BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JAMES D. BRITTAIN,

Claimant,

vs.

TRADESMEN INTERNATIONAL,

Employer,

and

NEW HAMPSHIRE INSURANCE CO.

Insurance Carrier,
Defendants.

File No. 5047566

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

James D. Brittain, the claimant, seeks workers' compensation benefits from defendants, Tradesman International, the alleged employer, and its insurer, New Hampshire Insurance Co., as a result of an alleged injury on June 29, 2012. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on October 15, 2015, and this matter was fully submitted at the close of that hearing. Oral testimony and written exhibits received into evidence at hearing are set forth in the hearing transcript.

The parties only submitted joint exhibits marked AA-EE. References in this decision to page numbers of an exhibit shall be made by citing the exhibit letters followed by a dash and then the page number(s). For example, a citation to claimant's exhibit AA, pages 2 through 4 will be cited as, "Ex. AA-2:4."

The parties agreed to the following matters in a written hearing report submitted at hearing:

1. On June 29, 2012, claimant received an injury arising out of and in the course of employment with defendant employer.

2. Claimant is not seeking additional healing period benefits at this time.

3. The injury is a cause of some degree of permanent, industrial disability.

4. Permanent partial disability benefits shall commence on May 8, 2015.

5. At the time of the alleged injury, claimant's gross rate of weekly compensation was $592.83. Also, at that time, he was single and entitled to one exemption for income tax purposes. Therefore, claimant's weekly rate of compensation is $377.58, according to the workers' compensation commissioner's published rate booklet for this injury.

6. Defendants agree that the requested medical expenses submitted by claimant at the hearing are fair and reasonable and were authorized by defendants.

7. Defendants agree to reimburse claimant for the Independent medical evaluation by Irving Wolfe, D.O. in the amount of $2,950.00 pursuant to Iowa Code section 85.39.

8. Prior to hearing, defendants voluntarily paid 26.4 weeks of permanent disability benefits for this work injury.

Also, at hearing, the parties agreed that if costs are awarded to claimant in this case, the amount charged by Cassim Igram, M.D. for preparing his report is $175.00.

ISSUES

At hearing, the parties submitted the following issues for determination:

I. The extent of claimant's entitlement to weekly permanent disability benefits; and,

II. The extent of claimant's entitlement to medical benefits.

FINDINGS OF FACT

In these findings, I will refer to the claimant by his first name, James, and to the defendant employer as Tradesman.

James, age 29 years, was employed by Tradesman from March 2010 until late 2012. Tradesman is essentially a temp agency that refers non-union construction workers to non-union construction contractors. During his entire employment with Tradesman, James was assigned to Midwest Glazing. In this job, he performed glazier duties. He also performed other construction duties such as concrete work, carpentry, and general labor work. He received $16.50 per hour and worked 40 plus hours a week.

About two months after James first returned to work after the work injury involved in this claim, Midwest Glazing became a union shop. James then joined Glazier's local 1075 and went through their apprenticeship program. He has completed this

apprenticeship and is now a journeyman union glazier. The entity, Midwest Glazing, later became Foreman Ford, and James continues working as a journeyman glazier for Foreman Ford at the present time. His income markedly increased after becoming a union glazier. He currently receives $21.71 per hour with an extra $4.00 per hour as vacation and holiday pay. He continues to work 40 plus hours a week. Although he is only doing glazier work duties, this includes not only installing glass, but installing pre-hung doors and windows. Since his current work primarily involves commercial installations, these are very large and heavy window and door assemblies. There is little question that such work is physically demanding.

Treatment for the stipulated work injury on June 29, 2012 initially only involved the right knee. The first treating doctor felt this was just a sprain, and treatment remained conservative with medications and physical therapy. (Exhibit AA) James was not placed on light duty, but apparently part of this time he was attending apprenticeship training classes. When James failed to improve, he was referred to Timothy Kenney, M.D., an orthopedic surgeon. After an MRI revealed a meniscus tear in the right knee, Dr. Kenney performed surgery on November 16, 2012 to remove the partially torn meniscus. (Ex. BB-4) Following surgery, James improved, but continued to have daily pain. Dr. Kenney then tried steroid injections, but that also failed to improve James' symptoms. Finally, in May 2013, Dr. Kenney suspected that the source of the pain may not be limited to the knee, and he recommended an MRI of the lumbar spine. (Ex. BB-18) Indeed, the MRI revealed small disc herniations at the L4-5, L5-S1 vertebral levels. (Ex BB-19) Dr. Kenney added a diagnosis of right lumbar radiculopathy. (Ex. BB-27:29) Dr. Kenney then referred James to Thomas Klein, D.O., a pain specialist, for epidural steroid injections (ESIs) in the summer and fall of 2013. (CC-1:9) The two ESIs provided only temporary relief, and a third injection was not felt appropriate by Dr. Klein. In December 2013, Dr. Kenney recommended evaluation by a lumbar spine specialist, Dr. Igram. (Ex. BB-33)

Dr. Kenney replied as follows when asked by defendants' adjuster about the causal connection of the lumbar radiculopathy to the fall injury on June 29, 2012:

> In retrospect, he was likely having pain being referred into his knee from his back in addition to the pain in his knee from the medial meniscus tear. My initial appointment with him was about 4 months after his initial injury. Therefore, it is somewhat difficult to make determinations about his back and leg pain in relationship to the work injury of June 29, 2012. By his history, he states he was having leg pain soon after the injury. A slip and fall type injury as he sustained could also potentially cause an injury to his back that was primarily causing leg pain of a radicular nature. As he states he was not having his pain prior to the injury, it would be reasonable to conclude that the injury did have a relationship to the development of the lumbar radiculopathy pain that he has continued to have throughout the postoperative course following his knee surgery.

(Ex. BB-34)

Dr. Kenney was asked by defendants in April 2014 to only provide an impairment rating for the knee injury. The doctor then opined that James suffered a 2 percent permanent partial impairment to the right lower extremity under the AMA Guides for only the knee injury. (Ex. BB-35)

Dr. Igram and his PA-C, Robey Orewiler, began treating James's lumbar radiculopathy in July 2014. Another MRI of the lumbar spine was ordered. From their review of this MRI, James was suffering from a herniated disc at the L5-S1 level and surgery was recommended. James agreed to the surgery and a lumbar discectomy at L5-S1 was performed on November 18, 2014. (Ex. BB-44:45) James was taken off work following this surgery. The surgery, however, did not alleviate his symptoms and a second MRI in January 2015 ruled out a recurrent disk problem. On February 2, 2015, James reported that his pain was worse. He reported that 70 percent of his pain was in the back and 30 percent was in the right leg. Dr. Igram and Robey Orewiler concluded there was nothing more surgically they could offer and diagnosed epidural fibrosis or scarring from the surgery. They released James to return to only light-duty work with no lifting over 10 pounds. James was also to avoid bending or carrying anything. They preferred office work. The medication Neurontin was prescribed in addition to Tramadol to see if that would help, and James was referred to a pain clinic for management of the ongoing symptoms. (Ex. BB-53)

Apparently, Dr. Igram left his medical practice in Des Moines to teach at the University of Iowa Hospitals and Clinics. James was then followed by Todd Harbach, M.D., another orthopedist at the same clinic. Dr. Harbach first saw James in May 2015 and he did not change Dr. Igram's assessments. The doctor noted James' ongoing pain and numbness in his back and leg and that he is currently under the care of a pain management physician. The doctor recommended continued pain management, but felt James had achieved maximum medical improvement as far as the surgery was concerned. He noted that James wanted to return to work to see how things would go, so he released him to return to work without restrictions. (Ex. BB-54) James testified that he could not return to work without a full release. Dr. Harbach also opined that James suffered a permanent impairment of 10 percent to the body as a whole pursuant to the Fifth Edition of the AMA Guides to the Evaluation of Permanent Impairment, as he fits into the DRE lumbar category #3. (Ex. BB-55) The doctor adds that despite reaching MMI, James still has considerable radicular pain and problems. (Id.)

James testified that he is still being treated by physicians at the Pain Specialists of Iowa clinic. We have only one record from that clinic in evidence. Neither counsel was able to obtain more records. According to Jolene Smith D.O., claimant was seen at the pain clinic in July 2015. At this time he was only taking the medication, amitriptyline HCL, to assist in his sleeping with his pain. The doctor increased his dosage of this medication. Also, the use of a spinal cord stimulator device for his pain was discussed, but the doctor reports that James did not want to proceed with that option. (Ex. DD-11)

At the request of his attorney, James was evaluated in August 2015 by Dr. Wolfe, a neurologist. James told Dr. Wolfe he continues to have constant low back pain and right leg pain with intermittent pain in the left leg. The back pain level varies from 3/10 to 10/10. The leg pain level is a steady 5/10. His pain is worse with prolonged sitting and standing, lifting more than 50 pounds, kneeling, bending and climbing up steps and ladders. His current therapy is to apply ice to back and taking the prescription medication amitriptyline. (Ex. DD-11:12) Dr. Wolfe opined that James has achieved MMI for this knee injury, but not his back injury. He recommends a one-week trial of a spinal cord stimulator, but again the doctor notes James' reluctance to that option. He recommended consultation with a pain management specialist. (Ex. DD-13:14)

Dr. Wolfe states that Dr. Kenney's 2 percent rating to the right leg converts to a 1 percent rating to the whole person under the AMA Guides, Fifth Edition. The doctor opines that claimant should have an additional 3 percent whole person impairment rating for continued severe pain under these AMA Guides and opines that the impairment rating for the right leg is 4 percent to the whole person. Dr. Wolfe also opines that assuming James is at MMI for the back portion of his injury, the permanent impairment rating would be 13 percent to the whole person if he had no continued symptoms under these AMA Guides, but due to ongoing significant symptoms an additional 3 percent should be added pursuant to the Guides for a total of 16 percent for the back portion of James' injury. The doctor then combines the ratings to the knee and back using the combined values chart in the Guides to arrive at a total whole person permanent impairment of 19 percent. (Ex. DD-14:15) Finally, the doctor opines that James should have the following work activity restrictions to avoid repetitive kneeling, squatting, twisting, bending at waist level, climbing up and down stairs and ladders, and crawling; sit and stand only as tolerated, but no more than one hour without a change of position; repetitive lifting of no more than 40 pounds; and, only occasional to rare non-repetitive lift of 41-60 pounds. (Ex. DD-17)

I find the work injury of June 29, 2012 is a cause of a 19 percent permanent impairment to the body as a whole. First, given the views of Dr. Kenney and Dr. Wolfe, James has clearly shown that his back and right knee problems are the result of his fall on June 29, 2012. I am unable to find that any of his left leg problems are due to this injury. The causation views of these doctors are uncontroverted. Second, I find the ratings by Dr. Wolfe more convincing because they adequately take into account James' continued pain as explained by Dr. Wolfe.

I find that the work injury of June 29, 2012 is a cause of his low back and leg pain from work activity that exceeds the limitations described by Dr. Wolfe. However, James has asked his treating physicians not to impose formal restrictions so he can continue in his union glazier job. He has been working full duty as a union glazier now for the last five months. James testified that his foreman is sympathetic to his back problems, as he also has had back surgery. Consequently, he is accommodated by his foreman when the work activity is slow. However, currently, the accommodations are not possible, as the work activity has increased. James states that his pain is consequently increasing.

However, as of the time of hearing, James was still working full duty, full time and receiving much higher wages as a union glazier than he had at the time of his injury. He has not sought any more aggressive treatment or alternative employment, but now is considering the spinal cord stimulator. His only prescription medication is amitriptyline.

James' work history before working for Tradesman was four years of general farm labor. He only completed the 11 grade, but not because of poor grades. He does now have a GED.

A reasonable argument could be made that James has not lost any earning capacity from his injury given that he is now a higher paid journeyman glazier and has no formal work restrictions. However, he is in a precarious position because he is suffering from pain that may eventually impact his ability to continue in his occupation. He has significant permanent impairment ratings under the AMA Guides and a medical record of two significant surgeries, which alone adversely impacts his ability to compete with other workers in the labor market who have no such medical history.

Therefore, I find that the work injury of June 29, 2012 is a cause of a 30 percent permanent partial industrial disability or lost earning capacity. This finding is based on his ability to continue as a union glazier with his current employer. If James is unable to continue in that work due to his work injury, such would be a significant change of his condition warranting review of this finding.

I also find that the treatment for the expenses listed in Exhibit EE constitutes reasonable and necessary treatment of the work injury of June 29, 2012.

CONCLUSIONS OF LAW

I. 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).

A treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404.408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2)(a-t), the disability is considered a scheduled member disability and measured functionally. If it is found that the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and measured industrially under Code subsection 85.34(2)(u). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. Delong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

Industrial disability was defined in Diederich v. Tri-City Ry. Co., 219 Iowa 587, 258 N.W.2d 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. However, consideration must also be given to the injured workers' medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured worker's qualifications intellectually, emotionally and physically; the worker's earnings before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted; Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616, (Iowa 1995); McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Serv. Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

In the case sub judice, I found that claimant suffered a 30 percent loss of his earning capacity as a result of the work injury. Such a finding entitles claimant to 150 weeks of permanent partial disability benefits as a matter of law under Iowa Code

section 85.34(2)(u), which is 30 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection.

I also noted in my findings, that this industrial loss finding is based on his ability to continue with his current employment. If that employment ends due to this injury, such would be a significant change of condition warranting a review of this finding.

II. Pursuant to Iowa Code section 85.27, claimant is entitled to payment of reasonable medical expenses incurred for treatment of a work injury. Claimant is entitled to an order of reimbursement if he/she has paid those expenses. Otherwise, claimant is entitled only to an order directing the responsible defendants to make such payments directly to the provider. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988).

In this case, it is unclear why the medical bill set forth in Exhibit EE has not been paid by defendants. Defendants agreed in the hearing report that it was authorized. Defendants will be ordered to pay that bill.

At hearing, defendants agreed to pay the IME cost in the amount of $2,950.00 for the report from Dr. Wolfe. I will order that paid as well.

Costs will be awarded to claimant, including the fee of Dr. Igram for preparing his report of $175.00.

ORDER

1. Defendants shall pay to claimant one hundred fifty (150) weeks of permanent partial disability benefits at the stipulated rate of three hundred seventy-seven and 58/100 dollars ($377.58) per week from the stipulated date of May 8, 2015. Defendants shall receive the stipulated credit of twenty-six point four (26.4) weeks previously paid to claimant.

2. Defendants shall pay or hold claimant harmless from the four thousand six hundred eighty-five and 50/100 dollars ($4,685.50) in charges by the Mercy Medical Center as set forth in Exhibit EE.

3. Defendants shall pay interest on unpaid weekly benefits awarded herein pursuant to Iowa Code section 85.30.

4. Defendants shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33, including reimbursement to claimant for the filing fee paid in this matter and the one hundred seventy-five and 00/100 dollars ($175.00) fee of Dr. Igram for preparing his report.

5. Defendants shall file subsequent reports of injury (SROI) as required by our administrative rule 876 IAC 3.1(2).

Signed and filed this 10th day of November, 2015.

LARRY WALSHIRE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Christopher D. Spaulding
Attorney at Law
2423 Ingersoll Ave.
Des Moines, IA 50312-5233
chris.spaulding@sbsattorneys.com

Thomas D. Wolle
Attorney at Law
115 – 3rd St. SE, Ste. 1200
Cedar Rapids, IA 52401
twolle@simmonsperrine.com

LPW/sam

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.