

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PENNY JOHNSON,

Claimant,

vs.

MERTZ ENGINEERING CO.,

Employer,

and

SFM INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 1652873.01

ARBITRATION DECISION

Head Note Nos.: 1803, 2502, 2907

STATEMENT OF THE CASE

Penny Johnson, claimant, filed a petition for arbitration against Mertz Engineering Company, as the employer and SFM Insurance Company as the insurance carrier. This case came before the undersigned for an arbitration hearing on June 15, 2020.

Pursuant to an order from the Iowa Workers' Compensation Commissioner, all in-person hearings were precluded as of the date of this hearing due to the pandemic currently affecting the state of Iowa. Accordingly, this case was heard via videoconference using CourtCall. Claimant appeared remotely via CourtCall, as did all other participants, including the court reporter.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 14. All exhibits were received without objection.

Claimant testified on her own behalf. Defendants called Chris Anderson, president of Mertz Engineering, to testify. The evidentiary record closed at the conclusion of the evidentiary hearing on June 15, 2020.

However, counsel for the parties requested an opportunity to file post-hearing briefs. This request was granted and both parties filed briefs simultaneously on July 1, 2020. The case was considered fully submitted to the undersigned on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. The extent of claimant's entitlement to permanent partial disability benefits.
2. The proper commencement date for permanent partial disability benefits.
3. Whether claimant is entitled to reimbursement of her independent medical evaluation fees.
4. Whether costs should be assessed against either party and, if so, in what amount.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Penny Johnson sustained a stipulated cumulative injury to her right arm as a result of her repetitive work duties in her Head and Piston job at Mertz Engineering Company on March 2, 2017. (Hearing Report) The injury caused a temporary disability that has already been compensated. No additional temporary disability, or healing period, benefits are claimed in this proceeding. (Hearing Report) The March 2, 2017 injury also caused permanent disability to claimant's right arm. (Hearing Report)

After Ms. Johnson reported the injury to the employer, Mertz Engineering directed claimant for medical care. Initially, the treating physician thought claimant had tendonitis. (Joint Ex. 2, p.1) Conservative care was initiated, which included a wrist brace, limiting lifting, and heat therapy. These efforts initially helped reduce claimant's symptoms. However, after working for an additional three months, claimant's symptoms returned. (Claimant's testimony)

By February 28, 2018, claimant's treating physician recorded full range of motion of the right wrist, hand, forearm, and elbow. He also recorded negative Phalen's and Tinel's testing. However, claimant's symptoms persisted. Her physician recommended physical therapy, an EMG, and referral to an orthopaedic hand surgeon. (Joint Ex. 2, p. 3)

ZeHui Han, M.D., performed an orthopaedic hand evaluation on Ms. Johnson's right hand on March 8, 2018. He diagnosed concerns about a radial artery blockage and noted concern for right carpal tunnel syndrome and/or right cubital tunnel syndrome. (Joint Ex. 1, p. 1) Claimant submitted to EMG testing on March 15, 2018. The EMG demonstrated dysfunction of the right median nerve, consistent with right carpal tunnel syndrome. (Joint Ex. 3, p. 1)

Claimant followed-up with Dr. Han on March 23, 2018. (Joint Ex. 1, p. 2) Dr. Han assessed claimant as having right carpal tunnel syndrome and an occlusion of the right radial artery and performed a cortisone injection into claimant's right wrist. (Joint Ex. 1, p. 3)

The cortisone injection was at least partially successful in alleviating claimant's symptoms and Dr. Han anticipated that her symptoms would continue to improve with time. (Joint Ex. 1, p. 5) Unfortunately, claimant's symptoms persisted. By May 4, 2018, Dr. Han recommended surgical intervention for claimant's right carpal tunnel syndrome. (Joint Ex. 1, p. 9)

By May 18, 2018, claimant agreed that surgery was necessary and requested that Dr. Han proceed with a right carpal tunnel release. (Joint Ex. 1, p. 10) Dr. Han took claimant to surgery on June 8, 2018 and performed a right carpal tunnel release. (Joint Ex. 1, p. 14) On August 17, 2018, Dr. Han noted claimant's reports of continued pain and some numbness. However, he declared claimant to be at maximum medical improvement as of that date. (Joint Ex. 1, pp. 18-19, 21) In response to an inquiry from the insurance carrier, Dr. Han opined on September 18, 2018 that claimant sustained a three percent permanent impairment to the right upper extremity pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Joint Ex. 1, p. 20) Dr. Han specifically relied upon Table 16-10 and Table 16-15 of the Guides.

Claimant requested additional medical care and returned to Dr. Han for further evaluation on October 18, 2018. Dr. Han indicated that he had nothing further to provide in the way of medical care, recommended a functional capacity evaluation (FCE) to determine permanent work restrictions, and discharged claimant from his care. (Joint Ex. 1, p. 22-23)

Given the persistent symptoms, defendants agreed to repeat EMG testing and agreed to provide claimant a second orthopaedic evaluation and opinion. Ms. Johnson submitted to a second EMG test on November 26, 2018. The repeat EMG demonstrated neurologic improvement of the right median nerve after Dr. Han's carpal tunnel release. However, the repeat EMG did not demonstrate total normalization of the right median nerve. (Joint Ex. 3, pp. 3-4)

Jeffrey A. Rodgers, M.D., evaluated Ms. Johnson on November 28, 2018. Dr. Rodgers concurred with the EMG results and concluded that claimant had improved median nerve function. However, he documented ongoing tenderness in the right palm and a feeling of right hand weakness. Dr. Rodgers, however, also documented "pain behaviors and disproportionate pain and disability." (Joint Ex. 6, p. 3) He concurred that claimant had achieved maximum medical improvement (MMI) and adopted an FCE that was performed to impose permanent work restrictions. (Joint Ex. 6, p. 3) In spite of the reported ongoing symptoms, adopting the FCE, and imposing permanent work restrictions, Dr. Rodgers opined that Ms. Johnson "has no objective basis for impairment." (Joint Ex. 6, p. 11) Dr. Rodgers reiterated his opinion that claimant has a zero percent permanent impairment according to the Guides, Fifth Edition. He also

pointed out that the Guides, Fifth Edition, does not permit an award in excess of five percent of the upper extremity following a carpal tunnel release. (Joint Ex. 6, p. 14)

Ms. Johnson obtained an independent medical evaluation, performed by Robin L. Sassman, M.D., on May 7, 2020. Dr. Sassman identified reductions in claimant's right wrist range of motion, as well as reduced strength in the right hand compared to the left during her evaluation. (Joint Ex. 7, p. 10) She diagnosed Ms. Johnson with right carpal tunnel syndrome status post right carpal tunnel release. However, Dr. Sassman noted residual abnormalities pursuant to the second EMG. (Joint Ex. 7, p. 11) Dr. Sassman also diagnosed claimant with right wrist tendinitis. (Joint Ex. 7, p. 11)

As far as maximum medical improvement, Dr. Sassman opined that claimant did not achieve MMI until one year after her surgery, or June 8, 2019. Dr. Sassman also opined that claimant sustained 13 percent permanent impairment of the right upper extremity due to her loss of range of motion. She assigned an additional 5 percent of the upper extremity for claimant's residual median nerve compression (carpal tunnel syndrome). In total, Dr. Sassman opined that claimant sustained 17 percent permanent impairment of the right upper extremity. (Joint Ex. 7, p. 12)

In response to Dr. Sassman's IME and impairment rating, defendants sought clarification from Dr. Rodgers. On May 18, 2020, Dr. Rodgers issued a supplemental report. Dr. Rodgers clarified that he identified no signs or symptoms of tenosynovitis in claimant's right wrist when he evaluated her. Therefore, Dr. Rodgers did not believe additional impairment was warranted for that condition. (Joint Ex. 6, p. 14)

Dr. Rodgers did not specifically address the loss of range of motion identified by Dr. Sassman. Dr. Rodgers noted that claimant had "full finger and thumb range of motion" on November 28, 2018. (Joint Ex. 6, p. 14) However, Dr. Rodgers did not specifically address Dr. Sassman's findings of loss of range of motion in the right wrist, including loss of flexion, extension, radial deviation and ulnar deviation. (Joint Ex. 7, p. 10) Review of Dr. Rodgers' November 28, 2018 examination note, it does indicate full finger and thumb range of motion, but there are no examination findings pertaining to range of motion of the right wrist. (Joint Ex. 6, pp. 1-2)

On the other hand, Dr. Han made specific reference to range of motion testing in his last evaluation note of August 17, 2018. Dr. Han specifically noted that claimant had "full ROM of fingers, hands, and wrists" as of August 17, 2018. (Joint Ex. 1, p. 19) I find it odd that claimant has reduced ranges of motion in May 2020 that were not present in August 2018. No explanation is offered why claimant would experience reduced ranges of motion a year and nine months after Dr. Han released claimant from his care.

I also note that there is some deviation between the ranges of motion in claimant's right wrist at the FCE on May 15, 2020 and Dr. Sassman's range of motion assessments 7 days earlier. (Joint Ex. 4, p. 12; Joint Ex. 7, p. 10) No explanation is offered why or how claimant's wrist range of motion would vary in certain respects over a 7 day period or how those changes might or might not be related to the initial work

injury. Ms. Johnson admitted that Dr. Sassman and the physical therapist performing the FCE performed similar measurements. (Claimant's testimony)

Ultimately, I do not find Dr. Sassman's impairment rating, including impairment for reduced wrist ranges of motion, convincing given Dr. Han's documentation of full ranges of motion in August 2018. I also have a difficult time finding the zero percent impairment rating offered by Dr. Rodgers to be convincing. He noted claimant had ongoing symptoms, objectively documented median nerve dysfunction even after a carpal tunnel release, reported symptoms of tenderness in the right palm, and reported feeling of weakness in the right hand. It is not realistic to believe that claimant had no loss of function given the ongoing symptoms and documented median nerve dysfunction. Therefore, I do not find Dr. Rodgers' impairment rating to be convincing.

This leaves Dr. Han's impairment rating. Dr. Han is the surgeon that initially evaluated claimant and performed the carpal tunnel release. Dr. Han's impairment and opinions acknowledged claimant's ongoing symptoms. Dr. Han assigned an impairment of three percent of the right upper extremity and referenced the AMA Guides, Fifth Edition. I find Dr. Han's impairment rating to be most convincing and credible in this evidentiary record. Therefore, I find claimant has proven she sustained a three percent permanent impairment of the right arm.

Claimant has returned to work for the employer in a different position as a material handler. She operates a forklift most of the day in her present position. She has excellent attendance and continues to work full-time at a pay rate commensurate with her earnings prior to the date of injury. Chris Anderson, the President of Mertz Engineering, testified that claimant is doing a great job as a material handler and described her as a hard worker and a dependable employee. (Testimony of Claimant; Testimony of Chris Anderson)

However, claimant testified that she takes ibuprofen before and after her work shifts to help control her symptoms and wears a brace on her right wrist while she works. Ms. Johnson reported difficulties playing videogames now due to her hand symptoms and difficulties with activities such as turning a doorknob with her right hand. She also described some difficulties with housecleaning and cooking for herself because of the right hand. (Testimony of Claimant)

All in all, however, I find that the three percent permanent impairment rating offered by Dr. Han is fairly representative of claimant's permanent functional loss of the right arm. Therefore, I find claimant has proven a three percent permanent functional loss of the right arm as a result of the work injury.

The parties also dispute the proper commencement date for permanent disability benefits. Claimant asserts that permanent disability benefits should commence on June 8, 2019. Defendants contend that permanent disability benefits should commence on August 17, 2018. It appears that claimant's contention is based on the MMI date

assigned by Dr. Sassman, while defendants' contention is based upon the MMI date from Dr. Han.

Ms. Johnson seeks an award of her independent medical evaluation fee. With respect to this disputed issue, I find that defendants obtained permanent impairment ratings from treating surgeons of their choosing. Dr. Han rendered his impairment rating on September 18, 2018. (Joint Ex. 1, p. 20) Dr. Rodgers provided his impairment rating on March 14, 2020. (Joint Ex. 6, p. 11) Claimant obtained her IME on May 15, 2020. (Joint Ex. 7, p. 12) Dr. Sassman's charges total \$3,000.00. (Joint Ex. 7, p. 15) I find Dr. Sassman's charges are reasonable.

CONCLUSIONS OF LAW

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).

In this case, I found the opinions of Dr. Han, including his three percent permanent impairment of the right upper extremity to be most credible and convincing. Having reached that finding and having considered claimant's testimony about her residual capabilities and functional difficulties, I also found that claimant proved a three percent permanent functional impairment of the right arm as a result of the March 2, 2017 injury.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is

determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

A wrist injury is an injury to the arm, not the hand. Holstein Elec. v. Breyfogle, 756 N.W.2d 812 (Iowa 2008).

In this case, the parties appropriately stipulated that the injury resulted in permanent disability to be compensated as a scheduled member injury to the right arm. (Hearing Report) Injuries to the arm are compensated on a 250-week schedule pursuant to Iowa Code section 85.34(2)(m) (2016). If the injury produced something less than total impairment or disability of the affected scheduled member, benefits are paid in proportion to the percentage of loss of use of the scheduled member in relation to the assigned number of weeks. Iowa Code section 85.34(2)(v)(2016). In this case, 3 percent of 250 weeks is 7.5 weeks. Therefore, I conclude that claimant has proven entitlement to 7.5 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(m), (v) (2016).

The injury in this case occurred before significant statutory changes occurred and took effect on July 1, 2017. Prior to the statutory changes, the Iowa Supreme Court held that permanent disability benefits commenced once healing period benefits terminate. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 372 (Iowa 2016).

Joint Exhibit 8, page 1 demonstrates that temporary total disability, or healing period, benefits commenced on June 12, 2018 and terminated on July 22, 2018. There is no claim for additional healing period and the parties assert the applicable credit for benefits paid is contained at Joint Exhibit 8. Therefore, I conclude that permanent disability benefits should commence on July 23, 2018. Iowa Code section 85.34(1) (2016); Evenson, 81 N.W.2d at 372.

Ms. Johnson also seeks reimbursement of the independent medical evaluation charges from Dr. Sassman. 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 this case, defendants selected the initial treating surgeon, Dr. Han, as well as the subsequent evaluating surgeon, Dr. Rodgers. Dr. Han provided an impairment rating on September 18, 2018, while Dr. Rodgers provided an impairment rating on March 14, 2020. Ms. Johnson did not obtain an independent medical evaluation until May 15, 2020, after both Dr. Han and Dr. Rogers authored impairment ratings. Therefore, I conclude claimant has established entitlement to reimbursement of her independent medical evaluation pursuant to Iowa Code section 85.39. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 843 (Iowa 2015).

Dr. Sassman charged \$3,000.00 for her services. Having found Dr. Sassman's charges to be reasonable, I conclude claimant is entitled to an order requiring defendants to reimburse Dr. Sassman's fees. Iowa Code section 85.39; Young, 867 N.W.2d at 843.

The final disputed issue is whether costs should be assessed against either party. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. I conclude that it is reasonable to assess claimant's filing fee pursuant to 876 IAC 4.33(7). It is also reasonable to assess claimant's service fees pursuant to 876 IAC 4.33(3).

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant seven point five (7.5) weeks of permanent partial disability benefits commencing on July 23, 2018.

All weekly benefits shall be payable at the stipulated weekly rate of three hundred fifty-one and 35/100 dollars (\$351.35) per week.

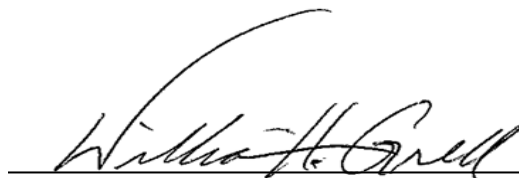
Interest shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

Defendants shall reimburse claimant's independent medical evaluation fees totaling three thousand dollars (\$3,000.00).

Defendants shall reimburse claimant for costs totaling one hundred thirteen and 70/100 dollars (\$113.70).

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 17th day of July, 2020.

A handwritten signature in black ink, appearing to read "William H. Grell", written over a horizontal line.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Janece Valentine (via WCES)

Lee Hook (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.