BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

THOMAS JACOBS,	:	
Claimant,	:	File No. 5066843
vs.	:	A R B I T R A T I O N
CITY OF DES MOINES,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Thomas Jacobs, seeks workers' compensation benefits from self-insured defendant, City of Des Moines, Iowa, for an accepted work injury dated June 30, 2017.

The record in this case consists of the Joint Exhibits 1-3, Claimant's Exhibits 4-7 and the testimony of the claimant and Scott Hutchins.

The matter was heard in Des Moines, Iowa, and considered fully submitted upon the simultaneous filing of briefs on January 20, 2020.

ISSUES

The extent of the permanent industrial disability;

Taxation of costs.

STIPULATIONS

The parties agree claimant sustained an injury on June 30, 2017, which arose out of and in the course of his employment with defendant employer. They further agree that injury was the cause of temporary disability entitlement to which is no longer in dispute. Medical benefits are also not in dispute and defendant has waived all affirmative defenses.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration

decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The injury resulted in permanent industrial disability but the parties dispute the extent. Permanent benefits commenced on December 5, 2017.

At the time of the injury, claimant's gross earnings were $1,487.50 per week. He was married and entitled to five exemptions. Based on those foregoing numbers, claimant's benefit rate is $936.00.

FINDINGS OF FACT

Claimant was a 54-year-old person at the time of the hearing. At all relevant times hereto, claimant was married with three dependent children. He described himself as "sort of ambidextrous" with a dominant left hand for finesse and motor skills and the right hand being used for strength activities.

His educational background consists of a high school diploma and five years of electrical apprenticeship.

Claimant was injured on June 30, 2017, and reached a stipulated maximum medical improvement (MMI) date of December 5, 2017.

His past medical history includes shoulder pain developed after sandbagging in 2010. He underwent an MRI and received physical therapy (PT) and cortisone injections. Despite the past medical issues, immediately prior to the injury claimant was performing the regular and essential duties of his job without complaint or accommodations.

On June 30, 2017, claimant was working on a cat walk. He extended his arms to remove a fitting when he felt a sharp, stabbing pain and heard a pop. He reported this injury immediately and was sent to UnityPoint Health for evaluation. (JE 1:1) During the examination, he exhibited reduced range of motion due to pain along with failed hornblower's test and impaired Neer's test. (JE 1:1) X-rays showed mild acromioclavicular and glenohumeral degenerative changes and calcification over the supraspinatus and infraspinatus tendons consistent with calcific tendinitis. (JE 1:1) Judith Nayeri, D.O. diagnosed claimant with right shoulder strain, prescribed 800 mg ibuprofen, icing, and physical therapy. (JE 1:1) Claimant was to avoid lifting, pushing or pulling and overhead work with the right arm. (JE 1:1)

He returned to UnityPoint on July 10, 2017, and was seen by PA-C Von L. Miller. (JE 1:2) He had not been authorized by the defendant insurer for physical therapy. (JE 1:2) Despite his avoidance of right arm use, his pain levels were at 7/8 out of 10 and he was waking up at night due to shooting pain. (JE 1:2) PA-C Miller advised claimant to ice and take his pain medications. (JE 1:2) The plan was for the claimant to attend physical therapy and then return for a re-evaluation. (JE 1:2)

During therapy, claimant did not make much progress.

On July 31, 2017, claimant returned to PA-C Miller with reports that even after rest and a few weeks of physical therapy, claimant had not improved. (JE 1:3) PA-C Miller ordered an MRI. The MRI had revealed findings of moderate arthrosis of the acromioclavicular (AC) joint with some inferior bony spurring which may contribute to impingement, relative bulky calcifications suspected within the adjacent supraspinatus tendon consistent with calcific tendinosis or bursitis, and a small amount of localized joint fluid or possible ganglion or bursitis in the subcoracoid recess region. (JE 1:3; 2) PA-C Miller felt more testing was necessary and referred claimant to a shoulder specialist. (JE 1:3)

The initial consult with Shane Cook, M.D. took place on August 18, 2017. (JE 3:10) Claimant reported he was taking tramadol and ibuprofen and doing light duty work; however, claimant had not seen improvement. Additionally, claimant reported a new symptom of right hand numbness that woke him at night. (JE 3:10) A focused examination revealed significant pain with any overhead activity. (JE 3:10) Claimant could actively forward flex to 70 degrees while passive testing moved him to 140 degrees. He was able to tolerate 40 degrees of passive abduction before movement was impeded by significant pain. He had weakness and pain with Jobe's testing of the supraspinatus. Cross body adduction incited no pain and he had good external rotation along with 5 out of 5 strength. He could internally rotate to his iliac crest but experienced pain upon completion of the motion. He was tender to palpation through the subacromial region. (JE 3:10)

Dr. Cook diagnosed claimant with right shoulder impingement with underlying calcific tendinopathy of the supraspinatus and new onset of right carpal tunnel syndrome. (JE 3:10) Dr. Cook concluded that the repetitive overhead activity at work exacerbated claimant's underlying calcific tendinitis as well as contributing to the development of the right-sided carpal tunnel syndrome. (JE 3:10) Claimant underwent a subacromial injection and was again sent to therapy. (JE 3:10) Additionally, claimant was ordered to keep his elbows at his side at all times with no overhead activity and no lifting more than one pound. (JE 3:11)

After the orthopedic consult, claimant returned to PA-C Miller on August 18, 2017, with continued complaints of right shoulder pain. (JE 1:4) PA-C Miller adopted the strict restrictions from Dr. Cook and returned claimant to work. (JE 1:4)

After a period of physical therapy, claimant returned to Dr. Cook and reported continued pain. (JE 3:12) Claimant actually felt as if he was getting worse. He stopped taking meloxicam as it was not helping but continued with the tramadol as that prescription did help him sleep. (JE 3:12) During the examination, claimant's significant pain resulted in reduced range of motion from the August 18, 2017 visit. (JE 3:12) Because of the failed conservative measures, Dr. Cook ordered the ultrasound-guided

calcific lavage of claimant's shoulder and referred him to Jason Sullivan, M.D. for this procedure. (JE 3:12)

Under ultrasound guidance, Dr. Sullivan performed a diagnostic evaluation of the right shoulder. The rotator cuff tendons were intact anteriorly but in the supraspinatus there appeared to be calcific tendonitis. The procedure could not be completed due to claimant's pain. (JE 3:14) Claimant testified that only about 20-30 percent of the steroid was injected before the pressure became too painful for him. Claimant was sent back to Dr. Cook.

On November 15, 2017, Dr. Cook performed a diagnostic arthroscopy with extensive debridement of subacromial space including bursectomy and acromioplasty with debridement of calcific tendinitis, a small axilla skin mass removal, and shoulder manipulation under anesthesia. (JE 3:17) Two weeks later, on November 30, 2017, claimant returned for follow-up with reports of better sleep but soreness during the day. (JE 3:20) Claimant was instructed to continue with aggressive physical therapy and to observe restrictions. (JE 3:20)

On December 4, 2017, claimant sought out PA-C Miller for approval of Dr. Cook's restrictions of no lifting more than one pound and avoidance of repetitive grasping, pinching, pulling and twisting on the right with overall limited use of the right arm. (JE 1:5) This was granted.

A little under a year later, claimant returned to Dr. Cook on September 13, 2018, for a right shoulder impairment rating. (JE 3:23) Despite the arthroscopic debridement, claimant continued to suffer from stiffness and pain in the right shoulder, albeit improved. (JE 3:23) Focused examination of the right shoulder showed forward flexion to 128 degrees, extension to 25 degrees, 111 degrees of abduction, and 25 degrees of adduction. With his arm abducted to 90 degrees, he had 10 degrees of internal rotation and 90 degrees of external rotation. (JE 3:23) Dr. Cook placed claimant at MMI and assessed a total upper extremity impairment to 13 percent or whole person impairment of 8 percent based on the impaired range of motion. (JE 3:25)

Claimant underwent an independent medical evaluation (IME) with John Kuhnlein, M.D. on January 23, 2019. (Ex 4) Dr. Kuhnlein issued the report on February 7, 2019. At the time, claimant was not receiving any treatment and felt that there was no care that would lead to significant improvement. (Ex. 4:29) Claimant was taking four over-the-counter (OTC) ibuprofen three to four times daily and performed daily stretching exercises in the morning and wall walking exercises for range of motion. Id. He complained of constant pain in the anterior right shoulder and occasional pain in the right trapezius area, worsening upon movement and use. Id. The pain radiated into the deltoid insertion/biceps area and had a range of four to nine on a ten scale but was usually around five. Id. at 30. Along with the pain and reduced range of motion, claimant described intermittent paresthesias in the shoulder extending into the right arm and intermittent tingling in the right hand involving the entire hand. Id.

Dr. Kuhnlein diagnosed claimant with right shoulder impingement syndrome with calcific tendinitis and probable adhesive capsulitis and clinical right carpal tunnel syndrome and possible cubital tunnel syndrome. Id. at 33. During the range of motion exam, claimant exhibited a passive hard endpoint in right shoulder flexion at approximately 110 degrees with a sense of stiffness and pain. Id. at 31.

Based on the review of the records, examination, and subjective history, Dr. Kuhnlein opined that despite the prior 2010 right shoulder issues and the calcific tendinitis of the supraspinatus tendon and the arthrosis of the acromioclavicular joint and glenohumeral joint that pre-dated the injury, claimant's current symptomatology was caused by claimant's work duties for the defendant employer. The pre-existing conditions were asymptomatic until the June 30, 2017, injury, and the specific injury on or about June 30, 2017, arising in and out of the course of his duties for the City of Des Moines lit up and materially aggravated these pre-existing conditions. Id.

Dr. Kuhnlein could not comment on whether the right carpal or cubital tunnel syndromes are related to June 30, 2017, incident, or claimant's work for the City of Des Moines. Id. at 33. Dr. Kuhnlein recommended a return to a medical professional so that the mass at the deltoid insertion could be evaluated as well as a visit to Dr. Cook again to determine whether claimant should proceed with further manipulation under anesthesia for apparent recurrent adhesive capsulitis. Id. at 34. Dr. Kuhnlein assessed a 6 percent whole person impairment and explained the difference between his rating and that of Dr. Cook's rating was that Dr. Kuhnlein's rating compared the right to the left shoulder with the left serving as a control, and Dr. Cook's impairment rating was based solely on right upper extremity measurements. Id. at 34.

For restrictions, Dr. Kuhnlein recommended keeping work close to claimant's body and limiting lifting away from the body to 40 pounds occasionally from floor to waist, 40 pounds occasionally from waist to shoulder, and 30 pounds occasionally at or above shoulder height. Id. at 35.

Claimant testified that he is unable bend his arm behind his back and that he has soreness and pain with any use of the shoulder. He believes his strength is reduced because of the injury to the shoulder and while he was released from Dr. Cook's care with no restrictions that was done at the request of the claimant. He agrees with the restrictions set forth by Dr. Kuhnlein and has mentally and physically modified his current job so as to work within those restrictions.

He cannot do overhead work for any length of time. He uses higher ladders and reaches less. He asks for help to move objects and for overhead work. He would not be able to return to previous jobs that required heavy physical labor such as bridge construction or running large conduit. He has modified the execution of his hobbies as well. For example, he does pistol shooting but shoots primarily with his left hand. He no longer bow hunts or uses shotguns. Every night he awakens due to pain.

CONCLUSIONS OF LAW

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 Electric 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).

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.

Defendant argues that claimant has been released to full duty work with no restrictions. Claimant has not returned for care since 2017. He takes over-the-counter medications. Today, he is working the same job at an increased pay as he was at the time of the injury. He has had no actual loss of earnings.

On the other hand, claimant has regular pain that has not subsided since the date of the injury. He has undergone therapy and primarily conservative treatment with some, but not total, relief. He has reduced or eliminated some of his recreation and leisure activities and has modified the way in which he conducts the essential duties of his job. He has worked as an electrician for all of the relevant past, but he testified credibly that he would not be able to return to his pre-electrician jobs because of the heavy manual labor those positions required. As a result, there is a loss of earning capacity.

Based on the foregoing, along with the restrictions recommended by Dr. Kuhnlein and the claimant's inability to avail himself of a certain portion of the labor market that was available to him prior to the injury as well as his educational background, his age and motivation to return to work, it is found claimant has sustained a 15 percent industrial disability.

Iowa Code section 86.40 states:

> **Costs.** All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Based on the totality of the case and the claimant's outcome, the costs are taxed against defendant.

ORDER

THEREFORE, IT IS ORDERED,

Defendant shall pay claimant seventy-five (75) weeks of permanent total disability benefits at the weekly rate of nine hundred thirty-six and 00/100 dollars ($936.00) from December 5, 2017.

That defendant shall pay accrued weekly benefits in a lump sum.

That defendant shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendant is to be given credit for benefits previously paid.

That defendant shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

Signed and filed this 27th day of March, 2020.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Corey J.L. Walker (via WCES)

Larry Dempsey (via email at lfdempsey@dmgov.org)

John O. Haraldson (via WCES)