

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CLARENCE JACKSON,

FILED

Claimant,

MAY 13 2019

vs.

WORKERS COMPENSATION

CHEP RECYCLED PALLET
SOLUTIONS,

File No. 5061686

Employer,

ARBITRATION DECISION

and

TRAVELERS INDEMNITY CO. OF CT,

Insurance Carrier,
Defendants.

Head Note Nos.: 1402.40

On March 26, 2018, the claimant, Clarence Jackson, filed a petition in arbitration against the defendant, CHEP Recycled Pallet Solutions ("CHEP"), and its insurer, the defendant, Travelers Indemnity Insurance Company of Connecticut ("Travelers"), alleging he sustained injuries to his head, neck, back, right shoulder, and body as a whole while working for CHEP on July 14, 2016. CHEP and Travelers filed an answer on April 9, 2018, admitting Jackson sustained a head injury, but denying he sustained other injuries.

An arbitration hearing was held on March 21, 2019, in Cedar Rapids, Iowa. Attorney Laura Schultes represented Jackson. Jackson appeared and testified. Attorney Jordan Kaplan represented CHEP and Travelers. David Roseberry with CHEP testified on behalf of CHEP and Travelers. Joint Exhibits ("JE") 1 through 5, and Exhibits 1 through 5 and A through I were admitted into the record. The record was held open through May 3, 2019, for the receipt of post-hearing briefs and for an additional exhibit from CHEP and Travelers. The briefs were received and the record was closed. No additional evidence was received.

Before the hearing the parties prepared a hearing report, listing stipulations and issues to be decided. CHEP and Travelers waived all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between CHEP and Jackson at the time of the alleged injury.

2. Jackson sustained an injury on July 14, 2016, which arose out of and in the course of his employment with CHEP.
3. The alleged injury is a cause of temporary disability during a period of recovery.
4. Temporary benefits are no longer in dispute.
5. If the injury is found to be a cause of permanent disability, the disability is an industrial disability.
6. At the time of the alleged injury Jackson's gross earnings were \$576.83 per week, he was single and entitled to two exemptions, and the parties believe the weekly rate is \$372.32.
7. Prior to the hearing Jackson was paid the benefits set forth in Exhibit G4
8. Costs have been paid.

ISSUES

1. Is the alleged injury a cause of permanent disability?
2. If the alleged injury is a cause of permanent disability what is the extent of disability?
3. If the alleged injury is a cause of permanent disability, what is the commencement date for permanent partial disability benefits?
4. Are CHEP and Travelers entitled to a credit for the benefits paid as set forth in Exhibit G4?
5. Is Jackson entitled to recover the cost of the independent medical examination?
6. Should costs be assessed against either party?

FINDINGS OF FACT

Jackson is single and has never been married. (Transcript, pp. 7-8) He is the father of three children. (Ex. 7) Jackson has lived in the Cedar Rapids area since 2015. (Tr., p. 7)

Jackson graduated from high school. (Tr., p. 9) After graduating from high school Jackson attended North Iowa Community College where he played basketball and earned an associate's degree. (Tr., pp. 9-10) Jackson transferred to the College of St. Joseph in Rutland, Vermont, where he played basketball and obtained a bachelor of

arts degree in communications. (Exhibits A, p. 3; 4, p. 3; Tr., pp. 9-12) Jackson received a full-tuition basketball scholarship. (Tr., pp. 10-11)

Jackson has limited work experience. While attending North Iowa Community College Jackson served as an unpaid intern for KIMT News with the assistant sports editor for one year. (Tr., pp. 12-13) While attending College of St. Joseph he was the editor for the school PEGTV for one year. (Tr., pp. 12-14)

After graduating from college Jackson played basketball for the Barnstormers, a semi-pro team on the East Coast. (Tr., pp. 14-15) Jackson played for the Barnstormers for one year as a reserve player. (Tr., p. 15) Jackson was not paid by the team, and he worked for Dunkin' Donuts in Vermont for three months as a cashier in customer service. (Tr., pp. 15-16)

Jackson moved back to Iowa. (Tr., p. 15) After moving back to Iowa Jackson worked for Casey's General Store as a cashier in customer service and cook, part-time from April 2012 through March 2013. (Exs. A, p. 4; 4, p. 4; Tr., p. 17) Jackson continued to play basketball in recreational leagues while he was working for Casey's. (Tr., pp. 17-18)

In March 2013, QuikTrip hired Jackson. (Exs. A, p. 4; 4, p. 4; Tr., p. 18) Jackson worked as a cashier in customer service full-time from March 2013 through June 2015. (Exs. A, p. 4; 4, p. 4; Tr., p. 18) Jackson continued to play basketball for recreational leagues while working for QuikTrip. (Tr., p. 18)

The Tobacco Outlet hired Jackson in June 2015 to work in customer service as a cashier full-time. (Exs. A, p. 4; 4, p. 4; Tr., p. 19) Jackson continued to work for the Tobacco Outlet until March 2016. (Exs. A, p. 4; 4, p. 4; Tr., p. 19) None of Jackson's jobs after college required a bachelor of arts degree. (Tr., pp. 15-19)

CHEP hired Jackson as a pallet builder in March 2016. (Exs. A, p. 4; 4, p. 4; Tr., p. 19) Jackson repaired seventy-five pound wooden pallets and pushed them down the line. (Tr., p. 20) CHEP provided Jackson with on-the-job training and Jackson used power tools, a saw, and a nail bender to perform his duties. (Tr., p. 20)

On July 14, 2016, Jackson reported the pallets were stacked up on the line and the supervisor asked the workers to stack off the pallets, so a forklift could pick up the pallets. (Tr., p. 21) Jackson relayed he repaired each pallet and stacked the pallets on the floor, nine high. (Tr., p. 21) Jackson testified his coworker

overshot his line and hit me in the back of the head. I fell down. I was kind of snoozed for a couple – for about a minute or so, got up. I was bleeding, felt – I saw it. Felt lightheaded, like, fatigued really fast, kind of walked toward the front office, and then there were regional managers and whatnot telling me to sit down.

(Tr., p. 21) Jackson reported he lost consciousness for about a minute after the pallet hit him in the back of the head. (Tr., p. 22) Jackson's supervisor took him to the hospital for emergency treatment. (Tr., pp. 22-23)

In the emergency room Jackson reported his coworker accidentally struck him in the head while he was stacking pallets. (JE 1, p. 2) Jackson relayed he experienced a brief loss of consciousness and felt "dazed." (JE 1, p. 2) Jackson received a head computerized tomography scan. (JE 1, p. 5) The reviewing radiologist listed an impression of "[n]o acute intracranial abnormalities" and found an old depressed left nasal bone fracture similar to a scan from December 2006. (JE 1, p. 5) Hospital staff noted Jackson had a small laceration on the right occipital area that did not require a dressing. (JE 1, p. 7) Hospital staff noted Jackson was reporting mild dizziness and blurred vision at times, discharged him, and informed him to follow up with occupational health the next day. (JE 1, p. 6)

On July 15, 2016, Jackson attended an appointment with Edward Ford, M.D., an occupational medicine physician with St. Luke's Work Well ("Work Well"), complaining of a slight headache, fatigue, and lightheadedness. (JE 2, pp. 1-3) Jackson reported he was struggling with bright lights and loud noises, and driving made his headaches worse. (JE 2, p. 1) Dr. Ford listed an impression of a scalp contusion with concussion symptoms, a reactive lymph node and recommended Jackson remain off work. (JE 2, p. 1)

Jackson attended a follow-up appointment with Dr. Ford on July 18, 2016, reporting he was able to exercise and walk a little without having headaches or nausea, and that he was tolerating bright lights and loud noises a little better. (JE 2, p. 5) Dr. Ford assessed Jackson with a scalp contusion, and concussion symptoms that were improving, and restricted Jackson to sedentary work, half days for three days, and then full days with sedentary work. (JE 2, pp. 5, 7)

On July 26, 2016, Jackson returned to Work Well and he was examined by William Manely, PA-C. (JE 2, p. 8) Manely documented Jackson was slowly improving and working eight hours per day, but he had gone beyond his clerical restriction and had been performing quality control pallet work, reporting when the pallets jammed, he had to pull and push pallets weighing seventy-five pounds each. (JE 2, p. 8) Jackson continued to report sensitivity to light and loud noises, noted his headaches were not constant, but he still had some nausea. (JE 2, p. 8) Manely imposed restrictions of clerical-type work a maximum of eight hours per day, and instructed Jackson to alternate walking, sitting, and standing as tolerated for comfort, with no stair climbing, forceful pushing, or pulling. (JE 2, pp. 8-9)

Jackson testified at hearing in the weeks after his injury CHEP did not offer him sedentary, light-duty work, and rather placed him in quality control where he approved or denied pallets. (Tr., pp. 26-27) If Jackson determined the quality of a pallet was not correct, he had to remove it from the line, so he was continuing to lift seventy-five pound pallets. (Tr., p. 27) Jackson reported CHEP never offered him sedentary work after his work injury. (Tr., p. 27)

Jackson returned to Work Well on July 29, 2016, and he was examined by Shirley Pospisil, M.D., an occupational medicine physician. (JE 2, p. 10) Jackson reported he had a headache, felt nauseated, and slightly dizzy, and rated his pain as one out of ten. (JE 2, p. 10) Dr. Pospisil assessed Jackson with closed head trauma with a loss of consciousness, a scalp contusion, and an abrasion with reactive lymph node improved, and continued his work restrictions. (JE 2, pp. 10-11)

On August 8, 2016, Jackson attended a follow-up appointment with Dr. Pospisil, reporting he was having a hard time looking at the sun, he had not returned to work, and he experienced daily headaches in the morning that go away by noon. (JE 2, p. 12) Dr. Pospisil noted his lymph node was much smaller, offered amitriptyline for his headache, which Jackson declined, and she continued his restrictions. (JE 2, pp. 12-13)

Jackson attended an appointment with Manely on August 16, 2016, reporting he was still having headaches and photophobia, but denying any reinjury, and noting he was not being accommodated at work. (JE 2, p. 14) Jackson denied problems with his neck and back. (JE 2, p. 14) Manely listed an impression of closed head trauma with continued photophobia and headaches, and a scalp abrasion, contusion, and reactive lymphadenitis, overall improvement. (JE 2, p. 14) Manely recommended a referral to a neurologist and continued Jackson's restrictions. (JE 2, pp. 14-16)

On August 9, 2016, CHEP documented Jackson voluntarily quit by having three days of unreported absence, noting he was a no call, no show on August 1 through 5, 2016, and August 8, 2016. (Ex. C, p. 3) After making this finding, CHEP permitted Jackson to return to work in September 2016. (Tr., p. 61; Ex. C, p. 2)

On September 13, 2016, Jackson attended an evaluation of a head trauma with Jill Miller, ARNP-DNP with Physicians' Clinic of Iowa, a nurse practitioner specializing in neurology. (JE 3, p. 25; Tr., p. 28) Jackson complained of increasing headaches, noting he was waking up with a headache and going to bed with a headache, reporting throbbing pain on the right side where he was hit, light and sound sensitivity, and dizziness when going to bed, and relaying he sees loops circling around when he closes his eyes. (JE 3, p. 25) Jackson reported in late August 2016 he began experiencing pain in his head down into his neck, and pain in his shoulders and across his upper back. (JE 3, p. 25) Miller assessed Jackson with postconcussion syndrome, cervicgia, and occipital neuralgia, ordered physical therapy, prescribed amitriptyline for occipital neuralgia, and Flexeril for muscle tightness, and imposed restrictions of sedentary clerical work only a maximum of six hours per day, and sitting and resting if his symptoms worsened. (JE 3, pp. 28-32)

Jackson attended a neuro recheck with Miller on October 20, 2016. (JE 3, p. 18) Jackson reported he had work restrictions of working a maximum of six hours per day and he was working ten hours per day with minimal breaks, he was not seeing much improvement with physical therapy, he had muscle pain in his neck, shoulders, and down the back, and daily headaches where he wakes up with the headache and goes to bed with the headache. (JE 3, p. 18) Miller diagnosed Jackson with postconcussion

syndrome, cervicalgia, and occipital neuralgia. (JE 3, p. 23) Miller continued Jackson's physical therapy, and released him to clerical sedentary work without repetitive motion a maximum of four hours per day, prescribed amitriptyline, and recommended trigger point injections. (JE 3, pp. 21, 23-24)

On November 2, 2016, Jackson underwent bilateral occipital nerve blocks and bilateral cervical, trapezius, and thoracic paraspinal myofascial trigger point injections. (JE 4, p. 1)

On December 8, 2016, Jackson attended a recheck with Miller. (JE 3, pp. 8, 16) Jackson reported he was waking up with a headache and going to bed with a headache, while he was having daily headaches he relayed the pain was not severe, and reported having some neck and mid-back pain. (JE 3, pp. 8, 16) Miller prescribed amitriptyline, cyclobenzaprine, and Flexeril. (JE 3, p. 16) Jackson continued to treat with Miller, reporting improvement with his daily headaches and neck pain. (JE 3, pp. 6-7)

Jackson underwent bilateral cervical and thoracic paraspinal trigger point injections on January 30, 2017. (JE 4, p. 7) The pain clinic recommended Jackson stop taking cyclobenzaprine, and ordered tizanidine. (JE 4, p. 8)

On February 22, 2017, Jackson attended a neuro recheck with Miller. (JE 3, p. 1) Miller documented Jackson was hit in the head with a pallet, which caused a whiplash injury, and that he had undergone trigger point injections at cervical and thoracic points, and since the injections his shoulder and back pain had resolved. (JE 3, p. 1) Jackson relayed he was still experiencing pain on the left side of the back of his head, and daily headaches that had not improved with amitriptyline. (JE 3, p. 1) Miller recommended an occipital block injection, and imposed restrictions of clerical work, six to eight hours per day. (JE 3, pp. 3, 5)

Jackson attended twenty physical therapy sessions from March 31, 2017, through July 24, 2017. (JE 5) Jackson testified he worked on his shoulders, back, and neck in physical therapy. (Tr., pp. 29-30) Jackson testified after physical therapy all of his symptoms resolved except for his migraine headaches. (Tr., p. 33)

Jackson received cervical spine magnetic resonance imaging on June 19, 2017. (JE 4, p. 12) The reviewing radiologist found the imaging was negative. (JE 4, p. 12)

CHEP and Travelers produced Exhibit I, which is a collection of video surveillance of Jackson from July 13, 2017, July 18, 2017, July 19, 2017, and July 22, 2017. The video from July 13, 2017, shows Jackson taking a taxi cab to Midwest Physical Therapy, and walking around outside wearing sunglasses and using a cellular telephone during a sunny day. (Ex. I) The video surveillance from July 18, 2017, records Jackson wearing sunglasses on a sunny day. (Ex. I) The surveillance from July 19, 2017, shows Jackson walking a dog and using a broom by a car on a sunny day. (Ex. I) He is not wearing sunglasses. (Ex. I)

Jackson attended a physical therapy appointment on July 13, 2017, as depicted in the video. (JE 5, p. 36) Jackson reported he was better overall, but light and sun, running more than thirty minutes, and rotating left or looking down to the left aggravated his symptoms. (JE 5, p. 36)

The most damaging evidence is from July 22, 2017. Video surveillance shows Jackson dribbling a basketball while carrying a backpack, and Jackson outside for extended periods during a sunny day not wearing sunglasses and talking on a cellular telephone. (Ex. I) Jackson is not running with the basketball, he is not playing a basketball game, or shooting hoops. (Ex. I, p. Tr., p. 31) The video shows Jackson with his girlfriend and her two children over the course of the day. (Ex. I; Tr., p. 40) Jackson's girlfriend is wearing sunglasses in portions of the video outside at the same time that Jackson is not wearing sunglasses. (Ex. I) Not wearing sunglasses on a sunny day is inconsistent with Jackson's claim of light sensitivity. The video also shows Jackson carrying his girlfriend's daughter on two separate occasions. (Ex. I) Jackson testified his girlfriend's daughter was six years old at the time the video was recorded. (Tr., p. 40) Jackson testified he believed she was twenty pounds. (Tr., p. 40) Based on my experience holding and observing children, I believe the child in the video appears to weigh more than twenty pounds. I do not find Jackson's testimony reasonable and consistent with the other evidence I believe. Jackson did not have any difficulty picking up the girl or holding her. The same video also shows Jackson shopping in the mall, a busy place with many people with his girlfriend and her two children. (Ex. I)

Jackson attended a physical therapy appointment on July 24, 2017, two days after the surveillance video from July 22, 2017 was taken. (JE 5, p. 38) Jackson reported it "[h]as been a bad week, ran out of medicine and they won't OK any more." (JE 5, p. 38) Jackson indicated his neck was better, but he was still experiencing headaches and he had not run or played basketball since his last visit on July 13, 2017, due to fear of increased symptoms. (JE 5, pp. 36-38)

Jackson testified at the time the video surveillance was recorded he was having migraine headaches. (Tr., p. 41) Jackson reported he was still experiencing headaches at the time of the March 2019 hearing. (Tr., p. 41) When asked about his migraines, Jackson replied,

[i]t just depends on the day. If I don't have enough sleep, instant migraine. If I'm doing, like, physical activity, like, weightlifting or playing basketball for a longer period of time of day or running for a long period of time, the tension of my muscles makes me have a migraine, and I'm usually just like – sometimes it's good days and then sometimes it's bad days, but most of the time they just kind of come when – you know, whatever I do that affects it.

(Tr., p. 42) Jackson reported he has difficulty sleeping because of stress and tension and that when he does not receive enough sleep he will develop a migraine headache that will last "[p]rimarily almost all day." (Tr., p. 43) Jackson relayed he was not taking

medication to treat his migraines, that massage helps, and sleeping with the lights off and pulling a dark curtain also helps. (Tr., p. 44)

On August 8, 2017, Jackson attended an appointment with Lara Lazarre, M.D., a neurologist, complaining of migraine headaches and neck pain that radiates into the back of his head, and hearing and feeling vibration in his head, exacerbated by standing, exertion, loud music, and heavy running. (JE 4, p. 13) Dr. Lazarre diagnosed Jackson with tinnitus, classic migraine with aura with intractable migraine, and a sleep-related movement disorder, prescribed gabapentin, recommended a sleep study and referral to an otolaryngologist for an evaluation of tinnitus, and recommended dietary changes, sleeping eight hours, exercising daily for thirty minutes, and complete physical therapy for headaches. (JE 4, pp. 16-17)

On October 12, 2017, Jackson attended an appointment with Laurence Krain, M.D., a neurologist with Physicians' Clinic of Iowa, for a second opinion concerning his headaches and trauma. (JE 3, p. 11) Jackson complained of photophobia leading to a headache and limiting his ability to work before sundown. (JE 3, p. 11) Dr. Krain noted he had reviewed videos of Jackson running and playing basketball outside in bright sunlight, and picking up his six-year-old daughter, carrying a backpack, and bending and picking up his backpack. (JE 3, p. 11) Dr. Krain opined that based on these observations he could not justify having Jackson perform clerical work only and to be limited to working only after sundown, opined Jackson was at maximum medical improvement, that he should follow up with Miller for ongoing medication management of his headaches, and found Jackson could return to work without restrictions. (JE 3, p. 11) While the video does not show Jackson running, Jackson's medical records document he was running while receiving treatment for headaches and neck pain.

Travelers sent Jackson's attorney a letter on October 31, 2017, notifying her Jackson had been placed at maximum medical improvement on October 12, 2017, CHEP had no work available for him to return to, and thus, Jackson was owed temporary total benefits from October 12, 2017 through October 31, 2017. (Ex. D, p. 1) Travelers also noted Jackson was owed thirty days of additional temporary total disability benefits from October 31, 2017 through November 30, 2017. (Ex. D, p. 1)

On January 8, 2018, Mark Taylor, M.D., an occupational medicine physician, conducted an independent medical examination for Jackson. (Ex. 1) Dr. Taylor reviewed Jackson's medical records and examined him. (Ex. 1) During his examination, Jackson admitted to Dr. Taylor that he had sporadically played basketball during the past year, and relayed that prior to his work injury he played basketball four to five days per week for eight or more hours total per week, and that "[h]e has diminished his playing down to once a week or every other week for no more than one to two hours." (Ex. 1, p. 4)

Dr. Taylor diagnosed Jackson with a closed head injury with scalp laceration, post-concussive syndrome with persistent headaches, photophobia, phonophobia, chronic cervicgia with asymmetric loss of motion and guarding on exam, possible occipital neuralgia/neuritis, and rare tinnitus, only during severe headaches. (Ex. 1, p.

7) Dr. Taylor opined Jackson's "injuries were directly and causally related to the work-related incident that occurred on or about July 14, 2016." (Ex. 1, p. 7) Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Taylor opined:

Mr. Jackson demonstrated evidence of guarding on examination of his cervical spine. Turning to Table 15-5, on page 392, I would place him within DRE Cervical Category II and would assign a 7% whole person impairment rating. As far as the post-concussive syndrome with headaches, he does not fit neatly into any one category in Chapter 13 for central nervous system injuries. He demonstrates persistent issues consistent with post-concussive syndrome and I would thus assign an additional 3% whole person impairment related to the headaches and post-concussive symptoms. When combined, this results in a 10% whole person impairment rating.

(Ex. 1, pp. 7-8) Dr. Taylor opined Jackson would need ongoing medication management for his headaches, and recommended permanent restrictions of lifting up to thirty to forty pounds between knee and chest level, lifting up to twenty pounds above head level, and "decreased lifting below knee level due to the difficulties he mentioned as far as bending over and the increased headaches that can occur," alternate between sitting, standing, and walking as needed for comfort, rare to occasional bending, squatting on an occasional basis, rare crawling, kneeling occasionally, avoid climbing extension ladders but occasionally climb stepladders, climb stairs occasionally, rare overhead tasks and reaching, avoid any job that requires sustained positions of his head, such as sustained flexion, extension, or bending, occasional side to side and up and down movement of the head, and travel occasionally and avoid driving when incapacitated. (Ex. 1, pp. 8-9)

The attorney for CHEP and Travelers went to Dr. Lazzarre's office on April 2018, and showed her video surveillance of Jackson. (Ex. E) Dr. Lazzarre issued a letter in response to the meeting, as follows:

[t]hanks for the meeting on 4/2/2018 to show me the video surveillance of Mr. Clarence Jackson. His behavior outside of the office seen on the video is inconsistent with his presentation of severe migraines.

Within a reasonable degree of medical certainty (greater than 50%):

- I do not recommend any further medical workup for Mr. Jackson.
- I do not recommend permanent work restrictions for Mr. Jackson
- His presentation in clinical visits has been of a man who is suffering and depressed that he can not function normally in

society. This conflicts with his actions on the DVD as he appeared quite comfortable and moving in ways inconsistent with a suffering man.

(Ex. 3, p. 3)

On April 12, 2018, Michael Cullen, M.D., a neurologist, conducted an independent medical examination records review for CHEP and Travelers. (Ex. F) Dr. Cullen reviewed Jackson's medical records and the surveillance video. (Ex. F) Using, Dr. Cullen opined Jackson had sustained a zero percent permanent impairment rating as a result of the July 14, 2016 work injury. (Ex. F, p. 6)

Jackson testified he played basketball two days before the hearing at the recreational center. (Tr., p. 44) Jackson reported he played one game and he felt a migraine coming on so he went home, had a massage, and rested lying down in bed. (Tr., p. 44)

Before his work injury Jackson played basketball every day if he could with multiple groups of people. (Tr., p. 45) He also used to lift weights often. (Tr., p. 46) Jackson testified that since his work injury he hardly plays basketball anymore and he does not lift weights because lifting weights causes him to develop a migraine headache. (Tr., pp. 45-46)

Jackson's counsel inquired whether Jackson ran for exercise before the July 2016 injury. (Tr., p. 47) Jackson relayed "I mostly exercise on a treadmill. Usually I run between 2 to 5 miles on a treadmill." (Tr., p. 47) Counsel for Jackson inquired whether that was before the work injury and he said it was, and since his work injury "[n]ot as often as I'd like to, no." (Tr., p. 47) During cross-examination Jackson admitted that during his deposition he told counsel for CHEP and Travelers that he only had problems with migraines when he went for a long run over one to two hours. (Tr., pp. 62-63)

Jackson testified that since his work injury he has looked for work by posting his resume on Indeed.com, a website. (Tr., p. 50) Jackson reported he received a few job leads with Enterprise for a manager in training program, and Furniture Row. (Tr., p. 51) Jackson testified he had two phone interviews with Enterprise, but he did not receive an in-person interview, and he never received a call back from Furniture Row. (Tr., p. 51) Jackson reported he filled out an on-line application for Sinclair Broadcast Group, but he was not hired. (Tr., p. 52)

Since the July 2016 work injury Jackson has had one job with Mass Markets. (Tr., p. 53) Jackson reported he performed telemarketing for Mass Markets in Iowa City from the end of October 2018 through February 2019. (Tr., p. 53) Jackson testified the ringing in his head became worse when he was working for Mass Markets. (Tr., p. 53)

CONCLUSIONS OF LAW

I. Applicable Law

This case involves several issues, including nature and extent of disability, recovery of the cost of an independent medical examination, and interest under Iowa Code sections 85.34, 85.39, and 535.3. In March 2017, the legislature enacted changes (hereinafter "Act") relating to workers' compensation in Iowa. 2017 Iowa Acts chapter 23 (amending Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.45, 85.70, 85.71, 86.26, 86.39, 86.42, and 535.3). Under 2017 Iowa Acts chapter 23 section 24, the changes to Iowa Code section 85.34 and 85.39 apply to injuries occurring on or after the effective date of the Act. This case involves a work injury occurring before July 1, 2017, therefore, the provisions of the new statute involving extent of disability Iowa Code section 85.34 do not apply to this case. The calculation of interest is governed by Sanchez v. Tyson, File No. 5052008 (Ruling on Defendant's Motion to Enlarge, Reconsider, or Amend Appeal Decision Re: Interest Rate Issue), which holds interest for all weekly benefits payable and not paid when due which accrued before July 1, 2017, is payable at the rate of ten percent; all interest on past due weekly compensation benefits accruing on or after July 1, 2017, is 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.

II. Nature of the Injury – Permanent Impairment

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Willis, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically

prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer.

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979). The parties agree Jackson sustained a work injury that resulted in a temporary disability during a period of recovery. Jackson alleges he has sustained a permanent disability as a result of the work injury. CHEP and Travelers reject his assertion and allege Jackson is not a credible witness.

The question of medical causation is “essentially within the domain of expert testimony.” Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must “weigh the evidence and measure the credibility of witnesses.” Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert’s education, experience, training, and practice, and “all other factors which bear upon the weight and value” of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

It is well-established in workers’ compensation that “if a claimant had a preexisting condition or disability, aggravated, accelerated, worsened, or ‘lighted up’ by an injury which arose out of and in the course of employment resulting in a disability found to exist,” the claimant is entitled to compensation. Iowa Dep’t of Transp. v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held,

a disease which under any rational work is likely to progress so as to finally disable an employee does not become a “personal injury” under our Workmen’s Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause.

Musselman v. Cent. Tel. Co., 261 Iowa 352, 359-60, 154 N.W.2d 128, 132 (1967).

Two physicians have provided permanent impairment ratings in this case, Dr. Taylor, an occupational medicine physician who conducted an independent medical examination for Jackson, and Dr. Cullen, a neurologist who conducted an independent medical examination for CHEP and Travelers. Dr. Cullen’s training and experience as a neurologist is superior to the training and experience of Dr. Taylor, an occupational medicine physician, in the treatment of headaches and other neurological disorders. I find the opinion of Dr. Cullen, as supported by Dr. Krain, a neurologist who provided a second opinion in the case, and Dr. Lazarre, a treating neurologist, most persuasive, after viewing the video surveillance myself, and considering all of the record evidence.

Using the AMA Guides, Dr. Taylor assigned Jackson a seven percent whole person impairment for his cervical spine, and a three percent whole person impairment for central nervous system injuries, for a combined ten percent whole person impairment rating. (Ex. 1, p. 8) Dr. Taylor also recommended restrictions. (Ex. 1, pp. 8-9) There is no evidence Dr. Taylor reviewed the video surveillance video, Exhibit I.

After reviewing Jackson's medical records and the video surveillance, Exhibit I, Dr. Cullen opined Jackson had sustained a zero percent permanent impairment rating under the AMA Guides. (Ex. F, p. 6) While Drs. Krain and Lazarre did not provide permanent impairment ratings in this case, their opinions support Dr. Cullen's opinion after reviewing the video surveillance.

After viewing the video surveillance, Dr. Krain opined he could not justify restrictions of clerical work only and work only after sundown. (JE 3, p. 11) Dr. Krain opined Jackson had reached maximum medical improvement and he could return to work without restrictions. (JE 3, p. 11) After reviewing the video surveillance of Jackson, Dr. Lazarre wrote that Jackson's behavior outside of the office as seen on the video is inconsistent with his presentation of severe migraines. (Ex. E, p. 3) Dr. Lazarre opined Jackson did not need any additional medical workup or permanent restrictions and noted "[h]is presentation in clinical visits has been of a man who is suffering and depressed that he can not function normally in society. This conflicts with his actions on the DVD as he appeared quite comfortable and moving in ways inconsistent with a suffering man." (Ex. 3, p. 3)

During the hearing I also assessed Jackson's credibility by considering whether his testimony was reasonable and consistent with other evidence I believe, whether he had made inconsistent statements, his "appearance, conduct, memory and knowledge of the facts," and his interest in the case. State v. Frake, 450 N.W.2d 817, 819 (Iowa 1990). Jackson has an obvious interest in the outcome of this case. I had the opportunity to observe Jackson testify under oath. I do not find his testimony reasonable and consistent with the other evidence I believe. I observed he was evasive when answering questions during the hearing.

Jackson has engaged in exercise that is inconsistent with suffering from migraines. Jackson's counsel inquired before the injury whether he ran for exercise. (Tr., p. 47) Instead of replying how he used to run, using the past tense, Jackson relayed "I mostly exercise on a treadmill. Usually I run between 2 to 5 miles on a treadmill." (Tr., p. 47) Counsel for Jackson inquired whether that was before the work injury and he said it was, and since his work injury "[n]ot as often as I'd like to, no." (Tr., p. 47) During cross-examination Jackson admitted that during his deposition he told counsel for CHEP and Travelers that he only had problems with migraines when he went for a long run over one to two hours. (Tr., pp. 62-63) Jackson's testimony was first in the present tense, stating "[u]sually I run between 2 to 5 miles." (Tr., p. 47) He then testified he does not run as often as he used to but did not deny running. Dr. Lazarre also documented Jackson reported his migraines and neck pain were exacerbated by heavy running. (JE 4, p. 13) During physical therapy, Jackson reported running more than thirty minutes aggravates his symptoms. (JE 5, p. 36)

At the time of the March 2019 hearing Jackson reported he was still experiencing headaches. (Tr., p. 41) Jackson attended a physical therapy appointment on July 13, 2017, as depicted in the video, Exhibit I. (JE 5, p. 36) Jackson reported he was better overall, but light and sun, running more than thirty minutes, and rotating left or looking down to the left aggravated his symptoms. (JE 5, p. 36) The video recordings show Jackson walking outside in the bright sun without sunglasses for long periods. I do not find his testimony reasonable and consistent with the other evidence I believe.

Video surveillance from July 22, 2017, shows Jackson with his girlfriend and her two children over the course of the day, Jackson dribbling a basketball, and Jackson walking outside. (Ex. I; Tr., p. 40) Jackson's girlfriend is wearing sunglasses in portions of the video outside while Jackson is not wearing sunglasses. (Ex. I) Not wearing sunglasses on a sunny day is inconsistent with Jackson's claim of light sensitivity. He is also shown carrying his girlfriend's daughter on two separate occasions. (Ex. I) Jackson testified his girlfriend's daughter was six years old at the time the video was recorded. (Tr., p. 40) Jackson testified he believed she was twenty pounds, noting she is small. (Tr., p. 40) Based on my experience holding and observing children, I believe the child in the video appears to weigh more than twenty pounds. Jackson did not have any difficulty picking up the girl or holding her on either occasion. (Ex. I)

Jackson attended a physical therapy appointment on July 24, 2017, two days after the surveillance video from July 22, 2017 was taken. (JE 5, p. 38) Jackson reported it "[h]as been a bad week, ran out of medicine and they won't OK any more." (JE 5, p. 38) Jackson indicated his neck was better, but he was still experiencing headaches and he had not run or played basketball since his last visit on July 13, 2017, due to fear of increased symptoms. (JE 5, pp. 36-38) The video evidence from multiple days is not consistent with Jackson's report to the physical therapist that he was having a bad week. Jackson's testimony is not consistent with the other evidence I believe.

Considering all of the record evidence I do not find Jackson to be a credible witness. Dr. Lazarre also opined the video evidence was inconsistent with her observations of Jackson in her office. There was no evidence that Dr. Taylor ever watched the video evidence, or that he was asked to respond to it. I do not find Dr. Taylor's opinion on permanency persuasive. Jackson has not met his burden of proof he sustained a permanent impairment caused by the work injury.

III. Costs

Dr. Taylor charged Jackson \$1,362.50 for his examination, and \$1,755.00 for his report. (Ex. 2) Jackson seeks to recover the cost of Dr. Taylor's independent medical examination.

Iowa Code section 85.39 (2016), provides, in part:

[a]fter an injury, the employee, if requested by the employer, shall submit for examination at some reasonable time and place and as often as reasonably requested, to a physician or physicians authorized to practice

under the laws of this state or another state, without cost to the employee; but if the employee requests, the employee, at the employee's own cost, is entitled to have a physician or physicians of the employee's own selection present to participate in the examination. If an employee is required to leave work for which the employee is being paid wages to attend the requested examination, the employee shall be compensated at the employee's regular rate for the time the employee is required to leave work, and the employee shall be furnished transportation to and from the place of examination, or the employer may elect to pay the employee the reasonable cost of the transportation. . . . If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination. . . .

CHEP and Travelers did not obtain an impairment rating before Dr. Taylor issued his report. Under Iowa Code section 85.39, Jackson is not entitled to recover the cost of the independent medical examination.

Jackson also seeks to recover the cost of the examination and report as a cost at hearing. Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 IAC 4.33(6), provides

[c]osts 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.

Jackson failed to meet his burden of proof that he sustained a permanent impairment caused by the work injury. I find the parties should be assessed their own costs.

ORDER


IT IS THEREFORE ORDERED:

Claimant shall take nothing further.

The parties shall bear their own costs.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 13th day of May, 2019.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Emily Anderson
Laura Schultes
Attorneys at Law
425 – 42nd St. SE, Ste. 1140
Cedar Rapids, IA 52401-1848
eanderson@fightingforfairness.com
lschultes@fightingforfairness.com

Jordan A. Kaplan
Attorney at Law
1900 E. 54th St.
Davenport, IA 52807
jak@bettylawfirm.com

HLP/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.