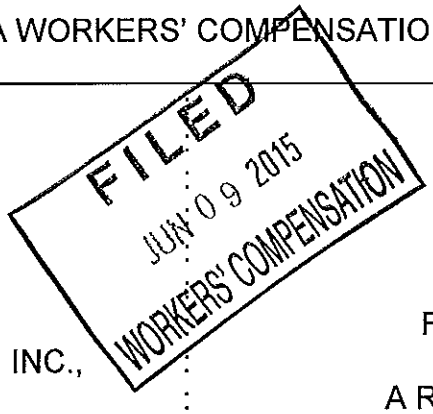
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



ETHAN EASTON,

Claimant,

vs.

DES STAFFING SERVICES, INC.,

Employer,

and

TRAVELERS PROPERTY CASUALTY CO. OF AMERICA,

Insurance Carrier,
Defendants.

File No. 5046889

A R B I T R A T I O N

D E C I S I O N

Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Ethan Easton, has filed a petition in arbitration and seeks workers' compensation benefits from DES Staffing Services, Incorporated, employer, and Travelers Property Casualty Company of America, insurance carrier defendants.

This matter was heard by Deputy Workers' Compensation Commissioner Ron Pohlman on April 17, 2015 at Des Moines, Iowa. The record in the case consists of claimant's exhibits 1-8; defendants' exhibits A-C as well as the testimony of the claimant.

ISSUES

The parties submitted the following issues for determination:

1. Whether the work injury of January 3, 2014 was the cause of any permanent disability; and

2. The extent of claimant's entitlement to permanent partial disability pursuant to Iowa Code section 85.34(2)(u).

FINDINGS OF FACT

The undersigned having considered all of the testimony and evidence in the record finds:

The claimant at the time of the hearing was 23 years old. He is a high school graduate with no additional education. In school the claimant took special education classes, as he had learning and speech difficulties. He currently resides in Leon, Iowa. His work experience consists solely of manual labor. Primarily he has worked in hog confinement systems and construction jobs. In December of 2013 he took a job with DES Staffing, a temporary employment service. He was assigned to a job stacking trusses. His job was to stack the trusses and then band them. This was a full-time job, and he was earning $10.00 per hour. On January 3, 2014 he sustained a work injury when he got his boot caught in a truss and was thrown forward. His body was twisted, and he was pinned or stuck underneath a truss that was on his back. A coworker had to help get him out from underneath the truss. The claimant thought he was okay and worked the rest of the day but began experiencing pain the following morning. He reported his injury and was provided care with Susan Gilbert, ARNP. Ms. Gilbert treated the claimant with medication, physical therapy and restrictions. The claimant contends that he still experiences back and left leg problems, but his neck problems have resolved.

The employer initially provided work for the claimant within his restrictions sorting cans at Mosaic. He did this work for about a week and felt that it was aggravating his back pain. The claimant went to Jenny at DES Staffing Services, as she requested that the claimant complete written incident reports about his work accident and explain how he could have avoided this injury. The claimant asked for a copy of those reports and informed Jenny that he had hired an attorney. Jenny denied the claimant's request for copies, and the claimant apparently took this as job termination. This took place three or four weeks after the work injury. Seven months later the claimant found a job in September 2014 power washing at General Construction.

On May 27, 2014 Ms. Gilbert had recommended that claimant have a functional capacity evaluation, but this was never arranged by the defendants. Claimant's attorney had the claimant undergo a functional capacity evaluation on March 4, 2015. The FCE was performed by Marc Vander Velden, DPT, CSCS and concluded:

> Based on results obtained the client is able to perform within the MEDIUM Physical Demand Strength Category of work with occasional lifting at below waist height to 45 pounds. The client carried 30 pounds. Pushing abilities were evaluated and the client pulled 40 horizontal force pounds and pushed 50 horizontal force pounds respectively.

Client demonstrated the ability to perform within the LIGHT Physical Demand Strength Category on occasional lifts at shoulder level and up. The client lifted 20 pounds to shoulder height and 18 pounds overhead.

Client demonstrated the ability to perform within the SEDENTARY Category on non material tasks within a competitive work environment such as walking and crawling which should be avoided.

(Exhibit 6, page 40)

The claimant's last medical care for treatment of the claimant's low back pain occurred on April 18, 2014. At that time Dawn Stout, BCFNP recommended physical therapy and a 40-pound weight restriction.

Defendants had the claimant evaluated by Charles Mooney, M.D. on August 19, 2014. Dr. Mooney placed the claimant at MMI effective April 18, 2014 and opined that claimant had no permanent impairment and no permanent restrictions:

ANSWERS TO SPECIFIC QUESTIONS:

1. MAXIMUM MEDICAL IMPROVEMENT:

It is my opinion that Mr. Easton has reached maximum medical improvement as it relates to date of injury of 01/03/14. Maximum medical improvement would be considered at completion of his physical therapy or final date of 04/18/14. It is my opinion that further treatment is unlikely to improve his overall complaints, and as such maximum medical improvement has been achieved.

2. If not at maximum medical improvement, what further treatment do you recommend?

It is my opinion that no additional treatment is indicated.

3. If he is at maximum medical improvement, does he have a permanent disability?

It is my opinion, based on the Guides to the Evaluation of Permanent Impairment, published by the AMA 5th edition, that Mr. Easton does not demonstrate any evidence of partial permanent impairment.

It is my opinion that no impairment is evident as there are no significant clinical findings, no observed muscular guarding or spasm, no documentable neurologic impairment, no documentable alteration in structural integrity, and no other indication of impairment related to injury or illness, and no fractures (5th edition AMA guide, page 384 DRE category 1, 0% WP).

4. Is there a need for permanent work restrictions?

It is my opinion that Mr. Easton is capable of functioning at whatever level he so desires, and that no restrictions in activity are indicated based on date of injury 01/03/14.

(Ex. A, p. 5)

Claimant's attorney had the claimant evaluated by Sunil Bansal, M.D. who issued a report January 30, 2015 opining that the claimant had a five percent permanent impairment and recommended permanent restrictions of no lifting over 30 pounds frequently from floor to waist; 45 pounds frequently from waist to shoulder and to avoid standing and walking greater than 45 minutes at a time. See Exhibit 5, pages 35-36. The claimant believes that these restrictions are consistent with his physical abilities.

Vocational Expert Phil Davis opined March 15, 2015:

When taking into consideration the restrictions set forth in the valid FCE and IME report of Dr. Bansal, his limited education, questionable ability to retrain, limited transferable skills and rural area of the state in which he resides, I would opine that without significant accommodation, or retraining, Mr. Easton's current ability to maintain gainful, substantial employment has been drastically reduced. (Ex. 7, p. 60)

The claimant has also worked for PerMar performing security work full time earning $8.00 an hour. He quit this job on January 31, 2015. He quit because of the walking and bending over and because his supervisor was showing him inappropriate pictures and making fun of him. Subsequent to this the claimant obtained a job in Creston, Iowa sweeping floors and is allowed breaks as needed. The claimant has current complaints of back and leg pain and difficulty sleeping and can walk for no more than 45 minutes.

The claimant underwent an MRI of the lumbar spine on February 14, 2014, which indicated mild straightening of the normal lumbar lordosis but was otherwise unremarkable.

REASONING AND CONCLUSIONS OF LAW

The first issue in this case is whether the work injury was the cause of any permanent disability.

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).

The last time the claimant saw a treater it was recommended that he undergo additional physical therapy, and he was given work restrictions, which have never been lifted. Further, the claimant has reported continued difficulty with lifting and walking since his work injury. Dr. Bansal has opined that the claimant has permanent impairment and permanent restrictions. Dr. Mooney has opined the opposite that the claimant has no work restrictions and no impairment. The claimant has a tendency to exaggerate his condition, but his complaints of symptoms are consistent with his injury and have been generally consistent such that the undersigned concludes the claimant has sustained some though not serious permanent disability.

The next issue is the extent of claimant's entitlement to permanent partial disability pursuant to Iowa Code section 85.34(2)(u).

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 claimant has restrictions, but those restrictions are primarily based upon his subjective complaints. He has undergone a functional capacity evaluation, and restrictions have been imposed, and those restrictions are generally consistent with the claimant's employment since his work injury. The universe of jobs for the claimant's skills, education and experience was small even before he was injured. At this point the claimant has found a job earning $12.00 an hour 40 hours a week sweeping floors and is accommodated. The claimant has suffered slight industrial disability entitling him to a ten percent industrial loss or 50 weeks of permanent partial disability benefits.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay claimant fifty (50) weeks of permanent partial disability benefits commencing February 10, 2014 at the weekly rate of two-hundred fifty-eight and 01/100 dollars ($258.01).

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30 with subsequent reports of injuries filed as directed by this agency.

Defendants shall pay the claimant for the cost of the functional capacity evaluation of eleven hundred and 00/100 dollars ($1,100.00), which was recommended by their medical provider, Susan Gilbert, but not provided pursuant to Iowa Code section 85.27.

Costs of this action are taxed to the defendants pursuant to Rule 876 IAC 4.33.

Signed and filed this 9th day of June, 2015.

Ron Pohlman

RON POHLMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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RRP/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.