

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TODD EVANS,
Claimant,

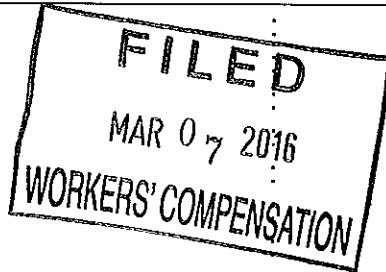
vs.

EAST JERSEY DAIRY,
Employer,

and

STANDARD FIRE INSURANCE
COMPANY,

Insurance Carrier,
Defendants.



File No. 5051346, 5051347

ARBITRATION
DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Todd Evans, claimant, filed petitions in arbitration seeking workers' compensation benefits from East Jersey Dairy and its insurer Standard Fire Insurance Company, as a result of an injuries he sustained on May 29, 2012 and July 9, 2012 that arose out of and in the course of his employment. This case was heard in Des Moines Iowa, and fully submitted on February 8, 2016. The evidence in this case consists of the testimony of claimant, joint exhibits 1 through 10 and defendants' exhibits C through E. The parties waived filing briefs. In these cases I will refer to the claimant as Todd and the defendants as East Jersey.

ISSUES

For File No. 5051346 (Date of injury May, 29, 2012):

1. The extent of claimant's disability.
2. Assessment of costs.
3. Whether defendants are entitled to credit for excessive payments.

The stipulations contained in the Hearing Report are accepted and incorporated into this decision as if fully set forth. The parties stipulated those defendants are entitled to a credit of 45 week or permanent partial disability benefits at the weekly rate of \$856.41.

For File No. 5051347 (Date of injury July 9, 2012):

1. Whether the claimant's injury is a scheduled member of industrial disability.
2. The extent of claimant's disability.
3. Assessment of costs.
4. Whether defendants are entitled to credit for excessive payments.

The stipulations contained in the Hearing Report are accepted and incorporated into this decision as if fully set forth.

FINDINGS OF FACT

The deputy workers' compensation commissioner, having heard the testimony and considered the evidence in the record, finds that:

Todd Evans, claimant was 44 years old at the time of the hearing. He went to two years of high school. He obtained a GED in 1997. Todd has a CDL Class A license. Todd is right handed.

Todd did construction work after he left high school. He then moved to the south east and worked on a tour boat and different shipping and produce companies. (Exhibit 1, page 1) In September 2000 Todd started to work for Swiss Valley Dairy. Swiss Valley Dairy eventually became East Jersey Dairy.

Todd's work for East Jersey was a delivery driver. He delivers milk to various customers such as grocery stores, convenience stores and schools. He works 50 to 60 hours per work week. His job is a union position with benefits.

On May 29, 2012, Todd was delivering milk and was pulling a dolly that got stuck. Todd pulled on the dolly and injured his shoulder. (Ex. 3, p. 1) Todd testified that the May 29, 2012 injury made his right hand numbness worse. (Todd had reported numbness in his right hand in April 2010). (Ex. 4, p. 2) He finished his shift. He reported his injury to work and was sent to Tri State Occupational Health. Todd was seen by Michael Stenberg, M.D. Dr. Stenberg's assessment was:

Assessments

Brachial neuritis – right

Neck pain – right

Observation following accident at work

Pain, shoulder – right

Sprain/strain: shoulder/arm - right

(Ex. 4, p. 6: ICD codes not included)

On June 14, 2012 Joseph Garrity, M.D., examined Todd. Dr. Garrity's diagnosis was probable carpal tunnel syndrome and right shoulder impingement. (Ex. 4, p. 10) Dr. Garrity wrote, "He probably has carpal tunnel on the right exacerbated by the events of May 29, 2012." (Ex. 4, p. 12) On June 14, 2014, an EMG findings were consistent with right median entrapment at the wrist, moderate to severe in degree. (Ex. 4, p. 13)

I find that the July 9, 2012 carpal tunnel syndrome was lit up by the May 29, 2012 injury. Thus, I find that File No. 5051347 with July 9, 2012 injury is part of the May 29, 2012 injury.

On June 29, 2012, an MRI of the right shoulder showed:

Impression:

1. Very small localized partial thickness intrasubstance/bursal surface tear supraspinatus tendon insertion.
2. Very small localized intrasubstance tear distal infraspinatus tendon.
3. Right shoulder MR arthrogram without significant finding.

(Ex. 8, p. 1)

On July 9, 2012, Todd reported additional arm pain and burning while at work. (Ex. 4, p. 17)

On October 23, 2012, James Nepola, M.D., examined Todd. He provided a right subacromial injection. (Ex. 9, p. 4) He had another injection on November 15, 2012. (Ex. 9, p. 10) On December 6, 2012, shoulder surgery was recommended. (Ex. 9, p. 14) On January 4, 2013, he performed a subacromial bursitis and partial rotator cuff tear. (Ex. 9, p. 20) On June 4, 2013, Dr. Nepola released Todd to return to work with no restrictions. (Ex. 9, p. 36) Dr. Nepola placed Todd at maximum medical improvement (MMI) on July 11, 2013. (Ex. 9, p. 37) On August 29, 2013, Dr. Nepola provided an impairment rating of 9 percent to the whole body. (Ex. 9, p. 41)

On April 9, 2015, Mark Taylor, M.D., performed an independent medical examination of Todd. (Ex. 10, pp. 1 – 11) Dr. Taylor found that it was more likely than not that Todd's work was a significant contributing factor in the developing of carpal tunnel syndrome. (Ex. 10, p. 9) He assigned a two percent for the right upper extremity for his carpal tunnel syndrome and a 9 percent to the whole body for the shoulder injury. (Ex. 10, p. 10) He recommended restrictions of 70-75 pound lifting floor to waist, 50-60 pounds between waist and shoulder and 40 pounds above shoulder level. (Ex. 10, p. 10) On May 11, 2015, Dr. Taylor wrote that he did not see mention of a distal clavicle excision in some follow up notes and recommended Dr. Nepola be contacted as it may affect the rating. (Ex. 10, p. 17)

Stephen Pierotti, M.D., provided treatment for Todd's carpal tunnel on his right arm. On December 11, 2015 an endoscopic carpal tunnel release of the right wrist was performed. (Ex. 5, p. 1; Ex. 6, p. 1) On May 8, 2013, Todd was found to have full range of motion and was asymptomatic. He was determined to be at MMI, was released from care with a zero percent impairment rating. (Ex. 5, p. 2)

On December 23, 2014, Todd was released to return to work without restrictions, although he was cautioned to be careful in his transition back to work. (Ex. 4, p. 37)

Defendants have requested credit for temporary total and permanent partial disability benefits paid at the incorrect rate. The defendants are requesting \$632.52 for temporary benefits and \$962.55 for permanent partial disability benefits. (Ex. E, p. 1)

CONCLUSIONS OF LAW

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).

In this case there is no dispute that Todd injured his shoulder on May 29, 2012. This is an industrial disability and is evaluated pursuant to Iowa Code section 85.34(2)(u). The extent of his industrial disability needs to be determined. I find that the work injury of May 29, 2012 permanently lit up claimant's carpal tunnel syndrome. Thus claimant's July 9, 2012 injury claim is considered part of his May 29, 2012 injury.

Todd is back at work performing his same duties. Todd testified that he is careful with his right shoulder at work. He has some limitations in lifting according to Dr. Taylor; however he can perform medium work and even some heavy work. He occasionally has some carpal tunnel symptoms. Todd currently enjoys his work with East Jersey and intends to keep working there and is motivated to work. Todd has a GED with no additional education. Based upon all the factors of industrial disability Todd has a 15 percent industrial disability. This entitles Todd to 75 weeks of permanent partial disability benefits.

Defendants have requested credit for overpayment of the weekly rate. Defendants are requesting a credit of \$632.52 for healing period benefits and \$962.55 for permanent partial disability benefits.

Iowa Code section 85.34(4) reads:

Credits for excess payments. If an employee is paid weekly compensation benefits for temporary total disability under section 85.33, subsection 1, for a healing period under section 85.34, subsection 1, or for temporary partial disability under section 85.33, subsection 2, in excess of that required by this chapter and chapters 85A, 85B, and 86, the excess shall be credited against the liability of the employer for permanent partial disability under section 85.34, subsection 2, provided that the employer or the employer's representative has acted in good faith in determining and

notifying an employee when the temporary total disability, healing period, or temporary partial disability benefits are terminated.

Iowa Code section 85.34(5) provides in relevant portion:

(5) *Recovery of employee overpayment.* If an employee is paid any weekly benefits in excess of that required by this chapter and chapters 85A, 85B, and 86, the excess paid by the employer shall be credited against the liability of the employer for any future weekly benefits due pursuant to subsection 2, for a subsequent injury to the same employee.

The Commissioner held in McBride v. Casey's Marketing Company, File No. 5037617 (Remand, February 9, 2015) that a defendant is entitled to a credit of an overpayment of healing period against the award of permanent benefits. Pursuant to this decision, I award the defendants a credit of \$632.52 against the award of permanent partial benefits.

The Iowa Supreme Court in Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129 (Iowa 2010) held that an employer is entitled to claim a credit for permanent partial disability only against a future claim of weekly benefits based upon a subsequent injury. The defendants are entitled to a credit of \$962.55 against a subsequent claim for benefits.

I find that Todd has shown entitlement under Iowa Code section 85.39 to payment for an independent medical examination (IME) of Dr. Taylor. Dr. Taylor provided an IME after Dr. Nepola, an authorized treating physician, rendered an opinion on the extent of Todd's impairment.

Using my discretion under rule 876 IAC 4.33, I award \$100.00 for the filing fee for these cases. It appears that both claims were filed on the same day so only one filing fee was assessed.

ORDER

For File No. 5051347

The claimant takes nothing further.

For File No. 5051346

Defendants shall pay claimant seventy five (75) weeks of permanent partial disability at the rate of eight hundred thirty-five and 02/100 dollars (\$835.02) per week. Defendants are entitled to a credit of six hundred thirty-two and 52/100 dollars (\$632.52)

Defendants are entitled to a credit of nine hundred sixty-two and 55/100 dollars (\$962.55) against a subsequent claim for workers' compensation claimant may have against the employer East Jersey Dairy.


Defendants shall pay costs of one hundred and no/100 dollars (\$100.00).

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

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

Signed and filed this 7th day of March, 2016.


JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Nick Avgerinos
Attorney at Law
55 W. Monroe St., Ste. 900
Chicago, IL 60603
nja@capronlaw.com

James M. Peters
Attorney at Law
115 Third St., SE, Ste. 1200
Cedar Rapids, IA 52401-1266
jpeters@simmonsperrine.com

JFE/kjw

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.