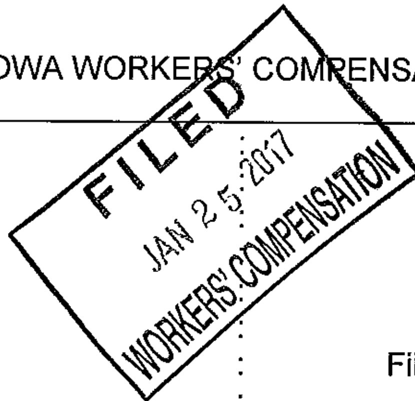
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



MARK HUNT, Claimant, vs. CURRIES MFG., Employer, and TRAVELERS INDEMNITY CO. OF CT., Insurance Carrier, Defendants.	File Nos. 5054635, 5054636 ARBITRATION DECISION Head Note Nos.: 1803, 2502, 1108

STATEMENT OF THE CASE

Mark Hunt, claimant, filed petitions in arbitration seeking workers' compensation benefits against Curries Mfg., employer, and Travelers Indemnity Co. of Ct., insurer, for an accepted work injury date of December 27, 2011, and an alleged work injury date of October 15, 2014.

This case was heard on October 5, 2016, in Des Moines, Iowa. The case was considered fully submitted on October 26, 2016, upon the simultaneous filing of briefs.

The record consists of claimant's exhibits 1-14 and testimony from the claimant.

ISSUES

File No. 5054635

1. The extent of claimant's industrial disability;

2. Whether claimant is entitled to reimbursement of the IME.

File No. 5054636

1. Whether claimant sustained an injury on October 15, 2014, which arose out of and in the course of employment;

2. Whether the alleged injury is a cause of temporary disability and, if so, the extent;

3. Whether the alleged injury is a cause of permanent disability and, if so,;

4. The extent of claimant's bilateral arm disability;

5. Whether there is a causal connection between claimant's injury and the medical expenses claimed by claimant;

6. Whether defendants are entitled to credit under Iowa Code section 85.38(2) for payment of short-term disability;

7. Whether claimant is entitled to reimbursement of the IME.

STIPULATIONS

File No. 5054635

The parties agree that the claimant sustained a work-related injury on or about December 27, 2011. This injury resulted in a temporary disability, entitlement to which is no longer in dispute. The parties agree that the claimant sustained some permanent disability but disagree as to the extent.

They agree that the commencement date for permanent partial disability benefits is November 17, 2012. At the time of the injury, the claimant's gross earnings were $971.68 per week. He was single and entitled to one exemption. Based on those foregoing figures, the weekly benefit rate is $585.54.

Prior to the hearing the claimant was paid 45 weeks of compensation at the rate of $600.16.

File No. 5054636

The parties agree that as of October 15, 2014, and all of the relevant times, the claimant was an employee of the employer. They further agree that the claimant was off work from June 9, 2015 through July 21, 2015 and then again from December 8, 2015 through January 20, 2016. If the defendants are found liable for the bilateral arm injury, the parties agree that the claimant is entitled to temporary benefits during the preceding periods of time.

They further agree that if permanent disability benefits are awarded, the appropriate commencement date would be January 21, 2016. At all relevant times for the above referenced file, the claimant's gross earnings were $1041.28. He was single and entitled to one exemption. Based on those foregoing numbers the weekly benefit rate is $609.12.

Prior to the hearing the claimant was paid short-term disability benefits of $2962.61 from June 16, 2015 through July 20, 2015 and $3015.71 from December 15, 2015 through January 19, 2016.

FINDINGS OF FACT

Claimant was a 51-year-old male at the time of the hearing. He completed high school in 1980 and spent one year studying at NIACC before beginning his employment with defendant employer 1981. He continues to work there to the present day. The defendant employer is involved in the business of making metal door frames.

Claimant began as a welder. He ran a number of machines such as a punch press and slitter. For the past fifteen years, claimant worked as a brake press operator. He would work with a flat sheet of metal approximately 6 feet by 2-1/2 feet to 10 feet long that is bent into shapes. The parts are oily and slippery. Claimant would often wear leather gloves while handling the sheet goods.

He would work with 300-500 pieces each day. The job is repetitive and constant throughout the work day.

He began to experience pain around 2010.

Claimant's past medical history includes a diagnosis of diabetes. He takes two pills a day. (Ex. 3, pp. 29, 31, 43) The diabetes appears to be controlled with medication.

There are two injuries giving rise to the above-captioned case. The first injury occurred on December 27, 2011, when claimant suffered a shoulder injury arising out of and in the course of his employment. Defendants accepted this claim and have paid 45 weeks of permanent partial disability benefits. The second injury is alleged to have occurred on or about October 15, 2014, concerning claimant's bilateral carpal tunnel syndrome. Defendants do not dispute claimant suffers from bilateral CTS, but, instead, contest the cause of the injury. Defendants have paid no benefits for this claim.

On December 27, 2011, claimant was working as a brake press operator, a position he has held for a number of years. On or about December 27 or 28, 2011, claimant lifted a frame and felt pain in his left shoulder. He did not seek immediate medical attention, hoping that the pain would abate. When the pain continued, claimant sought medical attention on June 5, 2012, with Steven J. Schulz, M.D. (Ex. 1, p. 1) Dr. Schulz ordered an MRI and instructed claimant to do no overhead work with the left arm and no lifting greater than 35 pounds. (Ex. 1, p. 1) Claimant returned to work with pain and tried to accommodate his pain by changing how he would handle the metal sheets.

The MRI showed evidence of some partial tears of the supraspinatus and degenerative-type changes along the biceps tendon; however, the overall imaging was poor due to positioning and body size. (Ex. 1, p. 5)

On July 19, 2012, Dr. Schulz placed claimant on light duty while claimant finished with physical therapy. (Ex. 1, p. 6) In the August 16, 2012, Dr. Schulz was dissatisfied with claimant's progress and recommended he seek an orthopedic opinion. (Ex. 1, p. 7) Claimant was still having significant pain centered around the AC joint.

On August 27, 2012, claimant was seen by Mark B. Kirkland, D.O., at First Team Sports Medicine and Orthopedics. (Ex. 2, p. 9) On examination, claimant exhibited guarding with some mild pain with supraspinatus testing, slight scapular winging on the left, pain with active abduction from 70 to 100 degrees, mildly positive Hawkins impingement sign and Neer impingement sign. (Ex. 2, p. 10) Dr. Kirkland diagnosed claimant with left shoulder internal derangement of the AC joint and partial or complete rotator cuff tear. (Ex. 2, p. 10) Dr. Kirkland went on to opine that the shoulder injury was related to the work incident and recommended modified duty, Celebrex, and wall walking exercises. (Ex. 2, p. 11) Initially, the wall walking exercises and Celebrex produced good results. (Ex. 2, p. 12) However, claimant continued to have pain and reduced range of motion into October. Dr. Kirkland injected claimant and discussed surgical options. (Ex. 2, p. 14) Surgery took place on October 18, 2012. (Ex. 2, p. 16)

During surgery, Dr. Kirkland found "a lot of some generalized fraying of the bursal surface of the rotator cuff" as well as fraying on the articular surface of the supraspinatus that was secondary to claimant's diabetes. (Ex. 2, p. 17)

Claimant had a fairly uneventful post-surgical recovery during which he was on modified light duty. He returned to his regular duty job in February 2013, and by March 13, 2013, claimant had achieved MMI according to Dr. Kirkland. (Ex. 2, p. 24) Claimant did have ongoing pain with his shoulder, but he had been doing his regular job duties without "major complaints." (Ex. 2, p. 24) Dr. Kirkland did not impose any restrictions but did offer the following opinion regarding claimant's impairment:

> It is in my opinion that Mark is at maximum medical improvement. It is also my opinion that he does not have any permanent restrictions or limitations. Mark has a 10% impairment to his left upper extremity secondary to excision of the distal clavicle. This value was obtained from table 16-27, page 506, of the *American Medical Association Guides to the Evaluation of Permanent Impairment*, 5th edition. Mark has a 1% impairment to his left upper extremity secondary to lack of shoulder flexion, a 1% impairment secondary to lack of shoulder extension, 1% impairment secondary to lack of adduction, and a 3% impairment secondary to lack of internal rotation. He has a 6% impairment to his left upper extremity secondary to range of motion loss. Combining the figures with the combined value chart, the combination of 10 and 6 gives a combined value of 15. Mark has a 15% impairment to his left upper extremity. A 15% impairment to the left upper extremity can be converted to 9% of the whole person.

> In summary, Mark is at maximum medical improvement without any permanent restrictions or limitations. He has a 15% impairment to the left upper extremity that converts to 9% of the whole person.
>
> I told Mark to continue to be consistent with his exercise program indefinitely. This means 5 days a week 15 to 20 minutes at a time.
>
> I gave him another prescription today for Celebrex 200 mg; dispense #30. I gave him 2 refills. He is currently taking this once a day. I told him it would be a good idea to take this once a day for the next month or so and then start weaning off the medication. He recently had blood studies for his yearly physical, and these were OK.
>
> Mark did not have any further questions today. I told him if he has any problems or questions in regards to his right shoulder in the future, to contact the Worker's Compensation people. I would be glad to see him back. It was a pleasure working with Mark.

(Ex 2, p. 24-25)

On October 30, 2014, claimant presented to Howard T. Kim, M.D. with complaints of bilateral hand pain and numbness. (Ex. 4, p. 49) Claimant was prescribed a Medrol Dosepak and wrist splints for sleeping.

> He does quite a bit of repetitive activity at work. He works as a brake press operator, which involves lots of gripping and flipping and grasping materials weighing 5 to 50 pounds repetitively. He has not had any troubles with his hands in the past as far as the numbness goes, but states that lately his work schedule has been busier and he has been working 10 hour days. He denies any other activities outside of work that requires repetitive gripping and handling and grasping with the hands.

(Ex. 4, p. 49) A subsequent EMG revealed bilateral CTS, moderate on the right and mild on the left. (Ex. 4, p. 51; Ex. 5, pp. 51-52) Restrictions of light duty with no lifting over five pounds were continued. (Ex. 4, p. 51) Claimant's care was transferred to Timothy A. Gibbons, M.D. (Ex. 6, p. 56) Dr. Gibbons recommended endoscopic CTR bilaterally. "I told him that I could not necessarily find causation here based on his employment of 33 years at Curries essentially doing the same things and nothing has really changed, plus he has a significant contributor to a nonoccupational risk factor, which is his diabetes." (Ex. 6, p. 57)

Claimant had some difficulty picking items up and would drop things more than once as well. He denied that there was any activity outside of work that involved repetitive grasping.

Claimant sought out a second opinion with Rene F. Recinos, M.D. (Ex. 7, p. 58) Dr. Recinos also did not feel the CTS was work related, but due to claimant's diabetes

and obesity. (Ex. 7, p. 40) An injection was recommended, and claimant consented to the procedure. (Ex. 6, p. 61)

While the injection provided some relief, it was only temporary. Claimant consented to surgical release on the right. (Ex. 7, p. 63) Surgery took place on June 9, 2016. (Ex. 8, p. 76) Six weeks after the surgery, claimant reported that his numbness had been eliminated and he wanted to proceed with the left side. (Ex. 7, p. 68) The left wrist surgical release occurred on December 8, 2015. (Ex. 9, p. 78)

On September 11, 2015, in a phone call with counsel for claimant, Dr. Recinos reiterated his belief that the CTS was caused and/or aggravated by claimant's obesity and diabetes. (Ex. 7, p. 73)

During one of his diabetes checkups, claimant reported being pain free, but did have signs of depression. (Ex. 3, pp. 40, 42)

Claimant underwent an IME with Sunil Bansal, M.D. on June 14, 2016. (Ex. 11, p. 85) Claimant reported occasional pain in the left shoulder and arm and sharp, shooting pain when his left arm was extended away from his body. He was able to lift over shoulder level but had some weakness in the left and right hands. He believed he was capable of lifting 50 pounds occasionally and 25 pounds frequently and 10 pounds over shoulder level. (Ex. 11, p. 94)

Dr. Bansal diagnosed claimant with an overuse injury due to repetitive lifting and flipping heavy metal. (Ex. 11, p. 96) Dr. Bansal assigned a 15 percent impairment rating to the upper right extremity due to loss of range of motion and for the distal clavicle resection. This translates into 9 percent body as a whole impairment. Dr. Bansal also recommended the following restrictions:

> I feel Mr. Hunt would benefit from and should have restrictions. However, he feels that if he has permanent restrictions it could jeopardize his employment, and would be detrimental to his employment situation. He reports that he has returned to work and is able to do his job, thus I do not feel permanent restrictions are necessary at this juncture. However, if he changes employers, I would suggest the following restrictions:
>
> No lifting more than 10 pounds above shoulder level occasionally with the left arm. No frequent overhead lifting with the left arm.

(Ex. 11, p. 100)

Dr. Bansal also attributed claimant's bilateral CTS to the work injury, but despite being asked to discuss the effects of claimant's diabetes and obesity, Dr. Bansal chose to ignore those two contributing factors in his conclusion. (Ex. 11, p. 102)

Claimant still has some problems with weakness. He drops things and cannot grip as securely as before. He no longer has pain or numbness. His pace is slightly slower and work requires more concentration. He has bid into a new job.

Claimant came across as a forthright, hard worker who is motivated to return to work and has returned to work despite his physical issues.

CONCLUSIONS OF LAW

File No. 5054635

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 sole issue for File No. 5054635 is the extent of claimant's disability.

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.

Dr. Kirkland discharged claimant and issued no work restrictions for the shoulder; however, he did instruct the claimant to continue to engage in at-home physical therapy 5 days a week, 15-20 minutes per day for his shoulder. Claimant had pain upon his discharge from Dr. Kirkland and continues to have mild pain in his shoulder today. While he returned to his brake press operator job, claimant continued to have some pain and engaged in maneuvers at work that would reduce strain on the shoulder such as reducing overhead lifting and reaching. He works at a slower pace, with greater concentration and deliberation.

Both Dr. Kirkland and Dr. Bansal issued a 9 percent impairment rating for the loss of use of shoulder and for the surgical procedure. Dr. Bansal recommended no

lifting more than ten pounds above shoulder level occasionally with the left arm and no frequent overhead lifting with the left arm. Claimant does not observe any formal restrictions, but does modify his work behaviors based on pain in the left shoulder.

Claimant is a hard worker, motivated to return to work and not given to malingering. He has worked in manufacturing for over two decades. Based on the foregoing, it is determined that his industrial loss arising out of the shoulder injury is 25 percent.

Defendants would be entitled to a credit of any permanent benefits paid after November 16, 2012.

The final issue is the outstanding costs of Dr. Bansal's IME. Claimant lists this as a cost but pursuant to Dart v. Young, IMEs are to be awarded under 85.39. Claimant is not required to show liability of the defendants in order to avail himself of his rights under Iowa Code § 85.39. Dodd v. Fleetguard, Inc., 759 N.W.2d 133 (Iowa Ct. App. 2008). Once the triggering event occurs, claimant is entitled to examination.

In this case, Dr. Recinos and Dr. Gibbons both opined that there was no causal link between the bilateral CTS and claimant's work. Therefore, the prerequisite in Section 85.39 that "an evaluation of permanent disability...made by a physician retained by the employer" is deemed to be "too low, the employee shall . . . be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice."

According to Dart v. Young, the appropriate amount to be awarded under Section 85.39 is the evaluation and/or examination fee. DART v. Young, 867 N.W.2d 839, 847 (Iowa 2015). Dr. Bansal does not break down the fee instead billing the claimant a total of $2994.00. (Ex. 14, p. 115) The report is 19 pages long. The medical records in the case are not voluminous. It is determined that claimant is entitled to reimbursement of two-thirds of Dr. Bansal's fee for the evaluation and examination of the claimant.
File No. 5054636

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.

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of

injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

While claimant has done repetitive work for the past fifteen years as a brake press operator, two hand specialists agreed that the claimant's bilateral CTS was not work related, but instead caused by claimant's diabetes and obesity. While Dr. Bansal opines differently than Dr. Gibbons and Dr. Recinos, Dr. Bansal is not a hand specialist. He lacks the training, experience and education in hand and wrist injuries that Dr. Gibbons and Dr. Recinos have. Further, Dr. Bansal did not consider the effect of diabetes and obesity whereas Dr. Gibbons and Dr. Recinos both considered claimant's work history when determining causation.

Based on the opinions of Dr. Gibbons and Dr. Recinos, the only hand specialists whose opinions are part of the record, it is found that the claimant's bilateral carpal tunnel syndrome is not caused by claimant's work.

The remainder of the issues are rendered moot. The IME was addressed in File No. 5054635.

ORDER

THEREFORE, it is ordered:

File No. 5054635

That defendants are to pay unto claimant one hundred twenty-five (125) weeks of permanent partial disability benefits at the rate of five hundred eighty-five and 54/100 dollars ($585.54) per week from November 17, 2012.

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

That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants are to be given credit for benefits previously paid.

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

That defendants shall pay the costs of this matter pursuant to rule 876 IAC 4.33 in the form of the filing fee and the service costs.

That defendants shall pay $1996.00 of Dr. Bansal's bill pursuant to Iowa Code section 85.39.

File No. 5054636

Claimant shall take nothing.

Signed and filed this 25th day of January, 2017.

JENNIFER S. GERRISH-LAMPE
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.