BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROGER HEATH, Claimant, vs. CITY OF DAVENPORT, Employer, Self-Insured, Defendant.	FILED JAN 11 2017 WORKERS COMPENSATION	File No. 5052864 ARBITRATION DECISION Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Roger Heath, has filed a petition in arbitration and seeks workers' compensation benefits from City of Davenport, employer, defendant. Deputy workers' compensation commissioner, Stan McElderry, heard this matter in Davenport, Iowa.

ISSUES

The parties have submitted the following issues for determination:

1. Whether the injury arising out of and in the course of employment on June 17, 2014 is limited to the right shoulder or is industrial;

2. The extent of permanent disability from the alleged injury, if any; and

3. Independent medical evaluation (IME).

FINDINGS OF FACT

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

The claimant was 53 years old at the time of hearing. He is a high school graduate, and attended one year of college before joining the United States Navy. He served in the Navy form 1981-1985 as a boatswain's mate, and from 1985-1987 in the reserves. Since 1991 much of his experience is as a truck driver, and then since about 2000 as a bus driver for the City of Davenport.

The claimant is largely ambidextrous, although there are activities he uses a preferred hand for, such as he catches left handed and throws right handed. The

claimant sustained a stipulated work injury on June 17, 2014. The primary issues are whether the injury is limited to the right upper extremity or is industrial, and whether the injury is a cause of permanent impairment.

The claimant saw Rick Garrels, M.D., for an evaluation of his right elbow on June 23, 2014. (Exhibit 5, page 9) The claimant reported that he had been diagnosed with right tennis elbow about 3 years previous and that he had now had right elbow symptoms for about 3 months. The claimant was released to return to work without restrictions but scheduled for physical therapy. The claimant was first seen at Rock Valley Physical therapy on June 25, 2014 and saw Kim Christensen, P.T. (Ex. 6, p. 29) Ms. Christensen noted improvement by July 8, 2014. The claimant returned to Dr. Garrels on July 10, 2014 and noted good flexion and extension but tenderness over the lateral epicondyle. (Ex. 5, p. 10) An injection was performed on August 7, 2014. (Ex. 5, p. 12) On August 14, 2014, the claimant reported that his symptoms were completely resolved. (Ex. 5, p. 13) On September 22, 2014, the claimant still reported no symptoms and was released with a zero percent impairment rating. (Ex. 5, p. 13)

The claimant returned on December 3, 2014 with complaints of returned right elbow symptoms. Dr. Garrels prescribed Tramadol and recommended a second opinion. (Ex. 5, pp. 13-15) The claimant saw Suleman Hussain, M.D., on December 17, 2014. (Ex. 6, p. 45) Dr. Hussain eventually recommended surgery. The claimant reported on January 21, 2015, to Dr. Garrels that he was beginning to have left elbow symptoms. Dr. Hussain performed an open tennis elbow debridement to the right elbow on February 24, 2015. (Ex. 8, p. 53)

The claimant saw Ms. Christensen again on March 3, 2015. He made no reference to any left arm or shoulder problems. (Ex. 5, p. 33, Testimony) On April 7, 2015, Ms. Christensen began to have the claimant lift a 10 pound wheel for 5 minutes to simulate the steering wheel of a bus. (Ex. A, p. 26) The claimant performed this exercise over 20 times between March 7 and June 9, 2015. (Transcript) The claimant testified that he told Dr. Garrels in March 2015 that he was having problems with his left shoulder. The claimant had a follow-up with Dr. Hussain on April 1, 2015. (Ex. 6, p. 50) On April 29, 2015 the claimant saw Dr. Hussain again for follow-up. He reported no new injuries or complaints and made no reference to left arm or shoulder problems. (Ex. 6, p. 51)

The claimant continued to improve and Dr. Garrels gradually lightened restrictions. (Ex. 5, pp. 23, 24) The claimant reported right hand and elbow symptoms to Ms. Christensen on May 26 and June 2, 2015. (Ex. 6, pp. 37 and 39) On June 4, 2015, the claimant demonstrated full range of motion regarding his right elbow. (Ex. 5, p. 41) And again full range of motion on June 9, 2015. (Ex. 5, p. 43)

On June 10, 2015, the claimant returned to Dr. Hussain and was so improved that Dr. Hussain released claimant from his care. (Ex. 6, p. 52) Nerve testing conducted on August 5, 2015 came back normal. (Ex. 5, p. 27; Ex. 9, p. 54) On

August 12, 2015, Dr. Garrels released the claimant to maximum medical improvement (MMI) and opined zero percent permanent impairment. (Ex. 5, p. 27)

The claimant saw Richard Kreiter, M.D., at his counsel's request for an independent medical evaluation on February 18, 2016. (Ex. 1) Dr. Kreiter opined that the claimant was not at MMI. (Ex. 1, p. 1) Dr. Kreiter opined a provisional 30 percent right upper extremity impairment and a 15 percent impairment for the left upper extremity. (Ex. 1, p. 1)

Dr. Garrels reviewed the Dr. Kreiter report and wrote a response on May 10, 2016. (Ex. 5, p. 28) First, Dr. Garrels notes that the claimant never reported left shoulder problems to him. He then notes that Dr. Kreiter's methodology for rating is inconsistent with the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition; particularly the use of a subjective measure of grip strength to determine impairment. (Ex. 5, p. 28) Ms. Christensen also credibly testified that the claimant never reported left shoulder problems to her.

Claimant filed a petition for benefits on August 4, 2015 alleging an injury date of July 16, 2014 to the neck, back, left arm, left elbow, bilateral shoulders, right arm, and right elbow. (Agency file) It was amended on May 24, 2016 to change the alleged injury date to June 17, 2014. At hearing the claimant testified that he is making no claim for his neck or back.

Since August 12, 2015, the claimant has been back to regular full time duty as a bus driver and had volunteered for over 330 hours of overtime from January 1, 2016 through the date of hearing. The claimant credibly testified that he is capable of performing every function as a bus driver. He is even able to get handicapped and wheel-chaired individuals on the bus. (Trans.) If the restrictions of Dr. Krieter of "no heavy grasping with the right hand" and "limited push/pull with the ride side" (Ex. 1, p. 1) were followed, the claimant could not perform his job. Yet he does, and thus the opinions of Dr. Garrels of no permanent restrictions appear more consistent with the claimant's abilities. Based on the claimant's lay testimony of his loss of use, I find a loss of use of 5 percent of the right upper extremity. I adopt Dr. Garrels' opinion of no work injury to the left upper extremity or shoulder.

On the date of injury the claimant had gross weekly earnings of $1,194.97, was married, and entitled to 5 exemptions. As such, his weekly benefit rate is $769.29. The commencement date for permanent disability is August 12, 2015.

REASONING AND CONCLUSIONS OF LAW

The first issue then is the bilateral upper extremity claimed injury.

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 Rule of Appellate Procedure 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).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's

Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4)(b); Iowa Code section 85A.8; Iowa Code section 85A.14.

The claimant has the burden of establishing an injury arising out of and in the course of employment. It was found above that he met that burden as to the right upper extremity and failed to meet that burden as to the left upper extremity/shoulder. All other issues as to the left extremity, such as alternate medical care, are therefore moot.

Right upper extremity.

Where an injury is limited to scheduled member the loss is measured functionally, not industrially. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983).

The courts have repeatedly stated that for those injuries limited to the schedules in Iowa Code section 85.34(2)(a-t), this agency must only consider the functional loss of the particular scheduled member involved and not the other factors which constitute an "industrial disability." Iowa Supreme Court decisions over the years have repeatedly cited favorably the following language in the 66-year-old case of Soukup v. Shores Co., 222 Iowa 272, 277; 268 N.W. 598, 601 (1936):

> The legislature has definitely fixed the amount of compensation that shall be paid for specific injuries . . . and that, regardless of the education or qualifications or nature of the particular individual, or of his inability . . . to engage in employment . . . the compensation payable . . . is limited to the amount therein fixed.

Our court has even specifically upheld the constitutionality of the scheduled member compensation scheme. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404 (Iowa 1994). Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Graves, 331 N.W.2d 116; Simbro v. DeLong's Sportswear 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C. M. Co., 194 Iowa 819, 184 N.W. 746 (1921). Pursuant to Iowa Code section 85.34(2)(u) the workers' compensation commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Co., 164 N.W.2d 84 (Iowa 1969).

Evidence considered in assessing the loss of use of a particular scheduled member may entail more than a medical rating pursuant to standardized guides for evaluating permanent impairment. A claimant's testimony and demonstration of difficulties incurred in using the injured member and medical evidence regarding general loss of use may be considered in determining the actual loss of use compensable. Soukup, 222 Iowa 272, 268 N.W. 598. Consideration is not given to what effect the scheduled loss has on claimant's earning capacity. The scheduled loss system created by the legislature is presumed to include compensation for reduced capacity to labor and to earn. Schell v. Central Engineering Co., 232 Iowa 421, 4 N.W.2d 339 (1942).

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by statute. Soukup, 222 Iowa 272, 268 N.W. 598.

I found that the claimant suffered a five (5) percent permanent loss of use of his left upper extremity due to the June 17, 2014 injury. Based on such a finding, the claimant is entitled to 12.5 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(m), which is 5 percent of 250 weeks, the maximum allowable weeks of disability for an injury to the arm in that subsection.

ORDER

THEREFORE IT IS ORDERED:

That the defendant pay claimant twelve point five (12.5) weeks of permanent partial disability benefits commencing August 12, 2015, at the rate of seven hundred sixty-nine and 29/100 dollars ($769.29).

Costs are taxed to the defendant pursuant to 876 IAC 4.33.

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

Signed and filed this 11th day of January, 2017.

STAN MCELDERRY
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.