BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JACOB FOLEY, Claimant, vs. JOHN DEERE DUBUQUE WORKS, Employer, Self-Insured, Defendant.	:	File No. 19006619.02 ARBITRATION DECISION Head Note Nos.: 1108

STATEMENT OF THE CASE

The claimant, Jacob Foley, filed a petition for arbitration and seeks workers' compensation benefits from John Deere Dubuque Works, a self-insured employer. The claimant was represented by Mark Sullivan. The defendant was represented by Dirk Hammel.

The matter came on for hearing on August 8, 2022, before deputy workers' compensation commissioner Joe Walsh via Zoom videoconferencing. The record in the case is quite voluminous and consists of joint exhibits 1 through 8; claimant's exhibits 1 through 9; and defense exhibits A through D. The claimant testified under oath at hearing. Buffy Nelson served as court reporter for the proceedings. The matter was fully submitted on October 7, 2022, after helpful briefing by the parties.

ISSUES

The parties submitted the following stipulations and issues for determination:

The parties have stipulated that Mr. Foley sustained an injury which arose out of and in the course of his employment on June 24, 2019. There are, however, numerous disputes regarding the nature and extent of this injury. Deere has only stipulated that he sustained an injury to his elbow. To that end, while Deere admits the injury itself, Deere denies that there was any injury to his shoulder and further denies the causal relationship of his admitted injury to any temporary or permanent disability in his shoulder. Deere does concede there was both temporary and permanent disability in his elbow/arm. If it is found that the disability does extend into the shoulder, there is an issue as to whether the disability is industrial or scheduled.

The parties have stipulated to all of the elements comprising the rate of compensation and have submitted a rate of $690.86 per week. There is no dispute regarding past medical expenses and the parties have stipulated to the benefits paid by

Deere. Claimant does seek future medical treatment for his shoulder. Affirmative defenses have been waived with the exception of notice. Defendant has raised a notice defense regarding the shoulder portion of the claim.

The defendant does not contest claimant's IME, however, defendant has paid half of the IME bill since a portion of the IME was spent dealing with claimant's denied shoulder claim. Defendant contends that the other half of the IME is not compensable.

FINDINGS OF FACT

Claimant Jacob Foley was 40 years old as of the date of hearing. He testified live and under oath at hearing. I find him to be generally credible. The defendant challenges Mr. Foley's credibility, suggesting he made false accusations against his treating physician. It is true that Mr. Foley's testimony regarding his treating physician was not favorable. He clearly did not have a good relationship with the physician. On the broader question of his actual credibility, however, his testimony is credible. His testimony generally matches up with other portions of the record including the contemporaneous medical documentation. There was nothing about his demeanor which caused me any concern for his truthfulness.

Mr. Foley graduated from high school in 2000 and testified he was an average student. In general, he appears bright and has good communication skills. He has worked in construction, office furniture sales and assembly before starting at Deere in approximately January 2011. Since starting at John Deere Dubuque Works he has worked primarily in assembly. Mr. Foley was also able to perform some apartment building maintenance work on the side while working for Deere where he earned about $12.00 per hour (for 10 to 15 hours per week) performing side work. Since this work injury, he has been elected to a position for the union with the shop committee.

In June 2019, Mr. Foley sustained an injury which arose out of and in the course of his employment. (Hearing Report, paragraph 2) Mr. Foley testified that he was on a job in the crawler assembly area which required him to use a sledgehammer. (Transcript, page 19; Claimant's Exhibit 5) He was required to pound pins into a crossbar. He described the work activity as labor intensive and physically challenging. (Tr., pp. 20-21) He testified that he transferred out of this position some time before June 24, 2019. (Tr., p. 23) He moved just a short distance down on the line. The person who replaced him, however, was unable to perform the job. On June 24, 2019, Mr. Foley returned to perform the sledgehammer function of the job. While performing using the sledgehammer, he sustained the injury. "And just one certain hit just - - it shot from my fingers up to my neck, and I couldn't - - I dropped the sledgehammer." (Tr., p. 27) Again, this is not really in dispute as the defendant has stipulated to the injury itself. The fighting issue in the case is whether this disability caused by this injury extended in any way into his right shoulder.

Mr. Foley reported this incident immediately and it is well-documented in Deere's health notes. (Jt. Ex. 1, pp. 1-2) He initially saw a chiropractor and had treatment for a couple of weeks. (Jt. Ex. 2) He also had some physical therapy. At that time, he was

complaining primarily of right elbow pain. He then had an MRI of the right elbow in July 2019. (Jt. Ex. 3) On August 14, 2019, he saw Robert Bartelt, M.D., at Cedar Valley Orthopedics. (Jt. Ex. 5, p. 165) Dr. Bartelt reviewed the MRI, noting mild degenerative changes with bone spurs and possibly a "loose body." An injection was performed on this date. Thereafter, Mr. Foley continued to follow up with Cedar Valley Orthopedics. In October, Todd Johnston, M.D., became his physician. Mr. Foley testified he was treated poorly by Dr. Johnston. (Tr. ,pp. 36, 44-45, 85-86) The incident itself, however, was reported consistently to Dr. Johnston who diagnosed right tennis elbow. (Cl. Ex. 5, p. 170) Dr. Johnston recommended surgery which was performed on November 26, 2019. (Jt. Ex. 6, p. 194) Mr. Foley testified his right arm was immobilized following the surgery which is verified in the physical therapy records. He did not like the sling.

The surgery was not particularly successful in resolving Mr. Foley's symptoms. He underwent more physical therapy. Mr. Foley testified that during physical therapy he began to have symptoms in his right shoulder from doing particular exercises. (Tr., pp. 31-32) He returned to Dr. Johnston in January 2020, with essentially the same symptoms. (Jt. Ex. 5, p. 176) Dr. Johnston maintained his restrictions (no gripping pulling or pushing more than 15 pounds) and ordered more therapy. In spite of this, the plant nurse kept Mr. Foley on half days and no lifting at all.

Mr. Foley continued in physical therapy and followed up with Dr. Johnston throughout most of 2020. His physical therapy was discontinued for a period of time due to the Covid-19 pandemic, as well as for a break recommended by Dr. Johnston. On March 11, 2020, claimant's counsel wrote a letter of representation to Deere's legal counsel indicating that Mr. Foley was also suffering from a right shoulder sequela. (Def. Ex. B, p. 4) The first medical record I can locate in the file which references right shoulder symptoms is in the Deere Health notes on May 20, 2020. The following is documented therein:

> The John Deere attorney had received a letter from the patient's attorney dated 11 March 20 stating that the employee was having symptoms in the right shoulder he believes related to physical therapy. Today I questioned Jacob about this and he said that he thinks it was some time back in February he was given a resistance band to use at home by the occupational therapist to help strengthen the elbow and after pulling on that repeatedly he started getting some right shoulder pain. He says he told Scott the occupational therapist about this and he says Scott told him to stop using it and within a few days the right shoulder pain had resolved and has not recurred.

(Jt. Ex. 1, p. 24) Mr. Foley testified consistently with this. He testified that he began to have right shoulder pain while in physical therapy in early 2020 and those symptoms subsided when he stopped performing the band therapy. He also testified he had a break from therapy.

On June 18, 2020, Dr. Johnston explained to Mr. Foley that he believes "there is something broader going on with his elbow, explained that he is having triceps and

anconeous pain. I believe the triceps is due to scar tissue and portal holes, I believe that will soften and loosen up with time." (Jt. Ex. 5, p. 184) He recommended casting the arm and providing even more significant restrictions stating that if this treatment did not work further surgery may be needed to address the ongoing symptoms. (Id.) The cast was placed on his arm on that date. Mr. Foley did not like the cast and complained to Deere Health. The cast was quickly removed and when he returned to Dr. Johnston, he was released without restrictions. "Explained that his elbow may have a few flare ups, but I do not anticipate any further treatment for this issue." (Jt. Ex. 5, p. 191)

Mr. Foley reported to Deere Medical the following day. The following is documented:

> He states Dr. Johnson [sic] released him from his care and said that he was as good as he was going to get his maximum medical improvement. That he could do nothing more for him. Told him to go back to his normal job without restrictions. Jacob states he would like to go back to OT. He reports that his right elbow pain is unchanged it hurts with active grasping and pinching motions at certain times causing a pain rated 6 to 7/10 on a pain scale of 0 to 10. He states the pain will last for a few minutes after he stops the activity for a few minutes but quickly resolves. EE reports that he would like to see if you get more range of motion and better strength as it is not been able to complete his OT. He reports no problems with his job as shop committee person and he denies having difficulty with restrictions of 15 pounds.

(Jt. Ex. 1, p. 35) According to the records, he started therapy again and it was somewhat helpful. (Jt. Ex. 1, p. 36; Tr., p. 46)

Therapy continued. He had physical therapy with both Finley Westmark and Dubuque Physical Therapy. In August 2020, records document that Mr. Foley began complaining about right shoulder pain in therapy. (Jt. Ex. 4, pp. 105-107) In September 2020, the following is documented. "He states he feels he still has a big knot in his R anterior shoulder and elbow." (Jt. Ex. 7, p. 197) Anterior right shoulder pain was documented as being constant. Over the next several weeks throughout October 2020, right shoulder pain and symptoms were regularly documented at the therapy visits. (Jt. Ex. 7, pp. 206-221)

On October 7, 2020, Dr. Johnston prepared a report which assigned a 4 percent impairment rating for Mr. Foley's right upper extremity and recited further opinions from his June 2020 report. (Jt. Ex. 5, pp. 192-193)

Deere filled out an "Incident Investigation Form" in January 2021. While the form is dated "January 7, 2020", I find that this is most likely a typographical error. The following is documented on this form:

> 6/24/19 the employee injured his right elbow while performing repetitive work in D144 production crawler using the tie band cutter, gripping and

> turning the hose fittings, and using a sledgehammer. Since this injury the employee stated he was on restrictions and then had surgery, so he had not performed any production type work. In July of 2020, the employee was elected into the shop committee role where he follows up on employee concerns, grievances, and performs office work

(Def. Ex. A, p. 1) In this report, Deere further documented that Mr. Foley "stated the shoulder pain is because of the injury in 2019 to his elbow." (Def. Ex. A) On January 21, 2021, Deere's legal counsel wrote a denial letter. "Mr. Foley was interviewed by the Safety Department on January 7, 2021, and stated there is nothing in his current job that caused his shoulder pain." (Def. Ex. C, p. 5)

Mr. Foley returned to Deere Medical in September 2021 indicating he was having difficulty with his left elbow and requesting further treatment. (Jt. Ex. 1, p. 47) He started treating again with Dubuque Physical Therapy. (Jt. Ex. 7, pp. 222-223) Mr. Foley continued to undergo significant amounts of physical therapy. Deere was paying for this treatment, including the shoulder treatment and then stopped, notifying the claimant that the shoulder portion of the claim had been denied. (Cl. Ex. 3, pp. 15-18) In addition, he was evaluated by Joseph Buckwalter, M.D., at University of Iowa Hospitals and Clinics on September 27, 2021. Dr. Buckwalter referred him to the tendinopathy clinic where he was given a diagnostic injection in November 2021. He was seen again by Dr. Buckwalter in February 2022. Dr. Buckwalter opined the following. "The etiology of his pain may be multifactorial with lateral epicondylitis and soft tissue scarring, …" (Jt. Ex. 8, p. 326) He recommended further physical therapy.

Mr. Foley underwent extensive further therapy and complaints of right shoulder pain persisted in the therapy notes all the way through May 2022. (Jt. Ex. 7, pp. 241-291)

In June 2022, Dr. Buckwalter examined Mr. Foley again and ordered an EMG/NCS, which had not been performed prior to hearing.

In June 2022, claimant was also evaluated again by Robin Sassman, M.D., for purposes of an independent medical examination (IME). Dr. Sassman reviewed medical records and examined Mr. Foley on two occasions. (Cl. Ex. 4, pp. 21-22) Dr. Sassman took a clinical history and performed a thorough physical examination in June 2022. (Cl. Ex. 4, pp. 29-31) On July 3, 2022, she prepared a report setting forth a number of expert medical opinions. She diagnosed the following:

1. Right elbow pain and right lateral epicondylitis status post a right elbow arthroscopy posterior lateral plica excision, open tennis elbow release on 11/26/2019 by Todd Johnston, MD, with continued symptoms of pain over the lateral condyle and in the distribution of the radial nerve.
2. Right shoulder pain with concern of impingement syndrome and bicipital tendonitis.

(Cl. Ex. 4, p. 32) She opined that these conditions were caused by the original injury on June 24, 2019. (Cl. Ex. 4, p. 32) She opined that he is not at maximum medical improvement for his shoulder condition and requires further medical evaluation. (Cl. Ex. 4, pp. 34-35) I find Dr. Sassman's medical opinions to be the most accurate and credible assessment of Mr. Foley's conditions at the time of hearing.

Mr. Foley testified that he continues to experience significant symptoms in both his right elbow and right shoulder at the time of hearing.

CONCLUSIONS OF LAW

The first question submitted is notice.

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. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (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).

The greater weight of evidence supports a finding that the claimant provided notice of his work injury on the same date the injury occurred.

Under the plain language of the statute, an injured worker need only to provide notice that an injury occurred, not which body parts were affected.

The next issue is whether the claimant sustained any temporary or permanent disability as a result of the stipulated work injury, and, if so, which body parts were injured.

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).

Having reviewed the evidence in the record, I find that the claimant sustained an injury to his left upper extremity on June 24, 2019, which extended from his right shoulder to his hand. His symptoms were initially primarily located in his right elbow and hand which led to a right elbow surgery in November 2019. As his treatment progressed, however, he developed symptoms in his right shoulder as well. I find that all of the treatment set forth in Claimant's Exhibit 1, is causally related to the work injury. This is based upon the claimant's credible testimony, the contemporaneous treatment notes from the physical therapists and Deere medical staff, as well as the expert medical opinion of Dr. Sassman.

Deere has focused intensely on the fact that Mr. Foley did not start complaining of consistent right shoulder pain until long after the original injury. When he started complaining of consistent right shoulder pain, Deere conducted a new investigation, as though his complaints were unrelated to his original injury. (Def. Ex. A) At the time of hearing, this approach appears quite cynical. Mr. Foley was clearly communicating that he believed his shoulder pain was related to his June 2019, work injury. Deere, however, did not seek any medical opinions or otherwise investigate whether his original injury somehow resulted in the condition in his right shoulder. I find Dr. Sassman's medical opinion to be more credible than the evidence submitted by Deere on this point, which is none. Based upon the record of evidence before the agency, I find it more likely than not that the claimant's work injury resulted in the condition and symptoms in his right shoulder.

The next issue is whether claimant is at maximum medical improvement for his conditions.

The imposition of a rating of permanent impairment is equivalent to an opinion that further significant improvement from the injury is not expected. Absent a showing that further improvement was expected, healing period ends when a permanent rating is given. Brown v. Weitz Company, File No. 830840 (App. March 13, 1990); Miller v. Halletts Materials, File No. 861983 (App. November 23, 1992). The persistence of pain does not prevent a finding that the healing period is over, provided the underlying condition is stable. Pitzer v. Rowley Interstate, 507 N.W.2d 389 (Iowa 1993). Medical

stability is viewed in terms of industrial disability; if it is unlikely that further treatment of pain will decrease the extent of permanent industrial disability, continued pain management will not prolong healing period. Id. at 392. Specifically, when a condition is stable medically further treatment "may extend the length of the healing period if a substantial change in industrial disability is also expected to result." Id. at 391. On the other hand, if the continued treatment is merely expected to assist with the symptoms rather than "decrease the extent of permanent disability" then the healing period should end. Id.

When an injury occurs in the course of employment, the employer is liable for all of the consequences that "naturally and proximately flow from the accident." Iowa Workers' Compensation Law and Practice, Lawyer and Higgs, section 4-4. The Supreme Court has stated the following. "If the employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury, such further disability is compensable." Oldham v. Scofield & Welch, 222 Iowa 764, 767, 266 N.W. 480, 481 (1936). The Oldham Court opined that a claimant must present sufficient evidence that the disability was naturally and proximately related to the original work injury.

In this case, the greater weight of evidence supports a finding that claimant has not reached maximum medical improvement. I reject the impairment rating of Dr. Johnston. On June 18, 2020, Dr. Johnston explained to Mr. Foley that he believed "there is something broader going on with his elbow, explained that he is having triceps and anconeous pain. I believe the triceps is due to scar tissue and portal holes, I believe that will soften and loosen up with time." (Jt. Ex. 5, p. 184) He recommended casting the arm and providing even more significant restrictions stating that if this treatment did not work further surgery may be needed to address the ongoing symptoms. (Id.) The cast was placed on his arm on that date. After Mr. Foley complained to Deere Health about this treatment, Dr. Johnston suddenly, and without much explanation, changed his medical opinion. He opined that Mr. Foley was at maximum medical improvement and no further treatment was required. Simply stated, this is not a believable or credible MMI opinion. Since then, Mr. Foley has gone on and received additional treatment on the elbow, both in physical therapy, as well as through Dr. Buckwalter. At the time of hearing, he had just had an EMG/NCV, the results of which were not available at the time of hearing. Dr. Sassman has opined that he is not at maximum medical improvement. The greater weight of evidence supports a finding that claimant is not at maximum medical improvement for any part of his right upper extremity or shoulder.

The claimant is seeking further treatment for both his right elbow and right shoulder and has listed alternate medical care as an issue for determination.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred

for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code section 85.27 (2013).

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Id. The employer's obligation turns on the question of reasonable necessity, not desirability. Id.; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983).

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

An employer's statutory right is to select the providers of care and the employer may consider cost and other pertinent factors when exercising its choice. Long, at 124. An employer (typically) is not a licensed health care provider and does not possess medical expertise. Accordingly, an employer does not have the right to control the methods the providers choose to evaluate, diagnose and treat the injured employee. An employer is not entitled to control a licensed health care provider's exercise of professional judgment. Assmann v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 18, 1988). An employer's failure to follow recommendations of an authorized physician in matters of treatment is commonly a failure to provide reasonable treatment. Boggs v. Cargill, Inc., File No. 1050396 (Alt. Care January 31, 1994).

The defendants have not offered any specific medical treatment for claimant's right shoulder condition even though they have paid for a significant portion of this treatment. Having found that the right shoulder condition is causally related to the June 2019, work injury, I find that the defendant is responsible for treatment for this condition.

The next issue is whether claimant is entitled to an IME.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991).

Having found that the shoulder condition is causally connected to the work injury, I find that claimant is entitled to full reimbursement for Dr. Sassman's IME.

The issue of permanency is not ripe for determination at this time.

ORDER

THEREFORE IT IS ORDERED

Claimant is not at maximum medical improvement for his June 24, 2019, work injury.

Defendant shall pay reimburse medical expenses set forth in Claimant's Exhibit 1.

Defendant shall authorize treatment for claimant's right shoulder injury with Dr. Buckwalter.

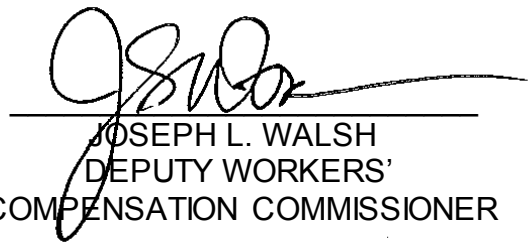
Defendant shall reimburse claimant for Dr. Sassman's IME as documented in Claimant's Exhibit 8, page 44.

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

Costs are taxed to defendant.

Claimant may file a new petition when the bifurcated issue of permanency is ripe.

Signed and filed this _7th_ day of February, 2023.



JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Mark Sullivan (via WCES)

Dirk Hamel (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.