BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARIA BALLESTEROS, Claimant, vs. STELLAR MANAGEMENT GROUP, INC., Employer, and SENTINEL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 21005774.01 ARBITRATION DECISION Head Note Nos.: 1100, 1402.30

STATEMENT OF THE CASE

Claimant Maria Ballesteros filed a petition in arbitration seeking workers' compensation benefits from defendants Stellar Management Group, Inc., employer, and Sentinel Insurance Company, insurer. The hearing occurred before the undersigned on September 8, 2021, via CourtCall video conference.

The parties filed a hearing report at the commencement of the arbitration hearing. In 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.

The evidentiary record consists of: Joint Exhibits 1 through 4; Claimant's Exhibits 1 through 4 and 6; and Defendants' Exhibits A through D. Claimant testified on her own behalf, and there was additional testimony from Marina Rubio, Carmen Merced, and Max Rivera. The evidentiary record was closed on August 12, 2021, and the case was considered fully submitted upon receipt of the parties' briefs on October 18, 2021.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury that arose out of and in the course of her employment on or about October 1, 2018.

2. If claimant sustained a work-related injury, whether claimant provided timely notice of her injury under Iowa Code section 85.23.

3. If claimant sustained a compensable, work-related injury, whether claimant's injury was limited to her shoulder or extended into her body as a whole.

4. The extent of claimant's entitlement to medical benefits, temporary disability benefits, and permanent disability benefits.

5. Whether claimant is entitled to reimbursement for an independent medical examination and costs.

FINDINGS OF FACT

Claimant alleges she sustained a work-related injury on or about October 1, 2018. The first mention of the alleged injury in any records appears on March 28, 2019, in a "Statement Report" in claimant's personnel file. The statement, translated, states:

> My arm hurts much [sic] I had reported once and Rene Martinez ga[v]e me some help and then started hurting again and I talked to my supervisor Cesar Martinez to move me from area or to give me help because I had the pain on my arm again and he said there was nobody and I talked to Norma and I told her that I could stand the pain on my arm and that's how they moved me from area but my pain still there because I have to continue lifting belts and that has [sic] six months

(Defendants' Exhibit B, p. 30)

This statement was obtained after defendant-employer's area safety manager, Max Rivera, received a call instructing him to do an incident investigation. (Hearing Transcript, p. 75) According to Mr. Rivera, the investigation was prompted when claimant threatened to go to the doctor after she was not moved to a different area at work. (Def. Ex. C, p. 33)

Mr. Rivera, both in the report of his conversation with claimant and in his hearing testimony, stated that claimant did not provide him with clear answers about which body

part was injured or when any such injury occurred. (Tr., pp. 77-78; see Def. Ex. C) She did not mention a specific task that caused the injury, nor did she describe an acute reaction, such as a "pop" in her arm or shoulder. (Tr., p. 78) Mr. Rivera testified that claimant's supervisor, Cesar Martinez, could not recall claimant reporting an incident, nor could the assistant manager or the plant safety manager. (Tr., pp. 79-80; see Def. Ex. C)

Claimant offered a different version of events at her deposition and at hearing. Per claimant's deposition testimony, she was lifting a piece of equipment on October 1, 2018 when she "felt like [her] arm cracked." (Def. Ex. D [Deposition. Tr., p. 20]) Per claimant's hearing testimony, she felt her arm and shoulder "pop" while washing a belt. (Tr., pp. 30-31)

She testified she "immediately" reported her injury to Mr. Martinez. (Tr., p. 31; see Def. Ex. D [Depo. Tr., pp. 21, 24]) Claimant testified Mr. Martinez told her he would make an injury report but she needed to stop crying and return to work. (Tr., p. 35) Per claimant, there were no witnesses to this initial conversation with Mr. Martinez. (Def. Ex. D [Depo. Tr., pp. 22, 24, 26])

Claimant testified she then told Mr. Martinez "every day" until March of 2019 that her shoulder was still hurting, but he never produced an injury report. (Tr., p. 36)

Mr. Martinez did not testify at hearing.

Consistent with claimant's testimony, claimant's former co-workers, Marina Rubio and Carmen Merced, testified they both witnessed claimant tell Mr. Martinez on several occasions about her shoulder problems. (Tr., pp. 63, 69) Ms. Rubio also testified she witnessed Mr. Martinez tell claimant he would make a report but she needed to return to work, and Ms. Merced testified she heard Mr. Martinez tell claimant to stop crying. (Tr., pp. 64, 70) Importantly, however, as mentioned above, claimant testified no one was present when Mr. Martinez made these alleged comments to her. Thus, per claimant's own testimony, Ms. Rubio and Ms. Merced could not have witnessed at least some of what they purported to witness. As a result, I assign little weight and credibility to the testimony of Ms. Rubio and Ms. Merced.

After claimant's meeting with Mr. Rivera, claimant was evaluated at her primary care clinic. The "Nurse Note" from the April 4, 2019 appointment states: "Has had left shoulder pain for 4 months. Does not remember any particular incident causing it, it would just ache. Then last week she was lifint [sic] [lifting] something at home that was about 70 pounds and the shoulder gave out." (Joint Ex. 2, p. 27) The "History of Present Illness" section of the records provides a similar description: "She has had left shoulder

pain for 4 months and left forearm pain. It was not that bad until a week ago or 'last week' she was lifting something estimated about 70 pounds and it 'gave out' and cause [sic] significant pain since then in the left shoulder." (JE 2, p. 27)

There is no mention in the records from claimant's April 4, 2019 appointment of a "pop" in claimant's shoulder in October of 2018, nor is there any mention of any injury or pain occurring at work. At hearing, claimant attempted to pin this discrepancy on interpretation issues. She explained that her daughter's interpretation skills were "very poor." (Tr., p. 40) In the records, however, claimant's provider specifically noted as follows: "Daughter interprets and the patient actually does understand most of what I am saying anyway she says and at other times the RN interprets for us." (JE 2, p. 27)

Furthermore, while there may have been some interpretation troubles, this description of the incident appears in two separate locations in the records—once in the nurse's intake note and again in the history section, which suggests this fairly detailed account of the incident was repeated on two occasions to two different individuals. (JE 2, p. 27) This makes it less likely that the discrepancy is attributable to a mere misunderstanding.

Regardless, after an MRI revealed a rotator cuff tear, claimant was referred to orthopedist Steven Aviles, M.D. Notably, in the notes from claimant's initial appointment with Dr. Aviles, there is no discussion about an acute incident at work wherein claimant felt a "pop" in October of 2018. (JE 3, p. 53) Instead, Dr. Aviles noted claimant reported pain in the shoulder "that has been getting worse over time" and was attributable to "lifting heavy objects at work." (JE 3, p. 53)

Dr. Aviles eventually performed surgery to repair claimant's rotator cuff tear and SLAP tear. (JE 2, p. 47) Claimant initially reported excellent results but was later referred to pain specialist John Rayburn, M.D., for pain into her scapula and neck. (JE 3, 78) Dr. Rayburn performed a trigger point injection for this muscular pain. (JE 3, pp. 82-84) Claimant has not returned to either Dr. Aviles or Dr. Rayburn since this injection.

In a check-the-box style letter, Dr. Aviles opined—after reviewing the records from claimant's primary care provider in April of 2019—that claimant's left rotator cuff injury was most likely due to the lifting incident at home and not caused by her work with defendant-employer. (JE 3, p. 85)

Claimant was evaluated for purposes of an independent medical examination (IME) by Jacqueline Stoken, D.O., on June 22, 2021. Claimant described the mechanics of her injury to Dr. Stoken as follows:

> She states that on October 1, 2018, she was at work picking up materials and doing her job. She has been doing this for quite some time with left shoulder pain. She had reported it over and over again to her supervisors, but she was not sent for care.
>
> She states that every day she would do the same heavy work with cleaning equipment and having to lift the heavy plastic sheet very high. She also pushed on doors with her shoulder because she could not handle them any other way. She states that she continued to have pain, which got worse.

(Claimant's Ex. 1, p. 1) Again, there is no mention of a specific incident occurring at work or any "pop." In fact, Dr. Stoken opined that claimant's injury was "consistent with the job duties of repetitive heavy lifting and no care over a period of time." (Cl. Ex. 1, p. 7 (emphasis added))

Ultimately, there are several different versions in the record of what actually happened to claimant's shoulder and when. Claimant herself has offered several different explanations. Per her testimony, there was an acute incident on October 1, 2018 that caused a "pop" or a "crack" in her arm while she was lifting a piece of equipment. Per the records from claimant's April 9, 2019 appointment, there was no "particular incident" until a week before the appointment when she was lifting something at home and felt her shoulder give out. (JE 2, p. 27) Per her reports to Dr. Aviles and Dr. Stoken, there was no acute incident but instead her injury was caused by heavy lifting at work over time.

Importantly, there is nothing contemporaneous in time in claimant's medical records that corroborate claimant's testimony about an injury occurring on or about October 1, 2018. Claimant was evaluated at her primary care provider's office in the months between October 2018 and April 2019 for unrelated conditions (such as her diabetes and a cold), but there is no discussion or even a mention of left shoulder pain. (See JE 1, pp. 13-25)

Given claimant's inconsistent descriptions of her injury and the lack of any other contemporaneous or credible supporting evidence, I do not find claimant to be a credible witness.

Without credible testimony or any other supporting documentation referencing an injury in October of 2018, I find there is insufficient evidence to find claimant sustained a work-related injury on or about October 1, 2018.

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 alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

Claimant sustained a rotator cuff and SLAP tear for which surgery required, but I did not find claimant to be a credible witness with respect to how or when this injury occurred. I likewise did not find claimant's co-workers' testimony to be credible. There are several different accounts of how claimant's injury occurred in the medical records, and none of these accounts occurred anywhere close in time to October 1, 2018, which claimant alleges as her date of injury. As a result, I conclude claimant failed to carry her burden to prove that her injury arose out of and in the course of her employment with defendant-employer.

Claimant seeks reimbursement for her IME with Dr. Stoken. However, the reimbursement provisions of Iowa Code section 85.39 for injuries occurring after July 1, 2017 are not triggered unless "the injury for which the employee is being examined is determined to be compensable." Iowa Code § 85.39(2) (post-July 1, 2017). In this case, I found claimant failed to prove she sustained an injury that arose out of and in the course of her employment, meaning reimbursement for Dr. Stoken's IME under the provisions of Iowa Code section 85.39 is not appropriate.

Claimant also seeks reimbursement for her costs, including Dr. Stoken's report and her filing fee. Assessment of costs is a discretionary function of this agency. Iowa Code § 86.40. Costs are to be assessed at the discretion of the deputy commissioner

or workers' compensation commissioner hearing the case. 876 IAC 4.33. Because I did not rely on the opinions in Dr. Stoken's report and instead concluded claimant failed to prove she sustained a compensable work-related injury, I decline to tax the cost of Dr. Stoken's report or claimant's filing fee to defendants.

Having determined claimant failed to prove she sustained a work-related injury, all remaining issues are rendered moot.

ORDER

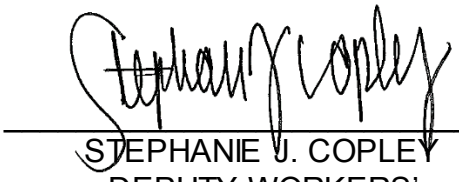
THEREFORE, IT IS ORDERED:

Claimant shall take nothing further as it pertains to permanent partial disability benefits.

Pursuant to rule 876 IAC 4.33, the parties shall pay their own costs.

Defendants 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 22nd day of December, 2021.



STEPHANIE J. COPLEY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

John Dougherty (via WCES)

Stephanie Techau (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.