BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CRAIG AHLGREN,

Claimant,

vs.

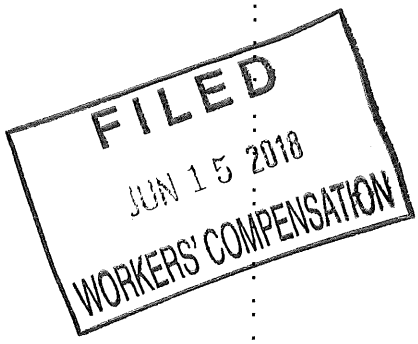
BBU, INC.,

Employer,

and

ACE AMERICAN INSURANCE COMPANY,

Insurance Carrier,
Defendants.



File No. 5054860

ARBITRATION

DECISION

Head Notes: 1108.50, 1402.40, 1703, 1803, 2907

STATEMENT OF THE CASE

Craig Ahlgren, claimant, filed a petition in arbitration seeking workers' compensation benefits from BBU, Inc., employer and ACE American Insurance Company, insurance carrier as defendants. Hearing was held on April 20, 2018 in Davenport, Iowa.

Craig Ahlgren, and Carl Nelson were the only witnesses to testify live at trial. The evidentiary record also includes joint exhibits JE1-JE4, claimant's exhibits 1-6, and defendants' exhibits A-I.

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.

The parties submitted post-hearing briefs on May 25, 2018.

ISSUES

The parties submitted the following issues for resolution:

1. The extent of permanent disability claimant sustained as a result of the stipulated November 1, 2013 work injury.

2. Whether defendants are entitled to a credit against any award?

3. Assessment of costs.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Claimant, Craig Ahlgren, sustained an injury to his left shoulder which arose out of and in the course of his employment with BBU, Inc. (also referred to as "Bimbo Bakeries") on November 1, 2013. Defendants dispute that Mr. Ahlgren sustained any industrial disability as a result of the work injury.

At the time of the hearing, Mr. Ahlgren was fifty-five years old. He completed the 11th grade and later obtained his GED. He began working for the defendant-employer, BBU, in July of 2006. At the time he was hired the company was known as Sara Lee; the name changed to BBU, Inc. around November of 2010. To the credit of all parties involved, Mr. Ahlgren was still working for the defendant-employer at the time of the hearing.

Mr. Ahlgren's job is a route sales representative. At the time of the injury his duties included unloading his bread truck, bringing the new bread into stores, pulling the old bread off of the store shelves, and placing the new bread on the store shelves. The loaves of bread were placed on a tray. The trays of bread were stacked and placed on a set of wheels for Mr. Ahlgren to move into and out of the store. (Testimony; Defendants' Exhibit C)

On November 1, 2013, the date of the stipulated injury, Mr. Ahlgren was loading trays of bread for a customer. While he was in the process of pushing trays he felt a twinge of pain in his left shoulder. Mr. Ahlgren is left-handed. He was able to continue working. He sent a text message to his supervisor, Joe Panicucci, which stated, "I think I messed up my shoulder – it is killing me." Mr. Panicucci replied with a text that stated, "K." At the time of the injury, Mr. Ahlgren was driving an older truck which did not have a ramp and had to be loaded and unloaded by hand. (Testimony)

Mr. Ahlgren eventually sought treatment at ORA Orthopedics. Ryan Dunlay, M.D. ordered an MRI of the left shoulder. The MRI demonstrated a small tear at the anterior portion of the supraspinatus as well as some intrasubstance biceps pathology.

Dr. Dunlay provided some conservative treatment, including an injection and physical therapy. The conservative treatment was not especially helpful. Dr. Dunlay performed surgery on the left shoulder on June 25, 2014. The left shoulder procedure included arthroscopic rotator cuff repair, arthroscopic extensive debridement, and biceps tenotomy. The post-operative left shoulder diagnoses included rotator cuff tear, biceps tenosynovitis, and suabacromial impingement. Mr. Ahlgren was restricted for a time following surgery. He continued to follow-up with Dr. Dunlay. The surgeon placed Mr. Ahlgren at maximum medical improvement (MMI) on March 6, 2015. Mr. Ahlgren was nine months post-surgery. The notes indicate that he was back to work with minimal problems. He reported he was able to perform his duties without restriction. Dr. Dunlay did not think there would be any permanent impairment. He advised Mr. Ahlgren to follow-up as needed. In November of 2015, Dr. Dunlay assigned zero percent whole person impairment to Mr. Ahlgren as a result of the work injury. Dr. Dunlay opined that he had no permanent restrictions related to his left shoulder injury. The surgeon stated that it was possible Mr. Ahlgren would require treatments including injections or diagnostic testing or potentially even a future surgery if the rotator cuff repair were to fail. The last time Dr. Dunlay saw Mr. Ahlgren was on March 20, 2017. According to Mr. Ahlgren's testimony, the doctor only spent about five minutes with him. Mr. Ahlgren was three years post-arthroscopic rotator cuff repair and extensive debridement. Mr. Ahlgren reported he was doing well but did have some fatigue and soreness in his left shoulder, especially with overhead activity. The doctor noted some loss of motion and some pain in the left shoulder related to the work injury. In April of 2017, Dr. Dunlay assigned 1 percent whole-person impairment to Mr. Ahlgren as a result of the work injury. (JE1, JE2, JE3 and Def. Ex. D)

On August 23, 2016, Mr. Ahlgren underwent an IME at the request of his attorney. Orthopaedic surgeon, Richard Kreiter, M.D. performed the IME. Dr. Kreiter opined that Mr. Ahlgren had sustained 11 percent whole person impairment as a result of the work injury. Dr. Kreiter utilized the 5th edition of the AMA Guides to assess the impairment. At the time of his examination Dr. Kreiter felt that only conservative treatment was indicated. However, if the AC joint became more symptomatic and caused some impingement then the lateral clavicle could be resected. He recommended continuation of anti-inflammatory medications. With regard to restrictions, Dr. Kreiter felt "these are basically self-limited. Mr. Ahlgren has been able to carry out his present job by finding ways to comfortably and safely lift. He should do rare overhead work with the left shoulder. Lifting with the arm to the side, and not away from the body, would be suggested." (Claimant's Ex. 3)

With regard to permanent functional impairment, I find the opinion of Dr. Kreiter to be more compressive and persuasive. Therefore, I find that Mr. Ahlgren has sustained 11 percent whole person impairment as a result of the work injury. With regard to restrictions, I find Dr. Dunlay's opinion to carry the greatest weight. I find that as a result of the work injury Mr. Ahlgren does not have any restrictions placed on his activities. Since being released to return to work without restrictions by Dr. Dunlay, Mr. Ahlgren has demonstrated that he is able to work without restrictions.

Mr. Ahlgren was released to return to work without restrictions on January 5, 2015. (JE1, p. 15; JE4, p. 33) He has continued to work for the defendant-employer since that time. He enjoys his job and performs it well. Mr. Ahlgren recognizes and appreciates that he has a good job with a good employer. He testified that it is very rare for someone to quit this job; employees either retire or die. He plans to continue working for BBU for several more years. He is motivated to continue his employment. (Testimony)

Karl Nelson, a territory sales manager at BBU is Mr. Ahlgren's supervisor. Based on the record, it appears that BBU and the claimant did an excellent job of working together to ease Mr. Ahlgren back into his job after his surgery. For the first few weeks back Mr. Ahlgren was provided a helper to help Mr. Ahlgren get his arms and legs working again for the strenuous job. Once Mr. Ahlgren was comfortable he was allowed to perform his job on his own. Since that time, Mr. Ahlgren has performed his full duties without any reported problems. Mr. Nelson testified that Mr. Ahlgren has performed his work at the same quality as he did prior to the injury. Although Mr. Ahlgren is currently working a different route than he did at the time of his injury the change in route is due to seniority, not his injury. (Testimony)

Mr. Ahlgren testified that he does have some difficulty putting bread on some of the low shelves in stores. He is still able to perform this duty; he just modifies the way he does this. Overall, he can complete all of his duties; he is just a bit slower and experiences a bit more fatigue than he did prior to his injury. Also, if Mr. Ahlgren has to drive for long periods of time, then his left shoulder gets sore. Driving takes a lot out of him. The route he is currently on requires less driving than the Muscatine route he had when he first returned to work after the surgery. Since the time of his injury he drives a new truck which has a ramp and is a bit easier to drive. His shoulder has also interfered with his sleep. (Testimony)

Mr. Ahlgren has worked for BBU or its predecessor since 2006. Prior to that time, he was employed by Wonder Bread for approximately 12 years. He drove a bread truck for Wonder Bread. His work history is limited to driving trucks and delivering bread products. His actual earnings have not changed because of the work injury. (Testimony)

Considering claimant's age, educational background, employment history, ability to retrain, motivation to continue with his current job, length of healing period, permanent impairment, lack of permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that he has sustained a 25 percent loss of future earning capacity as a result of his work injury with BBU, Inc..

Defendants assert that they overpaid claimant $2,148.12 in healing period benefits. Defendants contend they are entitled to a credit for this amount against any award of permanent partial disability benefits. (Hearing Report, p. 2) Claimant asserts that any overpayment of temporary benefits in this case can only be applied to any future workers' compensation injury claimant may have against defendants. In their

post-hearing brief defendants make no argument as to why they should receive the requested credit. I find claimant's argument to be persuasive. Thus, I find defendants are not entitled to a credit.

We now turn to the issue of costs. Claimant is seeking an assessment of costs. Because claimant was generally successful in his claim I find that an assessment of costs is appropriate. Claimant is seeking the filing fee in the amount of one hundred dollars ($100.00). I find this is an appropriate cost under 876 IAC 4.33(7). Claimant is also seeking costs of service in the amount of ($13.00); I find this is an appropriate cost under 876 IAC 4.33(3). Claimant is seeking transcription costs in the amount of $122.90 of two depositions which are evidence; I find these are appropriate costs under 876 IAC 4.33(2). Therefore, defendants are assessed costs totaling two hundred thirty-five and no/100 dollars ($235.00).

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6)(e).

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).

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.

Based on the above findings of fact, I conclude that Mr. Ahlgren sustained 25 percent industrial disability as a result of the work injury. As such, Mr. Ahlgren is entitled to 125 weeks of permanent partial disability benefits commencing on the stipulated commencement date of January 5, 2015.

Defendants have asserted a permanent partial disability credit for overpayment of TTD/healing period benefits in the amount of $2,148.12. Defendants state that they overpaid the weekly rate by $79.56 per week for 27 weeks. (Hearing Report, p. 2) Claimant disputes defendants' entitlement to a credit for overpayment of healing period benefits against an award of permanency for this injury. In support of their position claimant relies on Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 136-37 (Iowa 2010) and contends that defendants are only entitled to a credit against any benefits owed for a future work injury with this employer. See Iowa Code section 85.34(5). Defendants do not provide any argument or authority in support of their position. Therefore, I find that defendants are not entitled to a credit for overpayment of healing period benefits against an award of permanency for this injury

Claimant is seeking an assessment of costs. Based on the above findings of fact, I conclude that an assessment of costs against the defendants in the amount of two hundred thirty-five and no/100 dollars ($235.00) is appropriate.

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of six hundred forty-seven and 97/100 dollars ($647.97).

Defendants shall pay one hundred twenty-five (125) weeks of permanent partial disability benefits commencing on the stipulated commencement date of January 5, 2015.

Defendants shall be entitled to credit for all permanent partial disability benefits paid to date.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten (10) percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two (2) percent. See Deciga Sanchez v. Tyson Fresh Meats, Inc., File No. 5052008 (App. Apr. 23, 2018) (Ruling on Defendants' Motion to Enlarge, Reconsider or Amend Appeal Decision re: Interest Rate Issue).

Defendants shall reimburse claimant costs as set forth above.

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1 (2) and 876 IAC 11.7.

Signed and filed this 15th day of June, 2018.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.