

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MANUEL NUNEZ HERNANDEZ,

Claimant,

vs.

STORY CONSTRUCTION,

Employer,

and

TRAVELERS INDEMNITY CO. OF CT,

Insurance Carrier,
Defendants.

File No. 1653567.01

ARBITRATION DECISION

Headnotes: 1402.20, 1803, 1803.1

Claimant filed a petition in arbitration on April 28, 2022, alleging he sustained injuries to his right upper extremity, neck, back, and body as a whole, while working for Defendant Story Construction on August 24, 2018. Story Construction and its insurer, Defendant Travelers Indemnity Company of Connecticut ("Travelers"), filed an answer on May 24, 2022.

An arbitration hearing was held *via* Zoom video conference on June 28, 2023. Attorney Joel Waters represented Nunez Hernandez. Nunez Hernandez appeared and testified. Attorney Julie Burger represented Story Construction and Travelers. Jose Burgos provided Spanish interpretation services during the hearing. Joint Exhibits ("JE") 1 through 6 and Exhibits A through C were admitted into the record. The record was held open through June 29, 2023, for the receipt of JE 7. JE 7 was received, and the record was closed.

The parties submitted a hearing report listing stipulations and issues to be decided. A hearing report order was entered at the conclusion of the hearing accepting the parties' stipulations and the issues to be decided. Story Construction and Travelers waived all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between Story Construction and Nunez Hernandez at the time of the alleged injury.

2. Nunez Hernandez sustained an injury which arose out of and in the course of his employment with Story Construction on August 24, 2018.

3. The alleged injury is a cause of temporary disability during a period of recovery.

4. Entitlement to temporary benefits is no longer in dispute.

5. If the alleged injury is found to be a cause of permanent disability, the commencement date for permanent partial disability benefits, if any are awarded, is September 27, 2021.

6. At the time of the alleged injury Nunez Hernandez's gross earnings were \$689.19 per week, he was married and entitled to two exemptions, and the parties believe the weekly rate is \$461.80.

7. Medical benefits are no longer in dispute.

ISSUES

1. What is the nature of the injury?

2. Is the alleged injury a cause of permanent disability?

3. If the alleged injury is a cause of permanent disability what is the extent of disability?

FINDINGS OF FACT

Nunez Hernandez attended elementary school in Mexico. Nunez Hernandez is a Spanish speaker. Nunez Hernandez can read Spanish, but he cannot speak or read English. Nunez Hernandez has experience working as a farm laborer, bus boy in a restaurant, and in construction. Nunez Hernandez commenced employment with Story Construction as a construction laborer in 2017. At the time of the hearing, he was 57.

On August 24, 2018, Nunez Hernandez was working with a coworker using concrete forms. Nunez Hernandez had one side of the form and his coworker had the other side of the form. Nunez Hernandez testified his coworker was not paying attention and all the weight from the form went on him. Nunez Hernandez tried to grab the form with his right hand, he knelt down, he dropped the form, and then he felt bad pain in his back. Nunez Hernandez testified he injured his right arm, right hand and back. Nunez Hernandez reported the work injury to his employer.

Nunez Hernandez attended an appointment with Lacreasia Wheat-Hitchings, M.D., an occupational medicine physician with the McFarland Clinic, on August 28, 2018, complaining of abdominal, low back, and wrist pain following an injury on August 24, 2018, when he attempted to catch a wooden form to prevent it from falling on top of a coworker. (JE 1:1) Dr. Wheat-Hitchings examined Nunez Hernandez, assessed him with a lumbar region strain, abdominal muscle strain, and right wrist strain, prescribed diclofenac and Flexeril, recommended he use ice and heat, and imposed a restriction of no lifting over 20 pounds with both hands. (JE 1:2)

On September 5, 2018, Nunez Hernandez attended a follow-up appointment with Dr. Wheat-Hitchings. (JE 1:3) Dr. Wheat-Hitchings documented Nunez Hernandez reported his abdominal pain had slightly improved, he felt a "little bit swollen," his lower

back pain was much improved, and his wrist pain continued to be high. (JE 1:3) Dr. Wheat-Hitchings discontinued the diclofenac and Flexeril, prescribed Etodolac and Zantac, referred Nunez Hernandez for physical therapy, stated Nunez Hernandez must wear a wrist brace, and imposed a restriction of no lifting over 20 pounds with both hands with a five minute break every two hours, as needed. (JE 1:3)

Nunez Hernandez continued to treat with Dr. Wheat-Hitchings and he received occupational therapy for his right upper extremity. (JE 1) During an appointment on September 26, 2018, Nunez Hernandez reported his abdominal and back pain had improved, but his wrist pain was worse when he used a hammer at work and he complained of intermittent numbness into his fourth and fifth digits. (JE 1:14) Dr. Wheat-Hitchings diagnosed Nunez Hernandez with right wrist tenosynovitis and an abdominal strain, administered a Depo Medrol injection, prescribed a Medrol Dose Pak, continued his therapy, imposed restrictions of no lifting over 40 pounds with both hands and no use of a hammer, and ordered Nunez Hernandez to wear a wrist brace. (JE 1:14)

On October 24, 2018, Nunez Hernandez returned to Dr. Wheat-Hitchings reporting his back and abdominal pain had become worse since he had returned to regular duty, and relaying he had minimal wrist pain and numbness. (JE 1:22) Dr. Wheat-Hitchings diagnosed Nunez Hernandez with right wrist tenosynovitis, an abdominal strain, and a lumbar strain, refilled his Etodolac, and released him to regular duty. (JE 1:22)

During an appointment on November 19, 2018, Nunez Hernandez reported his wrist pain was much worse and that he was having difficulty holding an electric screwdriver at work, and that his back was intermittently painful. (JE 1:23) Dr. Wheat-Hitchings documented, "I reiterated the [*sic*] his back pain at this point is likely due to the underlying arthritis he has. It will flair from time to time," and she ordered magnetic resonance imaging of the right wrist. (JE 1:23-26)

On November 29, 2018, Nunez Hernandez underwent right wrist magnetic resonance imaging. (JE 1:27) The reviewing radiologist listed an impression of:

1. Likely degenerative tears of the triangular fibrocartilage complex and lunatotriquetral ligament with reactive marrow change of the lunate which all could be seen with chronic ulnolunate abutment syndrome.
2. Subtle tear of the membranous portion of the scapholunate ligament which is also felt likely degenerative.
3. Chronic appearing partial-thickness tear of the anterior oblique ligament.
4. No acute pathology of the wrist.

(JE 1:28)

After receiving and reviewing the imaging, Dr. Wheat-Hitchings referred Nunez Hernandez to a hand surgeon after he returned from a trip in mid-January 2019. (JE 1:30)

On February 12, 2019, attended an appointment with Warren Poag, M.D., an orthopedic hand surgeon with the McFarland Clinic. (JE 1:32) Dr. Poag examined Nunez Hernandez, assessed him with ECU tendonitis and possible carpal tunnel syndrome and cubital tunnel syndrome, and noted he offered surgical treatment, which Nunez Hernandez declined. (JE 1:33)

Nunez Hernandez returned to Dr. Wheat-Hitchings on April 24, 2019, reporting he was experiencing aching pain during the day and night in the 3rd through 5th fingers with numbness and a feeling like he was being pinched. (JE 1:34) Dr. Wheat-Hitchings diagnosed Nunez Hernandez with a degenerative tear of the triangular fibrocartilage complex of the right wrist and extensor tenosynovitis of the right wrist, released him to regular duty, and recommended a second opinion with a hand specialist. (JE 1:35-38)

On May 22, 2019, Nunez Hernandez attended an appointment with Jeffrey Rodgers, M.D., an orthopedic hand surgeon with Des Moines Orthopaedic Surgeons, P.C., for a second opinion regarding his right wrist. (JE 2:42) Dr. Rodgers examined Nunez Hernandez, assessed him with a right TFCC tear and ulnocarpal abutment exacerbated by work injury and possible carpal and cubital tunnel syndrome exacerbated by work activity, and he recommended nerve conduction studies. (JE 2:44)

Nunez Hernandez underwent nerve conduction studies with Todd Troll, M.D., a physiatrist, on June 5, 2019. (JE 3) Dr. Troll opined the study was abnormal and the findings were suggestive of right ulnar neuropathy at the elbow with no evidence of plexopathy or radiculopathy. (JE 3)

On June 5, 2019, Nunez Hernandez returned to Dr. Rodgers following the nerve conduction studies. (JE 2:45) Dr. Rodgers found the nerve conduction studies demonstrated Nunez Hernandez has right ulnar neuropathy. (JE 2:45) Dr. Rodgers assessed Nunez Hernandez with right cubital tunnel syndrome with material exacerbation by work activities using a hammer and right TFCC tear and ulnocarpal abutment with material exacerbation by work related traumatic injury, administered an injection into the right wrist, ordered occupational therapy to fit Nunez Hernandez for a Pilo splint, and recommended surgery after Nunez Hernandez stopped smoking for one month. (JE 2:43-49)

Dr. Rodgers sent a letter to Defendants' representative regarding Nunez Hernandez's condition on August 16, 2019. (JE 2:50) Dr. Rodgers noted Nunez Hernandez had elected not to proceed with surgical treatment and concluded he had reached maximum medical improvement on June 6, 2019. (JE 2:50) Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Rodgers assigned Nunez Hernandez two percent left upper extremity impairment as a result of his mild sensory dysfunction in the ulnar nerve distribution. (JE 2:50) Dr. Rodgers opined there was no additional impairment for his ulnocarpal abutment and did not assign any permanent restrictions. (JE 2:50)

Nunez Hernandez underwent lumbar spine magnetic resonance imaging ordered by Arnold Delbridge, M.D., on January 13, 2020. (JE 4) The reviewing radiologist listed an impression of:

1. Mild bilateral facet arthropathy at L4-5 with minimal bilateral neural foraminal stenosis. No other significant findings.
2. Bilateral pseudo articulations at L5-S1 seen on the previous radiograph. This can predispose to back pain.

(JE 4:76)

On February 17, 2020, Nunez Hernandez returned to Dr. Rodgers complaining of moderate pain in his ulnar wrist and numbness in his ring and small fingers. (JE 2:51) Dr. Rodgers recommended surgery, stated Nunez Hernandez needed to quit smoking before he would perform surgery, and he released him to full duty. (JE 2:51-53)

Nunez Hernandez attended an appointment with Dr. Wheat-Hitchings on July 1, 2020, complaining of back pain around his waist for two years which he attributed to a work injury in August 2018 when he injured his wrist. (JE 1:39) Dr. Wheat-Hitchings diagnosed Nunez Hernandez with chronic midline low back pain without sciatica and noted he has "degenerative joint disease of the lumbar spine unattributable with regard to causation to the 2018 work injury." (JE 1:40) Dr. Wheat-Hitchings released Nunez Hernandez to regular duty, recommended he follow up with his primary care provider using his private insurance, and wrote the condition is "[n]ot work-related." (JE 1:40-41)

On March 8, 2021, Nunez Hernandez returned to Dr. Rodgers complaining of right ulnar wrist pain and numbness in his small finger and reporting he had been having lateral elbow pain radiating into his shoulder for three months. (JE 2:54) Dr. Rodgers assessed Nunez Hernandez with worsening right ulnocarpal abutment and TFCC tear, right cubital tunnel syndrome, right lateral elbow tendinopathy, and discussed surgery. (JE 2:54)

Dr. Rodgers performed a right wrist arthroscopy and debridement of partial scapholunate ligament injury and right ulnar nerve release on March 25, 2021 and imposed a restriction of no use of the right hand. (JE 2:55-56) Dr. Rodgers listed postoperative diagnoses of right wrist partial scapholunate ligament injury, chronic, with grade 2 instability, intact triangular fibrocartilage, no evidence of ulnocarpal abutment changes, and right cubital tunnel syndrome and stable ulnar nerve post release. (JE 5:78)

On May 17, 2021, Nunez Hernandez attended a follow-up appointment with Dr. Rodgers reporting he injured his right upper extremity doing hammer exercises during therapy. (JE 2:61) Dr. Rodgers recommended he continue with occupational hand therapy to work on strengthening and imposed a five-pound lifting restriction. (JE 2:62)

During an appointment on July 19, 2021, Dr. Rodgers recommended additional occupational hand therapy to work on strengthening, assigned a 15-pound lifting restriction for the right hand, and noted that if Nunez Hernandez did not believe he

could return to his normal work activities he would order a functional capacity evaluation and assign permanent restrictions based on a valid exam. (JE 2:64-65)

On September 27, 2021, Nunez Hernandez attended a follow-up appointment with Dr. Rodgers reporting he was experiencing right neck pain radiating down his right arm. (JE 2:67) Dr. Rodgers examined Nunez Hernandez, found he reached maximum medical improvement for his ulnar release at the elbow and wrist arthroscopy and limited debridement, and noted, “[h]e has unrelated new complaint of radicular pain from the cervical spine down the right arm. This is not related to his work-related condition.” (JE 2:68) Dr. Rodgers ordered a functional capacity evaluation and imposed a 15-pound lifting restriction with the right hand until the functional capacity evaluation could be completed. (JE 2:69-71)

Nunez Hernandez underwent a functional capacity evaluation on October 5, 2021. (JE 6) The physical therapy found Nunez Hernandez demonstrated the ability to function in the light physical demand category, noting

Nunez Hernandez demonstrated significant signs of consistency and lacked observable signs of exertion throughout the evaluation. This, in combination with physiological responses (heart rate and respiratory rate), movement and muscle recruitment patterns both aware and unaware of observation, indicated that the capabilities outlined would be considered to be Manuel Nunez Hernandez’s minimal functional ability level.

(JE 6:80)

In response to an inquiry from Defendants’ representative, Dr. Rodgers issued an opinion letter on October 26, 2021. (JE 7:94) Dr. Rodgers opined based on the AMA Guides, Nunez Hernandez’s “range of motion examination for the wrist and ulnar nerve function measurements resulted in 0% permanent partial impairment of the right upper extremity.” (JE 7:94) Dr. Rodgers noted he had reviewed the functional capacity evaluation and

Based on that report, the majority of Mr. Nunez’s physical limitations relate to his lack of aerobic capacity as well as radiating arm pain from his cervical spine. His cervical spine problem and lack of aerobic capacity in my opinion are non work related conditions. Consequently there are no valid indications for permanent restrictions for his work-related right upper extremity conditions.

(JE 7:94)

CONCLUSIONS OF LAW

At hearing Nunez Hernandez alleged he sustained permanent impairments to his neck, back, arm, and hand, and body as whole caused by the stipulated August 24, 2018, work injury. Defendants dispute his claim and aver he has not sustained 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 Co. 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. Wills, 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., Kingsley v. Manning, 286 N.W.2d 174, 177 (Iowa 1979).

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).

An employer is responsible for a sequela injury “that naturally and proximately flow[s] from” an injury arising out of and in the course of employment. Oldham v. Schofield & Welch, 266 N.W.2d 480, 482 (Iowa 1936) (“[i]f an employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury, such further disability is compensable”); see also Mallory v. Mercy Med. Ctr., 2012 WL 529199, File No. 5029834 (Iowa Workers’ Comp. Comm’n Feb. 15, 2012). A sequela may occur as the result of a fall during treatment, an altered gait, or a later injury caused by the original injury.

Dr. Rodgers, a treating orthopedic hand surgeon who performed surgery on Nunez Hernandez, and Dr. Wheat-Hitchings, a treating occupational medicine physician, gave causation opinions on his conditions and Dr. Rodgers provided an impairment rating. Dr. Wheat-Hitchings diagnosed Nunez Hernandez with chronic midline low back pain without sciatica, opined claimant’s low back pain is “[n]ot work-related,” and recommended he follow up with his primary care provider regarding his condition. (JE 1:40-41) No physician has found his low back condition is work-related or permanent.

Dr. Rodgers initially assigned Nunez Hernandez two percent upper extremity impairment before he underwent surgery. Following surgery and a valid functional capacity evaluation, Dr. Rodgers assigned no permanent impairment to the right upper extremity. (JE 7:94) Dr. Rodgers noted he had reviewed the functional capacity evaluation and found:

Based on that report, the majority of Mr. Nunez’s physical limitations relate to his lack of aerobic capacity as well as radiating arm pain from his cervical spine. His cervical spine problem and lack of aerobic capacity in my opinion are non work related conditions. Consequently there are no valid indications for permanent restrictions for his work-related right upper extremity conditions.

(JE 7:94) No physician has causally related Nunez Hernandez’s cervical spine condition to the work injury or assigned permanent impairment for the condition.

Nunez Hernandez did not seek an independent medical examination in this case to rebut the opinions of the treating physicians. No physician has assigned permanent impairment to Nunez Hernandez for any condition related to the work injury. Based on the foregoing, I find Nunez Hernandez has failed to meet his burden of proof he sustained permanent impairment caused by the stipulated August 2018 work injury.


ORDER

IT IS THEREFORE ORDERED, THAT:

Claimant shall take nothing further in this case.

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 14th day of July, 2023.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Joel Waters (via WCES)

Julie Burger (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.