

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KEN GARVEY,

Claimant,

vs.

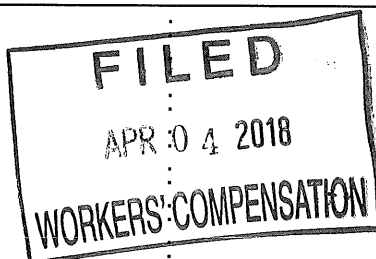
AMERICAN ORDNANCE,

Employer,

and

NEW HAMPSHIRE INSURANCE
COMPANY,

Insurance Carrier,
Defendants.



File No. 5063211

ARBITRATION
DECISION

Head Note No.: 1402.40, 1803

STATEMENT OF THE CASE

Ken Garvey, claimant, filed a petition in arbitration seeking workers' compensation benefits from American Ordnance, the employer and New Hampshire Insurance Company, the insurance carrier. The arbitration hearing was held on February 6, 2018, in Davenport, Iowa.

At hearing, Joint Exhibits JE1 through JE9, and Defendants' Exhibits A through J, were received and admitted into evidence without objection. Claimant did not submit separate exhibits. Claimant, and Brad Hamilton, Director of Facilities at American Ordnance, provided testimony.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

Counsel for the parties submitted post-hearing briefs on or before March 26, 2018, and the case was considered fully submitted on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

- 1) Whether the injury caused permanent disability and its extent
- 2) Whether claimant is entitled to 85.39 IME reimbursement

STATEMENT OF FACTS

At the time of the hearing, claimant, Ken Garvey, was 60 years old. He worked at the defendant employer, American Ordnance for 17 years as a millwright, repairing and maintaining all types of machines from small to very large.

Prior to the March 20, 2015 work injury, claimant sustained an injury to his right hand resulting in partial amputation of his right index and middle fingers. (Exhibit D, page 6) He stated that he had some ongoing numbness in his hand after that incident. On May 1, 2000, Michael Hendricks, M.D., assigned a 20 percent impairment rating to the upper extremity but did not assign any permanent restrictions. (Ex. JE1, p. 2) Claimant was diagnosed on December 11, 2014 with "obstructive sleep apnea." (Ex. JE2, p. 3)

On March 20, 2015, claimant sustained an electrical shock injury while working for the defendant. When the injury occurred, claimant was unknowingly attempting to plug in a standard 110 volt extension cord into what was described at hearing as a 440 volt outlet. It is also described in the medical records as a 220 volt outlet. In any event, it was a significantly higher voltage outlet. Claimant stated that the outlet was facing downward and it made it difficult to see it. Claimant had to crouch down and push the plug up into the outlet. While doing so, he saw a large white flash and received an electrical shock. The electricity entered into his right hand. Claimant believes the electricity exited through his foot and shoulder.

Claimant stated that he had received no training and there were no standard operating procedures for using the high voltage outlets.

Brad Hamilton stated that the plugs and outlets are color coded to avoid employees accidentally plugging something into the wrong outlet. After the incident the defendant implemented a lockout policy for the high voltage outlets.

After the incident, claimant was taken to Great River Medical Center Emergency Department. He was noted to have an electrocution injury to his right hand. He denied any loss of consciousness but complained of numbness and tingling in his right hand. (Ex. JE3, p. 4) Claimant stated that his heart rate was elevated and he felt "skiddish" after the incident.

Claimant received a consultation with Michael Niehaus, M.D. at the emergency room. (Ex. JE3, pp. 9) His assessment of claimant's injury was: "[e]lectrical shock right upper extremity – doubt significant underlying injury." (Ex. JE 5, p. 15) He also stated that "I do not think patient expose [sic] long enough to have enough energy delivered to the arm to cause myonecrosis." (Id.)

On March 23, 2015, Dr. Niehaus assessed claimant with "[e]lectrical shock right upper extremity – no evidence of significant injury," and returned claimant to work without restriction on March 24, 2015. (Ex. JE 5, pp. 17, 18)

On March 24, 2015, claimant was sent to Rachel Oliverio, D.O. at Great River Business Health, by the employer for a "fitness for duty examination." (Ex. JE6, p. 19) Claimant reported the problems related to the electrical shock as "barely noticeable", and he felt it was "almost entirely resolved." (Ex. JE6, p. 19) He reported his "pain level is 0/10." (Id.) Dr. Oliverio confirmed his fitness for duty and released claimant to return to work full duty on March 24, 2015. (Ex. JE6, pp. 20, 21)

Claimant testified that the injury occurred on a Friday. He was off work that weekend and did not work on Monday, March 23, 2015, awaiting his fitness for duty examination on March 24, 2015. He returned to work on Tuesday, March 24, 2015, and he was summoned to Brad Hamilton's office and was fired for "repeated safety violations and unsafe acts which present a clear and present danger to himself and others." (Ex. F, p. 13) Defendants presented at hearing just two other written warnings that claimant had been given in his 17 years of service. The first was for a security infraction, not a safety violation. (Ex. E, p. 11) The second occurred in 2011. It was a violation for exceeding his prior lifting restriction. (Ex. E, p. 12)

On May 26, 2015, claimant was seen by James Milani, D.O. an authorized treating physician at Great River Business Health. (Ex. JE6, p. 22) He reported new symptoms that started about one month prior involving neck pain with "popping and cracking and stiffness along with low back pain." (Ex. JE6, p. 22) He noticed the neck and low back pain when he started walking to lose weight. (Id.) Due to ongoing paresthesia, Dr. Milani ordered EMG/NCV testing for the right upper extremity. (Id.) He stated that his symptoms may likely be explained by cervical degenerative disc disease/arthritis. He reported his pain level at 3/10. (Ex. JE6, p. 25)

On June 24, 2015, Dr. Milani assessed claimant with right carpal tunnel based on the June 16, 2015 EMG. Dr. Milani stated that the electrical shock would not have caused the carpal tunnel. He further stated that claimant's current symptoms "are not related to the work injury" from the electrical shock. (Ex. JE6, p. 27) He further stated that the electrical shock injury has been "investigated, treated and resolved." (Ex. JE6, p. 27) Claimant expressed his concern that Dr. Milani was the company doctor and alleged that he did not believe that Dr. Milani had claimant's best interest in mind. (Ex. JE6, pp. 26, 27) This concern was expressed again at hearing.

Claimant believes that a number of physical complaints that he has are caused from the electrical shock injury.

On December 12, 2017, Dr. Milani opined that “none of the alleged complaints,” which were described as: “cognitive issues, neck pain, sleep difficulty, headaches, heat intolerance, sweating issues, depression, fatigue and peripheral neuropathy . . . are related to the March 2015 work injury.” (Ex. JE6, pp. 29-30)

After he was released by Dr. Niehaus and Dr. Oliverio and had been terminated from his employment, claimant pursued medical treatment on his own and had carpal tunnel surgery on the right and left arms in March and April, 2016, with Craig Bottke, M.D. (Ex. JE3, pp. 11, 12) On July 27, 2017, Dr. Bottke opined that the bilateral carpal tunnel surgeries that he performed would “not be related to the electrical injury to his right arm sustained in March 2015.” (Ex. JE7, pp. 33, 34)

On August 2, 2017, Marc Hines, M.D. conducted an independent medical evaluation (IME) at the request of claimant’s counsel. (Ex. JE8) Dr. Hines noted that claimant “made a perfect score and made no errors” during testing of his mental status. (Ex. JE8, p. 43) Dr. Hines concluded that claimant “has a number of underlying abnormalities that do not appear to have any relationship to his electrical injury.” (Ex. JE8, p. 45) Dr. Hines also stated that “several conditions would need to be met before one could proceed with any concerns regarding the electrical injury in 2015 as a cause of the patient’s current problems.” (Ex. JE8, p. 47) He said that although claimant “has significant complaints” the “bedside examination does not verify any significant difficulties.” (*Id.*) Therefore, Dr. Hines was unable to draw a conclusion that any of claimant’s present symptoms are causally related to the March 2015 electrical injury and he found no permanent impairment from the conditions claimant complained of.

On December 13, 2017, claimant was seen for an IME by Michael Jacoby, M.D. at the defendant’s request. (Ex. JE9) Dr. Jacoby noted that during the exam, claimant was perspiring although he claimed an inability to sweat. Dr. Jacoby stated that the claimed inability to sweat is not likely related to the March 2015 injury. Dr. Jacoby also noted peripheral neuropathy and low back myofascial complaints were present prior to the work injury. He stated that the work injury was not likely responsible for “selective memory problems.” (Ex. JE9, p. 54) Dr. Jacoby concluded that “aside from a skin lesion on his hand he claims related to the electrical event, there is no objective evidence to support other complaints as related to the work event in March, 2015.” (Ex. JE9, p. 55) He also stated that the skin lesion did not result in any permanent disability. (*Id.*)

Claimant testified that he was told by medical personnel that “there is not a direct line” from the March 2015 injury to his current complaints and he understood that prior conditions could account for his current complaints. However, he feels that his complaints are worse than they were before the work injury.

No permanent restrictions have been assigned to claimant for the alleged work injuries by any medical provider.

No permanent impairment rating has been assigned to claimant for the alleged work injuries by any medical provider.

I find from the opinions of Dr. Milani, Dr. Hines and Dr. Jacoby, and supported by the opinions of Dr. Niehaus, Dr. Oliverio and Dr. Bottke, that claimant has failed to show that his current complaints are related to the March 20, 2015 work injury.

CONCLUSIONS OF LAW

1) Causation and Extent of Permanent Partial Disability

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 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).

Based on the opinions of all of the medical experts in this case, including claimant's IME physician, I conclude that claimant has failed to show that his current complaints are related to his work injury and that he has failed to carry his burden of proof that his March 20, 2015 work injury resulted in permanent

impairment. Therefore, I also conclude that the issue of the extent of permanent impairment is moot.

2) Entitlement to IME Reimbursement

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 IME. 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).

Dr. Hines' IME was conducted on August 2, 2017. Iowa Code section 85.39 requires that there must first be "an evaluation of permanent disability . . . made by a physician retained by the employer," which the employee believes is too low, before the claimant is entitled to an IME under this section. In this case, I have found above that Dr. Jacoby conducted his IME on December 13, 2017, which is after Dr. Hines' IME. Dr. Jacoby found that the skin lesion does not result in any permanent disability. (Id.) I conclude that the condition precedent of a physician retained by the employer having evaluated permanent disability did not exist at the time of the Dr. Hines IME.

Assuming arguendo that I were to rely on the June 24, 2015 opinion of Dr. Milani, in which he stated that claimant's current condition was not related to his work injury, making Dr. Hines' opinion subject to reimbursement, I must also note that no proof has been offered as to the amount of said reimbursement. Iowa Code section 85.39 requires a defendant only to pay reasonable fees associated with the IME and no bill or invoice was introduced to establish the amount. Although an amount is referred to in the Hearing Report, the issue is disputed in the Hearing Report, and I am unable to rely on disputed assertions in the Hearing Report as adequate proof. This request is denied.

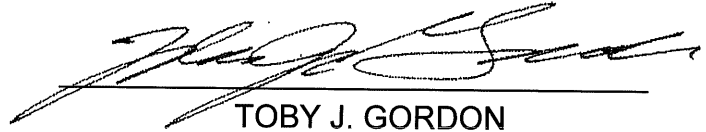
ORDER

IT IS THEREFORE ORDERED:

Claimant shall take nothing.

Each party shall pay their own costs.

Signed and filed this 4th day of April, 2018.



TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

James P. Hoffman
Attorney at Law
PO Box 1087
Keokuk, IA 52632
jamesphoffman@aol.com

Aaron T. Oliver
Attorney at Law
5th Floor, US Bank Bldg.
520 Walnut St.
Des Moines, IA 50309-4119
aoliver@hmrlawfirm.com

TJG/sam

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.