical aspects of his current position and that he avoids recreational activities that would aggravate his low back condition.

Defendants argue that the back pain suffered by the work injury was merely a temporary aggravation, but the claimant has not returned to his pre-injury condition. He has continued to have unrelieved back pain. The March 2015 injection by Mr. Barnhill has had the most relief, but that relief was temporary.

While claimant has continued in a similar position as he was prior to his injury and while he is earning more today than he was prior to his injury, the claimant's credible testimony is that he can no longer do the work he was doing. Dr. Taylor recommended claimant do less lifting and avoid twisting and bending. Dr. McMains also recommended similar restrictions.

Despite claimant's injury, he has continued to work through his pain.

Based on Dr. Taylor's restrictions and Dr. McMains' restrictions along with the testimony of the claimant, with motivation to return to work, it is found that claimant has sustained a 30 percent industrial disability. Heavy manual labor, which represents much of his past work experience, is outside of his capabilities.

The next issue is the appropriate commencement date of permanent partial disability.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Claimant was released to work and did return to his primary position as of April 17, 2014. He has worked continuously since that date without restrictions. Therefore, the appropriate commencement date of permanent partial disability would be April 17, 2014.

Claimant is entitled to ongoing care related to his low back including but not limited to pain management and injections.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant one hundred fifty (150) weeks of permanent partial disability benefits at the rate of five hundred sixty-seven and 03/100 dollars ($567.03) per week from April 17, 2017.

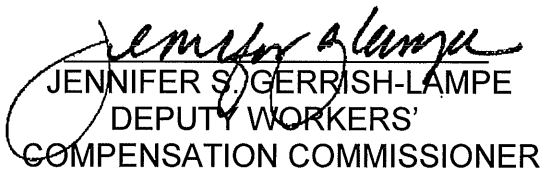
That defendants shall pay accrued weekly benefits in a lump sum.

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

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

That defendant shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

Signed and filed this 25th day of July, 2017.



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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.