BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MIKE SKIRVIN,

Claimant,

vs.

CLOW VALVE,

Employer,

and

ESIS,

Insurance Carrier,
Defendants.



File No. 5057361

ARBITRATION

DECISION

Head Notes: 1402.30, 1803

## STATEMENT OF THE CASE

Claimant, Mike Skirvin, filed a petition in arbitration seeking workers' compensation benefits from Clow Valve (Clow), employer, and ESIS, insurance Company, both as defendants. This case was heard in Des Moines, Iowa on September 29, 2017 with a final submission date of October 20, 2017.

The record in this case consists of Joint Exhibit 1, Claimant's Exhibits 2-4 and 20-22, Defendants' Exhibits C and E through G, and the testimony of claimant and Brian Box.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

## ISSUES

1. Whether claimant sustained an injury that arose out of and in the course of employment.

2. Whether the injury is a cause of permanent disability; and if so

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

## FINDINGS OF FACT

Claimant was 49 years old at the time of hearing. Claimant graduated from high school. Claimant has worked at an aluminum foundry. Claimant has worked 18 years with Clow.

Claimant testified Clow manufactures water valves. Most of Clow's product is for fire hydrants.

Claimant testified he began at Clow as a lathe operator. He testified that on the date of injury he worked in the flexible machinery cell. He said his job is to load and unload parts, change fixtures and to drive a forklift. Claimant said the job requires him to lift up to 45 pounds. Pictures of the Clow factory, taken from the company's website, are found at Exhibit 1, page 33.

Exhibit 21 is a job description of claimant's job. The description indicates the type of injuries that may occur when doing claimant's job include potential injuries to the shoulder, elbow and wrist. (Ex. 21)

Claimant testified that two to three months before the date of injury he had been having increased difficulties with his right shoulder.

Claimant testified that on January 11, 2016 he was trying to place a fixture, weighing approximately 945 pounds, onto a milling machine. The machine where claimant was trying to dock the fixture is shown at Exhibit F, pages 59-60. To move the fixture, claimant used an overhead trolly system and hoist to do the lifting. Claimant said he had to push and manhandle the fixture into place so that it would line up on both holes on the milling machine, shown in Exhibit F, pages 57-60.

Claimant said he overshot the bolt holes in the milling machine and had to pull the fixtures on the hoist back into place. He testified that while moving the fixture into place, he hit a dead or a sticking spot on the overhead trolly system. He said while nudging or moving the fixture from the dead spot, he felt a pop in his shoulder. (Exhibit 1, page 52)

Claimant testified he believed there was dust or debris in the overhead rails for the trolly system.

Claimant testified he had reported the trolly system sticking in the past to the maintenance department at Clow on several occasions prior to his injury.

On January 13, 2016 four employees from Clow investigated the hoist and trolly where claimant worked. According to readings made by Brian Box, Safety Engineer at Clow, the push/pull results showed that it took 19.2 pounds to move the hoist north; 19.5 pounds to move the hoist south; 30.9 pounds to move the hoist east; and 37.5 pounds of force to move the hoist west. (Ex. F, p. 65)

The investigative report shows one of the joints where two sections meet is a spot where the wheels of a hoist land, and it takes extra force to pull the hoist. The report notes from the ground the investigative committee could not tell if the rails where out of alignment. (Ex. F, p. 65)

On January 14, 2016 a maintenance technician got on a ladder and checked the alignment of the rails and the overhead trolly system and found nothing wrong. The tech also used an air hose to blow out the tracks. The report indicates a second-shift operator, presumably on January 14, 2016, said the hoist operated fine. (Ex. F, p. 65)

Brian Box testified he has been safety manager at Clow since February 2011. Mr. Box said he took the pictures, shown at Exhibit F, pages 59-64. He said he also used a push/pull gauge on the hoist used by claimant. Mr. Box testified he also made the photos and engaged in the investigative report found at Exhibit F, page 65. Mr. Box said nothing was found wrong with the rails or the hoist in the area where claimant was allegedly injured.

Mr. Box testified, on direct exam, he did not find any dead spots on the overhead rails of the trolly. On cross-exam, he admitted the report, found at Exhibit F, page 65, noted it takes extra force to pull the hoist at a place where the rails connect. Mr. Box also admitted the readings, shown in photos at Exhibit F, pages 61-62, are different from those shown in the investigative report found at Exhibit F, page 65.

On January 29, 2016 claimant was evaluated by Matthew Doty, D.O. Claimant indicated he was moving a fixture into a machine when it became stuck. Claimant was forced to push the fixture and felt a pop in the anterior portion of his shoulder. Claimant was assessed as having a right shoulder strain. He was put on work restrictions and prescribed physical therapy and medication. (Ex. 1, pp. 1-3)

On February 17, 2016 claimant met with staff from Clow, including Brian Box, to discuss his alleged work injury. The group went to the work area where the injury allegedly occurred. Force was measured on the hoist at that time. Claimant indicated the spot where the hoist needs to be positioned to set the fixture had a dead spot. (Ex. 1, pp. 73-74)

Claimant returned to Dr. Doty in followup. Dr. Doty was given testing from Clow indicating it took 9.2 pounds of force for the hoist to go from south to north; and 28.7 pounds when pulling the hoist to the left. Dr. Doty recommended an orthopedic surgeon for further treatment. Claimant was referred to Steven Aviles, M.D., an orthopedic surgeon. (Ex. 1, pp. 4-6)

In a note to Dr. Aviles, Dr. Doty noted several readings were given to him by Clow showing approximately 21.2 pounds of force was used to move the hoist. (Ex. 1, p. 6)

On March 1, 2016 claimant was evaluated by Dr. Aviles. Claimant indicated right shoulder pain after pulling heavy equipment with a hoist at work. Claimant felt the pop followed by pain. Claimant was given work restrictions. (Ex. 1, pp. 11-12)

An MRI of claimant's right shoulder, done on March 20, 2016 showed a full-thickness supraspinatus tear and a SLAP tear. (Ex. 1, p. 7)

Claimant returned to Dr. Aviles on April 11, 2016. Dr. Aviles assessed claimant as having a rotator cuff tear, along with a SLAP tear. Surgery was discussed and chosen as a treatment option. (Ex. 1, pp. 13-14)

In an April 27, 2016 letter Dr. Aviles opined the mechanism of claimant's injury was consistent with the diagnosis of a rotator cuff tear and SLAP tear. This suggested the injury was work related. (Ex. 1, p. 16)

In a May 16, 2016 letter, a representative from defendant-insurer asked Dr. Aviles to reassess his opinion of April 27, 2016. Dr. Aviles was given a job site analysis and told that moving the hoist required from 9.2 to 28.7 pounds of force. (Ex. 1, p. 17)

In a May 18, 2016 letter, Dr. Aviles changed his opinion. He indicated he was informed the force required to move the hoist at issue required between 9.2 to 28.7 pounds of force. Based on this information, he opined it was more likely than not this did not cause the rotator tear. (Ex. 1, pp. 18-19)

In a June 8, 2016 email, defendant-insurer indicated no further treatment for claimant's shoulder was authorized given the April 18, 2016 opinion of Dr. Aviles. (Ex. 1, p. 10)

In a physician's statement, Terry Cochran, M.D. indicated claimant's injury was work related. (Ex. 1, pp. 23-24)

On July 11, 2016 claimant was evaluated by David Steinbronn, M.D. with The Steindler Clinic. Claimant had right shoulder pain caused by pushing a hoist at work. Claimant was assessed as having a rotator and SLAP tear. (Ex. 1, pp. 34-36)

On August 16, 2016 claimant was seen by John Langland, M.D., a partner of Dr. Steinbronn. Surgery was recommended and chosen as a treatment option. (Ex. 1, pp. 38-41)

On August 22, 2016 claimant had right shoulder surgery performed by Dr. Langland. Surgery consisted of a right rotator cuff repair, biceps tenodesis, and a subacromial decompression. (Ex. 1, p. 42)

On December 27, 2016 claimant returned in followup with Dr. Langland. Claimant was released to work with no restrictions. (Ex. 1, pp. 45-46) Claimant testified he specifically asked Dr. Langland not to give him any work restrictions. Claimant returned in followup with Dr. Langland on February 7, 2017. Claimant was back to work

with no restrictions. Claimant was recommended to do exercises at home. (Ex. 1, pp. 47-48)

In an April 7, 2017 letter, written by claimant's counsel, Dr. Langland opined claimant had a preexisting condition in the right shoulder, but that the January 11, 2016 work event was the most probable source of his injury. He opined the accident of January 11, 2016 probably accelerated claimant's rotator cuff tear. (Ex. 1, pp. 49-50)

In an April 24, 2017 letter, written by claimant's counsel, Dr. Cochran indicated claimant did not have any documented right shoulder problems prior to January 11, 2016. He indicated the probable source of claimant's injury was the January 11, 2016 incident at work. (Ex. 1, pp. 30-31)

In a July 28, 2017 report, Sunil Bansal, M.D., gave his opinions of claimant's condition following an independent medical evaluation (IME). Claimant had a right shoulder aching with increased activity. Claimant also indicated some weakness in the right shoulder. Dr. Bansal found claimant had an 8 percent permanent impairment to the right shoulder, converting to a 5 percent permanent impairment to the body as a whole. He opined the January 11, 2016 injury caused claimant's right shoulder problems. Dr. Bansal limited claimant to lifting up to 20 pounds in the right arm. (Ex. 1, pp. 56-67)

In an August 7, 2017 report, Mark Kirkland, D.O., gave his opinions of claimant's condition following an IME. Dr. Kirkland was retained by defendants. Claimant indicated right shoulder pain approximately two to three months prior to the injury. Claimant indicated he got good relief from the surgery but still was not 100 percent. Claimant still had loss of range of motion in the right upper extremity. Claimant also had some weakness in the right shoulder if he lifted for too long. Dr. Kirkland found claimant at maximum medical improvement (MMI) as of February 2017. Dr. Kirkland opined claimant's preexisting injury was caused by his repetitive work at Clow. He opined the January 11, 2016 injury substantially aggravated claimant's condition. Dr. Kirkland found claimant had an 11 percent permanent impairment to the right upper extremity, converting to a 7 percent permanent impairment to the body as a whole. He did not give claimant any permanent restrictions. (Ex. 1, pp. 68-72)

Claimant testified he still worked at Clow. He said he is unable to lie on his right shoulder. He says his right shoulder condition causes him difficulty with sleep. He testified he uses over-the-counter medication for pain. He testified he believes he had lost some strength in range of motion of the right shoulder.

Claimant testified he could not return to work at the aluminum casting plant, as his shoulder could not take high volume repetitive activity and said he has also had difficulty working at Clow in jobs that require repetitive activity.

Claimant said he is still doing the same job he did at the date of injury. He said he is working approximately the same number of hours per week.

## CONCLUSIONS OF LAW

The first issue to be determined is if claimant sustained an injury that arose out of and in the course of 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. App. P. 6.14(6).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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 personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

Claimant testified he had a work-related injury on January 11, 2016 when pushing a 945-pound fixture on a hoist. Claimant contends the hoist became stuck on an elevated trolly system. Defendants contend the force used to push the trolly system was minimal, and that push/pull values tested on the hoist at issue, show there are minimal amounts of force needed to push and pull the hoist.

Claimant testified he had aching in his shoulder approximately two to three months prior to the alleged date of injury. He did not have any substantial problems until the hoist allegedly got stuck on an elevated trolly system.

Defendants did an investigation of the area where claimant worked on January 13, 2016. This was done the day after claimant reported the injury. The report notes the push/pull values were: 19.2 pounds to the north; 19.5 pounds to the south; 30.9 pounds to the east; and 37.5 pounds to the west. (Ex. F, p. 65)

The report also notes "one of the joints where two sections meet is to the spot as where the wheels of the hoist land and it takes extra force to pull the hoist." (Ex. F, p. 65)

Pictures of the push/pull values taken by Mr. Box are found at Exhibit F, pages 59-62. The values shown in the picture taken by Mr. Box are different from the values shown in the report found at Exhibit F, page 65.

Five experts have opined regarding the cause of claimant's injury. Four of those experts, Drs. Bansal, Cochran, Langland, and Kirkland, all opine claimant's shoulder injury was either caused or materially aggravated by the January 11, 2016 date of injury. (Ex. 1, pp. 23-24, 30-31, 49-50, and 56-72)

Only Dr. Aviles opined claimant's injury to his shoulder was not work related. (Ex. 1, pp. 18-19) Dr. Aviles initially opined claimant's injury was work related. (Ex. 1,

p. 16) Dr. Aviles only changed his opinion after being shown push/pull values by defendants indicating the hoist in question had been measured to only have push/pull values between 9.2 to 28.7 pounds. (Ex. 1, pp. 18-19)

There are a few problems with Dr. Aviles' opinion. First, it relies on push/pull values shown at Exhibit F, pages 61-62. Those values are different from those detailed in the internal investigation report made by Clow found at Exhibit F, page 65. As noted above, the investigation report done by Clow also notes one of the joints where two sections meet is to the spot as to where the wheels of the hoist land, and it takes extra force to pull the hoist. (Ex. F, p. 65)

The values for force given to Dr. Aviles are different from those values used by Clow in the internal investigation report of the accident. The internal investigation report also notes it takes extra force to pull the hoist across the joints where two rail sections of the overhead trolly meet. (Ex. F, p. 65) It does not appear Dr. Aviles was given the report found at Exhibit F, page 65.

Because Dr. Aviles was not made aware of a sticking point on the overhead trolly system, documented internally by Clow, and because the force values shown at Exhibit F, page 61-62 are different when compared by Exhibit F, page 65, Dr. Aviles' opinion is found not convincing.

Claimant testified he injured his shoulder while pushing a hoist at Clow after the hoist became stuck. An internal report from Clow also indicates the hoist would stick at a certain point on the rails of the overhead trolly system. Dr. Aviles' opinion of causation is found unconvincing. Four other experts have opined claimant's shoulder injury is work related. Given this record, claimant has carried his burden of proof his injury of January 11, 2016 is work related.

The next issue to be determined is whether claimant's injury resulted in a permanent disability. Claimant's injury occurred on January 11, 2016. Claimant underwent surgery for the work injury. Both Dr. Bansal and Dr. Kirkland opine claimant had a permanent impairment with the injury. No expert opinion contradicts the opinions of Dr. Bansal and Dr. Kirkland. Based on this, claimant has carried his burden of proof he sustained a permanent disability from the January 11, 2016 work injury.

The final issue to be resolved is the extent of claimant's entitlement to permanent partial disability benefits.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

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.

Claimant was 49 years old at the time of hearing. Claimant graduated from high school. Claimant has worked for a time in an aluminum foundry. He has worked for the last 18 years at Clow.

Two experts have opined regarding claimant's permanent impairment. Dr. Bansal found claimant had a 5 percent permanent impairment to his body as a whole. (Ex. 1, p. 65) Dr. Kirkland, the employer-retained IME physician, found claimant had a 7 percent permanent impairment to the body as a whole. (Ex. 1, p. 71) As both values for permanent impairment are relatively close, it is found there is no need to make a finding of fact as to which finding of permanent impairment is more convincing. Claimant has between a 5 to 7 percent permanent impairment to the body as a whole.

Only Dr. Bansal gave claimant any permanent restrictions. Claimant credibly testified he asked Dr. Langland specifically not to give him any permanent restrictions. Claimant has sustained a loss of range of motion and strength in the right shoulder due to the work injury. Claimant credibly testified he has difficulty with the right shoulder regarding repetitive activity and soreness. Claimant credibly testified he could not return to work to his prior job at the aluminum foundry, as he could not perform repetitive work. At the time of hearing claimant was still employed with Clow.

When all relevant factors are considered it is found claimant has a 15 percent loss of earning capacity or industrial disability. Claimant is due 75 weeks of permanent partial disability benefits.

## ORDER

Therefore it is ordered:

That defendants shall pay claimant seventy-five (75) weeks of permanent partial disability benefits at the rate of five hundred forty-seven and 59/100 dollars ($547.59) per week commencing on December 27, 2016.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits as ordered above and as set forth in Iowa Code section 85.30.

That defendants shall pay costs.

That defendants shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

Signed and filed this 27th day of December, 2017.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
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**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.