

4. The rate of compensation

FINDINGS OF FACT

The undersigned having heard and considered the evidence received at the hearing makes the following findings of fact:

The claimant is 35 years of age and is married. He is a high school graduate and attended one year of college at the College of the Redwoods in California and has attended classes at Milwaukee Area Technical College and Hawkeye Community College. Since 1986 the claimant has worked as a millwright. The work of a millwright involves any kind of work that is required for a technical steel worker which typically involves installing conveyors and requires skills in designing, welding, and working in lifting and carrying. The claimant has two toolboxes which weigh between 75 and 110 pounds each which are taken to all job sites and used to carry all of the tools of the trade. The claimant became a union card-carrying millwright in January 1990. The claimant has worked in nuclear power plants as a millwright.

In May 1998 the claimant began working for SG Junker & Associates as a millwright. On January 19, 1999, the claimant was working for the employer at American Colloid Corporation in Waterloo, Iowa. The claimant was helping to line a steel tank. The claimant and Robert Hurlbutt were carrying a 4' x 8' eighth inch thick sheet of steel across the tops of some bins to be lowered down into the tank that was being lined. The claimant was carrying the sheet with his finger grips when he slipped while stepping over a blow line. The claimant felt a twinge in his back which caused him to stop and put down his end of the sheet of steel. The sheet of steel weighed up to 160 pounds. The claimant had problems working the rest of the day but did finish his shift. When the claimant came home from work that evening, he reported to his wife that he was experiencing pain in his hip. The following day the claimant told the foreman, Jeff Sage that his back was sore. Mr. Sage didn't think anything of the complaint the claimant made and figured the claimant had just slept wrong or something. On February 5, 1999, the claimant went to his family chiropractor, Clark Willoughby, D.C. Dr. Willoughby notes of that visit indicate the following:

Symptoms: Left hip and central lower back pain. Onset about 2 weeks ago. No known cause. Possibly related to picking up child at home. No radiation into legs.

Objective: PI-L with tuat [sic] left hip muscles; fix. mid dorsal, mid and lower lumbar region.

Assessment: 739.4 Sacroiliac subluxation; 724.2 Lumbalgia; 739.3 Lumbar subluxation; 739.2 Thoracic subluxation.

Plan/Treatment: Traction lower back; Side posture lumbar spine left; Anterior technique 1's; Modified cervical break t's; Thompson technique neg left with bi-PIR; Thompson technique PI-L; Vibrator.

Rec. relative rest, return 2 to 3 days if not improving.

(Defendants' Exhibit B, page 24)

Claimant maintains that he did not indicate to Dr. Willoughby that his lower back pain was due to picking up a child but rather he reported to Dr. Willoughby that he needed treatment because he was having trouble picking up his child and this was something that was important for him to be able to do to meet his family objections. The claimant acknowledges that he never told Dr. Willoughby that he thought his problem was work related until November 1999. The claimant did not turn in his visit to Dr. Willoughby or his follow-up visit on February 8, 1999, for workers' compensation coverage.

Steve Junker is the owner of SG Junker & Associates and is usually on the job sites daily. He first learned of the claimant's alleged work injury on February 10, 1999. At that time the claimant was complaining of hip pain. Mr. Junker told the claimant to go to Allen Occupational Health Center for treatment.

In Dr. Willoughby's deposition he was asked about the possibility of a miscommunication regarding the causation of the claimant's back complaints:

Q: Is it possible that there was some miscommunication or a misunderstanding between the two of you relating to your record of February 5th wherein he might have told you that he was having problems picking up his child, rather than he thought his injuries were stemming from picking up his child?

A: That would be a possibility, yes.

(Def. Ex. B, Deposition page 22)

Dr. Willoughby remained confident on re-direct examination that the only suggestion of cause was in relationship to lifting a child. (Def. Ex. B, Dep. p. 23)

The claimant's deposition was taken on July 17, 2000. At that time the claimant was asked regarding whether he'd had any prior low back problems and testified as follows:

Q: Prior to January of 1999 did you ever have any low back problems or complaints that you can recall today?

A: No.

Q: So you never went to a chiropractor or any other treating doctor for complaints of low back pain prior to January of 1999?

A: As I remember, as I recall, none from my low back, no.

(Def. Ex. A, Dep. p. 5)

Dr. Willoughby's clinical notes from 1994 through November 1999 indicate that the claimant saw Dr. Willoughby for low back pain on October 16, 1995, and June 26, 1996, and that the claimant saw Dr. Willoughby for mid back pain on March 14, 1994, and June 25, 1996. (Def. Ex. C, pp. 5 and 6)

On February 11, 1999, the claimant went to the Fairbank Health Clinic and asked for a disability assessment. At that time the claimant described the work injury of January 19, 1999. (Claimant Exhibit 3-2) The assessment at the Fairbank Health Clinic on February 11, 1999, was L. S. muscle strain with spasm. The claimant was prescribed anti-inflammatories and told to return on February 16, 1999, for reassessment. (Cl. Ex. 3-2) The claimant returned on February 16, 1999, with the same assessment and found to be not responding to therapy. (Cl. Ex. 3-3) He was scheduled to return to see Dr. Kothari on March 11, 1999. The claimant came in again on February 25, 1999, and reported that his back pain was getting worse and was switched from Darvocet to Tylenol III. (Cl. Ex. 3-3) The claimant was seen by Dr. Kothari on March 11, 1999, and the diagnosis at that time was back pain with radicular left leg pain. (Cl. Ex. 3-6) Dr. Kothari recommended an MRI scan of the lumbar spine and the claimant was referred to Mary Greeley Hospital in Ames for the scan. (Cl. Ex. 3-6) The MRI scan showed a fairly large-sized herniated lumbar disc at L4-5 level with focal disc herniation on the left side. The claimant also had a mild left-sided disc herniation at L5-S1, however, the claimant's clinical symptoms were found to be in the L4 nerve root on the left side. (Cl. Ex. 3-8) Dr. Kothari decided to try the claimant with a one-time epidural cortisone injection. (Cl. Ex. 3-8) The injection failed to alleviate the claimant's symptoms and Dr. Kothari referred the claimant to Dr. Beer at St. Luke's Hospital in Cedar Rapids for surgical evaluation.

Dr. Beer first saw claimant on June 1, 1999, and at that time believed that the claimant had a lumbar herniated disc which he felt was caused by the claimant's activities at work. (Cl. Ex. 3-11) Dr. Beer had the claimant undergo a CT myelogram which confirmed the claimant had an L4-L5 herniated disc on the left. (Cl. Ex. 3-14) The claimant underwent a lumbar laminectomy and discectomy procedure on July 2, 1999. (Cl. Ex. 3-14) On September 30, 1999, Dr. Beer released the claimant to return to work without restrictions. (Cl. Ex. 3-14)

Dr. Beer was provided the documentation from Dr. Willoughby's notes and again asked to opine regarding the causation of the herniated disc. Dr. Beer's initial response is contained in his letter of June 24, 1999, which states:

I had the opportunity to review chiropractic documentation supporting the fact that Mr. Wilson had some back difficulties for which he sought chiropractic manipulation prior the disc which he herniated. I believe that there is clearly a cause and effect relationship between the disc which herniated at work. In light of the fact that he was carrying a heavy piece of steel however, I believe according to strict definition it is an exacerbation of pre-existing back difficulties.

(Cl. Ex. 3-16)

Dr. Beer was again asked to clarify this for defendant insurance company and responded in a letter dated July 6, 1999, as follows:

This letter is in reference to your request for information regarding Mr. Merle Wilson, dated June 30, 1999. With respect to the question you have posed it is impossible for me to determine whether the causal necessity for surgical intervention was related to something other than work related activities for Mr. Steve Junker. I believe that Mr. Wilson likely presented to his chiropractor for a degenerative lumbar disc disease and it is impossible for me to determine whether or not he actually herniated a disc which required surgery at the time he was carrying steel at work or prior to that time.

I am sorry that I'm unable to give you more specific information than that but as you know in cases such as this it is impossible for us to do so. Consequently, I would refer you back to my previous statement in which I believe that Mr. Wilson had pre-existing degenerative disc condition in his back and he presented to me with a herniated disc which likely was exacerbated or possibly caused with his work related injury.

(Cl. Ex. 3-17)

Dr. Beer was again questioned by defendant insurance carrier regarding causation and responded in another letter dated September 30, 1999, as follows:

I had the opportunity to review the letter regarding a record review provided by Dr. Patrick Hitchon. I see Dr. Hitchon noted there is a discrepancy in the medical record. I agree that there is a discrepancy present however, according to Mr. Wilson as I re-discussed with him today, his lower extremity radiating pain began following a lifting event which occurred at work. He stated that his chiropractic notes are in error, in fact what they should have stated that his pain was so severe he is having difficulties lifting his child. As such, my opinion is no different that it has been previously, according to this information I believe that his injury most likely occurred when he was lifting steel while at work.

(Cl. Ex. 3-19)

Defendants' counsel also questioned Dr. Beer and Dr. Beer responded regarding causation in a letter dated February 29, 2000, which provides:

I would agree that there are some inconsistencies in his presentation for evaluation. He, however, did disclose to me in my initial consultation that his pain developed on January 19th after he was carrying a piece of steel at work. I realize that you have documentation supporting an onset of

pain which was not substantiated by this injury and I believe that is the basis for the inconsistencies noted. As you are likely aware, a disc may herniate after relatively trivial actions and activities and as such it would be possible for Mr. Wilson to have herniated a disc in any number of ways other than by carrying a piece of steel. However, as I previously stated, the patient informed that his symptoms began while he was carrying steel, and as such I believe that if this information is accurate, could have been a potential source for his injury.

(Cl. Ex. 3-21)

Dr. Kothari opined in regards to causation as follows: "Based on the history that was obtained by me and also the history that was obtained by Larry LaMasters, P.A.C., at Fairbank Clinic. The patients present condition is work related. Lifting a small child would not cause a ruptured disc in my opinion." (Cl. Ex. 3-9)

Dr. Beer offered the following opinion with respect to functional impairment following the surgery: "According to the AMA Guidelines: surgically treated herniated lumbar disc with minimal residual post operative symptoms warrants a 9% permanent partial disability. I provided him with this number today and he will follow-up with me in the future on an as needed basis." (Cl. Ex. 3-22)

It is found that the claimant sustained an injury to his back on January 19, 1999, resulting in the claimant's present impairment and disability. The note in Dr. Willoughby's records of February 5, 1999, indicating that the claimant's problems were possibly related to picking up a child is simply the result of some miscommunication between the claimant and Dr. Willoughby. The claimant's testimony as to how the injury occurred is corroborated by his coworker, Mr. Hurlbutt and by the foreman, Mr. Sage, who was told of the incident the following day by the claimant. The claimant could have easily forgotten about his past incidents of low back pain as they were infrequent and had occurred several years before his deposition.

The claimant set out alternative calculations of his gross weekly rate in his trial brief. His gross weekly wages including the employer's payments directly to the welfare and pension funds is \$1,041.24 and without including payments for the welfare and pension is \$754.87. The money that is paid to the welfare and pension is paid directly for those fringe benefits by the claimant's employer.

The claimant's 1999 U.S. individual income tax return lists himself, his wife, and three children as dependents. The children the claimant claimed in 1999 were also claimed in 1997 and in 1998. (Cl. Ex. 2; Def. Ex. 1) It is found the claimant has five dependents as of the date of injury, January 19, 1999.

After the claimant's recovery from the surgery for the work injury and full release to return to work, the claimant began work for Blahnik Construction Company in Cedar Rapids, Iowa, at their work site for Quaker Oats Company. The claimant started work on October 4, 1999, for Blahnik and his rate of pay is \$21.02 per hour. His job title now is millwright foreman. This new job does not require the claimant to lift although the claimant does keep his toolbox at work. He has only used that toolbox on about a dozen occasions since he began work there.

The claimant thinks that if he were no longer able to work as a millwright foreman and had to go back to working as a millwright, he would not be able to do the work because of the back surgery.

Since the surgery the claimant no longer golfs, boats, camps, or ice fishes. He feels he is no longer as attentive to his children and that he doesn't wrestle with his son any longer. The claimant realizes that he does not have restrictions but is concerned that he may hurt himself again and wouldn't be able to provide for his family. He sometimes still experiences back pain.

REASONING AND CONCLUSIONS OF LAW

The first issue for determination is whether the claimant sustained an injury on January 19, 1999, which arose out of and in the course of his employment.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. of App. P. 14(f).

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

The claimant's testimony as to the work injury on January 19, 1999, was corroborated by Mr. Hurlbutt. The note from the chiropractor indicating a source of injury other than the one described by the claimant is dismissed as simply being a miscommunication between the claimant and the chiropractor as to the source of the claimant's problems. The claimant has established by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment on January 19, 1999, while he was carrying a heavy piece of steel with Mr. Hurlbutt.

The next issue for determination is whether the injury was the cause of any disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296 (Iowa 1974).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. The weight to be given to any expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts relied upon by the expert as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974); Anderson v. Oscar Mayer & Co., 217 N.W.2d 531 (Iowa 1974); Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Unrebutted expert medical testimony cannot be summarily rejected. Leffler v. Wilson & Company, 320 N.W.2d 634 (Iowa App. 1982), Poula v. Siouxland Wall & Ceiling, 516 N.W.2d 910 (Iowa App. 1994).

Dr. Beer and Dr. Kothari's opinions regarding causation of the claimant's current problems are consistent with the work injury the claimant has established. As a consequence of the claimant's work injury the claimant has suffered a nine percent functional impairment to his back based upon the opinion of Dr. Beers. Claimant has established that his work injury was the cause of permanent disability.

The next issue for determination is the extent of the claimant's entitlement to industrial disability pursuant to Iowa Code section 85.34(2)(u).

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which the employee is fitted. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry, 253 Iowa 285, 110 N.W.2d 660 (1961).

A finding of impairment to the body as a whole found by a medical evaluator does not equate to industrial disability. Impairment and disability are not synonymous. The degree of industrial disability can be much different than the degree of impairment because industrial disability references to loss of earning capacity and impairment references to anatomical or functional abnormality or loss. Although loss of function is to be considered and disability can rarely be found without it, it is not so that a degree of industrial disability is proportionally related to a degree of impairment of bodily function.

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

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

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

At the time of the hearing the claimant was 35 years old with a high school education plus some college training. The claimant currently has no work restrictions but has underwent a laminectomy and microdiscectomy surgery and now has a nine percent functional impairment rating according to Dr. Beers.

The claimant has been fortunate enough to improve his employment position and is earning more than before his injury. The claimant's industrial disability is not substantial. Considering these as well as all other factors of industrial disability, it is concluded that the claimant has sustained a 10 percent industrial disability which entitles him to 50 weeks of permanent partial disability benefits pursuant to Iowa Code section 85.34(2)(u).

The next issue for determination is the claimant's weekly rate of compensation.

The claimant contends that he is entitled to the inclusion of the payments made to the welfare and pension fund by the employer. Overtime, irregular

bonuses, expense allowances, and employer's contributions for benefit plans are not included in figuring the rate. (Iowa Code section 85.61(3)) The claimant's gross weekly earnings are found to be \$754.87. The claimant has presented tax returns showing three children claimed as dependents at the time of the injury. He is married. He is entitled to five exemptions. The claimant's weekly rate is \$485.47 per week using the rate book in effect at the time of the injury.

ORDER

THEREFORE IT IS ORDERED:

That defendants, SG Junker & Associates, and Heritage Mutual Insurance Company, shall pay claimant fifty (50) weeks of permanent partial disability at the rate of four hundred eighty-five and 47/100 dollars (\$485.47) per week commencing on October 4, 1999.

It is further ordered that defendants shall pay accrued benefits in a lump sum with interest pursuant to Iowa Code section 85.30 with claim activity reports filed pursuant to rule 876 IAC 3.1.

It is further ordered that defendants shall receive credit for benefits already paid.

Signed and filed this _____ day of April, 2001.

RON POHLMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

David P. Odekirk
Attorney at Law
PO Box 2363
Waterloo, IA 50704

Chris J. Scheldrup
Attorney at Law
PO Box 1943
Cedar Rapids, IA 52406