BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GAVIN COWAN,

Claimant,

vs.

IOWA STEEL & WIRE, INC.,

Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

FILED

MAR 14 2018

WORKERS COMPENSATION

File No. 5056223

ARBITRATION DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Gavin Cowan, claimant, filed a petition in arbitration seeking workers' compensation benefits from Iowa Steel & Wire and its insurer, Liberty Mutual Insurance, as a result of an injury he allegedly sustained on October 17, 2014 that allegedly arose out of and in the course of his employment. This case was heard in Des Moines, Iowa and fully submitted on August 1, 2018. The evidence in this case consists of the testimony of claimant, Cliff Jones, Joint Exhibit 1, Claimant's Exhibits 1 - 2, and Defendants' Exhibits A – K. Both parties submitted briefs.

ISSUES

Whether claimant sustained an injury on October 14, 2017 which arose out of and in the course of employment.

Whether claimant has a permanent disability.

The extent of claimant's disability.

Whether claimant is entitled to payment of an independent medical examination (IME).

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:

Gavin Cowan, claimant, was 35 years old at the time of the arbitration hearing. He graduated from high school and took a little over a semester on machine tech work at a local community college. He did not receive any degree or certificate. (Exhibit 2, page 4) Claimant testified he had worked with machines since age 12. (Transcript, p. 10) Claimant has worked for many different machine shops and companies, including several stints with a machine business that members of his family owned. (Ex. 2, pp. 5- 6) In addition to operating computer numerical control machines, claimant has worked in quality control, welding, fork truck operator and shipping and receiving. (Tr. p. 14) Claimant also worked seasonal road construction. (Tr. p. 17) In 2004 claimant worked for defendant Iowa Steel & Wire for about six months. (Ex. 2, p. 6) Claimant worked for Vermeer Manufacturing as a machinist and laborer in 2012 and 2013. Claimant testified that he can operate farm equipment and other equipment such as bulldozers and forklifts. He also acknowledged that he had some supervisory experience in a weld shop. (Tr. p. 112)

Claimant was rehired and started employment with Iowa Steel & Wire on May 21, 2014. (Ex. 2, p. 7; Tr. pp. 39, 136) According to Steven Aviles, M.D. claimant had a physical on that day for his work at Iowa Steel & Wire and passed. (Ex. I, p. 31) Claimant said that for the first couple of months he was flipping metal panels. The panels were approximately 8-10 feet in length and 4 feet wide and weighed about 30 pounds. (Tr. p. 84) Claimant and another employee would flip and stack panels. Claimant estimated he would stack about 100 panels per hour. (Tr. p. 72) The panels were at waist level and every other panel needed to be flipped. (Tr. p. 74) Claimant also worked as a bander during this time for Iowa Steel & Wire. Claimant stated that he would have to exert pressure, especially when a band got into a bind. (Tr. pp. 74, 75)

Claimant testified that he had medical issues with his right shoulder in October 1998. Claimant had significant swelling in his right arm and shoulder and was diagnosed with thoracic outlet syndrome (TOS). (Tr. p. 41) Claimant testified he has had three different surgeries to address the TOS. (Tr. p. 44) The first was in 2005, the second in 2010 and the third was in 2012. (Tr. pp. 45, 49, 52) Claimant testified that he had a satisfactory recovery after all of his surgeries and was able to continue his daily bow shooting hobby after each surgery. (Tr. p. 53) For the 2012 surgery claimant saw Robert Thompson, M.D. in St. Louis, Missouri.

Claimant began experiencing shoulder symptoms in October 2014. Claimant was feeling tingling in his forearm and fingers and did not have full range of motion in his arm. Claimant said the range of motion limitation was different symptoms than his

experience with his TOS. (Tr. p. 55) He contacted Dr. Thompson for an evaluation and was seen on October 17, 2017. Claimant had an ultrasound, venogram and angioplasty. Claimant testified that he had a collapsed vein. (Tr. pp. 56, 86; JE I, pp. 11-12) Claimant had another venogram in December 2014. (Ex. G, p. 22) Claimant was told to perform light duty for a period of time. (Ex. F, p. 18; Tr. p. 57) Iowa Steel & Wire was not able to accommodate the restriction. (JE 1, p. 12) Claimant said in mid-December he was told by Iowa Steel & Wire that it could not keep a job open for him and he was terminated. (Tr. p. 77) Claimant received unemployment benefits for a while. (Tr. p. 78) Clamant then worked on his home and did other construction. (Tr. p. 78) Claimant has owned a construction business since 2014. (Tr. p. 87) Claimant has applied for some positions and worked as a welder at Shivers for about 90 days. Claimant was terminated due to the number of doctor visits he had. (JE 1, p. 7) Claimant works at Hillphonex, a manufacturer that makes display cases and coolers, beginning approximately March 2017. (Tr. p. 132)

Claimant returned to Dr. Thompson in three weeks for a follow-up and was told his vein was fine. (Tr. p. 57) Claimant believed that something was not right and saw Dr. Thompson on July 30, 2015. (Tr. p. 58) Claimant was having limited strength and function in his right arm, especially overhead. (Ex. F, p. 20) Dr. Thompson told him there was nothing wrong with his vascular system and did not perform any testing. (Tr. p. 59)

Claimant went to the Mayo Clinic (Mayo) for evaluation on August 2015. (Ex. G, pp. 22 – 27; Tr. p. 59) At Mayo a number of tests were ordered including an MRI of the shoulder. The impression was "Right shoulder and arm pain with distal right arm swelling." (Ex. G, p. 24) The MRI revealed, "multifocal right glenoid labral tears and rotator cuff tendinopathy without tear." (Ex. G, p. 24) Claimant said that while one doctor at Mayo recommended shoulder surgery, surgery was ultimately not recommended based upon the risk of complication since he already had three shoulder surgeries. (Tr. pp. 62, 130; Ex. F, pp. 13, 14) Claimant said that he had received a cortisone shot and physical therapy for his shoulder. (Tr. p. 64)

Claimant testified that currently his main complaint about his shoulder was a limited range of motion when he reaches above his head. He described raising his arm at a 45 degree angle was painful. (Tr. p. 66) Claimant said that he has given up bow shooting.

Claimant did not recall that he had seen Kathleen Lange, M.D. in February 2014 for right arm pain. (Tr. p. 93; Ex. D, p. 8) Claimant was working for Vermeer Manufacturing during this time. (Tr. p. 108) The notes of the February 24, 2014 appointment with Dr. Lange identified that the claimant was having right arm pain and he was assessed with right arm swelling. (Ex. D, p. 8) Claimant additionally did not remember seeing Dr. Lange for right arm pain, which was also in his neck, on October 6, 2014. The notes of this visit show claimant was experiencing right arm pain for about two weeks. (Tr. p. 95; Ex. D, pp. 9, 10) Claimant admitted that the first physician that related his injury to his work at Iowa Steel & Wire was Matthew Pingree, M.D. at the Mayo Clinic. (Tr. p. 101) Claimant told Dr. Pingree that he used

250 pounds of force up to 700 times a day while working for Iowa Steel & Wire. (Tr. pp. 103, 104) Claimant said that the 250 pounds of force was an estimate and what he meant was that he had to use all the force he had when a band was stuck. (Tr. pp. 124 - 126) Claimant also admitted in his deposition that the 700 number was not accurate and that he would pull with his maximum force rather than 250 pounds of force. (JE 1, p. 10)

Cliff Jones, Human Resource and Safety Manager at Iowa Steel & Wire testified. While claimant was working at Iowa Steel & Wire he was unaware that claimant was claiming a work injury to his shoulder. (Tr. p. 139) Mr. Jones testified that the maximum force needed to pull through stuck bands was 60 pounds based upon measurements. (Tr. p. 140) He said that the average force required was about 35 – 40 pounds. (Tr. p. 141) Claimant's job title was Eight Foot Welder Bander. The job description stated that in this position carrying up to 50 pounds was required. I find that Mr. Jones' description of the force required to perform claimant's work is the force claimant used in his work at Iowa Steel & Wire.

On April 15, 2016, Sunil Bansal, M.D. performed an independent medical examination (IME). Dr. Bansal performed a medical examination and reviewed a number of treatment records. Dr. Bansal's diagnosis was, "SLAP tear and inferior glenolabral tear. Rotator cuff tendinopathy." (Ex. 1, p. 8) Dr. Bansal found claimant to be at maximum medical improvement (MMI) as of January 8, 2016. Dr. Bansal found that claimant's work at Iowa Steel & Wire, specifically the force he used to pull the bands, was the cause of his shoulder injury. (Ex. 1, pp. 8, 9) Dr. Bansal recommended restrictions of no lifting greater than 40 pounds to table level, 10 pounds table to shoulder level and no lifting overhead. He also recommended that claimant not perform frequent pushing or pulling with the right arm and not to pull or push greater than 80 pounds with the right arm. (Ex. 1, p. 9) Dr. Bansal charged claimant $2,488.00 for the IME. He charged $375.00 for the exam and $2,113.00 for the record review and report. (Ex. 1, p. 11)

On March 27, 2017, Steven Aviles, M.D. performed an IME. Dr. Aviles performed a medical examination as well as reviewing medical records. Dr. Aviles noted the treatment claimant received at Mayo. Dr. Aviles noted that while at Mayo in August 2015, Holly Duck, M.D. diagnosed claimant with a SLAP tear, but was unable to determine if the SLAP tear was the main source of his pain. Dr. Aviles noted Dr. Duck performed an injection which did not show that the SLAP tear was the primary source of his pain. (Ex. I, p. 32) Dr. Aviles's diagnosis was, "Right shoulder scapular dyskinesis and winging with possible long thoracic nerve palsy." (Ex. I, p. 33) Dr. Aviles opined that claimant's shoulder pain was not related to his work at Iowa Steel & Wire. He did not believe that the 4 - 1/2 months of working for Iowa Steel & Wire was sufficient for development of a chronic repetitive stress injury. (Ex. I, p. 35) Dr. Aviles provided no restrictions and because he did not believe it to be a work related injury, he provided a zero impairment rating. (Ex. I, p. 35)

I find claimant's gross wage to be $655.33, he was single and entitled to 1 exemption. Claimant's weekly workers' compensation rate for this claim is $410.62

RATIONALE AND CONCLUSIONS OF LAW

The evidence shows that claimant has an injury to his right shoulder. Claimant has limitation in the use of his right shoulder. Claimant had three surgeries to his right shoulder due to his TOS. His last surgery for this condition was 2012. The last examination by Dr. Thomas in May did not show that he was having symptoms of TOS.

The first issue to address is whether claimant has proven he has a permanent impairment that arose out of and in the course of his employment with Iowa Steel & Wire.

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

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

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)

Claimant has an injury to his right shoulder. Claimant was employed at Iowa Steel & Wire.

The deciding issue is whether claimant has proven his injury arose out of his employment. Dr. Aviles has stated that claimant's shoulder injury is related to the thoracic outlet syndrome and subsequent three surgeries[1]. Dr. Bansal opined that claimant's current shoulder problems are a result of his work doing repetitive work at Iowa Steel & Wire.

I find the opinions of Dr. Aviles more convincing as to whether claimant had an injury that arose out of his employment at Iowa Steel & Wire.

Dr. Aviles's IME is much more thorough in evaluating the medical testing performed upon the claimant. His report notes that the shoulder injection claimant had at Mayo should have provided relief if the shoulder tears were the cause of his pain. The injection did not provide the expected relief. Dr. Aviles also reviewed a number of orthopedic tests done on the claimant and opined that they did not show that his shoulder tears were generating his pain or restrictions.

Dr. Bansal did not review or mention the February 24, 2014 office visit that claimant had with Dr. Lange concerning shoulder pain. Dr. Bansal's opinion was much more conclusory that of Dr. Aviles. Dr. Bansal relied upon claimant's description of force he used, which is much more than the actual force claimant used.

Claimant has not met his burden of proof that his injury arose out of his employment.

Claimant has requested reimbursement of the IME performed by Dr. Bansal. Dr. Bansal's IME was performed before the defendants obtained a rating by a physician that they retained. Claimant is not entitled to payment for this IME under Iowa Code section 85.39.

Iowa Code section 86.40 states:

> **Costs.** All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

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[1] Dr. Aviles also stated that given the 4 - 1/2 month employment claimant had with the employer, claimant would not have developed a repetitive use syndrome. That is an incorrect analysis of causation under Iowa law. As the court in Meyer noted, even the short period of time that claimant worked for IBP could result in a compensable carpal tunnel work injury. I found however, that claimant has failed to show that his injury arose out of his employment at Iowa Steel & Wire.

Iowa Administrative Code Rule 876—4.33(86) states in part:

> **Costs.** Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be . . . (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

The Iowa Supreme Court provided guidance on whether the full cost of an IME may be taxed as a cost pursuant to rule 876 IAC 4.33 if that IME does not qualify for reimbursement under Iowa Code section 85.39. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, (Iowa 2015). In Young, the Court clarified that rule 876 IAC 4.33 allows only for the taxation of costs "incurred in the hearing." A physician's report becomes a cost incurred in a hearing when it is used as evidence in lieu of the doctor's testimony. However, the Court has indicated that the report is separate from the examination. The Court indicated that if an injured worker sought reimbursement for an IME, the provisions established by the legislature, under Iowa Code section 85.39, must be followed. Only the costs associated with preparation of the written report of a claimant's IME can be reimbursed as a cost at hearing under rule 876 IAC 4.33. (Id., pp. 846-847)

As claimant did not prevail on any issues, I decline to award him any costs.

ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing further.

Each party shall pay their own costs.

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

Signed and filed this 14th 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.