BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LUCAS STUMP,

Claimant,

vs.

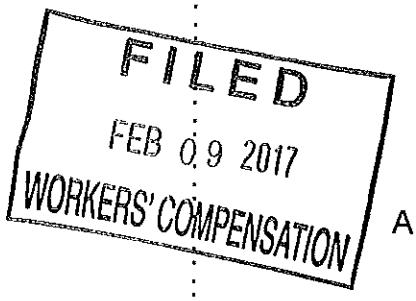
DOHRN TRANSFER,

Employer,

and

PROTECTIVE INSURANCE COMPANY,

Insurance Carrier,
Defendants.



File No. 5055151

ARBITRATION

DECISION

Head Note Nos.: 1803; 2503

STATEMENT OF THE CASE

Claimant, Lucas Stump, filed a petition in arbitration seeking workers' compensation benefits from Dohrn Transfer (Dohrn), employer and Protective Insurance Company, Insurance carrier, both as defendants. This case was heard in Des Moines, Iowa, on January 10, 2017.

The record in this case consists of claimant's exhibits 1 through 2, defendants' exhibits A through E, and the testimony of claimant.

ISSUES

1. Whether the injury resulted in a permanent disability;
2. The extent of claimant's entitlement to permanent partial disability benefits;
3. Whether claimant is due reimbursement for an independent medical evaluation (IME).

FINDINGS OF FACT

Claimant was 30 years old at the time of hearing. Claimant graduated from high school. He attended St. Ambrose University, Conception Seminary, University of Iowa, and Quincy University. It does not appear claimant graduated from any of these institutions. (Exhibit E, page 3)

Claimant has worked as a telemarketer, a delivery driver, a general laborer, and at the front desk of a hotel. Since 2012, claimant has worked as a truck driver. (Ex. E, p. 4)

Claimant worked with Dohrn as a truck driver and made deliveries to residential customers. On February 1, 2015, claimant was delivering a number of heavy tarps to a residential customer. Claimant testified he had to move the tarps off of a trailer, and then carry the tarps to a customer's garage.

Claimant said that at some point in the delivery, he reached down to pick up a tarp and felt pain in his right shoulder. Claimant testified he continued to work the rest of his day after his injury.

On March 13, 2015, claimant was evaluated by Rachel Oliverio, D.O., for right shoulder pain. Claimant was assessed as having right shoulder strain. He was told to ice his shoulder. He was returned to regular work duty. (Ex. 1, pp. 48-49)

Claimant returned to Dr. Oliverio on March 24, 2015 with continued complaints of right shoulder pain. Claimant was treated with medication, told to continue to ice, and recommended to have an MRI. (Ex. 1, pp. 50-51)

On April 3, 2015, claimant underwent an MRI arthrogram of the right shoulder. It showed tendinopathy and a subtle internal tear involving the superspinatus tendon. (Ex. 1, pp. 14, 18)

Claimant returned to Dr. Oliverio on April 6, 2015 with continued complaints of right shoulder pain. Claimant was prescribed physical therapy and to take over-the-counter naproxen. He was allowed to work full duty. (Ex. 1, pp. 53-56)

Claimant returned to Dr. Oliverio on May 8, 2015 and noted improvement in symptoms. Claimant noted his symptoms were aggravated by heavy labor at work. (Ex. 1, pp. 57-58)

Claimant saw Dr. Oliverio for the last time on May 15, 2015. Claimant's pain was almost completely resolved. Claimant was released from care and found to be at maximum medical improvement (MMI). (Ex. 1, pp. 59-60) Claimant testified he still had right shoulder pain when he was released from care from Dr. Oliverio.

On July 10, 2015, claimant was terminated from Dohrn for disciplinary reasons. (Ex. D, p. 1)

On September 13, 2015, claimant contacted Dr. Oliverio's office with complaints of continued right shoulder pain. Claimant was told to stretch and do home exercises. (Ex. 1, p. 61)

On March 7, 2016, claimant took a DOT physical and was found to be physically capable of driving a truck. (Ex. B, pp. 14-17)

In a June 24, 2016 report, Richard Neiman, M.D., gave his opinions of claimant's condition following an independent medical evaluation (IME). Claimant had pain in his right side of his neck and right shoulder. Using the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Dr. Neiman found claimant had a 7 percent permanent impairment of the right upper extremity converting to a 4 percent permanent impairment to the body as a whole. Dr. Neiman recommended claimant have a cervical MRI. (Ex. 2, pp. 68-71)

Claimant testified he is restricted in exercises involving use of his right shoulder. Claimant said he uses his left shoulder more to protect his right shoulder. Claimant said that he has loss of strength and range of motion in the right shoulder. Claimant said he has to be careful when picking up and playing with his children in regards to his right shoulder.

At the time of hearing, claimant was still working full duty. Claimant was working as a driver for Dayton Transport (Dayton). Claimant began working for Dayton in March 2016. At the time of hearing, claimant earned $21.80 per hour with Dayton. This was more than what claimant was earning with Dohrn.

CONCLUSIONS OF LAW

The first issue to be determined is if claimant sustained a permanent disability as a result of his February 1, 2015 date of 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 R. App. P. 6.14(6).

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).

Claimant was injured in February 2015. Nearly two years after the date of injury, claimant credibly testified he still had right shoulder pain and limitations in strength and function in his right upper extremity.

Dr. Oliverio indicated, in treatment notes, that she did not believe claimant would have any permanent impairment as a result of his injury. This opinion was rendered in April of 2015. (Ex. 1, pp. 59-60) Dr. Oliverio has not treated or evaluated claimant for approximately one and one-half years.

Dr. Neiman evaluated claimant in June 2016, approximately one year after Dr. Oliverio's final evaluation of claimant. Dr. Neiman opined claimant had permanent impairment. As Dr. Neiman's evaluation was performed more recently, it is found that his opinions regarding permanent impairment are more convincing.

Claimant credibly testified he continues to have pain limitations in his right shoulder. This is approximately two years after the date of injury. Dr. Neiman opined claimant has permanent impairment in his right upper extremity. Dr. Oliverio's opinions regarding permanency are found not convincing. Claimant has carried his burden of proof that his February 2015 injury resulted in a permanent disability.

The next issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

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.

Claimant was 30 years old at the time of hearing. Claimant graduated from high school. He has attended a number of secondary institutions of education but it does not appear he has graduated from any of those institutions. Claimant has worked as a telemarketer, a delivery driver, and a general laborer. Claimant has worked as a truck driver since 2012.

Dr. Neiman opined claimant had a 7 percent permanent impairment to the right shoulder converting to a 4 percent permanent impairment to the body as a whole. (Ex. 1, p. 70) Records indicate claimant has full range of motion in the right shoulder. (Ex. 1, p. 70) Claimant continues to work full time. Claimant credibly testified that two years since the date of injury, he continues to have limitations in strength and function regarding his right upper extremity. The record indicates claimant makes more at his current job than he did with Dohrn.

When all relevant factors are considered, it is found claimant has a 5 percent loss of earning capacity and industrial disability.

The final issue to be determined is if claimant is entitled to reimbursement for an IME from Dr. Neiman.

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).

In May 2015, Dr. Oliverio, the employer-retained physician, opined that she did not believe claimant would have any permanent impairment. (Ex. 1, pp. 59-60) In a June 2016 report, Dr. Neiman, the employer-retained physician, found claimant had a 4 percent permanent impairment to the body as a whole. (Ex. 1, p. 70) Given the chronology of the reports, claimant has carried his burden of proof that he is due reimbursement for Dr. Neiman's IME.

ORDER

THEREFORE IT IS ORDERED:

That defendants shall pay claimant twenty-five (25) weeks of permanent partial disability benefits at the rate of seven hundred fifty-three and 50/100 dollars ($753.50) per week commencing on May 15, 2015.

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

That defendants shall pay interest on unpaid weekly benefits as ordered above and as set forth in Iowa Code section 85.30.

That defendants shall reimburse claimant for the IME with Dr. Neiman.

That defendants shall pay costs.

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

Signed and filed this 9th day of February, 2017.

JAMES F. CHRISTENSON
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.