

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CHRISTOPHER JAMES,

Claimant,

vs.

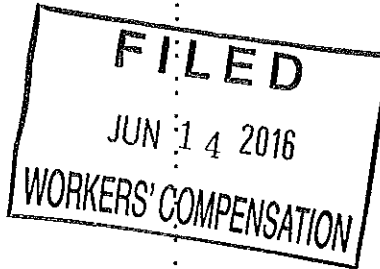
NICHOLS ALUMINUM, LLC,

Employer,

and

SENTRY CASUALTY COMPANY,

Insurance Carrier,
Defendants.



File No. 5052426

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Christopher James, claimant, filed a petition for arbitration against Nichols Aluminum as the employer and Sentry as its worker's compensation insurance carrier. An in-person arbitration hearing occurred on April 25, 2016 in Des Moines, Iowa.

On the same day as the arbitration hearing, claimant filed a motion to amend petition, which sought to clarify and correct the name of both the employer and insurance carrier. The motion was heard on the record and sustained. Nichols Aluminum, L.L.C., (hereinafter referred to as "Nichols") is now the named employer and Sentry Casualty Company is the named insurance carrier.

The evidentiary record includes claimant's exhibits 1 through 9, which were received without objection. The evidentiary record also includes defendants' exhibits A through E. Claimant's objection to exhibit E was overruled at the time of hearing and all of defendants' exhibits were received into the evidentiary record. Claimant was the only witness called to testify live at the arbitration hearing.

The parties' exhibits contain some duplication. All exhibits were received. However, throughout this decision, I will reference or cite an exhibit only in the location where it is most easily located by the undersigned. Failure to cite duplicate copies in the evidentiary record is not intended to convey any meaning or to suggest that the evidence was not reviewed in full. Rather, I merely cite to the evidence in the location

where it is most easily and expeditiously located during my review of the evidentiary record while preparing this decision.

The parties filed a hearing report in which the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed in either file. The parties are now bound by their stipulations.

After going on the record and reviewing the hearing report with counsel, defendants advised the undersigned that they would not dispute claimant's claim for medical mileage. Therefore, defendants were and are ordered to reimburse claimant's medical mileage in the amount of one thousand four hundred eighty-six and 43/100 dollars (\$1,486.43).

ISSUES

The parties submitted the following disputed issues for resolution:

1. The extent of claimant's entitlement to permanent disability benefits.
2. Whether claimant is entitled to reimbursement of the fee for his independent medical evaluation pursuant to Iowa Code section 85.39.
3. Whether claimant is entitled to an award of alternate medical care.
4. Whether claimant's costs should be assessed against defendants.

FINDINGS OF FACTS

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

Christopher James is a 28 year old, right hand dominant gentleman, who lives in Davenport, Iowa. Mr. James is a high school graduate. He attended one semester of community college, but dropped out as a result of poor grades. (Claimant's testimony)

On February 9, 2015, claimant was performing his typical work duties as a caster assistant for Nichols. He was attempting to use a crow bar to lift and remove a piece of steel. Unfortunately, claimant felt a release and a sharp, shooting pain in his right shoulder. Within a half an hour of the incident, claimant experienced swelling in his right shoulder and arm. He experienced sharp, shooting pain with numbness and tingling down his right arm. He also noticed a golf ball appearance on the top of his biceps. (Claimant's testimony)

The employer selected Camilla J. Frederick, M.D., an occupational medicine physician, to treat claimant and obtained an appointment for her to evaluate claimant on February 10, 2015. Dr. Frederick attempted conservative care and obtained a right

shoulder MRI, which was performed on February 25, 2015. (Exhibits 4, 5) The MRI disclosed a torn posterior labrum, as well as a torn inferior labrum. (Ex. 5) Dr. Frederick referred claimant to Abdul Foad, M.D., an orthopaedic surgeon, for evaluation.

Dr. Foad evaluated claimant on March 12, 2015. He diagnosed claimant with a posterior labral tear and possibly a SLAP tear. Dr. Foad also noted clinical appearance of a biceps rupture, though the MRI did not disclose this problem. Dr. Foad recommended surgical repair of claimant's right shoulder. (Ex. 7, pages 22-23)

On March 20, 2015, Dr. Foad took claimant to surgery. He performed a right shoulder arthroscopic biceps tenodesis, debrided the glenohumeral joint, and performed a subacromial bursectomy and subdeltoid bursectomy. (Ex. 7, pp. 25-27) Following appropriate post-operative care, Dr. Foad declared maximum medical improvement on September 17, 2015. He released claimant from his care on that date and also released claimant to return to work without restrictions. (Ex. 7, p. 33)

In a report dated September 21, 2015, Dr. Foad responded to an inquiry from defendants, noting that he identified full range of motion in claimant's right shoulder, excellent strength, and that claimant reported no significant pain or symptoms upon his release from care. Dr. Foad assigned a zero percent impairment rating for claimant's right shoulder pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Ex. 7, p. 34)

Dr. Foad reiterated his findings and opinions in a report to defense counsel dated December 1, 2015. Once again, Dr. Foad relayed that claimant did not require any permanent impairment, that claimant achieved full range of motion, had excellent strength, and had no functional limitations. Once again, Dr. Foad opined that claimant had a zero percent impairment rating. (Ex. 7, p. 35)

Although claimant concedes he was satisfied with Dr. Foad's surgical performance and outcome, he was not satisfied with the impairment rating offered by Dr. Foad. Therefore, claimant sought an independent medical evaluation performed by Richard L. Kreiter, M.D., on February 9, 2016. Dr. Kreiter opined that claimant sustained a permanent impairment rating equal to 13 percent of the whole person under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Dr. Kreiter also recommended permanent work restrictions that include rare overhead work with the right arm, occasional push/pull of 25 pounds with the right arm, limited hammer use with the right arm, avoidance of pulling with wrenches and a two-handed lift of 40 to 50 pounds occasionally. (Ex. 1, p. 1)

Dr. Kreiter provided an explanation of his permanent impairment rating. Specifically, Dr. Kreiter identified some loss of range of motion, which he determined warranted assignment of permanent impairment. (Ex. 1, p. 1) Dr. Kreiter also opined that "The long head of the biceps tendon plays a role in anterior shoulder stability, and with this tendon being released surgically, there may be an occult instability pattern."

(Ex. 1, p. 1) Dr. Kreiter also opined that there was a disorder of the AC joint, which justified a permanent impairment rating. (Ex. 1, p. 1)

Defendants asked Dr. Foad to review the impairment rating offered by Dr. Kreiter and to reconsider his assignment of a zero percent impairment. Dr. Foad re-evaluated claimant on March 31, 2016. Following his evaluation and review of Dr. Kreiter's opinions, Dr. Foad opined that his prior rating is proper and consistent with the AMA Guides, Fifth Edition. However, he did acknowledge on re-examination that claimant has "a mild cosmetic deformity which I either did not recognize on his last visit or it was not present. He does complain of some cramping and aching, and I believe him." (Ex. 7, p. 37) Nevertheless, Dr. Foad still opines that claimant receives a zero percent impairment rating under the AMA Guides Fifth Edition because he has full range of motion and excellent strength following surgical repair of his right shoulder. (Ex. 7, pp. 36-38)

Dr. Foad provided insightful analysis and explanation pertaining to Dr. Kreiter's impairment rating. Dr. Foad explained:

What is interesting is that he uses Table 16-18 on page 499 to give a ten percent (10%) rating to the whole person for the acromioclavicular (AC) joint. There was nothing wrong with the AC joint as it relates to the work injury. That table is used for disorders of the joints. Chris James had no significant abnormality of either the AC or the glenohumeral joint. Even before surgery, he had no AC joint pain and never complained of it throughout his six months of post-operative care. To keep this in perspective, if he had AC joint symptomatic pathology and we performed a distal clavicle resection (cutting out 1-2 centimeters of the end of the clavicle bone), he would receive ten percent impairment. Mr. James did not have anything done to his asymptomatic AC joint. Therefore, in my opinion, that table is incorrectly utilized.

(Ex. 7, p. 37)

Dr. Foad provided further critique and explanation regarding the impairment rating offered by Dr. Kreiter. Specifically, Dr. Foad opined:

Regarding the assignment of 6% impairment for occult instability pattern (page 505, table 16-26), I do not feel this is correct based on current literature and clinical situation. Mr. James never had any glenohumeral instability pattern and still has no instability pattern from today's exam. I believe Dr. Kreiter based his rating on the assumption that the long head of the biceps tendon plays a role in anterior shoulder stability, and by releasing the tendon either traumatically or atraumatically, one would acquire glenohumeral shoulder instability. This assumption is based on old literature that were lower level studies. Recent examiners and studies have concluded that this tendon has not been shown to serve

an important dynamic role in glenohumeral joint kinematics or stability. Although biceps tenotomy or rupture has been associated with cramping, cosmetic deformity, and fatigue, no substantial difference in overall outcomes has been demonstrated between tenotomy and tenodesis (see references cited below). In other words, no evidence of overall superiority or tenodesis exists in the current literature. There is no consensus in the literature for long head biceps tendon lesions because there is a paucity of high levels of evidence. The main stability to the glenohumeral joint comes from the bony morphologic characteristics and static and dynamic stabilizers such as the joint capsule and rotator cuff respectively. In Mr. James' case, his rotator cuff and joint capsule were intact. His glenohumeral joint morphology was normal. This was nicely shown in the arthroscopy pictures. Arthroscopy is the gold standard and the most accurate method for evaluating disorders of the glenohumeral joint.

(Ex. 7, p. 37)

Despite this critique and reiteration that his zero percent permanent impairment rating is accurate pursuant to the AMA Guides, Fifth Edition, Dr. Foad provides further analysis and explanation that claimant's right shoulder condition would qualify for permanent impairment if the AMA Guides, Sixth Edition was utilized. After reviewing the applicable sections, Dr. Foad opines that claimant would qualify for a 5 percent whole person impairment rating under the AMA Guides, Sixth Edition. (Ex. 7, pp. 38-39) Claimant also admits that Dr. Foad's medical record is accurate when it records that claimant reported full range of motion in the right shoulder and minimal to no pain in the shoulder. (Claimant's testimony)

Given claimant's admissions and the thoroughness of Dr. Foad's analysis, I find Dr. Foad's analysis, critique of Dr. Kreiter's permanent impairment rating, and ultimate opinions pertaining to permanent impairment under both the AMA Guides, Fifth and Sixth Editions to be credible and convincing. I accept Dr. Foad's opinions as most convincing and accurate in this case. That being said, I find Dr. Foad's explanation that claimant would qualify for a permanent impairment rating pursuant to the Sixth Edition to be a concession that there is some permanent modification and change in claimant's functional abilities with the right shoulder.

Mr. James testified credibly that there are certain work activities that are now difficult for him and for which he receives assistance from his co-workers. For instance, he testified that he has difficulties using a hammer on a repetitive and sustained basis. He testified that he has difficulties with significant overhead work. Fortunately, the job tasks that now give claimant difficulties are a relatively small portion of his job duties. His co-workers are willing and able to assist him with those job duties. (Claimant's testimony)

Claimant has returned to work for Nichols without permanent work restrictions. He is able to perform the essential functions of his job with minor difficulties and some minor assistance of his co-workers. He has worked at his pre-injury job since September 17, 2015 and is happy with the surgical results obtained from Dr. Foad's care. Claimant's current employment with Nichols is the best paying job he has ever held. Claimant continues to work overtime, when it is available and consistent with his personal schedule. He loves his job at Nichols and wishes to remain employed at Nichols. (Claimant's testimony)

Claimant also credibly testified about some daily activities that are more difficult since his right shoulder injury. He explained that he has difficulties now picking up small items such as paperclips with his right hand. He has difficulties with the hand over hand turning maneuver while driving a vehicle. He has sleep difficulties and wakes up with his right hand and arm totally numb. He is not able to bowl any longer. He cannot throw a baseball overhead following his injury. He struggles to push and pull his lawn mower. (Claimant's testimony)

Mr. James does not think that he could return to work detailing cars because of the necessary fine motor skills and sustained reaching required. Similarly, he does not believe he could return to work at Fed Ex because it would require too much lifting at a vigorous pace for his right shoulder. He also testified that his reduced dexterity would not allow him to return to work as a cook following his right shoulder injury. Claimant concedes he can continue in his job with Nichols and testified that he believes he could still drive a truck even after the right shoulder injury. (Claimant's testimony)

On the other hand, claimant intends to return to dirt modified car racing. He has essentially no ongoing wage loss as a result of the injury. He requires no permanent medical restrictions should he seek alternate employment. Realistically, however, claimant has some ongoing symptoms and some residual functional loss.

Claimant has not required any medical treatment for his right shoulders since being released by Dr. Foad and returning to Nichols in September 2015. He has not missed any work as a result of his right shoulder since returning to Nichols in September 2015. He admits he is generally pain free with the use of ibuprofen. (Claimant's testimony) Although claimant requests an award of alternate medical care, I do not find any specific future shoulder treatment recommendations that need be ordered at this time. I find that defendants have provided all reasonable, necessary and causally connected medical care to date.

I find it is likely that claimant has sustained a minor loss of earning capacity as a result of his February 9, 2015 right shoulder injury at Nichols. Considering claimant's age, educational background, employment history, ability to return to work in a new position, permanent impairment, permanent work restrictions, motivation, as well as all other relevant industrial disability factors, I find that Mr. James has proven he sustained

a 15 percent loss of future earning capacity as a result of the February 9, 2015 work injury.

CONCLUSIONS OF LAW

The parties have stipulated that claimant sustained a work-related right shoulder injury on February 9, 2015 and that the injury caused permanent disability. The parties appropriately stipulate that the injuries should be compensated industrially pursuant to Iowa Code section 85.34(2)(u). (Hearing Reports) However, the parties dispute the extent of claimant's entitlement to permanent partial disability benefits.

When disability is found in the shoulder, a body as a whole situation may exist. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949). In Nazareus v. Oscar Mayer & Co., II Iowa Industrial Commissioner Report 281 (App. 1982), a torn rotator cuff was found to cause disability to the body as a whole.

Since 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.

Upon consideration of all of the relevant factors of industrial disability, I found that claimant proved he sustained a 15 percent loss of future earning capacity. This is the equivalent of a 15 percent industrial disability. Therefore, I conclude claimant has proven entitlement to 75 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u).

Claimant also seeks reimbursement of his independent medical evaluation fee. 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).

Defendants selected Dr. Foad as the treating orthopaedic surgeon. Dr. Foad rendered his impairment rating on September 21, 2015. Claimant subsequently selected and obtained an independent medical evaluation performed by Dr. Kreiter on February 9, 2016. Claimant has established all of the prerequisites for reimbursement of Dr. Stoken's independent medical evaluation fee. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 830 (Iowa 2015).

I found Dr. Kreiter's fee to be reasonable. Therefore, I conclude that claimant is entitled to reimbursement of Dr. Kreiter's fee totaling eight hundred dollars (\$800.00).

Claimant also seeks an award of alternate medical care.

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

"Determining what care is reasonable under the statute is a question of fact." Long v. Roberts Dairy Co., 528 N.W.2d 122, 123 (Iowa 1995).

In Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 437 (Iowa 1997), the supreme court held that "when evidence is presented to the commissioner that the employer-authorized medical care has not been effective and that such care is 'inferior or less extensive' than other available care requested by the employee, . . . the commissioner is justified by section 85.27 to order the alternate care."

Claimant testified he is satisfied with the surgical care he received from Dr. Foad. There is no evidence that Dr. Foad has provided unreasonable medical care or refused to provide any reasonable and causally related medical care. Having not found any immediate needs for treatment of the shoulder injury, I conclude that claimant has failed to prove entitlement to an award of alternate medical care.

Finally, claimant submitted a statement of costs and seeks assessment of those costs. Costs are assessed at the discretion of the agency. Iowa Code section 85.40.

Claimant's independent medical evaluation fee was already assessed pursuant to Iowa Code section 85.39. Therefore, it is not assessed as a cost.

Claimant seeks assessment of his filing fee as a cost. I conclude that claimant's filing fee totaling \$100.00 is a permissible cost shall be assessed against defendants. See 876 IAC 4.33(7).

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay claimant seventy-five (75) weeks of permanent partial disability benefits commencing on September 17, 2015 at the stipulated weekly rate of six hundred thirty-seven and 12/100 dollars (\$637.12).

Defendants shall pay any accrued weekly benefits in lump sum with interest pursuant to Iowa Code section 85.30.

Defendants shall be entitled to a credit for all permanent disability benefits paid to date, including but not limited to the overpayment of the weekly rate, as stipulated on the hearing report.

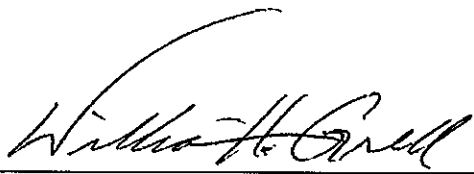
Defendants shall reimburse claimant's medical mileage in the amount of one thousand four hundred eighty-six and 43/100 dollars (\$1,486.43).

Defendants shall reimburse claimant's independent medical evaluation fee totaling eight hundred dollars (\$800.00).

Defendants shall reimburse claimant's costs totaling one hundred dollars (\$100.00).

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.

Signed and filed this 14th day of June, 2016.


WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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WHG/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.