

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FELISBERTO RIVAS-TORRES,

Claimant,

vs.

HORMEL FOODS CORP.,

Employer,
Self-Insured,
Defendant.

File No. 1664038.02

ARBITRATION DECISION

Head Note Nos.: 1803, 2907

STATEMENT OF THE CASE

Felisberto Rivas-Torres, claimant, filed a petition in arbitration seeking workers' compensation benefits from Hormel Foods Corporation, self-insured employer as defendant. Hearing was held on September 7, 2021. This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the declaration of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means, using CourtCall. Accordingly, this case proceeded to a live video hearing via CourtCall with all parties and the court reporter appearing remotely.

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

Felisberto Rivas-Torres was the only witness to testify live at trial. He testified via the use of a translator. The evidentiary record also includes joint exhibits JE1-JE5, claimant's exhibits 1-3, and defendant's exhibits A-B. The evidentiary record closed at the conclusion of the arbitration hearing.

The parties submitted post-hearing briefs on September 24, 2021, at which time the case was fully submitted to the undersigned.

ISSUES

The parties submitted the following issues for resolution:

1. The extent of permanent partial disability claimant sustained to his right upper extremity as the result of the stipulated April 3, 2019 work injury.

2. Assessment of costs.

FINDINGS OF FACT

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

Claimant, Felisberto Rivas-Torres, worked full-time at Hormel Foods Corporation ("Hormel") operating the pepperoni slicer machine; he was still employed in this position at the time of the hearing. The parties have stipulated that he sustained an injury to his right arm as the result of his work activities on April 3, 2019. The central dispute in this case is the extent of permanent disability he sustained.

On Friday, April 3, 2019, Mr. Rivas-Torres was working full time without restrictions operating the pepperoni slicer machine. He experienced pain in his right elbow and reported the problem to the nursing department at Hormel. His pain continued over the next few days. (Testimony)

On April 8, 2019, Mr. Rivas-Torres saw Alan Hjelle, M.D., at Kossuth Regional Health Center. He reported right elbow pain and swelling. He was working last week when he felt something pull in his right elbow. He had a history of a remote right elbow injury. The doctor noted early arthritic changes involving the medial and lateral elbow joint compartments. Dr. Hjelle took Mr. Rivas-Torres off work. Dr. Hjelle eventually referred Mr. Rivas-Torres to Michael Crane, M.D. (JE1, pp. 1-6)

Dr. Crane saw Mr. Rivas-Torres on April 23, 2019. Dr. Crane's impression was medial epicondylitis, right elbow. He recommended rest and physical therapy. He was limited to left arm work only. (JE2, p. 89)

Mr. Rivas-Torres was then sent to see Brent Owen, M.D., at Kossuth Regional Clinic. Mr. Rivas-Torres saw Dr. Owen on May 16, 2019. He ordered an MRI of the right elbow which showed significant osteoarthritis and loss of cartilage. Dr. Owen referred Mr. Rivas-Torres to orthopedics. (JE1, pp. 23-30)

Hormel eventually sent Mr. Rivas-Torres to see Chris Rierson, D.O., at Northwest Iowa Bone, Joint, and Sports Surgeons. On June 18, 2019, Dr. Rierson provided a right elbow injection and work restrictions. The injection did not provide much relief. Dr. Rierson referred Mr. Rivas-Torres to his partner, Phillip Deffer, M.D. (JE2, pp. 92-95)

Mr. Rivas-Torres saw Dr. Deffer on August 1, 2019. Dr. Deffer noted popping and catching in the elbow. He also had limitation of motion. He recommended a CT scan of the right elbow to assess for loose body. After reviewing the CT scan Dr. Deffer recommended physical therapy and possibly an arthroscopy. After another injection, Mr. Rivas-Torres continued to have decreased range of motion and loss of extension. Dr. Deffer eventually recommended surgery. (JE2, pp. 96-100; JE3, pp. 103-06)

On January 24, 2020, Dr. Deffer performed right elbow arthroscopy; retrieval of loose body; and excision of osteophytes. The postoperative diagnosis was right elbow osteoarthritis with loose body. (JE4, pp. 117-19)

Mr. Rivas-Torres saw Dr. Deffer for a post-op visit on January 30, 2020. Mr. Rivas-Torres had moderate swelling of the right elbow. He recommended physical therapy and work restrictions. (JE3, p. 109-110)

Hormel eventually scheduled Mr. Rivas-Torres for physical therapy. On February 26, 2020, Mr. Rivas-Torres reported that his pain was slowly improving in his right elbow, pain localized to the medial epicondyle and ulnar groove. The plan was for him to attend physical therapy one to three times per week over the next two to three weeks. His last physical therapy appointment was on May 27, 2020. At that time Mr. Rivas-Torres demonstrated full elbow flexion and extension with range of motion. He also had good strength in resisted elbow flexion and extension. He did experience some increased pain during resistance testing. He was able to fully supinate and pronate his forearm against resistance without any symptoms. (JE1, pp. 33-86)

After surgery Dr. Deffer continued to see Mr. Rivas-Torres. The last time Dr. Deffer saw him was on June 29, 2020. Mr. Rivas-Torres was still experiencing pain with terminal extension and forceful flexion. He had mild limitation of motion from -20 degrees of extension to 140 degrees of flexion. He had full pronation supination. Dr. Deffer placed him at MMI as of June 29, 2020. He released him to return to full work activities in the janitorial job he was placed in. Mr. Rivas-Torres was to return as needed. (JE3, p. 113)

On July 16, 2020, Dr. Deffer issued an impairment rating based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, page 472, Figure 16-34. Dr. Deffer noted Mr. Rivas-Torres had limitation of extension of approximately 20 degrees. He has full flexion, pronation, and supination. For the lost extension, Dr. Deffer assigned 2 percent upper extremity impairment. Dr. Deffer did not assign any restrictions and opined that no further treatment was anticipated. (JE3, p. 115)

At the request of his attorney, Mr. Rivas-Torres saw Sunil Bansal, M.D., on August 11, 2020, for an independent medical evaluation. (JE5) Dr. Bansal reviewed the records provided to him, examined Mr. Rivas-Torres, and issued a report with his opinions. In that report Dr. Bansal provided his opinion regarding he agreed that Mr. Rivas-Torres only has a 2 percent impairment rating under the AMA Guides. Dr. Bansal stated, “[n]o. While Mr. Torres has a range of motion impairment equivalent for extension of 2%, his functional loss is far greater. Compromise of the ability to straighten the arm out limits many sustained functions of the arm in terms of lifting, pushing, and pulling.” (JE5, p. 129) Dr. Bansal then stated that strength impairment would be the most reflective of Mr. Rivas-Torres’s functional loss. Dr. Bansal opined, “[p]er Table 16-35, he is assigned a 7% upper extremity impairment for the 40% loss of extension strength.” (id.) Dr. Bansal agreed that Dr. Deffer followed the Guides with regard to range of motion measurements. (id.)

Dr. Deffer and Dr. Bansal both offered opinions about permanent functional impairment. Both doctors assign 2 percent upper extremity rating due to loss of extension, pursuant to the AMA Guides. Only Dr. Bansal also assigns impairment due to loss of extension strength. Defendant argues that the impairment assigned due to loss of extension strength is not appropriate in this case under The Guides. In support of their position, defendant relies on an appeal decision from this agency. See Hill v. Vermeer Corporation, File No. 5066032 (App. January 30, 2020). That appeal decision indicates that strength is not the proper measure of impairment for an upper extremity injury except in very rare circumstances. That decision states,

[T]he AMA Guides caution physicians against assigning impairment for loss of strength. Section 16.8 on page 507 provides the AMA Guides do not assign a large role to strength measurements due to the fact strength measurements are functional test influenced by subjective factors that are difficult to control. Review of Section 16.8a of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, page 508, indicates:

In a rare case, if the examiner believes the individual's loss of strength represents an impairing factor that has not been considered adequately by other methods in the *Guides*, the loss of strength may be rated separately. An example of this situation would be loss of strength due to a sever muscle tear that healed leaving a palpable muscle defect. If the examiner judges that loss of strength should be rated separately in an extremity that presents other impairments, the impairment due to loss of strength could be combined with the other impairments, only if based on unrelated etiologic or pathomechanical causes. *Otherwise, the impairment ratings based on objective anatomic findings take precedence.* Decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities, or absence of parts (eg, thumb amputation) that prevent effective application of maximal force in the region being evaluated.

See Hill, at p. 4.

Dr. Bansal provides his impairment rating without explanation or confirmation that this is one of those rare cases. Additionally, the Guides state that the results of strength testing should be reproducible on different occasions or by two or more trained observers. The Guides, Section 16.8c. I find that Dr. Bansal only saw Mr. Rivas-Torres on one occasion and there is no evidence that the results were observed by two or more trained observers. Thus, I find the opinion of Dr. Deffer more credible and based solely on the Guides. As such, I find Mr. Rivas-Torres sustained 2 percent impairment of the upper extremity as the result of the work injury.

Claimant is seeking an assessment of costs in this matter. Costs are to be assessed at the discretion of the Iowa Workers' Compensation Commissioner or the deputy hearing the case. I find that claimant was generally not successful in his claim and therefore exercise my discretion to not assess costs in this case. I find that each party shall bear their own costs.

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).

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss of a scheduled member under Iowa Code section 85.34(2)(a)-(u) (2017) or for loss of earning capacity under Iowa Code section 85.34(2)(v) (2017). 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).

Determination of the functional loss resulting from a scheduled member disability "shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American [M]edical [A]ssociation, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A." Iowa Code section 85.34(2)(x) (2017). However, lay testimony and agency expertise are not appropriate considerations for determination of the functional impairment. Iowa Code section 85.34(2)(x).

The parties have stipulated that claimant sustained permanent partial disability to his right upper extremity. Thus, his injury should be compensated as a scheduled member injury to the left arm pursuant to Iowa Code section 85.34(2)(m). Injuries to an arm are compensated based upon a 250-week schedule. Scheduled member permanent disability benefits are payable proportional to the functional loss multiplied by the maximum number of weeks applicable for the specified injury. Iowa Code section 85.34(2)(w). In this instance, 2 percent of 250 weeks totals 5 weeks. Therefore, I conclude claimant has proven entitlement to 5 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(m),(w).

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of six hundred fifty-seven and 39/100 dollars (\$657.39).

Defendant shall pay five (5) weeks of permanent partial disability benefits commencing on the stipulated commencement date of June 29, 2020.


The parties stipulated that prior to hearing claimant was paid five (5) weeks of permanent partial disability benefits at the weekly rate of seven hundred fifty-two and 52/100 dollars (\$752.52). Defendant shall be entitled to credit for all weekly benefits paid to date. Thus, claimant shall take nothing further from this proceeding.

The employer and insurance carrier shall pay accrued weekly benefits in a lump sum together with interest 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).

Each party shall bear their own costs.

Defendant 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 20th day of January, 2022.


ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Jennifer Zupp (via WCES)

Abigail Wenninghoff (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.