BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DAVID STEVENS,

Claimant,

vs.

EATON CORP.,

Employer,

and

OLD REPUBLIC INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5049606

ARBITRATION DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, David Stevens, has filed a petition in arbitration and seeks workers' compensation benefits from Eaton Corporation, employer, and Old Republic Insurance Company, insurance carrier, defendants. Deputy workers' compensation commissioner, Stan McElderry, heard this matter in Council Bluffs, Iowa.

ISSUES

The parties have submitted the following issues for determination:

1. Whether the claimant suffered an injury arising out of and in the course of employment on February 16, 2014;

2. Whether the alleged injury is the cause of any temporary disability;

3. Whether the alleged injury is the cause of any permanent disability and if so, the extent;

4. Medical benefits; and

5. Iowa Code section 85.38(2) credits.

FINDINGS OF FACT

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

The claimant was 63 years old at the time of hearing. The claimant did graduate high school and has a post-high school outset printing press certification. Claimant worked various jobs in the printing business from 1974 to 1998. Next he worked for AT&T installing digital boxes and then worked on a Pella Windows assembly line for about 3 years. He worked as an electrician from about 2004 to 2007. Sometime in the 2000's he worked as a maintenance man for Americana and GPRE Ethanol.

The claimant began working for Eaton in April of 2011. He started in steel, then worked grey iron, and in February 2014 was working as a CNC operator in counter shafts. The claimant testified that he first noticed problems with his right thumb and hand about 3/4ths of the way through his shift on February 15, 2014. February 16 was a Sunday and a day off. On February 17, 2014 claimant called in sick and went to his personal physician Satya Thippareddi, M.D. (Exhibit 1, page 2) Dr. Thippareddi took the claimant off work, wanted an evaluation by an orthopedic surgeon, and set up an evaluation with Steven Goebel, M.D. on February 19, 2014. (Id.) The employer wanted the claimant seen by Gerard Stanley, M.D.. The claimant saw both Dr. Goebel and Dr. Stanley on February 19. (Ex. 4, p. 2; Ex. 2, p. 2) Both wanted an EMG performed. The EMG was performed on February 27, 2014. Following the EMG, the employer denied the claim by letter on March 14, 2014. Dr. Stanley has opined that the claimant's injury arose out of and in the course of his employment activities. (Ex. 2)

The claimant proceeded with treatment through his private insurance and had surgery (CMC arthroplasty and open median nerve decompression) to his right arm and hand by Nicholas B. Bruggeman, M.D., on May 30, 2014. (Ex. 5, p. 1) Dr. Bruggeman placed the claimant at maximum medical improvement (MMI) on August 7, 2014 and the claimant returned to work. (Ex. 4, p. 17) Work increased the claimant's arm and hand problems and on October 22, 2014 Dr. Bruggeman imposed a 10 pound lifting restriction. (Ex. 4, p. 28) When the claimant presented the restriction to the employer, he was sent home and has not worked for the employer since. Dr. Bruggeman has opined that the right hand and arm problems that led to surgery were due to an injury arising out of and in the course of employment. (Ex. 4, p. 28) He also opined an 11 percent permanent impairment to the right hand. (Ex. 4, p. 29)

The claimant underwent an independent medical evaluation by Donald M. Gammel, M.D., on July 22, 2015 at the defendants' request. (Ex. 6) Dr. Gammel opined that the claimant's right arm and hand problems were pre-existing and not related to work activities. (Ex. 6, p. 17) In doing so, Dr. Gammel seemed to not recognize the concept of a cumulative injury developing over time. (Ex. 6, p. 17) The opinion also clearly fails to recognize the repetitive nature of the claimant's position with the employer. (Ex. 6, p. 17) Dr. Gammel agreed that MMI was reached August 6, 2014

and that the right hand rating was 11 percent. (Ex. 6, p. 17) An 11 percent rating to the hand coverts to 10 percent of the upper extremity per the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. The converted rating of 10 percent to the right upper extremity is accepted.

Dr. Bruggeman is an orthopedic surgeon and performed surgery on the claimant. His views on causation are accepted over one time evaluator, occupational doctor Dr. Gammel. Dr. Gammel also did not recognize the concept of a cumulative injury developing over time, and clearly failed to recognize the repetitive nature of the claimant's position with the employer. Those failures are significant in weighing the weight to be given Dr. Gammel's opinions. The injury of February 16, 2014 was a cumulative injury that finally fully manifested on or about February 16, 2014. The claimant was off work from February 17, 2014 through August 6, 2014 when he was rated at MMI. He was paid temporary benefits through March 24, 2014.

On the date of injury the claimant was married, entitled to 2 exemptions, and had gross earnings of $1,124.00 per week. As such, his weekly benefit rate is $702.47. The commencement date for permanent disability is August 7, 2014, as was stipulated.

Defendants seek credit for disability benefits paid through a group plan the claimant had at the employer. The plan was at least partially paid for by the employer. Employer's disability policy paid a net after taxes of $7,596.18 of short term disability benefits during the healing period herein. (Ex. E, pp. 6-7) The employer then would also be entitled to a credit for 25 weeks found herein for the permanent disability period for which disability benefits were paid. Credit is $10,082.92 through December 31, 2014 (21 weeks). The employer is entitled to 4 more weeks of credit. For those 4 weeks, the undersigned is unable, from this record, to determine how much was paid in disability. If the parties cannot agree on that additional credit, a request for an enlargement of findings will be accepted. A credit for disability paid at other times is not within the jurisdiction of this agency (such as benefits later paid without offset after an award of Social Security Disability). (Ex. E, p. 9)

Claimant seeks payment of medical bills contained in Exhibit 9. Those expenses were reasonable and necessary for the treatment of the claimant's injury, which arose out of and in the course of employment.

REASONING AND CONCLUSIONS OF LAW

The first issue is whether there was an injury arising out of and in the course of employment on or about February 16, 2014.

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).

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).

It was found that the claimant suffered a cumulative injury to his right upper extremity arising out of and in the course of his employment that manifested on or about on February 16, 2014. As such, he has established a work injury.

Extent of permanent disability.

The courts have repeatedly stated that for those injuries limited to the schedules in Iowa Code section 85.34(2)(a-t), this agency must only consider the functional loss of the particular scheduled member involved and not the other factors which constitute an "industrial disability." Iowa Supreme Court decisions over the years have repeatedly cited favorably the following language in the 66-year-old case of Soukup v. Shores Co., 222 Iowa 272, 277; 268 N.W. 598, 601 (1936):

> The legislature has definitely fixed the amount of compensation that shall be paid for specific injuries . . . and that, regardless of the education or qualifications or nature of the particular individual, or of his inability . . . to engage in employment . . . the compensation payable . . . is limited to the amount therein fixed.

Our court has even specifically upheld the constitutionality of the scheduled member compensation scheme. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404 (Iowa 1994). Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Graves, 331 N.W.2d 116; Simbro v. DeLong's Sportswear 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

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 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).

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by statute. Soukup, 222 Iowa 272, 268 N.W. 598.

I found that the claimant suffered a 10 percent permanent loss of use of his right upper extremity due to the February 16, 2014 injury. Based on such a finding, the claimant is entitled to 25 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(m), which is 10 percent of 250 weeks, the maximum allowable weeks of disability for an injury to the arm in that subsection.

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's injury caused permanent disability and impairment. Thus, the temporary benefits herein are healing period benefits. The claimant was off work from February 17, 2014 through August 6, 2014 when he reached MMI. The defendants are responsible for paying healing period benefits for this period to the extent they have not already done so.

Medical benefits.

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 medical expenses that were reasonable and necessary for the treatment of the work injuries that are detailed in Exhibit 9. Those expenses are the responsibility of the defendants. The defendants shall pay/reimburse the medical bills as appropriate.

Long term/short term credits.

Defendants seek a credit for short term and long-term disability benefits paid to claimant.

Iowa Code Section 85.38(2) provides that when an employee receives benefits including medical, surgical, or hospital benefits, under a group plan covering nonoccupational disabilities to which plan the employer has contributed wholly or partially and which benefits would not have been paid for a work related injury, the employer receives credit for the amount so paid to the employee against any compensation benefits for which the employer is liable under the workers' compensation law. Amounts credited are to be deducted from payments made under the workers' compensation law.

Exhibit E sets forth the benefits paid. Claimant, in his post-hearing brief, concedes defendants are entitled to a credit. The issue is what amount is the credit.

Employer's disability policy paid a net after taxes of $7,596.18 of short term disability benefits during the healing period herein. (Ex. E, pp. 6-7) The employer then would also be entitled to a credit for 25 weeks found herein for the permanent disability period for which disability benefits were paid. Credit is $10,082.92 through December 31, 2014 (21 weeks). The employer is entitled to 4 more weeks of credit. For those 4 weeks, the undersigned is unable from this record to determine how much was paid in disability benefits. If the parties cannot agree on that additional credit, a request for an enlargement of findings will be accepted. A credit for disability paid at other times is not within the jurisdiction of this agency (such as benefits later paid without offset after an award of Social Security Disability). (Ex. E, p. 9) In other words, the credit allowable pursuant to 85.38(2) is only for those disability benefits paid during periods that the claimant was eligible for workers' compensation benefits.

ORDER

THEREFORE IT IS ORDERED:

That the defendants shall pay the claimant healing period benefits from February 17, 2014 through August 6, 2014 at the weekly rate of seven hundred two and 47/100 dollars ($702.47).

That the defendants shall pay the claimant twenty five (25) weeks of permanent partial disability commencing August 7, 2014 at the weekly rate of seven hundred two and 47/100 dollars ($702.47).

That the defendants pay/reimburse as appropriate the claimant's medical bills as detailed above.

Defendants shall receive credit for all workers' compensation benefits previously paid.

That defendants shall receive a credit for short term/long term disability benefits paid as detailed above.

Costs are taxed to the defendant pursuant to rule 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.

Signed and filed this 29th day of April, 2016.

STAN MCELDERRY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876 4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.