

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DEBRA BREEDEN,
Claimant,

vs.

JOHN DEERE DAVENPORT WORKS,
Employer,
Self-Insured,
Defendant.

File No. 5047097

ARBITRATION
DECISION

Head Note Nos.: 1801, 1803, 3003

STATEMENT OF THE CASE

Claimant, Debra Breeden, filed a petition in arbitration seeking workers' compensation benefits from John Deere Davenport Works (Deere), self-insured employer. This case was heard in Davenport, Iowa on February 18, 2015 with a final submission date of March 23, 2015.

The record in this case consists of claimant's exhibits 1-12, defendant's exhibits A-I, and the testimony of claimant, Robert Oney, and Brian Lovaas.

An amendment was filed in this matter changing the date of injury from July 1, 2012 to May 18, 2012. There was no objection to the amendment. The amendment was granted orally at hearing.

ISSUES

1. Whether the injury is a cause of permanent disability; and if so
2. The extent of claimant's entitlement to permanent partial disability benefits.
3. Rate.
4. The extent of claimant's entitlement to temporary partial disability benefits.

FINDINGS OF FACT

Claimant was 50 years old at the time of the hearing. Claimant's prior medical history is relevant. Claimant was assessed in 2002 as having a right carpal tunnel syndrome. (Exhibit I) There is no evidence claimant had any permanent impairment or permanent restrictions from this problem.

Claimant worked at Deere as an assembler. Claimant assembled air conditioning units. Claimant also built antennas. Claimant said the job was hard on her right upper extremity. She said she used pliers to open and place hose clamps. Claimant estimated she placed approximately 200 hose clamps per day. Claimant said using the pliers on the hose clamps required a lot of pressure to squeeze the pliers to open the clamps.

Claimant said she told a supervisor she was having difficulty using pliers on hose clamps. She said a mechanical engineer at Deere modified her pliers in an attempt to make the job easier. Claimant said the ergonomic director at Deere also discussed getting a tool to help claimant with her job, but the tool was never ordered.

On June 21, 2012 claimant was evaluated by Tyson Cobb, M.D. with complaints of paresthesia in the right upper extremity. Claimant was assessed as having a right elbow medial epicondylitis and a right cubital tunnel and carpal tunnel syndrome. Claimant was given a splint to wear at work and referred to physical therapy. (Ex. 5, pp. 45-46)

Claimant returned to Dr. Cobb on July 20, 2012. Claimant noticed some improvement but still had numbness and tingling in the fingers of her right hand. (Ex. 5, p. 47)

Claimant underwent conservative treatment from August to September of 2012. Surgery was discussed and chosen as a treatment option in September of 2012. (Ex. 5, pp. 48-49)

On September 20, 2012 claimant underwent a De Quervain release, a carpal tunnel release, transposition of the ulnar nerve and a partial denervation at the medial elbow on the right arm. Surgery was performed by Dr. Cobb. (Ex. 6)

Records from Dr. Cobb indicate claimant had a lot of pain and discomfort immediately after surgery. Claimant had a nerve block for pain. She was given pain medications. (Ex. 5, p. 51)

Claimant followed up with Dr. Cobb on September 25, 2012. Claimant's pain had improved. Claimant was returned to work with no use of the right arm. (Ex. 5, p. 52)

Claimant returned to Dr. Cobb in followup in October of 2012 through December of 2012. Claimant was gradually returned to work with limited use of the right arm. Records indicate claimant was pleased with her progress. (Ex. 5, pp. 50-56)

Claimant returned to Dr. Cobb on January 22, 2013. Claimant had occasional pain. She was found to be at maximum medical improvement (MMI). Claimant was returned to work with no restrictions. (Ex. 5, p. 57)

In a January 29, 2014 letter, Dr. Cobb indicated claimant's grip strength on the right was 80 pounds compared with 70-pound grip strength on the left. Dr. Cobb opined claimant had no permanent impairment rating. (Ex. 5, p. 58)

Claimant said when she saw Dr. Cobb last, she had not yet returned to work at full duty. She said when she saw Dr. Cobb last, she had been working under restrictions. Claimant said that after a visit with Dr. Cobb, she returned to work with no restrictions.

In an April 1, 2014 report Robert Milas, M.D. gave his opinions of claimant's condition following an independent medical evaluation (IME). Claimant's left grip strength was 80 pounds. Her right grip strength was 60 pounds. Dr. Milas found claimant had a 10 percent permanent impairment to the right upper extremity based on table 16-34, page 509 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. He recommended claimant avoid occupations involving repetitive activity with the right upper extremity. (Ex. 2)

In a November 21, 2014 report, Christine Deignan, M.D. gave her opinions of claimant's condition following an IME. Testing found claimant had a maximum grip strength of 60 pounds on the right and 86 pounds on the left. Claimant complained of tingling in fingers on the right and weakness in the right wrist. Claimant also complained of pain in the right elbow. Dr. Deignan found claimant had full range of motion in the right upper extremity. Dr. Deignan believed claimant was exerting less than maximum effort on grip strength. She also believed claimant's hypothyroidism might be a condition causing claimant's difficulties with her nerves. Dr. Deignan found claimant had no permanent impairment to the right upper extremity. (Ex. B)

Claimant testified she still works as an assembler. She said she lacks strength in her right hand. Claimant wears a brace at work if she is having pain. Claimant takes over-the-counter medication for pain.

Claimant says she notices pain in the right elbow when using power tools. She also notices pain in the right wrist when grabbing items.

Claimant testified she believes she earned \$15.455 per hour. She testified she normally receives an annual bonus. (Tr. p. 39)

Robert Owney testified he is claimant's supervisor. He said from August 2013 through October 2014 claimant installed glass in cabs. Mr. Owney said he never observed, or heard of, claimant having trouble with her arm due to work. He said claimant did not use pliers to install glass.

Brian Lovaas testified he is a payroll manager with Deere. In that capacity he is familiar with the payroll records at Deere. He testified as a payroll manager he is able to interpret claimant's payroll records found at Exhibits E and 8.

Mr. Lovaas said CIPP stands for continuous improvement payment plan. It is incentive pay for employees that are on a CIPP team. Mr. Lovaas testified CIPP is paid every six months, two times a year. A CIPP team needs to meet 115 percent of a production goal to qualify for CIPP payment. Mr. Lovaas testified claimant also received a bonus from a profit sharing plan. He said that how much a profit sharing bonus an employee at Deere receives is based on hours worked, average earnings, and company profitability. He said a profit sharing payout is not guaranteed. He said in order for an employee to get a profit sharing bonus, the company needs to show a profit, and the profit sharing bonuses need to be approved by the Deere Board of Directors. Mr. Lovaas testified there have been years, when he worked in payroll, that employees did not receive a bonus for profit sharing. He said a profit sharing bonus varies from year to year.

Mr. Lovaas testified that for the year of 2012 claimant was paid a total of \$5,098.57 for CIPP payments. (Tr. pp. 94-96) Claimant was paid the following amounts for the weeks ending from December 11, 2011 through May 13, 2012.

WEEK ENDING	HOURS WORKED	TOTAL
5/13/12	60	1113.40
5/6/12	49.58	920.02
4/22/12	59	1094.85
4/15/12	45	834.99
4/8/12	36	667.99
4/1/12	40	742.21
3/25/12	44	816.43
2/12/12	48	893.08
2/5/12	37	688.43
1/29/12	48.5	902.40
1/15/12	41	762.94
12/18/11	36	669.89
12/11/11	47	874.59

TOTAL \$10,981.22

For the weeks from November 4, 2012 through January 20, 2013 claimant had the following gross income.

WEEK ENDING	GROSS INCOME
11/4/12	682.10
11/11/12	682.10
11/18/12	666.50
11/25/12	669.89
12/2/12	694.83
12/9/12	706.16
12/16/12	1605.83
12/23/12	529.17
12/30/12	573.24
1/6/13	605.62
1/13/13	788.05
1/20/13	627.37

These figures are based on Exhibit E, descriptor indicator (912). Mr. Lovaas testified at hearing that a part of claimant's gross compensation is the \$3.70 paid per week used for legal services. He said these figures are not actually a part of claimant's gross compensation. (Tr. p. 62)

CONCLUSIONS OF LAW

The first issue to be determined is if claimant's injury is a cause of a permanent disability.

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 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 contends her injury resulted in a permanent disability. Defendant contends claimant has no permanent disability from her injury. Claimant had a repetitive motion injury with a date of injury of May 18, 2012. On September 30, 2012 claimant underwent surgery for the right arm consisting of a De Quervain release, a carpal tunnel release, transposition of the ulnar nerve and a partial denervation on the medial elbow. Surgery was performed by Dr. Cobb.

Claimant underwent conservative care for several months. Claimant was not to return to work at full duty until January of 2013, approximately four months after surgery.

Dr. Cobb found claimant had no permanent impairment. Other than the differences in grip strength, it is unclear how Dr. Cobb arrived at this opinion. Claimant testified her evaluation with Dr. Cobb was done before she returned to work at full duty, and is not an accurate evaluation of claimant's current condition. Given these concerns with Dr. Cobb's opinion, it is found his opinion regarding permanent impairment is not convincing.

Dr. Deignan also opined claimant had no permanent impairment. Dr. Deignan is the Workers' Compensation Medical Director of Health Services at John Deere. (Ex. B, p. 6) She suggests claimant's continued numbness and pain might be due to claimant's hypothyroidism. There is no evidence in the record this is actually the case. Because Dr. Deignan is John Deere's company doctor, and because of her opinion regarding claimant's upper extremity problems possibly related to her thyroid condition, the opinions of Dr. Deignan regarding impairment are also found not convincing.

Dr. Milas found claimant had a 10 percent permanent impairment to the right upper extremity. This is based, in part, on a finding that claimant had less grip strength on the right than left. Claimant is right-hand dominant. This finding is consistent with a

loss of grip strength found in Dr. Deignan's IME. I am able to follow Dr. Milas' report and understand how he found claimant had a permanent impairment. Dr. Milas' report is consistent with the testimony of claimant. Based on this, it is found Dr. Milas' opinion regarding permanent disability is more convincing than the opinions of Drs. Cobb and Deignan.

Claimant had surgery to her right upper extremity consisting of four different procedures. Claimant credibly testified she continues to have pain and numbness in her right arm approximately two and a half years after surgery. Claimant takes over-the-counter medications for pain. Dr. Milas opined claimant had a permanent impairment from her May of 2012 injury. Based on the above, claimant has carried her burden of proof she has a permanent disability from her May 18, 2012 injury.

The next issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

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) 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).

The only opinion regarding permanent impairment was that offered by Dr. Milas. He found claimant had a 10 percent permanent impairment to the right upper extremity. Claimant is entitled to 25 weeks of permanent partial disability benefits (10 percent times 250 weeks).

The next issue to be determined is rate.

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

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately

preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6).

The 13 weeks that should be used in determining claimant's average weekly wage, and the hours claimant worked during those weeks are as follows:

WEEK ENDING	HOUR	TOTAL
5/13/12	60	1113.40
5/6/12	49.58	920.02
4/22/12	59	1094.85
4/15/12	45	834.99
4/8/12	36	667.99
4/1/12	40	742.21
3/25/12	44	816.43
2/12/12	48	893.08
2/5/12	37	688.43
1/29/12	48.5	902.40
1/15/12	41	762.94
12/18/11	36	669.89
12/11/11	47	874.59

TOTAL \$10,981.22

The parties generally agree to the dates and the hours with two exceptions. Regarding the week ending April 1, 2012, defendant's table indicates claimant worked 40 hours while claimant's table indicates claimant worked 44 hours. (Ex. D; Ex. 8) Defendant's table finding claimant worked 40 hours the week ending April 1, 2012 appears correct based on Exhibit E, page 24 (See column headed "120401" for line 176). Defendant also used the week ending March 25, 2012 when claimant worked 44 hours. (Ex. E, p. 24) It is unclear why claimant chose not to include this week in her calculation for rate.

Along with the chart detailed above, there are three other areas that can be used to calculate claimant's average weekly rate.

First, claimant's straight time. Claimant's rate calculation uses a base rate of \$21.00 per hour. (Ex. 8) It is unclear where this figure comes from using Exhibit E. Claimant testified at hearing she believes she earned \$15.455 dollars an hour. (Tr. p. 27) Based on Exhibit E, this also appears to be an incorrect figure. Based on Exhibit E and 8, it appears claimant was actually paid approximately \$18.55 an hour. For example, the week ending April 1, 2012 claimant earned straight time earnings of \$816.43 per week for 44 hours per week. (Ex. E, p. 24) This results in an hourly wage of approximately \$18.55 per hour ($816.43 \div 44$). See also pages 21 and 27.

The second piece of determining claimant's average weekly wage is claimant's CIPP pay. Defendant agrees claimant's CIPP pay should be included in her average weekly wage. (Defendant's post-hearing brief, p. 15)

Defendant indicates there are weeks, in the 13 weeks used in calculating claimant's AWW, where claimant has a negative CIPP balance. For example, if an employee's CIPP team does not meet 115 percent production, money is deducted from an employee's CIPP earnings. (Tr. pp. 72-76; Defendant's post-hearing brief, p. 6)

Defendant suggests in those weeks where claimant has a negative CIPP balance, that negative balance should be subtracted from claimant's straight rate to accurately calculate claimant's AWW. (Defendant's post-hearing brief, pp. 16-17)

This cannot be correct. While it may be true a negative CIPP balance for a week effects claimant's overall CIPP payments, for a six-month period, a negative CIPP payment for a period is not subtracted from an employee's hourly straight time earnings. In short, the record does not support, for example, claimant's straight time earnings for the week of May 13, 2012 were \$1,089.98 because of a negative \$23.42 CIPP balance for that week. Claimant's straight time earnings for the week of May 13, 2012 were \$1,113.40, not \$1,089.98.

I am unable to calculate what claimant's total CIPP earnings were for the 13 weeks at issue. This is because, in part, I am unsure how the line for the adjusted CIPP payment affects the total CIPP payment claimant received. (Ex. E, p. 28, three-digit code descriptor "274" and "275")

Mr. Lovaas did testify at hearing that claimant's yearly CIPP total was \$5,098.57. (Tr. pp. 94-95) Divided by 52, this results in an average weekly CIPP earning of \$98.05. (Tr. 95-96) As defendant agrees CIPP payments should be added to a claimant's AWW, the average weekly CIPP payment of \$98.05 needs to be added in calculating claimant's AWW.

The third potential piece for calculating claimant's AWW would be any profit sharing bonuses claimant received. Defendant contends any profit sharing claimant received in 2012 should not be considered, in part, as the profit sharing bonuses are not recurring payments, and these are irregular bonuses. (Defendant's post-hearing brief, p. 14)

Case law suggests a bonus that is regularly paid for an employee may be considered as a part of an employee's AWW. Menard v. Scheffert, No. 14-1029, filed December 24, 2014 (Iowa Ct. of Appeals); Pella Corp. v. Minar, No. 13-1616, filed August 13, 2014 (Iowa Ct. of Appeals). There is little evidence the profit sharing bonus was routinely paid to claimant. Claimant did testify she normally receives an annual bonus. (Tr. p. 39) It is unclear from the record if claimant believes this annual bonus to be a profit sharing bonus or a CIPP payment. The records found at Exhibit E are also very confusing as to what the exact amounts of the profit sharing bonus claimant received for 2012. For these reasons, claimant has failed to carry her burden of proof the profit sharing bonus should be included in the calculation of claimant's AWW.

To summarize, for this case, claimant's AWW is determined by her base pay plus her CIPP pay, as detailed below.

WEEK ENDING	HOUR	TOTAL
5/13/12	60	1113.40
5/6/12	49.58	920.02
4/22/12	59	1094.85
4/15/12	45	834.99
4/8/12	36	667.99
4/1/12	40	742.21
3/25/12	44	816.43
2/12/12	48	893.08
2/5/12	37	688.43
1/29/12	48.5	902.40
1/15/12	41	762.94
12/18/11	36	669.89
12/11/11	47	874.59

SUBTOTAL \$10,981.22

+

CIPP (98.05 × 13) 1,274.65

TOTAL 12,255.87

AWW \$942.76

Claimant's AWW is \$942.76 per week. Claimant was married with two exemptions. Her rate is \$612.98.

The final issue to be determined is the extent of claimant's entitlement to temporary partial disability benefits.

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).

The parties agree regarding the period that claimant should be paid temporary partial disability benefits. Those figures, along with claimant's gross income for those weeks are as follows:

WEEK ENDING	GROSS INCOME
11/4/12	678.40
11/11/12	678.40
11/18/12	662.80
11/25/12	666.19
12/2/12	691.13
12/9/12	702.46
12/16/12	1,602.13
12/23/12	525.47
12/30/12	573.24
1/6/13	605.62
1/13/13	784.35
1/20/13	623.67

These figures are based on Exhibit E, descriptor indicator (912). Mr. Lovaas testified in a hearing that part of claimant's gross compensation is the \$3.70 paid per week for legal services. He testified this figure is not actually a part of claimant's gross compensation. The figures used above were arrived at by subtracting \$3.70 from the gross compensation line.

Based upon the above table, defendant is to pay temporary partial disability benefits based on the gross income figures detailed above using the AWW of \$942.76 per week. Defendant shall be given a credit for temporary partial disability benefits previously paid.

ORDER

THEREFORE IT IS ORDERED:

That defendant shall pay claimant temporary partial disability benefits using the average weekly wage of nine-hundred forty-two and 76/100 dollars (\$942.76) per week, combined with the actual earnings tables as detailed above.

That defendant shall receive a credit for temporary partial disability benefits previously paid.

That defendant shall pay claimant twenty-five (25) weeks of permanent partial disability benefits at the rate of nine-hundred forty-two and 76/100 dollars (\$942.76) per week commencing on January 22, 2013.

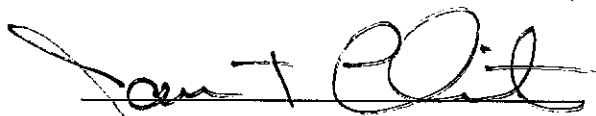
That defendant shall pay accrued benefits in a lump sum.

That defendant shall pay interest on unpaid weekly benefits as awarded above and as set forth in Iowa Code section 85.30.

That defendant shall pay the costs of this matter.

That defendant shall file subsequent reports of injury as required under rule 876 IAC 3.1(2).

Signed and filed this 27th day of April, 2015.


JAMES F. CHRISTENSON
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.