

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

 SERGE BUKASA,

Claimant,

vs.

TYSON FRESH MEATS,

Self-Insured Employer,

Defendant.

File No. 21011090.01

ARBITRATION DECISION

Headnotes: 1108, 1802, 1803.1

STATEMENT OF THE CASE

Claimant, Serge Bukasa, filed a petition for arbitration seeking workers' compensation benefits against Tyson Fresh Meats, a self-insured employer.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner, the hearing was held on April 25, 2023, via Zoom. The case was considered fully submitted on June 15, 2023, upon the simultaneous filing of briefs.

The record consists of Joint Exhibits 1-6, Claimant's Exhibits 1-4, Defendant's Exhibits A-G, along with the testimony of the claimant.

Claimant requested additional time in which to provide an interpretation of the physical therapy notes contained in Claimant's Exhibit 3. Over the objection of the defendant, this was allowed. Claimant was given an additional fourteen (14) days to provide additional evidence regarding the dynamometer measurements taken by the physical therapist. The deadline for submitting new evidence was May 9, 2023. On May 8, 2023, claimant submitted a fourteen-page expert witness report containing summaries and opinions by a new medical professional not previously mentioned at hearing, along with in-person examination and new dynamometer measurements. This supplemental expert opinion was disallowed. However, the April 27, 2023 letter from Dr. Safo interpreting the dynamometer measurements were not objected to and were accepted as Exhibit 4.

ISSUES

1. Whether claimant is entitled to temporary total, temporary partial, or healing period benefits from August 25, 2021, to the present;

2. Whether claimant sustained a permanent disability and if so, the extent;
3. The commencement date of benefits;
4. The rate;
5. Entitlement to future medical treatment.

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.

The parties stipulated claimant sustained an injury arising out of and in the course of his employment on August 25, 2021. They further agreed the injury was the cause of temporary disability and that if the injury is found to be a cause of permanent disability it is a scheduled member disability to the upper extremity.

There are no medical benefits in dispute.

Prior to the hearing, the claimant was paid 10 weeks of compensation at the rate of \$596.79 per week, for a total of \$5,967.90.

FINDINGS OF FACT

Claimant, Serge Mulumba Bukasa, was a 36-year-old person at the time of the hearing. At all times material hereto, claimant was married with three minor children.

He began working for the defendant employer on October 27, 2015. On August 25, 2021, while he was driving a forklift, he was struck by a metal piece and broke bones in his right arm.

On the same date, claimant presented to Washington County Hospital Clinics Emergency Department with a right wrist injury as the result of a crush injury at work. (Joint Exhibit 1:1) X-rays showed that he sustained a non-displaced fracture of the distal radius with intra-articular extension, mildly displaced ulnar styloid process fracture, and soft tissue swelling surrounding the wrist joint. (JE 1:2) A splint was applied, and he was given a prescription for hydrocodone. (JE 1:3) Claimant was also instructed to avoid use of his injured extremity. (JE 1:5)

On August 30, 2021, claimant was seen by the employer on-site medical staff, Robert L. Gordon, M.D., for the right wrist fracture. (JE 2:8) He denied numbness or tingling but felt his splint was too tight and noted swelling in his right hand. Id. He rated

his pain 8 on a 10 scale. Id. On examination, he had tenderness of his radial and ulnar wrist regions and edema of the right wrist and right hand. (JE 2:9) He also had limited range of motion of the right wrist. Id.

Claimant was referred for an orthopedic consult, which took place on September 1, 2021 with Thomas P. Ebinger, M.D. Claimant also underwent a CT of the right wrist on September 1, 2021 ordered by Dr. Ebinger. (JE 3:10) The CT images showed a 3 mm displaced ulnar styloid fracture and extensively comminuted intra-articular distal radial fracture with up to 7 mm of lateral and 3 mm of posterior displacement of the fracture elements. Id.

The following day, on September 2, 2021, claimant underwent open reduction and internal fixation of the right distal radius fracture with Arthrex dorsal locking plate. (JE 4:11)

Following surgery, he was restricted from use of his right upper extremity. (JE 4:13) Claimant was allowed to return to work with no use of the right upper extremity. Id.

He returned to Dr. Ebinger on December 14, 2021, for removal of the hardware including the Arthrex distal radius dorsal plate and seven screws. (JE 4:14) Dr. Ebinger returned claimant to work with restrictions (JE 4:15)

He began physical therapy on January 24, 2022. (CE 2:2-3) Medical records indicated that he was not at MMI and needed to return for a follow-up appointment on April 18, 2022. (JE 2:5)

On April 18, 2022, Dr. Ebinger placed claimant at MMI and returned claimant to regular work with no restrictions. (CE 2:6) On April 25, 2022, Dr. Ebinger filled out a checklist opinion letter, set the MMI date for claimant as April 18, 2022, and assigned a 4 percent permanent impairment to the right upper extremity with no further treatment recommended and no restrictions. (DE A:1)

On May 3, 2022, claimant requested additional medical care. (JE 5:16) He wrote in the request that he was suffering unbearable pain in the right hand and wrist. Id. Claimant testified that he did return to work but was in tremendous pain. He spoke about this pain to his supervisor who recommended he seek out the company nurse. He did so and was provided ibuprofen. This did not alleviate his symptoms. He returned to the nurse but was told there was nothing they could do for him.

He explained to his supervisor that he was only supposed to be doing work with his left hand. When the defendant responded that the doctor had cleared him to go back to work, claimant replied that he was also instructed to return if conditions worsened.

He was discharged on May 5, 2022, for refusal to work on May 3, 2022, as well as the previous week. (DE E:27)

On June 20, 2022, claimant was seen by Dr. Ebinger. (JE 6:17) In the history section, claimant is recorded as saying that his pain was improved. Id. He did not have pain while wearing the brace, and the sharp pains he was having while he was at rest had resolved, but that he continued to have pain anytime he used his wrist. Id. Examination showed a well-healed scar over the dorsum of the wrist and point tenderness at the radiocarpal joint line. (JE 6:18) He denied pain with palpation of the ulnar fovea. Id. He had limited range of motion in all planes. Id. He reported some pain with heavy grip. He had intact sensation to light touch throughout the right hand and wrist. Id. An injection of lidocaine and Kenalog was administered. Id. Dr. Ebinger advised claimant that surgical interventions were somewhat unpredictable and would not guarantee a complete resolution of pain. Id. The two discussed a referral for a FCE and determination of permanent restrictions. Id.

After the injection, claimant was released from Dr. Ebinger's care with a 10-pound lifting restriction of the right upper extremity. (JE 6:18) Claimant was directed to return to Dr. Ebinger in six weeks but did not. Claimant testified at hearing he believed that Dr. Ebinger would contact defendant employer about additional care. He also testified that he had lost trust in Dr. Ebinger and sought out care on his own.

The petition in this case was filed on August 1, 2022. At no time was an alternate care petition filed requesting additional care. Per defendant's counsel's letter to claimant's counsel, no additional care was requested. (DE G:30)

On March 22, 2023, claimant was seen by Ann Safo, D.O. Dr. Safo filled out a work restriction form stating, "Serge has debilitating pain. He is unable to work at this time. I recommend intense therapy with medication and therapy. We will evaluate him again in 3 months." (CE 1:1) Physical therapist Joan Graybeal Gillon wrote out dynamometer measurements, which indicated that claimant had 20 degrees of extension on the right compared to 70 degrees of extension on the left and 55 degrees of flexion on the right compared to 85 degrees of flexion on the left. (CE 3: 2) Dr. Safo's medical record notes that claimant was first seen on March 22, 2023, for right hand pain and weakness. (CE 4) He relayed a history of injury with surgery. Id. Following surgery, he had pain, decreased strength, and limited range of motion. Id. He was unable to do his job, which required normal strength of both hands. Id. He was referred to physical therapy where he as evaluated to have significant, nearly 80% decrease of strength. Id. Dynamometer results show major disability, with his right hand strength 21% of expected for a dominant hand. Id. His range of motion is limited to 28% of expected. Id. Normally, we would expect a dominant hand to be 120% compared to the non-dominant hand. Id. The assessment was post-traumatic osteoarthritis of hand. Id.

Claimant received TTD benefits for the time periods of 9/1/21 – 9/8/21 and 12/14/21 – 12/19/21, when Dr. Ebinger imposed temporary work restrictions that included no use of the right upper extremity. (DE D:26)

Defendant asserts claimant's gross weekly wages were \$805.11 at the time of the injury. He was married and entitled to four exemptions. Claimant offered no contrary

evidence. Based on those foregoing numbers, the weekly benefit rate is \$553.21. (DE C:5)

CONCLUSIONS OF LAW

Claimant alleges he has sustained permanent disability to his right upper extremity arising out of the August 25, 2021 work injury. Defendant has stipulated that claimant sustained both temporary and permanent disability as a result of that work injury but dispute the extent.

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).

The parties have stipulated claimant sustained a scheduled member injury to the right upper extremity. The extent of that injury is dictated by the Guides to the Evaluation of Permanent Impairment, Fifth Edition, published by the American Medical Association. Iowa Code Section 85.34(2).

There is only one expert opinion in the record on the extent of claimant's disability.

On April 25, 2022, Dr. Ebinger filled out a checklist opinion letter, set the MMI date for claimant as April 18, 2022, and assigned a 4 percent permanent impairment to the right upper extremity with no further treatment recommended and no restrictions. This did not change, even after subsequent visits to Dr. Ebinger in June 2022.

While claimant presented medical evidence of reduced range of motion in the right upper extremity, this information could not be used pursuant to Iowa Code Section 85.34(2), as well as the past case law that requires expert testimony to draw the connection between symptoms and the work injury.

Claimant argues that the medical note of Dr. Safo provides the basis for an award of running healing period and/or permanent disability benefits beyond the rating of Dr. Ebinger; however, the statement that claimant has pain and is unable to work at this time does not provide a causal bridge from the pain to the work incident. Dr. Safo's assessment that claimant's current condition is post-traumatic osteoarthritis of the hand is not sufficient in that it does not state that the condition for which she treated claimant was related to his work injury, and it would be speculative to infer that connection based on the historical note alone. Expert opinion must be given to a reasonable degree of medical certainty and Dr. Safo's treatment note is not sufficient. Further, no permanent impairment is provided by Dr. Safo.

Claimant further argues, erroneously, that he is entitled a permanent and total disability based on his experience, training, intelligence, and physical capacity. However, claimant's injury is to the right upper extremity. This is a scheduled member injury and compensated according to Iowa Code section 85.34(2). Loss of an arm is a percentage of 250 weeks. Iowa Code section 85.34(2)(m). The percentage disability is set by the AMA Guides. Iowa Code section 85.34(2)(x). The only expert testimony providing causation, as well as impairment, is from Dr. Ebinger. Even if Claimant's Attachment A were allowed into evidence, it would not provide a causal link between the claimant's injury and the claimant's alleged current symptomatology. Dynamometer measurements alone are not sufficient basis upon which to measure impairment.

The expert opinion of Dr. Ebinger is unrebutted, and there are no reasonable grounds upon which to disregard the opinion. Claimant argues that he lost faith in Dr. Ebinger, that the doctor's opinions are invalid as it is one recommended by the defendant,

that the doctor wrongfully ordered claimant to return to work despite the severity and gravity of the injury, and that the impairment was premature as claimant was in so much pain when the measurements were taken. Claimant was returned to work on March 21, 2022. He testified that he was unable to perform his work due to pain. However, in the follow up visit with Dr. Ebinger on June 20, 2022, claimant reported improvement with his wrist and that he did not have pain while wearing the brace. He did exhibit pain with heavy grip and some point tenderness at the radiocarpal joint line. There was limited range of motion in all planes. Claimant was released with a 10-pound lifting restriction. While the 4 percent impairment is low, it is the only impairment rating in the record, and therefore, the only one that can be adopted. If Dr. Ebinger's impairment rating is tossed aside, as the claimant suggests, there is no other impairment rating upon which to award permanent disability benefits.

Claimant also seeks an award of temporary disability benefits. Temporary benefits are awarded for periods of time in which claimant is healing and not able to work.

An employee is entitled to appropriate temporary partial disability benefits during those periods in which the employee is temporarily, partially disabled. An employee is temporarily, partially disabled when the employee is not capable medically of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury but is able to perform other work consistent with the employee's disability. Temporary partial benefits are not payable upon termination of temporary disability, healing period, or permanent partial disability simply because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury. Section 85.33(2).

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.

Claimant was returned to work with restrictions that were accommodated, except for the time periods of 9/1/21 – 9/8/21 and 12/14/21 – 12/19/21. During those two periods, claimant was paid temporary benefits. He was returned to full duty work without restrictions on April 18, 2022, and continued to work until his termination on May 5, 2022, albeit with pain, per his testimony. Claimant has not provided evidence he is entitled to additional temporary benefits arising out of his work injury of August 25, 2021, as there is no expert testimony that supports his claim that he is currently off work due to his work related injury. The last medical opinion on this matter came from Dr. Ebinger, who

returned claimant to work with no restrictions on April 18, 2022.

It should also be noted that the claimant was offered an opportunity to file a motion to continue prior to the start of the hearing, and claimant's counsel opted not to file one.

Claimant also argues he is entitled to reimbursement of an IME. This issue was not raised at the time of the hearing, and is therefore not considered herein.

ORDER

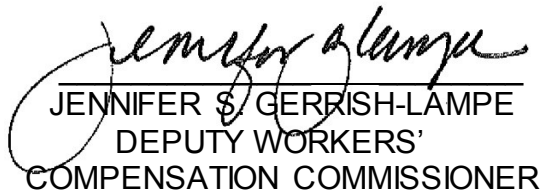
THEREFORE, IT IS ORDERED:

That defendant employer is to pay unto claimant 10 weeks of permanent partial disability benefits at the rate of five hundred fifty-three and 21/100 dollars (\$553.21) per week from April 18, 2022.

That defendant is entitled to a credit of five thousand nine hundred sixty-seven and 90/100 dollars (\$5,967.90) against the above award of permanent partial disability benefits.

That each party shall bear their own costs and the costs of the transcript shall be split evenly with one-half to be paid by claimant and one-half paid by defendant.

Signed and filed this 2nd day of October, 2023.


JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Mike Mbanza (via WCES)

Jason Wiltfang (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.