BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JAIME BARCENAS,

Claimant,

vs.

SIVYER STEEL CORPORATION,

Employer,

and

STARR INDEMNITY AND LIABILITY CO.,

Insurance Carrier,
Defendants.

File No. 5055957

ARBITRATION DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Jamie Barcenas, claimant, filed a petition in arbitration seeking workers' compensation benefits from Siyver Steel Corporation (Siyver) and its insurer, Starr Indemnity and Liability Company as a result of an injury he allegedly sustained on February 22, 2016 that allegedly arose out of and in the course of his employment. This case was heard in Davenport, Iowa. The evidence in this case consists of the testimony of claimant, Stacy Braden and Joint Exhibits 1 – 12. The hearing was interpreted. Both parties submitted post-hearing briefs.

ISSUES

Whether claimant sustained an injury on February 22, 2016 which arose out of and in the course of employment;

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

The extent of claimant's disability.

Whether claimant is entitled to alternate medical care.

Whether claimant is entitled to the cost of the independent medical examination.

Assessment of costs.

FINDINGS OF FACT

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

Jamie Barcenas, claimant, was 43 years old at the time of the hearing. He has lived in the United States for about 15 years. He went through eighth grade in Mexico. He does not have a GED. (Joint Exhibit 7, page 79) His primary language is Spanish, but he can speak some English. (Transcript, p. 11)

Claimant's first job in the United States was at IBP as a meat cutter from 1991 through 1997. Claimant started his work at Sivyer in 1998. Claimant is a welder at Sivyer. He was working for Sivyer at the time of the hearing and said he intends to work there until he retires.

In August 2014 claimant injured his right elbow. That claim was resolved by the parties in an Agreement for Settlement. (JE 9) The elbow injury is not part of this arbitration decision. Claimant had surgery on his elbow and was assigned to light duty. (Tr. p. 14) Claimant was assigned to drive a forklift while on light duty. Claimant alleges that he sustained an injury to his shoulder, back or neck while he was on light duty driving the forklift on February 22, 2016. Claimant said that while driving the forklift he had to operate levers and controls with his right arm. (Tr. p. 16) Claimant said that he felt pain in his upper back and shoulder. In describing his injury claimant said, "I am attributing my injury to being under restrictions for the surgery that I had on my right elbow and performing the job of two people and having to do a lot of work and a lot of movement while I was recuperating from surgery." (Tr. p. 35) Claimant reported his injury on February 22, 2016 and he was referred for medical care by his employer. (Tr. p. 17; JE 7, p. 83)

The next day, February 23, 2016, claimant was seen at Quad City Occupational Health by Brian Glasz, PA-C. Claimant reported to Mr. Glasz that it was one day from the onset of his pain and that the pain was sharp and severe. (JE 1, p. 1) Claimant's right shoulder was tender to palpation. X-rays of the right shoulder were normal as well as a number of additional motion tests. (JE 1, p. 2) Mr. Glasz wrote,

> DIAGNOSIS: 1. Shoulder pain, Right (M25.511)
>
> MEDICAL CAUSATION: The cause of this problem is related to work activities.

(JE 1, p.3) Mr. Glasz continued claimant's prior light duty restrictions. (JE1, p. 4)

On March 2, 2016, claimant was complaining of shoulder pain to Suleman Hussain, M.D. Dr. Hussain was claimant's elbow physician and deferred any care for the shoulder problem unless he received a referral. (JE 3, p. 49) Claimant saw Camilla Frederick, M.D., at Quad City Occupational Health on March 3, 2016. Dr. Frederick noted that claimant had been released from light duty for his elbow injury and had

returned to his welding position. She noted that claimant is right-hand dominant. Cervical examination showed he had pain with extension of the C spine and tender over T4 – T6 and with extension of the C spine it reproduces pain. (JE 1, p. 8) Examination of the right shoulder showed tenderness to palpation in the T spine (thoracic spine). "Movement of the shoulder causes pain only in the RT T, not the shoulder girdle." (JE 1, p. 8) Dr. Frederick's diagnosis was, "T spine m strain with facet subluxation." (JE 1, p. 8) Dr. Fredericks returned claimant to full duty and wrote, "The cause of this problem is related to work activities." (JE. 1, p. 9) Dr. Fredericks saw claimant on March 18, 2016 and continued her prior diagnosis and work causation opinions remained the same. (JE 1, p. 13) On April 20, 2016, Dr. Fredericks added an addendum to her records concerning the claimant. Dr. Fredericks wrote,

> Addendum: Following review of the job evaluation, there is lack of risk factors present, therefore within a reasonable degree of medical certainty, in my opinion, the subscapular and parascapular pain is not work related

(JE 1, p. 18)

On May 2, 2016, the defendants sent a letter to claimant informing him that his injury, subscapular and parascapular pain, was not considered work-related. (JE 8, p. 94) On May 4, 2016, claimant was examined by Dr. Fredericks. Dr. Fredericks shared the job evaluation that was performed by a therapist and discussed that the therapist's evaluation did not identify any risk factors in either the welding or forklift positions. (JE 1, p. 20) Dr. Fredericks offered to continue providing care, but said that claimant would be responsible for the costs. (JE 1, p. 23) Her last status report listed the date of injury as February 22, 2016 and diagnosed claimant with, "Sprain of ligaments of thoracic spine, in [*sic*]." She checked that the injury was not work related. (JE 1, p. 24)

On January 22, 2016, claimant reported to physical therapy he had an achy pain in the back of his shoulder since he woke up, which was worse when he took a deep breath. (JE 2, p. 29) On February 5, 2016, claimant attended physical therapy that was prescribed due to his elbow injury. The physical therapy note of that date states, "Pt. reports he has been driving a fork lift at work for the past 2 days, and that his R elbow and shoulder are sore." (JE 2, p. 34) The physical therapy note of February 22, 2016 stated his elbow was better, but claimant was complaining his shoulder was hurt due to driving the forklift. Claimant was given restrictions of driving two hours on and two hours off. (JE. 2, p. 37)

On March 1, 2016, claimant described how he performed welding at Sivyer. The therapy notes were,

> Job duties: Pt. is a welder at Sivyer Steel. His welding wand is approximately 5 lbs, and he has to use a hoist to move very heavy parts (1500 lbs) in order to weld. A lot of the work is pushing and pulling,

> sometimes in awkward positions, including kneeling and laying [*sic*] on his back or sides. He does have some over head [*sic*] work as well at times.

(JE. 2, 44)

On March 25, 2016, Curtis Witt, PT, performed a Functional Job Analysis of claimant's welding position at Sivyer. (JE. 2, pp. 47, 48) Mr. Witt stated he did not observe claimant working overhead while welding. (JE 2, p. 47) The report stated, "There are no areas of concern noted with his welding job. I also observed two different fork lift trucks and did not see any areas of concern with driving the fork truck as well." (JE 2, p. 28) Mr. Witt uses an OSHA Ergonomic Checklist to review claimant's job and found no risk factors. (JE 2, p. 48)

On March 10, 2017, Robin Sassman, M.D., issued an independent medical examination (IME). Dr. Sassman's diagnosis was cervicalgia and right scapula pain. (JE 4, p. 56) Dr. Sassman wrote concerning causation,

> It is my opinion that Mr. Barcenas-Rojas' pain in his right scapular area and cervical area is directly and causally related to the actions he had to do while operating a forklift. This was a job that he was assigned to due to the fact that he was on light duty because of the recent right elbow surgery. This job was usually done by two people; but, Mr. Barcenas-Rojas was doing the job by himself. It was also something different than what he was used to doing. It was while he was doing this job and performing the rapid and repetitive movements of operating the forklift that he began to notice pain in his upper back and scapular area. Because he denies having any of these symptoms prior to doing this job, and the mechanism is consistent with the injury, it is my opinion that these job activities were directly and causally related to this development of the above diagnoses.

(JE 4, pp. 56-57) Dr. Sassman recommended a short course of physical therapy and an MRI. She was not of the opinion claimant was at maximum medical improvement (MMI), but if claimant did not receive additional care she would place claimant at MMI as of March 4, 2016. (JE 4, p. 57)

Dr. Sassman provided a whole body impairment rating of 5 percent of the cervical spine and claimant should limit lifting, pushing, pulling and carrying above shoulder to occasionally lift 20 pounds and occasionally lift 30 pounds floor to shoulder. (JE 4, p. 57) Dr. Sassman has billed claimant $2,897.50 for the IME. (JE 4, p. 60)

Claimant testified that he currently has a lot of pain in the same area as his February 22, 2016 injury. He said that his pain increases when he does a lot of welding. (Tr. p. 23) Claimant has not missed work due to the February 22, 2016 injury and works overtime at Sivyer. (Tr. p. 25) Claimant worked for about 4 years as a metal

cutter when he started at Sivyer. The next position he had for about 11 years was driving a forklift. (Tr. p. 27)

Claimant's light duty restrictions were lifted on March 2, 2016 for his elbow injury. Claimant then resumed his work as a welder. (Tr. p. 30) Claimant has not worked under any restrictions since March 2016. (Tr. p. 36)

Stacy Braden is the Cleaning Room Manager at Sivyer and has supervised claimant for four years. (Tr. p. 42) Mr. Braden stated claimant bid into a welding specialist position in February 2017, which pays more than claimant's prior position of general welder. (Tr. p. 43) Mr. Braden testified that claimant works both mandatory and voluntary overtime at Sivyer. (Tr. p. 45) Mr. Braden disagreed with claimant's characterization that claimant was performing the work of two forklift truck drivers at the time of his February 2016 incident. (Tr. p. 51)

Claimant has requested costs for filing fees ($100.00), service costs ($13.34) and for the claimant's transcript ($98.00), for a total amount of $211.34. Defendants have requested the cost of claimant's deposition in the amount of $301.75. (JE 11 and 12)

Dr. Sassman has made recommendations limiting the weight claimant should lift or carry. These recommended restrictions have not interfered with claimant's employment at Sivyer as a welder. Claimant is slightly limited in his ability to work. Claimant has minimal restrictions due to his cervical back injury. I find that claimant has a five percent loss of earning capacity due to his February 22, 2016 work injury.

RATIONALE AND CONCLUSIONS OF LAW

The first issue to determine is whether claimant sustained an injury that arose out of and in the course of his employment.

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).

The day after claimant reported his injury and was seen by occupational health by Mr. Glasz, claimant's injury of February 22, 2016 was identified as an injury connected to his work. On March 3, 2016; March 8, 2016; and March 18, 2016; Dr. Fredericks attributed claimant's February 22, 2016 neck and back pain to his work.

It was after the March 25, 2016 job function report of Mr. Witt that Dr. Fredericks changed her opinion on causation. In an addendum, Dr. Fredericks wrote that based upon the job function report, which did not show risk factors for the welding or forklift jobs that she changed her opinion as to causation. It was only then that the defendants determined claimant's neck and back injury was not related to his work. The reason for the denial was the job function report.

While claimant did complain about pain in his back/shoulders in January 2016 he was not receiving active treatment and his complaint of an achy back was significantly different than the sharp pain he reported on February 22, 2016.

The test of causation of a work injury is not whether a job has or does not have risk factors, but where the work was a significant contributor to a work injury. It matters not that there are no risk factors in a job, if the work causes injury. Employees can be engaged in very innocuous light or sedentary work activities and still have a work related injury, even when there are no risk factors in a job.

Claimant reported his injury to his supervisor on February 22, 2016. I find the occupational health notes of February 23, March 3, 8, and 18, 2016, which found the injury work related, as well as the IME report by Dr. Sassman, most convincing on causation of claimant's work injury.

I accept Dr. Sassman's diagnosis of cervicalgia and right scapular pain. Dr. Fredericks noted in claimant's first visit with her that claimant had pain in the cervical spine and diagnosed thoracic spine strain.

I find that claimant suffered a permanent injury that arose out of and in the course of his employment on February 22, 2016.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

In assessing an unscheduled, whole-body injury case, the claimant's loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent

disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

Claimant has returned to work as a welder at Sivyer and has advanced to a skilled welding position. His income has not gone up, but that is because of general economic conditions and the union contract, not due to his injury. Claimant is viewed as a good employee and claimant enjoys working for Sivyer.

Claimant has a limited education. He has not had surgery and has self-limited some of his activities. He has a slight permanent impairment. I find that claimant has a 5 percent industrial disability entitling him to 25 weeks of permanent partial disability benefits.

Claimant has requested the cost of the IME. I find that the determination by Dr. Fredericks on April 20, 2016 was a determination by a defendant authorized physician of a zero rating. I find that the claimant was then entitled to an IME and that the IME by Dr. Sassman was reimbursable under Iowa Code section 85.39. I find the charges to be reasonable. Defendants shall pay claimant the IME costs of $2,897.50

The last issue is costs. 876 IAC 4.33 allows filing fees, service costs and deposition costs. I award claimant his cost of $211.34. I decline to award defendants any costs.

ORDER

Defendants shall pay claimant twenty-five (25) weeks of permanent partial disability at the weekly rate of four hundred sixty-four and 74/100 dollars ($460.74) commencing February 23, 2016.

Defendants shall pay claimant's IME costs of two thousand eight hundred ninety-seven and 50/100 dollars ($2,897.50).

Defendants shall pay claimant costs of two hundred eleven and 34/100 dollars ($211.34).

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

Signed and filed this 1st day of February, 2018.

James F. Elliott

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.