BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GLORIA BOONE, Claimant, vs. LENNOX INDUSTRIES, INC., Employer, and INDEMNITY INSURANCE CO. OF N. AMERICA, Insurance Carrier, Defendants.	File No. 1653797.01 ARBITRATION DECISION Head Notes: 1108.50, 1402.40. 1803.1, 2907

STATEMENT OF THE CASE

Gloria Boone, claimant, filed a petition in arbitration seeking workers' compensation benefits from Lennox Industries, Inc., employer, and Indemnity Insurance Company, Inc., insurance carrier, as defendants. Hearing was held on October 13, 2020. This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the outbreak of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means using CourtCall. Accordingly, this case proceeded to a live video hearing via CourtCall with all parties and the court reporter also appearing remotely.

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.

Claimant, Gloria Boone was the only witness to testify live at trial. The evidentiary record also includes Joint Exhibits 1-6, Claimant's Exhibits 1-5, and Defendant's Exhibits A-D. All exhibits were received without objection. The evidentiary record closed at the conclusion of the arbitration hearing.

The parties submitted post-hearing briefs on November 2, 2020, at which time the case was fully submitted to the undersigned.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant's injury should be compensated as a "shoulder" under Iowa Code section 85.34(2)(n) or as an unscheduled injury pursuant to section 85.34(2)(v).

2. Assessment of costs.

FINDINGS OF FACT

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

Claimant, Gloria Boone, was 65 years old at the time of the hearing. She sustained an admitted injury on September 11, 2018, while working at Lennox Industries, Inc. Gloria began working in Marshalltown, Iowa at Lennox in 2001 and was still employed there at the time of the hearing.

In July of 2018, a tornado tore through Marshalltown. As a result of the tornado, the Lennox plant was damaged and the plant was closed for a period of time. When the employees were called back to work after the tornado, some employees were asked to perform jobs that were different from their regular jobs. (Testimony)

On September 11, 2018, Gloria was assigned to operate a motorized tugger to move materials around the plant. While Gloria was making a U-turn, Gloria fell off the tugger onto her right shoulder. Gloria could not move her right arm. (Testimony; JE1, p. 5)

Gloria's employer drove her to the local emergency room at UnityPoint Health where she was examined. X-rays revealed a displaced fracture involving the humeral neck and greater tuberosity. Gloria was discharged with a sling and with instructions to follow-up with an orthopedic doctor. She was restricted to no use of right arm. (JE1, p. 5; JE3)

On September 12, 2018, Gloria saw Steven A. Aviles, M.D. at Iowa Ortho. Dr. Aviles' assessment included closed displaced fracture of proximal end of right humerus. He felt Gloria would not do well with conservative care. Given the four-part fracture, he recommended, and Gloria agreed to, a hemiarthroplasty. (JE4, pp. 13-16)

On September 21, 2018, Dr. Aviles performed a right shoulder hemiarthroplasty and rotator cuff repair surgery. (JE5, p. 48) He removed the fractured humeral head and replaced it with a metal humeral head. (JE5, pp. 48-50)

Dr. Aviles issued a work status report. He restricted Gloria from work for 5 days after the surgery. Once she returned to work, Gloria was restricted to no use of her right upper extremity except typing and writing with her right hand. (JE4, p. 17)

Gloria returned to see Dr. Aviles on October 3, 2018. She reported the surgery improved her pain. Dr. Aviles noted that she had fairly dense postoperative radial nerve palsy. Gloria was to return in four weeks. In the meantime, she was restricted to no use of her right arm. (JE4, pp. 19-21)

Gloria continued to follow-up with Dr. Aviles. (JE4) On November 19, 2018, Dr. Aviles authored a missive. He opined that the September 11, 2018, injury caused the need for Gloria's operation. Dr. Aviles did not believe that there was any preexisting condition that could have affected the need for further treatment. He explained that Gloria had a fall that sustained a proximal humerus fracture that had displaced. He opined that the fall was the cause of her condition. (JE4, p. 24)

On January 21, 2019, Gloria returned to Iowa Ortho. At the request of UnityPoint she he saw Scott M. Shumway, M.D. Gloria reported that on January 16, 2019, she fell in her shower. She landed on her right hand and developed pain and swelling along the dorsal ulnar aspect of the hand. X-rays at UnityPoint revealed a nondisplaced fracture involving the shaft of the right 5th metacarpal. UnityPoint gave her a thumb spica splint and referred her to Dr. Shumway for further evaluation. Dr. Shumway placed her in a fiberglass ulnar gutter splint. (JE4, pp. 29-31)

On January 23, 2019, Gloria returned to see Dr. Aviles. She reported that her pain level was 0 and there was no radiation. She continued to be stiff. Dr. Aviles encouraged her to continue to work on her motion and strength. She was restricted to 0 (zero) pound lifting restriction given her broken hand. He also restricted her to no work above shoulder level. (JE4, pp. 32-34)

Dr. Aviles placed Gloria at maximum medical improvement (MMI) as of March 6, 2019. He utilized the Fifth Edition of the AMA Guides and assigned 8 percent impairment of the upper extremity. He noted that her restrictions included a 25-pound lifting restriction and that she should avoid work above shoulder level. He felt that she did not require any additional treatment. (JE4, p. 47)

On November 25, 2019, at the request of her attorney, Gloria was seen for an IME by Mark B. Kirkland, D.O. She reported weakness of her right upper extremity. She also complained of some popping in her neck and occasional neck pain. At the time of the IME she had recently had a stent placed so she had not been working. Dr. Kirkland's impressions included right shoulder 4-part head splitting fracture of the humeral head; rotator cuff tear; osteoarthritis of the right acromioclavicular joint; resolved radial nerve palsy on the right; and status post right shoulder hemiarthroplasty and rotator cuff repair. Dr. Kirkland felt that her right shoulder condition and radial nerve palsy were causally related to the September 11, 2018, injury at Lennox. He placed Gloria at MMI as of March 6, 2019. Dr. Kirkland utilized the 5th Edition of the AMA Guides to assign permanent impairment. He assigned 16 percent impairment to her right upper extremity secondary to range of motion loss and 24 percent to the right upper extremity secondary to implant. (Cl. Ex. 1, pp. 1-5)

On July 22, 2020, Dr. Aviles authored a missive to defendants. He stood by his prior 8 percent upper extremity permanent impairment rating. Additionally, Dr. Aviles stated:

> On September 21, 2018, I performed a right shoulder hemiarthroplasty and rotator cuff repair. My diagnosis left head splitting proximal humerus fracture and rotator cuff tear at the level of the humerus. The site of Ms. Boone's injury was at the level of the shoulder joint and distal on the arm side. There was no portion of the surgery that was proximal or medial to the shoulder joint on the neck side. There was no structural damage or injury that was proximal to the glenohumeral joint or on the neck side. In the hemiarthroplasty, I repaired Ms. Boone's humerus and rotator cuff at the level of the humerus. The surgery I performed was at the level of the shoulder joint and distal to it. There was no portion of the surgery that was proximal to the glenohumeral joint or on the neck side. The letter addresses how I disagreed with Dr. Kirkland's permanent impairment rating of 36% to the upper extremity. I provided an impairment rating of 8%, which I feel is accurate according to the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition. Furthermore, I also disagree with Dr. Kirkland's inclusion of a 24% impairment of the upper extremity as a result of implant arthroplasty. Table 16-27 of the AMA Guides provides a 24% upper extremity impairment rating for a total shoulder arthroplasty, which is a procedure that is used for a very different reason; this is not a procedure utilized for fracture. I performed a hemiarthroplasty for fracture, which has a very different impairment. Hemiarthroplasty is not total shoulder replacement. Total shoulder replacement incorporates replacement of the glenoid or socket side, as well as the humerus or the ball side. Hemiarthroplasty only performs surgery on the ball side, once again, at the level or distal to the glenohumeral joint. It should be noted that in other sections of Table 16-27, and specifically as it pertains to the wrist replacement, that they make allowments for other forms of arthroplasty. This is not seen in the shoulder replacement section, as it only accounts for a total shoulder arthroplasty.

(Def. Ex. A, p. 2)

On September 8, 2020, Dr. Kirkland issued a letter in reply to a rebuttal report from Dr. Aviles. Dr. Kirkland stated that he assigned a 24 percent rating based on Table 16-27 of the Guides. Dr. Kirkland felt that the rating was very reasonable based on the significant injury and treatment. Dr. Kirkland also noted that:

> The rotator cuff tendon is formed from supraspinatus, infraspinatus, and teres minor muscles. These tendons are inserted on the greater tuberosity. The tendons do not contract themselves. They need the contraction of the muscles. These muscles are proximal to the

> glenohumeral joint and thus converts to the whole body. This is described as the muscle tendon unit.

(Cl. Ex. 1, p. 6)

With regard to the right shoulder injury sustained by Gloria, I find the diagnosis of Dr. Aviles to carry great weight. He is the doctor who performed the surgery in this case and has the greatest personal knowledge of the exact extent of Gloria's physical injuries. I find that as the result of the work injury Gloria sustained a left head splitting proximal humerus fracture and rotator cuff tear at the level of the humerus. Based on the opinion of Dr. Aviles, I find that there was no portion of the surgery that was proximal to the glenohumeral joint. (Def. Ex. A, p. 2)

The parties have stipulated that Gloria sustained permanent disability as the result of the September 11, 2018, work injury. There is a dispute regarding the amount of permanent partial disability sustained by Gloria. Claimant contends that the 36 percent upper extremity impairment rating assigned by Dr. Kirkland is the more appropriate rating. Defendants argue that the 8 percent upper extremity impairment rating assigned by Dr. Aviles is the appropriate rating.

Dr. Aviles stated, "Based on the various motion restrictions as seen in Figure 16-40 and 16-46, I do feel that she requires a permanent impairment rating." (Def. Ex. A, p. 1) He assigned 8 percent upper extremity impairment. To arrive at this rating, Dr. Aviles utilized the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition. Id.

In November of 2019, Dr. Kirkland assigned 16 percent impairment to her right upper extremity secondary to range of motion loss. He stated that these impairment values were obtained from Figure 16-40, 16-43, and 16-46 of the AMA Guides 5th Edition. Dr. Kirkland assigned an additional 24 percent impairment to the right upper extremity secondary to implant arthroplasty. He obtained this rating from Table 16-27 of the Guides. He combined those two ratings for a total of 36 percent impairment of the right upper extremity. (Cl. Ex. 1, pp. 4-5)

In July of 2020, Dr. Aviles specifically stated that he disagreed with Dr. Kirkland's rating of 36 percent to the upper extremity. He disagreed with Dr. Kirkland's inclusion of 24 percent impairment of the upper extremity as the result of the implant arthroplasty. Dr. Kirkland utilized Table 16-27. Dr. Aviles states,

> Table 16-27 of the AMA Guides, provides a 24% upper extremity impairment rating for a total shoulder arthroplasty, which is a procedure that is used for a very different reason; this is not a procedure utilized for fracture. I performed a hemiarthroplasty for fracture, which has a very different impairment. Hemiarthroplasty is not total shoulder replacement. Total shoulder replacement incorporates replacement of the glenoid or socket side, as well as the humerus or the ball side. Hemiarthroplasty only performs surgery on the ball side, once again, at the level or distal to

> the glenohumeral joint. It should be noted that in other sections of Table 16-27, and specifically as it pertains to the wrist replacement, that they make allowments for other forms of arthroplasty. This is not seen in the shoulder replacement section, as it only accounts for a total shoulder arthroplasty.

(Def. Ex. A, p. 2)

In September of 2020, Dr. Kirkland stood by his prior impairment rating. In support of his impairment rating Dr. Kirkland stated, "This impairment rating is very reasonable based on the significant injury and treatment." (Cl. Ex. 1, p. 6).

I find that Dr. Aviles' explanation for why he disagrees with the rating of Dr. Kirkland is based on the AMA Guides. When Dr. Kirkland was given the opportunity to rebut Dr. Aviles' criticism of his rating, Dr. Kirkland replied by stating he felt his rating was very reasonable given her significant injury and treatment. (Cl. Ex. 1, p. 6) However, Dr. Kirkland did not support his feeling that his rating was reasonable with any rebutting rationale or citation to the AMA Guides. Thus, I find that Dr. Aviles' rating was determined by utilizing The Guides and is the appropriate rating in this case. I find Gloria has sustained 8 percent impairment of the right upper extremity.

Claimant is seeking an assessment of costs. Costs are to be assessed at the discretion of the hearing deputy or the Commissioner. I find that claimant was generally not successful in her case. Therefore, I exercise my discretion to not assess costs against the defendants. Each side shall bear their own costs.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3)(e).

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).

The parties have stipulated that Ms. Boone sustained a work injury on September 11, 2018, which resulted in permanent disability. The central dispute in this case is whether her injury should be compensated as a "shoulder" injury under Iowa Code section 85.34(2)(n) or as an unscheduled injury under section 85.34(v).

Claimant's post-hearing brief states: "[w]hile the Commissioner's recent decision in Chavez and Deng (File Nos. 5066270 and 5061883) may cast doubt on Gloria's contention that her shoulder injury is a body as a whole injury, there should be no question that Gloria's impairment to her right shoulder exceeds the minimal 8% rating assigned by Dr. Aviles. . ." (Claimant's Brief, p. 4) Thus, claimant's argument centers on which impairment rating should be used to compensate the claimant. Defendants argue that according to the Deng decision, claimant's injury should be compensated as a "shoulder" under 85.34(n). Thus, it appears the parties agree that Deng is controlling in this case.

In 2017 the Iowa Legislature amended Iowa Code section 85.34. Before the 2017 changes, shoulder injuries were considered proximal to the arm and compensated as a body as a whole injury, pursuant to Iowa Code section 85.34(2)(u). Thus, a shoulder injury was compensated as an unscheduled injury, and based on industrial disability. See Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161(1949). One of the changes made to Iowa Code section 85.34 in 2017, dealt with the shoulder. Through the change, the legislature added the shoulder to the list of scheduled members. Iowa Code section 85.34(2)(n) states: "[f]or the loss of a shoulder, weekly compensation during four hundred weeks." Iowa Code section 85.34(2)(n)(2018). This amendment went into effect on July 1, 2018. It should be noted that the legislature did not define the term "shoulder."

The Iowa Supreme Court has said that this agency does not have the authority to interpret worker's compensation statutes. See Ramirez-Trujillo v. Quality Egg, LLC, 878 N.W.2d 759, 770 (Iowa 2016). However, the agency is the front-line in interpreting recently amended statutes. The Iowa Workers' Compensation Commissioner has issued several decisions regarding the amended Iowa Code section 85.34(2)(n) which provide agency precedent for the shoulder amendment. See Deng v. Farmland Foods, Inc., File No. 5061883 (App. September 29, 2020); Chavez v. MS Technology, LLC, File No. 5066270 (App. September 30, 2020); Smidt v. JKB Restaurants, LC, File No. 5067766 (App. December 11, 2020).

The commissioner determined that under Iowa Code section 85.34(n), the "shoulder" is not limited to the glenohumeral joint. The commissioner also determined that the muscles that make up the rotator cuff are considered part of the "shoulder."

Deng v. Farmland Foods, Inc., File No. 5061883 (App. September. 29, 2020). The commissioner stated:

> Given the entwinement of the glenohumeral joint and the muscles that make up the rotator cuff, including the infraspinatus, and the importance of the rotator cuff to the function of the joint, I find the muscles that make up the rotator cuff are included within the definition of 'shoulder' under section 85.34(2)(n).

Deng at 11.

Based on the above findings of fact, I conclude that as the result of the September 11, 2018, work injury, Gloria sustained a left head-splitting proximal humerus fracture and rotator cuff tear at the level of the humerus to her right shoulder. Thus, I conclude, according to agency precedent, Gloria's injury is to be compensated pursuant to Iowa Code section 85.34(n).

As noted, section 85.34(n) provides that permanent partial disability benefits for injuries to the shoulder are based on a percentage of four hundred weeks. Iowa Code section 85.34(2)(x) states:

> In all cases of permanent partial disability described in paragraphs "a" through "u" . . . the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the worker's compensation commissioner by rule pursuant to chapter 17A.

Iowa Code section 85.34(2)(x)(2018).

Based on the above findings of fact, I conclude that Dr. Aviles arrived at his impairment rating by utilizing The Guides and is the appropriate rating in this case. I adopt the impairment rating as set forth by Dr. Aviles. Thus, I find Gloria has sustained 8 percent impairment to her right upper extremity.

Permanent partial disability compensation for the shoulder shall be paid based on a maximum of 400 weeks. Iowa Code section 85.34(2)(n). Having adopted Dr. Aviles' 8 percent upper extremity impairment rating, I find claimant has shown by a preponderance of the evidence that she is entitled to receive 32 weeks of PPD benefits.

ORDER

THEREFORE, IT IS ORDERED:

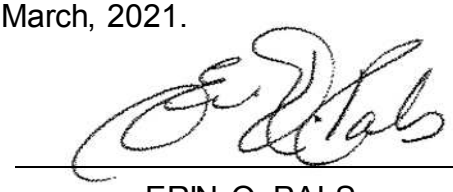
All weekly benefits shall be paid at the stipulated rate of six hundred fifty and 27/100 dollars ($650.27).

Defendants are responsible for 32 weeks of permanent partial disability benefits.

Defendants shall be entitled to credit for all weekly benefits paid to date. In the hearing report the parties stipulated that prior to the hearing defendants paid 32 weeks of compensation at the stipulated rate. Thus, defendants do not owe any additional PPD benefits as the result of this proceeding. Claimant shall take nothing further from this proceeding.

Defendant 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 ___4th____ day of March, 2021.



ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James Ballard (via WCES)

Gregory Michael Taylor (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.