BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOEL CEBALLOS,

Claimant,

vs.

TYSON FOODS, INC.,

Employer,
Self-Insured,
Defendant.

File No. 5051830

ARBITRATION

DECISION

Head Note Nos.: 1402.40; 1803

STATEMENT OF THE CASE

Joel Ceballos, claimant, filed a petition in arbitration seeking workers' compensation benefits from Tyson Foods, Inc., self-insured employer, defendant. Hearing was held in Council Bluffs, Iowa on May 12, 2016.

Joel Ceballos testified live at trial. It should be noted that claimant testified via the use of a translator. The translator, Perla J. Alarcon-Flory, was present for the entire hearing and the entire hearing was translated. The evidentiary record also includes claimant's exhibits 1-13 and defendant's exhibits A-C. It should be noted that exhibit 1, p. 2 was admitted for limited purposes consistent with Iowa Code section 86.11. The parties submitted a hearing report at the commencement of the evidentiary hearing. On the hearing report, the parties entered into certain stipulations. Those stipulations are accepted and relied upon in this decision. No findings of fact or conclusions of law will be made with respect to the parties' stipulations.

The parties submitted post-hearing briefs on June 9, 2016.

ISSUES

The parties submitted the following issues for resolution:

1. The extent of industrial disability sustained by Mr. Ceballos as a result of the April 5, 2011 work injury.

FINDINGS OF FACT

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

At the time of hearing Mr. Ceballos was 42 years of age. He was born in Mexico where he attended school until he completed the third grade. Mr. Ceballos has lived in the United States since he was approximately 17 years of age. He has no further formal education. He did receive some on-the-job training to operate a fork lift and a pallet jack. Since moving to the United States he has taken 2 or 3 months of English classes. He testified that he can read, speak, and understand a little English. However, for things such as the arbitration hearing he is much more comfortable with a translator. While working for the defendant employer he would sometimes use an interpreter. During cross-examination Mr. Ceballos testified that his wife's primary language is English and at home his family speaks both Spanish and English, but English is spoken more than Spanish. (Testimony)

After moving to the United States he initially lived in California where he performed lawn care work. He testified he performed this work for approximately one year and then moved to the Omaha-Council Bluffs area where he worked at the Ameristar Casino baking bread. Mr. Ceballos testified his work at the casino was not heavy work. He performed this job for three to four years and was paid $11.50 per hour. He left the casino job to work as a forklift operator at Omaha Cold Storage. He was paid approximately $9.00 to $10.00 per hour. He left the forklift job for better pay at Paulson Construction where he poured cement foundations. Mr. Ceballos considered this physically heavy work because he had to lift more than 100 pounds. He was paid $13.00 per hour. He left this job because it was very physically demanding. (Testimony)

Mr. Ceballos then went to work for Tyson Foods, Inc. ("Tyson"). He was hired on August 27, 1999 and was still working there at the time of the arbitration hearing. He spent his first few months at Tyson working in production. Then he moved to load out or shipping because he liked using a forklift and there were more hours available to him. Initially, the forklift he used was a sit-down forklift; however, he eventually changed to a standing forklift. He was working in the load out position at the time of the April 5, 2011 injury.

On April 5, 2011, Mr. Ceballos was loading a semi-tractor trailer with another worker. He went into the trailer with a pallet of boxes, but the other worker did not see him and he inadvertently crushed Mr. Ceballos between two mules. During the accident several boxes also fell onto Mr. Ceballos. He felt immediate pain. In the days following the injury he continued to experience very intense pain and reported the pain to the company nurse. The nurse recommended ice. As a result of this stipulated work injury Mr. Ceballos is now seeking additional permanent partial disability benefits due to an injury to his low back.

The first doctor Mr. Ceballos saw following the injury was his family doctor on August 23, 2011, who referred him to Dean Wampler, M.D. Mr. Ceballos saw Dr. Wampler on August 25, 2011. Dr. Wampler diagnosed sciatic nerve injury or possible left L5-S1 radiculopathy. Further testing and conservative treatment was performed. Dr. Wampler eventually recommended a neurosurgeon. (Ex. 5, pp. 1-6)

Mr. Ceballos was evaluated by Huy D. Trinh, M.D., on November 4, 2011. Dr. Trinh's impressions were grade 2 isthmic spondylolisthesis with foraminal stenosis at L5-S1, preexisting but aggravated by incident at work and mild left lumbar radiculopathy that was causing left buttock, and proximal thigh pain. He recommended three weeks of physical therapy to work on core strengthening, hamstring stretching, and pelvic tilt. (Ex. 7, pp. 1-2) Mr. Ceballos returned to Dr. Trinh and reported that the therapy had not been much help. Dr. Trinh discussed treatment options including a 360 degree fusion at L5-S1. Mr. Ceballos was undecided about the treatment options. The doctor recommended that for now he should keep losing weight and continue exercising on a regular basis. (Ex. 7, p. 3)

Mr. Ceballos returned to Dr. Trinh on February 13, 2012. At that point, he was ready to proceed with the recommended surgery. Dr. Trinh performed the surgery on March 28, 2012. (Ex. 7, pp. 8-10) Mr. Ceballos returned to Dr. Trinh on April 9, 2012, and reported he was doing well. He did not have any leg pain but did complain of slight numbness to his anterior right thigh only. He continued to follow-up with Dr. Trinh. On June 29, 2012, Dr. Trinh referred Mr. Ceballos to Thomas Webb, M.D., to rule out an incisional hernia.

Mr. Ceballos saw Dr. Webb who diagnosed a questionable hernia on July 12, 2012, probably related to the fusion. The hernia was repaired by Dr. Webb on August 15, 2012. (Ex. 9) Claimant does not contend that this hernia resulted in any additional disability. (Claimant's post-hearing brief, p. 2)

As of October 1, 2012, Mr. Ceballos was back to working full duty in his pre-injury job. Dr. Trinh placed him at maximum medical improvement (MMI) as of December 17, 2012. Dr. Trinh placed Mr. Ceballos in the DRE Category IV and assigned him a 20 percent body as a whole functional impairment rating. Dr. Trinh did not feel that restrictions were necessary. Mr. Ceballos underwent a functional capacity evaluation (FCE) on March 13, 2013, which placed him in the medium to medium-heavy category. Even after the FCE, Dr. Trinh did not feel permanent restrictions were necessary. (Ex. 7; A, p. 1, Ex. 10)

On July 18, 2014, a vocational assessment was prepared by Alfred J. Marchisio, Jr., of Midlands Rehabilitation Consultants, Inc. He concluded that Mr. Ceballos has a 30-35 percent industrial disability as a result of the work injury. At the time the assessment was prepared, Mr. Ceballos was still experiencing complications from his hernia surgery. Additionally, the vocational report seems to rely heavily on the "parameters" of the FCE. However, the record is void of any expert physician opinion adopting the limitations set forth in the FCE. Therefore, I do not give the vocational assessment great weight. (Ex. 11)

A job safety analysis was done of claimant's load out job and it was concluded that the job was safe for Mr. Ceballos to perform. (Ex. 10)

In late 2015, Mr. Ceballos changed shifts so he could help care for his son who was born after the work injury. This change in shifts was not related to the September 4, 2011, work injury. Prior to his job change he was performing his load out job successfully. He now continues to perform a similar job at the same pay grade. (Testimony)

Prior to the injury in question, Mr. Ceballos was able to operate the standing forklift without pain. According to Mr. Ceballos, the seated forklift is less difficult than the standing forklift. He believes the standing is more difficult because it requires him to have to stand for long periods of time. He must also press on the pedal, which really hurts his left hip, buttock, and left leg. Additionally, he has some difficulty with his ability to push and pull, especially pulling. Although the records demonstrate that Mr. Ceballos was released without any restrictions, Mr. Ceballos believes he does have restrictions but he cannot remember from which doctor. He believes he can only lift approximately 50 pounds. (Testimony)

Mr. Ceballos testified that since the time of the injury, he is not as active outside of work as he was before. He no longer runs, lifts weight, plays volleyball, or soccer. He is still able to fix his own cars, but the repairs take longer. Prior to the injury he used to mow the lawn and shovel the snow. However, since the injury these tasks hurt his back so he only performs these jobs on occasion. He no longer performs as many of the household chores as he did prior to the injury. (Testimony)

Mr. Ceballos testified that he always has pain and that he just puts up with it. He estimates he takes 1 or 2 Advil per week. He has not applied for any other jobs since the injury. He does not think he will be able to stay working at Tyson, but he is unsure of any other options. According to Mr. Ceballos, he cannot perform any of the jobs he did prior to being hired at Tyson. He said his prior baking job required too much standing. Although he does not have any restrictions placed on how long he may stand or sit he testified that he can only stand or sit for approximately 15 minutes before he experiences pain. He also experiences pain if he walks more than ½ mile.

I find that as a result of the work injury Mr. Ceballos sustained 20 percent functional impairment of his body as a whole. I further find that he does not have any permanent work restrictions as a result of the work injury. To the credit of both parties in this case, Mr. Ceballos continues to work at Tyson. Although Mr. Ceballos has changed jobs since the time of the work injury this was not due to the work injury. Rather, I find that he changed jobs due to personal reasons related to caring for his son. At the time of the work injury he was paid $11.30 per hour. At the time of hearing he was paid $11.60 per hour; he has received pay raises just like the other employees. However, Mr. Ceballos does continue to have pain.

Considering claimant's age, educational background, employment history, ability to retrain, permanent impairment, and lack of permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that Mr. Ceballos

has sustained a 25 percent loss of future earning capacity as a result of his work injury with Tyson.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6)(e).

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).

Because 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).

Based on the above findings of fact I concluded that claimant sustained 25 percent industrial disability as a result of his work injury with Tyson. As such, he is entitled to 125 weeks of permanent partial disability benefits. 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. Defendant shall pay claimant 125 weeks of permanent partial disability benefits commencing on the stipulated commencement date of May 26, 2012.

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the rate of three-hundred eighty and 21/100 dollars ($380.21).

Defendant shall pay one hundred twenty-five (125) weeks of permanent partial disability benefits commencing on the stipulated date of May 26, 2012.

All past due weekly benefits shall be paid in lump sum with applicable interest pursuant to Iowa Code section 85.30.

Defendant shall be entitled to credit for all weekly benefits paid to date.

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 10th day of August, 2016.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.