BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TAMMY SMITH, Claimant, vs. EATON CORP., Employer, and OLD REPUBLIC INSURANCE COMPANY, Insurance Carrier, Defendants.	File Nos. 5043381 5043382 5043383 APPEAL DECISION Head Note No.: 1803

Defendants Eaton Corporation and Old Republic Insurance Company appeal from an arbitration decision filed on September 30, 2014. The case was heard on February 25, 2014, and it was considered fully submitted on April 14, 2014, in front of the deputy workers' compensation commissioner.

Claimant Tammy Smith filed three petitions in arbitration seeking workers' compensation benefits from defendants. In Agency File No. 5043381, claimant alleged an injury date of February 1, 2012. In Agency File No. 5043382, claimant alleged an injury date of August 2, 2012. In Agency File No. 5043383, claimant alleged an injury date of August 10, 2012. In all three files claimant alleges injury to both arms as a result of repetitive work.

In the arbitration decision, the deputy commissioner found that claimant sustained the loss of both arms by a single accident and as a result suffered a total loss of industrial earning capacity.

Defendants assert on appeal that the deputy commissioner erred in determining the injuries to claimant's arms were simultaneous. Defendants also assert the deputy commissioner erred in determining claimant sustained a total loss of earning capacity. Claimant asserts that the decision of the deputy commissioner should be affirmed.

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

ISSUES ON APPEAL

1. Whether claimant sustained the loss of both arms by a single accident.

2. Whether claimant suffered a total loss of industrial earning capacity as a result of the injury.

FINDINGS OF FACT

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

Claimant, Tammy Smith, was 42 years old at the time of the arbitration hearing. She began working for Eaton Corporation in August 2004. She remained an employee there until her employment ended in August 2013. (Exhibit 8, page 4)

Claimant's last job at defendant-employer was working on the auxiliary counter shaft where she handled 90-95 pieces of steel per day weighting 28 pounds in a lathe-like machine until the steel pieces weighed approximately 19 pounds. Claimant testified she believed the repetitive nature of her job caused her arms to begin hurting in 2008. Due to the pain, she started wearing wristbands which provided her some relief. In 2010, the symptoms in her arms returned. She reported the symptoms to her employer but to claimant's knowledge no action was taken by the employer. Claimant began wearing bands again and continued working. (Tr. pp. 22-23; 26-27; 30)

In 2012, claimant's symptoms worsened. She went to the company dispensary which provided her with a band for her left elbow. In April 2012 she was experiencing pain in both elbows. At that time, an incident report was completed. (Ex. 11, p. 2) Despite her pain, she continued working until June 2012, when she began dropping parts. At that time, claimant informed the company she could no longer perform her job at the required standards.

Claimant was seen by James G. Kalar, M.D., on June 26, 2012. Claimant presented for bilateral elbow pain. According to the notes, she began experiencing problems with her left elbow in February. She subsequently developed pain in the right elbow. Dr. Kalar's impression was bilateral medial humeral epicondylitis, bilateral lateral humeral epicondylitis, and bilateral cubital tunnel. Claimant was treated conservatively. (Ex. 1, pp. 1-2)

On July 30, 2012, claimant saw Nicholas B. Bruggeman, M.D., at Nebraska Orthopaedic Associates. She reported bilateral arm pain which had been going on for approximately five months. Dr. Bruggeman's assessment was bilateral arm pain and numbness. (Ex. 2, pp. 1-3)

On August 2, 2012, claimant underwent EMG and nerve conduction testing of her upper extremities. The testing revealed bilateral median sensory nerve injuries within the carpal tunnels, mild on the left and very mild on the right. Otherwise, the testing was normal. (Ex. 5)

Claimant continued to follow-up with Dr. Bruggeman. On August 28, 2012, Dr. Bruggeman noted claimant remained symptomatic and he did not believe surgery would predictably allow her to go back to work. (Ex. 2, p. 10) At Dr. Bruggeman's request, claimant underwent an FCE on October 10, 2012, which placed her in the light-to-medium work category. (Ex. 6) Claimant returned to see Dr. Bruggeman on November 2, 2012. At that time Dr. Bruggeman recommended a second opinion from an upper extremity specialist. (Ex. 2, pp. 16-17)

On December 14, 2012, claimant was seen by Ian D. Crabb, M.D. for a second opinion. Claimant reported her problems began in February when she developed pain in her left elbow. Shortly thereafter, her right elbow began to bother her. Dr. Crabb noted claimant had been off work since August. The doctor felt claimant had bilateral medial epicondylitis. Dr. Crabb noted claimant demonstrated significant symptom magnification. He further noted claimant's symptoms developed gradually due to her work duties. Dr. Crabb stated, "Within a reasonable degree of medical certainty her occupational engagement caused and/or substantially aggravated her condition of medial epicondylitis." (Ex. 3, p. 4) Dr. Crabb felt claimant's symptoms were severe enough that they were limiting her ability to return to useful work. Dr. Crabb felt claimant had not reached MMI and she might benefit from cortisone injections and a short court of physical therapy. Dr. Crabb stated that after the injection and a course of physical therapy for strengthening claimant should be able to return to work. (Ex. 3, p. 5)

Claimant returned to Dr. Bruggeman for a cortisone injection. (Ex. 2, p. 19) He referred claimant for physical therapy. (Ex. 2, p. 20) She underwent physical therapy with Excel Physical Therapy. (Ex. D)

On February 14, 2013, claimant reported some improvement from the injection. Dr. Bruggeman placed her at maximum medical improvement (MMI). He did not have any further treatment for her. (Ex. 2, p. 22) Dr. Bruggeman released claimant with permanent restrictions of 20 pounds occasional lifting, 10 pounds frequent lifting, limit repetition to 25 repetitions per hour with a grasping force of no greater than 55 pounds. (Ex. 2, p. 23) Dr. Bruggeman opined claimant had zero impairment to both of her upper extremities. (Ex. 2, p. 24)

Claimant returned to Dr. Bruggeman on May 23, 2013. She had not worked since August 2012, but she was continuing to have trouble. Because she was no longer working and still experiencing symptoms Dr. Bruggeman noted this raised the question as to whether this was really work-related. (Ex. 2, pp. 25-26)

Claimant was evaluated by Michael J. Morrison, M.D. who issued a letter on July 25, 2013. Based on claimant's history, Dr. Morrison felt claimant had tendinitis medial aspect both elbows. Dr. Morrison opined that if claimant's job consisted of repetitive activity using her arms then this could cause the development of some tendinitis of the medial aspect of both elbows. Dr. Morrison felt claimant had reached MMI. Based on objective findings, Dr. Morrison did not feel claimant had any permanent impairment. Dr. Morrison noted that claimant's pain and hypersensitivity to touch along the inner aspect of her elbows were subjective. Based on his examination of claimant, Dr.

Morrison felt she would not be able to return to her regular job activities. Claimant felt there were jobs at Eaton she could perform but they were currently not available. Dr. Morrison did not recommend any additional ongoing medical treatment. (Ex. 4, p. 3)

On October 30, 2013, claimant was evaluated by Sunil Bansal, M.D. After examining claimant and reviewing the records, Dr. Bansal diagnosed claimant with bilateral medial epicondylitis. Dr. Bansal further opined that medial epicondylitis and distal biceps tendonitis were directly related to activities that increase the tension and stress of the wrist flexor group. Dr. Bansal assigned ten percent permanent impairment to each upper extremity. He also agreed with the restrictions set forth in the FCE. (Ex. 7, p. 12)

On February 7, 2014, Dr. Bruggeman sent a letter to defense counsel advising he reviewed claimant's chart and additional information provided to him. In light of the additional information, Dr. Bruggeman's diagnosis of bilateral arm pain did not change. He stated he did not believe claimant's ongoing complaints were related to her work at Eaton. Dr. Bruggeman believed this because claimant's history, examination findings, and radiographic and electromyographic studies did not support an objective diagnosis. Furthermore, Dr. Bruggeman noted claimant continued to have symptoms even though she was no longer working at Eaton. (Ex. B)

The first issue to be addressed on appeal is whether claimant's right and left upper extremity injury is a scheduled member injury pursuant to Iowa Code section 85.34(2)(m) or a bilateral upper extremity injury under Iowa Code section 85.34(2)(s). Defendants do not argue on appeal that the date of injury, February 1, 2012, is incorrect; rather, the argument is that the injury should not be compensated as a bilateral claim.

Defendants have admitted claimant sustained an injury to both arms arising out of and in the course of her employment. (Ex. 10) However, defendant's response to the request for admission merely admits an injury to each upper extremity, not that they were simultaneous injuries.

A review of the evidence demonstrates claimant's symptoms first began in 2008. She began wearing wristbands which helped her symptoms. Her symptoms returned in 2010; she reported the symptoms to Eaton but no action was taken by the employer. Claimant began to wear her wristbands again and continued working. In early 2012 she began to experience left elbow pain. The dispensary again gave her a band to wear on her elbow. Within a few months' time claimant began to experience symptoms in her right elbow. On April 11, 2012, claimant completed an incident report which states she was having problems with both elbows. (Ex. 11, p. 2) Subsequently, claimant was treated for her bilateral upper extremities. This agency has long held that repetitive injury symptoms which occur a few months apart but are subsequently treated as a bilateral problem constitutes a single injury. Therefore, I find Ms. Smith sustained a loss of both arms caused by a single accident.

The next issue to address is the amount of permanent benefits, if any, claimant is entitled to receive. In order to determine Ms. Smith's entitlement to PPD benefits we must first determine whether claimant is permanently and totally disabled. While

defendants admit claimant sustained permanent work restrictions as a result of the injury which precluded her from performing the type of work she had performed for Eaton, they dispute that she is permanently and totally disabled. (Ex. 10) I find that the claimant has shown by a preponderance of the evidence that she has permanent restrictions as a result of the work injury. I find that claimant's permanent restrictions resulting from the work injury are: 20 pounds occasional lifting, 10 pounds frequent lifting, and she is to limit repetition to 25 repetitions per hour with a grasping force of no greater than 55 pounds.

Both parties offered a vocational report into evidence. Claimant offered a January 20, 2014, report from Michael Newman, M.S., LPC, LMHP. Mr. Newman provided an analysis based on claimant's ability to perform light-medium work. It is Mr. Newman's opinion that claimant's future earning power had been diminished by 65 to 70 percent conservatively due to the work injury. (Ex. 9, p. 15) Mr. Newman provided a second analysis, but this analysis was based on claimant's self-reported limitations. Because I find claimant's permanent restrictions are those assigned by the medical experts and not those based on claimant's subjective reports I do not give Mr. Newman's second analysis any weight.

Defendants offered the vocational opinion of Ted Stricklett, M.S. According to Mr. Stricklett's February 21, 2014, report, it is his opinion claimant sustained loss of earning capacity of approximately 45-50 percent as a result of the work injury. Thus, I find that neither vocational expert concluded that based on the FCE restrictions claimant sustained a total loss of earning capacity.

At the time of the arbitration hearing claimant was 42 years old. She received her General Equivalency Diploma (GED) in 1991. She does own a computer and is able to connect to the Internet and use email. She uses Facebook on a daily basis and is able to type with a computer keyboard. She reported that her computer skills are "fair." She also owns a smartphone. Prior to working for Eaton she worked as a certified nurse assistant (CNA). She has also been employed as a traveling CNA. In the late 1990's she also worked for Pella performing window assembly. (Ex. E, p. 4) Based on Ms. Smiths' work experience, transferrable skills, education, intelligence, and physical capabilities, I find that injury did not result in a total loss of earning capacity. I find claimant is not permanently and totally disabled.

Because claimant sustained loss of both arms as the result of a single accident, and because she is not permanently and totally disabled, her degree of disability must be computed on a functional basis with a maximum benefit entitlement of 500 weeks. In the present case, several experts have rendered opinions with regard to claimant's functional impairment due to the work injury. Dr. Bruggeman and Dr. Morrison both opined claimant did not sustain any functional impairment as a result of the work injury. (Ex. 2, p. 24; Ex. 4, p. 3) Dr. Bansal assigned 10 percent impairment of each upper extremity. (Ex. 7, p. 11) I find Dr. Bansal's impairment ratings are more consistent with the restrictions set forth by the FCE and adopted by Dr. Bruggeman, Dr. Morrison, and Dr. Bansal. Therefore, I find claimant sustained 10 percent impairment of each upper extremity. Based on the AMA Guides, I find 10 percent impairment of the upper extremity is equivalent to six percent of the body as a whole. The body-as-a-whole

equivalents must then be combined to determine claimant's total functional impairment. According to the Combined Values Chart of the AMA Guides, six percent impairment of the body, plus 6 percent impairment of the body equates to 12 percent impairment of the body. Therefore, I find claimant is entitled to 60 weeks of permanent partial disability benefits as a result of the work injury.

CONCLUSIONS OF LAW

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).

Based on the above findings I conclude claimant did prove that she sustained permanent impairment resulting from her work injury. Having found claimant has permanent impairment as a result of the injury to her upper extremities, I conclude claimant has proven entitlement to permanent disability benefits in some amount.

Defendants have appealed whether the claimant's left and right upper extremity injury is a scheduled member injury under Iowa Code section 85.34(2)(m) or a bilateral upper extremity injury under Iowa Code section 85.34(2)(s).

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). 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).

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).

This agency has long held that when bilateral repetitive injury symptoms occur a few months apart in time, but are subsequently treated as a bilateral problem this constitutes a single accident pursuant to Iowa Code section 85.34(2)(s). See Fichter v. Griffin Pipe Products, File No. 941434 (Com'n Dec. April 29, 1993), citing Jones v. Lamoni Products, File No. 800310 (Com'n Dec. May 29, 1991). Based on the above findings of fact, I conclude that claimant sustained permanent partial disability of her arms caused by a single accident. Thus, she should be compensated pursuant to Iowa Code section 85.34(2)(s).

When section 85.34(2)(s) is involved, this agency must first determine whether the industrial disability, or loss of earning capacity, caused by the two simultaneous injuries has resulted in a total loss of earning capacity. If the simultaneous injuries cause a total loss of earning capacity, then permanent total disability benefits are awarded. However, if the loss of earning capacity is less than total, then the extent of permanent disability is measured functionally as a percentage of loss of use for each injured extremity, after being converted to a percentage of the whole person and combined. Riley v. Eaton Corp., File Nos. 5037054, 5037055 (Appeal Decision April 2013).

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935). A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

Functional impairment is an element to be considered in determining whether an injured worker has residual 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).

Based on claimant's work experience, transferrable skills, education, intelligence, and physical capabilities, I conclude that the work injury did not result in a total loss of earning capacity. I conclude claimant is not permanently and totally disabled.

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). Pursuant to that Code provision, the extent of the permanent disability is measured only functionally as a percentage of loss of use for each extremity which is then translated into a percentage of the body as a whole and combined together into one body as a whole value. Simbro; Burgett v. Man An So Corp., III Iowa Industrial Commissioner Report 38 (App. November 30, 1982).

Based on the above findings of fact, it is concluded that claimant has sustained 12 percent functional loss to the body as a whole, which entitles her to 60 weeks (12 percent times 500 weeks) of permanent partial disability benefits under Iowa Code section 85.34(2)(s).

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of September 30, 2014, is MODIFIED.

Defendants shall pay claimant sixty (60) weeks of permanent partial disability benefits beginning on February 1, 2012, (date of injury) at the rate of six hundred forty-five and 27/100 dollars ($645.27).

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.

Defendants shall receive credit for all benefits previously paid.

Each party shall bear their own costs of the appeal.

Signed and filed this 4th day of November, 2015.

Joseph S. Cortese II

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WORKERS' COMPENSATION
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