BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROSELEE JACKSON,

Claimant,

vs.

TYSON FRESH MEATS, INC., d/b/a TYSON FOODS, INC.,

Employer,
Self-Insured,
Defendant.

File No. 5065752

ARBITRATION

DECISION

Head Note Nos.: 1108; 1800; 1801; 1803; 1804; 2500

STATEMENT OF THE CASE

Roselee Jackson, claimant, filed a petition in arbitration seeking workers' compensation benefits against Tyson Fresh Meats, Inc., arising out of an alleged work injury sustained on July 26, 2016.

This case was heard on April 25, 2018, and considered fully submitted on May 25, 2018 upon the simultaneous filing of briefs.

The evidence consists of joint exhibits 1 through 13, claimant's exhibits 1 through 6, and defendant's exhibits A through T. The parties did exceed the exhibit page limits mandated by the uniform guidelines; however, the parties requested and were granted permission for over length exhibits upon the assertion that none of the exhibits were duplicative or unrelated to the issues that need to be decided in the above-captioned matter.

In addition to the aforementioned documentary evidence, there was the testimony of the claimant and Ramiz Muheljic.

ISSUES

1. Whether claimant sustained an injury on July 26, 2016 which arose out of and in the course of her employment;

2. Whether the claimant is entitled to temporary benefits;

3. Whether the claimant sustained a permanent disability arising out of a work injury;

4. The extent of any permanent disability;

5. Whether claimant is entitled to payment and/or reimbursement of medical expenses;

6. Whether claimant is entitled to an independent medical evaluation under Iowa Code section 85.39; and the assessment of costs.

STIPULATIONS

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The parties agree that at all relevant times hereto claimant was an employee of the employer. They further agree that claimant was off work between January 25, 2017 and January 29, 2018.

The parties agree that if an injury is found to be the cause of the permanent disability, the disability is industrial in nature and that the commencement date for permanent partial disability benefits, if any are awarded, is January 18, 2018.

At the time of the alleged injury, the claimant's gross earnings were $505.73 per week. She was single and entitled to one exemption. Based on those foregoing numbers the weekly benefit rate is $319.74.

Claimant seeks payment of medical expenses and while the defendants dispute that the fees and charges are fair and reasonable or that the treatment was reasonable and necessary, they would agree that the medical providers would testify as to the reasonableness of the fees and/or treatment set forth in the expenses identified in Exhibit 4 and 5. The defendants do not offer contrary evidence. They further admit that the listed expenses are causally connected to the medical condition upon which a claim of injury is based.

FINDINGS OF FACT

Claimant, Roselee D. Jackson, was a 76 year old person at the time of the hearing. She has a GED which she received in 2007.

Her past medical history includes a blow to her upper back, neck and head on or about March 26, 2003, while at work. (Exhibit C:4) She was diagnosed with post concussion syndrome and received physical therapy, chiropractic treatment and a series of injections to her neck and low back. She was released to full duty work on or about August 26, 2003 but continued to have some pain and stiffness in the right side of her neck along with occasional headaches. Id. As a result of this work injury, claimant received medical bill reimbursement and non-occupational disability benefits. (Exhibit C: 6)

Claimant suffered a work injury on December 19, 2008 when she slipped and fell injuring her left shoulder and knee. (Exhibit E: 3) In March 2009, claimant underwent arthroscopic repair of her left knee and on May 13, 2009 claimant underwent surgical repair of her left shoulder. (Exhibit E: 3-4) Following the surgeries, claimant continued to have pain in her knee and left shoulder along with swelling and weakness. She testified that she could not lift her left arm above 90°. (Exhibit 8:5)

Claimant also alleged a work injury to her left shoulder and cervical spine arising out of a work injury on January 13, 2011. (Ex. D:1) Pursuant to a finding of facts by a Cook County District Court judge, claimant was sitting in a van and attempting to turn the steering wheel which had power steering that was not working. As she struggled to turn the wheel, she felt something pop in her shoulder and neck. She experienced pain up and down her left arm, numbness in her left hand, and pain in her back. (Ex. D:2) The opinion included the following findings of a May 14, 2011, MRI:

> On April 13 and 21, 2011, Defendant was seen at the Rehabilitative Institute of Chicago where it was noted Defendant had been trying to perform her neck exercises but it was too painful.
>
> The May 14, 2011 Cervical MRI showed a straightening of normal cervical lordosis and mild to moderate degenerative changes in the cervical spine. At C6-7 there was central/left paracentral disc/osteophyte extending into the left foramen and causing moderate to severe left foraminal stenosis. There was also moderate spinal stenosis and moderate right foramen stenosis. Milder degenerative changes were noted at C3-4 to C5-6, causing mild spinal canal stenosis. There was no foraminal stenosis.
>
> When her May of 2011 cervical MRI was compared to her July 1, 2003 cervical MRI, there was a progression of the degenerative changes at C6-7 resulting in at least moderate spinal canal stenosis and mild to moderate bilateral axillary recess stenosis. The left neural foraminal stenosis resulted in part from a left foraminal disc protrusion.

(Ex D:3-4) Claimant ultimately went on to have a fusion at C6 – 7. (Ex D:5)

On or about September 15, 2015, claimant presented to the emergency room department following a motor vehicle collision that had occurred one day previous. Her vehicle was rear-ended by another. She was restrained. During the collision, her neck was jerked, resulting in neck pain that grew progressively worse. (Exhibit G: 5) A CT scan of the cervical spine was taken which noted post surgical changes of anterior body fusion involving the C6 – C7 level. There was bone fusion in the disk space and the hardware was in good position and alignment. (Exhibit G:7) Claimant was treated and released.

She had a follow-up visit on September 21, 2015 at Unity Point Health. To the physician, she complained of low back pain and left-sided neck pain. (Exhibit H: 1) Claimant was given medication.

Claimant returned to the emergency room on or about September 23, 2015, for increased pain in her neck and back. At that time, she had been taking Lortab but it was not controlling her pain. (Exhibit G: 2) On examination she was diffusely tender in the musculature of the posterior neck and upper back as well as tender in the lumbar region. She exhibited good range of motion and full strength in all of her extremities. (Exhibit G: 2) She was administered medication and discharged home with a muscle relaxer. It was recommended she follow through with physical therapy. (Exhibit G: 3)

Claimant returned for treatment on October 22, 2015 reporting pain in her low back and neck. (Exhibit 8:3) She had no further treatment for her back, neck, or left shoulder until summer of 2016.

Her work history includes janitorial services, work in a steel mill, and driving truck for the city of Chicago. In October 2015, claimant began working for the defendant employer. The first job she was assigned was grading ribs. She had difficulty with technique and reported slight back pain. (Ex. 6:1) On November 19, 2015, she was moved to a different job as she was unable to properly and timely grade ribs. (Ex. 6:3) It was noted that she showed great effort but that the task required movement faster than she could produce. (Ex. 6:2) She worked at the Skin Picnics position for some time.

Claimant testified that she was too slow for the Skin Picnics position and was disqualified again. Daily progress notes indicate that she began training on a skinning position sometime in late May, early June 2016. (Ex. 6:6-7) She was still slow, but she worked hard and did her best according to the trainer notes. (Ex. 6:7) She visited the nurse on June 21, 2016. (Ex. 6:6) On June 29, 2016, she was disqualified from the skinning job. (Ex. 6:6) She was then assigned to Place Loins position on July 25, 2016. (Ex. 6:10) July 25, 2016, was documented as a job instruction day. The second day she began working the position.

Robert Gordon, M.D., a physician working for the defendants, describe the position as follows:

> With regards the process of saddling the loins, the loins are delivered to the workstation via a chute with the assistance of gravity. The team member then slides/guides the loin from the chute onto the plastic saddle which in on the conveyor primarily with the right upper extremity. The team member is not required to pick up the loin, which weighs 25 - 30 pounds during the saddling process. The loin does move freely down the aforementioned chute and onto the saddle, which is on the conveyor. Approximately one loin is saddled every 3 to 4 seconds on average.

> Of note, at times, if the conveyor system is not operating properly, the team member does have to place and then remove loins on/from an adjacent metallic shelf.

(Joint Exhibit 4:14) The Place Loin position required several hand breaks throughout the day, at 10 minutes a piece. (Ex. J:6) Claimant experienced immediately difficulty working this position per her testimony and the contemporaneous notes of her trainer.

The notes indicate as follows:

"TM think job to much. TM is 75 years old. Said a lot on shoulder plus try to toss loins up into tray. Might want to DQ on job."

(Ex. 6:10) The notes of the following day, July 27, 2016, were as follows:

TM said job to much for her. To much on shoulder."

(Ex. 6:10) On July 28, 2016, claimant was disqualified from the Place Loins job. (Ex. 6:10)

Claimant testified that as she was throwing the loins up onto a shelf, she felt a pop in her shoulder. Claimant described the shelf as over her head. Dr. Gordon described it at chest height for Ms. Jackson who is around 5'8" according to Dr. Gordon. (JE 4:14) Ramiz Muheljic, general supervisor at defendant employer's plant in Waterloo, testified that skin is thrown up on a shelf, but not the whole loin. (Trans. pp. 62-63) Mr. Muheljic did not say where the shelf was located but did use the word "up" to describe how the skin was put on the shelf, indicating that to reach the shelf, an upward motion must be used.

Claimant worked until the break. Defendant argues that claimant could not have worked more than an hour and a half before the alleged injury occurred. Since the injury was an acute one, the length of time claimant worked before the injury occurred has little relevance. An acute injury can happen within the first minutes of employment or the last day of employment.

She reported her injury to her trainer and was sent to Unity Point Health on August 1, 2016. She described herself as suffering from right shoulder pain extending down to her right hand and fingers. (Exhibit 1, pp. 2, 6)

When questioned by the company nurse, claimant described the mechanism of her injury as follows: "the day of the injury, TM was performing a new job she won of throw loins. TM states she was throwing loins when she felt a pain from her neck to her shoulder." (Ex. L:5)

In the incident report, claimant's account was documented as follows:

> tm was a bid from second shift to align bone-in loins. She tated [sic] that she was doing her job placing loins on the loin saddles to go to the loin defat trimmers. The loins weigh between 20 to 30 lbs. each. She stated that the loins had backed up 4 to 6 loins on the line. She was trying to toss them off on the stack tray and saddle loins on the saddles at the same time. She stated while she was doing this that she felt sudden pain in her neck, right shoulder, right elbow and numbness in her two first fingers on the right hand. She said she stopped working that job and went to find her trainer who went to the Supervisor. The trainer and Supervisor stated that she never told them she was hurt until the next day. Team member stated that she finished that day and went home. The Supervisor stated that the next day the team member came in and was working at a combo which caused the supervisor to go over to her and ask her why she was doing her job saddling the loins. Team member told her she couldn't do that job and still didn't say explain [sic] about being hurt. Supervisor sent her to talk to the General about her not being able to perform the job. That is when she told the General after being disqualified from the job that she was hurt and was taken to the nurse. She was returned to second shift where she won her bid to first shift.

(Ex. M:1)

In her answers to interrogatories, claimant described the injury as follows:

> I was throwing loins up on a shelf because they were backed up on the line, when I felt the pull in my shoulder. I continued to try working until my hand break (as I was learning the job). When my trainer Mike Johnson came over I let him know what was going on. He told me to come down to the floor and help in the rib area. It wasn't until the next day that I found Ramiz and let him know about the issue and he took me down to the nurse's office and she put heat/ice on my shoulder.

(Ex. O:2) Claimant's account of how the injury occurred was consistent throughout her medical records and her testimony in the deposition as well as in the discovery responses.

An MRI was ordered which revealed an infraspinatus tendinopathy with an early laminar tear, capsulobursitis, os ocromiale, AC joint mild proliferation and arthropathy, superior labral fraying versus poorly defined SLAP lesion. (Joint Exhibit 2, page 1) She was given a sling.

She was seen by the on-site physician services doctor, Robert Gordon, M.D., on August 16, 2016. (Exhibit 4:6) She complained of right-sided cervical pain, right trapezial pain, right shoulder girdle region pain, numbness and tingling of her entire right upper extremity. (Joint Exhibit 4:6) Dr. Gordon found that she had full range of motion with complaints of pain upon movement as well as tenderness of the paracervical musculature on the right, tenderness in the right trapezius region, diffuse tenderness about the right glenohumeral joint. (Exhibit 4:7) He recommended claimant follow up with an orthopedic surgeon for appropriate treatment and informed her the EMG had been scheduled. He placed claimant on light duty with no utilization of the right upper extremity. (JE 4:8)

The first appointment with Robert Bartlett, M.D., the orthopedic specialist, took place on August 22, 2016. (Joint Exhibit 5:1). Claimant reported pain on the right side of her neck and shoulder radiating down the arm with numbness and tingling into the hand. Id. Dr. Bartlett was concerned claimant was suffering cervical issues and ordered an additional MRI. (Joint Exhibit 5:2) Claimant also gave Dr. Bartlett a history of her previous surgeries. (JE 5:1-2)

An MRI of the cervical spine was conducted on August 29, 2016 which showed mild degenerative disc disease at range C3 through C6 with central spur disc protrusions and slight encroachment of the ventral thecal sac. There was minimal indentation of the anterior surface of the cord and moderate to severe left-sided C5 to C6 neural foraminal stenosis. (Joint Exhibit 2:3)

On August 31, 2016, claimant contacted Dr. Gordon's office regarding her pain. (Joint Exhibit 4:9) He advised her to take tramadol one to two tablets every six hours and Tylenol 3. (Joint Exhibit 4:9) Dr. Gordon asked her why she did not bring up past cervical surgery, but claimant had felt that she did report the past neck pain, however, she did not have previous shoulder or arm pain. (Joint Exhibit 4:9) Dr. Gordon was skeptical of this as typically most individuals with neck surgery have symptoms in their arms as well. (Joint Exhibit 4:9)

Claimant returned to Dr. Bartlett's office for a review of the cervical spine MRI. (Joint Exhibit 5:3) He found that the imaging of the shoulder was typical for her age but that the symptoms did correspond with cervical radiculopathy. There was no convincing objective of radiculopathy in the EMG or the MRI. Dr. Bartlett recommended a course of physical therapy and injections. (Joint Exhibit 5:3) He conducted the first injection on the office visit of September 19, 2016. (Joint Exhibit 5:3)

An EMG of the right upper extremity showed no abnormal test results. (Joint Exhibit 6:5) An EMG conducted on September 11, 2016 of the cervical spine showed cervicalgia with symptoms of cervical radiculopathy in the C7 to C8 a distribution but electrodiagnostic results were within normal limits. (Joint Exhibit 6:3)

During her initial physical therapy visit, it was noted the claimant displayed severe tightness and tenderness on the right side of the cervical musculature. It was the therapist's professional opinion that the claimant required skilled physical therapy in conjunction with a home exercise program to address the claimant's pain, weakness, and discomfort. (Joint Exhibit 7:2)

In a follow-up visit on October 14, 2016, claimant reported that neither the shoulder injection or physical therapy helped. (Joint Exhibit 5:5) Dr. Bartlett referred claimant back to Dr. Gordon believing that there was nothing more he could offer her. (Joint Exhibit 5:5) In response to a letter from the defendant employer, Dr. Bartlett opined that the right shoulder and cervical complaints were not related to claimant's work injury. (Joint Exhibit 5:7)

Dr. Gordon provided an opinion on October 6, 2016 in which he stated that it was not "remotely plausible for her to have developed a new cervical condition or otherwise aggravated her underlying cervical degenerative changes in which she has had prior interior fusion at C6 – C7 due to the lack of any biomechanical factors." (Joint Exhibit 4:13) Dr. Gordon wrote in his opinion letter that he watched two individuals perform the job of centerlines and performed it himself. As a result, Dr. Gordon was convinced that there was no way the claimant could sustain any kind of shoulder or neck injury due to the mechanics of the position. (Joint Exhibit 4:14) He opined that while there is use of the right shoulder performing the tasks of Saddle Loins, the maximal ranges were not reached each time the loin was saddled and therefore could not cause or aggravate a disorder to the right shoulder. (JE 4:16)

Dr. Gordon felt that claimant's age, pre-existing factors were more likely than not the cause of claimant's current conditions. (Joint Exhibit 4:15)

Claimant was seen at Unity Point Health Clinic for elevated blood pressure on October 26, 2016. She brought up the pain in her right arm and decreased strength and limited range of motion. (Joint Exhibit 8:1) It was the opinion of Kelly K. Hassman, ARNP, that claimant's elevated blood pressure was as a result of pain. Nurse Practitioner Hassman recommended further treatment to the claimant's shoulder and arm. (Joint Exhibit 8:2)

On January 24, 2017, claimant was terminated from defendant employer for failure to show. Claimant testified that she had tried to call in and could not get through. Records indicate that she would call in and was excused from being absent or tardy. (Ex. N) On January 21, 2017, her absence was marked as unexcused per a management decision. (Ex. N)

Claimant underwent a second MRI of the right shoulder which revealed a partial tear of the supraspinatus, infraspinatus and subscapularis tendons, a labral tear, and os acromiale with small amount of fluid in the synchondrosis. (Exhibit 10:1)

She began care with Ashar Azal, M.D., on February 8, 2017. (JE 1:8) Claimant reported pain in the dorsolateral aspect of the neck radiating down into the right upper extremity, forearm and tips of the middle index and ring fingers. (Joint Exhibit 9:1) He found her to be in "quite significant distress." (JE 9:2)

> NECK: She did appear in quite significant distress. She was not able to move her neck. Actually, she was moving her shoulder towards the right side if and when needed. Range of motion of the cervical spine was thus limited in side-to-side rotation. Spurling maneuver positive on the right side. I looked at the posterior torso muscles. There was no atrophy of suprascapular muscles, rhomboids or latissimus on each side. Trapezius and levator scapulae appear to be intact. There was probably secondary spasm of the trapezii muscle. No specific trigger point was identified. Marked tenderness over the exiting cervical nerve roots on the right side. Minimal tenderness over the greater occipital nerves.

(Joint Exhibit 9:2)

Dr. Azal found her symptomology a bit confusing. She had severe neural foraminal stenosis at C-5 – 6 on the left side, however her symptoms were on the right side. He believed it had to do with "crossover of the pain fibers in the neuraxial space." He offered an epidural steroid injection which she declined. He initiated amitriptyline and ordered her to follow-up. (Joint Exhibit 9:2)

She reported in a follow-up visit that the amitriptyline was unsuccessful in alleviating her symptoms. He changed her prescription to gabapentin. (Joint Exhibit 9:6) He noted that her symptomatology was neuropathic in nature. Id.

Claimant saw Dr. Afzal again on March 9, 2017. She discontinued the gabapentin due to side effects. Due to the mismatch between the left-sided disease and the right-sided pain, Dr. Afzal recommended she returned to her treating physician for a more thorough neurological workup. (JE 9:8)

Claimant was then seen by Gregory R. Hill, M.D., on July 24, 2017 at the request of Dr. Sadler. (Joint Exhibit 11:3) Dr. Hill recommended full reverse shoulder surgery which took place on September 19, 2017 (Joint Exhibit 11:7)

Prior to the surgery, claimant was seen at the emergency room for left-sided back pain extending to the leg. (Exhibit F: 1)

She underwent a short course of physical therapy following the surgery from September 26, 2017 through December 14, 2017 (Joint Exhibit 12) While she improved, she was unable to meet her goals and did not continue with therapy after leaving town.

On January 8, 2018, claimant still had pain and poor range of motion. (Joint Exhibit 11:12)

Claimant described herself as an active person, running 4 to 6 miles a day. She appeared to be in very good condition during the hearing. She testified she enjoyed roller skating, ice-skating and taught her kids to ride the motorcycle. None of these activities were mentioned in her previous medical records or workers' compensation documents. It is possible that they are new hobbies although the time frame in which claimant had engaged in them was unclear from the testimony.

At the request of the claimant, she underwent an independent medical evaluation on March 6, 2017 with David H. Segal, M.D. (Exhibit 1:1) Dr. Segal is a certified neurosurgeon specializing in the brain and spine. (Exhibit 1) Dr. Segal felt the claimant had sustained an acute injury rather than a degenerative one. (Ex 1:5) He wrote that the SLAP lesion is a tear of the shoulder capsule and more consistent with injury than degeneration. Id. He pointed to Dr. Bartlett's first note which Dr. Segal believed was the most accurate description of the August 4, 2016 MRI. Id. Dr. Bartlett wrote, "the shoulder shows various wear and tear items as well as high-grade tendinopathy or low-grade rotator cuff tear." Id. Dr. Segal believed that the statement indicated that the SLAP tears and tendinopathy were the result of trauma. Id.

He did acknowledge that most of the shoulder and neck pain was likely related to cervical radiculopathy but the shoulder pathology contributed to the shoulder pain. (Ex. 1:9)

Dr. Segal disagreed with Dr. Gordon's conclusion that the type of task claimant performed could not have resulted in the symptoms claimant complained of in the right shoulder. (Ex. 1:6) Instead, he opined that throwing 25 to 30 pounds over one's head at any age could cause traumatic injury similar to the findings on claimant's MRI. (Exhibit 1:6) Dr. Segal noted that Dr. Gordon focused on a pre-existing trauma and incorrectly documented claimant having past complaints of right shoulder and cervical pain leading up to her injury. (Exhibit 1:6) Claimant had testified that she was pain free leading up to her injury however, she did seek out treatment for back and neck pain in the fall of 2015 and was receiving treatment and taking medication for the pain even as she started working for the defendant employer. During one of the first jobs she performed for the defendant, she experienced back pain. She was disqualified from that job and moved to another.

Dr. Segal did not appear to be aware of claimant's prior injuries except for the motor vehicle collision. (See Ex 1:1-2; 1:17-21)

During the March 6, 2017, examination she had tenderness to palpation at the C6 – C7 paraspinal region, depressed reflexes symmetrically, dermatomal distribution loss, decreased range of motion on the right as opposed to the left, positive Tinel's right elbow, and reduced range of motion in the shoulder. (Exhibit 1:8) He diagnosed her with the following three issues:

1. Pinched neck in the nerve. I do not think the prior injury or surgery has any involvement in her current symptomatology,

2. Tear in right shoulder, I believe this is causing some problems, but it is not the worst problem.

3. Ulnar neuropathy, Again, [sic] this is causing some problems but is not the primary problem.

(Exhibit 1:9)

Dr. Segal recommended claimant receive further treatment to improve her quality of life including medication, physical therapy, and injections. (Exhibit 1:9)

Dr. Segal concluded that claimant sustained neck and shoulder injuries arising out of the July 26, 2016 work injury. (Ex 1:9) In support of his conclusion he pointed to her symptom-free condition prior to the injury as well as the MRI results in the mechanism of claimant's work tasks.

He identified significant work restrictions including as follows:

- She cannot lift more than 5 pounds with her right arm.

- She cannot reach out at all with her right arm.

- She cannot lift her right arm over shoulder height.

- She cannot lift her right arm more than 80-90 degrees due to pain and actual limitation.

- She cannot do any fine manipulation with the right hand due to weakness and pain.

- She can walk only 10 minutes because the shoulder and arm start to hurt.

- She cannot reach normally in any direction – she has very limited reaching ability, and normal reaching with her right arm is restricted to never.

- She cannot do simple grasp with her right hand, as she would drop the item.
- She cannot do a firm grasp or fine manipulation with her right hand.
- She cannot push/pull with her right arm at all.
- No climbing with the right arm.
- No kneeling or crouching, as that would increase the pain in her right arm.

Her left arm is limited too because any forceful exertion with her left arm hurts her right arm. Left arm restrictions are as follows:

- She can lift up to 15 pounds with her left arm.
- She can do fine manipulation and firm grasp and simple with her left arm frequently, as long as it does not jar her body or move her right arm.
- She can sit up to 2-3 hours and can stand and walk only 10 minutes at a time due to pain.

. . . .

- Walking only up to 10 minutes at a time with rest
- Standing only up to 10 minutes at a time with rest
- Sitting up to 2-3 hours with taking breaks
- Limited driving.

(Exhibit 1:10, 12)

He assessed a 51 percent impairment of the whole person for the shoulder injury and the ulnar neuropathy injury and cervical radiculopathy. (Exhibit 1:11, 12) He felt that it was likely she would have to undergo right shoulder replacement surgery, steroid injections, radiofrequency ablation, and other conservative treatments. (Exhibit 1:11-13)

On February 23, 2018, Matthew Bollier, M.D., an orthopedic surgeon conducted an independent medical examination at the request of the defendant. (Exhibit A: 4) On this date, claimant reported dull, stabbing pain radiating into her right shoulder, right-sided neck, and right arm pain. She also reported left hip pain. Id. She reported that the surgery did help to alleviate some of the shoulder pain, however, she still had soreness

and increased pain with range of motion. She reported tingling of the long, ring and small fingers on her right hand as well as swelling of the fingers which made it difficult for her to close her hand into a complete fist. On examination, he found that she had full range of motion in her cervical spine with no tenderness but positive Spurling sign with radiation of symptoms down the right arm. She had tenderness to palpation in the bicipital groove, trapezius and deltoid. (Exhibit A: 5) She also exhibited decreased range of motion in the shoulder including an inability to internally rotate her arm at the side. (Exhibit A: 6)

His diagnoses included right shoulder pain, greatest in the trapezius and surrounding musculature which was the result of an underlying pre-existing degenerative arthritic shoulder and neck pathology. (Ex. A:7) Dr. Bollier cited several previous neck injuries outside of work and a previous neck fusion as part of the reason that the current symptomatology was not related to her work. (Ex.A:7) He also felt that the neck pain and current complaints were related to spine degeneration common to someone her age. Id.

Unlike Dr. Segal, Dr. Bollier felt that the MRI showing tendinopathy, labral fraying, and AC joint arthropathy confirmed a pre-existing and degenerative condition. (Ex. A:7)

Defendant argues that the claimant is not credible. The claimant's account of how the incident occurred were consistent to her medical providers, in her answers to interrogatories, and her deposition testimony, and in her testimony during the hearing. She was also consistent about the location of her pain which was primarily right-sided and in her neck, shoulder, arm, extending into the wrist and hand.

The areas in which claimant was not fully forthcoming initially was about her past medical history and the number of times that she has sustained neck, shoulder, or low back injuries. Dr. Gordon was disturbed the claimant did not reveal this upon her first visit. However, he did learn of these prior surgeries and injuries in later visits. While Dr. Segal's report did not include all of the claimant's prior injuries, it did note her cervical fusion as well as the 2015 motor vehicle collision. Yet it does not appear claimant intentionally concealed her surgeries. For instance, she saw Dr. Gordon on August 16, 2016 and while she did not give a full and complete medical history to him, she did report several surgeries to Dr. Bartlett only six days later on August 22, 2016, including neck surgery, back surgery, and rotator cuff repair. (Joint Exhibit 5:1) Yet, in the worksheet filled out after her motor vehicle collision, claimant denied any neck, back, herniated discs, shoulder, elbow, hip, foot, knee or ankle problems. (Ex. I:1)

Defendant asserts the testimony of Ramiz Muheljic, who testified at hearing, as more reliable than claimant's testimony. Mr. Muheljic testified that it is difficult to throw a whole loin on the shelf and instead, you would fling the skin onto the shelf. Whether it was skin or loin, an employee was required to use an upward flinging motion of the arm which impacted the shoulder.

Mr. Muheljic indicated that during the claimant's training phase, she would have someone with her at all times. At the time of her alleged injury, she was in her training phase. However, the individual who was training the claimant and who could competently testify regarding how the claimant's alleged injury occurred did not appear at hearing.

Defendant also takes issue with the fact the claimant has had previous worker's compensation injuries that have gone to hearing and therefore she is very familiar with the process. The claimant did report her workers' compensation matters in her answers to interrogatories. (Exhibit O: 1) It is unclear how this is a concealment as the defendant seem to imply. In the brief, the defendant refers to one worker's Compensation claim and that the claimant did not indicate how much she was awarded for what her restrictions were. However, claimant included references to two other worker's compensation procedures in 2008 and 2011. While she did not remember the amount of the settlement, she identified the attorney who represented her and provided the telephone number to said attorney. (Ex. O:1)

Defendant's characterization of the claimant as fabricating a workers' compensation claim and concealing information regarding her past experience in the workers' compensation systems is rejected.

There is one area of information that does give me pause. Claimant testified at hearing that she was in very good shape prior to her injury and that she ran 3 to 4 miles a day prior to her work injury. She also testified to riding a motorcycle, bowling, and roller skating prior to the work injury. However, in her 2011 worker's compensation matter, claimant reported difficulty in standing and walking due to swelling and pain in her knee as well as an inability to raise her left arm above her shoulder. These injuries and impairments lasted until at least to 2013 when claimant had her workers' compensation hearing. The decision of the district court judge was not issued until November 2015 but the date of the decision is not vital because it is a decision that was based on facts leading up to the hearing date in either 2013 or 2014.[1]

She sought out medical care for neck and back pain in the fall of 2015 after a motor vehicle collision. She described the neck pain as severe. (Ex. G:1)

Claimant maintained that she had no pain leading up to the injury, but she had serious and disabling injuries to her right upper extremity, neck and back prior to the present workers' compensation claims.

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[1] The District Court decision notes that the appeal decision was rendered on November 3, 2014, but does not indicate when the hearing took place or when the initial arbitration decision was rendered. The last medical date in the decision was July 22, 2013, wherein claimant was still reporting residual neck pain, limited cervical range of motion and low back pain. (Ex D:5-6)

Claimant healed from those past injuries and obtained new employment with defendant employer. She did not complain of walking difficulties or issues with her left arm while working for defendant employer but did have complaints regarding swelling in her hands and low back pain within weeks of her start date with the defendant employer. She was disqualified from at least two jobs for being slow and/or from complaints of pain her hands, wrists and low back prior to the alleged work injury. Her behavior at work was not consistent with someone who was actively running 3 to 4 miles per day, riding a motorcycle, bowling, and roller skating.

During the hearing, the claimant did not come off as evasive. She did not shift in her seat during cross-examination. She did not argue with the defendant's counsel. She appeared uncomfortable due to pain, but did not display unease as it relates to the questioning. She answered the questions to the best of her ability. Some of her injuries occurred over two decades ago while a few were in the more recent past.

Weighing all the above, I make a specific finding that claimant was a credible witness based upon her demeanor, a review of the medical records, and a comparison of her deposition testimony to her hearing testimony. However, she did have a tendency to forget past medical issues and may have exaggerated the extent of her active exercise in the months leading up to the injury.

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 R. App. P. 6.14(6).

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.

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 asserts injuries to her neck, shoulder, upper extremity, and wrist and hand on the right. Of the list of body parts affected, only the right shoulder was pain-free in the months leading up to the alleged work injury.

Claimant has an extensive history of neck, back, and left shoulder related trauma prior to the alleged work injury date.

Most recently, claimant was involved in a motor vehicle collision on or about September 15, 2015. She was restrained but her neck was jerked around resulting in an aggravation of the degenerative disease and fusion she had undergone years before. She was taking Lortab directly before or possibly even during the months of her initial employment. The contemporaneous notes of a trainer for defendant employer noted claimant reported back pain in October 2015.

Claimant also had sustained injuries to her neck in at least two previous instances including a work injury on March 26, 2003 and a work injury in 2008. She ultimately went on to have a fusion at C6-7 in June 25, 2012, and reported ongoing pain following the fusion.

In 2008, claimant reported pain and stiffness in the right side of her neck along with occasional headaches. She was awarded $9,003.60 in nonoccupational disability benefits as a result. However, this injury did not prevent her from obtaining new employment.

When she sustained an injury to her left shoulder and left knee in 2011, she maintained she had difficulty raising her left arm above her shoulder, turning her neck or sitting too long due to pain. She needed help dressing and combing her hair. (Ex. D:6) The initial decisions of the arbitrator in the 2008 work injury case determined claimant had a total loss of her left leg and left arm. (Ex. E:5)

Claimant relies on the expert opinions of Dr. Segal in support of her claims. Dr. Segal indicated that the injury to the infraspinatus tendon and labral injury was consistent with a SLAP lesion. Claimant's resulting surgery was a total reverse arthroplasty necessitated by the damage to claimant's rotator cuff damage. However, rotator cuff damage can be degenerative in nature.

Problematically, Dr. Segal either concludes claimant had no previous similar symptomatology or that the pain was transient and resolved. Perhaps Dr. Segal concluded this because he was unaware of the serious nature of claimant's complaints in 2002, 2008, and 2011. He did know of the September 2015 motor vehicle injury but did not appear to be aware of the fact that when she first started working for the defendant employer, she complained of back pain as well as swelling in her hands and wrists. She testified she was disqualified from a position due to swelling in her hand.

It is true that none of these previous injuries were to claimant's right shoulder. She did not receive injections or surgery to the right shoulder. There appears to be no recent medical treatment to claimant's right shoulder.

While Dr. Segal's opinion is well thought out and the article on SLAP tears attached to his opinion was illuminating, I find his opinion to be unreliable due to the lack of information that he had available to him when he rendered his conclusions.

On the other hand, Dr. Gordon is a doctor so intimately acquainted with the defendant that he can describe the jobs of the workers with more precision than the workers themselves. Despite having a different employer on his curriculum vita, Dr. Gordon is essentially a staff position for the defendant employer. He further opined that because the maximal range of shoulder movement was never reached during the work that the claimant performed that no shoulder injury as described by the claimant could occur. These types of extreme comments displayed Dr. Gordon's bias and rendered his opinions unhelpful.

Dr. Bollier was concerned that the right shoulder pain stemmed more from her cervical fusion than any acute damage to her right shoulder. This was consistent with Dr. Segal's opinion as well who opined that the majority of claimant's shoulder complaints were likely related to her cervical radiculopathy. Dr. Bartlett identified the shoulder condition as degenerative in nature.

This was a difficult case given the complexity of claimant's past medical history, but given Dr. Segal's lack of information regarding claimant's past medical problems as transient and resolved, his opinion is given lower weight. Dr. Bollier and Dr. Bartlett opined that claimant's shoulder pain was unrelated to the work injury. These are the opinions relied upon in rendering a conclusion in this case.

Because lower weight is given to Dr. Segal and he is the only expert connecting claimant's injury to the type of work she performed, it is found that claimant has not met her burden that she sustained a work injury to her shoulder, right upper extremity or right hand or wrist arising out of and in the course of her employment on July 26, 2016.

Based on the foregoing, the remainder of the issues are moot.

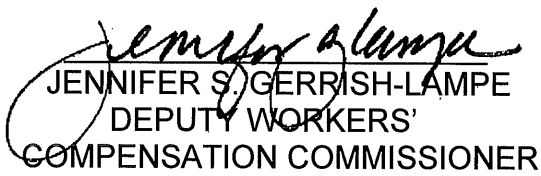
ORDER

THEREFORE, it is ordered:

Claimant shall take nothing.

That each party shall pay their own costs

Signed and filed this 1st day of August, 2018.



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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.