BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RUSSELL FREES, Claimant, vs. AREA PROFESSIONAL PAINTING & SANDBLASTING, Employer, and AUTO-OWNERS INSURANCE COMPANY, Insurance Carrier, and SECOND INJURY FUND OF IOWA, Defendants.	File Nos. 5051834, 5051852 ARBITRATION DECISION Head Note Nos.: 1101, 1402.5, 2401, 2600, 2800

STATEMENT OF THE CASE

Russell Frees, claimant, filed petitions in arbitration seeking workers' compensation benefits against Area Professional Painting & Sandblasting, employer, and Auto-Owners Insurance Company, insurer, and the Second Injury Fund of Iowa, for alleged work injury dates of September 11, 2014, and September 20, 2014.

This case was heard on September 28, 2016, in Des Moines, Iowa. The parties were offered the opportunity to brief but opted to submit the case. The case was considered fully submitted on September 28, 2016.

The record consists of claimant's exhibits 1-3, defendants' exhibits A-C, the Second Injury Fund's exhibit AA, and testimony of claimant and Ken Beaird.

ISSUES

File No. 5051834, Date of Injury: September 11, 2014

Whether claimant sustained an injury on September 11, 2014, which arose out of and in the course of employment;

Whether claimant's claim is barred for failure to give timely notice under Iowa Code section 85.23;

Whether the alleged injury is a cause of temporary disability and, if so, the extent;

Whether the alleged injury is a cause of permanent disability and, if so,;

The appropriate commencement date of permanent disability benefits;

The extent of claimant's industrial disability; and

Entitlement to an independent medical evaluation.

File No. 5051852, Date of Injury: September 20, 2014

Whether claimant sustained an injury on September 20, 2014, which arose out of and in the course of employment;

Whether claimant's claim is barred for failure to give timely notice under Iowa Code section 85.23;

Whether the alleged injury is a cause of permanent disability and, if so,;

The appropriate commencement date of permanent disability benefits;

The extent of claimant's scheduled member disability;

Whether claimant is entitled to Second Injury Fund benefits and, if so, the amount of benefits; and

Entitlement to an independent medical evaluation.

STIPULATIONS

The parties stipulate claimant was an employee at the time of the alleged injuries.

At all relevant times, claimant's gross earnings were $600.00 per week. He was single and entitled to 2 exemptions. Based on those foregoing numbers, the weekly benefit rate is $384.96.

FINDINGS OF FACT

Claimant was a 51-year-old person at the time of the hearing. Claimant left school after the eleventh grade and achieved his GED. He went through the Denison Job Corps for painting and decorating. In 1997, 2005, 2006, and 2007, claimant was charged with crimes of theft or dishonesty, including forging a signature on a check and shoplifting. (Exhibit AA) He began working for the defendant in 2003 and worked on

and off for the company since that time for a cumulative period of approximately five to six years.

Claimant has worked as a painter and sandblaster for most of his adult life for a number of different companies.

Claimant sustained an injury to his left upper arm as a result of a gunshot wound as a child. The left biceps is significantly atrophied as compared to the right. He has difficulty opening his hand all the way and has a loss of range of motion in his wrist from the tendon damage. (Ex. 2, page 6)

Claimant also sustained an injury to his right elbow while working for Superior Painting and he was off work from November 2013 until September 2014 when he began working for defendant employer. Claimant attributed his elbow pain to a previous injury that occurred while he worked at Jiffy Lube in 2005.

On September 1, 2014, claimant was loading a trailer with equipment. Along with a co-worker, he lifted a sand pot weighing approximately 800 pounds into the back of the trailer. As the pot was being lifted into the trailer, the other workers lost control and the pot slipped backward with much of the weight borne by the claimant. During the second attempt, claimant was positioned on the ground pushing the pot into the trailer. The second attempt was successful. He also used a sledgehammer to strike a lock from a trailer and during his deposition testimony claimed that he felt pain after that activity. At hearing, however, he maintained it was the pot that caused his hernia.

According to Ken Beaird, the owner of the company employing claimant at the time of his injury, claimant had performed two jobs: sandblasting a tank at a cement plant and a house. He admitted to knowing claimant for 12-15 years, but that claimant only worked a cumulative amount of a year. He picked claimant up and drove claimant to the work sites due to claimant's lack of a valid driver's license.

Claimant testified initially that he did not experience pain on the left side until a week later. In his deposition testimony, he stated that the pain came on after the use of the sledgehammer.

Claimant went on to proclaim that he reported the incident to his supervisor, Steve Beaird, the owner's son, but his request for medical treatment was ignored. Claimant's testimony was that he also tried to seek treatment but because it was a work injury, treatment was refused. This testimony stands in opposition to the medical record with Natalie Leddin, D.O., where claimant was treated for both carpal tunnel syndrome and referred to a specialist for the hernia. It also stands in opposition to the hernia surgery claimant underwent in 2016.

Claimant initially testified that he complained to both Steve Beaird and Ken Beaird, the owner, of his frequent right arm pain and numbness, but during cross-examination stated that he was not sure if he ever discussed the carpal tunnel with the defendants. Mr. Beaird denied claimant reported any injury, either the hernia or

the carpal tunnel problems. He further denies not providing medical care for the claimant and that they report injuries in a timely fashion. There were two injuries that defendants reported to their insurance company this year.

During cross-examination, claimant admitted having symptoms since approximately 2007, but that the symptoms generally waxed and waned. Now they are constant.

For the preceding testimonial discrepancies, it is found that claimant has low credibility.

On April 15, 2015, claimant reported to Mercy West Grand Medical Center where he was seen by Dr. Leddin for complaints of a hiatal hernia. (Ex. 1, p. 1) Along with the hernia pain, he also complained of lower back pain and numbness along with carpal tunnel in the right wrist. (Ex. 1, p. 1)

He was instructed to stretch his wrists, given medication, and referred for evaluation of the hernia. (Ex. 1, p. 1)

On September 2, 2015, claimant was seen by Sunil Bansal, M.D., for an independent medical evaluation (IME). (Ex. 2, p. 5) Claimant reported constant left groin pain and discomfort, swelling in the testicles and occasional pain that radiates into his abdomen and around his back. He also reported difficulties using his right hand, particularly with gripping and excessive use. The pain frequently radiated up his forearm and elbow. He had intermittent numbness and tingling of his right hand and into the fingers. He reported difficulty with lifting anything over 15 pounds on the right and 10 pounds on the left. (Ex. 2, p. 6-7) At hearing, he testified that he could lift 15 pounds on the left.

Dr. Bansal palpated the hernia to confirm its existence. (Ex. 2, p. 8) He also determined claimant exhibited appropriate tenderness over the volar aspect of the wrist as well as testing positive in the Tinel's sign and Phalen's sign. (Ex. 2, p. 8) Claimant had a loss of sensory discrimination over the thumb, index finger, and long finger. (Ex. 2, p. 8)

Dr. Bansal concluded that the lifting caused the hernia as "[t]his task would greatly increase the intra-abdominal pressure, leading to protrusion of abdominal contents through an opening of the inguinal canal." (Ex. 2, p. 9) Hernias have been caused by heavy lifting in the past per medical research from the Mayo Clinic. Further, claimant had not experienced this pain prior to the injury. (Ex. 2, p. 9)

Dr. Bansal further concluded that as a result of daily use of vibratory tools and hoses, claimant developed carpal tunnel syndrome. (Ex. 2, p. 9)

For the right wrist carpal tunnel syndrome, Dr. Bansal assigned a five percent upper extremity impairment rating and a seven percent rating of the whole person for

the hernia. For the loss of elbow flexion strength on the left, Dr. Bansal assigned three percent upper extremity impairment rating. (Ex. 2, p. 10)

Claimant eventually had surgery for the hernia with Dr. Roe on May 6, 2016, per his testimony, and was off work for approximately six to seven weeks. He has been released by Dr. Roe.

Claimant is currently not working and does not believe that he could work an eight hour day at this time due to his inguinal hernia pain. He has cramps from hard labor and cannot do the lifting he was able to do in the past. He has performed various odd jobs such as yard work and installation of a radiator. He believes his lifting max is around 50 to 60 pounds.

Defendants filled out a first report of injury on December 18, 2014, based on a letter from claimant's counsel regarding a possible injury. (Ex. B, p. 2) The injury was not identified. (Ex. B, p. 2) A first report of injury was filled out on May 26, 2015, for the carpal tunnel syndrome. (Ex. B)

On August 5, 2015, defendants informed the claimant that he did not provide proper notice of the hernia and carpal tunnel syndrome injuries and that it was "unclear" that the alleged injuries arose out of and in the course of claimant's employment. (Ex. A, p. 1)

Claimant was offered another project through defendants but either walked off early or did not appear. Mr. Beaird described claimant as unreliable.

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).

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.

There is no dispute that the claimant suffered a hernia that needed surgical repair or that he has carpal tunnel syndrome in his right upper extremity. The primary issue is whether the claimant's injuries arose out of and in the course of his employment. Evidence supporting the claimant's position includes Dr. Bansal's opinions that heavy lifting is a known cause of hernias and use of vibratory tools over time in a repetitive fashion is a known cause of carpal tunnel syndrome.

Defendants argue that claimant is not credible and point to his distant past of felony and misdemeanors involving crimes of theft and/or dishonesty. Additionally, they argue that claimant did not inform them that the injury was work-related and that they were unaware it was work related until a letter was sent on December 18, 2014, by counsel for the claimant. It was previously found claimant's testimony is given low weight due to his credibility problems.

Without relying on the claimant's testimony, or relying solely on undisputed evidence, claimant did have to lift heavy weights while working for the defendants. Based on Dr. Bansal's opinions, it is determined claimant has sustained work related injury resulting in a hernia.

As it relates to the carpal tunnel syndrome, the evidence is not as straightforward. Dr. Bansal was either not aware, or did not include, that claimant had an elbow injury on the right side which kept claimant off of work from November 2013 until September 2014 when he began working for defendant employer. Claimant attributed the pain to a previous injury which never healed. He also believed that the current carpal tunnel syndrome stemmed back to insults in 2006 and 2007.

Dr. Bansal did not note, or did not realize, that claimant had worked for other companies while sandblasting and painting. Claimant had only worked briefly for the defendant employer before reporting both carpal tunnel syndrome and the hernia. The claimant did not carry his burden to prove that the carpal tunnel syndrome was related to his work with defendant employer as opposed to a different employer. For the carpal tunnel syndrome claim, it is found that the carpal tunnel syndrome did not arise out of and in the course of claimant's work.

However, given that the hernia is found to be a work related injury, the question then turns on whether the claimant provided appropriate notice of the hernia injury.

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it

may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

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Claimant first received medical treatment for his hernia and carpal tunnel syndrome on April 15, 2015. He was aware that the groin pain and carpal tunnel syndrome were associated with his work at that time. During his testimony on cross, he stated:

> Q: And you did not seek any medical care . . . ?
>
> A: No, that's not right. . . .

(Transcript p. 37)

Claimant testified that he alerted defendants to his hernia injury at the time it occurred and demanded care, but was ignored. He also testified that he informed the defendants on a regular basis of his carpal tunnel syndrome symptoms.

Here the evidence is the testimony of the claimant against the testimony of the owner, Ken Beaird. Both parties have self-interest in their version being the correct one. While claimant does have a record of forgery, theft, and extortion, those charges are nearly ten years old. The finding of low credibility was impacted more by his testimonial discrepancies than his more distant misbehaviors. During his deposition, claimant reported pain after using a sledgehammer instead of lifting the heavy pot. This was not revealed during direct. Claimant testified that he reported the carpal tunnel syndrome with the defendants frequently but in cross, he admitted that he did not remember if he ever discussed carpal tunnel syndrome with the defendants.

Mr. Beaird's testimony was that when he is notified of an injury, he contacts his insurance agent. He reported two injuries in 2016. The paperwork supports this behavior. On December 15, 2014, claimant's lawyer sent a standard letter informing

defendant employer of a potential work injury. After the letter was received, a first report of injury was filled out on December 18, 2014, just days later. The letter informing the defendant employer that there was a work related injury did not specify what injury existed. (Ex. C)

Based on the testimony of Mr. Beaird, buttressed by the documentary evidence, it is determined that claimant did not alert the defendants to any work related injury until the December 15, 2014, letter arrived.

By his own testimony, claimant knew his hernia injury was related to his work and that his groin pain needed treatment. He testified that he informed his employer, "I told you I need to go to the doctor and you'll have to have Justin go with you today." (Tr. p. 33) This was not a repetitive or cumulative injury. It was the result of either the use of a sledgehammer or the lifting of a pot which occurred on September 1, 2014. Therefore, notice had to be given by December 1, 2014. It is found that claimant did not provide appropriate notice of his injury to defendants on December 1, 2014, and therefore he shall take nothing as it relates to his hernia injury.

Defendants are obligated to reimburse claimant for the IME under 85.39. However, certain conditions must be met. First, an evaluation of permanent disability must be made by the employer. It is after this that the claimant is entitled to seek his or her own IME. In this case, the claimant was not subjected to any examination by a physician chosen by the defendants.

Because the triggering events required with 85.39 did not occur, the claimant is not entitled to reimbursement under 85.39.

ORDER

THEREFORE IT IS ORDERED,

File Nos. 5051834, 5051852:

Claimant shall take nothing.

Each party shall pay their own costs.

Signed and filed this 10th day of January, 2017.

JENNIFER S. GERRISH-LAMPE
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.