BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DAWAYNE LEACH,

Claimant,

vs.

DAHL'S FOODS, INC.,

Employer,

and

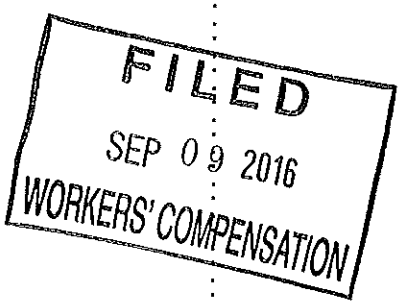
EMC PROPERTY AND CASUALTY COMPANY,

Insurance Carrier,

and

SECOND INJURY FUND OF IOWA,

Defendants.



File No. 5047957

ARBITRATION

DECISION

Head Note Nos.: 1108; 2701

STATEMENT OF THE CASE

Dawayne Leach, the claimant, seeks workers' compensation benefits from defendants, Dahl's Foods Inc., the alleged employer, and its insurer, EMC Property and Casualty Company; and, the Second Injury Fund of Iowa, as a result of an alleged work injury on March 25, 2014. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on July 18, 2016, but the matter was not fully submitted until the receipt of the parties' briefs and argument on August 5, 2016. Oral testimony and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Claimant's exhibits were marked numerically. Defendants' exhibits were marked alphabetically. The Second Injury Fund of Iowa offered no additional exhibits. References in this decision to page numbers of an exhibit shall be made by citing the exhibit number or letter followed by a dash and then the page number(s). For example, a citation to claimant's exhibit 1, pages 2 through 4 will be cited as, "Ex 1-2:4

The parties agreed to the following matters in a written hearing report submitted at hearing:

1. An employee-employer relationship existed between claimant and Dahl's Foods at the time of the alleged injury.

2. Claimant is seeking temporary total or healing period benefits from April 20, 2014 through June 1, 2015.

3. At the time of the alleged injury, claimant's gross rate of weekly compensation was $416.25. Also, at that time, he was single and entitled to one exemption for income tax purposes. Therefore, claimant's weekly rate of compensation is $267.25 according to the workers' compensation commissioner's published rate booklet for this injury.

ISSUES

At hearing, the parties submitted the following issues for determination:

I. Whether claimant received an injury arising out of and in the course of employment;

II. The extent of claimant's entitlement to alternate care; and,

III. The extent of claimant's entitlement to weekly temporary total or healing period benefits and permanent disability benefits.

At hearing, the parties agreed that Sunil Bansal, M.D., has been paid both by claimant and defendants for his medical evaluation of claimant and that Dr. Bansal needs to reimburse claimant for his payment of his fee. However, Dr. Bansal is not a party to these proceedings and I have no authority to order such a reimbursement.

FINDINGS OF FACT

In these findings, I will refer to the claimant by his first name, Dawayne, and to the defendant employer as Dahl's.

From my observation of his demeanor at hearing including body movements, vocal characteristics, eye contact and facial mannerisms while testifying in addition to consideration of the other evidence, I found Dawayne credible.

Dawayne is 57 years of age. He completed ninth grade, but dropped out in the tenth grade. He apparently does not have a GED. He received training as a truck driver while in the National Guard, but was assigned to only cooking duty. Dawayne's work history before Dahl's consists solely of janitorial work for various employers, both full and part-time, earning between $10.00 and $10.50 per hour.

Dawayne worked at a Dahl's food store from October 2011 until April 23, 2014. He initially was a temp worker for Midwest Janitorial assigned to the Dahl's store, but was hired by Dahl's to perform the same part-time work on March 3, 2012. In October 2012, he became a full-time employee for Dahl's and began receiving fringe benefits, the particulars of which was not discussed in the record.

There is no dispute that Dawayne's job at Dahl's involved cleaning, unloading trucks, and stocking shelves. Dawayne testified that his work injury began about four months after he started working at Dahl's when he was assigned to stripping and waxing floors for his entire shift. He used a power stripper and a long handled scraper. He states that the stripping activity required highly repetitive use of his hands and arms. Defendants asserted in their post hearing brief that Dawayne did not work a 40-hour work week at Dahl's. Exhibit C, a description of defendants' calculation of the weekly rate, was initially submitted at hearing, but later withdrawn when the parties stipulated the rate. The exhibit remained in the exhibit package. I am going to receive it has Commissioner's exhibit 1. According to defendants' calculations, Dawayne worked a total of 605.05 hours over the 14 week period prior to the alleged work injury. This represents an average work week of 43.22 hours.

Dahl's fired Dawayne effective on May 1, 2014, not long after he reported his alleged injury in this case. Dahl's asserted he was discharged for insubordination and contested Dawayne's application for unemployment benefits. (Ex. D-14, 16) However, Dawayne received unemployment benefits from the date of his discharge through November 2015. The nature of the alleged insubordination was not explained in the record. Dawayne received regular wage increases prior to his asserted work injury and was making $10.50 per hour when he left Dahl's. (Ex. 14) Only two performance appraisals were placed in evidence. One is undated and indicates that Dawayne is an excellent cleaner, but needs a lot of work on all other areas of his job. (Ex. D-11) Another is dated April 19, 2014 which indicates substandard work and that Dawayne needs to have a drastic improvement in quality of his work to avoid further disciplinary action. (Ex. D-12)

After leaving Dahl's, Dawayne was unemployed until March 2015. At that time, he worked for three months operating a riding lawn mower, earning $10.00 per hour. On July 7, 2015, he started working for another food store, Cash Saver, and was still so employed at the time the hearing. His job at Cash Saver is similar to his work at Dahl's performing janitorial duties such as vacuuming rugs, dust mopping and scrubbing floors using mops and machines, but no floor stripping. He also stocks shelves. He currently only works 24 hours a week and receives no fringe benefits. (Ex. 15-1)

Dawayne is asserting a cumulative type of work injury consisting of bilateral carpal tunnel syndrome (wrists) and cubital tunnel syndrome (elbows) as a result of his work at Dahl's with a manifestation date of March 25, 2014. Dawayne's health history before this asserted injury includes heart problems and significant type II diabetes. His heart problems were addressed with the implanting of a stent and there are no restrictions in evidence based upon a heart problem. To date, his diabetes remains uncontrolled despite continued treatment. Numerous doctor notes indicate that Dawayne is not good at complying with his physicians recommendations to control his diabetes.

Prior to his employment at Dahl's, Dawayne was diagnosed with right arm carpal tunnel syndrome (CTS) along with right shoulder impingement syndrome in 2010. The

CTS was based on an EMG which tested only the right extremity. (Ex. 3-14) That testing ruled out ulnar neuropathy. (Ex. 3-15) Dawayne was treated for the right CTS by his family doctors at the Primary Health Care clinic, Jeffrey Pederson, D.O. a physiatrist, along with Stephen Ash, M.D. and Hui Han, M.D., orthopedic surgeons (Ex. 1 thru Ex. 5) When injection therapy failed, a surgery was scheduled for the right carpal tunnel syndrome, but delayed indefinitely until the diabetes is better controlled. A five pound lifting restriction imposed by his physicians at this time was never lifted. The surgery was never done. Although Dawayne testified that he has done better with his diabetes, his recent A1c results remain very high and doctors continued to assess Dawayne with uncontrolled diabetes. (Ex. 1-55) It should be noted that none of the medical records from 2010 show any left-sided extremity pain complaints. The first complaint of left-sided problems was in September 2011, when Dawayne complained to his family doctor of left shoulder pain. (Ex. 1-12) The first complaint of bilateral arm symptoms occurred on January 3, 2013 when Dawayne reported to his doctor that both of his arms were hurting. (Ex. 1-14) He reported arm and shoulder pain in June 2013, but the office notes do not state it was bilateral. (Ex. 1-25)

On April 25, 2014, Dawayne reported to his family doctor of worsening pain and numbness in his hands and arms over the past month which was making his work at Dahl's and his daily tasks such as tying his shoes difficult. He told the doctor of his prior wrist problems in 2010. The doctor diagnosed bilateral CTS and gave him a retroactive release from work from April 20 through May 1, 2014. Dawayne told his doctor that he was interested in pursuing a workers' compensation claim, and the doctor advised him to contact his employer to find an occupational physician. (Ex. 1-43)

Dawayne then reported his injury to Dahl's the next day on April 26, 2014 and was sent by defendants to Richard Bratkiewicz, M.D. Dawayne saw Dr. Bratkiewicz on April 28, 2014. He told Dr. Bratkiewicz of his family doctor's assessment and of his prior carpal tunnel problems. (Ex. 7-1) Dr. Bratkiewicz agreed with the assessment of a worsened CTS condition from his job activities at Dahl's and ordered a new EMG study to compare with his prior EMG. (Id) He also imposed a five pound lifting restriction and told Dawayne to wear wrist braces when working and to avoid repetitive wrist motions. (Ex. 7-1:2) Dawayne returned to Dr. Bratkiewicz on May 9, 2014 after the EMG revealed not only a bilateral CTS but a bilateral cubital tunnel syndrome (CbTS). (Ex. 8) Dr. Bratkiewicz opined that this was a "clear-cut case of overuse with resultant nerve entrapment syndromes as proven on EMG." (Ex. 7-3) The doctor referred claimant for specialty consultation and continued the restrictions. (Id.) Dawayne returned to Dr. Bratkiewicz on September 8, 2014 to refill a prescription and reported that he was still awaiting defendants' approval of a consultation. The doctor stated that he was not quite sure why there was a delay in referring Dawayne to a hand specialist in that this was a clear-cut carpal and cubital tunnel syndromes and claimant was not improving. (Ex. 7-5) He again continued the restrictions. (Ex 7-6) There are no further reports from this doctor in evidence.

Instead of following the recommendations of Dr. Bratkiewicz for a treatment consultation, defendants sent Dawayne to Teri Formanek, M.D., an orthopedist, for an independent medical evaluation. Dr. Formanek opined that he is unable to state within a reasonable degree of medical certainty that Dawayne's work activities at Dahl's were a substantial contributing factor to the need for surgical intervention for his upper extremity compression neuropathy conditions. The doctor states that his poorly controlled diabetes, his underlying cardiovascular disease and his history of smoking are substantial contributing factors to the development of peripheral nerve compressions and that it is unlikely that the work at Dahl's substantially contributed to the need for surgery. He states that at most his Dahl's work could temporarily aggravate his prior conditions, but that aggravation would be gone as he had not been working at Dahl's for four months. The doctor opined that further treatment was necessary, but only as a personal health condition. (Ex. 9-2:3)

Dr. Formanek based his views on Dawayne's medical history that included left hand pain, numbness and tingling in 2010 diagnosed as left CTS by Dr. Han who scheduled him for surgery. (Ex. 9-1) Dr. Formanek also stated that from his review of the past medical records Dawayne had compression neuropathies (plural) of the upper extremities before working at Dahl's and the EMG testing done by Dr. Pederson in 2010 showed cervical radicular symptoms. (Ex. 9-2) As stated previously, Dawayne had no left-sided complaints in 2010 and was only diagnosed with right CTS. Cervical radiculopathy and ulnar neuropathy was ruled out by the 2010 EMG. (Ex. 3-15)

Based on the views of Dr. Formanek, defendants on October 7, 2014 denied Dawayne's workers' compensation claim based his CTS or CbTS conditions. (Ex. A-1) Essentially, treatment of the CTS and CbTS halted with this denial. However, briefly in early 2015, Dawayne sought care for his left shoulder and bilateral numbness and tingling in his hands, left worse than right, from physicians at Des Moines Orthopedic Surgeons, P.C. (DMOS). According to the office notes of a visit on February 20, 2015, claimant said that he first noticed left thumb and index finger numbness in 2010 and then began having numbness in 2012 in the right hand which progressed to all fingers. Again, claimant did not report any left-sided complaints in 2010 and I must assume that either Dawayne was a poor historian or the doctor was a poor listener. The assessment after EMG testing was again bilateral CTS and CbTS and an injection was given for the right CTS. (Ex. F-5:15) The left shoulder was evaluated in March 2015. There are no further records from DMOS in evidence.

At the request of his attorney, Dawayne was evaluated by Sunil Bansal, M.D., an occupational medicine physician. After his review of claimant's medical records and examination of claimant, Dr. Bansal opines that Dawayne's job duties at Dahl's were a significant contributing factor for the development of the left CTS and bilateral CbTS. The doctor states that Dawayne is a candidate for surgical releases of these conditions. He recommends restrictions consisting of no lifting greater than 5 pounds with the right hand, no frequent squeezing, pinching or grasping with either hand, and to avoid tasks requiring repeated or sustained elbow flexion. (Ex. 12-10:13) As pointed out by defense

counsel in her brief, the doctor does not mention claimant's history of smoking and his continued work as a janitor after leaving Dahl's. The doctor does not discuss causation of the right CTS. He provided an impairment rating if continued treatment is not provided.

Dawayne's treating physician in 2010, Dr. Pederson, was asked to comment on the report by Dr. Bansal. In a letter report dated May 11, 2016 Dr. Pederson agreed with the causation views of Dr. Bansal for the left CTS and bilateral CbTS, although he noted that he was basing this on the history only as outlined in Dr. Bansal's report. Dr. Pederson disagreed with Dr. Bansal statement that the 2010 EMG ruled out left-sided neuropathies, because the left side was not tested. However, he adds that there was no record of any prior ulnar neuropathy at the elbow in the 2010 EMG. Dr. Pederson agreed to the need for further treatment of his neuropathy conditions and had nothing further to add in regards to restrictions. (Ex. 3-38:39)

Ultimate Findings:

Based on the views of Drs. Bratkiewicz, Bansal and Pederson, I find that Dawayne suffered a cumulative work injury on or about March 25, 2014 from his repetitive hand and arm work activity at Dahl's while stripping and waxing floors. This work injury consists of the onset of left carpal tunnel syndrome and bilateral cubital tunnel syndrome. The date of March 25, 2014 is a logical manifestation date for the injury as this was the date when Dawayne suffered a start of a worsening of the condition to the extent that it was adversely impacting his work and he sought treatment a month later when symptoms did not subside. As pointed out by Dr. Formanek, claimant may have other contributors to his conditions such as smoking and uncontrolled diabetes. However, his work at Dahl's remained a significant contributing factor. While I find that the Dahl's work may have very well aggravated the prior existing right CTS, this aggravation did not cause the need for treatment of that condition because treatment has been needed since 2010 and only delayed by claimant's ongoing uncontrolled diabetes.

The views of Dr. Formanek are not convincing primarily because he bases his views on a history of prior left-sided neuropathies. This is simply incorrect as shown by the medical records in evidence and the views of Dr. Pederson. I also do not find convincing defendants' criticism of Dr. Bansal's views concerning the lack of any mention of claimant's smoking history and continued work at a food store. His current work status does not change the "clear-cut" evidence (as characterized by Dr. Bratkiewicz) of the onset of left CTS and bilateral CbTS as established by EMG testing while Dawayne was still working at Dahl's, which remains today as shown by the most recent EMG testing at DMOS.

Furthermore, I find that Dawayne has not achieved maximum medical improvement of his work-related left CTS and bilateral CbTS and remains in need of treatment for these conditions.

The work injury of March 25, 2014 is a cause of his current restrictions of no lifting over five pounds with the left arm and no repetitive activity causing pain in his hands and arms. These are the restrictions first imposed by Dr. Bratkiewicz which have not been lifted.

Defendants show that his last day of work at Dahl's was April 23, 2014. Consequently, he was not employed in any capacity from April 24, 2014 until he began working mowing lawns in March 2015. The exact date he started in March 2014 is not provided in the evidence. I will assume that this work started on March 1, 2015. During this time, claimant was not able to return to work in any similar job due to Dr. Bratkiewicz's restrictions. His current employer is accommodating for his restrictions by reduced hours and no stripping floors activity that caused claimant's problems at Dahl's.

Since March 1, 2015, claimant has been employed on a part-time basis as a lawn mower and subsequent as a janitor. Although claimant may be entitled to temporary partial disability benefits, due to a lack of evidence, I am unable to make any findings concerning his earnings each week since March 1, 2015 which is necessary to award such benefits.

An award of permanency benefits also cannot be made because treatment has not been completed and the extent of any permanent restrictions following treatment is unknown.

CONCLUSIONS OF LAW

I. The claimant has the burden of proving by of 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 Electric 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.

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).

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).

While a work injury must proximately cause the condition or disability for that disability or condition to be compensable, the statutory phrase, "arising out of employment" does not require a showing that the employment must proximately cause the injury, the employment only needs to be shown to have caused or contributed to the injury, a less onerous standard. Meyer v. IBP, Inc., 710 N.W.2d 213, 220-223 (Iowa 2006).

In the case sub judice, I found that claimant carried the burden of proof and demonstrated by the greater weight of the evidence that he suffered a work injury consisting of left CTS and bilateral CbTS. Claimant has not shown a significant aggravation injury to the pre-existing right CTS.

II. Pursuant to Iowa Code section 85.27, claimant is entitled to treatment of a work injury at employers expense. In this case, the employer denied further care after October 2014. It was found that claimant is in need of care for his work-related left CTS and bilateral CbTS conditions. This will be awarded

III. As stated in the Findings of Fact, no permanency benefits can be awarded because claimant has not completed treatment of his work injury. Consequently, the claim against the Second Injury Fund of Iowa cannot be adjudicated at this time. The issue of claimant's entitlement to permanent disability and Fund benefits will have to await the filing of a review-reopening petition when the issue of permanency is ripe for adjuration.

I found that he has been off work from the time he left Dahl's until he started a job mowing lawns in March 2015 while under restrictions preventing a return to full duty heavy repetitive work. Therefore, pursuant to Iowa Code section 85.33(1), claimant is entitled to temporary total disability benefits from April 24, 2014 through February 28, 2015. He received unemployment benefits during part of this time, but that does not disqualify him from weekly workers' compensation benefits. However, he will have to reimburse the unemployment fund upon receiving his workers' compensation benefits.

Also, as discussed before, after March 1, 2015, claimant may have been entitled to temporary partial disability benefits due to his part-time employment pursuant to Iowa Code section 85.33(4). However, the statutory computation under that code section is based on claimant's actual weekly earnings from his post injury employment. There was no evidence in this case to make such findings. Consequently, I am unable to award temporary partial disability benefits.

As this claim is ongoing, claimant will likely be entitled to temporary partial disability benefits in the future and defendants will have to pay such benefits when claimant provides them with his actual earnings.

Costs are assessed to defendants. Actual specific taxation of costs will be done if requested and there is no appeal of my decision rending taxation moot.

ORDER

1. Defendants shall pay to claimant temporary total disability benefits from April 24, 2014 through February 28, 2015 at the stipulated rate of two hundred sixty-seven and 25/100 dollars ($267.25) per week.

2. Defendants shall immediately provide medical treatment of claimant's left carpal tunnel syndrome and bilateral cubital tunnel syndrome conditions by a provider of their choice.

3. Defendants shall pay accrued weekly benefits in a lump sum.

4. Defendants shall pay interest on unpaid weekly benefits awarded herein pursuant to Iowa Code section 85.30.

5. Defendants shall commence temporary partial disability benefits when claimant provides defendants with his current actual weekly earnings.

6. Defendants shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33.

7. Defendants shall file subsequent reports of injury (SROI) as required by our administrative rule 876 IAC 3.1(2).

Signed and filed this 9th day of September, 2016.

LARRY WALSHIRE
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.