

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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RODNEY L. BUSKIRK,

Claimant,

vs.

MOLO PETROLEUM, LLC,

Employer,

and

ZURICH AMERICAN INSURANCE CO.,

Insurance Carrier,  
Defendants.

**FILED**

MAR 01 2017

WORKERS COMPENSATION

File No. 5054194

ARBITRATION DECISION

Head Note Nos.: 1402.40, 1803

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Claimant Rodney Buskirk filed a petition in arbitration on June 9, 2015, alleging he sustained an injury to his right elbow/forearm while working for the defendant, Molo Petroleum, LLC ("Molo"). Molo and its insurer, the defendant, Zurich American Insurance Co. ("Zurich"), filed an answer on June 26, 2015, admitting Buskirk had sustained a work injury.

An arbitration hearing was held on January 23, 2017, in Des Moines, Iowa, at the Division of Workers' Compensation. Attorney Mark Tarnow represented Buskirk. Buskirk appeared and testified. Attorney Ryan Clark represented Molo and Zurich. Exhibits 1 through 3, and A through G were admitted into the record. The record was left open through February 3, 2017, for the receipt of post-hearing briefs. At that time the record was closed.

Before the hearing the parties prepared a hearing report listing stipulations and the issues to be decided. Molo and Zurich waived all affirmative defenses.

**STIPULATIONS**

1. An employer-employee relationship existed between Buskirk and Molo at the time of the alleged injury.
2. Buskirk sustained an injury on June 9, 2013, which arose out of and in the course of his employment with Molo.
3. The alleged injury is a cause of temporary disability during a period of recovery.

4. Temporary benefits are no longer in dispute.
5. If the injury is found to be the cause of permanent disability, the disability is a scheduled member disability to Buskirk's right arm.
6. The commencement date for permanent partial disability benefits, if any are awarded, is March 15, 2014.
7. At the time of the alleged injury Buskirk's earnings were \$254.00 per week, he was married and entitled to two exemptions, and the parties believe the weekly rate is \$194.78.
8. Medical benefits are no longer in dispute.
9. Prior to the hearing Buskirk was paid 27.893 weeks of compensation at the rate of \$450.92 per week.

### ISSUES

1. Is Buskirk's alleged injury a cause of permanent disability?
2. Is Buskirk entitled to 200 weeks of permanent partial disability benefits for an eighty percent loss of use to his right arm?
3. Are Molo and Zurich entitled to a credit of \$7,373.74, based on the overpayment in rate set forth in Exhibit 6?

### FINDINGS OF FACT

Buskirk is married with three children. (Transcript, page 8) Buskirk attended school through the ninth grade; he has not graduated from high school. (Tr., pp. 8-9) At the time of the hearing he was fifty years old. (Tr., pp. 20-21)

After leaving school Buskirk worked in construction and for gas stations, which required heavy lifting. (Tr., pp. 9, 11) Buskirk testified while working construction he built basement foundations and held up panels weighing up to 200 pounds. (Tr., p. 9) Buskirk also worked for a security firm where he picked up change from banks, schools, and businesses weighing between 100 and 200 pounds. (Tr., p. 11) Buskirk used a two-wheeled dolly to push the change down flights of stairs, and lifted the change into an armored car. (Tr., p. 12)

Molo operates Big Ten Mart, a convenience store and gas station in Eldridge, Iowa. (Tr., p. 10) Buskirk commenced his employment with Molo in 2012, and worked from 4:00 p.m. through 11:30 p.m. (Tr., p. 10) Buskirk was responsible for mopping the floor, changing the coffee pots and fountain soda pop, stocking canned soda pop and beer in the coolers, waiting on customers, running the cash register, and closing the store. (Tr., pp. 13-14) Buskirk reported he would have to lift over his head to change the coffee pot. (Tr., p. 15) The cardboard boxes of syrup for the fountain soda pop

weighed twenty-five to thirty pounds. (Tr., p. 15) Buskirk worked by himself during his shift. (Tr., pp. 16-17) If Buskirk needed assistance he could call the manger. (Tr., p. 17)

Buskirk testified he developed chronic back and knee pain before working for Molo, but his pain did not prevent him from performing any of his duties for Molo. (Tr., p. 22) Buskirk sought treatment for his back ten years ago through his family physician, Matthew Neil, M.D. (Tr., p. 21) Buskirk also has a preexisting injury to his right upper extremity. (Exhibit A)

In late April 2008 Buskirk attended an appointment with Robert Volz, M.D., with the University of Iowa Hospitals and Clinics ("UIHC"), complaining of chronic right elbow pain interfering with his activities as security courier lifting heavy bags of coins. (Ex. A, p. 1) Dr. Volz assessed Buskirk with chronic right lateral epicondylitis and recommended surgical debridement of the right elbow, which was performed on January 29, 2008. (Ex. A, pp. 2-4) Buskirk remained off work through the end of March 2008 and later returned to work without restrictions. (Ex. A, pp. 5-9)

Buskirk testified he was diagnosed with "golfer's elbow" prior to his employment with Molo. (Tr., pp. 22-24) Buskirk underwent surgery on April 1, 2013. (Tr., p. 35) After the surgery Buskirk received physical therapy. (Tr., p. 24) On April 22, 2013, James Lyles, M.D., an orthopedic surgeon, released Buskirk to return to work with restrictions of no lifting, pushing, shoving, or pulling with the right arm. (Ex. 2, p. 11) On May 28, 2013, Dr. Lyles released Buskirk to return to work with no restrictions, and noted he should gradually increase pushing, pulling, and carrying up to fifty pounds. (Ex. 2, p. 13) Buskirk returned to full duty work at Molo. (Tr., pp. 24-25, 38-39)

On June 9, 2013, Buskirk reinjured his right arm when he was working. (Tr., p. 25) The fountain soda pop needed to be changed, so he went to the backroom to obtain the box and testified:

The one I needed I [*sic*] was the third one down. The first two I picked up were fine. I picked up the third one, and I felt a sharp pull, a tear in my arm, a pain. I didn't think too much about it at first. I continued working throughout the night. The pain got a little bit worse, and then when I got home I noticed that my arm was swollen, and then that following Monday I went and saw Dr. Lyles to check my arm because he did the surgery, and he said it looked like I tore my tendon but I didn't tear it off. I didn't tear it completely. I just tore it. I didn't rip it completely off. He said he was pretty sure I had tore it. Then when I went back to work I told my store manager, Melissa Noriega, about what happened that Saturday night, and then she contacted the safety director, Bill Skinner, and he came down and took my report of the incident.

(Tr., pp. 25-26) Skinner told Buskirk he could continue receiving care from Dr. Lyles. (Tr., p. 27)

On June 12, 2013, Dr. Lyles restricted Buskirk to light duty work with a ten pound lifting restriction. (Ex. 2, p. 14) Buskirk continued to treat with Dr. Lyles.

On September 19, 2013, Dr. Lyles assessed Buskirk with "[n]ormal postoperative course status post right cubital tunnel release, ulnar nerve neurolysis, right medial epicondylectomy, and reconstruction with Arthrex anchor." (Ex. B, p. 16) Dr. Lyles found Buskirk had reached maximum medical improvement and opined "[h]e has no permanent impairment, therefore will not require any impairment rating. He is to continue his work restriction of 35# weight limit/ 2 handed." (Ex. B, p. 16)

Dr. Lyles restricted Buskirk from working on October 14, 2013. (Ex. 2, p. 16) Dr. Lyles continued the restriction following Buskirk's November and December 2013 appointments. (Ex. 2, pp. 17-18)

Dr. Lyles referred Buskirk to Apurva Shah, M.D., a hand surgeon at the UIHC. (Ex. 3, p. 27) Dr. Shah examined Buskirk on December 18, 2013, and found that his symptoms were consistent with an exacerbation of carpal tunnel syndrome. (Ex. 3, p. 28) Dr. Shah recommended an electromyography nerve conduction study, and noted she wanted to review his prior operative report. (Ex. 3, p. 28) Dr. Shah imposed a two-pound lifting restriction with the right arm, and no restrictions for the left arm. (Ex. 3, p. 28)

Buskirk returned to Dr. Lyles on January 9, 2014. (Ex. 2, p. 19) Dr. Lyles assessed Buskirk with "[n]ormal postoperative course status post right elbow cubital tunnel release with ulnar nerve neurolysis, medial epicondylectomy, and reconstruction with Arthrex anchor; with persistent pain." (Ex. 2, p. 19) Dr. Lyles recommended Buskirk not return to work. (Ex. 2, p. 19)

Dr. Lyles released Buskirk to return to work with a two-pound lifting restriction on his right side on March 7, 2014. (Ex. 2, p. 24)

On March 10, 2014, Buskirk attended an appointment with Camilla Frederick, M.D., an occupational medicine physician, complaining of right elbow/forearm pain and that his arm was swollen. (Ex. D, pp. 19-20) Buskirk reported he felt a twinge in his right arm when he picked up a box of syrup for the fountain pop machine at work. (Ex. D, p. 19) Dr. Frederick documented she observed no visible swelling in Buskirk's right arm, but the circumference of his right elbow was thirty centimeters and his left elbow was twenty-nine centimeters. (Ex. D, p. 21) Dr. Frederick assessed Buskirk with right medial epicondylitis and right cubital tunnel syndrome, and opined "[t]he cause of this temporary aggravation is related to work but the original issue was not related to work activities." (Ex. D, p. 22) Dr. Frederick performed a right medial epicondylar injection and recommended light duty work. (Ex. D, p. 23)

On March 28, 2014, Buskirk returned to Dr. Frederick, and she administered a Toradol injection. (Ex. D., pp. 26-27) Dr. Frederick prescribed amitriptyline, noted Buskirk reported a five to ten percent improvement with the injection, and recommended light duty and electromyography. (Ex. D, pp. 26-27)

Irena Charysz-Birski, M.D., a neurologist, conducted electromyography testing of Buskirk on April 3, 2014. (Ex. C, pp. 17-18) Dr. Charysz-Birski found "[t]his is normal nerve conduction study and EMG of the right upper extremity. Ulnar neuropathy was not demonstrated on this test." (Ex. C, p. 18)

Buskirk attended a follow-up appointment with Dr. Frederick on May 2, 2014. (Ex. D, p. 28) Buskirk complained since his work injury his elbow had felt like it was being jabbed with a knife. (Ex. D, p. 28) Dr. Frederick prescribed Relafen, reviewed the electromyography results, and recommended Buskirk return to full duty. (Ex. D, p. 31) Dr. Frederick found Buskirk was at maximum medical improvement and opined "[h]e has a 0% PPI in accordance with the AMA guides 5th edition for this temporary aggravation of his preexisting condition of ulnar neuropathy S/P cubital tunnel release." (Ex. D, p. 31)

Buskirk sought medical care with Dr. Neil, his family practitioner. (Ex. 1) Buskirk attended an appointment with Dr. Neil on June 10, 2014, complaining of right elbow pain. (Ex. 1, p. 1) Dr. Neil diagnosed Buskirk with cubital tunnel syndrome, medial epicondylitis of the right elbow, and opined Buskirk "will need chronic restrictions in order to participate in the work force" and refilled Buskirk's hydrocodone. (Ex. 1, p. 3) Dr. Neil imposed a ten pound lifting restriction, and noted Buskirk need to be able to ice his arm three times per day for ten to fifteen minutes. (Ex. 1, p. 10)

When Buskirk returned to Molo, Molo assigned him to work in a store in Davenport with other employees as a cashier. (Tr., p. 18-19, 29) Molo honored Buskirk's ten pound lifting restriction. (Tr., p. 29)

Counsel for Molo and Zurich sent Dr. Frederick a form letter on December 15, 2015, asking whether she agreed with statements prepared by counsel. (Ex. D, pp. 33-35) Dr. Frederick agreed with each paragraph, but she did not provide any written comments. (Ex. D, pp. 33-35) Dr. Frederick agreed the June 9, 2013 work injury "resulted in only a temporary aggravation of Mr. Buskirk's previous right upper extremity conditions (medial epicondylitis and cubital tunnel syndrome.). That is, the incident is best characterized as a flare, which did not make his underlying condition any worse. Further, you confirmed that the instant injury is limited to the right elbow/forearm." (Ex. D, p. 34) Dr. Frederick further agreed she did not believe Buskirk sustained any permanent partial impairment rating under the AMA Guides, she had released him to full duty work and activities, and she believed he did not need further treatment as a result of the June 9, 2013 work injury. (Ex. D, p. 34)

Buskirk terminated his employment with Molo in February 2015. (Tr., p. 18) Buskirk reported the other employees at work were harassing him, so he quit. (Tr., pp. 35-36) Buskirk testified that after his termination he has applied for work as a cashier, but he has not been able to secure employment. (Tr., p. 31)

Buskirk testified his arm is painful and every morning he performs stretching exercises with his arm. (Tr., pp. 32-34) Buskirk noted the pain also interferes with his sleep. (Tr., pp. 33-34) Buskirk relayed his arm becomes swollen almost every day and

it is painful when he complies with his ten pound lifting restriction. (Tr., p. 34) Buskirk reported that at home he tries not to lift more than ten pounds and the few times he has lifted more than ten pounds his arm became swollen. (Tr., p. 32) Buskirk takes morphine sulfate for the pain. (Tr., p. 34)

### CONCLUSIONS OF LAW

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

[I]t 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 the employer.

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979). The parties stipulated Buskirk sustained an injury on June 9, 2013, which arose out of and in the course of his employment with Molo.

The claimant bears the burden of proving the claimant's work-related injury is a proximate cause of the claimant's disability and need for medical care. Ayers v. D & N Fence Co., Inc., 731 N.W.2d 11, 17 (Iowa 2007); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 153 (Iowa 1997). "In order for a cause to be proximate, it must be a 'substantial factor.'" Ayers, 731 N.W.2d at 17. A probability of causation must exist, a mere possibility of causation is insufficient. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). The cause does not need to be the only cause, "[i]t only needs to be one cause." Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60, 64 (Iowa 1981).

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 deputy 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).

Buskirk was treated by Dr. Lyles, an orthopedic surgeon, and Dr. Frederick, an occupational medicine physician. Dr. Fredrick opined Buskirk’s work injury temporarily aggravated his preexisting condition of ulnar neuropathy, status post cubital tunnel release. (Ex. D, p. 31) Dr. Frederick assigned a zero percent permanent impairment rating under the AMA Guides. Buskirk underwent electromyography, which was normal, and he was examined by the UIHC. Buskirk also saw his primary care physician, Dr. Neil. No physician has opined Buskirk sustained a permanent impairment as a result of the June 9, 2013 work injury. Buskirk has not met his burden of proof. Given Buskirk has not met his burden of proof the remaining issues are moot.

#### ORDER

IT IS THEREFORE ORDERED, that:

Claimant shall take nothing in this case.

Each party shall pay their own costs.

Signed and filed this 1<sup>st</sup> day of March, 2017.



HEATHER L. PALMER  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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HLP/srs

**Right to Appeal:** This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876 4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.