

## BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RANDY HAKE,

Claimant,

vs.

MUSCATINE POWER AND WATER,

Employer,  
Self-Insured,  
Defendant.

File No. 1634323.01

## ARBITRATION DECISION

Head Note Nos.: 1402.40, 1803, 2502,  
2907

## STATEMENT OF THE CASE

Randy Hake, claimant, filed a petition in arbitration seeking workers' compensation benefits from Muscatine Power and Water, self-insured employer as defendant. Hearing was held on July 26, 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.

Randy Hake and James Garrison were the only witnesses to testify live at trial. The evidentiary record also includes joint exhibits JE1-JE9, claimant's exhibits 1-4, and defendant's exhibits A-N. The evidentiary record closed at the conclusion of the arbitration hearing.

The parties submitted post-hearing briefs on September 9, 2021, at which time the case was fully submitted to the undersigned.

## ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant sustained any permanent disability as the result of the stipulated bilateral upper extremities, May 1, 2017 work injury. If so, the extent of permanent partial disability benefits claimant is entitled to receive.

2. Whether claimant is entitled to reimbursement of the IME pursuant to Iowa Code section 85.39.
3. Assessment of costs.

### FINDINGS OF FACT

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

Randy Hake sustained an injury to his bilateral upper extremities that arose out of and in the course of his employment with Muscatine Power and Water on May 1, 2017. Mr. Hake began working for Muscatine Power and Water in October 2013 as a journeyman line clearance tree trimmer; he was still employed in this position at the time of the hearing. He works full-time. When he was hired by Muscatine Power and Water he underwent fit-for-duty testing which included grip strength testing. He was found to be fit for duty. Mr. Hake testified that his duties include trimming trees pretty much all day. He uses hand saws including, trimmer poles, hand saws, and pole saws. (Hearing Report; Testimony; JE1)

In addition to working for Muscatine Power and Water, Mr. Hake has his own tree service A Notch Above Tree Care. He started this business in May or June 2013 before he started at Muscatine Power and Water. (Testimony)

Mr. Hake first began to notice pain and numbness symptoms in his hands in 2017. He reported the problem to Muscatine Power and Water and they sent him for medical treatment. (Testimony)

Mr. Hake saw Rhea Allen, M.D., at Unity Point Health on May 11, 2017. The doctor's assessment was median nerve neuritis. She recommended testing of the upper extremities. After the testing was conducted Mr. Hake returned to Dr. Allen. The studies showed bilateral carpal tunnel syndrome. Dr. Allen recommended a referral to an orthopaedic surgeon. (JE2, pp. 9-15)

Mr. Hake was sent to see Abdullah Foad, M.D., in June. Dr. Foad performed right endoscopic carpal tunnel release on July 14, 2017 and left on August 4, 2017. He returned to Dr. Allen in April 2018 and reported that he still has aching in his wrists, but the numbness was improved. He felt he had lost grip strength. He underwent physical therapy. (JE2, pp. 17-26; JE4, pp. 71-74; JE6)

Dr. Foad saw Mr. Hake on August 10, 2017. He was six days out from left single incision endoscopic carpal tunnel and four weeks out from his right single incision endoscopic carpal tunnel. Mr. Hake reported that the left incision was doing well, but his right was bothering him. (JE3, p. 62)

Mr. Hake returned to Dr. Foad on September 7, 2017. His right incision was still bothering him just a bit. He was ready to return to regular work. Dr. Foad placed him at

maximum medical improvement (MMI), with no restrictions. Mr. Hake was to contact the doctor's office with any questions or concerns. (JE3, p. 65)

On September 18, 2017, Dr. Foad issued an impairment rating. He opined that pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Mr. Hake sustained zero percent impairment. (Def. Ex. C, p. 6)

On March 4, 2019, Tobias Mann, M.D., performed an IME at the request of the defendants. Mr. Hake complained of an aching pain in his wrists and palms. He also had weakness, but denied any numbness or tingling. Dr. Mann noted that his postop EMG was normal. However, he also noted that it is possible to have carpal tunnel syndrome without having a positive EMG. Dr. Mann noted that given that he had numbness and tingling prior to surgery and the numbness and tingling improved with surgery that would make recurrent carpal tunnel syndrome less likely. He was concerned about the slightly flattened appearance of the median nerve in the carpal canal which could be suggestive of recurrence of the disease. He recommended bilateral carpal tunnel injections. If symptoms did not improve then Dr. Mann thought the chance of repeat surgery helping would be minimal. Dr. Mann felt it was likely that his workplace activities caused or materially aggravated his carpal tunnel syndrome and the need for treatment. (JE8, pp. 105-109)

Mr. Hake did undergo the bilateral carpal tunnel injections in March. He had complete resolution of his symptoms. Dr. Mann recommended follow-up in two months or sooner if symptoms returned. (JE8, pp. 110-113)

Mr. Hake saw Dr. Mann on July 1, 2019. His symptoms returned the past couple of weeks. Right revision carpal tunnel release with hypothenar fat pad flap was recommended. (JE8, pp. 114-115)

On October 10, 2019, Dr. Mann performed a right revision carpal tunnel release and right hypothenar fat pad flap operation. (JE9)

The last time Mr. Hake saw Dr. Mann was on February 24, 2020. Mr. Hake reported he was doing well. The doctor recommended he continue to work without restrictions and continue to work on scar massage. Dr. Mann offered to see him again in a month but Mr. Hake felt comfortable just giving him a call with any questions. Mr. Hake wanted to hold off on surgery for his left hand. (JE8, pp. 122-123)

Dr. Mann authored a missive dated April 2, 2020. Dr. Mann opined that based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, page 495, Mr. Hake has no objective basis for an impairment rating. Thus, Dr. Mann assigned a zero percent permanent partial impairment rating for the bilateral upper extremities. (Def. Ex. D, p. 8)

On November 11, 2020, Dr. Allen signed a letter authored by the defendants. Dr. Allen's signature indicates that she agreed with the statement set forth by the defendant in the letter. Dr. Allen indicated that it was her opinion that Mr. Hake's work as a tree trimmer in his private business was a cause and/or aggravating factor that contributed

to his bilateral hand and wrist complaints and subsequent surgeries. (Defendants' Exhibit A, p. 1)

On April 7, 2021, Mark Taylor, M.D., performed an IME at the request of the claimant. Mr. Hake reported that he always has wrist pain, right worse than left. He has minimal to no numbness or tingling. Dr. Taylor's diagnoses included: bilateral carpal tunnel syndrome and persistent bilateral wrist and hand pain, and decreased grip strength. Dr. Taylor noted mildly decreased range of motion of both wrists. Dr. Taylor uses several different proposed approaches to computing an impairment rating for Mr. Hake's bilateral carpal tunnel syndrome. In his computations, he references the AMA Guides, Fifth Edition. However, he ultimately does not adopt any approach set forth by the Guides; instead, Dr. Taylor recommended splitting the difference between two approaches. I find the opinion set forth by Dr. Allen that Dr. Taylor incorrectly applied the Guides to be persuasive. I find Dr. Taylor's rating is not a determination of the extent of loss of percentage of permanent impairment that is determined solely by utilizing the Guides. (Cl. Ex. 1, pp. 1-10)

On June 25, 2021, Dr. Allen issued a letter with her opinions regarding the IME performed by Dr. Taylor. She set forth a number of areas where Dr. Taylor's assessment is not consistent with the AMA Guides, Fifth Edition. Dr. Allen set forth her rationale for why the methods used by Dr. Taylor are incorrect under the Guides. She also sets forth why there is no objective basis for an impairment rating under the Guides for Mr. Hake. (Def. Ex. B) I find Dr. Allen's opinions to be logical, well-reasoned, and persuasive. I further find her opinions to be based on the Guides.

Furthermore, of the four physicians who evaluated Mr. Hake, Dr. Taylor is the only one who assigned any permanent impairment. I do not find the opinion of Dr. Taylor to carry greater weight than the opinions of Dr. Foad, Dr. Mann, and Dr. Allen. I find that the opinions of Dr. Foad, Dr. Mann, and Dr. Allen to be more persuasive than that of Dr. Taylor. Thus, I find that Mr. Hake has failed to demonstrate that he sustained any permanent impairment as the result of the stipulated May 1, 2017 work injury. (Cl. Ex. 1, pp. 1-10)

Mr. Hake is seeking reimbursement in the amount of \$2,777.50 for the IME performed by Dr. Taylor on April 7, 2021. I find that prior to the Dr. Taylor IME, Dr. Foad and Dr. Mann, physicians retained by the defendants opined that Mr. Hake had sustained zero percent permanent disability. I further find Mr. Hake believed the evaluation of impairment was too low. (Cl. Ex. 1; Def. Ex. C, p. 6; Def. Ex. D, p. 8)

Defendants contend that the charges for the IME conducted by Dr. Taylor are not reasonable and are not typical of a medical provider to perform an impairment rating in the local area where the examination was conducted. In support of their position they offer the opinion of Richard Kreiter, M.D. On July 13, 2021, Dr. Kreiter opined that the reasonable fee for an examination of an injured worker to perform an impairment rating, review of pertinent medical records plus preparation of a report is between \$1,500.00 and \$2,500.00 on average. (Def. Ex. L, p. 33) There are no other opinions in this case regarding the typical fee charged by a medical provider to perform an impairment rating

in the local area where the examination is conducted. I find the un rebutted opinion of Dr. Kreiter to be persuasive. I find the fee charged by Dr. Taylor is not the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted. I find defendants shall reimburse claimant for the IME in the amount of \$2,500.00.

### 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).

Iowa Code section 85.34(2)(t) states:

The loss of both arms, or both hands, or both feet, or both legs, or both eyes, or any two thereof, caused by a single accident, shall equal five hundred weeks and shall be compensated as such; however, if said employee is permanently and totally disabled the employee may be entitled to benefits under subsection 3.

Iowa Code section 85.34(2)(t)(2017).

Iowa Code section 85.34(2)(x) provides:

In all cases of permanent partial disability described in paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical

association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment pursuant to paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity.

Iowa Code section 85.34(2)(x)(2017).

Based on the above findings of fact, I conclude claimant failed to demonstrate by a preponderance of the evidence that he sustained any permanent disability as the result of the stipulated May 1, 2017 work injury. As such, he has failed to demonstrate any entitlement to permanent partial disability benefits.

Claimant is seeking reimbursement for the IME he obtained from Dr. Taylor. Iowa Code section 85.39(2) states:

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. An employer is only liable to reimburse an employee for the cost of an examination conducted pursuant to this subsection if the injury for which the employee is being examined is determined to be compensable under this chapter or chapter 85A or 85B. An employer is not liable for the cost of such an examination if the injury for which the employee is being examined is determined not to be a compensable injury. A determination of the reasonableness of a fee for an examination made pursuant to this subsection, shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted.

Iowa Code section 85.39(2)(2017).

Based on the above findings of fact, I conclude claimant is entitled to reimbursement of an IME pursuant to Iowa Code section 85.39. I further conclude that the fee charged by Dr. Taylor is not the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted. Thus, I conclude that defendants shall reimburse claimant for the IME in the amount of \$2,500.00.

Claimant is seeking an assessment of costs. 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 not successful in his claim and therefore exercise my discretion to not assess costs against the defendants. Each party shall bear their own costs. 876 IAC 4.33.

ORDER

THEREFORE, IT IS ORDERED:


Claimant shall take no weekly benefits from this proceeding.

Defendant shall reimburse claimant two thousand five hundred and no/100 dollars (\$2,500.00) for the IME of Dr. Taylor.

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 3<sup>rd</sup> day of January, 2022.

  
ERIN Q. PALS  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Heather Carlson (via WCES)

M. Anne McAtee (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.