BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
JAN 17 2017
WORKERS' COMPENSATION

PAUL WILLIAM RENDER, Claimant, vs. KEOKUK STEEL CASTINGS, Employer, and TRAVELERS INSURANCE CO., Insurance Carrier, Defendants.	File No. 5049799 ARBITRATION DECISION Head Note Nos.: 1402.20, 1802, 1803, 2206, 2500, 4000.2

STATEMENT OF THE CASE

Paul Render, claimant, filed a petition in arbitration seeking workers' compensation benefits from Keokuk Steel Castings (Keokuk) and its insurer, Travelers Insurance Co. as a result of an injury he allegedly sustained on January 5, 2015 that allegedly arose out of and in the course of his employment. This case was heard in Des Moines, Iowa and fully submitted on May 2, 2016. The evidence in this case consists of the testimony of claimant, Joseph Recor, Joint Exhibits 1 - 38 and Defendants' Exhibits A and B.

ISSUES

1. Whether claimant sustained an injury on January 5, 2015 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 disability.

5. Whether claimant is entitled to payment of medical expenses and medical mileage.

6. Whether claimant is entitled to penalty.

7. Assessment of costs.

STIPULATIONS

The parties have stipulated to the following:

1. Claimant was an employee of Keokuk at the time of his alleged injury.

2. If claimant is entitled to temporary benefits, the claimant is entitled to temporary benefits from January 5, 2015 through January 15, 2016.

3. The claimant's gross earnings were $1,150.09 per week, he was single and entitled to claim one exemption, and his weekly rate is $662.22.

4. The medical providers in this claim would testify as to the reasonableness of their fees and treatment.

5. Defendants are entitled to a credit of $9,193.62 for the payment of sick pay or disability pay during the period of January 6, 2015 through December 9, 2015.

The stipulations submitted by the parties have been accepted by the undersigned and no findings of fact will be made on these stipulated facts.

FINDINGS OF FACT

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

Paul Render, claimant, was 56 years old at the time of the hearing. He graduated from high school and characterized himself as a "C" average student. (Transcript, page 10) Claimant has no formal post-high school education. Claimant served for two years in the United States Air Force, in the military police, and was honorably discharged. (Tr. p. 19: Ex. 14, p. 3)

Claimant started to work in sales when he moved to Chicago in 1986. Claimant sold signs. He worked for a number of sign companies, in sales and started his own sign brokerage company in 2000. (Tr. p. 23) After three years he closed his business and became an authorized dealer for ADT Home Security. Claimant worked for about 11 years in the home security business and stopped when ADT decided that his company could no longer be an authorized dealer. Claimant worked in sales for about 20 years. (Tr. p. 101) Claimant testified that he did not like sales and did not think he was a good salesman. (Tr. p. 123) Claimant moved back to Fort Madison, Iowa in 2011 and claimant began working for Keokuk Steel Castings on July 11, 2011. (Tr. p. 29) Keokuk Steel Castings is also referred to in some of the records as Matrix Metals

Corporation. (Tr. p. 125) He started his work for Keokuk doing general labor and was a blast assistant. (Tr. p. 29) When hired he was required to pass a physical. (Ex. 25, p. 5) He had a number of different positions with Keokuk. He bid into the salvage job, and that was the job he was performing on January 5, 2015. (Tr. p. 35) Claimant was terminated from Keokuk as of February 15, 2016. The plant shut down. (Ex. 38, p. 1) Claimant's termination was not related to his work injury. (Tr. p. 118)

Claimant testified his health history before the alleged injury of January 5, 2015 consisted of a broken left elbow in 1983 or 1984, without surgery, he had arthroscopic left knee surgery in 1986 or 1987. Claimant has a history of anxiety since 2000 and takes medication as needed. (Tr. p. 12)

On November 19, 2014 claimant had an anxiety attack at work. At the same time he stood up and hit his shoulder blade on a table that caused a bruise. (Tr. p. 14) The claimant went to the Fort Madison Hospital and was assessed as having a syncopal episode and right shoulder soreness. The medical records do not identify an anxiety attack. (Ex. 5, p. 2) Claimant did not receive any additional medical treatment for this incident. Claimant testified that he had no ongoing problems with pain and discomfort, with his right and left arms and shoulders before January 5, 2015. (Tr. pp. 17, 18) Claimant is right handed. (Tr. p. 101)

Claimant was off work the week before January 5, 2015. On January 5, 2015 claimant was at work at the second shift, clocking in at around 2:45 p.m. After putting on his protective clothing claimant went to his work area, called a cell. The cell has curtains that enclose it when working. Claimant saw a Nordstrom valve on his table. The valve weighs approximately 900 to 1,100 pounds. (Tr. p. 42) Joseph Recor testified it weighed between 700 and 800 pounds. (Tr. p. 135) Upon inspection claimant noticed that there were some additional welds that needed to be performed. Claimant asked a welder, Shane Kelly, if he could work on the valve, and Mr. Kelly indicated he could work on the valve. (Tr. p. 45) The valve was sitting on a table. It had a chain around it connected to an overhead hoist. Claimant's plan was to use the hoist to move the valve to the ground so a fork truck could move the valve to Mr. Kelly. (Tr. 48) Claimant used the hoist to raise the valve and used both arms to push the valve over his table. The Nordstrom valve got stuck. (Ex. 25, p. 12) Claimant believes it was stuck on some smaller valves sitting on his table. Claimant then was going to use the hoist to raise the valve, but mistakenly lowered it. Claimant said that the valve started to tip towards him and the valve pushed his right arm, and he reached with his left to push it with his left arm. Due to the weight of the valve he did not move it. (Tr. pp. 52, 54)

Claimant described that he felt pain in his right shoulder when he tried to move the Nordstrom valve. He said it was like someone was stabbing him. (Tr. p. 60) At that time he did not feel pain in his left shoulder. (Tr. 67)

Claimant said that the Nordstrom valve was hanging at a 45-degree angle, and he did not think it was safe so he used his left arm to move the Nordstrom valve to an

upright position. (Tr. p. 68) Claimant then sat down for a brief time. He then opened the curtain of Shelley Nichols, who was a welder. Claimant tugged on her air hose and she came over to claimant. Claimant said he told Ms. Nichols that he really hurt himself and asked her to find his supervisor, Deon Walker. Ms. Nichols did not find Mr. Walker and told claimant he should go to the office. (Tr. p. 69) Claimant reported to the office and was given an ice pack and filled out an incident report. (Ex. 1, p. 1) The incident report is consistent with how claimant described his injury. Claimant said that he was unable to take off his protective apron and had to cut a strap with his left arm because he could not use his right arm to undo the strap. (Tr. p. 75)

Claimant was driven to the Fort Madison Hospital by Mr. Recor. Claimant was told that the x-ray did not show any damage and claimant was given a prescription for pain medication. (Tr. pp. 71, 72) Claimant was not able to obtain the prescription at that time. Claimant went home after the visit to the hospital. Claimant testified that when he went to bed he could not sleep on his right side. He tried to move to his left and that was the first time he experienced pain in his left shoulder. (Tr. p. 76)

Claimant has been off work since January 5, 2015. (Tr. p. 83)

Claimant reported to Travelers Insurance on January 7, 2015 that he was having pain in his right shoulder, right lower back and that his right hand goes numb when he tries to go to sleep. (Ex. 24, p. 7) On January 8, 2015 claimant reported to Mary Bentler, PA-C, that he had pain in his right shoulder, left shoulder and that his right hand was numb and tingling. (Tr. p. 78; Ex. 5, p. 7) He was assessed with right and left shoulder pain. (Ex. 5, pp. 8, 9) Claimant was ordered physical therapy on January 15, 2015; however, claimant was informed by the hospital that his injury was no longer being covered as a workers' compensation claim by the employer. (Ex. 5, p. 11; Tr. pp. 79, 80) Claimant was not provided any information as to why his claim was denied until February 2, 2015. (Ex. 16, pp. 6, 7) Claimant was not provided any of the investigation of his claim until February 10, 2015. (Ex. 16, pp. 16 – 25) Claimant began to receive short-term disability on March 13, 2015.

The Fort Madison Hospital Emergency Room records of January 5, 2015 assessment form notes that claimant was complaining of right shoulder pain. The physical exam noted tenderness, swelling and limited range of motion. (Ex. 5, p. 5) The clinical impression was of a shoulder sprain/strain. (Ex. 5, p. 6) Claimant returned to the Fort Madison Hospital on January 8, 2015.

Claimant was seen by Theron Jameson, D.O. on March 5, 2015. Dr. Jameson wrote on March 5, 2015 that, "Patient has osteonecrosis highly symptomatic about the right shoulder with acromioclavicular separation due to injury. I do not believe he has rotator cuff tendon tear. Left shoulder has impingement syndrome and rotator cuff tendinitis. Recommend starting physical therapy after surgery on both shoulders." (Ex. 7, p. 2) Dr. Jameson performed right shoulder surgery on March 11, 2015. His preoperative diagnosis was, "Right shoulder pain impingement syndrome distal clavicle DJD." (Ex. 7, p. 4) His postoperative diagnosis was, "Right shoulder biceps labral

complex anchor tear with tendinopathy of the biceps tendon, distal clavicle osteonecrosis." (Ex. 7, p. 4)

Claimant had physical therapy after his surgery. (Ex. 5, pp. 12 – 17) Claimant testified that while doing physical therapy his right forearm and wrist went numb. (Tr. p. 89) Claimant was referred to neurologist, Jugal Raval, M.D. Based upon an EMG/NCV study Dr. Raval concluded claimant had moderate right cubital tunnel syndrome and mild carpal tunnel syndrome. (Ex. 12, p. 1) Dr. Jameson then performed surgery on his right elbow and wrist on August 26, 2015. (Tr. p. 90; Ex. 9, pp. 3, 4) Dr. Jameson's postoperative diagnosis was right carpal tunnel syndrome and right cubital tunnel syndrome. (Ex. 9, p. 3) Claimant had surgery on his left shoulder on October 12, 2015. (Ex. 8, p. 4) Claimant testified that he requested that Dr. Jameson release him so he could return to work, as his short-term disability was running out. (Tr. p. 91) Dr. Jameson released claimant to return to work on November 25, 2015 with restrictions of no lifting above 10 pounds and no work above the chest for the right side. (Ex. 7, pp. 43, 45) Keokuk was unable to provide a job with claimant's restrictions. (Tr. p. 91) On January 14, 2016 claimant saw Dr. Jameson for the last time. He provided restrictions of no lifting greater than ten pounds and no overhead work for his right upper extremity and limited overhead for the left upper extremity. (Ex. 7, p. 48)

Dr. Jameson provided three statements concerning claimant's conditions. (Ex. 8, pp. 1 - 6) On March 31, 2015 Dr. Jameson wrote that claimant had a severe injury to his right shoulder which would be associated with trauma and "...[F]its well with his [claimant's] description of the injury which occurred on January 5, 2015." (Ex. 8, p. 1) Dr. Jameson noted that claimant would not have been able to continue to perform his work at Keokuk if the injury had occurred on November 14, 2014. Dr. Jameson stated the right shoulder condition was a January 5, 2015 work injury. He reserved making an opinion of the left shoulder at that time. (Ex. 8, p. 2) On December 29, 2015 Dr. Jameson wrote that he had reviewed the video of claimant's job. Based upon the history presented to him it was Dr. Jameson's opinion that the surgical procedures he performed were a result of a work injury of January 5, 2015. And that "...[W]ithin a reasonable degree of medical certainty that a substantial contributing factor to his right and left upper extremity problems and the surgeries I performed on him was the work related injury from January 5, 2015." (Ex. 8, p. 4) He noted that he released claimant on November 12, 2015 with restrictions. (Ex. 8, p. 4) On January 28, 2016 Dr. Jameson agreed that claimant's restrictions were:

> 1. Is it your opinion that Mr. Render should follow your restrictions detailed on November 25, 2015 and January 14, 2016 which are as follows:
>
> > 1. No push, pull, or lift greater than 10 pounds and no above chest height level work right upper extremity (November 25, 2015 restriction form).

2. Permanent restriction of limited overhead work left upper extremity (restriction form dated January 14, 2016).

___x_____Yes _____No

2. Do you believe Mr. Render has sustained a permanent impairment pursuant to AMA Guides to the Evaluation of Permanent Impairment, 5th Edition, as a result of his right and left shoulder injuries and surgeries and right cubital carpal tunnel conditions?

___x_____Yes _____No

(Ex. 8, p. 5) He also provided a 14 percent right upper extremity impairment rating, a zero rating for the carpal and cubital tunnel injury and a 15 percent rating for the left upper extremity. He provided a 22 percent whole person impairment rating. (Ex. 8, p. 5)

Darrin Ausman, OTR/L, CEAS III performed a job analysis of the salvager job on February 20, 2015. (Ex. A, pp. 1 – 5) Mr. Ausman was present during the video showing the operation of the hoist and other job functions. He measured the average force it took to move the Nordstrom valve and concluded that the force used would not be typically sufficient to cause a traumatic injury to a shoulder. (Ex. A, pp. 2, 4) Mr. Ausman noted that in one of the three videos the valve did lean towards the worker; however, there was no evidence that the valve was falling towards the worker. (Ex. A, p. 3)

Suleman Hussain, M.D. provided two reports. On July 27, 2015 Dr. Hussain reviewed medical reports, MRI, claimant's deposition, the job analysis and video in preparation of the report. (Ex. 11, p. 1) He did not examine claimant. Dr. Hussain reviewed the February 2015 MRI and did not detect evidence of a rotator cuff tear and noted that there was evidence of edema in his AC joint that appeared to be degenerative. He also noted a cyst consistent with chronic impingement. (Ex. 11, pp. 1, 2) Dr. Hussain noted that the mechanical effort and forces required to manipulate objects do not account for the clinical injury. (Ex. 11, p. 2) Dr. Hussain stated,

> Conclusively, the distal clavicle osteonecrosis, degeneration, and poor bone quality have nothing to do in regard to the work injury that has been described nor mentioned. Those are chronic findings and changes that are present on the patient's plain films and are associated with his edema on his MRI that are not related to the work injury or mechanism described. Those are changes that occur over quite some time and are degenerative in nature. The biceps tenosynovitis is a condition where you have inflammation of the biceps. The superior labral changes are quite common in the patient's age group and a substantial number of individuals of the patient's age have age-appropriate labral changes in the superior labrum that are consistent with what Dr. Jameson describes. In regard to

> the CA ligament release and his subacromial decompression, that is indicative of chronic impingement syndrome which also ties into the acromioplasty with debriding the anterior acromial bone, which is done for chronic impingement or irritation of the rotator cuff and are not acute changes that occur with acute injuries.
>
> Based on the mechanism of injury that has been described, based on the videos and review of the medical records that were provided, as well as the job analysis and force mechanisms that have been documented in regard to the injury, I cannot with medical certainty ascribe the work injury or mechanisms that have been described or reported in the deposition and in the conversation we had on June 26, 2015, to the work injury described in regards to the right shoulder as well.

(Ex.11, pp. 3, 4) Dr. Hussain was provided additional medical reports and wrote a letter on January 25, 2016. Dr. Hussain continued to disagree with Dr. Jameson's causation opinions and that claimant's condition was typical of a degenerative type of shoulder. Dr. Hussain opined the restriction provided by Dr. Jameson was arbitrary and that a full functional capacity examination should be conducted to verify claimant's functionality and work restrictions. Lastly, he opined that the carpal tunnel and cubital tunnel conditions were not caused by the work incident of January 5, 2015. (Ex. 11, pp. 10, 11)

Claimant testified that both shoulders cause him pain, but the right causes greater pain if he tries to lift. His grip strength in his right hand is limited. (Tr. p. 96)

Claimant applied for and was found eligible for unemployment benefits after his short-term disability ran out. Claimant looked for work after applying for unemployment. Claimant has applied at a number of companies and temporary employments agencies. Many of the jobs involve production or factory work, although some are in food service or convenience stores. (Ex. 18, pp. 1 – 4) Claimant said that he was told by employers he was not hired due to his restrictions, no experience or no college. (Tr. p. 98)

On January 22, 2016 Lana Sellner, MS, CRC performed a vocational assessment of the claimant. Ms. Sellner met with claimant. She noted that claimant was performing work prior to his injury at the heavy work level. Using the restrictions of Dr. Jameson, Ms. Sellner found that claimant was limited to the light category of work. (Ex. 14, p. 6) Ms. Sellner identified a number of jobs that claimant could perform in the Fort Madison area. They generally consisted of security, customer service, retail sales and reception/information clerk. The median hourly wages ranged from $8.77 to $16.69 per hour. (Ex. 14, p. 9)

Barbara Laughlin, M.A. provided a vocational report on January 25, 2016. Ms. Laughlin noted that claimant's age of 56 was not a positive factor for claimant. (Ex. 15, p. 3) Ms. Laughlin concluded claimant had a 56.1 percent loss of unskilled

occupations as a result of his restrictions. (Ex. 15, p. 6) Ms. Laughlin concluded that claimant would not be able to return to most of his past relevant work. (Ex. 15, p. 9)

Joseph Recor, the safety environmental coordinator for Keokuk testified. Mr. Recor worked in many positions with Keokuk over 19 years including salvage. Mr. Recor said that the position of salvage at Keokuk involved grinding and working closely with the welders. (Tr. p. 127) During his time at Keokuk Mr. Recor had not heard of a Nordstrom valve fall and cause injuries to the shoulders. (Tr. p. 129)

On January 5, 2015 Mr. Recor was called to the plant after claimant's injury. He drove claimant to the hospital. Mr. Recor returned to the plant after the trip to the hospital and inspected claimant's work area, Cell 1, and took pictures. (Tr. p. 133: Ex. 32, pp.15 - 22) On that day Mr. Recor spent between 45 to 60 minutes trying to have the Nordstrom valve fall towards him but could not recreate such an action. (Tr. pp. 134, 135) Mr. Recor was also present during a February 20, 2015 event shown on the DVD where another unsuccessful attempt was made to have the Nordstrom valve fall. (Tr. p. 141) Mr. Recor testified that claimant was denied workers' compensation benefits due to his inability to have the valve tilt in a manor claimant described during the attempts on January 5, 2015 and February 20, 2015. (Tr. p. 155: Ex. 32, p. 4) Upon cross-examination Mr. Recor agreed that if claimant was standing a little right of the position shown in the DVD and he had the valve stuck on the top of a small valve the Nordstrom valve could tilt down, but not fall. (Tr. p. 160; Ex. 32, p. 9)

Claimant commented on the DVD, Exhibit 33, which shows his work station and the hoist moving a Nordstrom valve. Claimant testified that the position of the smaller valves in the DVD is not the same as his work station on January 5, 2015. (Tr. p. 62) Claimant also said the DVD does not show the Nordstrom valve on top of a small valve but on the lip of a valve. Claimant contends the DVD does not show how he positioned the Nordstrom valve when it tipped towards him. (Tr. p. 65) The DVD was reviewed. (Ex. 33) The DVD shows the movement of a Nordstrom valve on and off the table with smaller casting on the table.

Shane Kelly testified via deposition. Mr. Kelly is a welder at Keokuk and worked with claimant. Mr. Kelly agreed that it took a lot of upper work as a salvager. (Ex. 26, p. 4) At the start of the shift claimant told Mr. Kelly that the Nordstrom valve needed some welding, and claimant told Mr. Kelly that he was going to send it over to him. (Ex. 26, p. 5) That was the last time Mr. Kelly saw claimant that day. Mr. Kelly was shown pictures the next day by Mr. Recor and stated that the pictures at the location of the items on claimant's table looked close to what he saw on January 5, 2015. (Ex. 26, p.8)

Robert Riddle testified via deposition. He was a supervisor at Keokuk. Mr. Riddle agreed that it would be difficult to perform the salvager job with significant limitations in the arms. (Ex. 27, p. 3) Mr. Riddle was in the office when claimant came in and told Mr. Walker and himself that he had hurt his shoulder. (Ex. 27, p. 3)

Deon Walker testified via deposition. He was claimant's immediate supervisor. Mr. Walker testified that it would be difficult for a salvager to perform the job with a significant limitation or injury to the arm. (Ex. 28, p. 3) (See also testimony of Darrel Beeler Ex. 30, p. 2). On January 5, 2015 Mr. Walker was in the office when claimant came in and reported an injury to his shoulder. After he finished his meeting Mr. Walker took pictures of claimant's work area. (Ex. 28, p. 5)

Adam Roan testified via deposition. He is a welder at Keokuk. On January 5, 2015 he saw claimant at work at the start of the shift. Claimant moved a part from one spot of the floor to another using the hoist for Mr. Roan. (Ex. 29, p. 4) He did not observe claimant having any physical difficulty doing his job on that day. (Ex. 29, p. 4)

Shelley Nichols testified via deposition. Ms. Nichols was a welder in cell one second shift on January 5, 2015. Claimant opened the curtain and Ms. Nichols saw claimant. Claimant told her he had hurt his arm and was holding it. (Ex. 31, p. 3) Ms. Nichols said she could tell he was in pain. (Ex. 31, pp. 3, 4) She testified that she told claimant he should report his injury. (Ex. 31, pp. 3, 4)

Claimant has requested medical mileage in the amount of $531.94. (Ex. 34, p. 1) Claimant has provided a list of medical expenses he contends are related to his January 5, 2015 injury in the total amount of $84,640.67. (Ex. 13, pp 1, 2) I find that these expenses are related to his January 5, 2015 injury.

I find the testimony of the claimant credible based upon his demeanor and appearance at the hearing. He testified that the valve was tilting towards him, and he reacted as if it was falling, and in this reaction injured his right and left shoulders. Claimant has consistently told Keokuk and reported to his medical providers concerning about how he injured himself. I find that claimant suffered an injury that arose out of and in the course of his employment with Keokuk on January 5, 2015.

Claimant has significant limitations due to his right and left shoulder injuries. He has no post-high school formal education. He is limited to sedentary work. He cannot return to the type of work he was performing for Keokuk or earn similar wages. I find that claimant has a 65 percent loss of earning capacity.

Pursuant to the parties' stipulations I find that the claimant's gross earnings were $1,150.09 per week, he was single and entitled to claim one exemption, and his weekly rate is $662.22.

RATIONALE AND CONCLUSIONS OF LAW

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).

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.

Claimant has met his burden of proof by a preponderance of the evidence that he suffered both temporary and permanent impairment as a result of a work injury on January 5, 2015. Claimant credibly testified that he had no shoulder impairment or injuries that prevented him from working prior to January 5, 2015. None of his co-workers noticed anything about claimant being in pain or unable to work when he came to work on January 15, 2015. There was no evidence that claimant was limited in any way when he started work on January 5, 2015.

Claimant credibly testified that he thought the Nordstrom valve was moving and by his reaction in trying to stop it injured his shoulders. Claimant has not argued that the regular exertion of work at Keokuk caused his injury.

Ms. Nichols is the one who advised claimant that he should report the injury. (Ex. 31, p. 4) Ms. Nichols testified that she could tell claimant was in pain when he caught her attention. Claimant could not take his apron off with his right arm. The emergency room report of January 5, 2015 recorded a swollen shoulder. Dr. Jameson wrote claimant had a severe injury to his shoulder.

The evidence is that claimant was doing heavy physical labor that could not be performed with significant impairment to an arm or shoulder and that he could not have performed his work with a significant injury. There is absolutely no evidence that claimant injured his shoulders the week before his injury on January 5, 2015. The record shows claimant returned to work without any difficulties after the November 2014 work incident.

The defendants do not have the burden of proof in this case, claimant does. The defendants' defense is that the work injury did not happen in the way claimant said it did or that claimant was injured before January 5, 2015. That theory is not consistent with the medical evidence and testimony of claimant and testimony of Ms. Nichols. The record from co-workers and Dr. Jameson is that claimant could not perform the functions of his job with a serious injury to his shoulder. Dr. Hussain does not adequately explain how claimant's shoulder symptoms were lighted up on January 5, 2015, if according to his report claimant's condition was one brought about by aging or a degenerative process.

I find the reports of Dr. Jameson to be more convincing on causation. He saw the claimant relatively recently after his injury and provided extensive medical treatment. His opinion is consistent with the report of significant pain claimant reported, and that Ms. Nichols reported and reflected in the Fort Madison Hospital records of January 5, 2015. He, unlike Dr. Hussain, examined claimant.

Claimant has proven temporary disability to the right shoulder, left shoulder and carpal tunnel and cubital tunnel. He has proven permanent injury to this right and left shoulder.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

I find that claimant is entitled to healing period benefits from January 5, 2015 through January 15, 2016. Defendants stipulated in the hearing report that permanency benefits, if awarded, would commence on January 16, 2016.

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.

Claimant has an industrial disability.

Claimant worked for Keokuk since 2011. Claimant's age and education are not positive factors. He is limited to sedentary work. The vocational reports show that claimant's wage prospects in the Fort Madison area are much less than what he was earning at Keokuk. He has not done sales in a number of years. Claimant argues that his ability to engage in sales is limited due to anxiety. While I do not doubt that claimant has anxiety, there is no evidence from a mental health provider that the degree of anxiety would be a barrier to resuming work in sales. I previously found claimant had a 65 percent loss of earning capacity. Considering all the factors of industrial disability I find claimant had a 65 percent industrial loss which entitles him to 325 weeks of permanent partial disability benefits.

Claimant has requested a penalty in this case. Claimant has proven a denial of benefits. Iowa Code 85.13 provides in part:

> 4. a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination of benefits.
>
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.
>
> c. In order to be considered a reasonable or probable cause or excuse under paragraph "b", an excuse shall satisfy all of the following criteria:
>
> (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.
>
> (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.
>
> (3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

Claimant argues that the defendants did not undertake a reasonable investigation. While the holding in this case is contrary to the defendants' investigation, I cannot find under the law that defendants failed to conduct a reasonable investigation.

I do find that defendants failed to contemporaneously convey the reason for the delay or denial of benefits. The defendants did not provide claimant information about why the claim was being denied until February 2, 2015. From January 5th through February 1st is four weeks. Considering the length of delay I award a 40 percent penalty

for defendants' failure to comply with Iowa Code section 86.13. I believe that the award of 40 percent is appropriate to provide defendants incentive to comply with Iowa Code section 86.13 in the future. The penalty award is $1,059.55 [662.22 x 4 = $2,648.88| $2,648.88 x 40% = $1,059.55].

Claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. See, Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Defendants should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc., File No. 1020226 (App. February 27, 1995).

Defendants are responsible for the medical costs set forth in Exhibit 13 in the amount of $86,640.67. The defendants shall reimburse any provider directly and pay claimant his out-of-pocket expenses.

Defendants shall reimburse claimant's medical mileage in the amount of $531.94.

Claimant is awarded cost under 876 IAC 4.33 of the filing fee of $100.00.

ORDER

The parties are ordered to comply with all stipulations that have been accepted by this agency.

Defendants shall pay claimant healing period disability benefits commencing on January 5, 2015 through January 15, 2016 at the weekly rate of six hundred sixty-two and 22/100 dollars ($662.22).

Defendants shall pay claimant three hundred twenty-five (325) weeks of permanent partial disability benefits commencing on January 16, 2016 at the weekly rate of six hundred sixty-two and 22/100 dollars ($662.22).

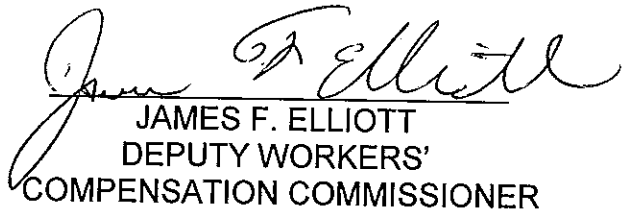
Defendants shall pay claimant a penalty of one thousand fifty nine and 55/100 dollars ($1,059.55).

Defendants shall pay claimant medical expenses as set forth in the decision.

Defendants shall pay claimant medical mileage of five hundred thirty-one and 94/100 dollars ($531.94) and costs of one hundred dollars ($100.00).

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 17th day of January, 2017.



JAMES F. ELLIOTT
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.