BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ALFRED SARMU, Claimant, vs. GREEN PLAINS INDUSTRIAL CLEANING SERVICES, Employer, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	File No. 5053809 ARBITRATION DECISION Head Note Nos.: 1803, 2500, 2208

FILED
JAN 09 2018
WORKERS' COMPENSATION

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Alfred Sarmu, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on March 16, 2016. Claimant alleged he sustained a work-related injury on August 23, 2015. (Original notice and petition.)

For purposes of workers' compensation, Green Plains Industrial Cleaning Services., defendant, is insured by Liberty Mutual Insurance Co., defendant. Defendants filed their answer on March 28, 2016. They admitted the occurrence of the work injury. A First Report of Injury was filed on September 8, 2015.

The hearing administrator scheduled the case for hearing on August 1, 2017. The hearing took place in Des Moines, Iowa at 150 Des Moines Street. The undersigned appointed Ms. Janice M. Doud as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on his own behalf. Defendants elected not to call any witnesses.

The parties offered exhibits. Claimant offered exhibits marked 1 through 7. Defendants offered exhibits marked A and B. The parties offered joint exhibits marked 1 through 4. All proffered exhibits were admitted as evidence in the case.

Post-hearing briefs were filed on or before September 1, 2017. The case was deemed fully submitted on that date.

STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

1. There was the existence of an employer-employee relationship at the time of the alleged injury;

2. Claimant sustained a work-related injury on August 23, 2015 which arose out of and in the course of his employment;

3. The alleged injury is a cause of temporary disability during a period of recovery;

4. The parties agree if permanency is found, the permanency is an industrial disability;

5. The parties agree, if a permanent work injury is determined, claimant reached maximum medical improvement on March 21, 2017;

6. The parties agree, the weekly benefit rate is $477.12;

7. Defendants have waived any affirmative defenses they may have had available;

8. Medical benefits are not in dispute;

9. Prior to the hearing, defendants stipulated they would reimburse claimant for the cost of the independent medical examination (IME) in the amount of $2,596.00;

10. Prior to the date of the hearing, defendants underpaid claimant for temporary or healing period benefits in the amount of $900.79 based on weekly payments made at the rate of $402.92 instead of $477.12 per week; and

11. The parties agree certain costs that are detailed were paid by claimant.

ISSUES

The issues presented are:

1. Is the work injury on August 23, 2015 a cause of permanent disability?
2. Is claimant entitled to permanent partial disability benefits?

3. If so, to what extent is claimant's permanent partial disability?

4. Is claimant entitled to the payment of an independent medical examination pursuant to Iowa Code section 85.39?

5. For which costs are defendants liable?

FINDINGS OF FACT

This deputy, after listening to the testimony of claimant at hearing, after judging his credibility, and after reading the evidence, and the post-hearing briefs, makes the following findings of fact and conclusions of law:

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

Claimant is 27 years old and single with two minor children. He is right hand dominant. Claimant was born and raised in Liberia. He graduated from high school in Liberia. He speaks both English and French. In 2010, he moved to the United States. Claimant attended the New England School of Technology for approximately one and one-half years. He did not graduate.

After claimant left school, he began working in the production field. He worked for AMTROL. He made water coolers, propane tanks, and he performed welding. He was required to lift 60 to 75 pounds. There was overhead lifting once every 45 minutes. Claimant earned $11.00 per hour.

Next claimant worked at Capstan Atlantic. This too was a production job. Claimant made transmission parts for Chrysler products. Every 30 minutes, claimant had to lift and carry tubs that weighed from 50 to 75 pounds. Claimant earned $13.00 per hour.

Claimant moved to Iowa in 2014 to join his cousin who lives in this state. Claimant began working for Green Plains Industrial Cleaning Services as a field technician. His job duties required him to climb a ladder with 50 feet of water hose and then "hydro-blast" tanks with caked corn syrup. Each hose weighed 25 pounds. The hoses were high pressure hoses that sprayed anywhere from 10,000 PSI to 40,000 PSI. (PSI is the pressure resulting from a force of one pound of force applied to an area of one square inch.)

Claimant was required to traverse multiple flights of stairs while carrying equipment. He was required to move up to 50-100 pounds occasionally, 25-50 pounds frequently, and 10-20 pounds frequently. Claimant's other duties included frequent climbing, crawling, kneeling, crouching, pushing, pulling, lifting, carrying, and gripping. Claimant was also involved in extensive travel. (Exhibit 1, pages 1-2)

On August 23, 2015, claimant was working in Tennessee and cleaning large tanks used in the manufacture of corn syrup. Claimant had to climb inside the tanks and "hydro-blast" the inside in an attempt to remove the dried corn syrup. Somehow, the hose malfunctioned, and the water hit claimant removing flesh from his back. Claimant testified he experienced immediate numbness.

Claimant presented to the emergency room at Baptist Memorial Hospital in Tennessee. Numerous lacerations were noted. Claimant's wounds were cleaned and dressed.

Claimant returned to Iowa. He was experiencing fevers, chills, and intense pain. On August 26, 2015, claimant presented to the Iowa Clinic for follow up care. (Joint Exhibit 2, page 1) Michael P. Mohan, M.D., examined and treated claimant. Dr. Mohan noted the following with respect to claimant's skin:

> **Skin:**
>
> Injury/Incision Site Upper back showed tissue injury. Wound on the back complex curvilinear wounds with some tissue undermining as well as devitalized tissue and purulence. He also has at least 1 and likely 2 deeper pockets of abscess.

(Jt. Ex. 2, p. 2)

Claimant also saw Jamey Joe Hawk, M.D., at the Iowa Clinic on August 26, 2015. (Jt. Ex. 2, p. 3) Dr. Hawk examined claimant's skin. The physician found:

> **Skin:**
>
> Moisture was abnormal. Lesions Multiple serpiginous lacerations on his right flank, green d/c from the wounds. 5cm induration midway down the back.

(Jt. Ex. 2, p. 4) Dr. Hawk diagnosed claimant with cellulitis. (Jt. Ex. 2, p. 5)

Dr. Hawk developed the following plan for claimant:

> **Plan:**
>
> Cellulitis: Discussed that this is serious infection. I showed the pictures to Dr. Mohan who agreed to see him today for consult. May need OR debridement. I sent cultures of wound, blood cultures, CBC, CMP, ESR. I did give him 500 mg IV Levaquin along with Gentamicin at 7mg/kg every 24 hour loading dose. Then tomorrow will return for a second dose of Levaquin 500mg IV and Gentamicin at 5.1 mg/kg/day. He may need a

> PICC line and/or admission to the hospital. He will be off work until re-evaluated tomorrow.
>
> Discussed with Dr. Mohan who feels this needs to go to the OR. She is working on utilization. I called Melinda at Liberty Mutual. They will give him the antibiotics peri-operatively. I would recommend he follow up with Urgent Care on Friday to go over culture results etc.
>
> F/U with the Urgent Care on Friday at 10:00 am.

(Jt. Ex. 2, p. 6)

On August 27, 2015, Dr. Mohan performed debridement, incision, and drainage of claimant's back wounds. (Jt. Ex. 2, p. 8) Claimant was restricted from work until September 9, 2015. (Jt. Ex. 2, p. 9)

Claimant did not return to work on the ninth. The healing process was slow. Claimant was allowed to return to work on September 28, 2015. (Jt. Ex. 2, p. 13) Claimant was restricted to working in a dry environment for two weeks. (Jt. Ex. 2, p. 13) Claimant testified he was to cover his wound properly. He was able to return to full duty work on October 12, 2015. (Jt. Ex. 2, p. 14) As of October 21, 2015, claimant was back to full duty work but he still encountered discomfort and stiffness. (Jt. Ex. 2, p. 15)

In May of 2016, claimant returned to Dr. Mohan. Claimant was experiencing pain at the scarring area. (Jt. Ex. 2, p. 18) Dr. Mohan recommended a referral to a plastic surgeon.

Claimant returned to Dr. Mohan on June 13, 2016. (Jt. Ex. 2, p. 20) Dr. Mohan noted a large keloid scar in the right upper back. Claimant complained of pain and tightness in the area. (Jt. Ex. 2, p. 21) The wound was tender to the touch. (Jt. Ex. 2, p. 20) Dr. Mohan discussed re-excision and steroid injections with a plastic surgeon. (Jt. Ex. 2, p. 20)

Konstantinos Lekkas, M.D., a plastic surgeon at the Iowa Clinic, examined claimant on August 31, 2016. Dr. Lekkas assessed claimant's condition as:

> **Assessment**
>
> Alfred is a 26-year old male who comes to the office today for evaluation of scarring on his right mid back area. He was hurt with a power washer about 1 year ago. I believe Dr. Mohan was called and repaired some of the wounds but now he has developed thick scarring that itches. I don't think this necessarily looks like a keloid. It could be keloid in nature and we may need to reinject it, but I think we should re-excise all these areas.

(Jt. Ex. 2, p. 24)

Dr. Lekkas performed a scar revision on the right mid back. The surgery occurred on February 20, 2017. (Jt. Ex. 2, p. 30) Claimant was removed from work through March 20, 2017. (Jt. Ex. 2, p. 31)

Dr. Lekkas last examined claimant on June 19, 2017. The plastic surgeon opined:

> He is healing very nicely. He has no limits in his range of motion. The pain is significantly improved. They are not itchy. He essentially is healed. I expect no further treatment necessary, and no further surgery. He is at maximum medical improvement. He has no disability from this and no pain. He has full range of motion. I would give him a permanent partial disability rating of zero.

(Jt. Ex. 2, p. 34)

Claimant exercised his right to an independent medical examination pursuant to Iowa Code section 85.39. Sunil Bansal, M.D., M.P.H., conducted his examination on July 26, 2017. The examining physician noted five scars from claimant's scapula to the right lower back. (Ex. 7, p. 6) (It is noted for the record: photos of the scars were contained in exhibit 2, pages 1 through 8.) Dr. Bansal found hypersensitivity over the back. (Ex. 7, p. 6)

Dr. Bansal opined claimant suffered a permanent functional impairment to his body as a result of his work injury on August 23, 2015. Dr. Bansal opined:

> High pressure burn to the right scapular and upper back region, with cellulitis.
>
> Status post debridement of right upper back wound, incision and drainage of subcutaneous abscesses.
>
> Keloid scar of the skin.
>
> Status post 15 cm scar revision to the back.
>
> With reference to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, specifically Table 8-2, Mr. Sarmu meets the criteria of a Class I Impairment. His burn is sensitive to the physical agents of temperature, and he does need to apply moisturizers. Secondary to the extensive body surface area burning, **I would assign a 5% impairment of the body as a whole.**
>
> In addition:
>
> With reference to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, specifically Figure 16-40 through 16-46 and comparing to the left shoulder, we find that Mr. Sarmu is assigned:

	RANGE OF MOTION	% UE Impairment
Flexion:	173, 173, and 170 degrees	1
Abduction:	162, 164, and 164 degrees	1
Adduction:	25, 28 and 30 degrees	1
External Rotation:	89,88, and 86 degrees	0
Extension:	42, 40, and 41 degrees	1
Internal Rotation:	71, 70 and 70 degrees	1

This equals a 5% upper extremity impairment, which is equal to a 3% impairment to the body as a whole.

(Ex. 7, pp. 7-8)

Dr. Bansal imposed work restrictions. They were:

Avoid prolonged exposure to sunlight. Avoid extreme temperature exposures, either hot or cold. Wear proper work gear to prevent exposure to environmental or chemical exposure. No lifting greater than 10 pounds over shoulder level with the right arm. No frequent reaching with the right arm, or over shoulder work.

(Ex. 7, p. 9)

At the arbitration hearing, claimant testified he avoids heat. Any heat feels as if his wound is burning. Claimant keeps his wound covered from the sun. He stated he has back pain at the site of his scars. He feels a pulling sensation when he reaches out in front of his body. Claimant testified he takes 2 to 3 over-the-counter pain pills every day. He must also use moisturizer on his back. Claimant stated he is capable of lifting up his right arm but when he does so, he experiences pain. Claimant indicated he no longer plays soccer or lifts weights. Claimant testified he is embarrassed by his scarred back.

Once claimant was released to full duty at Great Plains Industrial Cleaning Services, he continued to work there for approximately five months. He acknowledged he could perform the work but with pain, especially when he used his right arm.

In April of 2016, claimant commenced employment with TPI in Newton, Iowa. His job was to laminate fiberglass with resin. Claimant used rollers to laminate the fiberglass. He worked 8 hours per day and he earned $16.00 per hour. Claimant testified he was able to perform the job as there was no heavy lifting involved in the

position. There was absolutely no overhead lifting. Claimant voluntarily terminated his position in August of 2016.

At the time of the hearing, claimant was employed for Sky Climber of Delaware, Ohio. He commenced his position in September of 2016. His job required him to travel around the country to upgrade the software at the bottom of wind generating towers. Claimant testified he earned $20.00 per hour plus time and one half for hours worked in excess of 40 hours per week. Claimant testified he worked an average of 65 hours per week. Claimant traveled by air and by motor vehicle. He was away from his home for several weeks at a time.

In claimant's brief, that was dated, September 1, 2017, Mr. Nicholas L. Shaull, attorney for claimant, made a professional statement on behalf of his client. Mr. Shaull stated claimant voluntarily terminated his position with Sky Climber on August 15, 2017.

RATIONALE AND CONCLUSIONS OF LAW

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).

When an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522, 133 N.W.2d 867 (1965).

The weight to be given an expert opinion may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. St. Luke's Hospital v. Gray, 604 N.W.2d 646 (Iowa 2000).

Expert testimony may be buttressed by supportive lay testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 380; 101 N.W.2d 167, 170 (1960).

The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence. Together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire and Casualty Co., 526 N.W.2d 845 (Iowa 1995).

The undersigned is giving greater weight to the opinions of Dr. Bansal than to the opinions of Dr. Lekkas. Claimant testified when Dr. Lekkas evaluated claimant for the purpose of rendering a permanent impairment rating, the appointment lasted from 5 to 10 minutes. The surgeon felt the wound and then the plastic surgeon had claimant lift

his arm to the side of his body and then level with his shoulder. The report of Dr. Lekkas did not discuss whether any type of range of motion measurements had been taken. The doctor did not test for sensitivity.

However, when Dr. Bansal examined claimant, the examination lasted approximately one and one half hours. Claimant lifted the right arm over his head. He twisted the right arm. Dr. Bansal forced the arm backward, and behind claimant's back. Dr. Bansal also used measuring tools to check the length of claimant's scars. The examining doctor used pin prick tests to check claimant's sensitivity too. Additionally, Dr. Bansal posed all types of questions to claimant.

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.

In arbitration proceedings, interest accrues on unpaid permanent disability benefits from the onset of permanent disability. Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979); Benson v. Good Samaritan Ctr., File No. 765734 (Ruling on Rehearing, October 18, 1989).

The undersigned determines claimant has sustained a permanent partial disability in the form of an industrial disability. The location of claimant's wounds, as demonstrated in the photographs submitted at hearing, depict the length and breadth of the area affected. It is easy to see how the wounds would affect claimant's ability to reach, stretch, or lift at or above his shoulders. Dr. Bansal demonstrated there were issues with range of motion. Claimant's stiffness and tightness has limited claimant's ability to reach overhead. As a consequence, Dr. Bansal has placed very reasonable restrictions on claimant. He should not lift greater than 10 pounds over his shoulder with his right arm and he should not reach frequently with the right arm or perform frequent over the shoulder work. Such restrictions make it impossible for claimant to

return to some of his former jobs where overhead lifting was required. Likewise, frequent climbing and carrying heavy objects in the right hand are not in keeping with the restrictions imposed by Dr. Bansal.

In light of all the factors affecting industrial disability, it is the determination of the undersigned; claimant is entitled to a permanent partial disability in the amount of ten (10) percent. Defendants shall pay unto claimant fifty (50) weeks of permanent partial disability benefits at the stipulated weekly benefit rate of $477.12 per week and commencing from March 21, 2017.

The final issue is costs to litigate. Iowa Code section 86.40 states:

> Costs. All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

> Costs. Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb.

December 8, 2010) The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

The following costs are assessed to defendants:

Filing fee	$100.00
Service fee	unknown
Dr. Lekkas Report fee	$250.00

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant fifty (50) weeks of permanent partial disability benefits at the stipulated weekly benefit rate of four hundred seventy-seven and 12/100 dollars ($477.12) and payable from March 21, 2017.

Accrued benefits, including any underpayments, shall be paid in a lump sum, together with interest, as provided by law.

Costs are assessed to defendants as detailed in the body of this decision.

Defendants shall file all reports as required by law.

Signed and filed this 9th day, January, 2018.

Michelle A. McGovern

MICHELLE A. MCGOVERN
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.