BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DONNA BAKER, Claimant, vs. WAL-MART, INC., Employer, and NEW HAMPSHIRE INSURANCE CO., Insurance Carrier, SECOND INJURY FUND OF IOWA, Defendants.	File No. 19006945.01 ARBITRATION DECISION Head Note Nos.: 1803, 1803.01, 3200, 3202

STATEMENT OF THE CASE

Claimant, Donna Baker, has filed a petition for arbitration seeking workers' compensation benefits against Walmart, Inc., employer, New Hampshire Insurance Co, insurer, and the Second Injury Fund of Iowa.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner in the matter of the Coronavirus/COVID-19 Impact on Hearings, the hearing was held on May 10, 2022, and considered fully submitted upon the simultaneous filing of briefs on June 21, 2022, the agreed upon date for the simultaneous filing of briefs.

The record consists of Joint exhibits 1-7, claimant's exhibits 1-8, Defendant Walmart Associates, Inc. exhibits A-D, Second Injury Fund of Iowa exhibits AA to DD, and the testimony of the claimant.

ISSUES

1. Whether claimant has sustained a permanent disability, and if so,
2. Whether the permanent disability is a scheduled member injury or industrial in nature;
3. Whether claimant is entitled to reimbursement of an IME under Iowa Code section 85.39;

4. Whether claimant sustained a second qualifying loss pursuant to Iowa Code Section 85.64;
5. The extent of claimant's disability, if any;
6. The commencement date of benefits owed by the Second Injury Fund of Iowa, if any;
7. 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 stipulate claimant sustained an injury on June 6, 2019, arising out of and in the course of her employment. They further agree that the injury was the cause of a temporary disability entitlement to which is no longer in dispute.

The parties stipulate claimant sustained a first qualifying loss to the left lower extremity on December 19, 2013, and that the functional loss from that injury was 37 percent.

The parties agree the commencement date for permanent partial disability benefits, if any are awarded against the employer is July 18, 2020.

At the time of the injury claimant's gross earnings were $363.92 per week and that claimant was married and entitled to three exemptions. Based on the foregoing, the parties believe the weekly benefit rate to be $262.10

Defendants waive all affirmative defenses. There are no medical benefits in dispute.

FINDINGS OF FACT

Claimant was a 75-year-old person at the time of the hearing. Her educational background consists of thirteen college credits followed by a six-month pharmacy technician course. She obtained her certification but allowed it to lapse in 2007.

Her work history includes waitress, house cleaner, machine operator, tollbooth collector and cook in a commercial kitchen setting. (Tr. 31) She began work at defendant employer in 2002. At the time of her injury, her position as a Fitting Room Attendant required her to answer phones, fold clothes, place clothes on hangers, use a handheld scanner device, and paperwork. (DE A:4) The job description said that she must move, lift, carry, place merchandise and supplies weighing up to 10 pounds without assistance. (DE A:4) She testified at hearing that she is able to do all the essential tasks of her job but some of the aspects are more difficult than others. At the

time of her injury, she was making $12.85 per hour and at hearing she testified she currently earns $15.00 per hour. (See CE 7:36)

Her past medical history is significant for degenerative joint disease and total left knee replacement.

C-spine x-rays taken on March 23, 2003, showed no evidence of an acute fracture. (JE 1:1) There were significant changes to the 4, 5, 6th cervical interspaces due to degenerative joint disease, subarticular sclerosis, and anterior spur formation. (JE 1:1)

Claimant fell in March 2004 and underwent an MRI on June 21, 2004, which revealed disc protrusions due to degenerative changes at C4-5 and C6-7. (JE 1:3)

On November 12, 2018, claimant was seen by Ryan Pokorney, D.O., for left knee pain and weakness ongoing for two years. (JE 2:4) She first noticed the pain during her rehab from back surgery and believed that physical therapy had aggravated her condition. Claimant underwent total knee replacement on the left with Dr. Pokorney on December 19, 2018. (JE 2:5) She returned to full duty work for defendant employer approximately six months after her surgery. (JE 5:77) She continued to have pain and weakness although primarily with activity and lifting. (JE 2:7)

On or about June 6, 2019, claimant tripped at work, falling forward and landing on her right side. She was seen on June 10, 2019, by Kimberly Mulholland, ARNP, for right shoulder pain radiating into the right neck area as well as right elbow pain. (JE 3:8) She had moderate bruising on her elbow and pain with lifting her right arm past shoulder height. (Id.) She was placed on restricted duty, prescribed Tylenol for pain, lidocaine patches, and physical therapy. (JE 3:10) Because she continued to have pain, restricted movement, and weakness, ARNP Mulholland ordered an MR arthrogram on July 15, 2019. (JE 3:17) The MR arthrogram revealed a full thickness RTC tear and claimant was referred for an orthopaedic consult. (JE 3:24; JE 5:51) At the July 15, 2019, visit, claimant reported that her right elbow was 90 percent improved with her only symptom as soreness at the end of the day. (JE 3:16-19) She could flex and extend her elbow with no pain. (Id.)

On August 5, 2019, claimant presented for recheck of her right-sided cervical, shoulder and elbow pain. (JE 3:20) In the subjective portion, it was noted that claimant's right elbow issues had resolved and the right elbow was at 100 percent. (JE 3:21) This was confirmed with Ms. Mulholland's examination. (JE 3:23) Claimant's range of motion of the elbow was full. (Id.) There was no pain with palpation. (Id.) She had strength of 5/5 RT/LT to elbow flexion and extension. (Id.) Olecranon bursa was normal. (Id.) Swelling was not present. (Id.) She did have limited range of motion in her shoulder with popping and increased pain on flexion along with weakness in both abduction, external rotation and internal rotation. (JE 3:23)

Claimant consulted with Ryan Dunlay, M.D., on August 19, 2019, for the right sided injury. (JE 5:54) At that visit, she reported pain, catching, numbness and tingling. (Id.) Dr. Dunlay recommended surgical repair of the full thickness rotator cuff tear, right shoulder impingement, biceps tenosynovitis, and acromioclavicular joint arthritis. (JE 5:55) She underwent right shoulder rotator cuff repair, extensive debridement, subacromial decompression, acromioplasty and distal clavicle excision by Dr. Dunlay on December 5, 2019. (JE 5:60-62) Dr. Dunlay had planned on performing a biceps tenotomy but found "the bicep was actually absent and already torn from its labral insertion." (JE 5:61)

On December 16, 2019, Dr. Dunlay returned claimant to work with restrictions. She was to keep her arm in a sling and not use the arm at work. She was also sent to physical therapy. (JE 5:66) At the January 13, 2020, physical therapy visit, she reported right elbow and thumb pain. (JE 4:35) On January 17, 2020, her restrictions were changed to a 1 pound lifting restriction on the right. (JE 5:68) During the February 14, 2020, visit, claimant reported pain with overuse. (JE 5:71) Dr. Dunlay injected the subacromial space with Kenalog and Marcaine. (Id.)

She reported continuing pain and discomfort at her March 16, 2020, visit. (JE 5:72) Dr. Dunlay reassured claimant that her motion and strength looked good and encouraged her to continue physical therapy twice a week. (Id.) She was returned to work with a 10-pound lifting restriction. (Id.)

At the April 20, 2020, visit, claimant was doing well with mild discomfort in the right shoulder with certain positions but overall denied significant pain. (JE 5:74) She was kept on a 10-pound lifting restriction and continued on physical therapy. (JE 5:74)

On June 5, 2020, claimant reported pain in her neck and discomfort in the shoulder during her follow up appointment with Dr. Dunlay. (JE 5:77) She was returned to work with no restrictions. (Id.)

On July 1, 2020, claimant was discharged from physical therapy. (JE 4:49) The history included that claimant continued to have elbow pain as well as thumb pain. (JE 4:47) No treatment appeared to have focused on elbow or hand issues other than a few instructions about the use of a sling and proper posture during exercises. (See et seq. JE 4) The history section appeared to be a holdover or repeat of the initial evaluation instead of an ongoing diagnosis. She had attended 35 physical therapy appointments from January 31, 2030, to July 1, 2020. (Id.)

On July 17, 2020, Dr. Dunlay found claimant to be at maximum medical improvement (MMI). (JE 5: 80) She reported that she was doing well with limited pain. (Id.) She had some loss of range of motion in the shoulder. (Id.)

Dr. Dunlay saw claimant on December 1, 2020, for the one-year follow-up. (JE 5:83) She was experiencing an increase in shoulder pain. (Id.) Dr. Dunlay injected claimant with Kenalog and Marcaine and imposed restrictions of no lifting overhead.

(Id.) When Dr. Dunlay saw claimant on January 12, 2021, claimant reported ongoing pain with some movements. (JE 5:85) Dr. Dunlay determined claimant should have a permanent work restriction of no lifting overhead. (Id.)

Claimant continued to have pain and discomfort and eventually sought out treatment with Dr. Dunlay again on December 27, 2021. (JE 5:86) Dr. Dunlay provided injection treatment which claimant testified at hearing was helpful. (JE 5:86)

Dr. Dunlay assigned claimant a 4 percent right upper extremity impairment rating based on the loss of range of motion in the right shoulder joint and the permanent restriction of no lifting over shoulder height. (JE 5:85; JE 6:88)

Claimant testified at hearing she continued to seek treatment with Dr. Dunlay and had received an injection at her February 2022 appointment. (Tr. 37)

On March 4, 2022, claimant underwent an IME with Sunil Bansal, M.D. (CE 2) At the time of her evaluation, claimant continued to have right shoulder pain, as well as difficulty raising her right arm overhead. She was comfortable lifting a gallon of milk from the floor to table height but was only able to move her right arm behind her back at waist level. (CE 2:15) She also had ongoing occasional difficulties with her right elbow. There were times it would lock up in her biceps area such as when she had her elbow flexed and would extend it about half way. The elbow will snap and then she would experience a period of pain. (Id.)

Regarding the left knee, she continued to have difficulty kneeling, and difficulty navigating stairs and used the handrails for aid. She had pain although it was reduced since the knee replacement. (CE 2:16)

During the examination, claimant exhibited tenderness to palpation, greatest over the subacromial bursa, tenderness to palpation over the distal biceps, and a 10 percent loss of strength with elbow flexion. (CE 2:16) She had suprapatellar swelling in her left knee but she had good mediolateral and anterolateral stability. (CE 2:17)

Dr. Bansal opined claimant sustained a work injury on June 6, 2019, which resulted in a right shoulder and right biceps injury due to her fall to the floor when she struck her right elbow. (CE 2:18) Dr. Bansal agreed that her MMI date was July 17, 2020. (Id.) He recommended no lifting greater than 10 pounds with the right arm and no lifting overhead with the right arm. (CE 2:19)

Due to her loss of range of motion in the shoulder as well as the surgical repair, Dr. Bansal assigned a 21 percent impairment of the upper extremity. He assigned an additional 2 percent upper extremity impairment for the loss of strength in her right elbow due to flexion strength loss secondary to her partial biceps tendon displacement. (CE 2:19) For the left knee, he assigned a 37 percent lower extremity impairment based on Table 17-33 of the AMA Guides of Evaluation for Permanent Impairment, Fifth Edition, which estimates a 37 percent loss of lower extremity due to a total knee

replacement with good results. (CE 2:20; p. 546 of the AMA Guides, 5th Ed) He recommended claimant avoid frequent kneeling or squatting as well as multiple stairs due to the left knee injury. (CE 2:20)

Currently, claimant maintains she has difficulty kneeling, walking up hill, walking up stairs, walking on uneven surfaces. She uses Tylenol and ice packs for pain and discomfort on her knee.

For the shoulder, she has difficulty reaching above her shoulder. She must use a top stock three-tier cart with stairs to reach things on the top shelves at work. She has difficulty lifting items greater than 20 pounds, as well as difficulty with household chores such as retrieving a gallon of milk from the refrigerator or vacuuming. She has difficulty washing her hair and mostly uses her left arm to drive. Dressing can be difficult as well.

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. 6.904(3).

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 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).

The crux of the dispute is whether claimant sustained a permanent impairment to the right elbow or arm separate from the right shoulder injury. Claimant relies on the opinion of Dr. Bansal who concluded that claimant suffers from reduced strength due to her partial biceps tendon displacement. He assigned a 2 percent impairment for this alleged injury. Dr. Dunlay did not find that claimant sustained any elbow or arm injury but solely a right shoulder injury. In the medical records, claimant reported her right elbow was improved by 90 percent as of July 15, 2019. She could flex and extend her elbow without pain. A month later, claimant reported resolution of her elbow pain and on examination, her range of motion in the elbow was full with no pain upon palpation and full strength with flexion and extension.

Claimant did not report pain in her right elbow again until after the December 5, 2019, surgery. No treatment was provided for the right elbow and she sought out no care for the right elbow even though she continued to treat for the right shoulder.

A review of the medical records, particularly the treatment records of Dr. Dunlay along with the physical therapy records, supports a finding that claimant sustained a temporary injury to the right elbow that resolved on or about August 2019. She did report some elbow and thumb pain to the therapist following the surgery but no treatment was rendered. In Dr. Bansal's report, he stated her right elbow pain was when she would occasionally flex and extend the elbow halfway and then experience a period of pain. This brief mention of possible right elbow pain is not substantial evidence of a permanent impairment to the right elbow arising out of the work injury of June 6, 2019.

The parties essentially agree that claimant has sustained a permanent injury to the shoulder. Based on precedent, these injuries are considered scheduled member injuries pursuant to the 2017 revision of the Iowa Code. Chavez v. MS Tech. LLC, 972 N.W.2d 662, 670 (Iowa 2022) Claimant was treated for a shoulder injury, had surgery for right shoulder rotator cuff repair, extensive debridement, subacromial decompression, acromioplasty and distal clavicle excision.

The claimant argues that even if the shoulder is deemed to be a scheduled injury, she is entitled to industrial benefits because she injured both the arm and the shoulder under the catch-all provision of section 85.34(2)(v)

> In all cases of permanent partial disability other than those described or referred to in paragraphs "a" through "u", the compensation shall be paid during the number of weeks in relation to five hundred weeks as the reduction in the employee's earning capacity caused by the disability bears in relation to the earning capacity that the employee possessed when the injury occurred.

Id. § 85.34(2)(*v*).

However, because it is found that claimant did not carry her burden to prove that the biceps tear resulted in any permanent disability to her arm, as was the case in Chavez, section 85.34(2)(v) does not apply as there are not two permanent disabilities that would move claimant out of the standard analysis for a single shoulder injury into a catch-all provision of section 85.34(2)(v).

Iowa Code section 85.34(2)(x) instructs that in all cases of permanent disability as set out in Iowa Code section 85.34(2)(a)-(u) when determining functional disability, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published the American Medical Association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. Lay testimony or agency expertise shall not be utilized in determining such loss.

Dr. Bansal assigned a 23 percent upper extremity impairment rating due to the loss of strength in the right elbow, loss of range of motion in the right shoulder, and the surgical repair of the right shoulder. Dr. Dunlay assigned 4 percent. The difference is that Dr. Dunlay's opinion did not include a percentage impairment for the distal clavicle resection, reduced extension and reduced abduction. (CE 2:18-20, JE 6) Dr. Bansal's range of motion measurements registered a larger loss in abduction and internal rotation as well as flexion. (Id.)

Defendants argue that Dr. Bansal's assessment is incorrect because Dr. Bansal included a 10 percent multiplier for the distal clavicle excision. It is true that the severity of impairment due to "other disorders" such as the presence of a resection or implant arthroplasty, musculotendinous disorders, tendinitis, and loss of strength is determined in two steps. First, the severity of the impairment is rated separately. Second, the severity of impairment is multiplied by a maximum value set forth in Table 16-18. (Guides, pp. 498-99, Fifth Edition). However, with resection arthroplasty, in the presence of decreased motion, impairments are derived separately and combined with the arthroplasty impairment.

In this case, Dr. Bansal assigned a 10 percent impairment for the distal clavicle resection and 12 percent upper extremity impairment due to loss of range of motion. According to the Guides, the addition is correct and using the combined values chart, the total right upper extremity rating is 21 percent. (See 604-605).

Dr. Bansal's opinion is given more weight as it appears to be more complete and considers factors more consistent with claimant's medical condition including the past medical procedures she received. The 21 percent impairment rating is adopted herein.

Claimant also argues that a shoulder injury is a second qualifying injury under Iowa Code section 85.34(2)(v). Under Iowa Code section 85.64, only injuries to the hand, arm, foot, leg, or eye qualify for Fund benefits. See Iowa Code Ann. § 85.64 (West). In 2017, the legislature considered but failed to adopt a proposed amendment to Iowa Code section 85.64 which would have added the shoulder as a Fund-eligible

injury. See, id.; 2017 Iowa House File No. 518, Iowa Eighty-Seventh General Assembly - 2017 Session. On February 16, 2022, a bill was again introduced in the Senate seeking to amend Iowa Code section 85.64 to add the loss or loss of use of a shoulder as a compensable injury for Second Injury Fund benefits. 2022 Iowa Senate File No. 2300, Iowa Eighty-Ninth General Assembly – 2022 Session. There would be no need to reintroduce this proposal as recently as February 16, 2022 if the legislature already intended to include shoulders as Fund-eligible injuries.

Therefore, while the shoulder is a scheduled member injury, it is not an enumerated one for the purposes of the Fund qualifications." See also Gregory West, Claimant, File No. 20001935.01, 2021 WL 5932891, at *6 (Dec. 7, 2021), affirmed on appeal in Gregory West, Claimant, File No. 20001935.01, 2022 WL 1787582 (Apr. 21, 2022); also see, Kevin Carte, Claimant, File No. 1643167.01, 2022 WL 301794 (Jan. 25, 2022)

Claimant seeks reimbursement of the IME conducted by Dr. Bansal pursuant to Iowa Code section 85.39. Defendants argue that the bill should be apportioned given that the IME addressed both the shoulder and the left knee injury.

Claimant is requesting reimbursement of her § 85.39 IME expense with Dr. Bansal in the amount of $2,989.00. Dr. Bansal's report addressed both claimant's right shoulder injury, allegedly resulting from her June 6, 2019 work injury at Walmart, and left knee injury, allegedly resulting from a December 19, 2013 incident at home, and what is being claimed as a qualifying injury for Second Injury Fund purposes. Because Dr. Bansal's report addressed both the right shoulder and left knee injuries, the total cost of claimant's IME with Dr. Bansal should be apportioned between defendants and the Second Injury Fund. See Keyser v. St. Gobain Corp., d/b/a Certainteed Gypsum & Ceiling Mfg., Inc., File No. 5061026 (App. August 24, 2018). In Keyser, the Commissioner apportioned the IME bill due to Dr. Bansal's examination of the alleged first qualifying loss.

Based on Keyser, an apportionment is appropriate here. There is no itemization of hours spent on the shoulder and elbow examination versus the knee examination. Based on the medical record review, there was one page devoted to the left knee injury and four pages devoted to the shoulder and elbow. Only a small section of the examination appears to be related to the left knee. Based on the portion of time spent discussing the left knee versus the shoulder and elbow, it is found that defendant employer shall pay 2/3 of the cost of the IME examination pursuant to Iowa Code section 85.39 and 2/3 of the report fee pursuant to 876 IAC 4.33. Given that the shoulder is not a second qualifying loss, no fees are assessed against the Fund.

ORDER

THEREFORE IT IS ORDERED,

That defendants are to pay unto claimant fifty-two point five (52.5) weeks of permanent partial disability benefits at the rate of two hundred sixty-two and 10/100 dollars ($262.10) per week from July 18, 2020.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

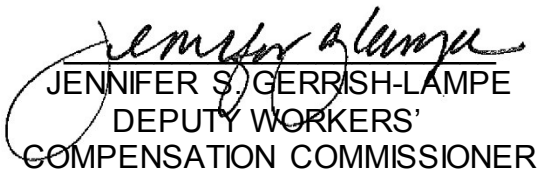
That defendants are to be given credit for benefits previously paid.

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

That defendants shall pay two-thirds (2/3) of the fee of Dr. Bansal pursuant to IAC 85.39

That defendant shall pay the costs of this matter pursuant to rule 876 IAC 4.33 including two-thirds (2/3) of the report of Dr. Bansal.

Signed and filed this 30th day of August, 2022.



JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Gabriela Navarro (via WCES)

Alison Stewart (via WCES)

Sarah Timko (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.