BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROBERT JONES, SR.,	FILED	
Claimant,	JAN 26 2018	
vs.	WORKERS COMPENSATION	File No. 5054753
CASH, INC. d/b/a TACO JOHN'S,		ARBITRATION DECISION
Employer,		
and		
DEPOSITORS INSURANCE COMPANY,		
Insurance Carrier, Defendants.		Head Note Nos.: 1108.50, 1402.40, 1803

STATEMENT OF THE CASE

Robert Jones, Sr., claimant, filed a petition in arbitration seeking workers' compensation benefits from Cash, Inc. d/b/a Taco John's, employer, and Depositors Insurance Company, insurance carrier, as defendants. Hearing was held on January 9, 2018 in Des Moines, Iowa.

Claimant, Robert Jones, Sr., and Craig Scott both testified live at trial. The evidentiary record also includes Joint Exhibits JE1-JE7 which were admitted without objection.

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.

ISSUE

The parties submitted the following issue for resolution:

1. Whether the stipulated injury is the cause of permanent disability? If so, the nature and extent of industrial disability claimant sustained as a result of the March 25, 2015 work injury?

FINDINGS OF FACT

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

Claimant, Robert Jones, Sr., has worked for the defendant-employer at the same Taco John's store for over 20 years. He is a valued employee. The owner of the store, Craig Scott, testified that Mr. Jones is a hard-worker who is valuable to have on the floor. Mr. Scott hired Mr. Jones who had previously worked at Hardee's. Mr. Scott testified that when he hired Mr. Jones there was a conversation about Mr. Jones having some prior neck and back issues that could possibly affect his ability to work. However, Mr. Jones was hired because Mr. Scott felt that they could work out any possible issues. Mr. Scott described Mr. Jones as a great employee. (Testimony)

At the time of the stipulated injury in March of 2015, Mr. Jones was working at Taco John's as a kitchen manager; this is the same position he has held throughout his employment with the defendant employer. His job duties include getting the food ready for the customers and managing other workers. He manages anywhere from four to seven people at a time; mostly part-time employees. He does not hire or fire individuals, nor does he work on scheduling. His management duties are limited to assigning employees tasks and managing the employees during their shifts. As kitchen manger he is also in charge of the front of the store. (Testimony; JE6)

On the date of the stipulated injury, Mr. Jones slipped and fell in the walk-in cooler. He landed on his left side of his body. He said his belt pulled tight when he fell and he had immediate pain in his abdomen. In his deposition, he testified that was the seventh time he fell in that cooler, in two and one-half months. There was a pipe in the walk-in cooler that was leaking and needed to be fixed. He did not report his injury immediately because he was the lead-person at the store when the injury occurred. However, after a couple of days the swelling in his abdomen did not go down so he reported the injury. He was told to go see his primary doctor and tell the doctor's office that it was covered under workers' compensation. (JE6)

Mr. Jones first sought medical treatment with his primary care physician, Gregory Thomas, M.D. in April of 2015. He ordered a CT scan of the abdomen which showed several hernias. Dr. Thomas referred Mr. Jones to see Dr. Tieszen. (Testimony)

He saw Myles E. Tieszen, M.D. on April 27, 2015. Dr. Tieszen noted that Mr. Jones had two previous surgeries for repair of abdominal wall hernias near his belly button. The most recent repair was 10 years ago; mesh was used for the repair. Mr. Jones reported that he was doing well until he had a slip and fall at work on April 9. Immediately after the fall he felt pain in his abdomen in the right lower region and left

middle region. His pain is made worse with movement or lifting things. His pain is much worse at the end of the day after being on his feet and active. The CT scan of the abdomen and pelvis from April showed 2 small ventral abdominal wall hernias continuing fat above the umbilicus. The CT also showed bilateral inguinal hernias with larger inguinal hernia noted on the left side. The doctor recommended surgical repair. (JE1, pp. 1-4)

Dr. Tieszen performed surgery on June 19, 2015. The operative report lists the diagnoses as bilateral inguinal hernia and incisional hernia midline abdomen periumbilical region. Dr. Tieszen performed laparoscopic properitoneal bilateral inguinal hernia and laparoscopic repair incisional hernia with placement intraabdominal prosthetic mesh. (JE1, pp. 5-7)

On August 18, 2015, Dr. Tieszen indicated that a diagnosis of anal fissure was not related to the hernia surgery which was performed on June 19, 2015. He also stated Mr. Jones would reach maximum medical improvement (MMI) from the hernia repairs approximately 90 days after the operation; roughly September 19, 2015. (JE1, p. 8)

On November 3, 2015, Mr. Jones underwent an independent medical evaluation (IME) with D.M. Gammel, M.D.; this was done at the request of the defendants. In addition to examining Mr. Jones, Dr. Gammel also reviewed the medical records provided to him. Mr. Jones' greatest concern was that prior to the injury he worked 40+ hours per week, but was now down to 24 hours. He wanted to be pain free so he could work as many hours as he did prior to the injury. He reported having a stiffness in his lower back, weakness in his right leg and abdomen, numbness and tingling in his right leg, and pain located in his beltline, groin, abdomen, down his right leg, and lower back. His pain was made worse with walking, bending, twisting, and is lessened with ice and ibuprofen. Dr. Gammel's diagnoses included recurrent ventral/incisional abdominal wall hernias x 2 and bilateral inguinal hernias; status post-operative repair. However, Dr. Gammel did not feel that these diagnoses were the cause of his current complaints of pain. He agreed with Dr. Tieszen that Mr. Jones' symptoms were likely musculoskeletal in nature and not related to the hernia repairs. He also concurred that the rectal complaints were not related to the hernia repairs. Dr. Gammel opined that no further treatment was warranted with regard to the hernias. Dr. Gammel did not feel that permanent restrictions were warranted. He felt that Mr. Jones reached MMI on or about November 9, 2015. Dr. Gammel then utilized the AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition to assign 0 percent permanent functional disability. (JE3)

On November 9, 2015, Mr. Jones saw Scott G. Rose, M.D. He reported he was still having pain and discomfort and was tired and fatigued. His latest CAT scan showed no evidence of any recurrent hernia. The doctor noted that his physical exam on the abdominal wall and inguinal regions were normal. The doctor did not see any surgical reason to intervene. He recommended talking to a pain clinic. (JE2, p. 9)

On June 21, 2016, Mr. Jones underwent another IME. This IME was conducted by Sunil Bansal, M.D. at the request of claimant's counsel. Dr. Bansal also reviewed the medical records that were provided to him. At the time of this IME, Mr. Jones reported experiencing back pain radiating down his right leg. He reported that this had led to his leg giving way. His pain, numbness, and tingling also radiated to his foot. Also, at times he could feel a sharp pain at his beltline. He reported that he no longer lifted things and was unsure of his actual ability to lift. The report also stated that Mr. Jones now walked with an antalgic gait. Dr. Bansal's diagnoses included ventral hernias and bilateral inguinal hernias and right sacroiliitis. Dr. Bansal stated that at the time of the injury Mr. Jones sustained an injury to his back and developed hernias. Dr. Bansal opined that the impact of his fall caused the hernias. He also felt that the mechanism of injury and his acute clinical presentation was consistent with the acute back pathology of right sacroilitis. Dr. Bansal utilized the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition to assign five percent functional impairment of the body as a whole for his right groin. There was no ratable impairment for the left groin. With regard to the back, Dr. Bansal assigned three percent whole person impairment. Dr. Bansal did not assign any restrictions. (JE4)

At hearing, Mr. Jones testified that the examination with Dr. Gammel was very brief and performed with his shirt on. Dr. Tieszen and Dr. Bansal both examined Mr. Jones without his shirt on. (Testimony)

I find Dr. Bansal's impairment rating to be more persuasive than that of Dr. Gammel. This agency has adopted the Fifth Edition to the Guides to the Evaluation of Permanent Impairment. 876 IAC 4.2. Dr. Bansal's rating utilizes the Fifth Edition of the AMA Guides while Dr. Gammel utilized the Sixth Edition. Based on the claimant's testimony regarding his ongoing symptoms and the report of Dr. Bansal, I conclude that claimant has carried his burden of proof to demonstrate by a preponderance of the evidence that he has sustained permanent disability as a result of the stipulated work injury.

We now turn to the issue of industrial disability. At the time of the hearing Mr. Jones was 54 years of age. Mr. Jones did not complete high school, but he did obtain his GED in 1984. Prior to working in the fast-food industry, he worked in maintenance at a trailer court. His maintenance duties included cleaning sewer lines, water heaters, furnaces, air conditioners, electrical wiring, and gas lines. He did not have any formal training in maintenance. He worked in maintenance for approximately 9 years. (JE6)

At the time of the stipulated work injury, Mr. Jones was being paid $12.00 per hour and continued to receive that same pay as of the date of his deposition which was July 7, 2016. (JE6, depo. p. 13) At the time of the arbitration hearing, he was still working six days a week for the defendant employer, but no longer works as many hours per day due to his pain. He usually works four to six hour shifts, but sometimes stays for 7 hours if the employer cannot get anyone else to come into work. Mr. Jones testified that he is now working approximately 35 hours per week. No doctor has limited

the number of hours he may work; however, Mr. Jones testified that this is all he can physically tolerate. He also self-limits his lifting because even just bending over causes him pain. No doctor has placed any formal lifting restrictions on Mr. Jones. Since the injury he has had ongoing pain and swelling. His pain increases with activity. For example, he has pain in his abdomen and groin when he brings the meat from the grill and cooker and that only weighs ten pounds. His pain also increases when he reaches and even just walking causes an increase in symptoms. Mr. Jones' testimony was not disputed by the owner, Craig Scott. (Testimony)

Considering Mr. Jones' age, educational background, employment history, ability to retrain, motivation to continue working in his job, permanent impairment, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that Mr. Jones has sustained a 15 percent loss of future earning capacity as a result of his work injury with the defendant employer.

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).

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.

Based on the above findings of fact, I concluded that Mr. Jones sustained permanent disability as a result of the work injury. I further concluded that he sustained a 15 percent loss of industrial disability due to the stipulated work injury. As such, defendants shall pay Mr. Jones 75 weeks of permanent partial disability benefits commencing on the stipulated commencement date of October 15, 2015.

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the rate of three hundred twenty and 50/100 dollars ($320.50).

Defendants shall pay seventy-five (75) weeks of permanent partial disability benefits commencing on October 15, 2015.

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

Defendants 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 26th day of January, 2018.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

James P. Hoffman
Attorney at Law
PO Box 1087
Keokuk, IA 52632-1087
jamesphoffman@aol.com

Deborah M. Stein
Attorney at Law
666 Walnut St., Ste. 2302
Des Moines, IA 50309
steind8@nationwide.com

EQP/srs

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.