BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RANDY W. HUNTER,

Claimant,

vs.

QUAKER MANUFACTURING, LLC,

Employer,

and

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Insurance Carrier,
Defendants.

File No. 5044483

APPEAL

DECISION

Head Note No.: 1803

Defendants Quaker Manufacturing, LLC, (hereinafter Quaker) and Indemnity Insurance Company of North America appeal from an arbitration decision filed November 17, 2014. The case was heard on October 7, 2014, and it was considered fully submitted in front of the deputy workers' compensation commissioner at the conclusion of the hearing.

The deputy commissioner awarded claimant 35 percent industrial disability plus costs.

Defendants assert on appeal that the deputy commissioner erred in finding claimant is entitled to 35 percent industrial disability. Defendants assert that the award of industrial disability should be reduced. Claimant asserts that the findings of the deputy commissioner should be affirmed.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, I reach the same analysis, findings and conclusions as those reached by the deputy commissioner.

Pursuant to Iowa Code Sections 86.24 and 17A.5, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on November 17, 2014, that relate to issues properly raised on intra-agency appeal with the following additional analysis:

ISSUE ON APPEAL

Did the deputy commissioner err in awarding claimant 35 percent industrial disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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 Elec. 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).

Because 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.

There is no dispute that claimant sustained a compensable injury to his neck and body as a whole on February 2, 2012, which arose out of and in the course of his employment with Quaker. The sole issue on appeal is whether the deputy commissioner erred in awarding 35 percent industrial disability.

On February 2, 2012, claimant walked into a steel beam and struck his forehead. He testified that his view of the beam was blocked by his hard hat. (Transcript, page 21) He was not knocked to the ground, but the blow to his head did cause his knees to buckle. (Exhibit E, p. 18) He experienced extreme pain into the top of his head and an incredible popping in his neck. (Tr., p. 21) Prior to this he had not had any injuries to his neck. (Tr., p. 22)

As a result of the injury, Loren J. Mouw, M.D., and Chad Abernathey, M.D., neurosurgeons, performed surgery on claimant's cervical spine on June 14, 2012, which consisted of the following:

1. Anterior cervical discectomy with intraoperative microscope C6-7, C7-T1, two levels.

2. Anterior cervical fusion with allograft, two levels.

3. Insertion of structural graft, 5x7 mm VG2 graft, C6-7; 6x8 mm VG2 graft C7-T1.

4. Anterior cervical instrumentation C6, C7 and T1, three segments, with a 32 mm Skyline plate and 15 mm variable and fixed angled screws.

(Ex. C, p.1)

Claimant had a good result from the surgery. He was released to return to work without restrictions on September 4, 2012. (Ex. D, p 4)

On December 14, 2012, Dr. Abernathey issued a permanent impairment rating of nine percent of the whole body "due to a left C7 radiculopathy, C6-7 disc degeneration with osteophyte formation and stenosis with subsequent surgical intervention with an anterior cervical discectomy and fusion with instrumented allograft." (Ex. D, p. 5) In his report, Dr. Abernathey did not state whether his impairment rating is based on the American Medical Association Guides to the Evaluation of Permanent Impairment, nor did he state how he arrived at the percentage of permanent impairment.

Claimant had an independent medical examination (IME) with Richard Neiman, M.D., neurologist, on March 19, 2014, at the request of claimant's counsel. In his report, Dr. Neiman stated claimant sustained 27 percent impairment of the whole person due to the work injury. (Ex. 1, p. 3) Dr. Neiman based his impairment rating on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. He stated claimant would qualify for DRE Cervical Category IV. Dr. Neiman did not place any particular lifting restrictions on claimant but he did advise claimant to avoid flexion, extension, lateral flexion and rotation of the cervical spine. (Ex. 1, p. 3)

Claimant testified that since the surgery he has been able to perform his job. (Tr., pp. 26, 45) However, claimant testified he is very careful when he needs to lift any weight because it tends to aggravate his neck. (Tr., p. 26) He has a self-imposed lifting restriction of 50 pounds. (Tr., p. 56) It is not a problem for him to lift 50 pounds to his waist, but lifting that much weight to shoulder level is problematic for him. (Tr., p. 56) He also testified he is able to perform overhead work, but he experiences headaches within minutes of doing overhead work and his neck will lock up. (Tr., pp. 26, 31) However, claimant testified he sets aside his discomfort to make sure he performs his job. (Tr., p. 27) He testified he realizes he is less effective now than he was prior to the injury. (Tr., p. 27) He testified there are co-workers who perform some of his work out of sympathy for him and he is concerned his co-workers will grow tired of doing his work for him. (Tr. pp. 30-31)

Claimant testified he continues to experience sharp pains in the base of his skull (Tr., pp.27-28) and dizziness when he performs overhead work. (Tr. p. 31) He testified he experiences pains similar to electric shock in his right shoulder area and pains in his arms, (Tr. p. 28) and his neck locks up. (Tr., p. 31) Claimant testified his injury affects his sleep because it is difficult for him to get comfortable due to his neck condition. (Tr., pp. 29-30, 35) He also notices the more active he is during the day the more difficult his sleep is that night. (Tr., p. 30) He attributes all of these problems to his neck injury. (Tr., p. 38) Claimant also testified that he tires more easily now and as a result he does less in his personal life than he did prior to the injury. (Tr. p, 27) He is still able to do the things he did before the injury, but he is now more selective about when he performs activities, depending on how his symptoms are each day. (Tr., p. 29) He testified he is a hard-headed individual, so if something needs to be done he attempts to get it done. (Tr., p. 29)

Claimant testified that prior to the injury he planned to work until age 65, which would be November, 2017, but due to the injury and his ongoing symptoms, he decided to retire in January of 2015 because he does not feel safe on the job. (Tr., pp. 31-32, 56; Ex. E, p. 27)

Because Dr. Abernathey did not explain how he arrived at his impairment rating, and Dr. Neiman does provide such an explanation, I agree with the deputy commissioner's finding that Dr. Neiman's impairment rating is more persuasive. Furthermore, in light of the nature and complexity of the surgery claimant had, I agree with the deputy commissioner's finding that Dr. Neiman's impairment rating and his activity recommendations fit more accurately with the medical and evidentiary picture as a whole. Claimant underwent an extensive cervical surgery which included a two-level fusion and although he has had a good surgical result, he continues to experience significant ongoing problems that affect his ability to perform his job. I find that claimant's unrebutted testimony regarding his ongoing symptoms and his limitations is consistent with the nature of his injury and the complex surgery he had.

Claimant testified that although he was still able to do his job at the time of the hearing, which was shortly before his planned retirement, his unrebutted testimony was that he needed assistance from his co-workers to perform his job. Even with the help of his co-workers, claimant was still experiencing pain and significant symptomatology, which caused him to elect to retire more than two years earlier than he had planned before his injury.

Claimant graduated from high school in 1970. (Tr., p. 7) From 1970 to 1971 he earned a certificate of completion at Iowa Automotive and Diesel to become an auto mechanic. (Tr., p. 7) Through Quaker, claimant received multi-skill training in welding, plumbing, and electrical. Each craft was a one-week course. (Ex. E, pp. 3-4) Claimant's experience and education is limited to the field of maintenance, which he can no longer perform without significant symptomatology.

Claimant earned $31.00 per hour and worked 40 or more hours per week at the time of the hearing. (Ex. E, pp. 15-16) The evidence shows that claimant's earnings have fluctuated since the injury, but this is due in part to the amount of work available at Quaker. (Ex. E, pp. 16-17) Since the injury in question, claimant has not bid on any new jobs at Quaker and he has not applied for any jobs with other employers. (Tr., p. 49) Although he has returned to his same job, he frequently receives help from his co-workers because of his injury. (Tr. pp. 30-31)

Some of the findings by the presiding deputy were based on the deputy's conclusion that claimant's testimony was credible. While I performed a de novo review, I give considerable deference to findings of fact that are impacted by the credibility findings, expressly or impliedly, made by the deputy who presided at the hearing.

Considering claimant's age, educational background, employment history, ability to retrain, permanent impairment and activity recommendations, as well as all other industrial disability factors identified by the Iowa Supreme Court, I affirm the deputy commissioner's determination that claimant has proven he sustained 35 percent industrial disability as a result of his work injury at Quaker on February 2, 2012.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of November 17, 2014, is AFFIRMED in its entirety.

Defendants shall pay claimant one hundred seventy-five (175) weeks of permanent partial disability benefits commencing December 15, 2012, at the weekly rate of nine hundred nine and 38/100 dollars ($909.38). Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30 with subsequent reports of injury filed as directed by this agency.

Defendants shall receive credit for benefits previously paid.

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

Defendants shall pay the costs of the appeal, including the preparation of the hearing transcript.

Signed and filed this 14th day of October, 2015.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

Copies to:

Matthew J. Petrzelka
Attorney at Law
1000 – 42nd St. SE, Ste. A
Cedar Rapids, IA 52403-3902
mpetrzelka@petrzelkabreitbach.com

Timothy W. Wegman
Attorney at Law
6800 Lake Dr., Ste. 125
West Des Moines, IA 50266-2504
tim.wegman@peddicord-law.com