BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SCOTT ANDERSON, Claimant, vs. IBP, INC., Employer, Self-Insured, Defendant.	:	File Nos. 1286760 & 1282767 A R B I T R A T I O N D E C I S I O N Head Note No.: 1100; 1402.30

STATEMENT OF THE CASE

Claimant, Scott Anderson, has filed petitions in arbitration and seeks workers' compensation from IBP, Inc., self-insured employer, defendant.

This matter came on for hearing before deputy workers' compensation commissioner, Ron Pohlman, on September 4, 2002, in Waterloo, Iowa. The record in the case consists of claimant's exhibits 1-5, defendant's exhibits A-G, as well as the testimony of the claimant, Deanna Wiedner; Scott Studebaker; and Tom Brown.

Claimant objected to the admission of defendant's exhibit G insofar as it contained records related to the claimant's termination of employment, objected to the claimant's deposition as being cumulative and objected to the admission of the claimant's criminal record, as being more than 10 years old. The first objection is overruled as the reason for the termination is relevant to issues of industrial disability and temporary disability. The second objection is sustained as the deposition is merely cumulative evidence. The final objection is sustained as the claimant's criminal record has no relevance to the issues in this claim.

ISSUES

In File No. 1286760:

1. Whether the injury of April 18, 2000, was the cause of any permanent disability; and

2. The extent of entitlement to permanent partial disability benefits pursuant to Iowa Code Section 85.34(2)(u).

In File No. 1282767:

1. Whether the claimant sustained an injury arising out of and in the course of employment on August 28, 2000;

2. Whether the injury was cause of any disability;

3. The extent of entitlement to permanent partial disability benefits pursuant to Iowa Code Section 85.34(2)(u); and

4. Whether the claimant is entitled to the payment of medical expenses pursuant to Iowa Code Section 85.27.

FINDINGS OF FACT

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

Claimant at the time of the hearing was 43 years old. He has lived in the state of Minnesota for the last one and one-half years. He has a 9th grade education and earned a GED three years ago. His work history consists of unskilled manual labor, primarily in factory work. He began working at IBP, Inc., in March 1999 as a plasma operator. A plasma operator uses a machine to separate the plasma from blood products and is in charge of cleaning the machine. Some of this job is done using a hoist but some heavy lifting is required to move barrels of chemical to the machine and to use a wrench to dismantle the machine for cleaning.

On April 18, 2000, the claimant sustained an injury consisting of a left inguinial hernia while on the job as a plasma operator. Robert Savereide, M.D, treated him for this injury. Dr. Savereide performed surgery on April 6, 2000. (Defendant's Exhibit B-1) The claimant reached maximum medical improvement from this injury on May 31, 2000.

Dr. Savereide's only restriction for the claimant was to do no work that causes pain in the groin or back. (Ex. B-5)

The claimant initially attempted return to work on May 15, 2000, but had to leave after four hours because of pain. He returned to Dr. Savereide who referred him back to Occupational Health for appropriate referral. (Ex. B-1) He was then seen by Richard P. Bose, M.D. Dr. Bose diagnosed mononeuropathy or mononeuropathy multiplex involving most likely the left ilioinguinal nerve; possibly the left genitofemoral nerve and less likely involvement of the left iliohypogastric nerve. (Claimant's Exhibit. 2, page 6) Dr. Bose gave the claimant an injection of the left ilioinguinal nerve. (Ex. 2, p.7)

Upon return to work the claimant continued to perform the normal duties of a plasma operator. The claimant was working as many hours as available including overtime. He worked 74.18 hours his second week after being released. (Ex. G-55)

Dr. Savereide did not opine as to an impairment rating but did note that the claimant continued to experience pain in the area of the hernia repair but the claimant did not have a recurrent hernia. (Ex. B-6)

Claimant continued to work the plasma operator position without incident until August 2000 when he began reporting pain and numbness in his right leg to the health services department. He was examined at Occupational Health by Patrick Malone, P.A., who thought the condition was not related to work but referred the claimant to Brian Sires, M.D., for EMG testing.

Dr. Sires reported:

> I suspect the patient has a progressive injury of the deep peroneal nerve at or distal to the level of the common peroneal nerve. An L5 radiculopathy could cause similar findings, but I would suggest an orthopedic referral to look at the knee and distally as an initial evaluation. Common causes for such findings would include entrapment of the nerve between the heads of the peroneus muscle, a cyst or ganglia ad so forth. Clinically I can identify Tinel's sign over the peroneal nerve distal to the fibular head and there is a great deal of tenderness in this area as well.

(Ex. C-1)

Claimant was continuing to work overtime and perform his regular job duties. On October 17, 2000, the claimant's employment was terminated for violation of the attendance policy. From October 18, 2000, to December 18, 2000, the claimant was off work and receiving unemployment benefits. He was re-hired by IBP because he was a good worker despite his attendance problem. When claimant returned to work on December 19, 2000, he was assigned to the South Operator position in the rendering department. He was again working overtime.

On October 20, 2000, the claimant saw Thomas Gorsche, M.D., for an opinion as to the claimant's back pain and numbness. Dr. Gorsche found the claimant to be neurologically intact but noted L5 radiculopathy by nerve conduction studies. (Ex. D-2)

He also noted the claimant had L5 spondylosis. (Ex. D-2) He suggested the claimant have an MRI which revealed mild circumferential disc bulges at 3-4 and 5-1 but Dr. Gorsche had no explanation for the claimant's problems. (Ex. D-3)

After follow-up testing on December 1, 2000, Dr. Sires opined:

> We initially saw Mr. Anderson for electrodiagnostic testing upon the referral from Pat Malone, PA, on September 1, 2000. Mr. Anderson did not give us a history which indicated a work related cause for the symptoms of numbness and weakness in his right leg. The electrodiagnostic examination at that time was most suggestive of injury to the right deep peroneal nerve, although L5 lumbar radiculopathy was a differential possibility. Because of the findings I suggested an orthopedic referral and an MRI of the knee which did not reveal an anatomic cause for the injury patterns seen on electromyography. We saw him subsequently on December 1, 2000, and repeated an electromyography at no charge. This showed prominent improvement of the prior injury pattern, but I was unable to clearly resolve whether the site of involvement was at the L5 nerve root or at the right peroneal nerve. The prognosis based on these findings however would appear to be very good and I would think that the patient will resolve his symptoms with no significant residual debility.
>
> I am unable to clearly delineate a relationship between the patient's condition and any work activity, either by history, examination or the results of the electrodiagnostic studies.

(Ex. C-7)

On May 22, 2001, the claimant was terminated because he instigated a fistfight with coworker, Tim Brown, over the claimant's belief that Mr. Brown was stealing overtime. The claimant struck Mr. Brown in the face nine times. Mr. Brown did not strike the claimant. The claimant initially lied about this incident in the employer's investigation in an attempt to save his job but later acknowledged what he had done.

On May 7, 2001, the claimant saw Arnold Delbridge, M.D,. for an independent medical evaluation. Dr. Delbridge opined that the claimant had a two percent permanent impairment as a result of the hernia repair and subsequent complications pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Ex. 3, p. 10) Dr. Delbridge opined with respect to the back condition:

> Scott Anderson also had an injury to his back, according to him. This did not take place in one episode but rather was cumulative over several years. It was apparent that he was asked to do enormously heavy tasks at work if his history is correct. He was asked to manipulate 500 lb. barrels of blood which is a daunting task for one individual in any situation.

> Given his exposure to these extreme conditions, it is credible that he would have back difficulties. In addition to that, he has radicular-like syndrome on the right and he also has an abnormal facet on the right at L5-S1 which could well be irritating his L5 nerve root.
>
> Dr. Sires felt that he was more likely to have a peroneal nerve injury, but the MR was negative for any cyst and it is unclear where that injury would come from. Dr. Sires also said it was possible that it could come from the L5 nerve root. Given the fact that he has no real dorsiflexor weakness of his foot, my thinking is that it is at least as likely to come from the L5 nerve root in the lumbar spine.
>
> Given that Mr. Anderson has some limited motion of his spine and given a radicular-like syndrome on the right lower extremity, my conclusion is that he has a 5% impairment or a DRE Category II lumbar impairment of his lumbar spine as stated in the fifth edition of Guides to the Evaluation of Permanent Impairment.
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> Note that under DRE Category II, it is not essential that a radiculitis be proved, only that a radicular-like syndrome exists. Mr. Anderson qualifies in that regard. He also has somewhat limited motion of his lumbar spine.
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> Combining the 5% impairment from spine with a 2% impairment for his inguinal hernia, gives him a 7% permanent impairment of the body as a whole related to the April 18, 2000 and the August 28, 2000 injuries. The hernia impairment is, of course, related to the April 18, 2000 injury and complications subsequent to his surgical intervention and the August 28, 2000 is related to a cumulative trauma effect superimposed on an abnormal lumbar spine resulting in decreased range of motion and a radicular-like effect in his lower leg.

(Ex. 3, pp 10-11)

The claimant began seeking chiropractic care with Shannon Score, D.C., in Minnesota on June 20, 2001. Dr. Score's notes reflect that claimant was treated weekly through September 21, 2001, for lower back and hip pain. Claimant filed an alternate medical care petition for this care, which was dismissed because defendant denied liability. It does not appear that this care provided much relief to the claimant, as the claimant's ratings of pain were consistent throughout this course of treatment. (Ex. 5, pp. 23-62)

On May 29, 2002, the claimant had a medical examination by Jeffrey Meyer, M.D., to obtain employment with Kempf Paper. Dr. Meyer recommended restrictions on the claimant's working: keep back upright, bend at the knees, do not bend/forward at the waist, occasionally lift up to 30 pounds, frequently lift 20 pounds, limit forceful pulling and to push heavy loads instead. (Ex. 4, p. 12) As a result of these restrictions, Kempf

Paper would not hire the claimant. The claimant has registered with temporary employment agencies but has not found regular work. He has been receiving welfare for the past months.

The defendant's had the claimant undergo an independent medical examination by Thomas Litman, M.D. Dr. Litman disagreed with Dr. Delbridge's diagnosis and placed the claimant at maximum medical improvement on July 1, 2002, the date of the IME. Dr. Litman explains that the DRE criteria should not be used:

> The DRE criteria for rating the lumbar spine injury is listed in table 15-3 on Page 384 of the Guides to the Evaluation of Permanent Impairment, of the American Medical Association, Fifth Edition. To use Category 2, one must have findings compatible with a specific injury and include significant guarding or spasm and asymmetric loss of motion. Or, an individual may have a clinically significant radiculopathy and an imaging study to demonstrate a herniated disk at a level and on a side that would be expected. Or, finally, fractures may be rated as Category 2. It is my opinion that Mr. Anderson has not had radiculopathy at any time. None of his clinical findings are consistent with radiculopathy. Therefore, it my opinion that Mr. Anderson now has a zero percent impairment of function of his body due to his lumbar spine in accordance with DRE Lumbar Category 1 of the Guidelines. This listing reveals no significant clinical findings, no observed guarding or spasm, no documented neurologic impairment, and no documented alteration in the structural integrity or other indication of impairment related to an injury or illness.
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> Finally, you will notice that I have avoided using the August 28, 2000 date as the date of injury since there clearly was no injury on that date. Mr. Anderson says that his right foot numbness occurred sometime earlier, and he feels that it was coincident with the hernia operation on the left side. From the history recorded in the medical records, and given to me by Mr. Anderson, there was no August 28, 2000 injury and that date simply was a date of reporting.

(Ex. E-5)

It is not found that the claimant sustained a body as a whole injury on August 28, 2000. The testing of the claimant has not established that the claimant has sustained any injury other than the hernia which was repaired. The claimant may or may not have problems with nerves at L5 or in the peroneal area but the record does not support a finding that such was caused by this employment.

The claimant has sustained some impairment as a result of the hernia repair. Dr. Savereide simply declined to rate this. Dr. Delbridge's rating is accepted. He has also sustained some disability as a result of this injury as demonstrated by the restrictions suggested by the treating physician, Dr. Savereide.

REASONING AND CONCLUSIONS OF LAW

In File No. 1286760:

The first issue in this file is whether the claimant has sustained any permanent disability as a result of the April 18, 2000 injury.

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 R. of App. P. 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. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296 (Iowa 1974).

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. The weight to be given to any expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts relied upon by the expert as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974); Anderson v. Oscar Mayer & Co., 217 N.W.2d 531 (Iowa 1974); Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

The restrictions suggested by Dr. Savereide are evidence of disability. The impairment rating of Dr. Delbridge for the hernia is also evidence of disability. The claimant did sustain permanent disability as a result of the April 18, 2000, injury.

The next issue in this file is the extent of claimant's entitlement to permanent partial disability pursuant to Iowa Code Section 85.34(2)(u).

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 and inability to engage in employment for which the employee is fitted. 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).

A finding of impairment to the body as a whole found by a medical evaluator does not equate to industrial disability. Impairment and disability are not synonymous. The degree of industrial disability can be much different than the degree of impairment because industrial disability references to loss of earning capacity and impairment

references to anatomical or functional abnormality or loss. Although loss of function is to be considered and disability can rarely be found without it, it is not so that a degree of industrial disability is proportionally related to a degree of impairment of bodily function.

Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity, and the length of the healing period; the work experience of the employee prior to the injury and after the injury and the potential for rehabilitation; the employee's qualifications intellectually, emotionally, and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. Likewise, an employer's refusal to give any sort of work to an impaired employee may justify an award of disability. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980). These are matters which the finder of fact considers collectively in arriving at the determination of the degree of industrial disability.

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 State of Iowa Industrial Commissioner Decisions 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 State of Iowa Industrial Commissioner Decisions 654 (App. February 28, 1985).

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.

The claimant does not have significant impairment as a result of this injury. He has restrictions but he continued to perform his job and work considerable overtime. He would likely still be at that job were it not for his attendance problem. The claimant now is having difficulty finding steady work. He has himself to blame for this problem because of his fistfight with Mr. Brown.

He is a motivated individual or was at the time he worked at IBP as evidenced by his overtime work.

Considering all issues of industrial disability it is concluded that the claimant has sustained a 5 percent industrial disability entitling him to 25 weeks of permanent partial disability benefits pursuant to Iowa Code Section 85.34(2)(u).

In File No. 1282767:

The first issue in this file is whether the claimant sustained an injury on August 28, 2000, arising out of and in the course of his employment.

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it arose out of and in the course of employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967). The words "arising out of" refer to the cause or source of the injury. The words "in the course of" refer to the time, place and circumstances of the injury. Sheerin v. Holin Co., 380 N.W.2d 415 (Iowa 1986); McClure v. Union Et. Al., Counties, 188 N.W.2d 283 (Iowa 1971).

The claimant has not established an injury in this file. The diagnostic testing has not revealed the cause of the condition for which the claimant complains nor has it established its existence. At most the record can show is speculation as to the causes of this problem. Such is not sufficient to meet the claimant's burden of proof.

As the claimant has failed to establish an injury in this file all other issues are moot.

ORDER

THEREFORE IT IS ORDERED:

In File No. 1286760:

That defendant IBP, Inc. shall pay claimant twenty-five (25) weeks of permanent partial disability commencing May 29, 2000, at the rate of three hundred thirty-nine and 46/100 dollars ($339.46) per week.

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code Section 85.30 with subsequent reports of injury filed pursuant to rule 876 IAC 3.1.

Costs are taxed to defendant.

In File No. 1282760:

Claimant shall take nothing from this file.

Costs are taxed to claimant.

Signed and filed this ____30th___ day of September, 2002.

_____
RON POHLMAN
DEPUTY WORKERS'
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