BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TIM HORN,

Claimant,

vs.

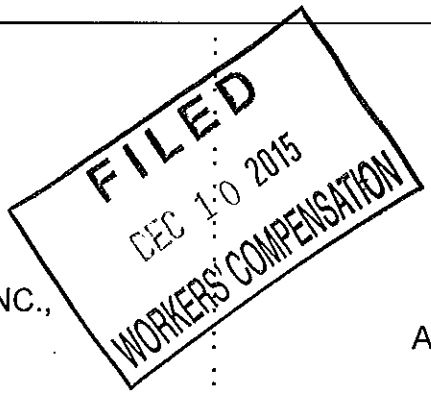
SEEDORFF MASONRY, INC.,

Employer,

and

ZURICH AMERICAN INS. CO.,

Insurance Carrier,
Defendants.



File No. 5051049

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Tim Horn, claimant, has filed a petition in arbitration and seeks workers' compensation from Seedorff Masonry, Inc., employer and Zurich American Insurance, insurance carrier, defendants.

This matter came on for hearing before Deputy Workers' Compensation Commissioner, Jon E. Heitland, on October 1, 2015 in Davenport, Iowa. The record in the case consists of claimant's exhibits 1 through 6; defense exhibits A, B and C; as well as the testimony of the claimant and Tim Wright.

ISSUES

The parties presented the following issues for determination:

1. Whether the alleged injury is a cause of permanent disability.

2. The extent of the claimant's entitlement to permanent partial disability benefits.

3. Whether the claimant is entitled to payment of medical expenses pursuant to Iowa Code section 85.27, including unpaid medical mileage.

4. Whether the claimant is entitled to an independent medical examination pursuant to Iowa Code section 85.39.

FINDINGS OF FACT

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

Claimant, Tim Horn, testified he lives in Davenport, Iowa. He is married, with one dependent child, a handicapped adult. He is 55 years old. His education consists of a high school diploma. He served a three-year apprenticeship from 1979 to 1981 as a bricklayer.

He began working in high school, as a bricklayer for his father. He then worked for his uncle as a bricklayer in Oklahoma. Later he worked for Lucia Masonry, as a bricklayer. He moved to Kansas City, where he worked for Alpha Masonry. He worked in Kansas City ten or eleven years. He then moved back to Iowa. He then began working for defendant employer Seedorff Masonry, beginning in August 1996. He was terminated in March 2015, due to his restrictions on his shoulders from this injury.

His job for Seedorff involved laying block weighing 36 to 60 pounds each. He would use his left hand to spread mortar with a trowel, and use his right hand to pick up material to put down. It is necessary to stand back from the wall being built to work on it so the wall will stay straight.

Claimant has tried to find work. He has a job where he lays bricks only weighing 2.5 pounds, such as decoration brick. He works about two days per week doing piecework, making $400.00 per week, or about $18.00 per hour. His average wage per week before his injury was $1081.00 per week, plus benefits. His base pay was $44.00 per hour. He lost his benefits with his job.

Exhibit 5 is an email from Tim Wright, the company's risk manager, to Marian Hall, the nurse case manager, indicating the blocks weigh 36 pounds. Most of the blocks were 12 inch, which weighed 60 pounds. His work restriction from Dr. Rink says he is not to lift more than 30 pounds. When he worked at Seedorff, 75 percent of the time he worked with eight-inch block, but sometimes it was the heavier blocks.

Claimant looked into finding a truck driving job but was told his restriction would prevent him from being hired. The same was true for masonry companies to which he applied. B and B Masonry does much of the masonry work in Davenport. Attobom Masonry also does masonry work in the Davenport area. Claimant applied to both, and was not hired. He has never been fired from employment from any other job.

Claimant had a prior injury around 2010 while working for Seedorff at ABM. While walking down a stairway, he slipped on a bolt, and injured his quad muscle on his right leg. He did not file a claim for that. He also injured his left arm in 2005 or 2006, at home. He uses his right arm to pick up bricks, so he was able to return to work.

He also had a prior motorcycle accident in 2009. He was treated by Peter Rink, D.O., for an injury to his right rotator cuff. That injury resolved and he was

able to return to work. There was no surgery. Exhibit 1, page 5, shows Dr. Rink stated the 2009 injury completely resolved. On page 9, Dr. Rink noted the motorcycle injury was healing until the work injury.

Claimant formerly liked to engage in bow hunting, but he cannot do that since the injury. He denies he aggravated his shoulder by bow hunting. He also helps his handicapped daughter get in and out of a car, but he has not injured his shoulder doing so. Dr. Rink noted he is extremely strong. His daughter is in a wheelchair, and he sometimes puts her wheelchair into the car. It weighs 15 pounds. He can still ride his motorcycle, but he has been advised not to ride it. He tried changing the seat so he would not have to reach so far. He can only ride 35 miles or so before he has to stop and rest. Before the injury he would ride cross country, riding 800 miles in one day one time. He rode home from the Sturgis Motorcycle Rally in South Dakota in 16 hours once.

He has been unable to find work because employers learn about his injury and do not want to hire him. Claimant asked to go back to work to light duty several times. He liked his job. It was a good company to work for.

On January 2, 2014, while stepping onto a ladder, he fell, hitting his ribs on the side of the scaffold and injuring his right arm. It occurred in Iowa City, while working for Seedorff. It was very cold. The scaffold was wrapped in plastic to hold the heat. The accident happened around 3:30. His ribs were immediately sore. His shoulder and buttocks were also painful. He reported the injury. Jeff Schultz was one of the supervisory personnel present at the time.

At the time he felt his ribs were hurt the worst. Exhibit 1, page 1, is a January 6, 2014, report of claimant's family doctor, who ordered an x-ray and prescribed cortisone pills. The x-ray showed nothing wrong. He referred claimant to Dr. Rink. He suspected a shoulder sprain. Claimant's ribs were feeling better.

Exhibit 1, pages 5 and 6, show Dr. Rink ordered an MRI and gave claimant a cortisone shot. The shot did not help. Claimant had an MRI on January 23, 2014, which showed a big tear of the rotator cuff. He was told it was a supraspinatus tendon that was involved, as well as the labrum. Exhibit 1, page 8, shows Dr. Rink's impression claimant had a complete rotator cuff tear. On February 6, 2014, claimant was placed on light duty, but the employer did not have light duty work available.

Claimant underwent surgery in February, 2014, and, Dr. Rink found the tear was even bigger and deeper than he thought. (Ex. 1, p. 12) The insurer originally did not approve the surgery, but Tim Wright finally arranged for the approval. Claimant tried to do the surgery under his health insurance but that insurer declined. Although they dispute liability for the medical expenses, all the medical bills have been paid now by the workers' compensation insurer.

Dr. Rink did not in any of his notes attribute claimant's condition to bow hunting, motorcycling, or any cause other than a work injury. Dr. Rink was the treating doctor.

Claimant went to therapy, which was painful for claimant. He was asked to pull rubber bands, and lift his hands up and wipe a wall, etc. Exhibit 1, page 18, shows Dr. Rink thought it would take at least six months for his shoulder to heal. Exhibit 1, page 18, shows Dr. Rink noted claimant was doing great and showing good rotator cuff function. During the first surgery, the table broke. Claimant does not know if he reinjured his shoulder when the table broke or not.

In physical therapy, the therapists had no understanding of what a brick layer does. Claimant tried to tell him, and they did not believe the blocks would weigh 36 pounds or 60 pounds, so claimant took sample blocks to them. Exhibit C shows the therapists concluded he could work with blocks because he carried them into their facility. Claimant had not been working all day with blocks when he brought them in. He pulled his truck up to the door and brought them in. A young man who worked there tried to pick them up and could not, and he was offended.

On June 6, 2014, he was not yet able to work with 20 pounds over shoulder level. Exhibit 1, page 22, shows the doctor noted claimant was pushy about riding a motorcycle again.

Exhibit 1, page 25, shows Dr. Rink was unhappy on August 12, 2014, that claimant was having pain at physical therapy, lifting a box weighing 40 pounds. He thought they should be more careful with claimant. The therapists were pushing claimant to get back to work, which claimant wanted also. Claimant was getting sore and had weakness.

Exhibit 1, page 25, shows after claimant had a second MRI, it showed a 9mm tear, another supraspinatus tendon tear and a large tear of the entire labrum. Claimant feels this showed something happened. In Exhibit 1, page 27, Dr. Rink noted no history of a new injury, and stated it happened during claimant's recovery. He was going to physical therapy several times per week, because he could not pick up a ten-pound weight they wanted him to be able to lift.

Claimant rode his motorcycle to work, but when Dr. Rink told him to stop riding, he did. Claimant did go back to work on light duty, and returned to riding the motorcycle. The physical therapy notes show claimant's rotator cuff re-tore. (Ex. 1, p. 29) Claimant was told by Dr. Rink he needed a second surgery or his rotator cuff would not heal. (Ex. 1, p. 30) The large tear was fixed in the second surgery for rotator cuff repair.

As of October 2014, claimant was back in physical therapy. Claimant cannot take many medicines because he gets hives, so he avoided painkillers. Mary Ann Hall, the rehab nurse, worked with him during this time. Dr. Rink noted he was being compliant. (Ex. 1, p. 34)

The second therapy was at Rock Valley Physical Therapy, at Nurse Hall's request. He began six weeks after the surgery. He found them to be knowledgeable, and they already had blocks there, along with tables set up to simulate his work, etc. Exhibit 36 shows as of December 1, 2014, claimant was found by Dr. Rink to be improving greatly. On March 30, 2015, Dr. Rink found claimant to be at maximum medical improvement (MMI) and mentioned assigning a rating of permanent partial impairment but never assigned one. He did assign a work restriction of no lifting overhead more than 30 pounds. (Ex. 1, p. 37A)

Exhibit 2 is a letter to Richard Kreiter, M.D., who had previously worked at ORA where Dr. Rink worked. He assigned claimant a 9 percent whole body rating of permanent partial impairment. He assigned restrictions of no overhead lifting of the right side, and no lifting over 40 pounds to bench level, along with avoiding hammering and impact tools. He was to start a lawn mower with his left hand rather than his right. He told claimant his shoulder could not be fixed if it was damaged again. (Ex. 3, pp. 39-40)

Claimant said losing his job made him pretty sad. He "moped around" for a week. If he could work, he would. He can lay brick within his restrictions, but it would be difficult to find jobs using the lighter bricks.

On cross examination, claimant stated he was terminated by the employer due to his restrictions. He was told that by the insurer and by John Blow. He is not aware of how the business was doing during those months. Gale Van Clay from the insurer called him and told him to call his lawyer because he was not going to be hired back. John Blow then told him they had "lost the battle" and they could not hire him back, due to the 30-pound restriction on his shoulder.

Claimant was a superintendent for several years. He still had to do physical labor as well as supervise others. He would sometimes have to lift 60-pound bricks alone.

He found his current job through a friend. He finds jobs through word of mouth. He reports his income on his taxes with a form 1099. He is paid by check. He averages two days per week working. He has not turned down work other than a job involving stone work, which would be outside his restrictions. He has worked for one builder and a few individuals. He does not advertise.

His 2009 motorcycle accident involved a tear in the same area of his right arm. He received a settlement from the other driver which involved repairing his motorcycle and reimbursing him for lost work.

Exhibit 1, page 18, is a May 19, 2014, note from Dr. Rink stating he did not want claimant to ride his motorcycle. Exhibit 1, page 22, a note by Dr. Rink dated July 22, 2014, indicates claimant wanted to ride his motorcycle and that he was riding it. Dr. Rink told him not to ride and claimant stopped. Exhibit B, page 9, dated August 26,

2015, is a note where Dr. Rink notes claimant had quit riding his motorcycle. Claimant states he did not try to hide the fact he was riding his motorcycle. He began riding to work as soon as he returned to work on light duty in July 2014. As soon as Dr. Rink told him in August to stop, he did. Claimant does not recall Dr. Rink telling him not to ride in May as Exhibit 1, page 18 indicates. The re-tear was discovered in August 2014.

Exhibit C contains physical therapy notes from Midwest Therapy indicating claimant mentioned going fishing, riding his motorcycle, and hunting. Claimant denies riding his motorcycle when he was told by Dr. Rink not to. One day at physical therapy they accused him of riding his motorcycle to the session, but it was someone else's motorcycle. The physical therapist also erroneously noted he was shooting his bow. He stated he is unable to shoot it.

In the IME, Dr. Kreiter does not mention claimant riding his motorcycle in July 2014. He also told claimant he should not ride his motorcycle, but because people get hurt on them. He normally stores it at the Harley Davidson dealership from September on, and gets it out again in June. If Dr. Rink told him not to ride in May 2014, he did not hear it. He rode to work only a few times, 45 miles each way. He quit when Dr. Rink told him to stop.

Claimant owns a mortar mixing machine he uses in his current job. He does not have to lift it; it is on a trailer he pulls behind his truck.

Timothy Wright testified for defendants that he is the risk manager for the employer, and is responsible for workers' compensation matters. He knows claimant. Mr. Wright "went to bat" for claimant, trying to get him returned to work. There was not enough work to put claimant back in a foreman position, and he was not in a foreman position when he was injured. It was necessary to get claimant back to where he could work with eight-inch block, which was the main part of the work, although sometimes twelve-inch block is used. If the employer had had a year with full employment, they might have been able to return him to work with the idea claimant would improve and go from a 30-pound restriction to 36. But the company did not have enough brick work or lighter work to take him back. He would recommend claimant to another employer.

On cross examination, he was asked about Exhibit 5, page 44. In it Mr. Wright notes eight-inch blocks weigh 36 pounds. Exhibit 1, page 45, is the job description for claimant, which mentions being able to lift up to 80 pounds up to eight hours per day, although Mr. Wright said that is a maximum; it is not normally the duties of the position. More typically the work involves half eight-inch blocks, half lighter bricks.

CONCLUSIONS OF LAW

The first issue in this case is whether the alleged injury is a cause of permanent disability.

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).

Claimant had a prior shoulder injury from a motorcycle injury. However, the medical evidence shows that injury had resolved and was not symptomatic.

Claimant's activities of bow hunting and motorcycle riding have not been shown to have caused his current conditions. He credibly testified he can no longer bow hunt. He also credibly testified that his motorcycle riding to work after the injury was minimal, and that when his doctor told him to stop, he did. His motorcycle was a full-sized model which claimant testified would not produce significant vibrations.

Dr. Kreiter found claimant's current right shoulder condition to be causally connected to the work injury. (Ex. 3)

Claimant's re-tear of his rotator cuff was addressed by Dr. Rink, who concluded there were no intervening causes, but rather the re-tear occurred during recovery. Claimant's return to work was appropriately restricted and yet the re-tear occurred. Dr. Rink definitively stated the re-tear was a consequence of the original injury, and is common in such cases. As such, it constitutes a sequela, and defendants are responsible for the effects of the re-tear as well, including the costs of the second surgery and subsequent treatment.

As both Dr. Kreiter and Dr. Rink causally connect claimant's tears of his rotator cuff to his work injury, and no medical opinion in the record finds otherwise, it is found the greater weight of the evidence shows claimant's current shoulder conditions, the

medical treatment for those conditions, and claimant's permanent impairment and work restrictions are caused by his work injury.

The next issue is the extent of the claimant's entitlement to permanent partial disability benefits.

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 is 55 years old, which puts him at a disadvantage in competing for jobs with younger workers. His education is limited to a high school diploma, which is adequate for the work he did before but may be a hindrance in applying for future positions. He has returned to bricklaying but is limited in the jobs he can do within his weight lifting restrictions.

As a result of his injuries, claimant has a rating of 19 percent permanent partial impairment of the body as a whole by Dr. Kreiter. He also imposed restrictions of lifting to be done with arms close to the body, no overhead work on the right side, and lifting up to 40 to 50 pounds from floor to bench, two handed, with arms to the side. Claimant was also to avoid using a lawnmower, and to avoid use of hammering or impact tools. (Ex. 3)

Due to his injuries, claimant is no longer able to do the brick laying work he did for many years. The employer in this case had to terminate his employment due to the work restrictions from the injuries. Claimant showed good motivation and found another job, but it involves lighter bricks, within his weight restrictions. Just considering claimant's loss of earnings caused by this injury, claimant now only earns about $400.00 per week, compared to over $1000.00 per week before he was injured, a 60 percent loss of earnings.

Based on these and all other appropriate factors of industrial disability, it is found claimant has, as a result of his work injury, an industrial disability of 65 percent.

The next issue is whether the claimant is entitled to payment of medical expenses pursuant to Iowa Code section 85.27, including unpaid medical mileage.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Claimant seeks reimbursement for medical mileage for 45 visits to physical therapy sessions. Defendants argue only 32 visits occurred. However, claimant relies on a later summary of visits, which does show 45 rather than 32. It is found claimant is entitled to the medical mileage he has claimed, as well as the other medical benefits sought.

The next issue is whether the claimant is entitled to the costs of an independent medical examination pursuant to Iowa Code section 85.39.

Defendants did not obtain a rating of impairment for claimant. Iowa Code section 85.39 states:

> 85.39 EXAMINATION OF INJURED EMPLOYEES
>
> After an injury, the employee, if requested by the employer, shall submit for examination at some reasonable time and place and as often as reasonably requested, to a physician or physicians authorized to practice under the laws of this state or another state, without cost to the employee; but if the employee requests, the employee, at the employee's own cost, is entitled to have a physician or physicians of the employee's own selection present to participate in the examination. If an employee is required to leave work for which the employee is being paid wages to attend the requested examination, the employee shall be compensated at the employee's regular rate for the time the employee is required to leave work, and the employee shall be furnished transportation to and from the place of examination, or the employer may elect to pay the employee the reasonable cost of the transportation. The refusal of the employee to submit to the examination shall suspend the employee's right to any compensation for the period of the refusal. Compensation shall not be payable for the period of suspension. If an evaluation of permanent disability has been made by a physician retained by the employer and the

> employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination. The physician chosen by the employee has the right to confer with and obtain from the employer-retained physician sufficient history of the injury to make a proper examination. (emphasis added)

As the employer did not obtain an evaluation of permanent disability, claimant is not entitled to be reimbursed the costs of the independent medical examination.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay unto the claimant three hundred twenty-five (325) weeks of permanent partial disability benefits at the rate of six hundred seventy-eight and 18/100 dollars ($678.18) per week from March 31, 2015.

Defendants shall pay accrued weekly benefits in a lump sum.

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

Defendants shall be given credit for benefits previously paid.

Defendants shall pay the claimant's prior medical expenses submitted by claimant at the hearing.

Defendants shall pay the future medical expenses of the claimant necessitated by the work injury.

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

Costs are taxed to defendants.

Signed and filed this 10th day of December, 2015.

Jon E. Heitland

JON E. HEITLAND
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.