BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOSEPH A. HUTCHISON,

Claimant,

vs.

NITRO ELECTRIC CO., LLC,

Employer,

and

LIBERTY MUTUAL,

Insurance Carrier,
Defendants.

File No. 5026018

ARBITRATION

DECISION

Head Note Nos.: 1803; 2500

STATEMENT OF THE CASE

Claimant, Joseph Hutchison, has filed a petition in arbitration and seeks workers' compensation benefits from Nitro Electric Co., LLC, employer and Liberty Mutual, insurance carrier, defendants.

This matter was heard by deputy workers' compensation commissioner, Ron Pohlman, on October 1, 2009, at Des Moines, Iowa. The record in the case consists of claimant's exhibits 1-11; defendants' exhibits A-C as well as the testimony of the claimant.

ISSUES

The parties submitted the following issues for determination:

The extent of claimant's entitlement to temporary partial disability and healing period;

The nature and extent of claimant's entitlement to permanent partial disability benefits;

The commencement date for payment of permanent partial disability benefits;

The claimant's gross weekly earnings and corresponding weekly rate;

Whether the claimant is entitled to payment of medical expenses pursuant to Iowa Code section 85.27;

Whether the claimant is entitled to payment for an independent medical evaluation pursuant to Iowa Code section 85.39; and

Whether the claimant is entitled to alternate medical care pursuant to Iowa Code section 85.27;

FINDINGS OF FACT

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

The claimant, at the time of the hearing, was 59 years old. He completed the eleventh grade and has a GED. He served in the United States Marines for four years during the Vietnam War. He received an honorable discharge at the rank of E5. The claimant's trade is pipefitter/mechanic. He has been in this trade for 34 years and is a member of the Local 440 Plumbers and Steamfitters. In his trade, he is a senior pipefitter/mechanic. A pipefitter's duties include welding, braising and fitting pipes together to connect machines in a plant. The claimant works on the ground to up to 300 feet above ground. Before December 3, 2006, the claimant had no restrictions and had no problems with balance or depth perception.

On December 3, 2006, the claimant got hit in the face by debris and felt something in his eye. He immediately and repeatedly rinsed his eye for 15 minutes. This injury occurred around 8:30 a.m. The claimant's normal work hours at that time were 7:00 p.m. to 5:30 a.m. The claimant had worked until 5:30 a.m. on December 3, and then was off of work until he returned at 7:00 p.m. on December 3.

The claimant saw David Hanks, D.O., an ophthalmologist, on December 11, 2006. Dr. Hanks' assessment was herpes simplex dendritic keratitis. Dr. Hanks explained to the claimant that this was not related to something that could have happened at work. Dr. Hanks prescribed medication and placed the claimant on light duty until he returned on December 13, 2006. On December 13, 2006, the claimant saw Mindy Gordon, O.D., a partner of Dr. Hanks. Dr. Gordon had the same assessment, but explained that it was possible that the scratch caused by the accident may have triggered the simplex virus to flare up. Defendants accepted liability for the claim and continued to provide the claimant treatment. The claimant worked on light duty, but was on vacation from December 25, 2006 to December 31, 2006. The claimant was working in the tool room until February 25, 2007, when there was a mandatory layoff. After the claimant was laid off, the claimant was referred by Dr. Gordon to Francis W. Price, Jr., M.D., in Indianapolis, Indiana. Dr. Price assessed the claimant with HSV dendrites keratitis and corneal ulcer. Dr. Price placed the claimant on viroptic drops and acyclovir. Dr. Price continued this treatment. On January 14, 2008, Dr. Price placed the claimant at maximum medical improvement (MMI) with permanent restrictions of no ladder and no scaffold. On January 29, 2008, Dr. Price

advised the nurse case manager for Liberty Mutual that the claimant had some unexplained light sensitivity and had some unexplained visual field loss, which he did not feel comfortable signing off upon so he recommended the claimant see Scott Sanders, M.D., a neuro-ophthalmologist for evaluation of the field loss. Dr. Sanders opined, on May 27, 2008:

> In summary, his vision appears to be at least 20/30 in the left eye with his current glasses. I see only a small linear scar on the cornea in his left eye, which is nasal to fixation and should not affect vision. I cannot explain his light-sensitivity, as it should have resolved with the inflammation from the infection. There are inconsistencies in visual field testing, making it unreliable. However, the corneal scar he had should not produce visual field loss and I see no other reason by the appearance of his retina and optic nerve that he would have any visual field loss. I have reassured him that his vision should be essentially normal at this time and he has no identifiable cause for light sensitivity and this should resolve, if not now, in the very near future. I will see him back if needed.

(Exhibit 8-a-1)

After Dr. Sanders' evaluation Dr. Price opined on June 16, 2008:

> With glasses, Mr. Hutchinson [*sic*] is correctable to 20/20 right eye and 20/30 left eye. A visual acuity impairment rating was calculated utilizing the *AMA* Guidelines [sic] to the Evaluation of Permanent Impairment, 6th Edition. Acuity related impairment rating was found to be 5% (Impairment of Visual Acuity, Table 12-2.
>
> He also has unexplained visual field loss (Impairment of Visual Field, Table 12-5) that translates to an additional 2% impairment. This gives Mr. Hutchison a Class 1 or 7% impairment of the whole person. (Table 12-8)

(Ex. 6-bb)

With respect to causation, Dr. Price opines:

> The herpetic condition is actually to a large degree a systemic condition which manifests itself locally in the eye. The virus becomes dormant in the nerves that go to the eye. When the virus is reactivated, it travels along the nerves to the eye and causes the disease. Presumably, the original injury which caused a break in the skin covering, or epithelium, on the surface of the eye, allowed the virus to gain access to the tissue of the eye. The virus then causes the infection and at that time traveled [*sic*] down the nerve to its site of origin where the virus stays permanently for the rest of his life. We do not know what causes some people to have infection in the eye while others do not. Almost all adults are infected with

> herpes virus somewhere in their body by the time they are teenagers, just most do not have eye infections – usually lips, nose, etc.

(Ex. 6-dd-2)

The claimant underwent an independent medical evaluation (IME) at the defendants' request on March 20, 2008, by Charles McCormick, M.D., an ophthalmologist. Dr. McCormick opines that the claimant sustained a trauma injury on the job complicated by the underlying herpes carrier status and that the claimant has had a resolution of the problem that is currently inactive, but potentially excitable at some future time. The claimant has some loss of vision, which is permanent, and he calculates at three percent. Dr. McCormick opines with respect to restrictions:

> There are limited restrictions in Mr. Hutchison's return to work. Prior recommendations to avoid high or precarious or unstable settings are appropriate. No lifting, driving, or heavy equipment operational limitations recommended. He should return to his prior job with these adjustments. These are advised due to both the injury of cornea and acquired retinal disease.
>
> Mr. Hutchison should return to fulltime employment with spectacles. He sees better that way, and it will provide a measure of eye protection in his occupation. Spectacle needs are related to a preexisting condition. Impressive improvement in vision was documented with this prescription.

(Ex. 7-a-5)

The claimant's attorney asked Dr. Gordon to opine as to causation and extent of permanent impairment as well as permanent restrictions. Dr. Gordon opined on March 10, 2009, that the claimant's propensity to get herpes simplex keratitis did not result from the injury, that it is a virus that most adults have been infected by, usually in their childhood or teenage years, which lies dormant and can become reactivated. She believes that it is likely that the corneal injury the claimant sustained on December 3, 2006, affected the claimant's body's immunosuppressant ability to keep this virus dormant and it became activated on the claimant's eye. Further, she states that it is impossible to predict that if the injury had never happened, whether the claimant would have likely have gotten herpes keratitis in his left eye triggered by something else at another time. Finally, she opines that the claimant is at a risk of getting recurrences of herpetic disease in his left eye in the future, regardless of his activities, and without any predisposing factors. With respect to a permanent impairment she opines that the claimant has a 15 percent permanent impairment of the left eye pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. With respect to permanent physical restrictions, she opines:

> Mr. Hutchison has asymmetric visual acuity and this may have a mild effect on his depth perception. It is for this reason that Dr. Price initially cautioned against working at high elevations, such as on ladders or on

> scaffolds. As Mr. Hutchison adapts to his vision, he may feel more comfortable to do work at greater elevation, but he should not do so if he has not adapted or still feels off-balance. Since he is already at risk for recurrences of his herpes keratitis, he should do his best to avoid environments that may increase his risk. Any environment that is very dry, dusty, or contains chemical exposure/fumes may aggravate his condition. I could recommend he avoid these types of environments. Having said this though, he could wake up with herpes keratitis one day without being around any of these potential triggers. That is the unknown of this disease. It can come on at any time without warning or cause. So to permanently limit him from certain jobs for fear of recurrences would still not guarantee this condition would not return and would therefore not be something I would write as an order.

(Ex. 4-r-2; 4-r-3)

The claimant was laid off from this employment. He worked briefly for Cummins Diesel, fitting water pipe, mostly working on the ground. The claimant was not able to operate lift machinery. He was laid off from that job and then worked in Council Bluffs as a pipefitter, again at ground level and later at some elevated levels. There was some work that the claimant did not want to do because of his vision problems. The claimant has worked at other employers and at the time of the hearing was working at U.S. Steel in Granite City full time. However, he must work on the ground. He can use a scissor lift to go up and down but cannot move around with it because of his vision problems. The claimant has difficulty working around welders because it seems to him that it takes longer for his eyes to overcome the initial welding flash.

With respect to the rate issue, the claimant's first week of work was November 13, 2006 through November 19, 2006, during which the claimant worked 70 hours at the rate of $28.23 per hour. The next week, November 20, 2006 through November 26, 2006, the claimant worked 47 hours, which the claimant urges is not a representative week because he was off two days due to the Thanksgiving holiday and the Friday after Thanksgiving. The third week the claimant worked, November 27, 2006 through December 3, 2006, the claimant worked 70 hours; again at $28.23 per hour. Based upon the two weeks the claimant considers representative, the claimant's average gross weekly wage was $1,976.10. It is stipulated that the claimant was married with two exemptions, so his weekly benefit amount is $1,134.58. It is found that a gross wage of $1,976.10 is representative of the claimant's weekly earnings and the weekly benefit amount is $1,134.58.

REASONING AND CONCLUSIONS OF LAW

The first issue is the extent of claimant's entitlement to temporary partial disability and healing period benefits.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to

work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, Iowa App. 312 N.W.2d 60 (1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

An employee is entitled to appropriate temporary partial disability benefits during those periods in which the employee is temporarily, partially disabled. An employee is temporarily, partially disabled when the employee is not capable medically of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability. Temporary partial benefits are not payable upon termination of temporary disability, healing period, or permanent partial disability simply because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury. Section 85.33(2).

The claimant's calculations of temporary partial disability are shown in Claimant's Exhibit 9. The claimant's calculations are based upon the weekly rate of $1,134.58, which has been found to be the correct rate in this case. The claimant's calculation of temporary partial disability is correct and accepted. The claimant contends that he was underpaid for his healing period because the correct rate was not found and the undersigned agrees.

The next issue in this case is whether the injury was the cause of permanent disability and the nature and extent of that permanent disability.

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).

Under the Iowa Workers' Compensation Act permanent partial disability is categorized as either to a scheduled member or to the body as a whole. See section 85.34(2). Section 85.34(2)(a)-(t) sets forth specific scheduled injuries and compensation payable for those injuries. The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). Compensation for scheduled injuries is not related to earning capacity. The fact-finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

There is no dispute that the injury was the cause of permanent disability to the claimant's eye. However, there is a dispute as to whether that disability is limited to the claimant's eye or has extended to the body as a whole. The record establishes that the claimant had a pre-existing herpetic virus condition in his body. The record further establishes that because of the trauma to the claimant's eye on December 3, 2006, that that condition was aggravated, resulting in permanent impairment to the claimant's left eye. The claimant contends that because of the damage to his eye, he has lost depth perception and balance and therefore has sustained a loss affecting his body as a whole. Loss of depth perception and balance is a natural consequence of loss of vision in one eye. This was contemplated by the schedule for the loss of the eye. The claimant has not established that he has sustained damage to his nervous system as a result of the work injury. The claimant has thus not established that he has sustained an injury to the body as a whole, which requires that his claim be evaluated industrially.

The ratings of impairment in the claimant's eye range from 3 percent to 15 percent. The claimant argues that the actual disability in the claimant's eye is 25 percent. Claimant bases this upon the lack of depth perception and loss of balance. The claimant also argues that he has light sensitivity. The opinions of the treating physicians in this case do not establish that the claimant's complaints of light sensitivity were caused by this injury. The record indicates that the claimant's loss of vision is modest. The undersigned concludes that the claimant has sustained a 15 percent permanent disability in his left eye, entitling him to 21 weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(p).

The next issue in this case is the claimant's weekly rate of compensation.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which injured as the

employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

Under section 85.36(7), the gross weekly earnings of an employee who has worked for the employer for less than the full 13 calendar weeks immediately preceding the injury are determined by looking at the earnings of other similarly situated employees employed over that full period, but if earnings of similar employees cannot be determined, by averaging the employee's weekly earnings computed for the number of weeks that the employee has been in the employ of the employer.

The claimant worked less than 13 full calendar weeks prior to his injury. The record shows that the best two weeks to represent the claimant's earnings are the first and third weeks preceding the injury and thus the claimant's calculation of his gross weekly earnings and rate is correct. The claimant's weekly rate of compensation is $1,134.58.

The next issue in this case is whether the claimant is entitled to payment of medical expenses pursuant to Iowa Code section 85.27.

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 16, 1975).

The claimant, in his brief, requests that the defendants continue to pay for Zovirax 400 mg., prescribed by Dr. Price and acyclovir also prescribed by Dr. Price to prevent another breakout of the herpetic impression. The claimant has established that this condition was aggravated by this work injury and thus has established causation. The claimant is entitled to have these prescriptions provided and paid for by the defendants. Defendants dispute whether the claimant is entitled to payment for prescription glasses because the claimant was far-sighted and it is typical for people at the claimant's age to wear glasses. However, the record shows that the claimant's sight and vision was made worse by this work injury and thus, the claimant is entitled to payment for glasses as claimed.

The next issue is whether the claimant is entitled to reimbursement for an independent medical evaluation pursuant to Iowa Code section 85.39.

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. The section also permits reimbursement for

reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination.. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

The claimant seeks reimbursement for the rating of permanent impairment by Dr. Price. Dr. Price was the treating physician, but the defendants did not ask him for a rating and instead asked Dr. McCormick. Claimant is entitled to reimbursement for this independent medical evaluation, including the costs of examination and evaluation by Dr. Sanders, which was required by Dr. Price to prepare his evaluation of claimant's permanent impairment.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant temporary partial disability in the amount of one thousand seven hundred forty-nine and 53/100 dollars ($1,749.53).

Defendants shall pay claimant healing period benefits at the weekly rate of one thousand one hundred thirty-four and 58/100 dollars ($1,134.58) per week through January 13, 2008.

Defendants shall pay claimant twenty-one (21) weeks of permanent partial disability commencing January 13, 2008 at the weekly rate of one thousand one hundred thirty-four and 58/100 dollars ($1,134.58).

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30 with subsequent reports of injury filed pursuant to rule 876 IAC 3.1.

Defendants shall receive credit for temporary benefits or healing period benefits paid in the amount of thirty-six thousand seven hundred six and 55/100 dollars ($36,706.55) and credit for permanent partial disability benefits paid in the amount of fourteen thousand two hundred thirty-six and 04/100 dollars ($14,236.04).

Defendants shall provide and pay for the medications recommended by Dr. Price and reimburse the claimant for any expenses he has personally paid pursuant to Iowa Code section 85.27. Defendants shall pay for claimant's prescription eyeglasses pursuant to Iowa Code section 85.27.

Defendants shall reimburse the claimant for the costs of the independent medical evaluation with Dr. Price, including the costs of evaluation by Dr. Sanders in the amount of two thousand one hundred and 00/100 dollars ($2,100.00).

Costs of this action are taxed to the defendant pursuant to rule 876 IAC 4.33.

Signed and filed this 17th day of May, 2010.

RON POHLMAN
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.