BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LAWRENCE D. HUNTER,

Claimant,

vs.

JOSEPH J. HENDERSON & SON, INC.,

Employer,

and

OLD REPUBLIC RISK MANAGEMENT,

Insurance Carrier,
Defendants.

File No. 5048340

ARBITRATION DECISION

Head Note Nos.: 1108.50; 1402.40; 1801; 1803

STATEMENT OF THE CASE

Lawrence D. Hunter, claimant, filed a petition in arbitration seeking workers' compensation benefits from Joseph J. Henderson & Sons, Inc., employer and Old Republic Risk Management, insurance carrier, both as defendants. Hearing was held on December 13, 2017 in Des Moines, Iowa.

Lawrence Hunter and Dave Henderson both testified live at trial. The evidentiary record also includes Claimant's Exhibits 1-4 and 6-7 and Defendant's Exhibits A-K and M-P. Defendants objected to Claimant's Exhibit 5, the independent medical examination (IME) report of Sunil Bansal, M.D. Exhibit 5 was admitted but defendants were permitted 60 days to obtain post-hearing rebuttal evidence. Defendants did not timely file any additional evidence with this agency. At the time of hearing defendants redacted their Exhibit L because it was duplicative of claimant's exhibits.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

It should be noted that after the conclusion of the hearing but before the original post-hearing brief deadline claimant's counsel filed a motion to withdraw as counsel. The motion was granted on March 30, 2017. On April 10, 2017, Mr. Hunter notified this agency that he would represent his own interests in this case. Post-hearing this agency received a certificate from Mr. Hunter regarding some classes he took in 2010. It is not clear from the filing if the information was provided to the defendants in this case.

Regardless, at the end of the arbitration hearing the record was left open for the sole purpose of defendants obtaining rebuttal evidence. Thus, claimant's post-hearing submission is not considered part of the evidentiary record.

Defendants were given an additional 60 days post-hearing to file the report of Dr. Broghammer; however, defendants failed to timely file Dr. Broghammer's report. The report was not received by this agency until June 13, 2017. Therefore, Dr. Broghammer's report is not considered part of the evidentiary record in this case.

The parties were given the opportunity to submit post-hearing briefs which were due on April 21, 2017. Claimant did not submit a post-hearing brief. Defendants submitted a post-hearing brief but not until May 10, 2017. Therefore, the defendants brief was not filed timely and was not considered. The matter was considered fully submitted as of April 21, 2017.

ISSUES

The parties submitted the following issues for resolution:

1. Whether the January 14, 2013 work injury was the cause of permanent disability? If so, the extent of industrial disability claimant is entitled to receive.
2. The appropriate commencement date for any permanency benefits.
3. Whether the alleged injury was the cause of temporary disability?
4. Whether claimant is entitled to alternate medical care?
5. Whether claimant is entitled to reimbursement for an IME under Iowa Code section 85.39?
6. Assessment of costs.

FINDINGS OF FACT

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

Claimant, Lawrence Hunter (hereinafter "Hunter"), began working full-time for the defendant employer, JJ Henderson, during the summer of 2012. At that time, JJ Henderson was a general contractor on a job site at the Waste Water Treatment Plant in Iowa City. Hunter was working as a construction laborer. (Testimony)

On Monday, January 14, 2013, Hunter sustained a work-related injury when he slipped on a plastic tarp and landed on his back on the concrete. He felt immediate pain and was not able to get up on his own. The co-worker who helped him up went and reported the injury to a man named Jerry. Jerry told Hunter to try to continue working. Hunter worked the rest of his shift and was then able to drive himself back home. He returned to work the following day and began working but he had some difficulties and was not able to complete the work day. Jerry realized that Hunter was still in pain and took him to the office. (Testimony)

The records show that Hunter was seen on January 15, 2013, at Mercy Occupational by Thomas Dean, P.A. Hunter reported that he was working as a construction worker on January 14, 2013, when he slipped, fell, and struck his head and landed on his back. Hunter reported he was wearing a safety helmet and that he did not lose consciousness at the time of the fall. He also denied any changes in sensorium including numbness and tingling, or visual field changes. He said his pain at the time of the injury was 10/10. The pain started at the base of his neck, went to his upper back, and into his back. The P.A.'s impression was myofascial pains of the cervical neck, thoracic, and lumbar regions. He took Hunter off of work for that day and the following day. He also prescribed him conservative treatment and advised him to follow-up in a couple of days. Hunter testified that he was experiencing difficulty with his vision during this examination and that P.A. Dean ordered an MRI of his head; this testimony is not consistent with the clinical notes. (Testimony; Exhibit A, pages 1-3)

Following the appointment, Hunter drove himself back to the worksite to drop off his paperwork. He then drove himself home. He did not return to work the next day. (Testimony)

Hunter returned to Mercy Occupational on January 17; he saw Sarvenaz Jabbari, M.D. Hunter reported that his head, neck, and back were not improving and at times the pain went down his bilateral legs. He rated his pain as 10/10. The doctor's impression was musculoskeletal pain of the back and neck. He prescribed physical therapy and additional conservative treatment. The doctor returned Hunter to work with restrictions of no lifting over 21 pounds, and limited bending, twisting, and climbing. Notably, Hunter reported to the doctor that he had never had back pain for which he had seen a physician. (Ex. A, pp. 4-7)

Hunter testified that he was supposed to have an MRI at this appointment but when he got to the doctor's office his general foreman, Mike was there. There is no mention of an MRI in the clinical notes. Hunter then testified his immediate foreman, Jerry, told him that they did not have any work available within his restrictions. He either had to perform full-duty work or go home. Hunter testified that he went home and has not returned to work since that time. He also testified that he was without medical coverage from January of 2013 until May of 2013. However, he later admitted that he had been on Medicare since 1990 and had treated using his Medicare from 1990 to 2013. (Testimony)

On January 18, 2013, Hunter was seen at the emergency room of the Genesis Medical Center for right hand complaints and headache since his fall 4 days earlier. He also reported nausea, low back pain, and buttock pain; he rated his pain as 10/10. Lisa Davis, M.D., examined Hunter. Dr. Davis noted normal range of motion for his back. A CT of his head came back normal. Dr. Davis diagnosed Hunter with a thoracic strain, lumbar strain, concussion, and right hand contusion. She prescribed a wrist splint for his right hand, Vicodin, and Motrin. She kept him off of work for one day. (Ex. 1, pp. 1-13)

On January 26, 2013, Hunter returned to Genesis. He reported continued musculoskeletal pain to his right hand, back, hip, and headache. He reported his pain as 10 out of 10. Tamara R. Mohs, ARNP, diagnosed Hunter with probable back pain and headache. Hunter was prescribed additional medication. His condition was considered to be improved and stable. Hunter was discharged home and advised to follow up with his primary care doctor and keep his previously scheduled appointment with occupational health. (Ex. 1, pp. 14-19)

Hunter returned to Genesis three days later with lumbar pain. He was seen by Stephen P. DePorter, FNP. Hunter did not report any injury; he reported that the onset was chronic. He was diagnosed with back pain. A physical therapy evaluation was ordered. Hunter was told to continue his medications and to limit his activity. (Ex. 1, pp. 20-28)

On February 7, 2013, Hunter attended one physical therapy session at Genesis. He was 20 minutes late for his appointment. He reported to the therapist that a CT scan demonstrated that he had a "moderate concussion." He also reported that he had fallen since the injury. He complained of head pain, pain behind the left eye, and dizziness at times. He also said he had experienced a change in his urine flow, difficulty remembering things, weakness in his arms, and cramping in his hands. Hunter said he had constant pain in his mid-back region inferior to the shoulder blades and extending down to the belt line. He reported pain and tightness extending into the buttocks along the posterior aspect of the lower extremities to the bottom of his feet to all of his toes. Hunter's pain level was 7-9 when it was at its best and a 10 when he was at his worst. The therapist noted that his general mobility was significantly guarded and very slow. She also noted high levels of diffuse pain. (Ex. B, pp. 1-2) There are no further therapy notes in evidence. However, claimant testified that he was seen for therapy at Genesis two times in February.

On April 22, 2013, Hunter was again seen at Genesis with back pain. The notes indicate that the onset of pain was three days ago and chronic. He also complained of a swollen hand and mild headaches. Hunter noted that he did not have a personal physician but preferred to come to the emergency room for all treatment. (Ex. 1, pp. 29-31)

On April 25, 2013, Hunter went to Unity Point where he saw Sanjay S. Pancholi, D.O. Hunter complained of right sciatic pain and left ankle pain. A CT of his lumbar spine revealed degenerative changes of the lumbar spine, most severe at L4/L5. (Ex. 2, pp. 1-4)

Hunter returned to the emergency room on April 29, 2013, with back pain. He reported increased pain in his upper and lower back which he had since January. He denied any numbness or tingling in his lower extremity. He reported he had an appointment the next day with his primary care physician and an appointment with the pain clinic in one week. The diagnosis was low back pain. Hunter was prescribed valium and Percocet and discharged home. (Ex. 2, pp. 2-8)

The following day Hunter was seen at the QCB Pain Clinic by Kerry P. Panozzo, M.D. Hunter reported pain in neck, back, shoulders, and arms which started on January 14, 2013 after a fall at work. He noted he had prior lower back pain but reported that this pain was much more intense than his prior pain. Dr. Panozzo's impression was lumbar radiculopathy, thoracic radiculopathy, and cervical radiculopathy. He recommended a full workup by an orthopedic/spine surgeon. (Ex. 2, pp. 9-11)

On May 8, 2013, Hunter was seen at QCM neurosurgery clinic by Vasan S. Purighalla, M.D. The doctor noted Hunter had a history of low back pain radiating into both lower extremities, more on the right along with an associated tingling and numbness for several years which has gradually gotten worse. Hunter denied any work injury or automobile accidents. The assessment was back pain, pain limb, degenerative disc disease (DDD) lumbar, spinal stenosis lumbar, and numbness and tingling. Therapeutic options were discussed and Hunter elected a lumbar fusion at L5-S1. (Ex. C, pp. 1-2; Ex, 2, pp. 30-32)

Dr. Purighalla performed the lumbar fusion on May 21, 2013. Hunter was discharged on May 23, 2013 with pain medications and he was told to follow up in two weeks. (Ex. 2, pp. 22-32; Ex. C, pp. 3-4)

Hunter returned to see Dr. Purighalla on June 5, 2013. He reported that his preoperative symptoms were significantly improved. The doctor advised Hunter to increase his activity levels as tolerated. The doctor also discussed physical therapy with Hunter; Hunter told the doctor he would let him know if he thought he needed the therapy. The doctor also noted that he discussed return to work with Hunter and Hunter advised him that he would let him know when he was ready to go to work so that the doctor could provide a letter. (Ex. C, p. 5)

On June 15, 2016, Hunter presented to Dr. Purighalla with neck pain radiating to both upper extremities with associated thickening and numbness. The note states that Hunter "also stated that the back surgery that he had in the past was work-related and he wanted me to add that fact to his notes and I told him that I could certainly added [*sic*] today." Hunter indicated he would call back to get a copy for his attorney. (Ex. 4, p. 1)

There are several medical opinions in this file. On April 20, 2016, Anis Ahmad, M.D. issued a "To Whom It May Concern" note which stated, "I have been treating Larry Hunter for his work related injury that occurred in January of 2013. Because of his work related injury, Mr. Hunter is now permanently disabled." (Ex. 3, p. 1) Unfortunately, based on the record, it is not known what, if any, prior records Dr. Ahmad had when he rendered his opinion. Also, Dr. Ahmad's opinion is not persuasive because the doctor fails to provide any rationale for his opinions.

On December 3, 2015, Hunter saw Peter G. Matos, D.O., for an independent medical examination. Based on his examination and review of the medical records, Dr. Matos opined that the work incident on January 4, 2013 did not cause a permanent injury or permanent aggravation of Hunter's preexisting degenerative disc disease and chronic low back pain. Dr. Matos felt that the work injury caused a minor temporary injury. He placed Hunter at maximum medical improvement (MMI) within 50 to 60 days of the work injury. He also noted that Hunter was in a motor vehicle accident in April of 2013 which would have caused another exacerbation of his chronic low back pain. Dr. Matos assigned zero functional impairment and no permanent restrictions as a result of the work injury. In support of his opinions, Dr. Matos noted that Hunter was an inconsistent historian. Further, he explained that Hunter's prior history of lumbar disc degeneration, chronic low back pain, and motor vehicle accident were and continued to be the significant and substantial contributing factor to his low back pain and tingling to bilateral lower extremities. The doctor noted the minimal changes in the October 2000 MRI versus the July 2010 MRI. (Ex. H, pp. 6-7)

On November 18, 2016, Hunter was examined by Sunil Bansal, M.D. for purposes of an IME. As a result of that examination and review of medical documentation provided to him Dr. Bansal issued a written report setting forth his opinions. Dr. Bansal's report indicates that he reviewed medical records dated May 16, 2013 through November 2, 2015. Dr. Bansal diagnosed Hunter with an aggravation of L4-L5 and L5-S1 disc bulging caused by the January 13, 2013 work injury. Dr. Bansal opined that Hunter reached MMI as of November 21, 2014. He assigned 20 percent permanent functional impairment to his whole person. Dr. Bansal restricted Hunter to no lifting over 15 pounds occasionally and 10 pounds frequently, and no frequent bending or twisting. Based on the record, it appears claimant did not provide Dr. Bansal with a complete medical history. The first record mentioned in Dr. Bansal's report is dated 2013. However, a review of the evidentiary record demonstrates that Hunter received treatment for his back since at least 1996. Because Dr. Bansal did not have a complete and accurate medical history his opinions cannot be relied upon. (Ex. 5, pp. 1-17)

David Henderson also testified at hearing. Henderson has been the President of Joseph J. Henderson & Sons since 2006. Henderson testified that JJ Henderson offered Hunter work within the doctor's restrictions beginning on January 18, 2013. He testified that it was the company's standard policy to accommodate light duty restrictions. At Henderson's request, Mike Bittow, the project superintendent, met with Hunter at the doctor's office on January 17, 2013. Bittow advised Hunter that JJ Henderson could accommodate his restrictions and he made the offer for Hunter to come back to light duty work the next day, on January 18, 2013. (Testimony)

Henderson testified that he believes Hunter's injury took place on a Monday. Hunter worked all day and did not complain to the superintendent or anyone in the office about the injury. Hunter returned to work on Tuesday and worked until approximately 11:00 a.m. At that point, he reported he was having some problems and wanted to see

a doctor. He was then taken to the jobsite office and asked if he needed a ride. Hunter declined the offer of a ride; he said he could drive himself. After the appointment, Hunter returned to the jobsite, picked up his paycheck, and reported that he had a follow-up appointment on January 17, 2013. Bittow spoke with Hunter on January 17, 2013, told him to take the rest of the day off and come back to work the next morning, performing light duty work. Henderson testified that if Hunter had come back to work on January 18, 2013 there would have been full-time work available for him within the doctor's restrictions. (Testimony; Transcript pp. 100-102)

According to Henderson, Hunter did not report to work on January 18, 2013. Henderson asked David Grum, the safety coordinator, to try to contact Hunter. Grum finally reached Hunter around 4:00 p.m. Hunter told Grum he wanted to go see his own doctor. Hunter had a follow-up appointment scheduled with the company doctor on January 24, 2013; Hunter did not show up for that appointment. At that point, it was Henderson's understanding that Hunter was getting his own treatment with his own doctors. (Tr. pp. 100-101)

I find that claimant's testimony is not terribly persuasive. His testimony was not supported by the medical records. For example, Hunter testified that he was experiencing difficulty with his vision during the January 15, 2013 examination and that P.A. Dean ordered an MRI of his head; this testimony is not consistent with the clinical notes. (Testimony; Ex. A, pp. 1-3) Hunter was also less than forthcoming throughout his claim. At one point, Hunter claimed he was without medical coverage from January of 2013 until May of 2013. However, he later admitted that he had been on Medicare since 1990 and had sought medical treatment using his Medicare since 1990. (Testimony) Hunter also did not provide accurate or complete answers to his interrogatories; he neglected to disclose numerous prior accidents and injuries. (Ex. I) At the arbitration hearing he unconvincingly denied signing the notarized claimant's answers to interrogatories. At the hearing he also claimed that Dr. Jabbari lied in his clinical notes. (Testimony) When the record is considered in its entirety, including the live testimony of the witnesses at hearing, I find that Mr. Hunter simply is not credible.

Claimant is seeking an award of permanent partial disability benefits. I find that the record does not support the allegation of permanent impairment. I find that there is not an expert with a complete medical history, who renders an opinion that supports claimant's allegation. Furthermore, I do not find claimant's testimony to be credible. For these reasons, I find that claimant has failed to show he sustained any permanent disability as a result of the work injury.

Claimant is seeking temporary benefits from January 15, 2013 through November 20, 2014. Henderson credibly testified that Bittow spoke with Hunter on January 17, 2013, advised him to take the rest of the day off and come back to light duty work the next morning. Henderson testified that if Hunter had come back to work on January 18, 2013 there would have been full-time work available for him within the doctor's restrictions. The work would have been pursuant to their light duty work program and consisted of light cleaning, taking care of trailers, handle site traffic, act as

a flagger, and have the worker be productive within their restricted activity level. However, Hunter never returned to work. (Testimony; See also, Ex. K, pp. 7-9) I find that when Hunter did not return to work on January 18, 2013, he refused suitable work and thus, is precluded from receiving temporary total disability (TTD) benefits during the period of his refusal. Thus, Hunter shall not receive any temporary total disability benefits on or after January 18, 2013.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

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

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).

Viewing the record in its entirety, I find that the claimant failed to carry his burden of proof to show by a preponderance of the evidence that the work injury caused any permanent disability. The record is void of a reliable expert opinion to support

claimant's allegation that he sustained permanent injury as a result of the work injury. Additionally, I concluded that claimant's testimony was not consistent with the clinical notes. Also, claimant was less than forthcoming with medical providers and with the defendants about his pre-injury back condition. For these reasons, I conclude that claimant has failed to carry his burden of proof to show entitlement to permanent partial disability benefits.

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employee refuses to accept the suitable work with the same employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal. Section 85.33(1).

The employer must show that the employee refused to perform work that was both offered and suitable. Based on the above findings of fact, I conclude that the employer offered Hunter suitable work beginning on January 18, 2013. However, claimant did not return to work and thus, refused the offer of suitable work. Because Hunter refused to accept the suitable work he shall not be compensated with temporary total disability benefits on or after January 18, 2013.

Hunter is also seeking temporary total disability benefits from January 15-17, 2013. Under Iowa law, if an injured worker is off work more than three calendar days due to the injury the worker may be entitled to temporary total disability benefits beginning on the fourth day. In the present case, the fourth day would be January 18 but claimant's refusal of suitable work precludes him from receiving TTD benefits. Therefore, I conclude that claimant is not entitled to TTD benefits from January 15 through January 17, 2013.

Hunter is also seeking alternate medical care. 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. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975). I conclude that Hunter failed to prove by a preponderance of the evidence that his ongoing conditions are related to the work injury. Therefore, claimant is not entitled to ongoing medical care. Claimant's request for alternate medical care is denied.

Claimant is seeking reimbursement for the 85.39 IME examination performed by Dr. Bansal. It appears the prerequisites of Iowa Code section 85.39 were met and that reimbursement for payment of the IME is appropriate. At the time of the hearing, Mr. Hamilton made a professional statement that his office had written a check for payment of the IME to Dr. Bansal's office. Therefore, defendants shall reimburse the Hamilton Law Firm in the amount of $2,998.00. (Ex. 5, p. 18)

Costs are to be assessed at the discretion of the deputy commissioner hearing the case. 876 IAC 4.33. Because claimant was not successful in this case, I exercise my discretion and order that each party bear their own costs in this matter.

ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing further from these proceedings.

Defendants shall reimburse the Hamilton Law Firm in the amount of two-thousand nine-hundred ninety-eight and no/100 dollars ($2,998.00) for the IME.

Each party shall bear their own costs.

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

Signed and filed this 29th day of September, 2017.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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EQP/srs/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.