BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| RHONDA CONNER,<br><br>Claimant,<br><br>vs.<br><br>UNITED PARCEL SERVICE,<br><br>Employer,<br><br>and<br><br>LIBERTY INSURANCE CORP.<br><br>Insurance Carrier,<br>Defendants. | FILED<br>FEB 15 2019<br>WORKERS' COMPENSATION<br><br>File No. 5051783<br><br>APPEAL<br><br>DECISION<br><br>Head Note Nos.: 1108, 1803 |

Defendants United Parcel Service, employer, and Liberty Insurance Corporation, insurer, appeal from an arbitration decision filed on August 30, 2017.

On February 11, 2019, the Iowa Workers' Compensation Commissioner delegated authority to the undersigned to enter a final agency decision in this matter. Therefore, this appeal decision is entered as final agency action pursuant to Iowa Code section 17A.15(3) and Iowa Code section 86.24.

This case originally proceeded to hearing on March 30, 2017, and it was considered fully submitted in front of the deputy commissioner on April 28, 2017. The parties stipulated claimant sustained a right shoulder injury on February 18, 2014, but defendants disputed the remainder of claimant's alleged injuries. In the resulting August 30, 2017 arbitration decision, the deputy commissioner determined claimant's right shoulder, left shoulder, and bilateral carpal tunnel conditions were caused by her work-related injury on February 18, 2014. However, the deputy commissioner determined claimant failed to give defendants adequate notice of her right carpal tunnel and left shoulder conditions. The deputy commissioner also determined claimant's neck condition was not causally related to the February 18, 2014 work injury, meaning her only compensable conditions were the right shoulder and left carpal tunnel. The deputy commissioner ultimately determined claimant sustained a 50 percent industrial disability due to her compensable conditions.

On appeal, defendants argue the deputy commissioner erred when she determined claimant's left carpal tunnel was causally related to claimant's February 18,

2014 work injury. Alternatively, defendants argue claimant failed to give adequate notice of the left carpal tunnel condition. Defendants also assert the deputy erred by determining claimant sustained a 50 percent industrial disability.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal. Notably, while claimant originally cross-appealed the deputy commissioner's decision, this cross-appeal was withdrawn. Thus, the deputy commissioner's determinations that claimant's neck condition was not causally related to her February 18, 2014 work injury and that claimant failed to give timely notice of her left shoulder and right carpal tunnel conditions were not appealed and therefore will not be addressed herein.

I performed a de novo review of the evidentiary record before the presiding deputy workers' compensation commissioner and the detailed arguments of the parties. Pursuant to Iowa Code section 17A.15 and Iowa Code section 86.24, the proposed arbitration decision filed on August 30, 2017 is affirmed in part with additional findings and analysis and modified in part.

## FINDINGS OF FACT

The threshold issue to be addressed on appeal is whether claimant's left carpal tunnel condition is causally related to her February 18, 2014 work injury. I affirm the deputy commissioner's findings regarding this issue in their entirety with the following additional findings:

On appeal, defendants argue the "overcompensation" opinions offered by Sunil Bansal, M.D., and Eugene Cherny, M.D., are unreliable because they are premised on an incorrect history. I disagree. After claimant fell on February 18, 2014 and fractured her right proximal humerus, claimant was placed in an immobilizer by Jason Sullivan, M.D. (See Joint Exhibit 2, pp. 2, 4) Claimant wore the immobilizer through March 6, 2014, at which time she was instructed to use a sling. (JE 2, p. 4) At a follow-up appointment on March 18, 2014, Dr. Sullivan told claimant to continue to use the sling but to discontinue it "in a couple weeks." (JE 2, p. 6) When claimant returned to Dr. Sullivan on April 3, 2014, claimant continued to wear the sling outside her home. (JE 2, p. 8) Thus, I find that claimant used an immobilizer and/or sling for at least six weeks.

During this six-week span, claimant was performing all of her daily activities with her left arm. (Hearing Transcript, p. 29) Claimant continued to experience pain in her right shoulder even after she was allowed to discontinue the use of her sling and return to work, which caused her to continue to rely on her left arm. For example, at her physical therapy appointment on July 11, 2014, claimant reported that her "uninjured (left) shoulder feels sore." (JE 3, p. 9) The physical therapist instructed claimant "to use her right arm more for functional activities during the day to take some of the load off of her left arm." (JE 3, p. 9) Thus, I find claimant's increased left arm usage continued after she discontinued her sling.

Claimant testified she began to develop numbness and tingling in her hands in the summer of 2014 after she returned to work in late May of 2014. (Tr., pp. 31, 37)

Both Dr. Bansal and Dr. Cherny opined claimant's increased use of her left arm due to overcompensation for her right shoulder injury caused or accelerated claimant's left-sided carpal tunnel. Dr. Bansal opined that because claimant's "left shoulder tendonitis and left carpal tunnel developed during the convalescence phase for her right arm pathology, it is to a medical degree of certainty that her left upper extremity pathology developed as sequelae to her right arm pathology." (Cl. Ex. 16, pp. 8-9) Defendants argue Dr. Bansal's opinions are unreliable because Dr. Bansal was under the impression claimant was in a sling "for a number of months" and because Dr. Bansal's timeline is incorrect. With respect to Dr. Bansal's timeline, defendants assert claimant did not develop wrist pain until "three to four months after claimant was released from her immobilizer and stop[ped] using the sling except for outside the home." (Def. Appeal Brief, p. 5) This is an inaccurate statement of the record. Claimant testified she developed wrist pain after she returned to work in late-May of 2014, roughly a month after she told Dr. Sullivan she was continuing to use her sling outside the home. (Tr., p. 31) Further, even if Dr. Bansal believed claimant was in a sling for months instead of weeks or if claimant's wrist pain did not actually develop until months after she was out of the sling as defendants suggest, claimant continued to rely more heavily on her left arm due to pain in her right shoulder well into the summer of 2014. (See JE 3, p. 9) In other words, she continued to overcompensate with her left arm for months after her injury. For these reasons, I am not persuaded that Dr. Bansal's report should be "totally discounted" as defendants suggest.

Defendants also argue Dr. Cherny's opinion is unreliable because his statement that claimant performed nearly all activities with her left arm during the spring and summer of 2014 is "inaccurate." I disagree. As discussed above, claimant's medical records indicate claimant continued to rely more heavily on her left arm into the summer of 2014. (JE 3, p. 9) Dr. Cherny's opinion, therefore, was not based on misinformation or an inaccurate history. I therefore find no reason to disregard or discount Dr. Cherny's report.

While I acknowledge Dr. Sullivan and Michael Gainer, M.D., offered opinions contrary to Dr. Bansal and Dr. Cherny, Dr. Sullivan only treated and examined claimant for her right shoulder condition, and Dr. Gainer offered no explanation for his opinion. (See Tr., pp. 35-36; Ex. B, p. 5) For these reasons, I find the opinions of Dr. Bansal and Dr. Cherny to be more persuasive than the opinions of Dr. Sullivan and Dr. Gainer. I therefore find claimant's left carpal tunnel syndrome developed as a sequela to her right shoulder injury on February 18, 2014.

Defendants alternatively argue on appeal that the deputy commissioner erred by deciding claimant gave timely notice of her left carpal tunnel syndrome under Iowa Code section 85.23. Ultimately, as is discussed below, I do not believe the notice provisions of Iowa Code section 85.23 are applicable. However, even assuming Iowa Code section 85.23 is applicable, I find claimant gave notice of her left carpal tunnel

condition within 90 days of her realization of the nature, seriousness, and probable compensable character of the carpal tunnel syndrome.

First, I find claimant told her supervisor before her left carpal tunnel surgery that she believed the left carpal tunnel condition was work-related. (See Tr., p. 41) Like the deputy commissioner, I find claimant's live testimony more persuasive than an assertion in an interrogatory answer. Thus, I find claimant gave defendants notice of her carpal tunnel condition before November 5, 2014.

I also find that August 19, 2014 was the first date on which claimant could have realized the nature, seriousness, or probable compensable character of her carpal tunnel syndrome. This was the first date on which claimant received treatment specific to numbness and tingling in her hands. (JE 4, p. 1) Claimant's references to numbness and tingling in her hands prior to this point were in passing to providers that were primarily focused on her right shoulder. In reality, it is more likely that claimant did not realize the nature, seriousness, or probable compensable nature of her carpal tunnel syndrome until later, such as when she had the EMG that confirmed her carpal tunnel syndrome or when she was scheduled for surgery. Regardless, November 5, 2014 is 84 days after August 19, 2014, meaning claimant gave notice within 90 days.

The last issue to be addressed on appeal is the extent of claimant's industrial disability. The deputy commissioner determined claimant sustained a 50 percent industrial disability due her right shoulder and left carpal tunnel conditions, and defendants argue on appeal this award was too high.

With respect to claimant's functional limitations, Dr. Bansal assigned permanent restrictions but offered no explanation as to which restrictions were related to claimant's right shoulder and left carpal tunnel syndrome versus claimant's non-compensable neck, left shoulder, right carpal tunnel, and right cubital tunnel conditions. (See Cl. Ex. 17, pp. 13-14)

Regarding claimant's left carpal tunnel syndrome, Dr. Bansal's report makes no mention of restricted gripping or grasping. This is consistent with Dr. Gainer, who opined that claimant could perform sedentary job functions such as simple hand grasping and fine hand manipulations. (Def. Ex. B, p. 6) Dr. Cherny assigned restrictions of no lifting greater than 10 pounds and intermittent typing with 20-minute intervals after claimant returned to work after her left carpal tunnel release. (See JE 4, p. 10) It appears Dr. Cherny continued to recommend modified duty for claimant's left arm through claimant's right carpal tunnel release in December of 2015. Although claimant never returned to work after her right carpal tunnel release (Tr., p. 45), Dr. Cherny assigned restrictions of "no repetitive gripping, pinching or lifting secondary to ongoing bilateral hand pain and weakness" at his last appointment with claimant on March 24, 2016. (JE 4, p. 19) Dr. Cherny did not indicate whether these restrictions were intended to be permanent or temporary. Notably, the opinions of Dr. Bansal and Dr. Gainer were offered after claimant was last seen by Dr. Cherny. I therefore find

there is insufficient evidence to determine whether claimant has any permanent work restrictions relating specifically to her left carpal tunnel syndrome.

Regarding claimant's right shoulder, Dr. Bansal's lifting restrictions, primarily the recommendation to avoid lifting more than five pounds overhead with no frequent overhead lifting, are presumably related to claimant's shoulder conditions. (See Cl. Ex. 17, p. 13) Dr. Bansal's report is at odds with the opinion of Dr. Sullivan, who released claimant to full duty without restrictions in August of 2014. (JE 2, pp. 19, 23) In fact, claimant was able to work without restrictions through November of 2014 when she had her left carpal tunnel release. (Tr., pp. 66-67) That being said, at claimant's final physical therapy appointment on September 12, 2014, she was still complaining of pain and limited range of motion in her right shoulder. (JE 3, pp. 14-15) Further, Dr. Sullivan opined claimant sustained a four percent whole body impairment due to her right shoulder condition. (JE 2, p. 25) Thus, while I do not specifically adopt Dr. Bansal's five- to ten-pound lifting restriction, I find claimant's physical capabilities, specifically the ability to perform medium to heavy lifting, have been negatively impacted due to her permanent right shoulder injury.

Importantly, while claimant continued to be off work at the time of the hearing, she was off work due to her neck—a non-compensable condition. (Tr., p. 46) She also testified her neck pain is more problematic than her right shoulder condition. (Tr., p. 53) She likewise testified she believed she could return to a reduced work schedule with defendant-employer even with her right shoulder condition. (Tr., pp. 54-55) Notably, claimant worked roughly 37 to 40 hours per week from August of 2014, when she was released from Dr. Sullivan's care, through November of 2014, when she had her left carpal tunnel surgery. (Tr., p. 74) She then returned to working 37 to 40 hours per week in February of 2015, after her left carpal tunnel surgery, until December of 2015, when she had her right carpal tunnel surgery. (Tr., p. 74) Thus, it was not until claimant began treating for her non-compensable right carpal tunnel syndrome and neck condition that she became incapable of returning to her job with defendant-employer.

Claimant, who was 55 years old at the time of the hearing, has performed office work since the 1970s. (Tr., p. 18, 22-24) Claimant provided insufficient evidence to show that she cannot continue to perform office work due to her left carpal tunnel syndrome and right shoulder condition. In fact, claimant acknowledged she could return to office work in an accommodated capacity when considering her right shoulder condition in isolation. I find claimant's non-compensable conditions are her biggest barrier to re-entering the workforce. I therefore respectfully disagree with the deputy commissioner's finding that claimant sustained a 50 percent industrial disability.

Still, claimant has a permanent injury to her right shoulder resulting in a four percent whole person impairment and a permanent disability from her surgically treated left carpal tunnel syndrome resulting in a four percent upper extremity or two percent whole body impairment. (JE 2, p. 25; Cl. Ex. 16, p. 8) I found she has permanent physical limitations due to her right shoulder condition, and these limitations would prevent her from pursuing work in the heavy, or likely even medium, physical demand

categories. I acknowledge that claimant was unlikely to pursue work in these physical demand categories given her long career in sedentary office work, but that does not change the fact that claimant's work-related injuries have negatively affected her earning capacity. That being said, the evidence reveals claimant was able to return to her office job—work for which she is suited—after she was released from Dr. Sullivan's care and after her left carpal tunnel release. Ultimately, I find claimant could return to office work with her right shoulder and left carpal tunnel conditions, though there are likely some tasks with which she would require modification or assistance. For these reasons, I find claimant sustained a 30 percent industrial disability. The deputy commissioner's findings are therefore modified.

## CONCLUSIONS OF LAW

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).

An injury is considered to be a sequela of an original work injury if the employee sustained a compensable injury and later sustained further disability that is a proximate result of the original injury. Mallory v. Mercy Medical Center, File No. 5029834 (Appeal February 15, 2012). The Iowa Supreme Court held long ago that "where an accident occurs to an employee in the usual course of his employment, the employer is liable for all consequences that naturally and proximately flow from the accident." Oldham v. Scofield & Welch, 266 N.W. 480, 482 (1936). The Court explained as follows:

> If an employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury, such further disability is compensable. Where an employee suffers a compensable injury and thereafter returns to work and, as a result thereof, his first injury is aggravated and accelerated so that he is greater disabled than before, the entire disability may be compensated for.
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> Id. at 481.

Based on the opinions of Dr. Bansal and Dr. Cherny, I found claimant's left carpal tunnel syndrome developed as a sequela to her right shoulder injury on February 18, 2014. I therefore conclude claimant's left carpal tunnel syndrome was a proximate result of her original injury and is therefore compensable. The deputy commissioner's determination that claimant sustained work-related carpal tunnel syndrome is therefore affirmed with my additional findings, conclusions, and analysis.

Defendants alternatively argue on appeal that the deputy commissioner erred by deciding claimant gave timely notice of her left carpal tunnel syndrome under Iowa Code section 85.23. First, I respectfully disagree with the deputy commissioner's analysis of claimant's carpal tunnel syndrome as a separate cumulative injury claim. As discussed above, I found claimant's left-sided carpal tunnel syndrome was a sequela of claimant's right shoulder injury. As such, I conclude the notice provisions of Iowa Code section 85.23 are inapplicable for purposes of claimant's left carpal tunnel condition because claimant's left carpal tunnel syndrome was not a new, separate, or distinct cumulative injury.

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury. The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. Robinson v. Dep't of Transp., 296 N.W.2d 809, 811 (Iowa 1980)

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

In this case, defendants raise lack of notice only for the carpal tunnel portion of claimant's claim, which I found was a sequela of the original right shoulder injury. However, the notice requirement applies to the injury, not to all consequences or conditions that naturally and proximately flow from the accident. See Iowa Code § 85.23. Defendants do not dispute the fact that claimant timely reported the February 18, 2014 fall. I therefore conclude defendants' affirmative notice defense fails.

Assuming the notice provisions of Iowa Code section 85.23 are applicable to claimant's left carpal tunnel sequela, however, I conclude claimant gave timely notice.

As explained by the Iowa Supreme Court:

> [A] condition is implied in limitations provisions of most workers' compensation statutes that "(t)he time period for notice or claim does not begin to run until the claimant, as a reasonable man, should recognize the nature, seriousness and probable compensable character of his injury or disease." 3 A. Larson Workmen's Compensation § 78.41 at 15-65 to 15-66 (1976). This rule is applicable to the notice of claim provision in section 85.23 of our workers' compensation statute. Robinson v. Department of Transportation, 296 N.W.2d 809, 812 (Iowa 1980).

Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256, 257 (Iowa 1980)

In this case, I found claimant told her supervisor that she believed her left carpal tunnel surgery was work related less than 90 days after the first date on which she could have realized the nature, seriousness, or probable compensable character of her carpal tunnel syndrome. Thus, assuming the notice provisions of Iowa Code section 85.23 are applicable to claimant's left carpal tunnel syndrome, I conclude claimant gave timely notice of her left carpal tunnel syndrome and affirm the deputy commissioner's determination with my additional findings, conclusions, and analysis.

Ultimately, under either scenario, I conclude defendants' affirmative notice defense fails.

The last issue to be decided on appeal is the extent of claimant's industrial disability.

"If an employee suffers both an injury to a scheduled member and also to part of the body not included in the schedule, then the resulting injury is compensated on the basis of an unscheduled injury." Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994) I therefore conclude claimant's injuries should be compensated as an injury to the body as a whole.

Because 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. Iowa Code § 85.34.

As discussed above, I found claimant sustained a 30 percent industrial disability. Thus, I concluded claimant is entitled to 150 weeks of permanent partial disability benefits. The deputy commissioner's determination that claimant sustained a 50 percent industrial disability is therefore modified.

## ORDER

IT IS THEREFORE ORDERED that the arbitration decision of August 30, 2017 is affirmed in part with additional findings, conclusions, and analysis, and modified in part.

Defendants shall pay one hundred fifty (150) weeks of permanent partial disability benefits at the rate of five hundred five and 55/100 dollars ($505.55) per week commencing on August 12, 2014.

Claimant is entitled to healing period benefits from November 5, 2014, through February 5, 2015.

Defendants shall pay accrued weekly benefits in a lump sum, together with interest from the date of this appeal decision, at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the October 21, 2015, date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

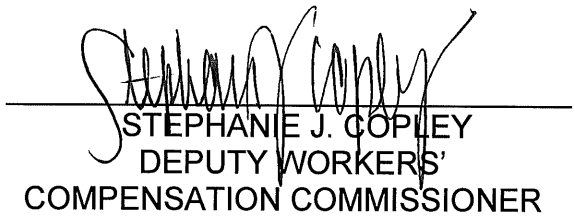
Defendants are entitled to a credit for benefits previously paid for the right shoulder and left carpal tunnel syndrome.

Defendants shall pay medical expenses and provide future medical care related to the right shoulder injury and left carpal tunnel syndrome.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

The parties shall split the cost of this appeal.

Signed and filed this 15th day of February, 2019.



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