BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOSEPH PHIPPS,

Claimant,

vs.

MIDAMERICAN ENERGY COMPANY,

Employer,
Self-Insured,
Defendant.

File No. 5066050

ARBITRATION DECISION

Head Notes: 1402.30, 1802, 1803, 2501

STATEMENT OF THE CASE

Claimant, Joseph Phipps, filed a petition in arbitration seeking workers' compensation benefits from MidAmerican Energy Company, self-insured employer, as defendant. This case was heard in Des Moines, Iowa on September 26, 2018 with a final submission date of October 31, 2018.

The record in this case consists of Joint Exhibits 1 through 9, Claimant's Exhibits 1 through 9, Defendant's Exhibits A through H, and the testimony of claimant and Montey Halls.

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.

ISSUES

1. Whether claimant sustained an injury that arose out of and in the course of employment on April 24, 2017.

2. Whether the injury is a cause of temporary disability.

3. Whether the injury is a cause of permanent disability; and if so

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

5. Whether there is a causal connection between the injury and the claimed medical expenses.

FINDINGS OF FACT

Claimant was 65 years old at the time of hearing. Claimant graduated from high school. Claimant was in the Marines. Most of claimant's work life has been as an electrical lineman. (Claimant's Exhibit 1, page 5) Claimant testified most of the work he does as a lineman involves working overhead. Claimant began employment with MidAmerican in 2003 as a journeyman lineman.

Claimant's prior medical history is relevant. In 2012 claimant had an elbow injury while at work. In 2015 claimant had bilateral shoulder injuries. There is no evidence claimant had any permanent restrictions or permanent impairments from the 2015 shoulder injury. Claimant settled his right elbow injury on April 20, 2012 in an agreement for settlement found at Exhibit B. (Joint Exhibit 1, 2)

Claimant testified he was dispatched to open overhead electrical switches on April 24, 2017. The switches were hung from telephone lines and telephone poles. Claimant was in a cherry picker. Claimant used a 15-foot fiberglass extendo stick. Claimant was attempting to open the switch by latching the extendo stick onto the switch and pulling down. Claimant said he pulled down hard a number of times, but was unsuccessful in opening the switches. He said as soon as he stopped working on the switches, he felt pain in both shoulders.

Claimant testified he gave notice to his supervisor regarding hurting his shoulders on April 24, 2017. On April 25, 2017 claimant gave written notice to MidAmerican he injured his shoulders. (Ex. C, pp. 13-14)

On April 25, 2017 claimant was evaluated by Mary Shook, M.D. for bilateral shoulder pain when trying to pull down on a hot stick to open a switch. Claimant was assessed as having right and left shoulder strain. He was recommended to treat with ice and do range of motion exercises. (Jt. Ex. 3, pp. 5-10)

Claimant returned in follow up with Dr. Shook on May 5, 2017. Physical therapy was recommended. (Jt. Ex. 3, p. 13a)

On June 6, 2015 claimant underwent an MRI of the left and right shoulders. It revealed a partial-thickness tear of the supraspinatus, infraspinatus and superior subscapularis tendon on the left. The MRI of the right shoulder showed a partial-thickness articular surface tear. (Jt. Ex. 5, pp. 34-35, 38)

On June 21, 2017 claimant was evaluated by Steven Aviles, M.D. with complaints of bilateral shoulder pain that began when claimant was pulling down on a "hot switch." Claimant developed pain in both shoulders after pulling down on the hot switch. Claimant was assessed as having a complete rotator cuff tear on the left shoulder and osteoarthritis in the right shoulder. Dr. Aviles believed claimant's right

shoulder was a temporary exacerbation of his arthritis. He recommended surgery on the left. He restricted claimant to no switching. Surgery was discussed and chosen as a treatment option. (Jt. Ex. 6, pp. 42-46)

Claimant testified Dr. Aviles only spent 10 minutes with him. He said Dr. Aviles did not examine him. He said Dr. Aviles did not perform range of motion or grip strength tests. He testified he only saw Dr. Aviles one time in June of 2017 and has not seen him since.

In a June 26, 2017 letter, written by defendant's third-party administrator, Dr. Aviles indicated claimant's bilateral shoulder condition was not related to his May 24, 2017 work injury at MidAmerican. (Ex. A, p. 1) In a July 10, 2017, letter, defendant denied claimant's claim for benefits. (Ex. F, p. 27)

On August 28, 2017 claimant was evaluated by Brian Crites, M.D., an orthopedic surgeon. Claimant indicated pain in both shoulders that increased when pulling on wires. Claimant was assessed as having a complete rotator cuff tear on the left and right shoulders. Surgery was recommended and chosen as a treatment option. As claimant's left shoulder was more symptomatic, surgery was to be performed on the left shoulder first. (Jt. Ex. 8, pp. 54-57)

On September 14, 2017 claimant underwent a left rotator cuff repair and distal clavicle excision. Surgery was performed by Dr. Crites. (Jt. Ex. 8, pp. 63-64)

Claimant returned in follow up with Dr. Crites on September 25, 2017. Claimant was told to not lift with the left. (Jt. Ex. 8, pp. 65-66) On October 4, 2017 claimant was returned to work but was restricted to lifting only one pound on the left. (Jt. Ex. 8, p. 69)

In a November 22, 2017 note, Dr. Aviles opined claimant's work activities with MidAmerican neither caused nor materially aggravated his shoulder condition. (Ex. A, p. 4)

On March 21, 2018 Dr. Crites returned claimant to work at full duty. (Ex. 8, pp. 77-80)

On April 3, 2018 claimant underwent a rotator cuff repair on the right. Surgery was performed by Dr. Crites. (Jt. Ex. 8, pp. 80-81)

Claimant saw Dr. Crites in follow up on April 16, 2018. Claimant was restricted from lifting with his right arm. (Jt. Ex. 8, pp. 82-84)

Claimant was returned to work at full duty on June 26, 2018. (Jt. Ex. 8, pp. 88-90)

In a July 6, 2018 report, written by claimant's counsel, Dr. Crites gave his opinions of claimant's condition. He opined claimant's accident of April 24, 2017 either caused or materially aggravated claimant's shoulder injury. He based this opinion, in

part, on the MRI showing claimant's left and right rotator cuff tears were relatively recent and likely traumatic. He opined it was reasonable and necessary for him to perform surgery on claimant. Dr. Crites found claimant was at maximum medical improvement (MMI) for the left shoulder as of September 14, 2017. He opined claimant was at MMI for the right shoulder on April 3, 2018. He found claimant had a 6 percent permanent impairment to the body as a whole for both the left and right shoulders. He released claimant to return to work without restrictions. (Cl. Ex. 3)

In deposition, Dr. Crites testified the MRI showed smaller and more recent rotator cuff tears. (Ex. 9; Deposition pp. 19-20) He testified claimant's shoulder had good quality tissue, which was another indicator claimant had a recent injury on his shoulder and not an older injury. (Cl. Ex. 9; Depo. pp. 56-57) Dr. Crites again opined, in deposition, the activities of claimant repeatedly pulling down on stuck switches exacerbated his underlying arthritis and caused claimant's full-thickness tears on both shoulders. (Cl. Ex. 9; Depo. pp. 46-47)

In an August 8, 2018 note Dr. Aviles indicated he had reviewed Dr. Crites' report. He opined the trauma described by claimant was not significant enough to generate a rotator cuff tear. (Ex. A, p. 6)

Claimant testified at hearing he did not believe he was at 100 percent in both shoulders since his surgery. He believes he has some loss of strength, some loss of range of motion, and some off and on again pain.

Claimant testified he would like to continue to work. He believed he would have difficulty finding a job as a lineman with another employer, given his age.

CONCLUSIONS OF LAW

The first issue to be determined is whether claimant sustained an injury that arose out of and in the course of employment on April 24, 2017.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

The claimant has the burden of proving by a 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.

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 credibly testified that on April 24, 2017 he injured both shoulders attempting to open electrical switches that were overhead. There is some evidence that claimant had some minor shoulder injuries prior to April 24, 2017. There is no evidence any of these temporary problems resulted in a permanent impairment or permanent restrictions.

Claimant underwent MRIs of both shoulders. He was evaluated by Dr. Aviles. Dr. Aviles diagnosed claimant as having a full-thickness rotator cuff tear with a partial bicep tear on the left. He also assessed claimant as having temporary aggravation of preexisting arthritis on the right. (Jt. Ex. 6, p. 42)

Two experts have opined regarding the cause of claimant's bilateral shoulder condition. Dr. Crites actively treated claimant for nearly a year. He performed both of claimant's surgeries. Dr. Crites opined claimant materially aggravated his shoulders on April 24, 2017. Dr. Crites based his opinions on claimant's MRI that showed smaller and recent tears. He also opined claimant had good tissue quality in his shoulders, indicating claimant had a new injury to the shoulder bilaterally, and that his condition was not the result of an old ongoing injury. (Ex. 3; Cl. Ex. 9; Depo. pp. 19-20, 44, 46-48, 56-57)

Dr. Aviles evaluated claimant on one occasion in June of 2017. Claimant testified Dr. Aviles met with him for only 10 minutes and performed no tests. Dr. Aviles opined the trauma experienced by claimant was not enough to generate a rotator cuff tear. (Ex. A, pp. 4, 6)

Dr. Crites treated claimant for nearly a year. As a practical and factual matter, he has far more experience with claimant's shoulders and claimant's medical presentation than does Dr. Aviles, who saw claimant once in June of 2017 for 10 minutes. Dr. Crites performed both of claimant's shoulder surgeries. Dr. Crites based his opinions on causation, in part, on his review of claimant's MRIs and his review of the tissue in claimant's shoulder during surgery. Based on this, it is found Dr. Crites' opinions regarding causation are more convincing than those of Dr. Aviles.

Claimant had injuries to his bilateral shoulders on April 24, 2017 while attempting to open closed electrical switches. The record indicates claimant reported the injury to his supervisor after trying on numerous occasions to open closed switches. The opinions of Dr. Crites regarding causation are found more convincing than those of Dr. Aviles. Given this record, claimant has carried his burden of proof he sustained an injury on April 24, 2017 that arose out of and in the course of employment.

The next issue to be determined is the extent of claimant's entitlement to temporary benefits.

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

In the hearing report, the parties stipulated if defendant was found liable for the injury at issue, claimant would be entitled to temporary benefits for the periods of August 10, 2017 through September 11, 2017; September 14, 2017 through October 4, 2017; and from April 3, 2018 through June 24, 2018. As claimant has carried his burden of proof that his injury arose out of and in the course of his employment, claimant is due temporary benefits for the above-described periods of time.

The next issue to be determined is whether claimant's injury resulted in a permanent disability.

The only expert opinion in the record regarding permanent disability comes from Dr. Crites. Dr. Crites found claimant had a 10 percent permanent impairment to both the left and right shoulders. Claimant underwent rotator cuff surgery on both shoulders. Based on this, claimant has carried his burden of proof he sustained a permanent disability regarding his bilateral shoulder injuries.

The next issue to be determined is the extent of 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 was 64 years old at the time of hearing. He graduated from high school. He served in the Marines. For most of claimant's adult working life he has worked as an electrical lineman for various power companies.

Dr. Crites found claimant had a 6 percent permanent impairment to the body as a whole for the left and right shoulders. The combined value tables in the AMA Guides to the Evaluation of Permanent Impairment indicate that a 6 percent permanent impairment to the body as a whole combined with a 6 percent permanent impairment to the body as a whole results in a 12 percent permanent impairment to the body as a whole. It is found claimant has a 12 percent permanent impairment to the body as a whole due to his bilateral shoulder injuries.

Claimant returned to MidAmerican. At the time of hearing claimant was still working as a journeyman lineman for MidAmerican. Claimant has no permanent restrictions. Claimant credibly testified he believes he has a loss of strength and range of motion in both shoulders. When all relevant factors are considered, it is found claimant has a 10 percent loss of earning capacity or industrial disability.

The next issue to be determined is whether there is a causal connection between the injury and the claimed medical expenses.

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).

The parties stipulated at hearing defendant was self-insured for workers' compensation insurance and for group medical. Because claimant had his medical benefits for his shoulder condition paid under his group health plan, the only determination that needs to be made regarding reimbursement of medical bills is whether claimant is due out-of-pocket medical expenses. Claimant had out-of-pocket medical expenses of $126.50. Claimant is due reimbursement for $126.50. (Claimant's Ex. 8; Tr. pp. 5-7)

ORDER

Therefore, it is ordered:

That defendant shall pay claimant healing period benefits at the rate of one thousand ninety-seven and 34/100 dollars ($1,097.34) per week from August 10, 2017 through September 11, 2017; from September 14, 2017 through October 4, 2017; and from April 3, 2018 through June 24, 2018.

That defendant shall pay claimant fifty (50) weeks of permanent partial disability benefits at the rate of one thousand ninety-seven and 34/100 dollars ($1,097.34) from October 5, 2017 through April 2, 2018, and recommencing on June 25, 2018.

Defendant shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30. Defendant shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, 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).

That defendant shall receive a credit for benefits paid under Iowa Code section 85.38(2).

That defendant shall reimburse claimant for medical expenses as detailed above.

That defendant shall pay costs.

That defendant shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

Signed and filed this 21st day of November, 2018.

JAMES F. CHRISTENSON
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.