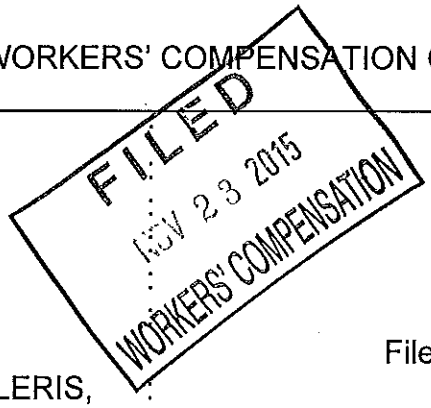
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



DEAN ANDERSON,

Claimant,

vs.

NICHOLS ALUMINUM, n/k/a ALERIS,

Employer,

and

ACE AMERICAN INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5047598

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Dean Anderson, has filed a petition in arbitration and seeks workers' compensation benefits from Nichols Aluminum, n/k/a Aleris, employer, and Ace American Insurance Company, insurance carrier, defendants.

Deputy Workers' Compensation Commissioner, Stan McElderry, heard this matter in Davenport, Iowa.

ISSUES

The parties have submitted the following issues for determination:

1. The extent of disability/impairment from the injury of February 1, 2014 which arose out of and in the course of employment;

2. Untimely claim; and

3. Independent medical examination (IME).

FINDINGS OF FACT

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

The claimant was 42 years old at the time of hearing. At the time of hearing the claimant had worked for the employer herein for just over 19 years. The claimant was diagnosed with carpal tunnel syndrome while working at the employer herein in August of 2000. The defendants argue that that fact time bars this claim. For that to be the case they have to establish that the claimant knew that the carpal tunnel was serious, affecting work, potentially compensable, and that continued work for the employer did not worsen the condition. The claimant did connect the carpal tunnel to work activities. However, it does not appear that claimant realized that it was serious or potentially compensable; particularly as defendants point out in their brief that even by 2015 the bilateral carpal tunnel is still mild, or "minimal" per the claimant. (Defendants' hearing brief; Exhibit D, page 2 for claimant's reference to minimal) The claimant had had carpal tunnel symptoms before when he worked at Wonder Bread. (Ex. 4, p. 35) However, the symptoms resolved on their own. In 2012 the claimant developed trigger finger, but with treatment it resolved. The development of trigger finger does establish that the claimant was performing repetitive work contrary to the defendants' assertions that claimant's work could not cause carpal tunnel because it was not repetitive.

The claimant saw James E. Lyles, M.D., on February 18, 2014 with bilateral numbness and weakness complaints. (Ex. 1, p. 1) Dr. Lyles arranged for an EMG of the upper extremities. (Ex. C, p. 1) Camilla Frederick, M.D., who was retained by the defendants, ordered a job task evaluation on March 14, 2014. On April 15, 2014 Dr. Frederick opined that there were no job-associated risk factors for carpal or cubital tunnel. (Ex. D, p. 5) The defendants denied the claim following. On May 19, 2015 Dr. Frederick wrote a lengthy report, without further seeing the claimant. (Ex. E) Dr. Frederick opined that the work herein did not cause or aggravate the claimant's bilateral carpal tunnel. (Ex. E, p. 7) Dr. Frederick further opined that impairment was zero, and up to 7-9 percent of the upper left extremity if further treatment such as surgery was performed. (Ex. E, pp. 7-8) She uses the AMA Guides Sixth Edition for this rating. This agency has specifically not adopted the AMA Guides Sixth and instead uses the Fifth Edition.

An EMG and nerve conduction velocity was performed on September 10, 2014 by Dr. Daniel Johnson. (Ex. 5, p. 40) This showed bilateral moderate to severe carpal tunnel. Marc E. Hines, M.D., performed an independent medical evaluation of the claimant on November 14, 2014. (Ex. 5) As part of the IME Dr. Hines physically examined the claimant and reviewed available medical records. Dr. Hines noted that his examination of the claimant showed the claimant to have impairment to both hands, right worse then left, from carpal tunnel. (Ex. 5) Dr. Hines opined no current rating for the left and 10 percent for the right. (Ex. 5, pp. 42-43) He imposed no restrictions and strongly recommended surgery starting with the non-dominant left hand. (Ex. 5, p. 43)

The claimant had pre-existing carpal tunnel that resolved, then returned after four years with this employer. It then largely resolved until a position change in 2012 that resulted in the claimant in 2014 going to Dr. Lyles for treatment. The work over time caused a cumulative injury to the bilateral upper extremities that manifested by February 18, 2014. The issue then is the extent of loss of function. Given the claimant's reports of minimal problems, and the rating of Dr. Hines, the loss of function is halfway between zero and 10 percent, or 5 percent to the bilateral upper extremities. This is also slightly less than Dr. Frederick's hypothetical sixth edition worst case rating. Since the injury was a simultaneous bilateral injury the loss of use is calculated using loss of use times 500 weeks, but the injury is not industrial, and is limited to the scheduled members.

On the date of injury based on the claimant's gross earnings, married status, and entitlement to two exemptions his weekly benefit rate is $709.82. Claimant also seeks payment of Dr. Hines' IME fee of $1,074.99; $750.00 of the fee was for the report. At the time of the IME no physician retained by the employer had issued a numeric impairment rating, but the doctor had denied causation. (Ex. D, p. 5)

REASONING AND CONCLUSIONS OF LAW

An original proceeding for benefits must be commenced within two years from the date of the occurrence of the injury for which benefits are claimed or within three years from the date of the last payment of weekly compensation benefits if weekly compensation benefits have been paid under Iowa Code section 86.13. Iowa Code section 85.26(1). A proceeding in review-reopening must be commenced within three years from the date of the last payment of weekly benefits under either an award for payments or an agreement for settlement. Iowa Code section 86.26(2). The "discovery rule" may extend the time for filing a claim where weekly benefits have not yet been paid. The rule does not extend the time for filing a claim where benefits have been paid. Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256 (Iowa 1980). Under the rule, the time during which a proceeding may be commenced does not begin to run until the claimant, as a reasonable person, should recognize the nature, seriousness and probable compensable character of the condition. The reasonableness of claimant's conduct is to be judged in light of the claimant's education and intelligence. Claimant must know enough about the condition to realize that it is both serious and work connected. Orr, 298 N.W.2d at 261; Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to timely commence an action under the limitations statute is an affirmative defense which defendants must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940); Venenga v. John Deere Component Works, 498 N.W.2d 422 (Iowa App. 1993) the court held that for purposes of the notice requirement of Iowa Code section 85.23, the employee must realize an injury will have an impact on employment.

The Iowa Supreme Court discussed Iowa Code section 85.26(1) and the discovery rule in Ranney v. Parawax Co., Inc., 582 N.W.2d 152 (Iowa 1998).

> The resolution of this case requires the application of three related principles of law: the statute of limitations, the discovery rule and inquiry notice. Parawax has the burden to prove its limitations defense; Ranney has the burden to establish any exception to the ordinary limitations period, such as the applicability of the discovery rule.
>
> . . . .
>
> We think that once a claimant knows or should know that his condition is possibly compensable, he has the duty to investigate.
>
> . . . .
>
> By 1988 at the latest, Ranney knew of the possible connection between his disease and his employment; he had two years from that date to complete his investigation and file suit. His inability to find expert support for his theory of causation within that time does not prevent the limitations period from running.

Ranney at 582 N.W.2d 154, 155, 157.

The Iowa Supreme Court issued its decision in Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001). In Herrera the court held at 633 N.W.2d 288 that "by virtue of the discovery rule, the statute of limitations will not begin to run until the claimant's employment or employability . . . ." The court rejected a finding in Herrera that the claimant as a reasonable person should have been aware of the seriousness of her condition and its impact on her employment when she had had pain, sought medical treatment and was placed on light duty and into work hardening.

The claimant was diagnosed with carpal tunnel syndrome while working at the employer herein in August of 2000. The defendants argue that that fact time bars this claim. For that to be the case they have to establish that the claimant knew that the carpal tunnel was serious, affecting work, potentially compensable, and that continued work for the employer did not worsen the condition. The claimant did connect the carpal tunnel to work activities. However, it does not appear that claimant realized that it was serious or potentially compensable; particularly as defendants point out in their brief that even by 2015 the bilateral carpal tunnel is still mild, or "minimal" per the claimant. (Defendants' hearing brief; Ex. D, p. 2 for claimant's reference to minimal) The claimant had had carpal tunnel symptoms before when he worked at Wonder Bread. (Ex. 4, p. 35) However, the symptoms resolved on their own. The claimant's condition was not affecting his work nor was it serious until the doctor visit of February 18, 2014 put the claimant on notice of the need for additional testing and a possible work impact. The claim is not time barred.

The next issue is the extent of the claimant's entitlement to permanent partial disability pursuant to Iowa Code section 85.34(2)(s).

Benefits for permanent partial disability of two members caused by a single accident is a scheduled benefit under section 85.34(2)(s); the degree of disability must be computed on a functional basis with a maximum benefit entitlement of 500 weeks. Simbro v. DeLong's Sportswear, 332 N.W.2d 886 (Iowa 1983).

It was found that claimant has lost the use of 5 percent of the body as a whole (non-industrial) due to the simultaneous bilateral injuries which manifested on or about February 18, 2014. As such, he is entitled to 25 weeks of benefits pursuant to Iowa Code Section 85.34(2)(s).

Independent Medical Examination.

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). Defendants' liability for claimant's injury need not ultimately be established before defendants are obligated to reimburse claimant for an independent medical examination.

The claimant chose to get an evaluation/examination to establish whether the injury arose out of and in the course of employment, and whether it caused permanent impairment or disability. The claimant got that exam from Dr. Hines, who charged a fee of $1,074.99 for the examination and report. The rating followed a finding of no causation from a doctor retained by the defendants. Defendants then denied the claim. The defendants shall pay/reimburse as appropriate the IME fee of Dr. Hines. Without the denial of causation from the defendants' retained doctor only the $750.00 report fee would have been payable pursuant to Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015).

ORDER

Therefore it is ordered:

That the defendants pay the claimant twenty five (25) weeks permanent partial disability commencing February 18, 2014 at the weekly rate of seven hundred nine and 82/100 dollars ($709.82).

That the defendants shall pay/reimburse as appropriate the one thousand seventy-four and 99/100 dollars ($1,074.99) IME fee of Dr. Hines.

Defendants shall receive credit for all benefits previously paid.

Costs are taxed to the defendants 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 23rd day of November, 2015.

STAN MCELDERRY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

James P. Hoffman
Attorney at Law
PO Box 1087
Keokuk, IA 52632
jamesphoffman@aol.com

Richard C. Garberson
Attorney at Law
PO Box 2107
Cedar Rapids, IA 52406
rcg@shuttleworthlaw.com

SRM/sam

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.