BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROBERTO AYARD, Claimant, vs. CRYSTAL DISTRIBUTING SERVICES, INC., Employer, and LeMARS INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5054030 ARBITRATION DECISION Head Note Nos.: 1108.20; 1402.60; 1803; 2204; 2700

FILED
AUG 11 2016
WORKERS' COMPENSATION

STATEMENT OF THE CASE

Claimant Roberto Ayard ("Ayard") filed a petition in arbitration on April 30, 2015, alleging he sustained an injury to his back and body as a whole while working for the defendant, Crystal Distributing Services, Inc. ("Crystal Distributing"), on July 25, 2014. Crystal Distributing and the defendant, Le Mars Insurance Company ("Le Mars Insurance") filed an answer on May 18, 2015. Ayard later amended his petition to allege he sustained an injury to his back and body as a whole with mental sequela while working for Crystal Distributing.

An arbitration hearing was held on May 20, 2016, at the Iowa Workforce Development Office in Waterloo, Iowa. Attorney James Byrne represented Ayard. Interpreter Patricia Vargas-Ver Ploeg provided Spanish interpretation services during the hearing. Ayard appeared and testified. Attorney Thomas Read represented Crystal Distributing and Le Mars Insurance. Exhibits 1 through 9 were admitted into the record. The record was left open through June 13, 2016, for the receipt of post-hearing briefs. At that time the record was closed.

Before the hearing the parties completed a hearing report listing stipulations and issues to be decided. Crystal Distributing and Le Mars Insurance withdrew all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed at the time of Ayard's alleged injury.

2. Ayard sustained an injury on July 25, 2014, which arose out of and in the course of his employment with Crystal Distributing.

3. If Ayard has sustained a permanent disability, the disability is an industrial disability.

4. At the time of the alleged injury, Ayard's gross earnings were $628.86 per week, Ayard was married and entitled to five exemptions, and his weekly benefit rate is $439.09.

5. Crystal Distributing and Le Mars Insurance have accepted responsibility for Ayard's alleged back injury and have agreed to pay all causally related medical bills.

6. Although medical expenses for Ayard's alleged mental sequela injury are disputed, the fees or prices charged by providers are fair and reasonable, the treatment was reasonable and necessary, and the medical providers would testify as to the reasonableness of their fees and/or treatment set forth in the listed expenses, and the defendants are not offering any evidence to the contrary.

7. Crystal Distributing and Le Mars paid zero weeks of compensation prior to the hearing.

ISSUES

1. What is the nature of Ayard's injury?

2. Is Ayard at maximum medical improvement?

3. If Ayard is at maximum medical improvement, what is the extent of Ayard's disability?

4. If Ayard has sustained a permanent disability, is the commencement date for permanency September 25, 2014?

5. Is Ayard entitled to reimbursement for medical expenses related to his alleged mental sequela injury?

6. Is Ayard entitled to reimbursement for Dr. Bansal's independent medical examination?

7. Should costs be assessed against either party?

FINDINGS OF FACT

Ayard was born in Michoacan, Mexico, and at the time of the hearing he was 52. (Transcript, page 13) Ayard is married and is the father of five children. (Tr., p. 12) At the time of his injury, Ayard had three dependent children living with him. (Tr., p. 12) Ayard attended school through the third grade in Mexico. (Tr., p. 13; Exhibit 5, page 148) Ayard does not use tobacco. (Ex. 1, p. 46)

In 1986, Ayard moved to the United States and lived in California. (Tr., pp. 13, 18) Ayard has taken English classes, but he is not able to read or write in English. (Tr., p. 14) Ayard is able to understand simple instructions in English. (Tr., p. 13-14) Ayard does not know how to type or how to use a computer. (Tr., p. 14)

Before moving to the United States, Ayard worked in agriculture planting beans and corn and as a fisherman. (Tr. pp. 16-17) When he worked in agriculture, Ayers lifted containers of beans and corn weighing 10 to 12 pounds each throughout the day and often had to bend and squat. (Tr., p. 16) Ayard was not paid wages and received food in exchange for his labor. (Tr., p. 17) As a fisherman, Ayard lifted stones weighing 60 to 80 pounds used with fishing nets, and he was paid the equivalent of $20.00 per day in pesos. (Tr., p. 18)

After moving to California, Ayard worked in agriculture picking grapes and peaches for one to two years. (Tr., p. 19) Ayard climbed ladders to pick the fruit and placed the fruit in containers he carried on his chest. (Tr., p. 19) Ayard reported the ladders weighed 60 to 80 pounds and the containers weighed 50 to 60 pounds. (Tr., p. 19) Ayard left agriculture and accepted a position in a furniture factory where he assembled, pushed, and lifted furniture for one to two years. (Tr., pp. 19-20) The furniture weighed between 50 and 60 pounds. (Tr., p. 20)

After leaving the furniture factory, Ayard accepted a position with American Racing where he manufactured rims for car wheels. (Tr., p. 20). Ayard worked for American Racing for approximately four years. (Tr., p. 20) Ayard reported the rims came in different sizes and some weighed between 30 and 50 pounds. (Tr., p. 21)

Ayard left American Racing and returned to Mexico where he owned a retail car business and a grocery store. (Tr., p. 21) Ayard reported the beans and corn he sold at the store came in boxes weighing between 50 and 60 pounds, and he also moved bags weighing 80 to 100 pounds. (Tr., pp. 21-22)

Ayard moved back to the United States and accepted a position peeling pigs' legs for Swift in Marshalltown. (Tr., pp. 22-23) Ayard left Swift to work for Crystal Distributing in November 2001. (Tr., p. 23; Ex. 5, p. 149)

Crystal Distributing hired Ayard to pack fresh meat and to stack boxes. (Tr., p. 25) Ayard continued with the position for four to five years until he moved into his current forklift driver position. (Tr., pp. 25, 43-44; Ex. 5, p. 149) The forklift driver

position requires Ayard to drive a forklift, unload trucks, run the line, lift boxes, move pallets, and lift trash containers. (Tr., pp. 26, 43) Ayard testified the position requires him to lift boxes weighing 60 to 70 pounds, containers weighing between 50 and 60 pounds, and pallets weighing different amounts. (Tr., p. 26)

On July 25, 2014, Ayard was stacking boxes of frozen meat at work. (Tr., p. 27) Ayard testified, "[w]hen I grabbed a box, I twisted to the left. That's went I felt a pull and very severe pain in my back. And I dropped the box. It fell to the ground." (Tr., p. 27) Ayard reported the box weighed between 60 and 70 pounds and the pain he experienced was in his low back. (Tr., pp. 27-28) Ayard reported the incident to his supervisor and he was sent to Allen Occupational Health Services in Waterloo. (Tr., p. 28)

Ayard injured his back on two other occasions. He first injured his back sometime 24 to 27 years ago when he was pushing furniture. (Tr., p. 24) Ayard cannot recall receiving treatment and reported he continued with his normal duties. (Tr., p. 24) Ayard testified he recovered from the injury. (Tr., p. 48)

Approximately five to eight years ago when he was working for Crystal Distributing, Ayard slipped and fell backwards. (Tr., p. 24) Ayard testified he received medication and therapy for approximately two months and he was released without restriction and returned to his normal job duties. (Tr., pp. 24-25, 48-49)

After reporting his work injury on July 25, 2014, Ayard left work and went to Allen Hospital, where he received treatment from Lloyd Luke, M.D., at Allen Occupational Health Services. (Ex. 1, p. 1; Tr., p. 28) Ayard's son provided interpretation services during his appointment with Dr. Luke. (Tr., p. 28)

Ayard told Allen Occupational Health Services that when he was lifting boxes of meat weighing approximately 60 pounds each he felt pain on his left side of his back and experienced a loss of strength immediately. (Ex. 1, p. 1) Dr. Luke prescribed Naprosyn and Flexeril and told Ayard to ice his back for 10 minutes every three hours. (Ex. 1, pp. 4-5) Dr. Luke imposed restrictions of no lifting greater than 15 pounds, no excessive bending or twisting, limited pushing, pulling, and reaching, and no lifting below the knee or above the shoulder. (Ex. 1, p. 5) Ayard testified he took Dr. Luke's restrictions to his supervisor. (Tr., p. 29)

Ayard returned to Dr. Luke on July 28, 2014, complaining of low back pain. (Ex. 1, p. 6) Dr. Luke continued with the same restrictions, and estimated Ayard could return to full duty in five days. (Ex. 1, p. 9) During a follow-up appointment on August 1, 2014, Ayard reported his back pain was "a little better" with no new symptoms. (Ex. 1, p. 11) Dr. Luke continued with Ayard's restrictions and medications, and estimated Ayard would return to full duty in four weeks. (Ex. 1, pp. 10-11)

During his appointment with Dr. Luke on August 29, 2014, Ayard relayed he was performing his regular duties and his back pain had not changed. (Ex. 1, p. 13) Ayard reported he was experiencing numbness on his left side from his hip to his knee. (Ex. 1, p. 14) Dr. Luke ordered physical therapy and continued Ayard's medications. (Ex. 1, p. 15) Dr. Luke imposed restrictions of no lifting greater than 20 pounds, no excessive bending, no prolonged standing, walking or sitting, and to sit, stand, and walk as necessary. (Ex. 1, p. 16) Dr. Luke estimated Ayard would return to full duty in one to two weeks. (Ex. 1, p. 16)

During his follow-up appointment on September 5, 2014, Ayard reported his pain remained the same. (Ex. 1, pp. 17-18) Dr. Luke imposed restrictions of no lifting greater than 20 pounds, no excessive bending, no prolonged standing, walking or sitting, to sit, stand, and walk as necessary, and no jarring or jolting of the body. (Ex. 1, p. 20) Dr. Luke estimated Ayard would return to full duty in one to two weeks. (Ex. 1, p. 20)

During his physical therapy appointment on September 12, 2014, Ayard complained of anterior thigh numbness and tingling since his injury. (Ex. 1, p. 21) Ayard noted aggravating factors include lumbar extension, rotation, and quick movements. (Ex. 1, p. 21)

Ayard attended a follow-up appointment with Dr. Luke on September 18, 2014. (Ex. 1, p. 28) Ayard reported his back as "a little sore from therapy," but he believed his back was improving. (Ex. 1, p. 28) Dr. Luke continued with the same restrictions and medications, and estimated Ayard would return to full duty in seven days. (Ex. 1, pp. 30, 32)

Ayard finished physical therapy before his September 24, 2014 appointment with Dr. Luke. (Ex. 1, p. 38) During his appointment Ayard relayed his back was "a little better," and noted he had pain with hard and fast movements. (Ex. 1, p. 38) Dr. Luke examined Ayard and released him to full duty without restrictions. (Ex. 1, p. 41) Ayard testified he returned to work without restrictions, but his back continued to hurt and he "had a lot of pain." (Tr., p. 31)

Ayard retained Sunil Bansal, M.D., to perform an independent medical examination. (Ex. 2) Dr. Bansal reviewed Ayard's treatment records, and examined Ayard on January 30, 2015. (Ex. 2) Dr. Bansal issued his report on March 4, 2015. (Ex. 2) Dr. Bansal agreed with Allen Occupational Health Services' assessment Ayard has lumbar myofascial pain. (Ex. 2, p. 132) Dr. Bansal opined that Ayard's back pain is related to his July 25, 2014 injury. (Ex. 2, p. 133) Dr. Bansal used the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides") and concluded that based on the AMA Guides, Ayard's current symptomology, and his physical examination, Ayard "qualifies for a DRE Category II impairment. He meets several criteria, including radiculopathic complaints, guarding, and loss of range of motion. Therefore, he is assigned a 5% whole person impairment based on Table 15-

3." (Ex. 2, p. 133) Dr. Bansal imposed permanent restrictions of no lifting over 35 pounds, and no frequent bending or twisting. (Ex. 2, p. 133) Dr. Bansal opined Ayard may need intermittent trigger point injections and NSAIDs in the future. (Ex. 2, p. 134)

After he saw Dr. Bansal, Ayard told his supervisor he was continuing to have back pain. (Tr., p. 33) Ayard reported his supervisor would not give him an answer and responded the doctor had released him and said he was fine. (Tr., p. 33)

In June 2015, Ayard sought additional care from Jeffrey Guse, ARNP, on his own. (Ex. 1, p. 45; Tr., pp. 33-34, 49-50) Guse ordered imaging of Ayard's lumbosacral spine during his first appointment on June 16, 2015. (Ex. 1, p. 45) The radiologist's report noted an impression of "moderately severe degenerative disc disease at L5-S1. Mild degenerative disc disease at L2-3, L3-4, and L4-5. No acute abnormality." (Ex. 1, p. 42) Guse prescribed escitalopram, hydrocodone-acetaminophen, meloxicam, oxycodone-acetaminophen, and prednisone. (Ex. 1, p. 45)

After receiving the results from the initial testing, Guse ordered magnetic resonance imaging of Ayard's lumbar spine without contrast. (Ex. 1, p. 43) The radiologist's report noted the following impression:

> IMPRESSION
>
> No compression deformity or bone marrow edema.
>
> Posterior annular tear with diffuse disc bulges at L4-L5 and L5-S1.
>
> Moderate bilateral neural foraminal stenosis at L5-S1.
>
> Probable right renal cyst.

(Ex. 1, p. 44)

Guse examined Ayard on August 31, 2015, and listed diagnoses of back pain, depression, and anxiety. (Ex. 1, p. 50) Guse documented,

> Patient states that he is still experiencing extreme difficulty with the pain in his spine which is leading to depression as he is trying hard to do a good job at work, but is severely limited by his back injury. Patient states that he is feeling very depressed today and would like some medication to help with his. At his last visit we tried Lexapro but, but [sic] the patient states he does not want to take that medication a longer period instead we will try Zoloft.

(Ex. 1, p. 51) Ayard testified he was having mental health issues, noting, "I couldn't sleep, depression, nerves." (Tr., p. 35) Ayard reported, "I wasn't comfortable at work. I couldn't focus." (Tr., p. 35)

Ayard testified he had been experiencing problems with depression for three years before his work injury because his supervisor was mistreating him, by yelling at him, and blaming him for things he had not done. (Tr., p. 35) Ayard reported after his injury his depression became worse, he could not sleep, and he was scared to return to work. (Tr., p. 36)

Guse referred Ayard to Mary Hlavin, M.D., for a neurosurgical consultation on September 10, 2015. (Ex. 1, p. 54) Dr. Hlavin examined Ayard and reviewed the magnetic resonance imaging results, and found:

> He has a loss of signal and height at L4-5, where there is some very slight bulging that narrows the lateral recesses. He has some loss of signal and height as well as modic changes at L5-S1 where there is some bilateral L5 foraminal narrowing. Unfortunately, the patient has primary axial pain without any evidence of radiculopathy. In good faith, I cannot recommend a fusion operation, particularly a 2-level fusion for primary axial pain. I suspect his pain does have both discogenic as well as facet arthropathic component with it. I suggested we try a muscle relaxer at some point he might benefit from. It might be worth considering Elavil. I will refer him to the pain clinic to see if injection therapy might have something to offer. Unfortunately, at this point, I cannot recommend an aggressive surgical stance. I have had an extensive discussion with his son, however, that should he develop a significant radicular component, surgery could potentially be an option. He certainly is a for a [sic] setup for developing L5 radiculopathy.

(Ex. 1, p. 55)

Ayard was referred to Ashar Afzal, M.D., for a pain consultation on September 30, 2015. (Ex. 1, p. 74) Dr. Afzal listed an impression of chronic low back pain, bilateral lumbar facet arthropathy, and bilateral lumbar radicular symptoms, L4 and L5. (Ex. 1, p. 75) Dr. Afzal offered Ayard an epidural injection, which Ayard deferred until a later date. (Ex. 1, p. 75)

Crystal Distributing and Le Mars Insurance retained David Segal, M.D., to conduct an independent medical examination and to provide treatment to Ayard. (Ex. 3) Dr. Segal examined Ayard on December 3, 2015, and he issued a report on December 4, 2015. (Ex. 3) Dr. Segal found that Ayard's back pain was causally related to his July 25, 2014 work injury. (Ex. 3, p. 141) Dr. Segal recommended epidural steroid injections to treat Ayard's pain. (Ex. 3, p. 142)

On December 17, 2015, Dr. Afzal performed a lumbar epidural L4 to L5 on Ayard. (Ex. 1, pp. 92, 94) Dr. Afzal listed an impression of chronic low back pain, lumbar degenerative disk disease, lumbar facet arthropathy, degenerative spondylosis, and lumbar radicular pain L4 and L5. (Ex. 1, p. 92) Ayard testified the injection provided some pain relief for about two or three days. (Tr., p. 38)

Ayard attended an appointment with Patricia Nelson, L.I.S.W., with Black Hawk-Grundy Mental Health on December 30, 2015. (Ex. 4, p. 143) Nelson documented Ayard told her he "[f]eels nervous, isn't sleeping, gets mad over small things. This has been going on for a couple of years and has been having problems at work the last couple of years." (Ex. 4, p. 143) Nelson recommended a psychiatric evaluation. (Ex. 4, p. 144)

Ayard returned to Dr. Afzal on January 13, 2016, and reported he did not receive much relief from the epidural steroid injection. (Ex. 1, p. 114) Dr. Afzal noted, "[a]though the MRI shows more arthropathy at L3-4 and L4-5; however, on examination it appears that he has marked tenderness over the L4-5 and L5-S1 facet joints and those are the levels where I will do the diagnostic injections." (Ex. 1, pp. 114-15) Ayard reported Dr. Afzal administered more injections, and the injections "relieved the pain for about five days for about 50 percent." (Tr., p. 38)

Jamey Gregersen, PMHNP-BC, a psychiatric nurse practitioner with Black Hawk-Grundy Mental Health, examined Ayard on February 3, 2016. (Ex. 4, pp. 146A-146E) Ayard complained of difficulty sleeping, problems with his mood, and irritability. (Ex. 4, p. 146) Ayard told Gregersen the problems had been present for the past few years, but had grown worse and were affecting his relationships with family and friends. (Ex. 4, p. 146) Ayard reported he had low energy and was more withdrawn. (Ex. 4, p. 146) Gregersen documented:

> Pt feels much of the problem is triggered by his work environment. He does not speak English, and nearly all of his coworkers and supervisor [sic] do, and he feels that he is not treated fairly. He states he often gets blamed for mistakes made by others, and isn't able to even defend himself because he can't express himself in a way they can understand. He has been working at this job for 16 years, and has been fairly miserable for the past few years, but doesn't feel he has much opportunity to go elsewhere due to his limited communication skills and education. He reports poor sleep and nightmares most nights, poor energy, negative thoughts, and decreased appetite for the past 3 weeks.

(Ex. 4, p. 146B) Gregersen prescribed Cymbalta and gabapentin "for mood, anxiety, and chronic pain" and also prescribed duloxetine. (Ex. 4, pp. 146C-146D) Gregersen diagnosed Ayard with an unspecified depressive disorder and low back pain. (Ex. 4, p. 146D)

During a follow-up appointment with Dr. Afzal on March 9, 2016, Dr. Afzal documented,

> [s]ince he has experienced short-term relief from the facet injection that was beyond 50% he would be a candidate for radiofrequency ablation for the L4-5 and L5-S1 facet joints. I told the patient either we can perform

> the radiofrequency ablation or he can go back and see Dr. Segal. The patient wanted to try radiofrequency ablation first.

(Ex. 1, p. 125) Dr. Afzal noted he would need authorization for the procedure. (Ex. 1, p. 125)

Ayard attended a follow-up appointment with Gregersen on March 10, 2016. (Ex. 4, p. 146G) Gregersen diagnosed Ayard with an unspecified depressive disorder, low back pain, and an adjustment disorder with mixed anxiety and depressed mood. (Ex. 4, p. 146G) Ayard informed Gregersen he had stopped using Cymbalta and gabapentin because the medication made him feel sedated. (Ex. 4, p. 146G) Ayard reported since he stopped taking the medication he had more energy, but he continued to have anxiety, a depressed mood, and nightmares. (Ex. 4, p. 146G) Gregersen restarted the gabapentin at a lower dose, stopped the duloxetine, and prescribed fluoxetine. (Ex. 4, p. 146G)

Ayard attended an appointment with Dr. Segal on April 12, 2016, complaining of back and neck pain. (Ex 3, p. 142A) Ayard told Dr. Segal his "[s]upervisor [sic] still having him do heavy work with bad verbal abuse." (Ex. 3, p. 142A) Ayard reported the pain was in his lower back, was worse on the left, and radiated into his bilateral buttocks, bilateral hips, and bilateral anterior and posterior thighs. (Ex. 3, p. 142A) Dr. Segal assessed Ayard with spondylolysis, lumbar region, and with spondylosis, multiple sites in the spine. (Ex. 3, p. 142B) Dr. Segal imposed a lifting restriction of 10 to 15 pounds, not to exceed two hours per eight hour shift, and no bending, twisting of the torso, squatting, or lifting above his head. (Ex. 3, p. 142C) Dr. Segal also provided a restriction of "[n]eeds to work at a comfortable pace with opportunity to rest." (Ex. 3, p. 142C) Dr. Segal requested approval for magnetic resonance imaging of the lumbar spine, facet injections, x-rays, and a back brace. (Ex. 3, pp. 142D-42E)

Ayard reported he received the magnetic resonance imaging recommended by Dr. Segal, and the findings were similar to his earlier imaging. (Tr., p. 39) Ayard testified Dr. Segal recommended he "continue with treatment, maybe try something different." (Tr., pp. 39-40)

Ayard attended an appointment with Gregersen on April 14, 2016. (Ex. 4, p. 146L) Ayard reported he was taking his medication, but he continued to have anxiety and a depressed mood. (Ex. 4, p. 146L)

Ayard's attorney sent Guse a letter on April 13, 2016, providing a summary of Ayard's medical history, and asking Guse a series of questions concerning his opinions. (Ex. 1, pp. 126A-F) Guse agreed he had treated Ayard on several occasions in 2015 for his back pain and "resultant Depression." (Ex. 1, p. 126E) Guse also agreed:

> Is it correct that your diagnosis is of Mr. Ayard's 7/25/14 work injury is L4-5 and L5-S1 posterior annual tears with associated lumbar radiculopathy, diffuse disc bulging, moderate bilateral neuroforaminal

> stenosis at L4-5 and L5-S1, which was either directly caused by his 7/25/14 work injury, or his 7/25/14 work injury substantially aggravated an underlying degenerative condition in his low back, and he likely sustained a mental sequela/Depression as a result of his 7/25/14 work injury and his ongoing pain and resultant physical limitations?

(Ex. 1, p. 126E)

Ayard's attorney also sent Dr. Segal a letter on April 19, 2016, providing a summary of Ayard's medical history, and asking Dr. Segal a series of questions concerning his opinions. (Ex. 3, pp. 142F-42K) Dr. Segal agreed that he performed an independent medical examination of Ayard and treated Ayard's back pain. (Ex. 3, p. 142J) Dr. Segal responded he agreed with the following questions:

> 3. Is it correct that your diagnosis is of Mr. Ayard's 7/25/14 work injury is disk herniations at L4-5 and L5-S1 with associated lumbar radiculopathy and chronic back pain, which was either directly caused by his 7/25/14 work injury, or his 7/25/14 work injury substantially aggravated an underlying degenerative condition in his low back?
>
> 4. Is it correct that, while you have not yet performed an impairment rating on Mr. Ayard, it is your opinion that given his subjective complaints and the objective imaging, as well as your physical exam, Mr. Ayard has sustained permanent impairment in his back as a result of his 7/25/14 work injury, which is likely at least 13% to his whole person (which could increase if he undergoes back surgery); that permanent restrictions are in order, and you would assign restrictions to include no lifting more than 20 pounds, no repetitive bending or twisting, and no standing more than 1 hour at a time, to be followed by a 15 minute break before standing again?

(Ex. 3, pp. 142J-142K) Dr. Segal did not provide any written narrative with his responses.

Ayard testified that since his work injury he no longer performs any heaving lifting, or engages in twisting or frequent bending at work and only drives a forklift. (Tr., p. 41) Ayard reports the cold, unloading or loading trucks, and pushing things aggravate his back, and he still has numbness all the time in his left leg. (Tr., p. 41) At the time of the hearing Ayard continued to take pain medication and medication to treat his depression, but reported the main problem is his back. (Tr., p. 42)

At the time of the hearing Ayard had additional appointments with Dr. Segal and with his mental health provider. (Tr., p. 47) Ayard reported Dr. Segal had recommended additional injections, but Ayard had not received one in the month prior to the hearing. (Tr., p. 47)

CONCLUSIONS OF LAW

I. Industrial Disability

The parties stipulated Ayard sustained an injury to his lumbar spine on July 25, 2014, arising out and in the course of his employment. (Hearing Report) The parties also agree that if Ayard is at maximum medical improvement, any permanent disability is an industrial disability. (Hearing Report) Crystal Distributing and Le Mars Insurance aver Ayard is not at maximum medical improvement and Ayard contends he is. The parties dispute Ayard sustained a mental health sequela injury, the extent of disability, and the commencement date of permanency.

A. Maximum Medical Improvement

Crystal Distributing and Le Mars Insurance contend the issue of permanency is not ripe because Ayard is still receiving treatment. Ayard counters while he may need future medical care, Dr. Bansal has found he is at maximum medical improvement and he has issued a permanency rating and permanent restrictions.

Iowa Code section 85.33 governs temporary disability benefits, and Iowa Code section 85.34 governs healing period and permanent disability benefits. Dunlap v. Action Warehouse, 824 N.W.2d 545, 556 (Iowa Ct. App. 2012). As a general rule, "temporary total disability compensation benefits and healing-period compensation benefits refer to the same condition." Clark v. Vicorp Rest., Inc., 696 N.W.2d 596, 604 (Iowa 2005). The purpose of temporary total disability benefits and healing period benefits is to "partially reimburse the employee for the loss of earnings" during a period of recovery from the condition. Id. The appropriate type of benefit depends on whether or not the employee has a permanent disability. Dunlap, 824 N.W.2d at 556. Ayard was not paid any temporary benefits in this case because while he performed light-duty work during a period of convalescence, he continued to work full time for Crystal Distributing following his June 2014 injury.

"Compensation for permanent partial disability shall begin at the termination of the healing period." Evenson v. Winnebago Indus., Inc., No. 14-2097, 2016 WL 3125846, at *11 (Iowa June 3, 2016) (quoting Iowa Code § 85.34(2)). Under the statute, healing period benefits continue:

> until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

Iowa Code § 85.34(1). Ayard has maintained full-time employment since his injury. Dr. Luke restricted Ayard to light-duty work during a period of convalescence, from the date of his injury through September 24, 2014, when Dr. Luke released him to full duty

without restrictions. (Ex. 1, p. 41) Ayard did not have a loss of earnings. Ayard testified he returned to work without restrictions, but his back continued to hurt and he "had a lot of pain." (Tr., p. 31)

Crystal Distributing and Le Mars Insurance aver Ayard is not at maximum medical improvement, Dr. Bansal's report does not provide an opinion that Ayard's condition is permanent, and Dr. Bansal recommended additional treatment. Dr. Bansal opined, based on the AMA Guides, Ayard's current symptomology, and his physical examination, Ayard "qualifies for a DRE Category II impairment. He meets several criteria, including radiculopathic complaints, guarding, and loss of range of motion. Therefore, he is assigned a 5% whole person impairment based on Table 15-3." (Ex. 2, p. 133) Dr. Bansal imposed permanent restrictions of no lifting over 35 pounds, and no frequent bending or twisting. (Ex. 2, p. 133) The AMA Guides are a "uniform set of standards and guidelines for medical practitioners to utilize in evaluating permanent impairment and rending opinions on the percentages of impairment." Prewitt v. Firestone Tire & Rubber Co., 564 N.W.2d 852, 855 (Iowa 1997) (citing to an earlier version of the AMA Guides). Crystal Distributing and Le Mars Insurance have not presented a contrary opinion supporting their bare assertion that Ayard is not at maximum medical improvement.

Moreover, while Crystal Distributing and Le Mars Insurance did not request an impairment rating from Dr. Segal, Ayard's counsel contacted Dr. Segal, and asked Dr. Segal a series of questions concerning his opinions. Dr. Segal agreed Ayard has sustained a permanent impairment and that "permanent restrictions are in order." (Ex. 3, p. 142K) Drs. Bansal and Segal both agree Ayard has sustained a permanent impairment and that permanent restrictions are in order. Crystal Distributing and Le Mars Insurance have presented no contrary medical opinions. The mere fact that Ayard will continue to need medical treatment for his work injury in the future does support the defendants' assertion that the issue of permanency is not ripe. Cf. Waldinger Corp. v. Mettler, 817 N.W.2d 1, 8-9 (Iowa 2012) (noting an injured employee's need for ongoing medical care may extend beyond the initial period of convalescence and after attempts to return to work)

B. Mental Health Sequela

Ayard avers he sustained a mental health sequela injury as a result of his July 25, 2014 work injury. Crystal Distributing and Le Mars Insurance contend Ayard has failed to prove he sustained a compensable mental health sequela injury.

An injury to one part of the body can later cause an injury to another. Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 16-17 (Iowa 1993) (holding a psychological condition can be caused or aggravated by a scheduled injury). The claimant bears the burden of proving the claimant's work-related injury is a proximate cause of the claimant's disability and need for medical care. Ayers v. D & N Fence Co., Inc., 731 N.W.2d 11, 17 (Iowa 2007); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 153 (Iowa 1997). "In order for a cause to be proximate, it must be a 'substantial factor.'" Ayers, 731

N.W.2d at 17. A probability of causation must exist, a mere possibility of causation is insufficient. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997).

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The deputy commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

Ayard testified he had been experiencing problems with depression for three years before his work injury because his supervisor was mistreating him, by yelling at him, and blaming him for things he had not done. (Tr., p. 35) The record establishes that Ayard experienced an increase in his depressive symptoms after his work injury. When Guse examined Ayard on August 31, 2015, he documented Ayard was "still experiencing extreme difficulty with the pain in his spine which is leading to depression," and that Ayard was "feeling very depressed today and would like some medication to help with his. At his last visit we tried Lexapro but, but [sic] the patient states he does not want to take that medication a longer period instead we will try Zoloft." (Ex. 1, p. 51) Gregersen, a psychiatric nurse practitioner, also diagnosed Ayard with an unspecified depressive disorder and low back pain. (Ex. 4, p. 146D) Gregersen prescribed Cymbalta and gabapentin "for mood, anxiety, and chronic pain" and also prescribed duloxetine. (Ex. 4, pp. 146C-146D)

None of Ayard's treating or examining medical practitioners have offered opinions that Ayard has sustained a permanent mental health impairment caused by his work injury. While the record supports Ayard's major depression is a sequela of the work injury, the record does not support Ayard has sustained a permanent mental health impairment as a result of the work injury.

C. Extent of Disability

"Industrial disability is determined by an evaluation of the employee's earning capacity." Pease, 807 N.W.2d at 852. In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u). When considering the extent of disability, the deputy commissioner considers all evidence, both medical and nonmedical. Evenson, 2016 WL 3125846, at *9.

After reviewing Ayard's medical records and examining him, Dr. Bansal assigned Ayard a five percent whole person impairment based on the AMA Guides and imposed permanent restrictions of no lifting over 35 pounds, and no frequent bending or twisting. (Ex. 2, p. 133) Crystal Distributing and Le Mars Insurance have not presented a contrary opinion.

At the time of the hearing Ayard was 52. (Tr., p. 13) Ayard attended school through the third grade in Mexico. (Tr., p. 13; Ex. 5, p. 148) He has taken English classes, but he cannot read or write in English. (Tr., p. 14) Ayard does not know how to type or how to use a computer. (Tr., p. 14) Given his age and limited education, Ayard would have a difficult time with retraining.

Ayard's past relevant work required lifting exceeding Dr. Bansal's 35 pound permanent lifting restriction. Ayard is certified to drive a forklift, but he has no other specialized training. Ayard has maintained his employment at Crystal Distributing since his injury and has no loss of earnings. Crystal Distributing has followed Ayard's permanent restrictions and he no longer engages in heavy lifting, bending, or twisting. I do believe if Ayard were to lose his employment with Crystal Distributing, he would likely have difficulty securing employment consistent with his past-relevant work and restrictions. Based on the industrial disability factors, I conclude Ayard has sustained an industrial disability of 25 percent.

D. Commencement Date of Permanency

Ayard contends the commencement date for permanency is September 25, 2014. Dr. Luke restricted Ayard to light-duty through September 24, 2014. Crystal Distributing and Le Mars Insurance aver that assuming Ayard is at maximum medical improvement, "the commencement date for permanent partial disability should be the date on which a claimant is adjudicated to be disabled." (Defendants' Brief)

Iowa Code section 85.34(2), which governs permanent partial disabilities, provides, "[c]ompensation for permanent partial disability shall begin at the termination of the healing period." The statute also provides that healing period benefits continue until: (1) the employee has returned to work; (2) the employee has reached maximum medical improvement; or (3) "employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first." Iowa Code § 85.34(1). In Evenson, the Iowa Supreme

Court found "the statute clearly states the healing period lasts until whichever situation *occurs first*." 2016 WL 3125846, at *11.

After his injury Ayard was on light-duty during a period of convalescence until Dr. Luke released him to full duty on September 24, 2014. Under the statute, the date for permanency is September 25, 2014, the date Ayard was released from light-duty to full duty, the earliest of the three triggers. Id. (finding the date of the claimant's "first return to work established the end of the healing period and commencement of PPD benefits because it was the earliest of the three triggering events prescribed in section 85.34(1)")

II. Medical Bills

Crystal Distributing and Le Mars Insurance agree they are responsible for and have paid for the medical treatment Ayard has received for his back injury, but they have not paid for the cost of Ayard's mental health treatment, as set forth in Exhibit 8. "An employer is required to 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." Iowa Code § 85.27(1). The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. Id.; Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 436 (Iowa 1997). "If the employer chooses the care, the employer shall hold the employee harmless for the cost of care until the employer notifies the employee that the employer is no longer authorizing all or any part of the care and the reason for the change in authorization." Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 771 (Iowa 2016) (quoting Iowa Code § 85.27(4)). The Iowa Supreme Court has held that the plain language of the statute "limits employer liability for authorized care to expenses incurred seeking care related to the medical condition or conditions for which the employee sought care in the aftermath of a workplace injury and upon which the employee's claim for workers' compensation benefits is based." Id. at 775.

As analyzed above, the record supports Ayard's major depression is a sequela of the work injury. Crystal Distributing and Le Mars Insurance are responsible for all casually related medical treatment, including Ayard's sequela injury, and are responsible for the medical bills for his sequela injury set forth in Exhibit 8 and future treatment necessitated by the work injury.

III. Dr. Bansal's Independent Medical Examination

Ayard seeks to recover the $2,495.00 cost of Dr. Bansal's independent medical examination and report pursuant to rule 876 Iowa Administrative Code 4.33. The bill is not itemized. (Exhibit 2) Crystal Distributing and Le Mars Insurance contend Ayard is not entitled to recover the cost of Dr. Bansal's examination and report because Crystal Distributing and Le Mars Insurance did not request a permanent impairment rating before Dr. Bansal conducted his exam.

After receiving an injury, the employee, if requested by the employer is required to submit to examination at a reasonable time and place, as often as reasonably requested to a physician, without cost to the employee. Iowa Code § 85.39. If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes the evaluation is too low, the employee "shall, upon application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choosing." Id.

In the case of Des Moines Area Regional Transit Authority v. Young, the Iowa Supreme Court held:

> We conclude section 85.39 is the sole method for reimbursement of an examination by a physician of the employee's choosing and that the expense of the examination is not included in the cost of a report. Further, even if the examination and report were considered to be a single, indivisible fee, the commissioner erred in taxing it as a cost under administrative rule 876-4.33 because the section 86.40 discretion to tax costs is expressly limited by Iowa Code section 85.39.

867 N.W.2d 839, 846-47 (Iowa 2015). Young does not permit the taxing of the cost of Dr. Bansal's report pursuant to rule 876 IAC 4.33.

Dr. Bansal conducted an independent medical examination of Ayard in January 2015, and issued his report in March 2015. Crystal Distributing and Le Mars Insurance did not obtain an impairment rating prior to Dr. Bansal's examination. Ayard is not entitled to recover the cost of Dr. Bansal's independent medical examination. See id.

IV. Costs

Ayard seeks to recover the $100.00 filing fee, and service costs totaling $12.96. Rule 876 IAC 4.33 outlines the costs that can be taxed, as follows,

> 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.

The costs Ayard seeks to recover are expressly permitted by the rule. Ayard is entitled to recover $112.96 in costs.

ORDER

Defendants shall pay the claimant one hundred twenty-five (125) weeks of permanent partial disability benefits, commencing on September 25, 2014, at the rate of four hundred thirty-nine and 09/100 dollars ($439.09).

Defendants shall pay accrued benefits with interest in a lump sum.

Defendants shall pay all medical bills causally related to the claimant's mental health sequela injury and are responsible for future treatment necessitated by the work injury.

Costs totaling one hundred twelve and 96/100 dollars ($112.96) are taxed to the defendants pursuant to rule 876 IAC 4.33.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 11th day of August, 2016.

HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

James C. Byrne
Attorney at Law
1441 – 29TH Street, Suite 111
West Des Moines, Iowa 50266
jbyrne@nbolawfirm.com

Thomas B. Read
Attorney at Law
PO Box 1968
316 2ND ST SE, Ste. 124
Cedar Rapids, IA 52401
read@elderkinpirnie.com

HLP/kjw

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.