

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DONNA EVANS,	FILED	File No. 5059655
Claimant,	JUL 18 2019	
vs.	:	ARBITRATION
HY-VEE FOOD STORES, INC.,	WORKERS COMPENSATION	DECISION
Employer,	:	
Self-Insured,	:	Head Note Nos.: 1100,108, 1402,1700,
Defendant.	:	1800, 1802, 1803

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Donna Evans, filed her original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on September 18, 2017. Claimant alleged she sustained a work-related injury to her shoulder on August 1, 2016. (Original notice and petition)

For purposes of workers' compensation, Hy-Vee Food Stores, Inc., is self-insured. Defendant filed its answer on October 5, 2017. The defendant denied the occurrence of the work injury on August 1, 2016.

The hearing administrator scheduled the case for hearing on August 2, 2018. The hearing took place at 150 Des Moines Street in Des Moines, Iowa. The undersigned appointed Ms. Debra A. Hoadley, as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on her own behalf. Defendant elected not to call any witnesses to testify at the hearing. Joint Exhibits 1 through 4 were admitted. Claimant offered exhibits 1 and 2. Defendant offered exhibits A through R. The aforementioned exhibits were admitted as evidence. The parties also submitted post-hearing briefs on August 30, 2018. The case was deemed fully submitted on that date.

STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

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

2. If defendant is liable for any temporary benefits, the time frame is from October 5, 2016 through January 5, 2017;
3. If permanency benefits are awarded, the permanency benefits are to be calculated by the industrial method;
4. If permanency benefits are owed, the commencement date is January 5, 2017;
5. If weekly benefits are owed, the weekly benefit rate is \$405.25;
6. Defendants waive any affirmative defenses they may have had available to them;
7. If medical bills were paid under the Hy-Vee Group plan, a credit could occur and;
8. The parties agree claimant has paid the costs listed.

ISSUES

The issues presented are:

1. Whether claimant sustained an injury on August 1, 2016, which arose out of and in the course of her employment;
2. Whether the alleged injury is a cause of temporary and/or permanent disability;
3. Whether claimant is entitled to permanency benefits; and if so, the extent of those permanency benefits; and
4. Whether certain medical benefits were authorized by defendant.

FINDINGS OF FACT

This deputy, after listening to the testimony of claimant and after judging the credibility of the claimant, plus 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 the issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

Claimant is presently 62 years old and divorced with two adult children. Claimant is right-hand dominant. She graduated from high school and attended Indian Hills Community College where she received an A.A. degree in culinary arts. Claimant commenced employment with "Hy-Vee" in 1976.

Claimant has sustained previous work injuries at Hy-Vee. A deputy workers' compensation commissioner issued an arbitration decision in the matter of Donna Evans v. Hy-Vee and EMC Insurance Company, File No. 5042150, (January 8, 2014). The deputy determined claimant failed to carry her burden of proof she had a work-related neck or shoulder condition as a result of an alleged work injury on August 18, 2008. The deputy determined claimant had permanent impairments to both upper extremities. The deputy explained:

The record in this case makes numerous references to the chronic pain claimant has following her surgeries. The record has numerous references indicating claimant fails to sleep properly due to pain. Claimant is limited to lifting 20 pounds and cannot work in an area below 65 degrees. Because of her limitations claimant has been moved to an inventory job. I am able to follow Dr. Miller's analysis of why he awarded five percent to each upper extremity for the residual cubital tunnel syndrome, and four percent for the loss of range of motion on the left elbow. Based on this, it is found Dr. Miller's opinion that claimant has a combined 10 percent permanent impairment on the right, and a combined 14 percent impairment on the left, is more convincing than the rating given by Dr. Kallemeier.

The combined values chart of the Guides indicates a 10 percent impairment combined with a 14 percent impairment yields a 23 percent impairment. Based on this, claimant is due 115 weeks of permanent partial disability benefits. (23% x 500 weeks)

(Defendant's exhibit E, page 7)

As a result of the above arbitration decision, claimant was awarded 115 weeks of permanent partial disability benefits at the rate of \$374.57 a week commencing from January 9, 2011. (Def. Ex. E, p. 8) In File No. 5042150, the same deputy workers' compensation commissioner had also approved a \$500.00 settlement between claimant and the Second Injury Fund of Iowa. The settlement was approved on or about October 20, 2017. (Administrative notice taken of records at the Iowa Division of Workers' Compensation.)

In the present case, claimant testified how her alleged work injury occurred on August 1, 2016. She testified as follows:

Q. (By Mr. Detlie) Can you describe what happened at Hy-Vee on or about August 1, 2016, that brings us here?

A. Yeah. I went to fill up some ads on a spindle. And I picked it up to bring it closer to me so I could fill it and I felt a pull, a strain and pain.

Q. And you're pointing to what part of your body?

A. My – the back of my shoulder here.

Q. On the right?

A. On my arm, my upper arm. That's where it hurt.

Q. Which side?

A. On my right, sorry.

Q. And you say "a spindle." Can you describe that so that we'll have a clear picture of what you're talking about?

A. Yeah. It's probably about as tall as I am, and it's got a metal rod that goes down, and it's [sic] got a metal round base. And it's [sic] got clip - - metal rods, like four of them, that have little clips on them. And you just hand the ad, ads on those for customers to come in and pick up.

Q. And you gestured while you were describing the base. About how far across is this metal base?

A. Total probably 12 inches. I'm guessing. I—

Q. And how tall is the base?

A. The base? A couple, 3 inches probably.

Q. And what is it made out of?

A. Metal.

Q. Do you have any idea how much that spindle would weigh?

A. I don't.

Q. And so you said you reached for the spindle with which arm?

A. My right, my right hand.

Q. And were you bringing it directly toward you or what were you doing?

A. I was bringing it towards me.

Q. Did you lift it up entirely off the floor?

A. Yes.

Q. How could you tell – what was the first indication you had that something had happened that you had some sort of injury?

A. Well, this was a different kind of pain than I've ever had. It -- like I said, it was a -- it was a pull. It was a pull, a strain, a very painful pain.

Q. And was it mostly in the front of the shoulder or the back?

A. Back of my shoulder.

Q. Have you had pain in your arms and your shoulders before?

A. I have.

Q. Describe where that pain was before this spindle incident. How would you describe your pain in your upper extremities before the spindle incident?

A. Just dull, aching, throbbing.

Q. And how would you compare that to the pain that you were experiencing immediately after the accident?

A. Well, it was a completely different pain. It was a sharp -- I mean, when I picked that up, I knew I'd done something. When I felt that pull, that strain, that -- it was a different kind of pain.

Q. How far were you into your shift when this happened?

A. It was the morning. It was the morning. I usually work eight to four. It was probably between eight and noon, eight o'clock and noon.

Q. First half of your shift?

A. Right.

Q. Were you able to complete your shift?

A. I was.

Q. And what was your job at that time?

A. Express lane checker, cashier.

Claimant did not seek medical attention for her right shoulder until August 17, 2016. She presented to Mercy Ottumwa Medical Clinic. (Joint Exhibit 1, page 5) Claimant provided the following medical history to Ashley Bland, ARNP:

History of Present Illness

Donna presents today for complaints of right arm pain with movement and difficulty with ROM such as lifting the right arm. She denies any increased numbness. She has chronic numbness in both arms due to carpal tunnel syndrome and past surgeries.

She works as a cashier at Hy-Vee. She currently has a weight limit of 20# in the right hand and 10# in the left due to carpal tunnel surgeries.

The discomfort started to occur end of April/first part of May of this year and Donna has noticed it slowly has increased in pain with limited ROM. She denies any falls or injuries to the right arm.

(Jt. Ex. 1, p. 5)

The nurse practitioner assessed claimant as having arm pain, arm stiffness, and decreased range of motion of the right shoulder. (Jt. Ex. 1, p. 7) The nurse recommended:

1. Patient is already on multiple medications for pain/discomfort related to fibromyalgia and an anti inflammatory [sic] medication.
2. Gentle stretching exercises to right arm.
3. Apply heat for comfort.
4. Refer to physical therapy.

(Jt. Ex. 1, p. 8)

Claimant was referred to Bradley Scott, D.O., an orthopedic surgeon in Ottumwa, Iowa. (Jt. Ex. 2, p. 9) The initial appointment occurred on September 8, 2016. (Jt. Ex. 2, p. 9) In claimant's exhibit 2, page 1, "The attending Physician's Statement-Initial Report", someone checked the condition was the result of an injury. It was also checked on the same exhibit; the condition was due to an illness or injury that was related to a work activity. (Cl. Ex. 2, p. 1)

Claimant indicated the injury was not work related. (Jt. Ex. 2, p. 10) Dr. Scott diagnosed claimant with right shoulder pain and a possible rotator cuff tear. (Jt. Ex. 2, p. 11)

Claimant underwent magnetic resonance imaging (MRI) on September 20, 2016. Elvin McCarl, M.D., interpreted the test results as follows:

IMPRESSION:

1. Full thickness rotator cuff tear involving supraspinatus tendon,
2. Prominent subchondral cystic degenerative change greater tuberosity and base of the humeral head laterally.

(Jt. Ex. 3, p. 15)

Claimant did not report the spindle incident to members of management at Hy-Vee until September 27, 2016. (Def. Ex. O, p. 1) The report to management was tendered approximately one week prior to right shoulder surgery. Claimant could not recall the date and time the event occurred. (Def. Ex. O, p. 1)

Claimant testified why she did not report the incident immediately. She stated:

Q. (By Mr. Dettie) After this happened on August 1st, you felt a pain in your shoulder, did you report it right away?

A. I didn't.

Q. Why not?

A. Well, because I've already had too many, I thought, work comp claims, and I felt people were talking about me and talking about how medicine costs, and I just got depressed about it and didn't report it.

Q. Did you eventually report it?

A. I did.

Q. When was that?

A. I think it was - - if I'm remembering right, I think it was right before I had surgery.

(Tr., pp. 15-16)

On October 5, 2016, Dr. Scott performed a right shoulder arthroscopic surgery. (Exhibit 2, page 1) The surgery was necessary to repair a rotator cuff tear. (Ex. 2, p. 2) Dr. Scott indicated the injury was related to claimant's work activity. (Ex. 2, p. 1) The surgeon recommended physical therapy subsequent to the surgery.

On November 17, 2016, claimant returned for a follow-up visit with Dr. Scott. (Jt. Ex. 2, p. 12) Claimant reported she was doing well but had some pain in the anterior

portion of the right shoulder. (Jt. Ex. 2, p. 13) Dr. Scott indicated the rotator cuff tear was not specified as trauma induced. (Jt. Ex. 2, p. 13) Claimant displayed appropriate range of motion and the neurovascular system was intact. (Jt. Ex. 2, p. 14)

Prior to the alleged work injury on August 1, 2016, defendant sent claimant to Charles Mooney, M.D., for an independent medical examination. Dr. Mooney issued a report on April 19, 2016. Among other opinions, Dr. Mooney opined claimant had normal passive range of motion of the right shoulder. (Ex. J, p. 109) Dr. Mooney also opined claimant's symptoms in her upper extremities were out of proportion to what one would expect. (Ex. J, p. 11)

Pursuant to a request from defense counsel, Dr. Scott issued an opinion letter on November 10, 2016. (Ex. A) Dr. Scott reviewed some medical records supplied to him by defense counsel. (Ex. A, p. 3) Then Dr. Scott was asked to check yes or no to two statements within a reasonable degree of medical certainty. Dr. Scott answered yes to each of the following:

1. It is more likely than not that claimant's right shoulder condition was the result of a degenerative and chronic condition affecting claimant's right shoulder.
2. It is more likely than not that while claimant's work activities at Hy Vee may have been a contributing factor to her right shoulder condition; it is my opinion that her work activities at Hy Vee were not a substantial or material factor in contributing to her right rotator cuff tear and the subsequent need for surgery.

(Ex. A, p. 3)

Claimant exercised her right to an independent medical examination pursuant to Iowa Code section 85.39, subsequent to receiving the opinions of Dr. Scott. Mark C. Taylor, M.D., MPH, MBA, examined claimant on June 15, 2017. Dr. Taylor issued his independent medical report on July 12, 2017. (Ex. 1) Claimant reported "the spindle incident" to Dr. Taylor as part of her patient history. (Ex. 1, p. 2) Claimant also reported the following medical history to Dr. Taylor:

She (claimant) was later seen by Dr. Bradley Scott on September 8, 2016. Again, she recalled that she did not inform him of the more recent injury and therefore he similarly documented nearly six months of discomfort as far as the duration of pain. I asked on several occasions and Ms. Evans stated that she has had chronic neck and shoulder pain for a number of years but that the incident with the spindle was associated with a well-defined change in her right shoulder discomfort. Dr. Scott also recommended exercises and, if there were not improvements, they would proceed with an MRI.

(Ex. 1, pp. 2-3)

Dr. Taylor conducted a physical examination of claimant. With respect to the right and left shoulders, the physician found:

SHOULDER Right/Left	Flexion	Extension	Abduction	Adduction	Internal Rotation	External Rotation
Value	140/150 degrees	35/50 degrees	110/130 degrees	25/30 degrees	40/50 degrees	50/75 degrees

Dr. Taylor opined the following with respect to claimant's shoulders:

Her strength testing was difficult to fully assess due to her acute pain associated with the upper extremities. She appeared to have somewhat more pronounced weakness associated with the right shoulder compared to the left, mainly with abduction and adduction....

(Ex. 1, p.8)

Dr. Taylor diagnosed claimant with a right shoulder rotator cuff tear and a right shoulder rotator cuff repair by Dr. Scott. (Ex. 1, p. 8) The independent medical examiner also determined claimant had myofascial pain around the bilateral shoulder blades. (Ex. 1, p. 8)

With respect to medical causation, Dr. Taylor opined:

Causation

All opinions are expressed within a reasonable degree of medical certainty. As it pertains to the right shoulder, Ms. Evans recalled a specific incident when she went to lift/move a spindle on a stand. The device was used to hold ads. As she went to lift and move it, she noticed the symptoms immediately over the right shoulder and the character of the pain, as well as the location of the pain, was distinctly different than what she had experienced on a chronic basis dating back for quite a few years as far as her symptoms impacting the neck and upper back, as well as her upper extremities. Due to her chronic work-related issues and medical care, she was very hesitant, and nervous, to report it to her employer and she therefore sought treatment on her own. She apparently later completed a First Report of Injury but the claim was denied by the insurance carrier.

Assuming the incident with the spindle occurred as described, and assuming that she developed the previously described symptoms associated with that incident, then it is my opinion that the work incident represented a significant contributing factor to her right shoulder condition. She may have had pre-existing tearing, to some extent, associated with her shoulder, but she had never previously undergone an MRI. She

became acutely symptomatic, based on her report, at that time (when moving spindle). I understand the initial reports when she was seen by Ms. Bland, as well as Dr. Scott, were contradictory as compared to what was later reported. However, she appeared credible in describing the incident and was fairly detailed as to what occurred and the symptoms that resulted.

(Ex. 1, p. 8-9)

In his concluding remarks, Dr. Taylor stated:

The opinions given are based upon the available information at this time, including the history given by the medical records and tests provided, and the physical findings. It is assumed that the information provided to me is correct.

(Ex. 1, p. 10)

Dr. Mooney conducted another independent medical examination of claimant on August 15, 2017. The report was issued on the following date. (Ex. K) Claimant reported to Dr. Mooney:

Complaints of right shoulder pain:

Ms. Evans complains of ongoing pain in the right shoulder, stating that the pain is now anterior, pointing somewhat toward the acromioclavicular joint in my discussion. She reports that the pain developed after her surgery when performing physical therapy and that her pain prior to her surgery was more posterior. She reports that is aggravated by certain positions, describing external rotation and abduction, and reports that it is relieved by changing positions. It is not constant. She does not report any improvements with ongoing PT exercises which she has discontinued. She does report that she occasionally uses hydrocodone for severe pain, not only for her right shoulder, but also for her left elbow. She also reports some soreness in her left shoulder, which is generalized.

(Ex. K, p. 4-5)

Dr. Mooney discussed the cause of claimant's right shoulder condition in his August 15, 2017 report. Dr. Mooney opined:

CAUSATION:

As it pertains to Ms. Evans diagnosis of right rotator cuff tear and ongoing right shoulder pain, the medical records do not support any specific relationship between her current or previous work activities and the onset of her symptoms and subsequent MRI and surgical findings.

The explanation provided as the date of injury occurring in August of 2016 is not corroborated by the medical record and based on the mechanism discussed with me, is unlikely to have either provoked or be directly casual to the onset of her increased symptoms. I concur with her treating physician, Dr. Scott, that her presentation with a right rotator cuff tear is most consistent with a chronic degenerative change, including chronic impingement and acromioclavicular arthropathy.

In review of Dr. Taylor's report, he "assumes" the incident in lifting the spindle occurred as described and further assumes that she developed the described symptoms associated with the incident. These assumptions are the only support for his opinion that the work incident represented is a significant contributing factor to her right shoulder condition. Noting that she may have had preexisting tearing to some extent associated with the shoulder, but she never had previously undergone an MRI, and she became acutely symptomatic based on her report at that time when moving the spindle.

It is my opinion, that Dr. Taylor's opinion is conjecture and requires his validation of Ms. Evan's [sic] description of the incident as accurate and substantial, despite not being supported by any evidence in the medical record. As it is not my position to question Ms. Evans' integrity, I believe that any causal relationship of the incident stated to have occurred in the course of her duties at Hy-Vee in August of 2016 and her presentation for right shoulder pain should be left to legal authorities as it requires a judgement [sic] of Ms. Evan's [sic] integrity and is not supported in the medical record.

(Ex. K, pp. 8-9)

Dr. Mooney issued another report on August 1, 2018. (Ex. I) Defense counsel provided the physician with several questions. Dr. Mooney answered them in writing. Those questions and answers relevant to causation are duplicated below:

1. Question 1. What is your diagnosis of claimant's condition of her right shoulder?

Answer. It is my opinion that the medical records clearly indicate that Miss Evans has a history of persistent shoulder pain, most consistent with chronic impingement syndrome. It is my opinion that the diagnosis of rotator cuff tear was the result of this chronic process which has been described by Neer.

2. Question 2. Do you believe claimant sustained a material and substantial aggravation as a result of her alleged work injury on or about August 1, 2016 or do you believe it is more likely than not

claimant sustained a temporary exacerbation of her underlined personal conditions including but not limited to the physical injuries claimant alleges?

Answer. The incident of August 1, 2016 has been described as a lifting incident occurring when Ms. Evans lifted a floor spindle which holds store ads on it like a magazine rack, and felt immediate pain and a pulling sensation in her right shoulder. This description is provided by Ms. Evans and is otherwise uncorroborated.

It is my opinion that this incident did not cause any objective advancement of her chronic shoulder condition and that there is no causal relationship between the incident and her MRI findings. The MRI findings clearly demonstrate significant impingement and full thickness Rotator tear and cystic degenerative changes of the greater tuberosity of a long-standing nature. It is my opinion that Miss Evans [sic] findings are consistent with the natural progression of this condition.

My previously expressed opinions regarding the [sic] any causal relationship between the incident of August 1, 2016 and Miss Evans [sic] presentation with complaints of shoulder pain are unchanged as it relates specifically to the incident and Miss Evans [sic] description.

(Ex. 1, p. 2)

RATIONALE AND CONCLUSIONS OF LAW

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); Dunlavy 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).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 908, 76 N.W.2d 756, 760-61 (1956). If the claimant had a preexisting condition or disability that is materially, aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 135, 115 N.W.2d 812, 815 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 375, 112 N.W.2d 299, 302 (1961).

When an expert's opinion is based upon an incomplete history, it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522, 133 N.W.2d 867 (1965).

The weight to be given an expert opinion may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. St. Luke's Hospital v. Gray, 604 N.W.2d 646 (Iowa 2000).

The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence. Together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire and Casualty Co., 526 N.W.2d 845 (Iowa 1995).

Claimant alleges she tore her right rotator cuff when she lifted a metal spindle at work on August 1, 2016. Claimant did not report the incident on that date. The event

was not witnessed by anyone else. Claimant did not seek medical treatment until August 17, 2016 when she presented to Mercy Ottumwa Medical Clinic. (Jt. Ex. 1, p. 5) At the time, claimant reported her discomfort commenced the end of April or the first part of May. Claimant did not discuss any incident involving a metal spindle. (Jt. Ex. 1, p. 5) Moreover, claimant denied any falls or injuries to her arm. (Jt. Ex. 1, p. 5) There was limited range of motion of the right shoulder and physical therapy was ordered. (Jt. Ex. 1, p. 7)

When claimant saw Dr. Scott on September 8, 2016, she denied her right shoulder condition was the result of a work injury. Claimant indicated she had experienced the pain for six months. (Jt. Ex. 2, p. 10)

Claimant did not complete a "Workers' Compensation Employee Report" until September 27, 2016. Only then did claimant inform members of management at Hy-Vee of the "spindle incident". Claimant's report was filed nearly two months after the alleged incident and just a week before claimant was scheduled to have her right rotator cuff tear repaired by Dr. Scott. (Ex. O)

Claimant's verbalizations of her medical history with regard to her right shoulder are in direct conflict with the testimony claimant gave at her hearing. She explained she feared retaliation from her employer if she filed another claim via the workers' compensation system. However, her fear seems unfounded. Claimant was already working with restrictions. Her employer had been accommodating her work restrictions for many years and claimant had suffered no repercussions because of prior work injuries. In January of 2016 claimant was earning \$15.90 per hour as an express cashier. As of the date of the hearing, claimant was earning \$16.75 per hour for the same position. It is highly implausible claimant tore her right rotator cuff lifting a metal spindle.

Then there are the opinions of the medical experts. Claimant's own orthopedic surgeon, Dr. Scott opined claimant's torn rotator cuff was the result of a degenerative and chronic condition affecting claimant's right shoulder. (Ex. A, p. 3) Additionally, Dr. Scott opined claimant's work activities were not substantial or material factors in contributing to claimant's right rotator cuff tear and the need for surgical repair. (Ex. A, p.3) Claimant even admitted during her cross examination; she had never mentioned the "spindle incident" to Dr. Scott. (Tr. pp. 55-56)

Dr. Mooney shared opinions similar to the ones held by Dr. Scott. Dr. Mooney opined the medical records did not support any specific relationship between claimant's work activities and the onset of her right shoulder symptoms, the subsequent MRI results, and the surgical findings. (Ex. K, p. 8)

Dr. Taylor, the independent medical examiner retained by claimant, supported claimant's claim. However, Dr. Taylor based all of his opinions on the assumption, the "spindle incident" occurred. As mentioned earlier in this decision, it is highly implausible

claimant tore her right rotator cuff lifting a metal spindle. For that reason, Dr. Taylor's opinions are not given any weight. His opinions were based on erroneous facts.

Therefore, after reviewing all of the medical records, after reviewing the hearing transcript, after judging the credibility of claimant, and reading the arguments of the parties, the undersigned determines claimant has failed to meet her burden of proof. Claimant is unable to establish by a preponderance of the evidence, her injury arose out of and in the course of her employment on August 1, 2016. Additionally, claimant has failed to establish her right shoulder condition was caused by her employment at Hy-Vee. As a consequence, claimant takes nothing from these proceedings.

The final issue is the matter of costs.

Iowa Code section 86.40 states:

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

Iowa Administrative Code Rule 876—4.33(86) states:

Costs. Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, “persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation.” A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010) The entire reasonable costs of doctors’ and practitioners’ reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

It is the determination of the undersigned; each party shall pay her/its own costs.

ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing from these proceedings.

Each party shall pay her/its costs as detailed in the body of the decision.

Defendants shall file all reports as required by law.

Signed and filed this 18th day of July, 2019.



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.