BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ALAN STREICHER, Claimant, vs. CNH INDUSTRIAL AMERICA, LLC, Employer, and INDEMNITY INSURANCE COMPANY OF N. AMERICA, Insurance Carrier, Defendants.	FILED APR 29 2019 WORKERS COMPENSATION	File Nos. 5065714, 5065715 ARBITRATION DECISION Head Note Nos.: 1803, 2401, 2402, 2801, 2803

STATEMENT OF THE CASE

Alan Streicher, claimant, filed a petition in arbitration seeking workers' compensation benefits against CNH Industrial America, LLC, employer, and Indemnity Insurance Co. of N. America, insurer, for alleged work injury dates of December 30, 2015 and August 20, 2016.

This case was heard on March 11, 2019, in Des Moines, Iowa. The case was considered fully submitted on March 11, 2019. The parties were extended the opportunity to brief which was declined.

The record consists of Joint Exhibits 1-4; Claimant's Exhibits 1-2; Defendants' Exhibits AA-DD, A-B, and the testimony of claimant.

ISSUES

File No. 5065714

Whether the alleged injury was a scheduled member injury to the bilateral arms or whether the alleged injury was a scheduled member injury to the right arm;

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

Whether there is lack of timely notice under Iowa Code section 85.23;

Whether the claim is untimely under Iowa Code section 85.26;

Whether claimant is entitled to future medical treatment.

File No. 5065715

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

Whether there is lack of timely notice under Iowa Code section 85.23;

Whether the claim is untimely under Iowa Code section 85.26;

Whether claimant is entitled 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.

File No. 5065714

The parties agree that the commencement date for permanent partial disability benefits, if any are awarded, is December 31, 2015. They further agree that at the time of the alleged injury of December 30, 2015, claimant's gross earnings were $1,412.36 per week, that he was married and entitled to four exemptions. Based on the foregoing numbers the weekly benefit rate is $884.09.

File No. 5065715

The parties agree that the alleged injury as to the bilateral arms and that the commencement date for permanent partial disability benefits, if any are awarded, is August 21, 2016.

At the time of the alleged injury, the claimant's gross earnings were $1,486.80 per week. The claimant was married and entitled to four exemptions. Based on those foregoing numbers the weekly benefit rate is $926.30.

FINDINGS OF FACT

Claimant, Alan Streicher, was a 49-year-old man at the time of the hearing. At all relevant times hereto, he was married with two children.

His educational history includes high school graduation followed by business courses and welding classes. No degrees were obtained. His past work history includes

a stint at a gun manufacturing plant where handguns and rifles were produced. He worked at another small factory running CNC machines. He also mowed lawns and served as an EMT.

His medical records show a diagnosis of bilateral lateral epicondylitis, ulnar nerve entrapment at the right elbow and possible early carpal tunnel of the right wrist. (Exhibit CC:1) On or about May 30, 2001, he underwent a right carpal tunnel release and a left anterior transfer of the ulnar nerve. (Ex. CC:2) There was a settlement for a work related injury to the back.

In December 2015, he was a plasma operator. His duties included placing a piece of metal on a table which would then be sent through the plasma to be cut into smaller pieces. Once the sheets of metal were cut, he walked up a set of stairs and picked up the cut metal pieces and placed them in a plastic box. The cut metal pieces weighed from 5 to 26 pounds each. There were 50-70 pieces per sheet.

In August 2016, his job changed and instead of throwing the pieces into a plastic container which would then go through another machine, he would place them on a wooden pallet which would be sent through a sandpaper machine.

He was required to do this 10 to 12 hours per day and 5 to 6 days per week.

In late 2015, he contracted a sinus infection and took himself to his family doctor, Kurtis Davis, M.D., on December 30, 2015. At the end of the examination, claimant mentioned that he was having pain in his right elbow. Dr. Davis suggested that the pain may be due to repetitive work and diagnosed claimant with right lateral epicondylitis as well as left hand-trigger finger symptoms. (JE 1:4) Claimant testified that he reported this to the company nurse who provided elbow straps and advised him to ice and take ibuprofen as necessary.

He had a follow-up visit with Dr. Davis on April 27, 2016, wherein he relayed that the elbow pain radiated to the forearm and was aggravated by repetitive movements at work. (JE 1:6) Dr. Davis performed an injection. (JE 1:7)

The injection had some palliative effect but not a lasting one. A second injection was administered on July 21, 2016. (JE 1: 12) On August 31, 2016, claimant filled out a work-related incident report alleging injury to both elbows. (CE 1:1) Personally, claimant believed both elbow pains were from the repetitive work he performed.

Claimant consulted with Terry O'Neal-Cox, M.D., on October 14, 2016. (JE 2:2) In the history, it was noted that claimant's onset of pain was August 20, 2016. Id. The pain level was an 8 on a 10 scale for the right and 2 on a 10 scale for the left. (JE 2:2) X-rays were taken which showed mild bilateral degenerative changes but no other abnormalities. (JE 2:1) Dr. O'Neal-Cox diagnosed claimant as suffering from bilateral lateral epicondylitis; worse on the right than the left. (JE 2:4) Dr. O'Neal-Cox fitted claimant with elbow straps, assigned modified duty and ordered physical therapy (PT). (JE 2:4) Restrictions included limiting lifting, pushing, pulling to 20 pounds, no prolonged

firm grasping with the right upper extremity and no operating hazardous machinery or company vehicles. (JE 2:5)

After approximately a month of PT, claimant's condition had improved. (JE 2:6)

> Left Upper Arm: The upper arm examination is normal.
>
> Right Upper Arm: The upper arm examination is normal.
>
> Left Elbow: An abrasion is not present. He wore PT tape from lateral mid-upper arm the the [*sic*] third and 4th MCPJ, Erythema is not present. Fasciculations are not present. Pain on motion is not present. Pain to palpation is present over the lateral epicondylar area. Range of motion is normal. Strength is limited. Swelling is not present.
>
> Right Elbow: Same as the left elbow, except pain on deep palpation ROM against opposing force is scaled at 6/10, Strength is limited.
>
> Flexion strength is 2+/5. Supination strength is 2+/5. Pronation strength is 2+/5.
>
> Left Forearm: Distal to the epicondyle is normal.
>
> Right Forearm: Same as left forearm.
>
> Neurological: The neurological examination is normal.

Id.

Work restrictions were eased but not eliminated and claimant was instructed to continue with PT. Id. The new work restrictions included no pushing, pulling, lifting over 40 pounds. (JE 2:8)

Claimant was seen by Aaron Wesp, M.D., on February 24, 2017, for pain in the bilateral elbows. (JE 1:19) Claimant sought injections in both arms. There was tenderness noted in the bilateral lateral epicondyle. Id.

Claimant returned to Dr. O'Neal-Cox on May 10, 2017. He continued to report pain in the bilateral elbows and bilateral hands. (JE 2:9) He assigned a pain level of 8 on a 10 scale and reported increased pain with repetitious work. Id. Claimant was referred to an orthopedic specialist for evaluation, but his work status was recommended to be regular duty. Id.

On May 24, 2017, claimant was seen by Derek L. Breder, M.D. (JE 3:1) On this visit, claimant reported the pain to be 4 or 5 on a 10 scale. (JE 3:1) The pain was constant, interfered with sleep, and aggravated by grasping, gripping, shaking, and repetitive use or activity. (JE 3:1) On examination he had tenderness with palpation on the lateral epicondyle on the right as well as radial head tenderness. (JE 3:3) His range

of motion was largely normal and he showed no signs of carpal tunnel. (JE 3:4) On the left, his examination was largely normal but for lateral epicondyle tenderness. Id. Dr. Breder recommended bilateral epicondyle steroid injections, referral for occupational therapy, and a return to work without restrictions. (JE 3:5)

Claimant returned for a follow-up visit with Dr. Breder on August 14, 2017. (JE 3:9) Claimant maintains that his condition was unchanged even with the physical therapy. Id. The physical examination had essentially the same findings as was documented in the May 24, 2017 visit. (JE 3:11)

Dr. Breder advised claimant of the chronic intermittent nature of this injury. No further course of steroid injections was recommended as it would put claimant at risk for tendon injury or rupture. Instead, platelet-rich plasma (PRP) injections were proffered. (JE 3:12) Dr. Breder returned claimant to work with no restrictions, despite claimant's reports that the repetitive work aggravated claimant's symptoms, and assigned zero percent impairment rating. (JE 3:14)

The PRP injections were approved and administered on September 8, 2017. (JE 3:15) On October 11, 2017, claimant returned to Dr. Breder and reported a one week period of relief following the injections but that the pain and numbness had returned. (JE 3:16) Again, the physical examination was unchanged from the May 24, 2017 visit. (JE 3:18) Dr. Breder admitted that there was no other treatment that he could offer. He recommended at least two years of non-operative management before considering surgery. (JE 3:19) Dr. Breder recommended claimant consider finding a different job that does not require so much repetitive work but claimant stated that that was not an option. (JE 3:19)

Claimant was advised to return if in two years the symptoms had not resolved or they had worsened to the point that he could no longer do his job. (JE 3:19) Dr. Breder placed claimant at maximum medical improvement with no permanent restrictions. Id.

Claimant did return to Dr. Breder on June 20, 2018 with continued pain and discomfort. (JE 3:20) Claimant's pain was 4 on a 10 scale and gradually worsening. With certain movements pain level could increase to 7 on a 10 scale. Work, particularly repetitious work, aggravated his condition. Id. Dr. Breder's examination resulted in the same findings that he recorded in the May 24, 2017 visit with the claimant. (JE 3:22) Dr. Breder administered injections but cautioned the claimant that these were the last that he would perform. (JE 3: 23) Claimant was returned to work without restrictions.

In a letter dated March 7, 2019, Dr. Breder opined that the claimant's bilateral epicondylitis was materially aggravated by his repetitious work at the defendant employer. (JE 4:1) In another letter with the same date, Dr. Breder agreed that the claimant may require surgical intervention in the future. (JE 4:2)

Between October 2016 and July 2017, claimant underwent physical therapy. When he was discharged in August 2017, it was noted the claimant had made poor

progress with physical therapy and demonstrated moderate exacerbation of symptoms. His progress had plateaued and he was referred back to the care provider. (CE 2:1)

Currently claimant has pain and burning sensation in his bilateral elbows and forearms. He takes prescription medications which were recommended for reasons not related to his arms. He is working in a similar job with no restrictions.

CONCLUSIONS OF LAW

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 Rule of Appellate Procedure 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 Elec. 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 defendants have admitted that the claimant sustained a right elbow injury arising out of and in the course of his employment. The claimant maintains that he has sustained a bilateral injury to both arms.

There are two petitions, both alleging injuries to the bilateral extremities. Both petitions were filed on March 21, 2017. The only difference is the injury date pled. The injuries claimant has suffered are cumulative. When the injury develops gradually over time, the cumulative injury rule applies.

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).

Claimant first reported right elbow pain on December 30, 2015. His family practice doctor suggested that the pain may be due to his work and diagnosed the claimant with right lateral epicondylitis as well as left hand trigger finger symptoms. The condition did not prevent claimant from working and he returned to work until April 27, 2016. At that time, he sought treatment with his family practice doctor for the right elbow. There was no mention of left elbow pain. It was not until the injury report filed on August 31, 2016, that claimant made mention of a bilateral injury inclusive of his left upper extremity. After that date, claimant began receiving treatment for the bilateral upper extremity issues. Dr. Breder confirmed that the bilateral injuries were the result of claimant's work.

While the injury may not have begun as a bilateral injury, it eventually transformed into one. This is consistent with past decisions including Weishaar v. Snap-On Tools Corp., 506 N.W.2d 786, 788 (Iowa Ct. App. 1993). In the Weishaar case, the claimant reported pain in her right hand on September 3, 1985. Id. at 781-82. On December 18, 1985, claimant was diagnosed with bilateral carpal tunnel. She had surgical release on her right hand on January 3, 1986. No further treatment was provided to the left. Id. at 788.The claimant's injury was treated as a bilateral one. Id.

While claimant did not mention left elbow pain initially, he did complain of left upper arm pain on the same date he initially reported the right elbow pain. (JE 1: 1) Based on the medical opinions of Dr. Breder, buttressed by the testimony of the claimant, it is found that the claimant sustained a bilateral injury to his upper extremities as a result of repetitive work performed for the defendant employer.

The defendants maintain that even if it is determined claimant has sustained a work related injury to his upper extremities, the claim is barred for lack of notice and untimely claim. These are affirmative defenses and the burden rests on the defendants to prove that the claims were untimely.

The Iowa Workers' Compensation Act imposes time limits on injured employees both as to when they must notify their employers of injuries and as to when injury claims must be filed.

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

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

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

Iowa Code section 85.26(1) requires an employee to bring an original proceeding for benefits within two years from the date of the occurrence of the injury if the employer has paid the employee no weekly indemnity benefits for the claimed injury. If the employer has paid the employee weekly benefits on account of the claimed injury, however, the employee must bring an original proceeding within three years from the date of last payment of weekly compensation benefits.

That the employee failed to bring a proceeding within the required time period is an affirmative defense which the employer must plead and prove by a preponderance of the evidence. See Dart v. Sheller-Globe Corp., II Iowa Industrial Comm'r Rep. 99 (App. 1982).

Defendants concede claimant provided notice to the defendants on or about August 31, 2016, at the latest. Claimant also maintained he informed the defendants shortly after the December 2015 doctor visit. He filed petitions on March 21, 2017. In

order to determine whether the above affirmative defenses apply, the manifestation date must be determined.

In this case, claimant has not missed any work nor has his job required any accommodation. Dr. Breder has released claimant to full duty work with no restrictions. His family physician informed claimant that his right elbow complaints could be related to his work on or about December 30, 2015. He received an injection to his right elbow on April 27, 2016, and then again on July 21, 2016. However, it was not until August 20, 2016, that he formally reported the injuries to his employer. It is the determination of the undersigned that the filing of the formal report was the claimant's realization that the condition of his elbows was serious enough to have a permanent, adverse impact on his employment.

Based on the manifestation date of August 20, 2016, it is determined defendants had timely notice within 90 days. Further, the petitions were filed on March 21, 2017 and within the two-year statute of limitations. Given the finding that the date of injury is August 20, 2016, petition File No. 506714 with the pled date of injury as December 30, 2015, is deemed to be duplicative and moot and claimant shall take nothing from that petition.

Defendants have failed to carry their burden with regard to their affirmative defenses as to the injury date of August 20, 2016.

Because the affirmative defenses have failed, the claimant is entitled to permanent benefits.

Benefits for permanent partial disability of two members caused by a single accident is a scheduled benefit under section 85.34(2)(s); the degree of disability must be computed on a functional basis with a maximum benefit entitlement of 500 weeks. Simbro v. DeLong's Sportswear, 332 N.W.2d 886 (Iowa 1983).

Where an injury is limited to scheduled member the loss is measured functionally, not industrially. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983).

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Iowa Code section 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C. M. Co., 194 Iowa 819, 184 N.W. 746 (1921). Pursuant to Iowa Code section 85.34(2)(u) the workers' compensation commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Co., 164 N.W.2d 84 (Iowa 1969).

Evidence considered in assessing the loss of use of a particular scheduled member may entail more than a medical rating pursuant to standardized guides for evaluating permanent impairment. A claimant's testimony and demonstration of difficulties incurred in using the injured member and medical evidence regarding general

loss of use may be considered in determining the actual loss of use compensable. Soukup, 222 Iowa 272, 268 N.W. 598. Consideration is not given to what effect the scheduled loss has on claimant's earning capacity. The scheduled loss system created by the legislature is presumed to include compensation for reduced capacity to labor and to earn. Schell v. Central Engineering Co., 232 Iowa 421, 4 N.W.2d 339 (1942).

Claimant continues to do the same work that he performed prior to his injury without accommodations or restrictions. This work aggravates his bilateral lateral epicondyle symptoms. It has required him to seek out intermittent medical care in the form of injections. These injections are no longer available to him and his primary treating physician believes that surgery may be in claimant's future. Despite claimant's discharge from physical therapy, he has not returned to pre-injury levels. He still experiences pain and discomfort. While Dr. Breder refused to provide restrictions and set the impairment at zero, he counseled the claimant to seek out work that did not involve repetitive movements.

It is possible in the future that if claimant's condition worsens, his disability may also worsen. However, given the current facts and that claimant continues to work the same job with no restrictions or accommodations, it is appropriate to assess a ten percent bilateral loss.

Claimant also seeks ongoing care for his bilateral upper extremity injuries.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 16, 1975).

Claimant is entitled to ongoing care and treatment for his bilateral upper extremity injuries.

ORDER

THEREFORE, it is ordered:

File No. 5065714

Claimant shall take nothing.

File No. 5065715

That defendants are to pay unto claimant fifty (50) weeks of permanent partial disability benefits at the rate of nine hundred twenty-six and 30/100 dollars ($926.30) per week from August 21, 2016.

That claimant is entitled to future medical care.

That defendants shall pay accrued weekly benefits in a lump sum.

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

That defendants are to be given credit for benefits previously paid.

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

That defendants shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

Signed and filed this 29th day of April, 2019.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JGL/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.