BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DENNIS GOODMAN,

Claimant,

vs.

RUPP TIRE SHOP,

Employer,

and

CONTINENTAL WESTERN INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5045203

ARBITRATION DECISION

Head Note Nos.: 1801, 1803, 2400, 2402

STATEMENT OF THE CASE

The claimant, Dennis Goodman, filed a petition in arbitration seeking workers' compensation benefits from Rupp Tire Shop, employer, and Continental Western Insurance Company, insurance carrier.

Prior to the hearing, the defendants filed a motion for summary judgment based on a statute of limitations defense. The summary judgment motion was granted on September 9, 2014. The judgment was subsequently appealed and reversed. The defendants raised the limitation defense again, which was denied.

On March 28, 2016, the defendants filed an interlocutory appeal, which was denied on April 11, 2016. The parties were contacted prior to the hearing to determine whether there was any motion to continue and while the defendants stated their intent to file for judicial review of the denial, there is no motion to stay or any other impediment to proceeding forth with the hearing. Counsel for the defendants made the professional assertion that they were prepared to defend the claim on the merits.

The record consists of the testimony of the claimant and claimant's exhibits 1 through 10. The case was heard on April 22, 2016, and considered fully submitted as of May 20, 2016, upon the simultaneous filing of briefs.

ISSUES

Whether claimant is entitled to additional temporary benefits for the period between May 11, 2015, to November 19, 2015;

Whether claimant is entitled to permanent partial disability benefits arising out of the November 14, 2005 injury;

Whether the claim is barred by the statute of limitations; and

The extent of any permanent partial disability.

STIPULATIONS

The parties agree the claimant sustained an injury on November 14, 2005 which arose out of and in the course of his employment. If permanent benefits are to be awarded, the parties agree that the injury is industrial in nature.

At the time of his injury, claimant was married and entitled to 2 exemptions. His gross weekly earnings were $552.00. Based on those foregoing numbers the parties agree that the weekly benefit rate would be $369.70.

Prior to the hearing, defendants previously paid 15 percent industrial disability and are entitled to a credit of that amount against any award.

FINDINGS OF FACT

At the time of the hearing, the claimant was a 71-year-old male. His educational history includes high school and some college courses. He has no college degree. Following high school, claimant entered the Air Force where he was honorably discharged in 1984. While serving in the Air Force, claimant was trained as an electrical power production specialist who helped to run diesel and gas-driven generators for various Air Force facilities. Some of the work entailed heavy lifting, work overhead, and heavy pushing/pulling.

His work history also includes farm laborer, pool cleaner, and boat trailer assembly worker.

In 1989 the claimant began working for the defendant employer at the Ida Grove facility as a mechanic. His job duties included replacing car or truck tires and rims, replacing mufflers, changing oil, and similar tasks. He retired voluntarily in 2010.

After his retirement from the defendant employer, claimant mowed for Platinum Ethanol using a tractor and as a maintenance employee for Golden Horizons where he did odd jobs involving changing light bulbs, fixing faucets, painting and some landscape work. He was working approximately ten hours a week and quit because he did not like the "boss lady."

On November 14, 2005, claimant was injured when he fell from a ladder from a height of about six feet. He hit the floor on his left side. He reported the injury to his boss, who retrieved the claimant's vehicle. The claimant drove to pick up his wife and they went to the emergency room.

Claimant was seen by Dr. Sinnott with complaints of left hip, wrist and shoulder pain. (Exhibit 1, page 105) X-rays revealed a fracture of the left wrist and left hip. (Ex. 1, pp. 101-104; Ex. 2, p. 8) The shoulder films revealed mild degenerative changes but no acute trauma. (Ex 1, p. 103) Claimant was given a prescription, advised to use crutches, and instructed to return. (Ex. 2, p. 8)

He returned for a follow-up visit in December with ongoing pain and discomfort on the left side. Claimant had good range of motion in the shoulder but was tender with movement. (Ex. 2, p. 8)

On January 25, 2006, claimant was returned to work at full activity. He was still getting physical therapy to improve his range of motion, but he was ambulating well and x-rays showed good healing in the fractures. (Ex. 2, p. 3)

On February 6, 2006, claimant saw Dr. Sinnott for ongoing left shoulder pain. Upon examination, claimant revealed signs of impingement. An MRI was ordered and claimant was referred to S.J. Meyer, M.D. (Ex. 2, p. 2)

The MRI showed a rotator cuff tear. (Ex. 1, p. 94) Dr. Meyer recommended AC joint resection arthroplasty, subacromial decompression, and open rotator cuff repair of the left shoulder. Claimant underwent this surgical repair on March 9, 2006. (Ex. 4, p. 10) This was the first of five surgeries on claimant's shoulder.

A second MRI was conducted on November 11, 2006, resulting in Dr. Meyer referring claimant to Ryan. C. Meis, M.D. for debridement. Dr. Meis performed the debridement as well as an arthroscopic revision of the subacromial decompression and manipulation under anesthesia on December 21, 2006. (Ex. 4, pp. 7-8)

After a course of physical therapy, claimant returned to work on March 3, 2007, at full duty. (Ex. 3, p. 112) Dr. Meis signed a letter on August 1, 2007, stating that claimant had reached maximum medical improvement (MMI) and sustained a five percent body as a whole impairment. (Ex. 3, p. 111)

Claimant was then sent to D.M. Gammel, M.D. for an independent medical evaluation on March 12, 2008. (Ex. 6) Claimant's current complaints during the examination included:

> Mr. Goodman states he has stiffness in "left shoulder", weakness in "left shoulder", numbness and tingling in "left little & ring fingers", and pain located in "left shoulder, left hip", described as "shoulder aches all the time; pain increase when reaching overhead, and hip has pain after walking for a short distance"[.] He states his pain is worsened with

> "overhead work and distance walking" and relieved by "Ibuprofen". He describes the frequency of his pain as constant (present ¾ to all of the time). Mr. Goodman states that his symptoms affect his ability to perform daily activities as "moderate, interferes with activity" to "limiting, prevents full activity." He describes tasks that are difficult for him to perform as "overhead left arm work and reaching behind shoulders" and that he is unsure of having other difficulties.
>
> On a scale of 0 to 10, Mr. Goodman rates his pain at this time at 2.5, with a past monthly average of 3.5, high of 6.5, and low of 2. He was requested to use a Pain Drawing to describe his sensations through a series of symbols. He indicates [a]n aching, stabbing pain in the left anterior and posterior shoulder, aching pain in the entire left hip and lower extremity, and pins and needles sensation and numbness in the left fourth and fifth fingers.

(Ex. 6, p. 5) Dr. Gammel noted decreased range of motion in the shoulder and left hip. There appeared to be no impairment related to the left wrist.

> Based on the medical records reviewed and history as related by the examinee, it is my opinion that Mr. Goodman sustained injuries to his left shoulder, wrist and hip secondary to an injury occurring on 14 November 2005 resulting in the need for subsequent medical treatment, physical therapy, diagnostic testing and surgical intervention. His current physical examination reveals decreased left shoulder and hip range of motion, visible left deltoid atrophy, left deltoid weakness, and intact sensation. Impairment rating to the left upper extremity secondary to the left shoulder is 16 percent. Whole person impairment rating secondary to left hip and pelvis pathology is 6 percent. Mr. Goodman's current physical examination fails to reveal objective medical findings warranting any permanent impairment rating to the left wrist.

(Ex. 6, p. 8)

Despite the restrictions, claimant continued to work his regular duty. In 2009, claimant had renewed pain complaints and on January 21, 2009, after another MRI, Ryan C. Meis, M.D. concluded claimant had a re-tear of the rotator cuff and recommended another surgery. (Ex. 3, p. 110) The surgery took place on April 6, 2009. (Ex. 3, p. 106)

Claimant followed a course of physical therapy but the pain and lack of motion persisted. On November 10, 2009, the physician's assistant in Dr. Meis's office noted as follows:

> DISCUSSION: Unfortunately despite his revision procedure, he seems to have persistent pain in his shoulder. At this point in time though, he appears to be functioning fairly well at work but we would be concerned

> if he were to have to do a lot of heavy lifting[,] particularly up overhead. We feel as though this would be very difficult for him. We therefore will place him on permanent restrictions with a 20-pound lifting restriction for the left arm and just occasional overheard with his left arm. [O]therwise [he] has no specific restrictions. We will go ahead and declare him at MMI today. An impairment rating will be provided upon request.

(Ex. 3, p. 98)

Dr. Meis revised his previous impairment rating to seven percent. (Ex. 3, p. 96)

A functional capacity evaluation (FCE) was performed on March 2, 2010, which placed claimant in the light physical demand level. (Ex. 5, p. 2) Safe lifting levels included 18 pounds for the leg, 15 pounds for the shoulder. The maximum tolerable force was 29.3 pounds. (Ex. 5 p. 2) Claimant told the evaluator that he could drive and/or ride in a car for 5 hours before needing to rest. (Ex. 5, p 5)

The claimant returned to work but eventually retired from the defendant employer due to the ongoing pain and discomfort. Claimant did find part-time work doing lawncare, landscaping, and occasional handywork but he continued to have problems with the left shoulder.

He was sent to Ben Bissell, M.D. on April 13, 2015. Dr. Bissell recommended surgery after an MRI showed a partial cuff tear. On May 11, 2015, Dr. Bissell performed a left shoulder arthroscopy with a rotator cuff repair and debridement. (Ex. 3, pp. 90-91) Dr. Bissell took claimant off work and did not return him to work until November 19, 2015.

In July, claimant was playing with his grandchildren when he experienced intense pain. An MRI in September of 2015, showed the following:

> IMPRESSION:
>
> 1. Mild supraspinatus tendon degeneration/tendinopathy.
>
> 2. Small complete tear of the supraspinatus component of the rotator cuff complex without tendon retraction[.]
>
> 3. Small glenohumeral joint effusion with fluid in the subacromial/subdeltoid bursa[.]
>
> 4. Mild degenerative changes involving the glenohumeral joint[.]
>
> 5. Moderate acromioclavicular joint arthropathy.

(Ex. 3, p. 85) Claimant underwent a total shoulder arthroplasty on October 21, 2015. (Ex. 3, pp. 40-41)

In 2016, claimant reported hip pain. (Ex. 3, p. 23) Radiology reports showed no signs of abnormalities. On February 8, 2016, claimant was seen by Dr. Bissell for the left hip, hamstring and left shoulder. As for his left shoulder, claimant reported only taking Aleve and that he was feeling much better despite the limited motion. (Ex. 3, p. 3) Claimant reported only minimal discomfort with activity for his left hip. His gait was normal. (Ex. 3, p. 4)

On examination, claimant revealed limitations in the left shoulder forward flexion, external rotation and internal rotation. (Ex. 3, p. 3)

Dr. Bissell determined claimant reached MMI as of February 8, 2016, and determined his impairment rating was 14 percent of the whole body. He recommended a 25 pound lifting limit with only occasional overhead work or reaching above claimant's shoulder. (Ex. 3, p. 3)

Currently claimant reports taking two Aleve—one in the morning and one in the evening. His pain level is greatly reduced.

Q: Do you have any pain at all anymore?

A: Yeah. A little bit at times. If I'm doing a little something extra heavy or I get a little tired or worn out, you know, yeah, it gets a little sore.

Q. Did you get your range of motion back too with that surgery?

A. Not a hundred percent, but I got a good percentage of it.

Q. What's the highest you can raise your arm now?

A. I can raise it straight up if I want to.

Q. How do you do that?

A. But it hurts (indicating).

(Transcript p. 60)

As for his range of motion, he admitted to regaining a "good percentage of it." (Trans. p. 60) Certain motions, however, increase his pain levels. He cannot lift any weights above his head.

He currently works approximately 20 hours a week doing lawn maintenance and trash removal. His lifting is limited to a 5-gallon can of gas. He testified that he believes the most he can lift is 10-12 pounds comfortably.

He has some problems sitting and standing for long periods of time due to pain in his hip. Despite the lack of medical care (or complaints), claimant maintained at hearing that he had ongoing hip pain since the 2005 injury. However, claimant did suffer from

clogged arteries in the left leg, which he represented was partially impacted by his smoking. He suffered left leg pain because of the diminished blood flow. (Ex. 1, p. 2, Ex. 3, p. 46)

Additionally, he sustained a fall on November 21, 2015, that injured his hamstring. (Ex. 3, p. 6)

> OBJECTIVE: On physical exam his left hip has full symmetric motion. Impingement test negative. Straight-leg test negative. Greater trochanter nontender. He has focal isolated tenderness at the ischial tuberosity and pain with restricted hamstrings testing, but his hamstrings strength does seem to be 5/5.
>
> IMAGING: Previous AP pelvis and hip x-rays from November 2015 showed no fracture or dislocation, but there is some mild abnormality of the left inferior pubic rami, possibly a nondisplaced fracture.

(Ex. 3, p. 6)

He has reduced the number of activities he does at home. He does not paint or mow the lawn, do his own roofing, or engage in other maintenance tasks around the home. Of his past work, he believes he could do swimming pool maintenance, assembling boat trailers, and maintenance work similar to the part-time work he performed at Golden Horizons.

CONCLUSIONS OF LAW

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).

Defendants raise the issue of claim preclusion in their brief, but that argument has already been addressed in the denial for summary judgment and will not be revisited here.

They also assert a statute of limitations defense. Defendants presented no evidence at hearing but instead rely upon the past testimony and evidence introduced in support of the motions for summary judgment.

Chapter 85 of the Code contains the workers' compensation statute. Section 85.26(1) provides in pertinent part:

> An original proceeding for benefits . . . shall not be maintained in any contested case unless the proceeding is commenced within two years from the date of the occurrence of the injury for which benefits are claimed or, if weekly compensation benefits are paid under section 86.13, within three years from the date of the last payment of weekly compensation benefits.

Defendants assert that the last payment of indemnity benefits was mailed to claimant's attorney's office on September 17, 2013. Claimant filed his petition on September 19, 2013.

At hearing, claimant testified that he would routinely pick up checks at his attorney's office or that his attorney would mail those checks to him.

The denial of summary judgment was based on the finding that there were genuine issues of material fact in dispute. The dispute was over whether the check was mailed on September 17, 2013.

In support of their motion, defendants introduced the affidavit of James Glendening, an agent of the defendant insurance company.

In the affidavit, Mr. Glendening stated that he typed a check made payable to the claimant on September 16, 2010 and that the check was sent to the claimant's attorney at the request of the claimant and/or his counsel and that the check was placed in an envelope for transmission through the U.S. mail on September 17, 2010 and that said envelope was deposited in the mail on September 17, 2010. He further testified that the procedure outlined in the affidavit was consistent with the office custom for the payment of weekly benefits.

Mr. Glendening was then deposed and in his deposition he admitted that he had not typed the check on September 16, 2010, but rather some time before. He was not certain of the exact date. As the Public Finance Co. v. Van Blaricome, 324 N.W.2d 716, 720-21 (Iowa 1982) case states, evidence of office custom raises a presumption of mailing. Here, however, Mr. Glendening's affidavit and deposition testimony are different. Despite the actual date on the check of September 17, 2013, Mr. Glendening admitted that the check was written on a different date—one that he could not remember. Thus the face of the check is inaccurate and cannot be relied upon as proof as to when the check was created or mailed.

In paragraph two on the statement of exhibit of the affidavit, Mr. Glendening wrote that he sent the check to the claimant's attorney's office at the request of either the claimant or the attorney. In his deposition he testified that he did not recall who made the request or when it was made. In answers to interrogatories, defendants assert that either verbal or correspondence was made by counsel for the claimant beginning on July 5, 2007. In the deposition, Mr. Glendening did not know if that was his answer or someone else who had provided that information. Mr. Glendening admitted that even after claimant's counsel became involved indemnity benefits were sent directly to the claimant at his address.

Beginning on November 20, 2009, checks were then made out to both claimant's counsel and the claimant because the claimant had been placed at maximum medical improvement. Mr. Glendening testified that in 2010 a gentleman by the name of Bill Cherry who worked for Acceptance Insurance Company was the individual who would take the checks, affix the postage and put them in the mail. Mr. Cherry was not an

employee of Berkley Risk, whom Mr. Glendening worked for, but rather an employee of another insurance company who office-shared with Mr. Glendening. No employee of Berkley Risk took the mail out of the building to an actual registered mail box.

There were multiple conflicts between the affidavit of Mr. Glendening and his subsequent deposition testimony. It is the defendants' burden to prove the affirmative defense. Given the many conflicts between the affidavit and the subsequent deposition testimony, it is found that defendants did not prove their affirmative defense. Specifically, they did not prove that the check was mailed on September 17, 2009, and therefore it is determined that the claimant's petition is not barred by the statute of limitations.

We now turn to the issue of industrial liability.

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 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).

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 fell on November 25, 2005, which resulted in injuries to his left hip, wrist, and shoulder. The hip and wrist resolved and required no treatment following 2006 until claimant re-injured his left hip in a non-work related fall in 2015. Claimant's shoulder pain persisted despite five surgeries.

Claimant seeks an industrial impairment based, in part, on his left hip, but that claim was not supported by the evidence. Following 2006, claimant had no complaints regarding his left hip and no treatment for his left hip until 2015 when he sustained a fall. Prior to 2015, claimant was developing clogged arteries leading to reduced blood flow, which claimant admitted during testimony caused him a significant amount of pain. Dr. Gammel, the IME doctor, who assigned a percentage impairment for hip pain did not note this in his medical report.

Claimant's current hip pain is not connected by medical testimony, either by report or contemporaneous treatment documentation. His hip pain following the injury resolved after a period of healing. The additional complaints of leg and hip pain appear to be more likely related to his ongoing arterial issues or the fall in 2015.

Claimant's industrial disability is measured based solely on his shoulder injury. His last shoulder surgery was performed by Dr. Bissell, an authorized treating physician. Dr. Bissell is in the best position to provide an expert opinion on the current state of claimant's body. Dr. Gammel and Dr. Meis have not seen claimant for nearly seven to eight years. Claimant's medical picture has changed since that time. He has had additional non-work related medical complications, additional surgery to his left shoulder, and new work restrictions. Dr. Bissell's opinions are given the greatest weight.

Dr. Bissell determined claimant reached MMI as of February 8, 2016, and determined his impairment rating was 14 percent of the whole body. Dr. Bissell recommended claimant observe a 25 pound lifting limit with only occasional overhead work or reaching above the shoulder.

Claimant testified that he could clean pools, perform light building maintenance, security work, and lawn care. He is motivated to return to work as evidenced by his regular, and successful, attempts to find employment.

While claimant's past work history is primarily as a tire maintenance worker, there are many skilled and semi-skilled jobs available to him including assembly work, maintenance work, security work, and some landscaping positions. Claimant has a valid driver's license. Based on the claimant's age, his willingness and motivation to return to work, his experience and education, along with the work restrictions imposed by Dr. Bissell, it is determined that claimant's impairment is 65 percent. Defendants have agreed that any additional benefit payments should commence on September 20, 2010. Because they are entitled to a 15 percent credit, the additional permanency award is 50 percent or 250 weeks.

Dr. Bissell was, and is, an authorized treating physician and he took claimant off of work due to the shoulder surgery from May 11, 2015, to November 19, 2015.

Section 85.34(1) of the Code provides in material part:

> If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable . . . the employer shall pay to the employee compensation for a healing period . . . beginning on the date of the injury, and until he has returned to work or competent medical evidence indicates that recuperation from said injury has been accomplished, whichever comes first.

Claimant is entitled to temporary benefits during that time.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant two hundred fifty (250) weeks of permanent partial disability benefits at the rate of three hundred sixty-nine and 70/100 dollars ($369.70) per week from September 20, 2010.

That defendants are to pay unto claimant healing period benefits at the rate of three hundred sixty-nine and 70/100 dollars ($369.70) per week from May 11, 2015, to November 19, 2015.

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

That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

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

That defendants shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

Signed and filed this 2nd day of August, 2016.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JGL/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.