BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TONY PAZZI,

Claimant,

vs.

CFCO/CPI,

Employer,

and

TRAVELERS INSURANCE CO. OF CT,

Insurance Carrier,
Defendants.

File No. 5053306

ARBITRATION DECISION

Head Note Nos.: 1803, 2907

STATEMENT OF THE CASE

Tony Pazzi, claimant, filed a petition for arbitration against EFCO/CPI (hereinafter referred to as "EFCO"), as the employer and Travelers Insurance Company of Connecticut as the insurance carrier. An in-person hearing occurred in Des Moines on February 6, 2018.

The parties filed a hearing report at the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Medical Exhibits 1 through 15, Claimant's Exhibits 1 through 7 and Defendants' Exhibits A through F. All exhibits were received without objection.

Claimant testified on his own behalf. Claimant also called his former wife, Sheryl Pazzi, to testify. Defendants called Thomas Hamilton and Francisco Juardo to testify.

The evidentiary record closed at the end of the February 6, 2018 hearing. However, counsel for the parties requested the opportunity to file post-hearing briefs. Their request was granted. The parties filed their post-hearing briefs on March 2, 2018, at which time the case was considered fully submitted to the undersigned.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant's cervical spine condition arose out of and in the course of claimant's employment as a result of the stipulated February 24, 2012 work injury.

2. The extent of claimant's entitlement to permanent disability benefits.

3. Whether costs should be assessed against either party.

FINDINGS OF FACT

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

Claimant, Tony Pazzi, is a 50-year-old gentleman. He is a high school graduate with no further education. He enrolled in the National Guard full-time after high school, but was medically discharged two years later due to foot problems.

Claimant's work history includes working as a manager at three fast food restaurants, as an assistant manager at a Blockbusters and as a customer service agent for a credit card company. He has worked for the employer, EFCO, since 2005. He started at EFCO as a shipping clerk and was later promoted to a lead man, who continued to perform shipping clerk duties.

Mr. Pazzi sustained a work related injury to his low back on February 24, 2012. (Hearing Report) He required significant conservative treatment, numerous epidural injections, two lumbar surgeries resulting in an interbody fusion at the L5-S1 level, and subsequent implantation of a spinal cord stimulator. Despite this significant medical treatment, claimant has ongoing symptoms. No further surgery is recommended by the treating surgeon or by an evaluating physician. (Joint Exhibit 4, page 19; Joint Ex. 12)

Claimant's treating surgeon, David E. Hatfield, M.D., opined that Mr. Pazzi sustained a 20 percent permanent impairment of the whole person and declared maximum medical improvement on June 19, 2013. He opined that claimant requires a 50-55 pound lifting restriction.

Since Dr. Hatfield offered that opinion, claimant has been evaluated by Farid Manshadi, M.D. Dr. Manshadi evaluated claimant at the defendants' request. Dr. Manshadi recommended that claimant obtain additional medical treatment and opined that he could not work full duty at his former shipping clerk position at EFCO. Dr. Manshadi recommended lifting restrictions of 20 to 30 pounds and recommended that claimant limit his standing and walking to 1 or 2 hours during an 8-hour work shift. (Joint Ex. 9)

Claimant obtained a valid functional capacity evaluation (FCE), which demonstrated the ability to safely lift 30 pounds on an occasional basis but no more than 15 pounds on an occasional basis overhead. The FCE lifting recommendations closely correlate with those offered by Dr. Manshadi and suggest the restrictions offered by Dr. Hatfield were overly optimistic.

Claimant also obtained an independent medical evaluation, performed by John D. Kuhnlein, D.O. on July 6, 2016 with a supplemental opinion report authored on September 1, 2016 and a repeat evaluation of claimant on November 28, 2017. (Claimant's Ex. 1) Dr. Kuhnlein opines that claimant sustained a 22 percent permanent impairment of the whole person as a result of injuries occurring to his low back and thoracic spine on February 24, 2012 at work. Dr. Kuhnlein opines that claimant sustained a new neck injury after February 24, 2012, but did not attribute claimant's current neck condition to the February 24, 2012 work injury. Dr. Kuhnlein opines that claimant achieved maximum medical improvement on September 24, 2017. He accepts and recommends the limitations set forth in the FCE. (Claimant's Ex. 1)

Claimant's treating pain specialist, Steven R. Quam, D.O., concurs that claimant sustained an injury to his thoracic spine and also recommends application of the FCE limitations as claimant's permanent restrictions. (Claimant's Ex. 2)

Mr. Pazzi asserts a neck injury as part of his February 24, 2012 work injury. I find that he has not proven he sustained a neck injury or that his neck condition is a direct sequela of the February 24, 2012 work injury. Dr. Kuhnlein opined that there is not a causal connection. I accept his opinion as the most convincing causation opinion in this evidentiary record. It is well-explained and corresponds to claimant's history of no neck pain at the time of Dr. Kuhnlein's initial evaluation. Claimant may have sustained the neck injury as a result of subsequent work activities according to Dr. Kuhnlein. However, that determination is for another day in another potential case. I find that the neck condition was not caused by, nor a direct sequela of, the February 24, 2012 work injury.

I find that claimant has proven a permanent injury to his lumbar and thoracic spine areas as a result of the work activities of February 24, 2012 or as a sequela of that initial injury. Claimant has also proven that he sustained permanent disability as a result of the thoracic and lumbar spine injuries.

I find the FCE to be accurate as to claimant's residual functional abilities. Numerous physicians have adopted the FCE as the proper limitations. Dr. Manshadi offered restrictions similar to those outlined in the FCE. Therefore, I find the abilities outlined in the FCE to be the claimant's applicable work restrictions as a result of the February 24, 2012 work injury, and I find those to be permanent.

I reject the restrictions offered by Dr. Hatfield. After those restrictions were imposed, claimant required ongoing medical care, including a spinal cord stimulator.

The subsequent FCE demonstrated that Dr. Hatfield's recommendations were overly optimistic.

Dr. Hatfield and Dr. Kuhnlein both opine that claimant sustained a 20 percent permanent impairment of the lumbar spine as a result of the work injury. Their opinions in this respect are reasonable and accepted as accurate. Dr. Kuhnlein also awards an additional 3 percent for a thoracic injury. After combining these impairment ratings, Dr. Kuhnlein opines that claimant sustained a 22 percent permanent impairment rating as a result of the February 24, 2012 work injury. This rating is accepted as accurate.

Mr. Pazzi continues to work for EFCO as a shipping clerk. He was removed from his position as a lead man after the injury. Although the company continues to employ Mr. Pazzi, claimant is not capable of performing all of his required job duties as a shipping clerk. He performs perhaps a few hours per day of duties that are specific to the shipping clerk position and then performs other "odd jobs" around the plant to keep busy during his shift.

Admirably, the employer continues to employ Mr. Pazzi despite his injury and limitations. Although the employer demoted claimant from his lead man position earning $18.63 per hour to a shipping clerk position, it still pays him $18.16 per hour. Therefore, claimant has experienced only a very modest reduction in his actual earnings with the employer.

Mr. Pazzi also demonstrates a great deal of motivation as an employee. He continues to show up for work and finds tasks every day to stay busy and be as productive for the employer as he can be. Claimant and the employer have developed a wonderful relationship in which each tries their best to help the other. This type of loyalty and cooperation is admirable and to be encouraged. Both Mr. Pazzi and EFCO are commended for their efforts to date.

However, realistically, claimant would not be hired to be a shipping clerk for EFCO with his permanent work restrictions. If he were competing for a position at EFCO as an unknown quantity, he would not be hired with his restrictions. Clearly, some of the work he performs is not work that is directly required of or within the job description of a shipping clerk. He cannot perform the full requirements of a shipping clerk. (Testimony of Francisco Juardo) In fact, with his current work restrictions, claimant could not fully perform any of the jobs at EFCO. (Testimony of Thomas Hamilton) Claimant's supervisor also admitted that EFCO would not replace claimant if he was not still working at EFCO. (Testimony of Francisco Juardo)

If he were to lose his job for any reason in the future, Mr. Pazzi would have to compete on the open labor market with the restrictions outlined in the FCE. He would have some difficulty in obtaining alternate employment, though he concedes he probably could perform a job similar to the customer service position he held at the

credit card company. He remains employable but has sustained a loss of future earning capacity as a result of the February 24, 2012 work injury.

Having considered claimant's age, educational background, employment history, permanent impairment, permanent work restrictions, the severity of his injury and required surgeries, his need for a spinal cord stimulator to control his symptoms, his ability to retrain, motivation, and all other factors of industrial disability outlined by the Iowa Supreme Court, I find that Mr. Pazzi has proven he sustained a 45 percent loss of future earning capacity as a result of the February 24, 2012 work injury.

CONCLUSIONS OF LAW

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).

In this case, I found that claimant did not prove by a preponderance of the evidence that his cervical spine condition arose out of and in the course of his employment or as a result of or a sequela of the February 24, 2012 work injury. Therefore, I conclude that claimant is not entitled to any medical or weekly benefits specifically related to his neck condition. Claimant's neck condition will not be considered or weighed as part of the industrial disability analysis in this case, as that condition has not been proven to be related to work and arose after the alleged injury date.

The parties appropriately stipulated that the injury should be compensated industrially pursuant to Iowa Code section 85.34(2)(u). (Hearing Reports) 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).

Having considered all of the relevant industrial disability factors outlined by the Iowa Supreme Court, I found that claimant has proven a 45 percent loss of future earning capacity. This is equivalent to a 45 percent industrial disability and entitles claimant to an award of 225 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u). Claimant will be awarded 225 weeks of permanent partial disability to commence, as stipulated, on April 24, 2013 at the stipulated weekly rate of $569.82. (Hearing Report)

Finally, claimant seeks assessment of his costs. Costs are assessed at the discretion of the agency. Iowa Code section 85.40. Exercising the agency's discretion and recognizing that claimant has prevailed on all disputed issues, claimant's filing fee of $100.00 shall be assessed pursuant to 876 IAC 4.33(7).

Claimant also seeks assessment of the cost of obtaining a functional capacity evaluation performed by Kenetic Edge. It is not apparent from 876 IAC 4.33(6) that assessment of a functional capacity evaluation is a permissible cost. Even if it is permissible under rule 4.33, the billing statement from Kenetic Edge does not specify the expense specifically related to drafting a report in lieu of testimony. I conclude that the cost of the Kenetic Edge functional capacity evaluation is not a taxable cost in this circumstance. 876 IAC 4.33; Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 846 (Iowa 2015).

Mr. Pazzi also requests assessment of expenses from Dr. Kuhnlein. Review of Dr. Kuhnlein's billing statement at Exhibit 7, page 2 demonstrates that it includes charges for abstracting medical records and a follow up examination. Neither of these charges are related to drafting a written report in lieu of testimony. I conclude this is not a taxable cost. Young, 867 N.W.2d at 846.

Claimant also seeks assessment of a charge from Dr. Quam for "[r]eview of information sent and working on letter for Tony Pazzy [*sic*]." (Claimant's Ex. 7, p. 3) Dr. Quam's billing statement does not delineate the time, or charges, for review of information versus drafting of a report. For the reasons outlined above, I conclude that the billing statement and charges cannot be assessed as a cost. Id.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant two hundred twenty-five (225) weeks of permanent partial disability benefits commencing on April 24, 2013 at the stipulated weekly rate of five hundred sixty-nine and 82/100 dollars ($569.82).

Defendants shall pay interest on all accrued weekly benefits pursuant to Iowa Code section 85.30.

Defendants shall receive the credit to which the parties stipulated on the hearing report.

Defendants shall reimburse claimant's costs totaling one hundred and 00/100 dollars ($100.00).

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 19th day of April, 2018.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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WHG/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.