BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

VELENE K. MERRICK,

Claimant,

vs.

CRESTRIDGE, INC.,

Employer,

and

IOWA LONG TERM CARE RISK MANAGEMENT ASSOCIATION,

Insurance Carrier,
Defendants.

File No. 5041869

ARBITRATION DECISION

Head Note Nos.: 1108; 1400; 1402; 1800; 1801; 1803

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Velene K. Merrick, filed her original notice and petition with the Iowa Division of Workers' Compensation. She alleged she sustained a work-related injury to her right shoulder and to her body as a whole when she was transferring a resident. Claimant alleged the injury occurred on June 30, 2011. (Original notice and petition) A single petition was filed on May 20, 2013.

Defendant-employer is insured for purposes of workers' compensation by Iowa Long Term Care Risk Management Association. Defendants filed their answer on June 4, 2013. Defendants admitted the mechanism of injury, but denied all remaining allegations. A first report of injury was filed on December 5, 2012.

The hearing administrator scheduled the hearing for May 28, 2014 in Davenport, Iowa at the Kahl Building. The undersigned appointed Ms. Konni Stapf as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified at her hearing. The other witnesses who testified were: Jack Brian Hulsebus, L.P.N., Clifton Galloway, and Harold McElderry.

The parties offered joint exhibits marked 1 through 31. All joint exhibits were admitted. The parties filed post-hearing briefs. The case was deemed fully submitted on June 30, 2014.

From September 9, 2014 through February 15, 2015, the undersigned was unavailable to hear and write arbitration decisions as she had been appointed by Governor Branstad as Acting Workers' Compensation Commissioner. Those duties have now concluded, and the undersigned is readily available to decide this case.

STIPULATIONS

The parties readily agreed:

1. There was the existence of an employer-employee relationship at the time of the alleged injury;

2. Claimant sustained an injury on June 30, 2011, which arose out of and in the course of her employment;

3. The injury was a cause of temporary disability during a period of recovery;

4. Temporary or healing period benefits are no longer in dispute;

5. If claimant is entitled to permanent disability, the type of disability is an industrial disability;

6. Defendants have waived all affirmative defenses they may have had available; and

7. The parties are able to agree to the costs involved in litigating the contested case.

ISSUES

The parties contend the issues are:

1. Whether claimant's injury is a cause of permanent disability;

2. Whether claimant is entitled to a running award; and if not, the commencement date for any permanent partial disability benefits;

3. The proper weekly benefit rate to use to calculate claimant's benefits, if any;

4. Whether claimant is entitled to alternate medical care pursuant to Iowa Code section 85.27; and

5. Whether estoppel applies in this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This deputy, after listening to the testimony of claimant, and the other three witnesses during the arbitration hearing, and after reading the evidence and the post-hearing briefs, makes the following findings of fact and 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).

Claimant is single and 24 years old. At the time of her work related injury to her right shoulder, claimant was employed as a certified nursing assistant (CNA). The injury was reported immediately.

On the same date as the work injury, Jerald Bybee, M.D., examined claimant. Dr. Bybee diagnosed claimant with "Impingement syndrome R shoulder." The physician recommended limited activity, that claimant use ice on the area of pain and the doctor prescribed Mobic for pain. (Exhibit 2, pages 1-2) Dr. Bybee opined claimant was fit for modified duty effective June 30, 2011. (Ex. 2, p. 2)

Claimant returned to Dr. Bybee on July 7, 2011. (Ex. 2, p. 3) The physical examination revealed no deformity. (Ex. 2, p. 3) Dr. Bybee indicated in his clinical notes:

> She reports she has the shoulder dislocated in the past and her mom thinks her R clavicle sticks out more than the L. She holds herself in a certain way at night. I find no tenderness along the clavicle. Minimal discomfort at the AC joint and especially on the trapezius laterally above the shoulder.

(Ex. 2, p. 3)

X-rays were taken on the same date. (Ex. 3, p. 1) Michael F. Macke, M.D., interpreted the results as: "There is no evidence of fracture or dislocation. No arthritic change." (Ex. 3, p. 1)

One week later, claimant informed Dr. Bybee, it was not the right shoulder that was dislocated on an earlier occasion, but her left shoulder. (Ex. 2, p. 3) Once again, Dr. Bybee conducted a physical examination of the right shoulder. He found "tenderness now that is right at the right AC joint." (Ex. 2, p. 3) Also, Dr. Bybee noted claimant's right clavicle was more prominent than the left one. (Ex. 2, p. 3) The authorized treating physician diagnosed claimant with "Right AC joint strain." (Ex. 2, p. 3)

Claimant was continued on light duty work. She was not to lift more than five pounds with her right arm. (Ex. 2, p. 6) Relafen was prescribed for discomfort. (Ex. 2, p. 3) The employer provided light duty options for claimant to perform in the workplace. (Ex. 2, p. 6)

On July 22, 2011, claimant had a follow-up appointment with Dr. Bybee. (Ex. 2, p. 7) Claimant reported some improvement, but not total resolution. (Ex. 2, p. 7) On August 2, 2011, claimant complained of continued pain in the right shoulder when she visited with Dr. Bybee. (Ex. 2, p. 9) The authorized treating physician found minimal limitation in claimant's right shoulder range of motion. (Ex. 2, p. 9) Dr. Bybee recommended an orthopedic referral. (Ex. 2, p. 9) Claimant remained on light duty work. (Ex. 2, p. 11)

On August 10, 2011, Dr. Bybee noted "vague tenderness about the R shoulder," when he examined claimant. (Ex. 2, p. 12) The doctor was "not clear what the pathology is." (Ex. 2, p. 12) Claimant remained on light duty with no lifting greater than five pounds. (Ex. 2, p. 13)

On August 17, 2011, Suleman Hussain, M.D., an orthopedic surgeon, who was selected by defendants, examined claimant for "Right shoulder discomfort." (Ex. 4, p. 1) Dr. Hussain conducted a physical examination of claimant's right shoulder. The orthopedist found:

> Examination of bilateral upper extremities reveal no ecchymosis, bruising, lymphadentis. No masses are present. She has a negative Spurling sign in either direction. She has palpable radical pulses. Median, ulnar, radial, and axillary nerves are motor and sensory intact. She has restricted range of motion today with discomfort and pain in her right shoulder. Forward elevation is 130 degrees, internal rotation to the lumbosacral spine, external rotation of 15 degrees, compared to normal range of motion of her left shoulder. She does have some slight weakness with Jobe's testing today. Neer's and Hawkins signs are positive secondary to discomfort and restricted range of motion. Labral pathology is difficult to assess today given her discomfort and her limited range of motion. She is sore over her acromioclavicular joint and moderately sore over the biceps tendon and anterior shoulder capsule.

(Ex. 4, p. 1)

Dr. Hussain diagnosed claimant with:

> **IMPRESSION: She likely had an injury that has caused capsulitis and now she has a frozen shoulder as her main presenting complaint. There could be an underlying component of acromioclavicular joint discomfort or labral pathology, but that is**

> **difficult to ascertain right now given that capsulitis is her most gross abnormality.**

(Ex. 4, pp. 1-2)

Dr. Hussain prescribed physical therapy and continued claimant on light duty. Claimant was restricted to using the left arm only while at work. The orthopedist injected claimant's right shoulder with 20 mg of Kenalog. (Ex. 4, p. 2)

On September 14, 2011, claimant reported to Dr. Hussain the insurance carrier would not authorize physical therapy. (Ex. 4, p. 5) Nevertheless, claimant acknowledged she had improved by 50 percent just by her own rehabilitation. (Ex. 4, p. 5) Dr. Hussain diagnosed claimant with:

> **ASSESSMENT: A patient with likely underlying shoulder bursitis which presented like a frozen shoulder, but probably the base of her problems is that she overall has multidirectional instability that probably got flared.**

(Ex. 4, p. 5) Once again, Dr. Hussain recommended physical therapy for claimant.

On November 4, 2011, claimant returned to Dr. Hussain after undergoing injection therapy and physical therapy. (Ex. 4, p. 7) The orthopedist indicated in his clinical notes for the same date:

> Ms. Merrick comes in today for a right shoulder examination. She reports she is doing really well after injection therapy and physical therapy course. She is getting back pain-free range of motion and has regained motion quite significantly. She has some mild discomfort in her biceps tendon but is overall improving accordingly. She reports minimal discomfort, no evidence of recent trauma. She would like to go back to work in terms of full duty.

(Ex. 4, p. 7) The doctor determined claimant was at maximum medical improvement; she could return to full duty work, but she could not lift more than 50 pounds for a 1 month period. (Ex. 4, p. 8)

Dr. Hussain issued a permanent impairment rating for claimant on April 24, 2012. The doctor wrote in his report:

> I initially saw Ms. Merrick on August 17, 2011, and I have last seen her on November 4, 2011. During that time frame, Ms. Merrick had an x-ray which revealed no evidence of bony abnormality. As of her last visit on November 4, 2011, she had full range of motion and was wanting to go back to work full duty. Based on my evaluation and Ms. Merrick's full range of motion and lack of significant strength deficiency in her extremity,

> based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Ms. Merrick actually does not warrant permanent impairment rating as she has not suffered a permanent functional impairment. Therefore, I would give her a value of 0% in terms of impairment rating for her whole body.

(Ex. 4, p. 9)

Claimant exercised her right to an independent medical examination pursuant to Iowa Code section 85.39. Richard L. Kreiter, M.D., examined claimant on July 20, 2012. The orthopedist diagnosed claimant with a right shoulder condition that was causally connected to claimant's work injury. Dr. Kreiter opined claimant had:

1. Anterior shoulder instability with possible labral tear. There was little belief claimant suffered from a right rotator cuff tear. However, the doctor opined claimant had subacromial bursitis and tendonitis.

2. Claimant had synovitis of the right sternoclavicular joint. And

3. Claimant suffered from dorsal or thoracic back pain with myositis and tension headaches.

(Ex. 1, p. 1)

Dr. Kreiter opined claimant was not at maximum medical improvement. The orthopedist recommended additional medical treatment for claimant such as an MRI arthrogram. (Ex. 1, p. 1)

Even though claimant was not at maximum medical improvement, Dr. Kreiter provided a permanent impairment rating. Dr. Kreiter wrote in his report:

> With respect to the right shoulder condition, connected to the 06/30/11 injury, looking at page 476 and 477, figure 16-40 and 16-43, a flexion of 120 degrees equals 4% upper extremity impairment. Abduction to 100 degrees equals 4% upper extremity impairment. External rotation to 45 degrees on page 479, figure 16-46 equals 1% upper extremity impairment. The instability from page 505, table 16-26, upper extremity impairment due to symptomatic instability patterns with subluxing humeral head equals a 12% upper extremity impairment. A 21% upper extremity impairment equals a 13% whole person impairment from page 439.

(Ex. 1, p. 1)

Dr. Kreiter imposed permanent work restrictions of no overhead work. He determined pulling, pushing and polishing with the right arm should be limited or avoided. The evaluating physician suggested working at bench level with no lifting

greater than 30 or 35 pounds from the floor to bench level. Also the doctor restricted claimant from lifting with the arm extended outward as there would be too much force and stress on the right shoulder. (Ex. 1, p. 1)

Claimant returned to Dr. Hussain for a follow-up examination on December 5, 2012. Claimant reported she still had discomfort and pain with a limited range of motion in her extremity. (Ex. 4, p. 13) She reported the symptoms had been on-going for some time. Dr. Hussain ordered the MRI arthrogram. (Ex. 4, p. 13)

On December 27, 2012, claimant underwent a right shoulder MR arthrogram. Patrick P. Rheingans, M.D., a radiologist, interpreted the results as:

> 1. Tendinopathy of the supraspinatus tendon with no full-thickness tear or partial undersurface tear.

(Ex. 6, p. 2)

On January 9, 2013, Dr. Hussain examined claimant. Dr. Hussain diagnosed claimant with: **"Rotator cuff tendonitis and no evidence of tears inside the shoulder."** (Ex. 4, p. 18) Dr. Hussain injected claimant's right shoulder with 20 mg of Kenalog and a local anesthetic in the bicipital tendon sheath. The doctor also injected the subacromial space with 10 mg of Kenalog and local anesthetic. Claimant was prescribed formal physical therapy, a home exercise program, returned to work on light duty and told to take over-the-counter anti-inflammatories.

Claimant was advised to follow-up with an appointment in four to six weeks. (Ex. 4, p. 18) There was no indication claimant returned to see Dr. Hussain. She testified January 9, 2013 was the last medical appointment she attended for her right shoulder. As of January 29, 2013, Dr. Hussain was still of the opinion claimant had no permanent partial impairment rating. (Ex. 4, pp. 21-22)

On December 8, 2011, claimant requested a voluntary change in her status as an employee at Crestridge, Inc. She wanted to switch from a full time certified nursing assistant to one who was considered PRN. Claimant desired the switch so she could return to college as a full time student in the EMT program. She testified she was not satisfied with the manner with which members of management had treated her at Crestridge. (Transcript p. 30) Later, claimant completed her Firefighter One program. At the time of the hearing, claimant was enrolled at Kirkwood Community College and studying to become a paramedic. She was no longer licensed in Iowa as a certified nursing assistant.

Mr. Harold McElderry, former administrator at the care facility, testified about the meaning of PRN.

> Q. What is – you mentioned a PRN policy. What is that; how does it work?

A. Basically, an employee that wishes to go to PRN status has to request it, sign the documents. They are required to work two shifts per month. They either call in for the shifts or if we have shifts available, we'll contact them. They also, of course, have to keep up their educational requirements to stay within state and federal guidelines for, you know, continuing education.

(Tr. pp.83-84)

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).

Claimant has established she sustained a temporary injury to her right shoulder. She has not met her burden of proof in establishing her right shoulder injury resulted in any permanent disability. No objective testing demonstrated any tears in claimant's right shoulder. At best, she sustained a strain or experienced tendonitis of the right shoulder. (Ex. 6, p. 2) No surgical procedures were warranted. Only conservative treatment modalities were ordered. Dr. Hussain examined claimant on numerous occasions from August 17, 2011 through January 9, 2013. Despite the many examinations conducted, Dr. Hussain did not find any permanent impairment. Moreover, claimant voluntarily discontinued all treatment of her shoulder effective January 9, 2013. Claimant left her employment to pursue other career opportunities.

It is acknowledged Dr. Kreiter opined claimant had a 13 percent permanent impairment rating. However, Dr. Kreiter examined claimant on 1 occasion only. The exam occurred on July 26, 2012. At the time, claimant had not undergone the

MRI arthrogram which established claimant had nothing more than tendonitis of the right shoulder. (Ex. 6, p. 2) The independent medical examination occurred nearly 6 months prior to the additional medical treatment claimant underwent to rehabilitate her right shoulder. Dr. Kreiter did not have the benefit of the results of the MRI arthrogram when he rendered his opinion on impairment.

In light of the foregoing, it is the determination of the undersigned; claimant has not met her burden of proof with respect to permanency. As a consequence, claimant takes nothing additional from these proceedings.

ORDER

THEREFORE IT IS ORDERED:

Claimant takes nothing additional from these proceedings.

Each party shall pay her/its/their own costs.

Signed and filed this 26th day of February, 2015.

Michelle A. McGovern

MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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 in writing and received by the commissioner's office 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 a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.