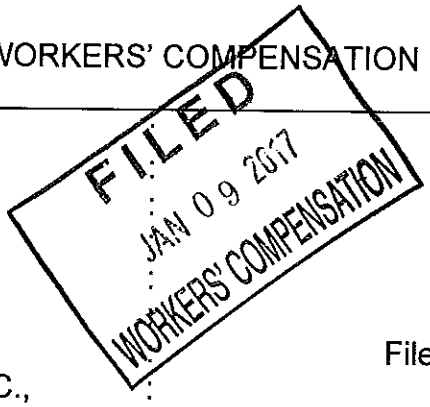
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



MICHAEL L. GAYMAN,

Claimant,

vs.

MERLE GAYMAN & SONS, INC.,

Employer,

and

AUTO-OWNERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5051622

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Michael L. Gayman, the claimant, seeks workers' compensation benefits from defendants, Merle Gayman & Sons, Inc., the alleged employer, and its insurer, Auto-Owners Insurance Company, as a result of an alleged injury on December 16, 2013. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on October 26, 2016, but the matter was not fully submitted until the receipt of the parties' briefs and argument on November 7, 2016. Oral testimony and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Claimant's exhibits and the joint medical exhibits were marked numerically. Defendants' exhibits were marked alphabetically. 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 joint exhibit 1, pages 2 through 4 will be cited as, "Jt 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 defendant employer at the time of the alleged injury.

2. At the time of the alleged injury, claimant's gross rate of weekly compensation was $680.00. Also, at that time, he was single and entitled to one exemption for income tax purposes. Therefore, claimant's weekly rate of compensation is $418.87 according to the workers' compensation commissioner's published rate booklet for this injury.

ISSUES

The parties submitted the following issues for determination in the hearing report:

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

II. Whether the claim is barred by Iowa Code section 85.26 for failure to timely file the original notice and petition.

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

IV. The extent of claimant's entitlement to reimbursement for the independent medical examination pursuant to Iowa Code section 85.39, and;

V. The extent of claimant's entitlement to costs under our administrative rule 876 IAC 4.33.

Claimant check marked the box in the Medical Benefits section that he was seeking payment of medical expenses listed in an attachment to the hearing report. There was no such listing attached, only a listing of requested costs. After hearing, again, claimant only submitted a list of requested costs, not medical expenses. Therefore, no medical expense issue was submitted for determination.

Defendants also raised a lack of notice defense under Iowa Code section 85.23. However, claimant is a part owner and clear agent for the employer, Merle Gayman & Sons, Inc. This was an entity started by claimant's father and included himself and his brother. After the father died, claimant and his brother operated the business. There can be no lack of notice to the employer defense when the claimant is an agent and officer of the employer. Whether or not there are special notice requirements between this employer and the insurer is a contractual matter, not governed by workers' compensation law which only requires notice to the employer.

FINDINGS OF FACT

In these findings, I will refer to the claimant by his first name, Michael, and to the defendant employer as MGS.

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 Michael credible.

Michael was 62 years of age at the time of the hearing. He did not pursue further formal education after graduating from high school. His entire working life has involved working for MGS, a family business in which he was part owner. This work involved manual labor as a concrete laborer and finisher and later on, the additional task of managing the family business with his brother. There is no dispute in the record that Michael was personally involved in the heavy work of installing concrete in residential areas for over 40 years. The business did not do commercial work. This concrete work involved initially dealing with customers, estimating and planning, preparing the site, installing forms, ordering concrete, transporting concrete from the truck to the project site using wheelbarrows if necessary, pouring the concrete and finishing the concrete with various hand tools and equipment. This job involved a lot of very heavy lifting and prolonged bending, squatting and kneeling. Typically, the crew involved three persons, Michael, his brother and a laborer. All three were treated as hourly workers in the company organization. Michael was paid $17.00 per hour. Michael and his brother would split any profit after expenses of the company at the end of the year which Michael states was around $5,000.00. The work was seasonal and Michael collected unemployment compensation benefits in the off season. This business ceased operations in August 2016. Michael has not sought out other employment since that time because he considers himself fully retired.

There is little dispute that Michael has had a considerable amount of health problems over the years. In an attachment to the hearing report, Michael admits to the following past and present health conditions:

Hypertension;

Type II Diabetes;

Hyperlipidemia;

Osteoarthritis;

Peripheral vascular disease (PVD);

Obesity;

Edema from time to time;

Vasculopathy in both legs;

An episode of acute thrombosis of the popliteal artery in the right leg in 2009, treated with an impacted stent by Eric Dippel, M.D., a cardiologist;

Bilateral leg pain;

Peripheral neuropathy and pain in the right foot;

Cancer of the lip; and,

Cardiac issues, including angiography.

(See Jt Ex. 1 thru 7)

Claimant also suffered a stroke in June 2015. Michael testified that he fully recovered from that stroke, and is there is nothing in evidence to suggest otherwise.

After reviewing the hearing report, hearing the statements and testimony at hearing and a review of claimant's post-hearing brief, the precise nature of this claim is a bit confusing. Initially, claimant filed a claim with the insurer for an injury consisting of increased knee pain from peripheral vascular disease (PVD) in the lower extremities and the installation of a vascular stent in the calf of his right leg with an injury date of December 16, 2013. The significance of that date is not apparent in the record. The first report of injury only describes the injury as "leg pain." (Ex. 1) The petition filed with this agency added injuries to both legs and knees. A subsequent amendment to the petition included injury to the back. All of these injuries were claimed to have resulted from "repetitive trauma for many years of over use."

In his post-hearing brief, the initial issues presented by claimant included only injuries to the back and knees from an aggravation of osteoarthritis caused by repetitive, physically demanding work as a cement finisher. There was no mention of the claimed PVD. Later on in the brief, the claimant discusses PVD and makes references to various opinions from Dr. Dippel issued in 2009 causally relating prolonged kneeling in this job to an occluded right popliteal artery (thrombosis) diagnosed at that time upon complaints of right foot pain and subsequently treated with a percutaneous revascularization and stent installation by the doctor in the lower right leg. (Jt Ex. 1-5) In 2010, Dr. Dippel notes that Michael does not report any claudication symptoms in his legs, but does describe considerable arthritic pain in both knees. (Ex. 1-6)

The record does not show that a workers' compensation claim was made from such a vascular injury in 2009, or that any workers' compensation weekly benefits were paid as a result of such an injury. Clearly, more than two years elapsed between that injury and the filing of the petition in his case on January 15, 2015.

After 2010, claimant did not return to Dr. Dippel until January 2014. At that time, he complained of pain in his right calf. After testing, Dr. Dippel assessed Michael as suffering from another blockage of the femoral artery in the upper right leg, and surgery was done to remove the blockage and install another stent. (Ex. 7-52)

After submitting his claim, the insurer sought a causation opinion concerning PVD from Paul Conte, M.D., who according to his letterhead is board certified in surgery, thoracic surgery and independent medical examinations. From a records review with no examination of claimant, Dr. Conte opines in his report dated June 25, 2014 that the peripheral vascular disease and leg pain are due to this chronic

underlying medical conditions and not a work-related injury. It was not a worsening of the prior vascular problem and the 2014 blockage was in a different location than the blockage in 2009. He adds that chronic kneeling such as occurs in cement laying has not been seen to cause his pattern of arterial occlusions. (Ex. A-3)

At the request of his attorney, Michael was evaluated by Sunil Bansal, M.D. on August 19, 2016. Dr. Bansal agreed with Dr. Conte and did not causally relate the PVD or the blockage in 2014 to Michael's work activity as a cement worker. However, he went on to opine that Michael's work duties as a cement worker aggravated his bilateral knee degenerative joint disease. He went on to provide a permanent impairment rating to the lower extremities, using the AMA Guides, fifth edition, for both knees: 7 percent for the right knee and 20 percent to the left knee. He also recommended permanent restrictions of no lifting greater than 40 pounds, no frequent kneeling, bending, squatting, climbing or twisting; no prolonged standing/walking greater than 30 minutes at a time and avoid multiple stairs and uneven terrain.

On August 24, 2016, Michael underwent a functional capacities evaluation by Mike Lanaghan, PT. Following testing, Lanaghan recommended work restrictions to avoid floor to waist lift; only infrequent lifting with both arms no more than 5 pounds waist to shoulder lifting, and no more than 1 pound waist to overhead. Also, Michael was to carry no more than 10 pounds over long distances or carry no more than 15 pounds over short distances. He was to push or pull no more than 20 pounds and only infrequently stand or kneel with no crawling or squatting. Finally, he could only bend occasionally. The record does not show any physician adopting these FCE recommendations.

In light of Dr. Bansal's views and the occurrence of a stroke in June 2015, defendants sought another opinion from Dr. Conte concerning the asserted work-related arthritis. Dr. Conte opined in his report dated October 20, 2016 as follows:

> Arthritis, specifically Osteoarthritis of the knee is a very common condition, its incidence approaching half of the adult population over 60 years of age. While work related repetitive trauma, such as kneeling has been associated with increased incidence, Genetic factors, Obesity, and Diabetes are more significant particular risk factors and Mr. Gayman has had these last two as long-standing comorbidities. Given this, I think it is just as likely as not that his Osteoarthritis is due to long standing comorbidities and genetic predisposition than due to prolonged episodes of kneeling at work.

(Ex. A-4)

Ultimate Findings:

First, due to the lack of any supporting medical opinion, I am unable to find that Michael's work as a cement finisher was a cause of his peripheral vascular disease

and/or the blockage in upper right leg diagnosed and treated in January 2014 or that such work aggravated a prior existing vascular condition in 2009.

Second, I am unable to find that Michael's back condition was caused, aggravated or worsened by his cement work. Again, there is no medical opinion to support such a claim.

Third, I find that Michael's work for over 40 years as a cement worker/finisher caused, aggravated or materially worsened, simultaneously, the arthritis in both knees. This is based on the opinions of Dr. Bansal and Dr. Conte. Dr. Conte admitted that Michael's work was a risk factor; he just believed the other risk factors were more significant. As will be stated in the next section of his decision, it is unnecessary to show the work activity to be the most significant cause or even more significant than other causes. It is only necessary to show that the work was a significant cause among others.

I find the work injury of June 18, 2016 to be a cause of a 7 percent permanent partial impairment to the right leg and a 20 percent permanent partial impairment to the left leg. Using Table 17-3 at page 527 of the AMA Guides, fifth edition, these ratings convert to a 3 percent and 8 percent permanent impairment to the body as a whole respectively. Using the combined values chart at page 605 of the same AMA Guides, the two ratings combine into a single 11 percent permanent impairment to the body as a whole.

The proper manifestation date for this injury is troublesome since nothing significant was shown to have occurred on December 16, 2013 other than filing the claim with the insurance carrier. The record does not show that he took any time off just to treat the arthritis in the knees. It is likely that the knee arthritis along with his other non-work related health conditions lead to his retirement. Consequently, the most logical injury date must be June 18, 2016, the date when the injury manifested itself and contributed to the decision to leave the work force.

For assessing the industrial impact of this work injury, I find as a result of the work injury of June 18, 2016, that Michael is now permanently restricted as opined by Dr. Bansal. These restrictions consist of no lifting greater than 40 pounds; no frequent kneeling, bending, squatting, climbing or twisting; no prolonged standing/walking greater than 30 minutes at a time; and, avoid multiple stairs and uneven terrain.

I am unable to find the FCE recommendations to be valid for this claimant. No physician has adopted them, and an opinion by a physical therapist does not have the same weight as the views of a licensed physician.

Although the restrictions are significant, they do not show that Michael is unable to be employed in any capacity. His current unemployed status does not show that he is unemployable, because he has withdrawn from the work force. As a part-owner of a business that operated for more than 40 years, claimant has administrative/managerial

skills and a physical ability to work in light or sedentary jobs. Therefore, this work injury has not rendered him unemployable.

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 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).

It has long been the law of Iowa that Iowa employers take an employee subject to any active or dormant health problems and must exercise care to avoid injury to both the weak and infirm and the strong and healthy. Hanson v. Dickinson, 188 Iowa 728, 176 N.W. 823 (1920). A material aggravation, worsening, lighting up or acceleration of any prior condition has been a viewed as a compensable event ever since initial enactment of our workers' compensation statutes. Ziegler v. United States Gypsum Co., 252 Iowa 613, 620; 106 N.W.2d 591 (1961). While a claimant's must show that the injury proximately caused the medical condition sought to be compensable, it is well established in Iowa that a cause is "proximate" when it is a substantial factor" in bringing about that condition. It need not be the only causative factor, or even the primary or the most substantial cause to be compensable under the Iowa workers' compensation system. Miller v. Laurdsen Foods, Inc., 525 N.W. 2d 417 (Iowa 1994). Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980).

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). Consequently, although a claimant may have only worked a very short time with an employer (a few days in the case of Meyer), if it is shown that the type of injury clamant sustained is a "rational consequence" of a hazard of the work he performed, the claim is compensable. Id. at 224.

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 cumulative trauma or gradual injury arising out of and in the course of employment with defendant employer with a manifestation or injury date of June 18, 2016.

II. A claim based on the 2009 injury, is barred by Iowa Code section 85.26(1) in that no benefits were paid and more than two years elapsed between the 2009 injury and 2015 filing of the petition.

III. The claimant has shown that the June 18, 2016 work injury resulted in a permanent impairment to two upper extremities occurring simultaneously. This is viewed by this agency to be caused from a single accident. Fichter v. Griffin Pipe Products, Case No. 941434, Appeal Decision, 4/29/93. Therefore, the extent of

disability is measured pursuant to Iowa Code section 85.34(2)(s). Measurement of disability under this subsection is peculiar.

Normally, if the injury is to only an extremity, the amount of disability is measured functionally as a percentage of loss of use which is then multiplied by the maximum allowable weeks of compensation allowed for that scheduled member set forth in Iowa Code sections, 85.34(2)(a-r) to arrive at the permanent disability benefit entitlement. These disabilities are termed "scheduled member" disabilities. Barton v. Nevada Poultry Company, 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C.M. Co., 184 N.W. 746 (1922).

For all other injures including those to the body as a whole, the degree of permanent disability is measured pursuant to Iowa Code section 85.34(2)(u). Unlike scheduled member disabilities, the degree of disability under this provision is not measured solely by the extent of a functional impairment or loss of use of a body member. A disability to the body as a whole or an "industrial disability" is a loss of earning capacity resulting from the work injury. Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899 (1935).

Under Iowa Code section 8534(2)(s), this agency must first determine the extent of industrial disability or loss of earning capacity caused by the two simultaneous injuries. If there is a 100 percent or total loss of earning capacity, then clamant is entitled to permanent total disability benefits. If the injury caused a loss of earning capacity that is less than total or 100 percent, then the extent of the permanent disability is measured only functionally as a percentage of loss of use for each extremity which is then translated into a percentage of the body as a whole and combined together into one body as a whole value. This can be done using the AMA guides. If the industrial disability is total or there is a total loss of earning capacity, then claimant is entitled to permanent total disability benefits under Iowa Code section 85.34(3). Simbro v. DeLong's Sportswear. 332 N.W.2d 886 (Iowa 1983); Burgett v. Man An So Corp., III Iowa Industrial Commissioner Report 38 (App. November 30, 1982).

In the case sub judice, it was found that claimant had not suffered a total loss of earning capacity; consequently, his entitlement to permanent disability benefits is measured functionally. Based upon the findings of a combined 11 percent impairment to the body as a whole as a result of the injury, claimant is entitled as a matter of law to 55 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(s) which is 11 percent of the 500 weeks, the maximum allowable for a simultaneous injury to two extremities in that subsection.

There was no showing of lost time from work due to recovery from an arthritis injury. Therefore, no healing period benefits can be awarded.

III. Claimant seeks reimbursement for the fees of Dr. Bansal to provide an independent medical examination. 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.

Indeed, Dr. Bansal was asked to evaluate claimant after Dr. Conte provided his views on causation. However, Dr. Conte's views prior to the evaluation by Dr. Bansal only involved the work relatedness of the peripheral vascular disease, not the claim for arthritis of the knees. Dr. Bansal evaluated the PVD claim as well as the arthritis claim. Claimant cannot be reimbursed for the portion of the examination related to the knee arthritis claim. Dr. Bansal's bill does not break down the total charge of $2,775.00. For lack of no better apportionment, defendants shall be ordered to only pay one-half of this charge or $1,387.50.

IV. Claimant seeks various costs set forth in state of costs submitted after hearing on November 9, 2016. Three of the costs are fees by various providers to copy and provide their medical records to the claimant. These costs are not reimbursable under our rule 876 IAC section 4.33. Claimant seeks the costs of the functional capacity evaluation (FCE). However, only the costs of preparing the report are reimbursable, not a fee for medical examination. Des Moines Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015); Lagrange v. Nash Finch Company, File No. 5043316 (App. July 1, 2015). There is no breakdown of the fees for the FCE. It is unknown whether testing to prepare the FCE report is a reimbursable costs under the confusing language of the Young case. In the past, such testing was reimbursable. Absent better guidance from above authorities, the full costs shall be awarded in this case. The remaining costs for the filing fee and service of process are fully reimbursable under the rule. The total cost awarded is $487.96.

ORDER

1. Defendants shall pay to claimant fifty-five (55) weeks of permanent partial disability benefits at the stipulated rate of four hundred eighteen and 87/100 dollars ($418.87) per week from June 18, 2016. Defendants shall pay accrued weekly benefits in a lump sum.

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

3. Claimant shall reimburse claimant the sum of one thousand three hundred eighty-seven and 50/100 dollars ($1,387.50) for the IME by Dr. Bansal.

4. Defendants shall reimburse claimant for his costs of this action pursuant to administrative rule 876 IAC in the amount four hundred eighty-seven and 96/100 dollars ($487.96).

5. 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 January, 2017.

LARRY WALSHIRE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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LPW/sam

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.