BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DEAN ANDERSON,

Claimant,

vs.

NICHOLS ALUMINUM, n/k/a ALERIS,

Employer,

and

ACE AMERICAN INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5047598

APPEAL DECISION

Head Note Nos.: 1402.30, 2502

STATEMENT OF THE CASE

Defendant, Nichols Aluminum, n/k/a Aleris (Nichols), employer, and Ace American Insurance Company, insurer, both as defendants, appealed from an arbitration decision filed on November 23, 2015. That decision found claimant was entitled to permanent partial disability benefits under Iowa Code section 85.34(2)(s), and that claimant was due reimbursement for an independent medical evaluation (IME).

The parties indicated on the hearing report, and at hearing, that an issue in dispute was whether claimant's injury arose out of and in the course of employment. That issue was not addressed or analyzed in the arbitration decision. Defendants' liability for claimant's injury is raised on appeal and will be addressed in this decision.

The detailed arguments of the parties have been considered, and the record of the evidence has been reviewed de novo. Upon written delegation of authority by the Workers' Compensation Commissioner under Iowa Code section 86.3, I render this decision as a final agency decision on the behalf of the Iowa Workers' Compensation Commissioner.

ISSUES

1. Whether claimant's injury arose out of and in the course of employment.

2. The extent of claimant's entitlement to permanent partial disability benefits.

3. Whether claimant is entitled to reimbursement for an IME.

FINDINGS OF FACT

Claimant was 42 years old at the time of hearing. At the time of hearing claimant had worked for Nichols almost 20 years. (Exhibit J)

Nichols is a plant that processes scrap aluminum into an aluminum alloy. (Transcript pages 70-71)

Claimant worked at Nichols as a utility worker. Claimant has worked in both the shredding and melting departments at Nichols. (Ex. J)

Beginning in September of 2010 claimant worked as a melting utility worker. In April 2012 through July 2012 claimant worked as a utility II shredding worker. On July 11, 2012 claimant returned to work as a melting utility worker. (Ex. J)

In August of 2000 claimant was evaluated by Anthony D'Angelo, D.O. for numbness and tingling in the right and left hands. Claimant reported similar symptoms four years prior with a different employer. Claimant was assessed as having bilateral carpal tunnel syndrome. Dr. D'Angelo recommended EMG and nerve conduction studies. He opined claimant's symptoms were work related. (Ex. 4, p. 35)

The record indicates claimant did not have diagnostic testing as recommended by Dr. D'Angelo. (Ex. D, p. 1)

On February 18, 2014 claimant was evaluated by James Lyles, M.D. for bilateral hand numbness. Claimant indicated symptoms for the past three months. Symptoms were not bothersome during the day and affected claimant at night. Claimant was assessed as having bilateral mononeuropathies. Claimant was recommended to have an EMG. (Ex. 1, p. 1)

Claimant testified at hearing he saw Dr. Lyles, because he was waking up with numbness in his hands and wrists. (Tr. p. 11)

On March 14, 2014 claimant was evaluated by Camilla Frederick, M.D. Claimant indicated numbness in his wrists three to four times a week for one to two years. Claimant was assessed as having bilateral medial and ulnar neuritis. A job evaluation was requested. (Ex. D, pp. 1-5)

In an April 11, 2014 report, Curtis Witt, PT indicated he performed a functional job analysis of claimant's job. Physical Therapist Witt observed all of claimant's job functions. Physical Therapist Witt opined there were no risk factors from claimant's job duties for vibration, contact stress, force, repetition, or awkward positions. Based on the

job analysis and the lack of risk factors, Physical Therapist Witt opined claimant's carpal tunnel symptoms were not work related. (Ex. G, pp. 1-3)

On April 15, 2014 Dr. Frederick reviewed the job analysis performed by Physical Therapist Witt. She noted Physical Therapist Witt found no risk factors for carpal tunnel or cubital tunnel syndrome. (Ex. D, p. 5)

On September 10, 2014 Daniel Johnson, M.D. performed EMG studies on claimant. They showed bilateral moderate carpal tunnel syndrome. (Ex. 5, p. 40)

In an October 16, 2014 addendum, Physical Therapist Witt reassessed claimant's job duties following a review of claimant's answers to interrogatories. In an interrogatory claimant indicated he also performed sweeping, used an air chisel, did shoveling, operated an excavator, and stacked pallets. Physical Therapist Witt observed claimant's work for 30 minutes and saw one person sweeping for approximately 30 seconds. Co-workers indicated the air chisel was, on average, used 30 minutes per week. Physical Therapist Witt noted shoveling was done no longer than 90 minutes. He saw operators using an excavator taking 30-minute breaks every two hours. He noticed pallet stacking was done approximately two times a week. Based on his review of the work performed, Physical Therapist Witt still did not believe claimant's symptoms were caused by his job. (Ex. G, pp. 2-3)

In a December 4, 2014 report Marc Hines, M.D. gave his opinions of claimant's condition following an IME. Dr. Hines noted that Dr. Johnson conducted EMG and nerve conduction velocity studies indicating a finding of moderate bilateral carpal tunnel syndrome. Dr. Hines found claimant had a permanent impairment of 10 percent to the right upper extremity with no impairment to the left. (Ex. 5, pp. 40-43)

In a May 19, 2015 report Dr. Frederick gave her opinions concerning the causal connection of claimant's work to his carpal tunnel symptoms. Dr. Frederick noted carpal tunnel syndrome is a multifactorial disease. She noted when evaluating if carpal tunnel syndrome is work related, an expert needs to know the specific job duties an individual with carpal tunnel syndrome performed. (Ex. E, p. 1)

Dr. Frederick noted there were job-related risk factors for the development of carpal tunnel syndrome. Those risk factors are force and repetition, force and undesirable hand/wrist position, and jobs that have both factors without adequate rest. Dr. Frederick indicated she visited the Nichols plant on many occasions and was familiar with most of the job specialties in the plant. She said she had familiarity with claimant's job at Nichols. Dr. Frederick reviewed the job analysis performed by Physical Therapist Witt. She also performed research regarding the issue of causation of carpal tunnel syndrome. Based on her familiarity with claimant's job, the job analysis, and literature and research regarding carpal tunnel syndrome, she opined claimant's bilateral carpal tunnel syndrome was not caused by his work at Nichols. (Ex. E, pp. 2-7)

Dr. Frederick also reviewed Dr. Hines' report of November 14, 2014. She believed it was inappropriate to rate claimant's impairment at the present. This was because claimant could have no permanent impairment following further care or treatment. (Ex. E, pp. 7-8)

Exhibit N is PowerPoint and photographs of claimant's job duties. Duties shown in Exhibit N include, but are not limited to, banding coils of aluminum, cleaning the furnace up with a "spoon," operating an end loader, controls for end loaders and excavators and forklifts, and operation of the well walker. A hard copy of the PowerPoint was also found at Exhibit N.

Claimant testified at hearing he worked a 3-2-2 schedule of 12-hour shifts. This resulted in claimant working 36 hours one week and 48 hours the next week. (Tr. pp. 31-32)

Claimant said his job required him to perform a number of different tasks during a shift. He testified he operated an end loader approximately three to four hours every shift. Claimant used, what he described as a joystick, to operate the loader. (Tr. pp. 13-14) He said he split end loader time with a coworker. (Tr. p. 58)

Claimant said he swept three of four times per shift, for approximately 15 minutes each time. (Tr. p. 63) Claimant said he skimmed a pump well with a large spoon and other tools three to four times per shift, for about five minutes each time. (Tr. pp. 14-15, 59-60) Claimant indicated he spent approximately two hours per shift running machines that were operated by a joystick. (Tr. p. 16)

Claimant said he rarely did banding of aluminum coils. (Tr. pp. 20, 43) Claimant said four to five times a day he used a well walking machine to skim the furnace. He said the well walker was operated by using four joystick controls. (Tr. p. 16) Claimant said he used an air chip hammer four to five years prior to hearing, but rarely used the air chipping hammer now. (Tr. pp. 12-13, 16, 18)

Claimant testified he has four motorcycles. Claimant said he rides to and from work every day when weather permits. Claimant also has taken long distance trips on his motorcycles. This includes a few thousand mile trip back and forth to South Dakota in 2013, and a trip to North Carolina in 2014. (Tr. pp. 28, 29)

Claimant testified that at the time of hearing he takes no medication and had received no treatment for his wrist and hand symptoms. He said he has no issues with his hands at work, and his numbness in his hands occurs randomly in the morning. (Tr. pp. 35-37) Claimant said he has had no care for his hands since March of 2014. (Tr. p. 63)

Phillip McBroom testified he is a health and safety manager for Nichols. In that capacity he is familiar with claimant's claim and claimant's job duties. Mr. McBroom testified he did not consider claimant's job duties repetitious. (Tr. pp. 66-69, 77)

Mr. McBroom testified that duties shown at Exhibit N accurately describe claimant's job tasks. (Tr. p. 74)

Dennis Hoagland testified he was a former health and safety manager at Nichols. He said he worked at Nichols for approximately 29 years. In that capacity he was familiar with the jobs claimant performed at Nichols. Mr. Hoagland testified he did not believe claimant's job created a risk for carpal tunnel syndrome. (Tr. pp. 86-93)

CONCLUSIONS OF LAW

The first issue to be determined is whether or not claimant's injury arose out of and in the course of employment.

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 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). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

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 contends he sustained a bilateral cumulative injury to both upper extremities. He contends the injury was caused by the repetitious activities he performed on his job at Nichols.

The arbitration decision, in this case, did not list causation as an issue in dispute. The issue was raised on the hearing report and at hearing. (Tr. pp. 5-6) As noted in

defendants' appeal brief, the Deputy Commissioner who authored the arbitration decision failed to address causation in the decision.

Claimant has been assessed as having bilateral carpal tunnel syndrome. (Ex. 5, p. 40)

Three experts have opined regarding the causal connection between claimant's job at Nichols and his carpal tunnel syndrome.

Dr. Hines evaluated claimant one time for an IME. According to the records, Dr. Hines has spent approximately 20 minutes evaluating claimant and 10 minutes reviewing claimant's medical records. (Ex. 5, p. 38) Dr. Hines' report appears to suggest claimant's carpal tunnel syndrome is caused by his work. Dr. Hines notes claimant runs heavy equipment with a joystick, over a period of years, and developed carpal tunnel syndrome from heavy work with his hands and wrists. Dr. Hines' report also notes claimant used vibratory tools. (Ex. 5, p. 42) The description of claimant's job appears to have been provided by claimant.

There is no indication Dr. Hines was provided with the job analysis performed by Physical Therapist Witt. There is no evidence Dr. Hines has visited the Nichols plant where claimant worked. There is no evidence Dr. Hines was provided a detailed analysis of the jobs claimant performed at Nichols, for example as shown in Exhibit N.

Physical Therapist Witt followed claimant at work at Nichols on two occasions. He provided a detailed job analysis of claimant's work duties at Nichols. He detailed risk factors that cause carpal tunnel syndrome due to repetitious work. Physical Therapist Witt found there were no risk factors for vibration, contact stress, force or repetitive or abnormal positions of the wrist and hands on claimant's job. Based on his analysis, he opined, in two different reports, that claimant's carpal tunnel symptoms were not work related. (Ex. G, pp. 1-3; Tr. pp. 72-73)

Dr. Frederick reviewed Physical Therapist Witt's job analysis. She reviewed research regarding repetitive motion injuries. Dr. Frederick has toured the Nichols plant a number of times. Dr. Frederick indicated she was familiar with most of claimant's job duties at Nichols. She opined claimant's bilateral carpal tunnel symptoms were not caused by his work at Nichols. (Ex. E)

Dr. Hines spent approximately 20 minutes examining claimant. His understanding of claimant's job is based upon a brief description by claimant. Dr. Hines did not review Physical Therapist Witt's analysis. He did not visit the Nichols plant. He was not provided with any details of claimant's many job duties. Physical Therapist Witt followed claimant's work on two occasions. He provided a detailed analysis of claimant's job duties. Dr. Frederick reviewed the analysis, and research materials regarding repetitive injuries. Dr. Frederick is familiar with claimant's job duties. She has toured the Nichols plant on numerous occasions. Based on these facts, and the others

detailed above, it is found the opinions of Physical Therapist Witt and Dr. Frederick are more convincing than Dr. Hines' regarding causation.

Dr. Hines' opinions regarding causation are found not convincing. The opinions of Physical Therapist Witt and Dr. Frederick, that claimant's carpal tunnel symptoms are not caused by work, are found more convincing. Both Mr. McBroom and Mr. Hoagland are familiar with claimant's job duties. Both Mr. McBroom and Mr. Hoagland opined they did not consider claimant's job repetitious or a risk for carpal tunnel syndrome. (Tr. pp. 66-69, 86-93)

Given these facts, it is found claimant has failed to carry his burden of proof his injury arose out of and in the course of employment.

As claimant failed to carry his burden of proof his injury arose out of and in the course of employment, the issue regarding the extent of claimant's entitlement to permanent partial disability benefits is moot.

The next issue to be determined is if claimant is entitled to reimbursement for costs associated with Dr. Hines' IME.

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.

Defendants are 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).

The Iowa Supreme Court provided a literal interpretation of the plain-language of Iowa Code section 85.39, stating that section 85.39 only allows the employee to obtain an independent evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 847 (Iowa 2015).

The Court also noted:

> If the injured worker wants to be reimbursed for the expenses associated with a disability evaluation by a physician selected by the worker, the process established by the legislature must be followed. This process permits the employer, who must pay the benefits, to make the

> initial arrangements for the evaluation and only allows the employee to obtain an independent evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Iowa Code § 85.39.
>
> Young argues the process is unfair to workers because the employer has too much control over the evaluation and can impose adverse consequences on the employee. She argues the process unfairly limits her to one reimbursable, independent evaluation and could permit employers to sabotage the claim process by failing to initiate the evaluation process. Yet, these arguments have been impliedly rejected by the legislature in enacting section 85.39. Additionally, the consequences feared by Young fail to consider the authority given to the commissioner by the legislature to order an examination and report of the injured worker by an impartial physician. *Id.* § 86.38. If an employer unduly delays in seeking an examination under section 85.39, or fails to obtain an examination, the employee may request the commissioner to appoint an independent physician to examine the employee and make a report.
>
> Young at 847

Under the Young decision, an employee can only obtain an IME at the employer's expense if an evaluation of permanent disability has been made by an employer-retained physician.

The Supreme Court, in Young noted that in cases where Iowa Code section 85.39 is not triggered to allow for reimbursement of an independent medical exam (IME), a claimant can still be reimbursed at hearing the costs associated with the preparation of the written report as a cost under rule 876 IAC 4.33 Young at 846-847.

There is no evidence in the record that an employer-retained physician made an evaluation of impairment prior to Dr. Hines' report. For this reason, claimant is not due reimbursement of Dr. Hines' IME under Iowa Code section 85.39.

As noted above, the Young court noted that a claimant can still be reimbursed for the costs associated with preparation of the IME report.

Pursuant to rule 876 IAC 4.33, costs are assessed at the discretion of the deputy or commissioner. As claimant failed to prevail on the issue of causation, it is found claimant is not due reimbursement for costs associated with the Hines IME under rule 876 IAC 4.33

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of November 23, 2015, is reversed.

Claimant shall take nothing from these proceedings.

Both parties shall pay their own costs.

Signed and filed this 23rd day of January, 2018.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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