

MARK A. MOWREY,	:	
	:	
Claimant,	:	
	:	
vs.	:	
	:	File No. 1278190
WINNEBAGO INDUSTRIES,	:	
	:	ARBITRATION
Employer,	:	
	:	DECISION
and	:	
	:	
SENTRY INSURANCE,	:	
	:	
Insurance Carrier,	:	HEAD NOTE NOS: 1801; 1802; 1803
Defendants.	:	

This is a proceeding in arbitration filed by Mark A. Mowrey, claimant, against Winnebago Industries, employer, and Sentry Insurance, insurance carrier, defendants, for benefits as a result of an injury that occurred on January 3, 2000. A hearing was held in Des Moines, Iowa on Monday, July 15, 2002, at 1:00 p.m., at the office of the worker's compensation commissioner, which is the time, date, and place previously set by the order of the worker's compensation commissioner. Claimant was represented by Ruth Carter. Defendants were represented by Steven T. Durick.

The case was fully submitted at the close of the hearing. Both attorneys submitted excellent post hearing briefs.

That an employer/employee relationship existed between employer and claimant at the time of the injury; that claimant did, in fact, sustain an injury on January 3, 2000, which arose out of and in the course of employment with employer; that the injury was

the cause of temporary disability during a period of recovery; that claimant was off work from September 14, 2000, through January 3, 2001; that claimant's gross earnings were \$505.25 per week; claimant is single and entitled to one exemption; and the parties believe the weekly rate of worker's compensation to be \$308.22 based on this information; that medical benefits are not in dispute; that defendants assert no affirmative defenses.

ISSUES

The parties submitted the following issues for determination at the time of the hearing.

1. Whether the claimant is entitled to temporary disability benefits for the period from September 14, 2000, through January 3, 2001;
2. Whether claimant is entitled to permanent disability benefits, and if so, whether he is entitled to scheduled member disability for an injury to his right upper extremity or whether he is entitled to industrial disability benefits for permanent injury to his right shoulder.
3. Whether defendant is entitled to a credit in the amount of \$788.15 for the overpayment of temporary disability benefits from May 31, 2000, until September 11, 2000.

FINDINGS OF FACT

Claimant, born on September 26, 1959, was forty years old at the time of hearing. He completed high school and received an AA degree from Northern Iowa Area Community College (NIACC) in General Electronics. He served honorably in the United States Air Force for four years doing electronic work at Ellsworth Air Force Base near Rapid City, South Dakota, working in Radio Communications. Claimant is right extremity dominant and has had a number of prior employments.

Claimant started to work with Winnebago in June of 1987 and separated from their employment thirteen years later in September of 2000. He did not recall his starting salary but testified that when his employment ended he was making \$12.05 per hour. He testified that he did light duty work for most of the year of 2000.

Claimant testified that he first noticed trouble in his right upper extremity as early as July of 1999. It became more apparent in December of 1999 when he noticed pain in his right elbow and right shoulder, which eventually became constant and became unbearable. He would rate it as a nine on a scale of one to ten.

He reported the injury and was treated by company doctors or medical personnel. However, he did not have a MRI or an arthrogram, but he did receive medications, physical therapy, and exercise programs. He also received cortisone

injections, which only relieved the pain approximately two to three days. The pain has never gone away and it wakes him up at night.

Claimant was working in Forest City on the first shift from 6:00 a.m. to 3:30 p.m.

Claimant asserted a cumulative trauma to both shoulders, his right arm, and elbow.

He was given light duty up until the time his employment terminated on September 11, 2000.

At that time he was told that due to changes within the company he would have to transfer from Forest City to Charles City and be assigned to the second shift because the company had no more work available for him within his restrictions at the Forest City plant. Claimant refused to move to Charles City and his employment with the company was terminated.

Even though claimant had reached maximum medical improvement at the time of a functional capacity examination on May 31, 2000, he continued to receive workers' compensation benefits until September 11, 2000, then he refused to continue with the company. Defendants claim that claimant was overpaid \$788.16 for benefits paid during this time.

Claimant explained that he declined the Charles City job because there was no public transportation to the second shift job and he did not believe his car, which had over a hundred thousand miles on it, would be reliable enough for him to perform the second shift job. Therefore, he was forced to quit his thirteen-year employment with this employer.

Claimant did receive unemployment compensation benefits after his employment terminated but he was not successful in a civil rights claim, which he filed against the employer.

Subsequently claimant received a job managing a television station at \$8.65 per hour, which he terminated after approximately one year because of long hours, unpredictable hours, and the stress involved in the job.

Subsequent to that he worked for Pella Windows for approximately \$9.00 per hour assembling storm doors at work within his restriction and did not have any pain in his right arm or in his shoulder performing that job. Claimant testified that he has constant pain in his right arm and his right shoulder all of the time. He further stated that nothing more could be done to relieve it.

Claimant received a functional abilities profile at North Iowa Mercy Health Center on May 31, 2000, for his diagnosis of right elbow pain, right elbow epicondylitis, and right rotator cuff tendinitis, which they said, occurred on January 5, 2000. [sic] At that

time it was noted that claimant was presently working with restrictions of no overhead work and no lifting over 20 pounds.

Sentry Insurance requested Dr. Wolbrink on August 1, 2000, to confirm whether his restrictions were to the right arm, if and when claimant reached MMI, and if claimant has sustained any permanent partial impairment due to the work injury.

Dr. Wolbrink, the authorized treating physician, responded on August 10, 2000:

The restrictions as indicated on Functional Capacity Evaluation (FCE) are for Mr. Mowrey's right arm.

In my opinion, Mr. Mowrey had reached maximum medical improvement (MMI) at the time of his Functional Capacity Evaluation.

In my opinion, Mr. Mowrey had no permanent impairment due to work injury.

(Ex. G-5)

The date of the FCE was May 31, 2000.

Dr. Wolbrink, responded to questions from defendant's counsel by a letter dated July 10, 2002.

In my opinion this patient does not have any permanent impairment to either the right arm or right shoulder as a result of the work injury from January 3, 2000.

I previously advised the patient that he should avoid work above shoulder level. This restriction is because he has a high probability of developing further shoulder difficulty if he works in that position. This is a safety precaution in hopes of protecting him against future injury.

(Ex. G-14)

A job site/ergonomic evaluation was performed by evaluator Marylynn Aalderks on June 28, 2000. Ms. Aalderks determined that the jobs that claimant was performing for employer did not meet the criteria prescribed by Dr. Wolbrink, to perform only limited work above shoulder height only occasionally.

Justin L. Ban, M.D., F.A.C.S., performed an independent medical examination on March 26, 2001, which was very thorough, comprehensive, and explanative. He arrived at a diagnosis of (1) right lateral epicondylitis, improved, and (2) right rotator cuff tendonitis resolved.

Using the fifth edition of the Guides to the Evaluation of Permanent Impairment American Medical Association, Chicago, 2000, Chapter 16 "The Upper Extremities" Dr. Ban determined that:

The only functional abnormality present at this time is a mild flexion contracture of the right elbow. On physical examination the examinee was noted to lack 20 degrees of elbow extension. According to figures 16-34 on page 472 of The Guides (see Enclosure #1) this abnormality represents a 2% upper extremity impairment.

(Ex. M-6)

For reasons of his own choosing he converted this to one percent whole person impairment.

Dr. Ban concluded his report with the following determinations:

1. That claimant sustained an injury to the right upper extremity as a result of his work activities with Winnebago.
2. Within a reasonable degree of medical certainty his work caused, contributed, or materially, permanently aggravated the condition involving his right upper extremity.
3. That he would not place any restrictions on the examinee's work activities other than to avoid prolonged or repetitive grasping, gripping, holding, handling, squeezing or pressing with the right upper extremity.
4. The examinee's prognosis is good and in all medical probability, his condition will not change significantly in the immediate future.

(Ex. M-9)

CONCLUSIONS OF LAW

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. 6.14(6)

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 medical opinion of Dr. Wolbrink, the authorized treating physician, is preferred over the opinion of the independent medical examiner in this case. Dr.

Wolbrink has seen claimant several times and had a better opportunity to evaluate his injury than the one-time examiner, Dr. Ban.

Dr. Wolbrink clearly and unambiguously stated that claimant's restrictions of the functional capacity evaluation related to claimant's right arm that had reached maximum medical improvement on the date of the functional capacity evaluation May 31, 2000, and that in his opinion Mr. Mowrey had no permanent impairment due to the work injury. Essentially Dr. Ban also did not impose any permanent work restrictions.

Dr. Wolbrink further clarified on July 10, 2002, that claimant had no permanent impairment to the right arm or right shoulder as a result of this work injury and that his restriction to avoid work above shoulder level because claimant had a high probability of developing further shoulder difficulty if he works in that position. He stated that this was a safety precaution in hopes of protecting him against future injury.

Therefore, it is determined that claimant did not sustain the burden of proof by a preponderance of the evidence of evidence that this injury was the cause of any permanent disability to either claimant's right arm or to his body as a whole. Furthermore, claimant did not sustain the burden of proof by a preponderance of the evidence that he is entitled to temporary disability benefits from September 14, 2000, to January 3, 2001, for the reason that there is no evidence that any doctor took claimant off work either because he was temporary totally disabled or because he was in a healing period.

With respect to the alleged overpayment of benefits it should be calculated as follows:

Defendants claimed a credit for overpayment of temporary disability benefits. They alleged it was \$788.16 at the hearing and then changed it to \$1,932.83 in their post hearing brief.

Joint Exhibit B-1 shows that claimant received 10 payments in the amount of \$131.36 (plus \$.06 for 3 payments made at the rate of \$131.39). Thus, total payments were \$1,313.66.

The agreed rate of compensation in this case was agreed to be \$308.22. Thus, claimant should have received \$3,082.20. Thus, claimant was underpaid \$1,768.54.

Defendants did not dispute their liability for these first 10 payments.

After May 31, 2000, claimant received payments totaling \$1,865.32. Defendants consider these overpayments.

However, if the underpayment of \$1,768.54 is subtracted from the overpayment of \$1,865.32, then the overpayment is actually \$96.78.

ORDER

THEREFORE, IT IS ORDERED:

That claimant take nothing from this proceeding for either temporary or permanent disability.

Defendants are entitled to a credit in the amount of \$96.78 against future benefits. Iowa Code section 85.34(5).

That the cost of the action, including the cost of the attendance of the court reporter at hearing and the transcript of hearing are charged to claimant pursuant to Iowa Code section 86.19, Iowa Code section 86.40 and rule 876 IAC 4.33.

That defendants file any subsequent reports requested by this agency pursuant to Iowa Code section 3.1.

Signed and filed this 30th day of September, 2002.

WALTER R. MCMANUS, JR.
DEPUTY WORKERS' COMPENSATION
COMMISSIONER

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