BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

AMY ROCHAU, Claimant, vs. DAVENPORT COMMUNITY SCHOOL DISTRICT, Employer, and EMPLOYERS MUTUAL CASUALTY COMPANY, Insurance Carrier, Defendants.	File No. 20001672.01 ARBITRATION DECISION Head Note Nos.: 1803, 1803.1, 2500, 2502, 2700

STATEMENT OF THE CASE

Claimant, Amy Rochau, has filed a petition for arbitration seeking workers' compensation benefits against Davenport Community School District, employer, and EMC Insurance Company, insurer, both as defendants.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner in the Matter of Coronavirus/COVID-19 Impact on Hearings, the hearing was held on March 10, 2021, via Court Call. The case was considered fully submitted on March 31, 2021, upon the simultaneous filing of briefs.

The record consists of Joint Exhibits 1-16, Defendants' Exhibits A-G, and the testimony of claimant.

ISSUES

1. Whether claimant has sustained a permanent disability arising out of an accepted work injury;

2. Whether claimant's injury resulted in a permanent disability that is a scheduled member or industrial in nature;

3. Whether claimant is entitled to reimbursement of medical expenses itemized in Joint Exhibit 14;

4. Whether claimant is entitled to payment of an independent medical examination pursuant to Iowa Code section 85.39;

5. Whether claimant is entitled to alternate medical care under Iowa Code section 85.27;

6. 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 the claimant sustained an injury on May 3, 2019 which arose out of and in the course of her employment.

At the time of the injury, claimant's gross earnings were $698.17. She was single and entitled to one exemption. Based on the foregoing, the weekly benefit rate is $441.51.

While the parties do not agree as to whether claimant is entitled to reimbursement of medical expenses in Joint Exhibit 14, the defendants will stipulate that the prices charged by the providers were fair and reasonable, that medical providers would testify as to the reasonableness, and that the defendants will not offer any contrary evidence. Further, although the causal connection of the expenses to the work injury cannot be stipulated, the list of expenses is causally connected to the medical condition upon which the claim of injury is based.

FINDINGS OF FACT

Claimant was a 55-year-old person at the time of the hearing. Her educational background includes graduation from high school. Her past work history includes nine months at a boarding and doggie daycare, almost twelve years as a Culligan delivery person who carried water bottles and 50-pound bags of salt, and nine months as a nighttime stocker at Sam's Club. Most of her past employment required physical strength for lifting.

Claimant began working for the defendant employer as a paraeducator and passed a post offer physical on May 13, 2014 which indicated the claimant could perform all essential job functions with no medical restrictions. (JE 7:27; DE B:8) In late 2016, claimant applied for a position of security officer; she was required to undergo another post offer physical which she passed. (JE 7:30) Claimant testified that during the test she was required to lift up to 50 pounds from the floor to the waist and waist to shoulder, pushing sleds, pulling sleds, climbing ladder, and mopping the floor.

On February 13, 2019, claimant took a part-time job with Menards, stocking shelves and assisting customers. (DE B:8) She resigned from this position on June 28, 2019. (DE F:30) At the time of the hearing, claimant worked in the shipping and receiving department of the warehouse associated with the school. There is some lifting involved. She earned $22.86 as a security person for defendant employer and currently makes $18.93 per hour. (DE E:27)

Her prior medical history includes two surgeries with Suleman Hussain, M.D., to claimant's right shoulder following a fall on metal steps. Claimant was working for Culligan at the time delivering water bottles when she slipped and fell on her right side and right hip. (JE 1:2) The first surgery was on February 21, 2012 when Dr. Hussain repaired a tear in the right supraspinatus. (JE 3:7) The second surgery took place on January 29, 2013. (JE 3:8) Claimant returned to work without restrictions and a 6% whole person impairment rating. (JE 4:12-13) Dr. Kuhnlein conducted an IME on March 26, 2014, wherein he assessed claimant as sustaining an 18% whole person impairment rating and that she had permanent restrictions of lifting, pushing, pulling and carrying up to 30 pounds rarely from floor to waist, 30 pounds occasionally from waist to shoulder, and 10 pounds rarely over the shoulder. (DE G:45) He advised against the use of vibratory or power tools. Id.

Claimant testified that while she did not leave her employment with Culligan willingly, she also knew that lifting fifty pounds over her head after two surgeries was not a good idea. Her shoulder always ached.

On May 3, 2019, claimant was involved in an altercation with a student resulting in claimant landing on her right shoulder and striking her head on the floor.

She was sent to Concentra for care. (JE 8:36) The medical note recorded pain in the right shoulder and noticeable bruising on the face and a laceration close to the eye and eyebrow. (JE 8:36) Initial x-rays were negative for fractures, but there was a slight elevation of the distal right clavicle thought to be compatible with a Rockwood classification type II acromioclavicular separation injury. (JE 8:39-40) There were also signs of moderate primary osteoarthritic changes. (JE 8:40) She was put on modified duty of lifting up to 10 pounds occasionally and no reaching above her shoulders or head and no use of the right upper extremity. (JE 8:41)

Claimant returned for follow-up on May 13, 2019, to Concentra with continued reports of pain and weakness in the right shoulder along with bruising in the face. (JE 8:49) It was noted that claimant was "approximately 25% of the way toward meeting the physical requirements of her job." (JE 8:50) Claimant was referred back to Dr. Hussain and treated continuously with Dr. Hussain and his PA from June 3, 2019, through January 22, 2021. (See generally JE 9).

Dr. Hussain administered an injection at the first visit on June 3, 2019. He wrote, "After discussing the options with the patient, we are going to proceed with a right

shoulder injection. She understands her long-term prognosis will be a shoulder replacement." (JE 9:57-58) He returned her to work full duty with no restrictions. (JE 9:58)

On June 19, 2019, Dr. Chelli, who had seen claimant at Concentra, opined that claimant had suffered a temporary aggravation of a pre-existing condition and that she had been released to full duty without restrictions by her orthopedic surgeon. (JE 8:53-54)

On July 3, 2019, claimant returned to Dr. Hussain with continued pain in her right shoulder. Her active elevation was 170 degrees bilaterally and her external rotation was good but internal rotation was limited on the right side. (JE 9:60) She had crepitation in the right shoulder and was tender anteriorly. (JE 9:60) A second injection was administered, and Dr. Hussain recommended an MRI. (JE 9:60) A July 22, 2019 MRI showed a small full-thickness tear of the right shoulder rotator cuff and moderate glenohumeral chondromalacia. (JE 10:77) Dr. Hussain, with the agreement of the claimant, treated the defect in the rotator cuff conservatively with the offer of injection therapy every 3-4 months. (JE 9:63)

> [p]hysical therapy, activity modifications and injections. After discussing options with the patient, we are going to proceed with prescribing Meloxicam, she is fine to take this on her busier days to avoid any discomfort in the shoulder, she knows not to mix this with Aleve and should she want to continue taking it she will need to get the refill from her primary care physician so it can be monitored. I have advised that her long term prognosis will be a shoulder replacement. I gave her red flags to watch for like a loss in her strength which will tell her when it is time to consider the replacement. I advised that she is welcome to return for injection therapy until they are no longer providing her with relief, she is safe to get the injections every 3-4 months. She is agreeable to the plan. I would like her to follow-up in 6-8 weeks for repeat injection therapy.

Id. Claimant continued injection therapy throughout 2019 and into 2021 with her most recent injection prior to the hearing taking place on January 22, 2021. (JE 9:75) On February 14, 2020, Dr. Hussain wrote a letter to the defendants following a conference with the attorney for defendants. (JE 9:71) In the letter, he concluded that claimant will need to undergo a total shoulder arthroplasty but that the need for that surgery was "related to the natural posttraumatic osteoarthritis progression that occurred in 2012 and 2013, based on the interventions, based on her prior work injury, and these would not be linked or related to her May 3, 2019 event." (JE 9:71)

On February 18, 2020, defendant insurer issued a letter to the claimant informing them that they were denying the claim based upon Dr. Hussain's conclusions. (JE 15:99)

In October 2020, claimant moved to the warehouse position as she felt working

with the kids as a security officer was too much stress on her right arm. She shared her concerns with her co-workers and they allowed her to work on the left side, but she was limited in reaching and holding kids with her right arm.

On January 5, 2021, Richard L Kreiter, M.D., authored an opinion at the request of the claimant. (JE 11) After a record review and an evaluation, Dr. Kreiter opined that claimant's fall on May 3, 2019, caused increased interarticular pathology, including erosion to the labrum or articular cartilage of the joint with increased inflammation and evidence of moderate changes on x-ray. (JE 11:83) As such, the injury of May 3, 2019, aggravated and accelerated the pre-existing moderate osteoarthritis. Id. Dr. Kreiter advised temporary restrictions of no overhead work with the right upper extremity, limiting lifting to no more than 30 to 35 pounds from floor to bench with two hands and arms close to the side occasionally, no forceful pushing or pulling with a right arm and no repetitive pushing, pulling or polishing activity. (JE 11:83-84)

The fee for the IME was $1,000.00. (JE 16:100)

Claimant is currently working and has been since her injury. She does request help from her co-workers and she testified that it hurts to extend her right arm.

Claimant has not elected to undergo a total replacement surgery because she cannot afford to be off for six months for recovery without pay. She would like to go through with the surgery and recover use of her right arm. However, she is not comfortable with Dr. Hussain any longer after he issued the opinion that her current symptomology relates back to her previous injury in 2012.

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" refer 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 Elec. 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).

Dr. Hussain treated claimant in 2012, performed two surgeries, and then saw claimant again in 2019 for the injury that is the subject of dispute in this present case. He opined that the claimant's need for total right shoulder replacement surgery was related to the 2012 injury and not the 2019 injury.

Defendants argue that claimant's right shoulder symptoms have not changed or increased since the original 2012 injury. As of October 7, 2015, claimant was alleging that she could not lift over her shoulder or with her right arm extended. (DE G:34) However, claimant has been without medical treatment from 2013 when she was released by Dr. Hussain until 2019 when she began to see him again for injection therapy.

Dr. Hussain's opinion that claimant suffered only a temporary aggravation is contradicted by his ongoing injection therapy treatment. While Dr. Hussain has treated claimant over the course of almost a decade, his causal opinion does not take into consideration the Iowa law regarding aggravation. It is not that Dr. Hussain's opinions are not credible or that he was a bad doctor who did not treat the claimant well; instead, his opinion does not control because his interpretation of causation is not consistent with the legal definition of causation as directed by the Iowa Supreme Court. Further, as stated previously, he is providing ongoing care which undermines the opinion that clamant has only suffered a temporary aggravation of a pre-existing condition.

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, 76 N.W.2d 756 (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, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

The opinion of Dr. Kreiter is more consistent with the claimant's physical complaints. Between her July 13, 2013 release and her May 3, 2019 injury, claimant had no medical treatment for her shoulder. She was working her full duty job at the time of her injury. On May 3, 2019, claimant suffered a traumatic insult to her right shoulder area. She had immediate pain and problems arising from the right shoulder region and went on to undergo medical treatment which continued up to the hearing.

The type of injury, the lack of prior medical care, claimant's own actions, and her course of medical treatment support Dr. Kreiter's opinions that as a result of her work, claimant sustained an aggravation, acceleration or worsening of her osteoarthritis that developed following the 2012 and 2013 surgeries.

Claimant's condition is not ripe for a permanency finding. She is back to work, full duty with no restrictions, but she is careful with her right arm and moved to a different, lower paying position to accommodate her pain and weakness. She needs total shoulder replacement surgery and her condition following her recovery from that surgery would determine her permanent disability. Further, it is premature to make a determination as to whether the injury is a scheduled member and confined to solely her shoulder or is industrial in nature.

Based on the causation finding, claimant is entitled to the medical expenses in Joint Exhibit 14.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Defendants did not authorize the treatment but given that they denied the claim, the claimant has the right to seek out her own care. When compensability is found, the employee can then recover the award of reasonable medical care the employer should have furnished from the inception had compensability been acknowledged. Bell Bros. Heating and Air Conditioning v. Gwinn, 752 N.W.2d 35 (Iowa Ct. App. 2008)

Claimant also seeks a finding of alternate medical care, no longer wishing to return to Dr. Hussain due to a loss of trust.

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

Alternate care included alternate physicians when there is a breakdown in a physician/patient relationship. Seibert v. State of Iowa, File No. 938579 (September 14, 1994); Nueone v. John Morrell & Co., File No. 1022976 (January 27, 1994); Williams v. High Rise Const., File No. 1025415 (February 24, 1993); Wallech v. FDL, File No. 1020245 (September 3, 1992) (aff'd Dist Ct June 21, 1993).

"Determining what care is reasonable under the statute is a question of fact." Long v. Roberts Dairy Co., 528 N.W.2d 122, 123 (Iowa 1995).

Claimant's dissatisfaction with Dr. Hussain arises from his opinions and not the medical care he has been providing. However, she feels that he has placed himself in a position adverse to her own condition and she is concerned that this would affect her treatment in the future. Based on the claimant's statement of loss of trust, the seriousness of her injury and future treatment, it is found there is a breakdown in the physician-patient relationship between claimant and Dr. Hussain. Treatment with the University of Iowa Hospital and Clinics would be reasonable under the circumstances.

Claimant also seeks reimbursement for her IME

Iowa Code 85.39(2) states:

> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a

> subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination.

Iowa Code 85.39(2).

Iowa Code 85.39 was amended in 2017. Iowa Code 85.39(2) added:

> An employer is only liable to reimburse an employee for the cost of an examination conducted pursuant to this subsection if the injury for which the employee is being examined is determined to be compensable under this chapter or chapter 85A or 85B. An employer is not liable for the cost of such an examination if the injury for which the employee is being examined is determined not to be a compensable injury. A determination of the reasonableness of a fee for an examination made pursuant to this subsection shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted.

Iowa Code 85.39(2) (2017). In this case, Dr. Chelli opined claimant's shoulder injury was only a temporary aggravation, and the defendants denied the claim based on Dr. Chelli and Dr. Hussain's opinions, both of whom were doctors claimant was referred to while defendants controlled care.

Dr. Kreiter then undertook an examination on January 5, 2021, at the request of the claimant. The examination fee would qualify under 85.39 and the report can be assessed as a cost pursuant to 876 IAC 4.33. Claimant also seeks recovery of the filing fee which is an appropriate cost to be assessed under 876 IAC 4.33 as well.

ORDER

THEREFORE, it is ordered:

Claimant's right shoulder symptomatology and need for total right shoulder replacement surgery arises out of and in the course of her employment.

Defendants shall reimburse and/or pay for the medical expenses in JE 14.

Claimant is entitled to alternate medical care in the form of treatment for her right shoulder from the UIHC.

Defendants shall pay the amount of one thousand dollars ($1000.00) for Dr. Kreiter's report and examination pursuant to Iowa Code section 85.39 and 876 IAC 4.33

Defendants shall pay the filing fee and the cost of the transcript pursuant to 876 IAC 4.33.

Defendants shall file subsequent reports of injury as required by rule 876 IAC 3.1(2).

Signed and filed this ___26th___ day of July, 2021.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Thomas Cady (via WCES)

Maggie Boesen (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.