BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRANDON POWERS,	FILED	
Claimant,	MAR 26 2018	File No. 5057196
vs.	WORKERS COMPENSATION	ARBITRATION
JOHN DEERE WATERLOO WORKS,		DECISION
Employer, Self-Insured, Defendant.		Head Note Nos.: 1802, 1803, 2801

STATEMENT OF THE CASE

Brandon Powers, claimant, filed a petition in arbitration seeking workers' compensation benefits from John Deere Waterloo Works (Deere) self-insured, as a result of an injury he allegedly sustained on November 14, 2014 that allegedly arose out of and in the course of his employment. This case was heard in Waterloo, Iowa and fully submitted on August 16, 2017. The evidence in this case consists of the testimony of claimant, Claimant's Exhibits 1 -16, Defendant's Exhibits A – D and Joint Exhibits 1 – 12. Both parties submitted briefs.

ISSUES

Whether claimant sustained an injury on November 14, 2014 which arose out of and in the course of employment;

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

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

The extent of claimant's disability.

The commencement date of permanent partial disability benefits.

Whether claimant provided timely notice of his injury to Deere.

Whether claimant is entitled to payment of medical expenses.

Assessment of costs.

STIPULATIONS

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.

FINDINGS OF FACT

The deputy workers' compensation commissioner, having heard the testimony and considered the evidence in the record, finds that:

Brandon Powers, claimant, was 45 years old at the time of the hearing. Claimant graduated from high school. Claimant also served in the U.S. Army and received an honorable discharge. (Transcript, page 16)

Claimant started working for Deere, (his second stint at Deere), on March 7 2011. (Exhibit 11, p. 33) Claimant was medically examined and cleared to work at Deere on February 16, 2011. (Ex. 3, p. 8)

At the time of his alleged injury claimant was working in Department 626. Claimant would assemble items for the right side of a cab, put on a fender and blinking lights. (Tr. pp. 23, 24) Claimant said that working with torque wrenches and putting on the extremity arm added to his left elbow problem. (Tr. p. 24) Claimant testified that it is his belief that this work at Deere caused his outside-left elbow injury. (Tr. p 28) Claimant first started to experience symptoms in his left elbow in September 2014. Claimant reported his symptoms to his supervisor, Paul McNamara, who referred claimant to the clinic at Deere. (Tr. p. 29). Claimant was first seen at Deere for his left elbow on October 2, 2014. (Tr. p. 29; JE 1, p. 1) Claimant is right-hand dominant. (JE 4, p. 71) Claimant requested a cortisone shot for his left elbow on October 6, 2014. Deere did not provide the shot. (JE 1, p. 3)

Claimant went to his family practitioner, Megan Menkin, ARNP on October 7, 2014 to ask if a cortisone shot might help. ARNP Menkin referred claimant to James Crouse, M.D. (Tr. p. 37; JE 2, p. 7)

Claimant saw Dr. Crouse on October 8, 2014. Claimant was diagnosed with left elbow lateral epicondylitis and was given a cortisone shot. (Tr. p. 37; JE 2, p. 9) The lateral (outside) of his elbow hurt. Claimant returned to the Deere nurse on October 14, 2014 and informed her that his arm was better and did not have pain. (JE 1, p. 4)

Claimant's last day at work was November 14, 2014. (Tr. p. 40; Ex. 7, p. 23) Claimant submitted a written resignation dated November 24, 2017.

Claimant received cortisone injections for his left lateral elbow injury on December 3, 2014 and January 14, 2015. (Tr. pp. 51, 52) Dr. Crouse noted on

December 3, 2014 that the injection he previously gave claimant helped for a couple weeks but claimant's symptoms returned and claimant had difficulty with gripping and climbing using ladders at the railroad. Dr. Crouse's diagnosis was, "Lateral epicondylitis, left elbow. (JE 2, p. 12)

Claimant started working for the Iowa Northern Railroad as a student conductor on November 17, 2014. (Tr. pp. 41, 45) On November 25, 2014 claimant was seen by Matthew Kettman, M.D. for left elbow pain. (JE 2, p. 10) Claimant reported he believed the left elbow pain was caused by overuse. Dr. Kettman's assessment was epicondylitis, lateral. (JE 2, p. 11) Claimant testified that at this time he was taking classes at Iowa Northern Railroad and was not engaged in physical activity. (Tr. p. 49) Claimant had a physical for this job and checked on a form that he had no serious recurring issues with his elbow. (JE 3, p. 35; Tr. p. 44) On March 3, 2015 claimant reported his left lateral epicondylitis felt better; however he was having pain in the medial aspect of his left elbow. On March 3, 2015 claimant had a cortisone injection to the medial portion of his left elbow. (Tr. p. 56) Roswell Johnson, D.O. recommended claimant change the way he gripped. Dr. Johnson took claimant off work. (JE 2, pp. 14, 15) On April 1, 2015, Dr. Crouse noted that claimant was having recurrent trouble with his elbow due to his lateral epicondylitis. Claimant had to adjust his grip upon recommendation of Dr. Johnson, which caused more stress on the medial aspect of the left elbow. Dr. Crouse noted that claimant could not take time off work for surgery at that time. Dr. Crouse's diagnosis was, "Chronic recurrent lateral epicondylitis. Left elbow." (JE 2, p. 16) He had an injection to the left lateral elbow on April 30, 2015. (JE 2, p. 20)

Claimant worked until June 14, 2015 when he had an injury to the medial (inside) of his left elbow[1]. (Tr. p. 46) On June 1, 2015, Dr. Crouse's diagnosis was "Severe lateral epicondylitis, left elbow." (JE 2, p. 24) He provided an injection and he recommended surgery. Claimant went to Dr. Crouse when he injured the medial left elbow while working for the railroad on June 14, 2015. Dr. Crouse took claimant off work on June 15, 2015. Dr. Crouse stated that claimant would be unable to work until 4-6 weeks after surgery. (JE 2, p. 25) On June 25, 2015, Dr. Crouse performed surgery. Dr. Crouse's post-operative diagnosis was, "left elbow lateral epicondylitis." (JE 5, p. 73)

On August 27, 2015, Dr. Crouse noted that claimant's lateral aspect of his left elbow was better, but his medial area was worse. (JE 2, p. 31) Claimant went to a pain clinic on September 10, 2015 and was prescribed a pain compound for medial epicondylitis. (JE 6, p. 87) On September 14, 2015, claimant went to the emergency room due the pain he had in his left elbow; both sides. (Tr. p. 62; JE 5, p. 74) On September 16, 2015, claimant saw Dr. Crouse for the last time. The notes of that visit reflect that claimant was having an extraordinary amount of pain in his left elbow. Dr. Crouse's diagnosis was, "Severe medial epicondylitis, left elbow, with some persistent lateral symptoms despite surgery for the lateral epicondylitis." (JE 2, p. 32)

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[1] Claimant has filed a lawsuit against the Iowa Northern Railroad Company in the Iowa District Court for Blackhawk County. (Ex. C, pp. 1 – 5)

On December 19, 2016, Dr. Crouse provided a report to claimant's attorney. Dr. Crouse noted that as of September 16, 2015 claimant was having mild discomfort of the lateral aspect of the left elbow. (Ex. 1, p. 1) Dr. Crouse wrote, "Mr. Power's [*sic*] work at John Deere Tractor Cab Assembly Operations was a substantial factor in causing his lateral epicondylitis, which required surgery on 06/25/2015." (Ex. 1, p. 2) Dr. Crouse, using a December 2016 functional capacity evaluation (FCE) and the AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition provided a 15 percent impairment due to the lateral epicondylitis. (Ex. 1, p. 2) Dr. Crouse stated that the work for the railroad was the reason for the elbow surgery by Dr. Morrey in December 2015. (Ex. 1, p. 2) He recommended that claimant avoid repetitive use of the left arm, elbow and wrist, particularly with heavy vibratory tools and heavy lifting and repetitive twisting and gripping activities. (Ex. 1, p. 3) I find the restrictions of Dr. Crouse are claimant's restriction to his right elbow.

Claimant was seen by ARNP Menken on September 22, 2015. Testing revealed claimant was taking non-prescribed narcotics and that she would not prescribe any more narcotic medication for the claimant. (JE 9, p. 102)

Claimant was referred to the Mayo Clinic in October 2015. (JE 10, p. 107) On December 22, 2015, Mark Morrey, M.D. performed surgery on the claimant's left elbow. Dr. Morrey's post-operative diagnosis was, "left ulnar neuropathy, left medial epicondyle tendinopathy with tear." (JE 11, p. 117) On March 9, 2016, Dr. Morrey released claimant to return to work and to use his elbow as tolerated. (JE 11, p. 133) Claimant admitted that Dr. Morrey never provided any treatment for the lateral aspect of his left elbow. (Tr. p. 77) On October 20, 2016, Dr. Morrey wrote that he was unable to speculate as to the causation of claimant's injuries. He provided a 15 percent impairment rating for the left elbow and opined that claimant had reached maximum medical improvement. (JE, 11, p. 136)

Claimant said that he was not able to work at any time from June 14, 2015 through March 9, 2016. (Tr. p. 69) Claimant started working for International Paper in mid-March 2016. (Tr. p. 69) Claimant had a physical performed when he applied to work at International Paper on March 4, 2016. On a form claimant indicated he had had surgery for his elbow. He did not indicate he was having pain or that he had a work related injury. (JE 3, pp. 41, 42; Tr. pp. 70, 81) Claimant also stated he had no disability. (Ex. D, p. 3)

Claimant incurred a number of medical expenses for treatment and prescription to his left elbow. Claimant's Exhibit 9 shows a total amount charged of $10,274.83, payment of $5,213.19 and a balance of $5,213.19. (Ex. 9, p. 28)

Claimant was working at International Paper at the time of the arbitration hearing. Claimant said that he currently has pain in the lateral aspect of his left elbow about 75 – 80 percent of the time. (Tr. p. 73)

Claimant was complaining of left arm pain on January 17, 2016 after playing tug-of-war with his dog. (JE 11, p. 127) Claimant also had a fall on January 30, 2016.

(JE 7, p. 90) On June 11, 2016, claimant was examined for wrist pain when his dog pulled on a harness. (JE 5, p. 79)

On May 22, 2017, Robert Broghammer, M.D. performed an independent medical examination (IME) of the claimant. Dr. Broghammer found claimant's conditions to be,

- History of lateral epicondylitis recalcitrant to treatment status post surgical debridement.
- Medical epicondylitis stats post surgical treatment
- Ulnar collateral ligament tear status post surgical treatment.

(Ex. A, pp. 33, 34) Dr. Broghammer opined that the work at Deere did not cause or materially aggravate claimant's lateral epicondylitis. (Ex. A, p. 34) Dr. Broghammer noted that claimant used to be a weight lifter and that or some other idiopathic reason could be the cause of his epicondylitis. (Ex. A, p. 34) He found that claimant's lateral epicondylitis had resolved by the time claimant quit his employment at Deere. (Ex. A, p. 34) Dr. Broghammer provided a four percent upper extremity impairment rating, using the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Ex. A, p. 36) Dr. Broghammer recommended no permanent restrictions. Dr. Broghammer opined that claimant's surgery in June 2015 was more likely due to his work on the railroad rather than Deere and that the surgery in November 2015 was also not related to his work at Deere. (Ex. A, p. 38)

I find that claimant's gross income at the time of the alleged injury was $1,228.95, that he was married and entitled to claim 4 exemptions. Based upon the rate book in effect at the time of the alleged injury, claimant's weekly workers' compensation rate is $780.59.

RATIONALE AND CONCLUSIONS OF LAW

The Iowa Supreme Court held in Meyer v. IBP, Inc., 710 N.W.2d 213, 220 (Iowa 2006):

> Our workers' compensation statute provides coverage for "all personal injuries sustained by an employee arising out of and in the course of the employment." Iowa Code § 85.3(1); accord Meade v. Ries, 642 N.W.2d 237, 243 (Iowa 2002) (citing Miedema v. Dial Corp., 551 N.W.2d 309, 311 (Iowa 1996)). This statutory coverage formula gives rise to four basic requirements: (1) the claimant suffered a "personal injury," (2) the claimant and the respondent had an employer-employee relationship, (3) the injury arose out of the employment, and (4) the injury arose in the course of the employment. See Freeman v. Luppes Transp. Co., 227 N.W.2d 143, 148 (Iowa 1975). The failure of any one requirement results in a denial of a claim for benefits. Yet, all four elements are woven together by the common threads of injury and employment. The first two elements

> establish the existence of the injury within the ambit of the workers' compensation statute, and the third and fourth requirements work hand in hand to establish a connection between the injury and the work. See 1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 3.01, at 3–3 (2005) [hereinafter Larson]. (footnote omitted)

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).

Claimant minimized and concealed his elbow problems when he applied for work after he left Deere. While I do not condone such actions and do consider those facts in assessing the evidence, it does not make the claimant's testimony entirely unbelievable. Claimant's testimony was unrebutted and credible that when he saw Dr. Kettman on November 25, 2014 that he had only been in classrooms while working for the railroad. Dr. Crouse noted on December 3, 2014 that claimant's symptoms had returned and that he was having lateral epicondylitis of the left elbow. I find, based upon this testimony, medical reports, as well as the report of Dr. Crouse, that claimant has proven a permanent temporary and permanent impairment of lateral epicondylitis, left elbow.

I do not find the report of Dr. Broghammer to be convincing. Dr. Broghammer's speculation that claimant's history of weight lifting caused his left lateral epicondylitis is not supported by any of the treating physicians; either his doctors in Waterloo or at the Mayo Clinic.

I find the evidence shows that claimant's November 14, 2014 injury had not resolved. Dr. Johnson and Dr. Crouse related claimant symptoms to his November 14, 2014 injury. The treatments in December 2014, January, March, April and surgery of June 2015 was related to the November 14, 2014 injury.

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

Defendant asserted an affirmative defense of no notice of the injury in the hearing report pursuant to Iowa Code section 85.23. Defendant did not brief the issue; claimant did. The evidence is overwhelming that defendant knew claimant was complaining his work at Deere was causing him injury, pain and limitations, to his left elbow. Claimant informed his supervisor at Deere and was referred to the clinic at Deere. Claimant informed the clinic at Deere on October 2, 2014 that his work was causing elbow pain. He requested of Deere a cortisone injection on October 6, 2014. And Kevin Smith of the Safety Department reviewed claimant's job on October 7, 2014. (JE 1, p. 3) Steven Olsen, D.O., M.S. issued a report on October 21, 2014 concerning whether claimant's job could cause or contribute to claimant's elbow pain. (JE 1, p. 5) Defendant's assertion of the notice defense was not well grounded in fact or law. (See Iowa Rule of Civil Procedure 1.413) Defendant's affirmative defense fails. Defendant had notice as of October 2, 2014.

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)-(t) (2016) or for loss of earning capacity under section 85.34(2)(u). 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). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

In this case the claimant received a rating of 15 percent for the left lateral epicondylitis by Dr. Crouse using the Sixth Edition of the AMA Guides. This agency has adopted the Fifth Edition of the AMA Guides. 876 IAC 2.4. Dr. Broghammer provided a 4 percent impairment to the upper extremity. As Dr. Broghammer used the Fifth Edition of the Guides, I find claimant has proven a 4 percent left arm functional impairment.

This entitled to claimant to 10 weeks of permanent partial disability benefits (250 weeks X 4% = 10 weeks) As claimant began his work at the railroad I find claimant's permanent partial benefits commence on November 17, 2014. See Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360 (Iowa 2016).

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Iowa Code section 85.33(1).

The determination of the period for healing period benefits is made complicated by the fact that claimant suffered a subsequent injury to the medial aspect of his left elbow that required surgery on December 22, 2015. Dr. Crouse, before the June 2015 surgery, stated that recovery would generally take four to six weeks. Claimant; however, was having an exceptional amount of pain after his surgery.

While the claimant was unable to work from June 15, 2015 through March 9, 2016, I find that the claimant was entitled to healing period benefits from June 15, 2015 through December 21, 2015. There is not convincing evidence that claimant's lateral epicondylitis was the substantial contributor to his continuing healing period as of the date of his second surgery.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975.

I find that the medical expenses contained in Claimant's Exhibit 9 are due to his work injury at Deere. Defendant shall pay these expenses and reimburse claimant directly any out-of-pocket expenses he incurred for the treatments and prescription shown in Claimant's Exhibit 9.

Claimant has requested costs of a filing fee ($100.00) and medical report of Dr. Mooney ($500.00) (Attachment to hearing report) I find that claimant is entitled these costs pursuant to rule 876 IAC 4.33.

ORDER

THEREFORE, it is ordered:

Defendant is to pay unto claimant healing period benefits at the rate of seven hundred eighty and 59/100 dollars ($780.59) per week from June 15, 2015 through December 21, 2015.

Defendant is to pay unto claimant ten (10) weeks of permanent partial disability benefits at the rate of seven hundred eighty and 59/100 dollars ($780.59) per week from November 17, 2017.

Defendant shall pay medical expenses as set forth in this decision.

Defendant shall pay accrued weekly benefits in a lump sum.

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

Defendant shall pay the costs of six hundred and 00/100 dollars ($600.00) as set forth in this decision pursuant to rule 876 IAC 4.33.

Defendant 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 26th day of March, 2018.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFE/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.