BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRENT HUSMANN, Claimant, vs. BRUGGEMAN LUMBER, INC., Employer, and HASTINGS MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 1664726.02 ARBITRATION DECISION Head Note Nos.: 1108, 1803

STATEMENT OF THE CASE

The claimant, Brent Husmann, filed a petition for arbitration on October 28, 2019. He seeks workers' compensation benefits from Bruggeman Lumbar, Inc., employer, and Hastings Mutual Insurance Company, insurance carrier. The claimant was represented by Channing Dutton. The defendants were represented by Nathan McConkey.

The matter came on for hearing on January 13, 2021, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa via Court Call videoconferencing system. The record in the case consists of Joint Exhibits 1 through 8; Claimant's Exhibits 1 through 5; and Defense Exhibits A through F. The record did remain open for a period of time following the hearing to allow for the submission of a rebuttal report.

The claimant testified at hearing, in addition to Alex Wiezorak. Kimberly Blink served as the court reporter for these proceedings and the hearing transcript was filed on February 10, 2021. The matter was fully submitted on March 15, 2021 after helpful briefing by the parties. Both parties were well-represented.

ISSUES

The parties submitted the following issues for determination:

1. Whether the stipulated work injury is a cause of any permanent disability.

2. Whether claimant is entitled to alternate medical care.

3. Whether apportionment is appropriate.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship.

2. Claimant sustained an injury, which arose out of and in the course of employment on October 22, 2018.

3. Temporary disability/healing period and medical benefits are no longer in dispute.

4. The commencement date for any permanent disability benefits is May 16, 2019.

5. The weekly rate of compensation is $438.48

6. Defendants have paid and are entitled to a credit as set forth in the hearing report.

7. Affirmative defenses have been waived other than apportionment.

FINDINGS OF FACT

Claimant Brent Husmann was 49 years old as of the date of hearing. He lives in Hopkinton, Iowa, a small town approximately 30 miles from Dubuque. He is a high school graduate and he attended auto mechanic courses after high school. Mr. Husmann testified live and under oath at hearing. I find him to be generally credible. He was a verbose witness and offered details unnecessarily at times. He generally answered the questions he was asked though. There was nothing about his demeanor which caused me any concern regarding his truthfulness. It is noted that his credibility is a key issue in the case and this shall be discussed further below.

Mr. Husmann has a varied and interesting work history. He is ambitious, entrepreneurial and the record reflects he has an excellent work ethic. His full work history is set forth in Claimant's Exhibit 2. He has truck driving experience, including operating his own business. He also has retail sales experience and owned a pawn shop for a period of time. He began working for Bruggeman Lumber, (hereafter Bruggeman) in 2010, first as a driver, and later in the shop. He also earns income on the side as a performance hypnotist, a conceal carry trainer and screen printing on shirts.

While employed at Bruggeman, Mr. Husmann underwent four surgeries for a non-work related condition and at some point, mostly stopped driving a truck. He earned $640.00 per week prior to his work injury. His job duties involved providing maintenance on the trucks.

On October 22, 2018, Mr. Husmann sustained a fairly serious workplace accident. He was attempting to fix a hose on the bed of a truck early in the morning while it was still dark. Upon climbing on the truck, he hit his head on a boom and fell off the truck approximately four feet to the ground onto the concrete. (Transcript, pages 41-42) He initially felt pain in his shoulder and head. Toward the end of his workday, he noticed his back was stiff. "And then October 26, I couldn't hardly move. I had pain going down my leg." (Tr., p. 43) Photographs of the area where the injury occurred are at Claimant's Exhibit 3.

The condition of Mr. Husmann's back prior to this injury is highly relevant to this case. Mr. Husmann testified at hearing that he began receiving chiropractic care for maintenance when he was approximately 25 years old. He testified:

> And I remember the chiropractor, the first one I went to, he said, 'It's kind of like changing oil on your car. You need routine maintenance.' So every so often you come in and get straightened back out and you feel better.
>
> And 90 percent of the time, it seems like, when they did my neck, I wouldn't have any – you know, just seemed like it was night-and-day difference. So if you had a stuffy nose or something and they cracked your neck, it seemed like the stuffy nose would go away. I just did it kind of as routine maintenance.

(Tr., p. 48) He testified that he never had the same type of back pain prior to the work accident that he had after. (Tr., p. 49)

The chiropractic records in evidence, however, did show prior low back problems with some fairly significant symptoms at times. These records were identified early on in the claim, however, apparently the records were not obtained by the parties until just shortly before hearing. It is noted that Mr. Husmann never attempted to hide his chiropractic treatment or earlier condition. He did downplay and minimize the condition to some extent at hearing and in his deposition testimony. Mr. Husmann had reported low back pain as early as January 2013. (Jt. Ex. 2, p. 2) He was seen for back pain in 2014 and 2015. (Jt. Ex. 1) He was also seen for muscle spasms in the low back and right hip pain. (Jt. Ex. 2) He continued with low back treatments in 2016, 2017 and 2018, all the way up to just a few months before his work injury. (Jt. Ex. 2; Jt. Ex. 1, p. 17) On August 20, 2018, he was diagnosed with sciatica, low back pain and muscle spasms.

Following the work injury, the employer directed Mr. Husmann's medical treatment. He was given an MRI, physical therapy and injections. (Jt. Ex. 4) He was evaluated by Chad Abernathey, M.D., in February 2019. (Jt. Ex. 5) Dr. Abernathey documented the following. "To date, medical management, including physical therapy and epidural steroid injection, has stabilized his symptomatology, but he still has some residual discomfort." (Jt. Ex. 5, p. 1) Dr. Abernathey diagnosed lumbosacral strain and recommended further conservative management.

In March 2019, Jeffrey Westpheling, M.D., evaluated Mr. Husmann. Dr. Westpheling diagnosed left lumbar radiculitis and recommended another epidural steroid injection. (Jt. Ex. 6, p. 1) Mr. Husmann followed up with Dr. Westpheling attempting further conservative care including SI joint injections, medications and osteopathic manipulations. None of the treatments alleviated his symptoms. His last visit to Dr. Westpheling was in May 2019. At that time, he was restricted to no lifting more than 40 pounds and limited squatting, kneeling and climbing. Dr. Westpheling recommended a functional capacity evaluation (FCE) to determine permanent restrictions. (Jt. Ex. 6, p. 17)

Andrew Pugely, M.D., performed a defense IME in June 2019. (Jt. Ex. 8) Dr. Pugely reviewed a number of records and examined Mr. Husmann. He recounted the treatment history and then provided a number of expert opinions.

> Today Mr. Husmann reports 6/10 midline low back pain extending down the left buttock down the back of the left leg to the back of the foot. He also has pain down the right buttock to the proximal posterior thigh. He denies pain in the left foot. See symptom drawing scanned into the media tab in Epic. He reports the leg pain is always there, and can be very sharp. He is often pretty comfortable when sitting, but his pain is aggravated by climbing into a truck, pushing a shopping cart that cause pain to go down his leg. He describes his symptoms as worsening over the last 7 months. Functional capacity evaluation has not been done.

(Jt. Ex. 8, pp. 1-2) Dr. Pugely diagnosed low back pain and indicated there was no radiographic or clinical evidence of nerve compression. (Jt. Ex. 8, p. 5) He assigned a 5 percent whole body impairment rating and concurred with Dr. Westpheling's restrictions of limiting his lifting to 40 pounds. He modified the no squatting, kneeling, ladders and fork truck to occasional. (Jt. Ex. 8, p. 6)

Alex Wiezorak, the maintenance manager at Bruggeman testified on behalf of the employer. His testimony is generally credible. He testified that Mr. Husmann, along with a number of other employees, was laid off in 2019. (Tr., p. 93) Mill workers were recalled. Mr. Husmann was not.

Claimant retained Sunil Bansal, M.D., for an IME in October 2020. Dr. Bansal reviewed appropriate medical records and examined Mr. Husmann. Dr. Bansal noted Mr. Husmann's prior back issues. (Cl. Ex. 1 p. 9) I find Dr. Bansal had a generally accurate history. He diagnosed an aggravation of lumbar facet arthropathy and assigned a 7 percent whole body rating for this condition. (Cl. Ex. 1, p. 12) He opined this rating was related to the stipulated work injury. (Cl. Ex. 1, p. 13) He recommended no lifting greater than 35 pounds and limited bending, twisting and stairs. (Cl. Ex. 1, p. 13)

At the commencement of hearing, the parties indicated that a number of early chiropractic records in Joint Exhibits 1 and 2 were obtained late in the discovery process, after all the expert reports had been obtained. (Tr., p. 10) In response,

defendants sought to obtain a further report from their expert regarding these records. The record in the case was held open and defendants submitted Joint Exhibit 8, pages 7 through 9. It is a "check box" report from Dr. Pugely, written on defense counsel letterhead. Defense counsel set forth a history that went beyond the discussion of the old chiropractic records, although those are mentioned. Dr. Pugely opined that Mr. Husmann did not suffer any structural damage to his back/spine/hip from his work injury and at most suffered a soft-tissue strain or temporary aggravation of his underlying condition. (Jt. Ex. 8, p. 8) These opinions appear to be consistent with Dr. Pugely's earlier opinions. Defendants requested he also opine that Mr. Husmann would not require any additional treatment in the future related to his work injury, and Dr. Pugely refused to agree with this. (Jt. Ex. 8, pp. 8-9)

Having reviewed all of the evidence in the file, I find the greater weight of evidence supports a finding that the claimant sustained an injury, which arose out of and in the course of his employment on October 22, 2018. The greater weight of evidence supports a finding that this injury materially aggravated Mr. Husmann's preexisting low back condition, which was likely symptomatic to some degree at the time he sustained his work injury. I believe Mr. Husmann, however, that the pain and symptoms he experienced after the injury were more severe and different than what he had experienced in the past. Furthermore, the accident was relatively significant. He fell approximately four feet from a flatbed truck onto the cement. It does appear that Mr. Husmann may have downplayed or minimized, to some degree, the significance of his earlier low back symptoms. This is likely because in his mind, the conditions were very different in both type and severity.

CONCLUSIONS OF LAW

The primary question submitted is one of medical causation. The defendants argue that claimant has had a symptomatic low back for many years and has failed to prove that his work injury is a substantial cause of his work injury.

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).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961). "An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment with a different employer or from causes unrelated to employment." Iowa Code section 85.34(7) (2019).

For the reasons set forth in the findings of fact above, I find that the greater weight of evidence supports a finding that the claimant has sustained a permanent disability as a result of his work injury. I based this upon the claimant's credible testimony, the nature and severity of his stipulated work injury, and the opinions of Dr. Bansal. Furthermore, I find that Dr. Bansal's causation opinion is generally supported by the remaining medical evidence in the file.

The defendants point to the opinions of Dr. Pugely, who opined there was no "structural damage" caused by the stipulated work injury. (Jt. Ex. 8, p. 8) Dr. Pugely further opined that Mr. Husmann sustained at most a soft-tissue strain or temporary aggravation of his degenerative condition. Dr. Pugely's causation opinion, however, is somewhat ambiguous. While he does not provide enough information on his own to meet claimant's burden to prove medical causation, his opinion is somewhat unclear as to what his exact opinion is. The fact that he refused to state that he would not need any further treatment for his work injury in the future further complicates the ambiguity of his opinion. He opined that claimant had sustained a mild disability "as it relates to the work-related injury." (Jt. Ex. 8, p. 5) In contrast, Dr. Bansal provided a clear causation opinion based upon his record review, history taken and examination of Mr. Husmann. His conclusions are more convincing in light of the record of evidence. "The above mechanism of falling, coupled with his immediate clinical presentation, is consistent with his symptomatic lumbar back pain. Specifically, he aggravated his lumbar arthropathy." (Cl. Ex. 1, p. 13) I find this is the most convincing and credible expert medical opinion in the record.

The defendants also raised "apportionment" as an issue at hearing, although it was not briefed. The defendants seem to argue that his earlier disability should be apportioned out of his work injury claim. The defendants, however, have not proven any permanent preexisting low back disability. He undoubtedly had some symptoms which had never resulted in significant treatment (other than chiropractic maintenance), work restrictions or impairment. Once the claimant has proven medical causation, the

burden shifts to the defendants to apportion out any preexisting disability. The defendants have failed to prove that any ascertainable portion of claimant's preexisting condition resulted in a permanent disability.

The next issue is the extent of claimant's 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 Ry. Co. of Iowa, 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.

Mr. Husmann was 49 years old as of the date of hearing. He lives in a small town in northeast Iowa. He is bright and has a number of transferrable work skills, which make him employable. He sustained a relatively significant work injury, which aggravated his underlying lumbar arthropathy. This has resulted in a permanent impairment of approximately 7 percent of the whole body. He was not a surgical candidate and underwent conservative treatment only. He has some recommended work restrictions, which are somewhat limiting in the area of manual labor. Mr. Husmann had worked for this employer for approximately 10 years and was a valuable maintenance employee. He was laid off for economic reasons. He has secured higher paying employment in skilled manufacturing, which is well within his physical capabilities. He is, however, a less attractive job candidate in the competitive job market as a result of his condition. It is noted the defendants did obtain video surveillance of Mr. Husmann carrying some items and unloading a truck. It does not show him doing much at all, however, it does show that he is generally able to engage in some minor physical activities.

Considering all of the factors of industrial disability, the claimant has proven a minor industrial disability of 15 percent. I conclude this entitles Mr. Husmann to 75 weeks of compensation at the rate set forth in the hearing report commencing on May 16, 2019.

The next issue is whether claimant is entitled to alternate medical care. Mr. Husmann has asked for treatment recommended by Dr. Pugely; specifically, a back brace, physical therapy and ongoing chiropractic maintenance.

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. Iowa Code section 85.27 (2013).

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Id. The employer's obligation turns on the question of reasonable necessity, not desirability. Id.; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983).

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

An employer's statutory right is to select the providers of care and the employer may consider cost and other pertinent factors when exercising its choice. Long, at 124. An employer (typically) is not a licensed health care provider and does not possess medical expertise. Accordingly, an employer does not have the right to control the methods the providers choose to evaluate, diagnose and treat the injured employee. An employer is not entitled to control a licensed health care provider's exercise of professional judgment. Assmann v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 19, 1988). An employer's failure to follow recommendations of an authorized physician in matters of treatment is commonly a failure to provide reasonable treatment. Boggs v. Cargill, Inc., File No. 1050396 (Alt. Care Dec. January 31, 1994).

I find that the claimant's medical treatment to date has been generally appropriate and reasonable. Therefore, the alternate medical care claim is technically denied. Dr. Pugely, however, did recommend a lumbar support brace and chronic maintenance therapy. (Jt. Ex. 8, p. 5) Mr. Husmann is entitled to treatment for his work-related condition. This would, however, exclude any chiropractic maintenance of the type he received prior to his work injury. The defendants ceased all medical care after receiving Dr. Pugely's IME report, which, as mentioned, was somewhat vague as related to medical causation. I find that claimant did aggravate his underlying lumbar arthropathy, and is entitled to ongoing treatment for this condition. The appropriate

remedy is that defendants, if requested, shall authorize another physician to review whether there is any reasonable and necessary medical treatment associated with this condition.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay the claimant seventy-five (75) weeks of permanent partial disability benefits at the rate of four hundred and thirty-eight and 48/100 ($438.48) per week commencing May 16, 2019.

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 be given credit for weeks previously paid as stipulated.

If requested, defendants shall promptly authorize a new treating physician to provide an opinion as to whether there is any reasonable and necessary treatment for claimant's work-related aggravation of his lumbar arthropathy.

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

Costs are taxed to defendants.

Signed and filed this 30th day of September, 2021.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Channing Dutton (via WCES)

Nathan McConkey (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.