BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JARED SWANGER, Claimant, vs. CLOVERLEAF COLD STORAGE, Employer, and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA/AIG, Insurance Carrier, Defendants.	File No. 5049990 APPEAL DECISION Head Note No: 1803

FILED
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WORKERS' COMPENSATION

Defendants Cloverleaf Cold Storage, employer, and its insurer, Insurance Company of the State of Pennsylvania/AIG, appeal from an arbitration decision filed on October 6, 2017. Claimant Jared Swanger responds to the appeal. The case was heard on January 24, 2017, and it was considered fully submitted in front of the deputy workers' compensation commissioner on March 1, 2017.

The deputy commissioner found claimant sustained 80 percent industrial disability as a result of the stipulated injury which arose out of and in the course of his employment with defendant-employer on June 24, 2014, which entitles claimant to receive 400 weeks of permanent partial disability benefits, commencing on May 29, 2015. The deputy commissioner found claimant is not entitled to receive a running award of healing period benefits. The deputy commissioner found claimant is entitled to receive reimbursement from defendants for the requested past medical mileage itemized in Exhibit 18. The deputy commissioner ordered defendants to pay claimant's costs of the arbitration proceeding.

Defendants assert on appeal that the overwhelming medical evidence from multiple providers demonstrates that claimant's subjective complaints are not supported by physical findings. Defendants assert claimant has a somatic symptom disorder, that work hardening has been refused by claimant, and therefore an award of 80 percent industrial disability is not justified for claimant, who defendants assert has persistently failed to participate in his own treatment. Furthermore, defendants assert claimant is

not entitled to alternate medical care because he has already been provided significant months of care and that the recommendation of the requested alternate care provider is work hardening, which is the same recommendation urged by defendant's authorized treating physicians in treatment that claimant has refused to undertake.

It is important to note the parties do not disagree as to the occurrence of claimant's injury or that claimant has sustained a somatic symptom disorder. Rather defendants dispute the extent of claimant's entitlement to industrial disability benefits resulting from the somatic symptom disorder.

I do not find claimant lacks credibility, but rather I find claimant suffers from the somatic symptom disorder which results in a subjective pain profile that is not consistent with the physical injury. I respectfully disagree with the deputy commissioner and I find claimant has sustained 50 percent industrial disability as a result of the work injury. I provide the following analysis for my decision in this matter:

FINDINGS OF FACT

At the time of the hearing, claimant was a 38-year-old male, with a high school diploma. In middle school he sustained several concussions and develop learning problems with reading comprehension and math. He was placed in special education classes and maintained a D grade-point average. (Exhibit 11, page 1) Clayton J. Toddy, Psy.D., clinical psychologist who evaluated claimant on December 22, 2015, determined claimant's present level of cognitive functioning is in the average range, consistent with premorbid level of cognitive functioning estimated in the low average to average range. (Ex. 11, p. 4)

There is no dispute that at the time of claimant's June 24, 2014, work injury, an MRI showed a small disc herniation at L5-S1 and an annular tear at L4-5. During the period between the date of injury, and September 2014, claimant underwent three epidural steroid injections at the recommendation of neurologist Leonel Herrera, M.D. (Ex. 2, pp. 3-8) After continued complaints of pain along with no relief from the injections, Dr. Herrera ordered EMG studies. (Ex. 3, p. 20) Those studies were negative. (Ex 3, p. 25) The MRI studies were repeated on September 23, 2014, and revealed a herniated disc at L5-S1 causing nerve root compression of the S1 nerve root. (Ex. 3, p. 33) Claimant also underwent three sacroiliac joint injections but he received no relief from those injections. (Ex. 2, pp. 3-8)

Claimant was referred to orthopedic surgeon W. O. Samuelson, M.D., who evaluated claimant on September 29, 2014. (Ex. 3, pp. 35-36) Dr. Samuelson discussed a variety of treatment options including microdiscectomy, another epidural injection, and exercise activities. (Ex. 3, p. 36)

Claimant then requested a second opinion. On October 7, 2014, Ralph Reeder, M.D., neurosurgeon, evaluated claimant and recommended Botox injections. (Ex. 8, p.

3) On November 4, 2015, Dr. Reeder ruled out surgical intervention due to claimant's generalized symptoms and recommended an aggressive work hardening program. (Ex. 8, p. 5)

Claimant and his wife were not satisfied with Dr. Reeder's recommendations so defendants authorized a third opinion with J. B. Gill, M.D., at Nebraska Spine and Pain Center. (Ex. 9) A new MRI was conducted at the order of Dr. Gill which was essentially the same as the September 23, 2014, MRI. (Ex. 9, p. 8) Dr. Gill determined surgery was not indicated because claimant's symptomology did not match the imaging findings, claimant experienced no improvement with epidural injections, and he experienced no relief from high dosage narcotics. (Ex. 9, p. 8)

At the recommendation of Dr. Gill, claimant underwent a bilateral transforaminal epidural steroid injection on February 26, 2015. (Ex. 9, p. 11) As with all of the other treatment received by claimant, this injection provided no relief. (Ex. 9, p. 12)

In his March 11, 2015, medical record, Dr. Gill summarized the previous treatment claimant had received. "Physical therapy from 8/13/14 to 11/26/14 and subsequent aqua therapy, chiropractic, medication that does not relieve pain: Advil, Flexeril, Hydrocodone, OxyContin, Percocet, Tramadol, corticosteroid injection on 7/14/14, 7/28/14, and 8/11/14 and, provides no relief, and back brace provides no relief." (Ex. 9, p. 13) At this juncture, claimant inquired about a functional capacity evaluation (FCE), but Dr. Gill was concerned it would be invalid. Dr. Gill referred claimant to his partner, John Massey, M.D., and suggested a psychological evaluation may be necessary. (Ex. 9, p. 16)

Dr. Massey evaluated claimant on April 2, 2015, and he concluded there were very few options left to consider. "We're concerned that there is really no progress and the patient increasingly sees himself in the sick role and at this point in time his long-term outcome for improvement with respect to the subjective experience of pain is primarily limited by his perception that he cannot be active at any degree with ongoing discomfort." (Ex. 9, p. 28)

At the recommendation of Dr. Massey, an FCE was conducted on April 13, 2015, which was deemed invalid due to claimant's pain complaints. (Ex. 9, p. 31) In the pain questionnaire summary, claimant self-identified extreme levels of pain. (Ex. 9, p. 32) Based on claimant's performance during the testing process, the evaluator concluded claimant would have difficulty functioning independently with activities of daily living. (Ex. 9, p. 32) This is consistent with the testimony of claimant's wife, who stated during the hearing she has to wash the lower part of claimant legs, ankles, and feet and she has to trim his toenails. (Hearing Transcript page 10)

Based on the invalid FCE, Dr. Massey concluded the best recommendation for improving claimant's pain was to gradually work towards reactivation. (Ex. 9, p. 39) Dr.

Massey recognized claimant was resistant to activity, but he believed returning claimant to work for a few hours per day might eventually reap rewards. (Ex. 9, p. 39)

Claimant was ordered to return to work for three hours a day for two weeks, restricted to light duty. Following those two weeks, his hourly input was increased to six hours per day with the goal of returning claimant to work without restrictions after six weeks. (Ex. 9, p. 40)

Claimant returned to Dr. Massey after approximately three weeks on May 7, 2015, wheelchair-bound and in great pain. (Ex. 9, p. 41) Dr. Massey was not able to provide any solutions to the satisfaction of the claimant or his wife. (Ex. 9, p. 44) Dr. Massey concluded that because there were no further options available from an interventional standpoint or medication standpoint to improve claimant's symptoms, claimant was at maximum medical improvement. (Ex. 9, p. 44)

As of the time of the hearing, no surgeon had recommended surgical intervention. The only medical professional who believed surgery would help claimant was Sunil Bansal, M.D., the independent medical examiner retained by claimant. (Ex. 14) In his IME report dated May 14, 2015, Dr. Bansal concluded claimant suffers from a large L5-S1 disc herniation with left lateralized component and a central component that causes right-sided symptoms. (Ex 14, p. 17) Dr. Bansal specializes in public health. He is not a surgeon or a neurologist, yet, he confidently overruled the findings and conclusions of the surgeons, or disregarded them entirely. Dr. Bansal did not recommend work hardening but rather surgical treatment and/or epidurals. (Ex. 14, pp. 16, 19)

Claimant was sent for a neuropsychological evaluation by Dr. Massey, which was conducted on July 27, 2015, by Robert G. Arias, PhD. (Ex. A) According to Dr. Arias, claimant's MMPI-II profile contains 3/10 significant elevations with prominent conversion values indicating a tendency to convert psychological stress into physical symptoms. Such individuals tend to have increased somatic complaints, primarily of a neurological nature, which are vague and diffuse. (Ex. A, p. 4) In conclusion, Dr. Arias determined claimant had a significant psychological overlay to the pain complaints and that those elevated pain behaviors were encouraged by claimant's wife's behavior. (Ex. A, p. 1) Claimant was highly deactivated, reporting being off his feet 22 to 23 hours per day, and claimant and his wife maintain minimal insight into those problematic aspects of his behavioral pain management. (Ex. A, p. 1)

In December 2015, claimant sought care at the Mayo Clinic because he felt his worker's compensation medical providers had failed to properly treat his condition. (Ex. 12) The imaging studies performed at the Mayo Clinic showed only a right paracentral L1-L2 disc protrusion as well as a slight posterior disc bulging at the L4-5 and L5-S1 levels without significant effacement of the cord. There were degenerative changes along the same areas but without canal compromise or root compression. (Ex. 12, p. 7) Indeed, the medical providers at the Mayo Clinic believed the radiographs showed

claimant's disk had improved over time from the last several MRIs and, therefore, his condition did not necessitate or validate any surgical intervention. Brett A Freedman, M.D., wrote, "From an objective and anatomic standpoint, he has healed an annular tear and disc herniation. There is no ongoing neurological stenosis, and there is no role for surgical intervention." (Ex. 12, p. 8) It was recommended that claimant seek out a work hardening program as well as a pain management specialist. (Ex. 12, p. 7)

Dissatisfied with the results of the Mayo Clinic evaluation, claimant sought care from Sanford USD Medical Center and Neurological Spine Department. (Ex. 15) He was initially seen by APRN Adam Walker. (Ex. 15, p. 1) Mr. Walker reviewed the MRI performed at the Mayo Clinic and confirmed that the December 2015 MRI did not show the previous disc herniation or nerve impingement. (Ex. 15, p. 1) The plan was to refer claimant to a neurologist and obtain further studies. Claimant was evaluated by neurosurgery on June 22, 2016, and it was felt the MRI findings do not support any impingement as the cause of claimant's radiculopathy. (Ex. C) An EMG was done, which showed diffuse spontaneous activity with an early recruitment in some muscles and reduced recruitment in other muscles. (Ex. E, p. 33)

On December 22, 2015, claimant underwent the psychological evaluation with Dr. Toddy referenced above. (Ex. 11) Dr. Toddy noted claimant was deconditioned with a weak right leg, slow gait, and numbness in both legs. (Ex. 11, p. 2) Claimant's MMPI-II, which Dr. Toddy scored as valid, was consistent with normal people who are very self-controlled, somewhat unsophisticated, very conventional, unassuming, and non-pretentious. (Ex. 11, p. 4) Dr. Toddy also concluded claimant lacked insight into his own behaviors and denied psychological problems. (Ex. 11, p. 4) Dr. Toddy found claimant did not appear to be exaggerating his symptoms but instead actually minimized psychological symptoms of depression and anxiety secondary to his chronic pain. (Ex. 11, p. 9) Dr. Toddy agreed with the opinions of Dr. Bansal regarding claimant's back injury.

On March 17, 2016, Dr. Arias penned a letter in response to the opinions of Dr. Toddy.

> In response to Dr. Toddy's opinions, I disagree with his assertion that mental or emotional factors rarely, if ever are the cause of the pain experience and that most experts agree on this. According [to] the *DSM-5* (Page 320) Conversion Disorder, for example, has been found to occur on approximately 5% of referral[s] to neurology clinics. This would be 1 out of 20 patients seen in neurology clinic. This would constitute a common occurrence. In my clinical experience of working in a pain clinic for the past 12 years and seeing many thousands of pain patients, I would concur that pain disorders associated with the psychological factors or even conversion disorders such as noted above, are a common occurrence. Thus, patients who have an absence of any clinical evidence to explain

> their subjective pain complaints is common, particularly in individuals who are litigating or in other situations where secondary gain is at play, such as with Mr. Swanger. There may be intentional feigning of symptoms, or unconscious symptom production. It is also common for individuals in their MMPI-2 responses to present themselves in an overly positive light with non-somatic questions so as to minimize any portrayal of being a psychologically disturbed individual, while also magnifying somatic symptoms.

(Ex. A, p. 10)

Conservative care has not been successful for claimant. Defendants argue claimant's refusal to participate in work hardening should diminish the extent of his industrial disability. I agree. While claimant does have a psychological component to his injury, claimant's unwillingness to undertake medical care that has been recommended to him by multiple medical providers, including those of his own choosing, impacts the industrial disability to be assigned to claimant's work injury.

Both mental health experts agree claimant has some type of psychological overlay to his current condition. Claimant believes he is injured, fears the pain associated with therapy, and conducts himself in a manner consistent with someone who is severely disabled. The surveillance conducted by defendants shows claimant to walk gingerly and with a limp. Defendants did not offer the surveillance but rather it came in through claimant's exhibits, likely because it showed claimant to be in the medical condition he describes to his doctors.

Yet, physically, there is no explanation for claimant's continued pain complaints. He has received significant and varied treatments including anti-inflammatories, anxiety medications, significant opioids, multiple epidural steroid injections, physical therapy, and aquatic therapy. None of those treatment modalities has provided claimant with any relief.

Dr. Arias concluded claimant's psychological overlay predated the work injury and is not associated with the injury. The deputy commissioner found that even if he were to agree that claimant's psychological condition predated the work injury, despite lack of evidence in that regard, the record shows claimant's work injury lighted up and permanently aggravated his pain syndrome and his back condition. Dr. Toddy argues claimant's pre-existing psychological profile was lit up by the injury. I agree with the deputy commissioner that claimant's preinjury condition was more consistent with Dr. Toddy's findings than the findings of Dr. Arias.

Defendants argue that the premise of Dr. Toddy's opinions is in error because Dr. Toddy concludes claimant has a physical basis for his pain complaints. While it is true all of the treating physicians believe there was not a connection between the extent of claimant's pain complaints and his physical condition, I do not read the medical

records as concluding claimant had no physical injury. Claimant's MRI revealed annular tears and a herniated disc. Initially, even a microdiscectomy was proposed to claimant. This is sufficient evidence of a physical basis for claimant's pain complaints.

In claimant's current condition, it is unlikely he can return to the heavy labor positions he engaged in prior to his injury. When considering any injured parties' extent of disability, a multitude of factors must be considered.

CONCLUSIONS OF LAW

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.

Claimant is a fairly young worker, with a high school education. His primary work experience is that of heavy labor. His physical injury is mild. He lacks any motivation to return to work and demonstrates very little willingness to participate in the medical modalities which might return him to his pre-injury state. Dr. Toddy suggests this is because claimant lacks the ability to understand or appreciate that his pain could be reduced through exercise and conditioning. I agree with this finding. Claimant's primary pain complaints come from a psychological overlay rather than any physical medical condition. The Mayo Clinic's MRI results show the claimant's back tears and herniations have actually healed and improved since the original work injury. Claimant's somatic dysfunction however goes untreated and has caused claimant to believe he is permanently disabled. According to the greater weight of the medical evidence, claimant is not permanently disabled. However, he is unable to return to the heavy work he did prior to the work injury, he has limited education, and low average cognitive ability. He needs a light duty position that allows him to change position as needed for

comfort. (See Ex. 9, p. 40) Claimant has not sought any work and, therefore, there is limited information as to what positions within the labor market he could perform.

Based on the foregoing, taking into consideration claimant's refusal to undergo the therapy he needs to return to his pre-injury status, his lack of motivation to return to the work force, the relatively mild back injury which appears to have healed in part since the original work injury, his lack of ability to understand that his pain could be reduced through exercise and conditioning, and considering all other factors of industrial disability, I find claimant's industrial disability is 50 percent.

Claimant sought out an award of alternate medical care which was awarded by the deputy commissioner in part by allowing claimant to be seen by someone other than Dr. Massey.

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

It does appear claimant has a poor relationship with Dr. Massey and it appears Dr. Massey is frustrated with claimant and his wife. A new medical provider would better serve both parties. However, the right to choose the physicians and medical providers remains with the defendants in this case and they are hereby ordered to authorize treatment for claimant with another provider. Claimant's refusal to follow up with any authorized medical care may imperil his right to further medical care. Defendants are only obligated to offer appropriate care. They cannot force claimant to follow care recommendations made by his authorized treating physicians.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on October 6, 2017, is modified as follows:

Defendants shall pay claimant two hundred fifty (250) weeks of permanent partial disability benefits at the weekly rate of five hundred ten and 57/100 dollars ($510.57), commencing on May 29, 2015.

Defendants shall receive a credit for all benefits previously paid.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to

the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Defendants shall reimburse claimant for the requested past medical mileage itemized in Exhibit 18.

Defendants shall authorize medical providers of their choice to provide appropriate ongoing treatment for claimant for the work injury and defendants shall be responsible for providing all care recommended by, or through, those providers and for payment of all expenses related to that medical care.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding, and the parties shall split the costs of the appeal, including the cost of the hearing transcript.

Pursuant to rule 876 IAC 3.1(2), defendants shall file subsequent reports of injury as required by this agency.

Signed and filed on this 26th day of February, 2019.

Joseph S. Cortese II

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WORKERS' COMPENSATION
COMMISSIONER

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