BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JIMMY CROSBY,

Claimant,

vs.

FOODLINER, INC.,

Employer,

and

TRAVELERS,

Insurance Carrier,
Defendants.

File No. 5054995

ARBITRATION

DECISION

Head Notes: 1108, 1803, 2500

STATEMENT OF THE CASE

Jimmy Crosby filed a petition for arbitration seeking workers' compensation benefits from Foodliner, Inc., and Travelers.

The matter came on for hearing on March 1, 2017, before Deputy Workers' Compensation Commissioner Joseph L. Walsh in Des Moines, Iowa. The record in the case consists of Claimant's Exhibits 1 through 21; Defense Exhibits A through L; as well the sworn testimony of claimant, Jimmy Crosby. Debra Hoadley was appointed court reporter for the proceeding. The parties briefed this case and the matter was fully submitted on March 27, 2017.

It is noted that just prior to hearing, defendants moved for a continuance, contending that claimant had not reached maximum medical improvement. Defendants insisted that claimant was still under active medical care for his work injury. Defendants indicated they intended to exercise their right to a Section 85.39 evaluation with doctors from the University of Iowa Hospitals and Clinics. The motion to continue was denied.

ISSUES & STIPULATIONS

The parties entered into a number of stipulations in the Hearing Report and Order. I approved the Hearing Report and Order at the time of hearing. Those stipulations are deemed binding upon the parties.

Through the hearing report, the parties stipulated that there was an employer-employee relationship between the parties. The defendants further stipulated that the claimant sustained an injury on September 2, 2015. The defendants, however, dispute that the injury resulted in any permanent disability. Claimant makes no claim for temporary disability benefits. The claimant alleges the permanent disability is industrial. Defendants deny any permanency, but contend if there is permanency, it is limited to the right eye. The parties have stipulated that if any permanency benefits are awarded, the commencement date is September 25, 2015. The elements comprising the rate of compensation are stipulated as outlined in the hearing order. Affirmative defenses have been waived. Claimant seeks payment for an independent medical evaluation (IME) under section 85.39.

FINDINGS OF FACT

Jimmy Crosby was 48 years old as of the date of hearing. He is a married man who lives in Corydon, Iowa. He completed the 10th grade and eventually attained his GED. He has a varied and interesting work history. He has worked as an electrician, a working supervisor on a hog lot, and a truck driver. He has also worked as a book keeper. He has numerous transferrable skills through his work history. The majority of his work history, however, has been as some type of truck driver. He has done many different types of driving in the past. He was hired by the employer in this case, Foodliner, Inc., as an over-the-road truck driver in 2010. (Claimant's Exhibit 16) In the past, he has worked as both an employee and as an independent owner operator for Foodliner. At the time of the injury herein, he was an employee.

Mr. Crosby testified live and under oath at hearing. I find him to be credible. His testimony at hearing was generally consistent with his prior deposition testimony as well as the medical records in the file. His testimony was direct and straightforward. There was nothing about his demeanor which caused the undersigned any concern regarding his truthfulness.

The parties have stipulated Mr. Crosby suffered an injury on September 4, 2015, which arose out of and in the course of his employment. On that date, he climbed up on the trailer to empty it. As he climbed down, he fell from the ladder. This occurred in Muscatine, Iowa. Mr. Crosby testified he immediately had issues in his right shoulder, neck and low back. He was able to get up and drive himself back to Eddyville.

He was seen at the Eddyville Clinic by, Jeffrey Waddell, NP, on September 2, 2015.

> Presents with work related injury. Pt was descending ladder about 0800 today and slipped off the ladder. He landed on the ground on his feet and buttocks, more on R than L. Initial paresthesia with jolt. This has improved. He tried to catch himself on a rung with his R hand. The resulting suspension and jarring caused immediate R shoulder and clavicular pain. Indicates pain to the R trapezius region. Shoulder feels lit

[sic] it is catching/something stuck.

(Cl. Ex. 2, p. 19) The clinic performed x-rays, prescribed medications and provided work restrictions. He was instructed to heat/ice his low back and follow-up in 10 days or sooner if the pain worsened.

Mr. Crosby was off work for the injury from September 6, 2016, through September 10, 2015. (Def. Ex. D, p. 2) He then returned to work on light-duty, not driving a truck. He was paid temporary partial during this period of time. (Def. Ex. D)

Mr. Crosby continued to treat with the Eddyville Clinic through September 2015 and eventually was referred to Iowa Orthopedics, Todd Harbach, M.D. (Cl. Ex. 4) Dr. Harbach first evaluated claimant on October 19, 2015. He treated his low back and right shoulder, diagnosing sciatica in the low back and impingement syndrome in the right shoulder. (Cl. Ex. 4, p. 34) He continued to keep claimant on light duty. (Cl. Ex. 4, p. 35) Dr. Harbach treated claimant conservatively with light duty, medications, injections, diagnostic testing and physical therapy from October 2015, through January 2016. (Cl. Ex. 4, pp. 32-44) On January 15, 2016, Dr. Harbach stated the following:

> The patient continues to have the same pain that he has had all along both in his RIGHT shoulder to the base of his RIGHT neck and in his low back. His lumbar spine just shows one degenerative disk at L5-S1 that pre-existed his work related injury. His [MRI] of his RIGHT shoulder shows some signs of impingement including a type II acromion and scuffing of the rotator cuff but no full thickness rotator cuff tear. He has failed inections in the subacromial space, in fact, they made him worse. He has tried at least 4 different nonsteroidals and physical therapy has also made him worse with his back and shoulder and neck. Treatment has been continuous and ongoing for 5+ months. I would not recommend any surgical procedure for him. He has reached a steady state without change; therefore, I am going to state that he has reached maximal medical improvement and release him without restrictions.

(Cl. Ex. 4, p. 43)

Mr. Crosby attempted to return to work in January, 2016. He took two runs as a truck driver, which he testified significantly increased his symptoms. According to his payment records, his temporary partial disability payments ceased for approximately 4 weeks between mid-January 2016, through February 14, 2016. He then received temporary total disability again from February 15, 2016 through February 23, 2016, before resuming temporary partial disability from February 23, 2016. In April 2016, he was offered "temporary alternative light duty work" not on-site for Foodliner. (Def. Ex. H) Claimant accepted this and continued receiving temporary partial disability benefits.

After his failed attempt to return to truck driving in January 2016, Mr. Crosby returned to Dr. Harbach on February 16, 2016. "The patient has returned feeling worse

now that he has gone back to work. His RIGHT arm hurts so badly that he leaves his hand lying on his lap, and it is difficult to shift in his truck." (Cl. Ex. 4, p. 47) From February through June 2016, Mr. Crosby continued to treat with Dr. Harbach, and later, Kyle Galles, M.D. While there were a number of appointments during this period of time, there was very little treatment. (Cl. Ex. 4, pp. 50-56) The physicians primarily attempted to discern whether the source of his pain was his shoulder or his neck. None of the treatment helped. There was apparently some question as to whether the neck condition was causally connected to the work injury. (Cl. Ex. 8)

In June 2016, claimant took it upon himself to visit his family medical clinic for treatment. He saw Ojiaku Ikezuagu, M.D. "He is here to seek second opinion regarding his neck pain and shoulder pain." (Cl. Ex. 1, p. 5) Dr. Ikezuagu performed a full examination and took a full history, ultimately diagnosing cervical radiculopathy and impingement syndrome of the right shoulder region. (Cl. Ex. 1, p. 7) This was unauthorized care. Dr. Ikezuagu recommended a cervical MRI. He had a cervical MRI on June 23, 2016. (Cl. Ex. 9(d), pp. 87-88) Defendants paid for this MRI. (Def. Ex. D, p. 3)

Claimant followed up with his authorized physicians after June 2016, staying on light-duty work. He continued to receive diagnostic tests and injections all the way through February 2017, just prior to hearing. (Cl. Ex. 4, pp. 57-73; Cl. Ex. 7)

Sunil Bansal, M.D., evaluated Mr. Crosby for an independent medical evaluation on October 31, 2016. Dr. Bansal performed a thorough review of the records and took a thorough history from the claimant. (Cl. Ex. 10, pp. 90-97) He performed a physical examination which evaluated the claimant's conditions in his neck, right shoulder and low back. (Cl. Ex. 10, pp. 97-98) Dr. Bansal opined claimant suffers from multi-level spondylosis with C4-C5, C5-C6 and C6-C7 disc herniations, as well as superimposed L5-S1 bilateral foraminal stenosis. (Cl. Ex. 10, p. 99) He opined that both conditions were materially aggravated or lit up by his work injury of September 2, 2015. (Cl. Ex. 10, pp. 99-102) He assigned impairment ratings of 8 percent of the body as a whole for the neck and 7 percent of the whole body for the low back. (Cl. Ex. 10, p. 103) He opined that claimant's right shoulder symptoms resulted from his cervical condition. (Cl. Ex. 10, p. 99)

For the neck and low back, Dr. Bansal recommended significant permanent restrictions for these conditions.

> I would place a lifting restriction of 15 pounds. He should avoid lifting more than 5 pounds overhead, and no frequent overhead lifting. Lifting any more than this causes him considerable pain, and would place additional pressure on the neck.
>
> He needs to avoid work or activities that require repeated neck motion, or that place his neck in a posturally flexed position for any appreciable duration of time (greater than 15 minutes).

No frequent bending or twisting.

Sitting, standing, and walking as tolerated. Being in any one position for too long causes him discomfort. Specifically, he should avoid sitting for more than 30 minutes, no standing for more than 30 minutes, and no walking more than 30 minutes at a time.

(Cl. Ex. 10, p. 104)

In January 2017, he saw Dr. Harbach a final time, who noted the problem had not changed. He was still experiencing pain and ongoing symptoms, particularly in the neck. (Cl. Ex. 4, p. 68) He continued claimant on work restrictions at that time. In February 2017, he saw Dr. Galles for a final time. Dr. Galles again questioned whether the source of the pain was the neck or the shoulder, and performed an injection. (Cl. Ex. 4, p. 71) On February 14, 2017, Dr. Galles released claimant to work with no medical restrictions. (Cl. Ex. 4, p. 73) This was a dramatic change from the previous temporary restrictions. (Cl. Ex. 4, p. 67) This was claimant's last medical evaluation prior to the hearing. Claimant testified that the injection did not help, however, he did have a return visit scheduled.

Foodliner sent a letter to Mr. Crosby to return to work on February 27, 2017. Mr. Crosby returned and was sent for a physical. The nurse practitioner performing the evaluation refused to certify Mr. Crosby met the standards for a two-year certificate. (Def. Ex. I, p. 4) She checked that determination was "pending" and that medical records needed reviewed. Mr. Crosby testified he was not allowed to return to work.

At hearing, Mr. Crosby testified that his neck and low back continue to be symptomatic. He testified he can hardly turn his neck to the right or look up. He continues to have shooting pains down into his right shoulder and right arm. The more active he is, the more he hurts. Regarding his low back, he has difficulty sitting or standing for extended periods.

CONCLUSIONS OF LAW

The first question is whether the work injury is a cause of any permanent disability. The claimant alleges it is, as demonstrated by the expert opinion of Dr. Bansal. The defendants contend that the claimant's condition is not ripe for an assessment of permanency, as he was under active medical treatment at the time of hearing in March 2017.

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).

By a preponderance of evidence, I find that the claimant reached maximum medical improvement for his September 2, 2015, work injury on September 16, 2016. Both Dr. Harbach and Dr. Bansal agree that claimant is at maximum medical improvement for at least his neck. Dr. Harbach opined he reached MMI on September 16, 2016. (Def. Ex. L, p. 2) Dr. Bansal opined he reached MMI on June 15, 2016. (Cl. Ex. 10, p. 102)

Dr. Harbach seemed to believe claimant's primary symptoms did not result from his neck, but rather his shoulder. Thus, while Dr. Harbach opined claimant was at MMI, he did not believe there was any permanent impairment as it relates to the neck. (Def. Ex. L) He further opined that he was "unable to identify any objective source for the subjective complaints that Mr. Crosby is currently making." (Def. Ex. L, p. 2) There is no specific opinion in the record from Dr. Galles. Dr. Harbach and Dr. Galles have treated the claimant since January 2016, and have been unable to reach a definitive diagnosis which is causing the claimant's ongoing current symptoms at the time of hearing. Neither has presented a compelling or convincing opinion regarding the claimant's diagnosis, medical causation, or disability. Unless I am to believe that the claimant is faking or greatly exaggerating his ongoing symptoms and condition (which no expert has opined), I am left to reach a conclusion based upon the competent, expert medical evidence in the record.

The greater weight of evidence in this file is that Mr. Crosby suffers from multi-level spondylosis with C4-C5, C5-C6 and C6-C7 disc herniations, as well as superimposed L5-S1 bilateral foraminal stenosis which were substantially aggravated or lit up by his fall at work on September 2, 2015. (Cl. Ex. 10, p. 99) This diagnosis is supported by the opinion of Dr. Ikezuagu. (Cl. Ex. 1, pp. 7-8) The reality is, Dr. Bansal's expert medical opinion is the only well-reasoned, holistic medical opinion regarding the claimant's condition in the record. His opinion is supported by Dr. Ikezuagu, as well as the testimony of the claimant. While I concede on this record, I

do have some doubt whether this is the exact correct diagnosis, I have no doubt that it is the best evidence in the record.

In lieu of providing a holistic expert medical opinion from the defense perspective, the defendants attack Dr. Bansal's opinion as biased. They contend he is a "claimant-retained physician" citing some 431 proceedings that went to hearing before the Division of Workers' Compensation. (Def. Ex. J) I have reviewed Defendants' Exhibit J thoroughly, including the portions of Dr. Bansal's deposition testimony regarding his IME practice from an unrelated case. There is no question that Dr. Bansal has a reputation as a physician who is primarily retained by counsel for injured workers. I do not find this type of credibility evidence particularly compelling in this specific case. When viewing this entire record as a whole, however, Dr. Bansal's expert medical opinion provides the best explanation for Mr. Crosby's current medical condition. It is possible that this evidence would be more compelling to me if the defendants had a plausible medical explanation for the claimant's severe ongoing symptoms.

For these reasons, I find that the claimant's work injury is a cause of permanent disability, and he has reached maximum medical improvement.

The next issue is the extent of his industrial disability.

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 greater weight of evidence is that the claimant has suffered a 60 percent loss of earning capacity at the time of hearing. It would undoubtedly be easier to assess the claimant's industrial disability after he attempted a work search and became reemployed. At the time of hearing, he had just been told to return to work and then he failed to pass the DOT physical so that he could return to work. Based upon the

claimant's testimony, it is clear he is not capable of returning to his position as an over-the-road truck driver for the employer. It is just not clear what he will be able to do.

The claimant is 48 years old and in his prime earnings years. He only has a GED, but he is obviously smart and has some demand work skills which may help him get employment which is less physically demanding. He has done some bookkeeping work and has managed other workers as a working supervisor for a hog lot. He has also worked as an independent owner-operator which requires skills to essentially run your own business.

In any event, at the time of hearing, it appears that the claimant's medical condition is quite severe. The greater weight of evidence in this file is that Mr. Crosby suffers from multi-level spondylosis with C4-C5, C5-C6 and C6-C7 disc herniations, as well as superimposed L5-S1 bilateral foraminal stenosis. (Cl. Ex. 10, p. 99) His condition has persisted from the date of his injury through the date of hearing with no real improvement. The ongoing symptoms are significantly disabling and miserable. Dr. Bansal's recommended restrictions are quite severe.

> I would place a lifting restriction of 15 pounds. He should avoid lifting more than 5 pounds overhead, and no frequent overhead lifting. Lifting any more than this causes him considerable pain, and would place additional pressure on the neck.
>
> He needs to avoid work or activities that require repeated neck motion, or that place his neck in a posturally flexed position for any appreciable duration of time (greater than 15 minutes).
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> No frequent bending or twisting.
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> Sitting, standing, and walking as tolerated. Being in any one position for too long causes him discomfort. Specifically, he should avoid sitting for more than 30 minutes, no standing for more than 30 minutes and no walking for more than 30 minutes at a time.

(Cl. Ex. 10, p. 104)

While the claimant may be able to adapt to a work environment with slightly less restrictive work limitations, at the time of hearing, these restrictions are the best evidence of his limitations. These restrictions would preclude him from a significant majority of his past work history. At the time of hearing, he could not pass a DOT physical, and going back to driving does not appear possible.

Having considered all of the relevant factors of industrial disability, I find that the claimant has suffered a 60 percent loss of earning capacity as a result of his September 2, 2015, work injury. This entitles him to 300 weeks of benefits commencing the date he returned to work, September 11, 2015. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 372 (Iowa 2016).

The final issue is whether claimant is entitled to medical expenses as outlined in Claimant's Exhibit 20.

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).

Dr. Ikezuagu was not an authorized treating physician. Claimant sought a second opinion from Dr. Ikezuagu. He was frustrated that Dr. Harbach and Dr. Galles had been unable to reach a conclusive diagnosis. I find it was perfectly reasonable for him to do this. I do not, however, find that he has met the standards set forth in Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193 (Iowa 2010).

ORDER

THEREFORE IT IS ORDERED

Defendants shall pay the claimant three hundred (300) weeks of permanent partial disability benefits at the rate of five hundred thirty and 41/100 dollars ($530.41) per week from September 11, 2015.

Defendants shall pay accrued weekly benefits in a lump sum.

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

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

Defendants shall pay the IME set forth in Claimant's Exhibit 21.

Costs are taxed to defendants.

Signed and filed this 13th day of February 2018.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Fredd J. Haas
Attorney at Law
5001 S.W. 9th St.
Des Moines, IA 50315
freddjhaas1954@gmail.com

Chris J. Scheldrup
Jason P. Wiltfang
Attorneys at Law
PO Box 36
Cedar Rapids, IA 52406-0036
cscheldrup@scheldruplaw.com
jwiltfang@scheldruplaw.com

JLW/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.