BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHAEL NASSIF,

Claimant,

vs.

ANAMOSA STATE PENITENTIARY,

STATE OF IOWA,

Self-Insured,
Employer,
Defendant.

File No. 5056715

ARBITRATION DECISION

Head Note: 1800

STATEMENT OF THE CASE

Claimant has filed a petition in arbitration and seeks workers' compensation benefits from Anamosa State Penitentiary, State of Iowa, self-insured employer, defendant.

Deputy workers' compensation commissioner, Stan McElderry, heard this matter in Cedar Rapids, Iowa.

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.

ISSUES

The parties have submitted the following issues for determination:

1. Whether the injury of June 12, 2014 is the cause of any temporary disability;
2. Whether the June 12, 2014 injury is the cause of any permanency, and if so, the extent;
3. Medical benefits; and
4. Independent medical evaluation (IME).

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

The claimant was 29 years old at the time of hearing. He is a high school graduate, and has a certificate in audio/visual from Kirkwood Community College. He began employment with the employer on May 2, 2014 as an Electronic Engineer Technician. A health appraisal was part of the employment process. Also a 4 week pre-service training in Des Moines, Iowa was required.

On June 12, 2014 while in a self-defense class, which was part of the pre-service training, the claimant injured his neck and left shoulder while doing forearm blocks. There was an underlying pre-existing aneurysmal bone cyst which had been asymptomatic before, and which the June 12, 2014 incident lit-up and made symptomatic. There is no medical dispute on this point. Even Patrick W. Hitchon, M.D., who will not agree that this was a work injury, agrees on this point. (Joint Exhibit 4, page 49) "In response to your queries, I believe that the martial arts exercises were responsible for producing the symptoms referable to the left upper extremity in the presence of the tumor. Had there not been a tumor, the exercises would not have resulted in any symptoms." (JE 4, p. 49) "No one knew that this patient had an aneurysmal bone cyst until after the exercises had been completed and the patient developed symptoms." (JE 4, p. 49) "We are in agreement that the exercises in the presence of the tumor were responsible for the symptoms." (JE 4, p. 49) Lighting up of an asymptomatic underlying condition due to work activities is a work injury.

Diagnosis was cervical radiculopathy secondary to a spinal cord lesion at C7. Mr. Hitchon performed a C7 laminectomy and resection, C5-T2 fusion on January 6, 2015. (JE 4, pp. 14-19)

Laren J. Mouw, M.D., on May 17, 2016 offered some opinions on the claimant's care and treatment. (Ex. 3) That opinion was that the self-defense class activities of June 13 [*sic*], 2014 likely lit up or flared up an underlying asymptomatic condition. (Ex. 3, p. 1)

Robert Milas, M.D., performed an IME of the claimant on April 18, 2016. Dr. Milas's report is Exhibit 2. Dr. Milas opines a 28 percent of the body as a whole impairment from the work injury of June 12, 2014. He further opines that the surgery was performed as a direct result of the underlying condition being lit up by the June 12, 2014 work activities. No formal restrictions were opined. (Ex. 2) The opinions of Dr. Milas are generally accepted, but the impairment rating when combined with no restrictions appears excessive.

Claimant is able to return to almost all relevant past employment. He has not yet lost actual earnings. He has some limitations and restrictions but none are formal. He has industrial loss, but it is not large. Considering the claimant's medical impairments,

training, permanent restrictions, as well as all other factors of industrial disability, the claimant has suffered a 10 percent loss of earning capacity.

On the date of injury the claimant was single, entitled to 1 exemption, and had gross earnings of $916.00 per week. The weekly benefits rate is therefore $546.27. The claimant was off work for the work injuries from January 6-23, 2015. The claimant seeks payment/reimbursement of medical expenses as detailed in Exhibits 5-6. Those expenses were reasonable and necessary for the treatment of the work injury. The claimant seeks payment/reimbursement of the IME fee of Dr. Milas. That IME followed an opinion of no work injury from a defense selected doctor.

REASONING AND CONCLUSIONS OF LAW

Temporary 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).

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1).

The claimant was off work from January 6-23, 2015 to recover from work injuries which caused permanent impairment. The period was one of healing for which defendants are responsible for paying healing period benefits.

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. Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 845 (Iowa 2011). 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 finder of fact, must determine the credibility of the witnesses, weigh the evidence, and decide the facts at issue in a case. See Arndt v. City of LeClair, 728 N.W.2d 389, 394-95 (Iowa 2007). One factor the commissioner considers is whether an expert's

opinion is based upon an incomplete medical history. Dunlavey v. Econ. Fire & Cas. Co., 526 N.W.2d 845, 853 (Iowa 1995).

It was found that the claimant met his burden of establishing that his injury of June 12, 2014 caused permanent disability.

The next issue is extent of permanent disability for the injury.

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.

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.

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961). Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

Based on the finding that the claimant has suffered a 10 percent loss of earning capacity, he has sustained a 10 percent permanent partial industrial disability entitling him to 50 weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(u).

Medical

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).

The claimant has unpaid medical bills detailed in Exhibits 5-6. Those medical bills are for medical treatment and expenses necessary for the treatment of the work injury. Those bills are the responsibility of the defendants.

IME

Iowa Code section 85.39 provides, in relevant part, as follows:

> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination.

Defendant is responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

The issues on the IME are whether the IME of Dr. Milas should be reimbursed. The IME followed the defendant's own doctor, Dr. Hitchon, opining that the injuries were not work related. So payment/reimbursement of an IME is appropriate. The defendant shall pay/reimburse as appropriate the IME fee of Dr. Milas.

ORDER

THEREFORE IT IS ORDERED:

That defendant pay the claimant healing period benefits for January 6 through January 23, 2015 at the weekly rate of seven hundred twenty-nine and 18/100 dollars ($729.18).

That defendant pay claimant one hundred (100) weeks of permanent partial disability at the weekly rate of seven hundred twenty-nine and 18/100 dollars ($729.18) commencing May 12, 2015.

That the defendant pay/reimburse as appropriate the medical expenses as detailed above.

That the defendant pay/reimburse as appropriate Dr. Milas's IME fee.

Costs are taxed to the defendant pursuant to 876 IAC 4.33.

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30 with subsequent reports of injury pursuant to rule 876 IAC 3.1.

Defendants shall receive credit for benefits previously paid.

Signed and filed this 14th day of June, 2017.

STAN MCELDERRY
DEPUTY WORKERS' COMPENSATION
COMMISSIONER

Copies to:

Robert R. Rush
Attorney at Law
PO Box 637
Cedar Rapids, IA 52406-0637
bob@rushnicholson.com

Sarah C. Brandt
Assistant Attorney General
Special Litigation
Hoover State Office Bldg.
Des Moines, IA 50319-0106
sarah.brandt@iowa.gov

SRM/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.