

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

WILLIAM BROWN,

Claimant,

vs.

ESTES EXPRESS,

Employer,

and

NEW HAMPSHIRE INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 20014133.01

ARBITRATION DECISION

Headnotes: 1402.40; 1803; 2907; 3001

STATEMENT OF THE CASE

William Brown, claimant, filed a petition for arbitration against Estes Express Lines, Inc., as the employer, and New Hampshire Insurance Company as its workers' compensation insurance carrier. This case came before the undersigned for an arbitration hearing on March 29, 2023.

Pursuant to an order from the Iowa Workers' Compensation Commissioner, this case was heard via Zoom video conference. All participants appeared remotely.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. A discussion of the hearing report was held on the evidentiary record and modifications were verbally made to the hearing report. However, any remaining stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 6, Claimant's Exhibits 1 through 6, as well as Defendants' Exhibits A through K. All exhibits were received without objection.

Claimant testified on his own behalf. Defendants called Ronald Seifert to testify. The evidentiary record closed at the conclusion of the March 29, 2023 arbitration hearing.

However, counsel for the parties requested an opportunity to file post-hearing briefs. This request was granted and both parties filed briefs simultaneously on May 18, 2023. The case was considered fully submitted to the undersigned on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. The extent of claimant's entitlement to permanent disability benefits.
2. Claimant's gross earnings at the time of his injury and the corresponding weekly worker's compensation rate at which benefits should be paid.
3. Whether costs should be assessed against either party and, if so, in what amount.

FINDINGS OF FACT

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

William Brown is a 70-year-old gentleman, who works as a pick-up and delivery driver for Estes Express Lines, Inc. He has worked for the employer since December 2008. Claimant testified this is a physically demanding job, but he continued to be able to perform all job duties prior to November 13, 2020.

On November 13, 2020, Mr. Brown sustained a stipulated left shoulder injury performing his work duties. The parties stipulate this injury caused permanent disability. However, there is a dispute about the extent of claimant's permanent disability resulting from the injury. (Hearing Report)

Mr. Brown credibly testified that he had no prior injury or limitations to his left shoulder. Unfortunately, the November 13, 2020 injury resulted in a massive rotator cuff tear in the claimant's left shoulder. The employer authorized medical care, including an MRI and orthopedic treatment. (Joint Exhibit 3)

Timothy R. Vinyard, M.D. provided claimant's orthopedic care. He took claimant to surgery on January 6, 2021, and performed a repair of claimant's massive rotator cuff tear. Dr. Vinyard also performed a subacromial decompression and a distal clavicle excision. (Jt. Ex. 3, p. 21)

Following a period of recovery, including physical therapy, Dr. Vinyard declared maximum medical improvement (MMI) on June 21, 2021. (Jt. Ex. 3, pp. 38-39) Dr. Vinyard released claimant to return to work without restrictions on that date. (Jt. Ex. 3, pp. 40-41) Mr. Brown did return to work, but developed additional problems with his left shoulder. He

requested, and the employer authorized, a return for evaluation by Dr. Vinyard on November 22, 2021.

At the November 22, 2021 evaluation, Dr. Vinyard noted the ongoing symptoms, discussed permanent restrictions with claimant, and ultimately imposed permanent restrictions that included no lifting greater than 70 pounds and to avoid repetitive lifting, pulling, pushing, climbing, reaching above head, and work above shoulder level. (Jt. Ex. 3, p. 44) The restrictions imposed by Dr. Vinyard permitted claimant to continue working without accommodation or limitation in his driving job with the employer. Claimant has not obtained further medical treatment for his left shoulder since November 22, 2021.

Two orthopedic surgeons offered opinions about claimant's permanent functional impairment relative to the stipulated left shoulder injury. Dr. Vinyard opined on July 1, 2021 that claimant sustained a two percent permanent functional impairment of the left upper extremity as a result of the November 13, 2020 work injury. (Jt. Ex. 3, p. 42) Dr. Vinyard references the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, and three figures contained therein in formulating his impairment rating. (Jt. Ex. 3, p. 42)

Review of the figures referenced by Dr. Vinyard demonstrates that he evaluated and assigned permanent impairment based upon his range of motion measurements of claimant's left shoulder. Dr. Vinyard's range of motion measurements are documented at Joint Exhibit 3, p. 38 and were obtained on June 21, 2021.

The second physician that offered an opinion on claimant's permanent functional impairment is claimant's independent medical evaluator, Mark B. Kirkland, D.O. Dr. Kirkland performed his evaluation on March 9, 2022. Dr. Kirkland confirmed the diagnosis of a massive left rotator cuff tear, subacromial decompression, and distal clavicle excision. He also noted that claimant sustained a ruptured left biceps tendon as a result of the work injury. (Claimant's Ex. 1, p. 4)

Dr. Kirkland performed a physical examination of claimant and recorded his range of motion findings at Claimant's Exhibit 1, page 4. Dr. Kirkland's range of motion measurements were performed using a goniometer, but claimant testified Dr. Vinyard did not use a goniometer during his June 21, 2021 evaluation. Dr. Kirkland's March, 2022 measurements demonstrate reduced ranges of motions when compared with those identified by Dr. Vinyard in June, 2021.

Dr. Kirkland offers a permanent impairment for claimant's reduced left shoulder range of motion. Dr. Kirkland references the same figures within the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, and offers a permanent impairment equivalent to 10 percent of the left upper extremity as a result of reduced ranges of motion. Dr. Kirkland also offers a 10 permanent impairment rating for the excision of claimant's distal clavicle and references Table 16-27 of the AMA Guides, Fifth Edition. Dr. Kirkland combines the impairment ratings for range of motion and for the distal clavicle excision and provides a final impairment rating of 19 percent of the left upper extremity.

The factual question to be answered is which permanent impairment rating is most convincing and appropriate for claimant's injury. Dr. Vinyard has the advantage of being the treating surgeon, having seen claimant on multiple occasions and inspected claimant's shoulder intra-operatively. However, according to claimant, Dr. Vinyard did not utilize a goniometer to measure claimant's left shoulder ranges of motion.

Dr. Kirkland has the advantage of having evaluated claimant last. He evaluated claimant on March 9, 2022 and re-evaluated him on February 2, 2023. He opined that claimant had very similar range of motions at both evaluations and resulted in the same permanent impairment rating at both evaluations. Dr. Kirkland also utilized a goniometer to measure claimant's shoulder ranges of motion. The AMA Guides specifically reference the use of a goniometer to measure range of motion. See AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, p. 451.

Ultimately, I find the range of motion measurements taken by Dr. Kirkland to be most accurate, credible, and convincing because he used a goniometer. Dr. Kirkland's examination and evaluation, as well as his multiple evaluations and measurements of the range of motion, appear to be appropriate and consistent with the requirements of the AMA Guides. I find that Mr. Brown proved he sustained a 10 percent permanent functional impairment of the left arm as a result of loss of range of motion resulting from his November 13, 2020 work injury.

Dr. Kirkland also identified and awarded impairment for the distal clavicle excision performed on claimant's left shoulder. I find the award of permanent impairment for the distal clavicle excision is appropriate under the AMA Guides. However, I note that Dr. Kirkland did not use the applicable multiplier provided for in the AMA Guides. I find that a 25 percent multiplier must be used on the 10 percent impairment rating offered, resulting in a 2.5 percent permanent impairment for the distal clavicle excision.

Therefore, I accept Dr. Kirkland's 10 percent permanent impairment rating for loss of range of motion as most accurate. I accept that claimant is entitled to permanent impairment for the distal clavicle excision but find that the applicable permanent impairment rating for that procedure is 2.5 percent of the left upper extremity under the AMA Guides. Pursuant to the Combined Values Chart on page 604 of the AMA Guides, Fifth Edition, these functional impairment ratings combine and result in 13 percent permanent functional impairment of the left upper extremity. I specifically find that claimant proved he sustained 13 percent permanent functional impairment of the left shoulder as a result of his November 13, 2020 work injury.

Claimant is now 70 years of age and was clearly over the age of 65 years when he sustained this work injury. Claimant provided un rebutted testimony that his wife was also over the age of 65 when he was injured. (Transcript, p. 42) He also introduced tax records from 2020 demonstrating that both claimant and his wife claimed an additional exemption as individuals over the age of 65. (Cl. Ex. 5, p. 17) Defendants offered no

rebuttal to this evidence. I find that both Mr. Brown and his wife were over the age of 65 when claimant was injured in November, 2020.

CONCLUSIONS OF LAW

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).

In this case, defendants admit that claimant sustained a compensable work injury on November 13, 2020. Defendants further stipulate that the injury resulted in permanent disability. The parties stipulate that the injury is limited to a scheduled member disability to the left shoulder. (Hearing Report)

However, there is a dispute between the parties as to the extent of the permanent disability resulting from the injury. Two experts provided opinions on the extent of claimant's permanent functional impairment. Dr. Vinyard opined that claimant sustained a two percent permanent functional impairment of his left upper extremity as a result of reduced range of motion. Dr. Kirkland concurred with the diagnosis offered by Dr. Vinyard but opined that claimant sustained a 19 percent permanent functional impairment rating of the left upper extremity as a result of the work injury.

Ultimately, I conclude neither of the physicians rendered a completely accurate impairment rating. Claimant challenges the impairment rating offered by Dr. Vinyard because it does not include impairment for the distal clavicle excision he performed on claimant's left shoulder. Indeed, the Iowa Workers' Compensation Commissioner held, "The AMA Guides direct the physician to assign a rating for a distal clavicle excision." Jay v. Archer Skid Loader Service, L.L.C., File No. 19003586.01 (Appeal August 2022).

Therefore, I find and conclude that Dr. Vinyard's impairment rating is not complete because it does not include an impairment rating for the distal clavicle excision.

On the other hand, defendants challenge the impairment rating offered by Dr. Kirkland for the distal clavicle excision because Dr. Kirkland does not utilize a multiplier mandated by the Guides. Indeed, the Iowa Workers' Compensation Commissioner has similarly held, "The AMA Guides also require application of a 25 percent multiplier. This results in a 2.5 percent impairment for a distal clavicle excision under the plain text of the AMA Guides." Jay, File No. 19003586.01 (Appeal August 2022). Given this agency-level precedent, I conclude that the impairment rating by Dr. Kirkland is also erroneous and is inflated because it does not reduce the impairment rating for the distal clavicle excision by the 25 percent multiplier.

Defendants contend that the undersigned cannot utilize or apply the erroneous impairment rating offered by Dr. Kirkland. Claimant contends that there is no medical evidence in this record to permit a reduction of that impairment rating. However, in Jay, the Commissioner made the necessary modification to the impairment rating resulting from a distal clavicle excision. Relying upon Jay v. Archer Skid Loader Service, L.L.C., File No. 19003586.01 (Appeal August 2022), I conclude that claimant proved entitlement to 2.5 percent permanent impairment of the left arm for the distal clavicle excision. Having found Dr. Kirkland's range of motion impairment rating to be most convincing and accurate in this case, I found claimant proved by a preponderance of the evidence that he sustained a 10 permanent functional impairment for loss of range of motion. Using the AMA Guides' Combined Values Chart, I found that claimant proved a 13 percent permanent functional impairment of the left upper extremity as a result of the November 13, 2020 work injury to his left shoulder.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(u) or for loss of earning capacity under section 85.34(2)(v). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). In all scheduled member injuries:

[T]he extent of loss of percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American Medical Association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment pursuant to paragraphs "a" through "u".

Iowa Code section 85.34(2)(x).

Having found that Dr. Kirkland utilized the Guides to the Evaluation of Permanent Impairment, Fifth Edition, and that Dr. Kirkland's impairment rating is the most credible and accurate (after application of the multiplier for the distal clavicle excision), I conclude claimant proved a 13 permanent functional impairment. When a functional disability of less than 100 percent is found, an award of permanent partial disability benefits is made proportional to the number of weeks assigned for each scheduled member injury. Iowa Code section 85.34(2)(w).

A shoulder injury is compensated on a 400-week schedule. Iowa Code section 85.34(2)(n). Pursuant to Iowa Code section 85.34(2)(w), claimant is entitled to 13 percent of 400 weeks. Therefore, I conclude claimant proved entitlement to 52 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(n), (w).

The second disputed issue is the weekly rate at which benefits should be paid to claimant. There are two issues that must be determined to resolve this disputed issue. The first issue to be determined is claimant's gross average weekly wage at the time of his injury.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6).

The parties concur on the vast majority of the weekly earnings to be utilized in claimant's gross average weekly wage calculation. The real difference is that defendants include earnings for the week ending November 14, 2020. Claimant contends this week should be excluded because his injury occurred on November 13, 2020. Instead, claimant utilizes earnings for the week ending August 8, 2020.

All parties appear to concur that the applicable statutory section is Iowa Code section 85.36(6), which provides that the claimant's weekly earnings shall be computed using "the last completed period of thirteen consecutive calendar weeks immediately preceding the injury." In this case, defendants include weekly earnings for a calendar week that ends the day after Mr. Brown's injury. According to the plain language of the statute, the applicable earnings to be used are "completed" weeks "immediately preceding the injury." Iowa Code section 85.36(6). Claimant's application of the statutory language is most consistent and accurate. Therefore, I concur with claimant's gross

weekly wage calculations and conclude that claimant's gross average weekly wages at the time of his injury were \$1,168.99. (Cl. Ex. 4, p. 14)

The parties stipulate that claimant was married at the time of his injury. (Hearing Report) However, the parties dispute claimant's entitlement to exemptions. Claimant contends that he and his wife were both over the age of 65 at the time of his injury and that he is entitled to claim two additional exemptions as a result of their age. Defendants challenge this claim and further challenge whether claimant established his wife was over the age of 65 at the time of his injury.

Iowa Code section 85.37 provides, "The weekly benefit amount payable to any employee for any one week shall be upon the basis of eighty percent of the employee's weekly spendable earnings." Iowa Code section 85.61(9) defines "spendable earnings" as "that amount remaining after payroll taxes are deducted from gross weekly earnings." Iowa Code section 85.61(6) defines "payroll taxes." Section 85.61(6) provides claimant is entitled to the maximum number of exemptions he could claim, including any exemptions for "old age."

Claimant was clearly over the age of 65 when he was injured in November 2020. He is entitled to a personal exemption, as well as an additional exemption for his age. The parties stipulated that claimant was married so he is entitled to a third exemption for his wife. The remaining question is whether claimant is entitled to a fourth exemption for his wife based on her age at the time of his injury. Having found that claimant's wife was over the age of 65 when he was injured, I conclude claimant is entitled to four exemptions for purposes of calculating his weekly rate.

Having concluded that claimant's average gross weekly wage is \$1,168.99 and that he was married and entitled to four exemptions at the time of his injury, I consult the Commissioner's website and rate information. (<https://www.iowaworkcomp.gov/ratebook-spreadsheet-july-1-2020%E2%80%93june-30-2021>).

According to the Commissioner's Ratebook spreadsheet for injuries occurring between July 1, 2020 and June 30, 2021, claimant's applicable weekly worker's compensation rate is \$769.59. I conclude all weekly compensation benefits should be awarded at this rate.

The final disputed issue is whether costs should be assessed against either party. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. In this case, claimant receives an award of permanent disability benefits and has prevailed on the exemption issue and weekly benefit rate issue. Exercising the agency's discretion, I conclude that it is appropriate to assess claimant's costs in some amount. Iowa Code section 86.40.

Claimant seeks assessment of his filing fee (\$103.00). (Cl. Ex. 5) This is a reasonable cost that is specifically permitted by 876 IAC 4.33(7). I conclude it is reasonable and appropriate to assess claimant's filing fee as a cost.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant fifty-two (52) weeks of permanent partial disability benefits commencing on June 21, 2021.

All weekly benefits shall be payable at the rate of seven hundred sixty-nine and 59/100 dollars (\$769.59) per week.

Defendants are entitled to the stipulated credit against the award of permanent partial disability benefits.

If additional past weekly benefits are owed after the aforementioned credit is taken and applied, interest 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 percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Defendants shall reimburse claimant's costs in the amount of one hundred three and 00/100 dollars (\$103.00).

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 6th day of September, 2023.

A handwritten signature in black ink, appearing to read "William H. Grell", is written over a horizontal line.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James M. Ballard (via WCES)

Aaron Oliver (via WCES)

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, 10A) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.