BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRIAN WEIMERSKIRCH, Claimant, vs. PROGRESSIVE PROCESSING, LLC, Self-Insured Employer Defendant.	: : : : : : : : : :	File No. 1655936.01 A P P E A L D E C I S I O N Headnotes: 1402.20; 1402.40; 1803; 1803.1; 2907

Defendant Progressive Processing, LLC, self-insured employer, appeals from an arbitration decision filed on October 21, 2022. Claimant Brian Weimerskirch responds to the appeal. The case was heard on April 12, 2022, and it was considered fully submitted in front of the deputy workers' compensation commissioner on June 3, 2022.

In the arbitration decision, the deputy commissioner found claimant met his burden of proof to establish he sustained a left shoulder sequela injury on January 22, 2019, caused by the stipulated April 5, 2018, right shoulder injury. The deputy commissioner found claimant is entitled to receive healing period benefits from October 28, 2019, through August 8, 2020, subject to a credit for the short-term disability benefits claimant received. The deputy commissioner found claimant sustained industrial disability as opposed to functional loss because claimant's employment terminated before the hearing. The deputy commissioner found claimant sustained 35 percent industrial disability as a result of the work injury, which entitles claimant to receive 175 weeks of permanent partial disability benefits. The deputy commissioner ordered defendant to pay claimant's costs of the arbitration proceeding in the amount of $519.72.

Defendant asserts on appeal that the deputy commissioner erred in finding claimant proved he sustained a left shoulder sequela injury on January 22, 2019, caused by the stipulated work injury. Defendant asserts the deputy commissioner used the wrong legal standard for determining whether claimant suffered a sequela injury or a separate and distinct injury. Defendant asserts the deputy commissioner erred in finding claimant is entitled to receive industrial disability benefits as opposed to functional disability benefits. Defendant asserts if it is found on appeal that claimant is entitled to receive industrial disability benefits, the award should be reduced substantially.

Claimant asserts on appeal that the arbitration decision should be affirmed in its entirety.

Those portions of the proposed arbitration decision pertaining to issues not raised on appeal are adopted as part of this appeal decision.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.15 and 86.24, the arbitration decision filed on October 21, 2022, is affirmed as modified, and is reversed in part, with my additional and substituted analysis.

Without further analysis, I affirm the deputy commissioner's finding that claimant is entitled to receive healing period benefits from October 28, 2019, through August 8, 2020, subject to a credit for the short-term disability benefits claimant received. I affirm the deputy commissioner's finding that claimant sustained 35 percent industrial disability as a result of the work injury, which entitles claimant to receive 175 weeks of permanent partial disability benefits. I affirm the deputy commissioner's order that defendant pay claimant's costs of the arbitration proceeding in the amount of $519.72.

With the following additional and substituted analysis, I affirm the deputy commissioner's finding that claimant proved he sustained a left shoulder sequela injury on January 22, 2019, caused by the stipulated April 5, 2018, right shoulder injury. I reverse the deputy commissioner's finding that permanency benefits begin as allegedly stipulated by the parties.

The deputy commissioner found claimant proved he sustained a left shoulder sequela injury on January 22, 2019, caused by the stipulated April 5, 2018, right shoulder injury. Defendant contends claimant sustained a separate, distinct injury on January 22, 2019, and that the deputy commissioner applied the wrong legal standard.

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). 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, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

> it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be

> required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer.

Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174, 177 (Iowa 1979).

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye v. Smith-Doyle Contractors, 569 N.W. 154, 156 (Iowa 1997). When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

It is well-established in workers' compensation that "if a claimant had a preexisting condition or disability, aggravated, accelerated, worsened, or 'lighted up' by an injury which arose out of and in the course of employment resulting in a disability found to exist," the claimant is entitled to compensation. Iowa Dep't of Transp. v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held,

> a disease which under any rational work is likely to progress so as to finally disable an employee does not become a "personal injury" under our Workmen's Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause.

Musselman v. Cent. Tel. Co., 261 Iowa 352, 359-60, 154 N.W.2d 128, 132 (1967).

An employer is responsible for a sequela injury "that naturally and proximately flow[s] from" an injury arising out of and in the course of employment. Oldham v. Schofield & Welch, 266 N.W.2d 480, 482 (Iowa 1936) ("[i]f an employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury, such further disability is compensable"); see also Mallory v. Mercy Med. Ctr., 2012 WL 529199, File No. 5029834 (Iowa Workers' Comp. Comm'n Feb. 15,

2012). A sequela may occur as the result of a fall during treatment, an altered gait, or a later injury caused by the original injury.

The parties stipulated claimant sustained an injury to his right shoulder on April 5, 2018, while breaking up frozen meat with his right arm. Claimant received conservative treatment and he was eventually referred to Robert Bartelt, M.D., an orthopedic surgeon. (Joint Exhibit 3; JE 4) Dr. Bartelt diagnosed claimant with a high-grade partial thickness tear of the supraspinatus. (JE 4, p. 31) Dr. Bartelt performed a right shoulder arthroscopy with rotator cuff repair on October 17, 2018. (JE 4, p. 33) On December 21, 2018, Stephanie Smith, ARNP, who is with Dr. Bartelt's office, examined claimant and released him to return to work on January 2, 2019, with restrictions of no lifting over two pounds with the right arm and no overhead work or work away from the body. (JE 4, p. 35) When claimant returned to Smith on February 1, 2019, claimant reported he sustained a left shoulder injury while performing modified work. (JE 4, p. 36) Smith noted the left shoulder injury had not been accepted. (JE 4, p. 36)

Claimant testified that when he returned to work in January 2019 defendant assigned him to the canning department. (Hearing Transcript, p. 27) Claimant testified as follows, that on January 16, 2019,

> A. Myself and other employees were assigned to go through some cans of SPAM that was double stacked, which was the amount of 24 cans. And I don't remember exactly what we were looking for. I don't know if it was the date on it was missing or what it was for sure, but I had to tip it up on end, because they were shrink wrapped together, there was 24 cans there, and I tipped it up on end, put my four fingers on the bottom and put my thumb in between the cans on the very bottom tote in order to lift it up off the pallet, because I couldn't use my right arm.
>
> Q. So you were doing that with your left arm.
>
> A. Correct.
>
> Q. And you described this for us before in your deposition, but for whatever tasks you had to do, you were moving cases of packaged SPAM from one pallet to another; correct?
>
> A. Yes.
>
> Q. How high were you stacking them at the time of your injury?
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> A. I don't remember what the required height was on them. I would say probably 4 foot, maybe.
>
> Q. And so you were doing this in the motion you described with your left hand. Would you have been doing that differently had you not had restrictions on your right arm?

A. Yes.

Q. How would you have been doing it had you not had restrictions on your right arm?

A. I would have been using both hands.

Q. So then you were doing a lift. Did something happen, then while you were lifting with your left arm?

A. Yes. I went to pick up one from a pallet to put on the next pallet, and I felt a really excruciating sharp pain in my left shoulder. And I couldn't move my left arm at all.

(Tr. pp. 28-30)

Claimant was eventually referred to David Field, M.D., orthopedic surgeon, in October 2019. (JE 6, p. 43) Dr. Field examined claimant, reviewed claimant's MRI, and recommended surgery. (JE 6, p. 44) On October 25, 2019, Dr. Field performed a left shoulder rotator cuff repair, acromioplasty, and bursectomy on claimant. (JE 6, p. 45) Claimant's recovery did not go well and he experienced ongoing pain and decreased range of motion. (Tr. p. 30; JE 6, p. 47-58) Claimant received injections and underwent a manipulation under anesthesia. (JE 6, pp. 48, 50, 55) Dr. Field recommended and performed a diagnostic arthroscopy, removal of scar tissue and adhesions from the shoulder on June 19, 2020. (JE 6, p. 57) During that surgery Dr. Field found a small undersurface injury to the supraspinatus. (JE 6, p. 59) The surgery and claimant's post-surgical treatment improved his function and reduced his pain.

Defendant provided Dr. Bartelt with a video showing someone performing the job claimant was performing at the time of the January 2019 injury and asked Dr. Bartelt for his opinion on causation. (JE 4, p. 41) Dr. Bartelt opined:

> Based on how the job was performed on the video there is very little shoulder movement involved. Brian indicates that he was carrying the cases of spam differently with the arm extended from the body. I shared with Brian that rotator cuff tears can happen over time from wear and tear as well as injury. I also shared with him that the job as performed on video would involve very little shoulder movement whatsoever. To address the issue of causation it is always somewhat difficult in the circumstances [*sic*]. I think it is medically possible that his work activities have caused or aggravated the tear. However I think the likelihood of this is probably less than 50%.

(JE 4, p. 41)

After receiving additional information from claimant, Dr. Bartelt revised his opinion, agreeing to the following statement:

> Mr. Weimerskirch had an additional discussion with you regarding his left shoulder during your office visit with him on June 26, 2019. Prior to that visit you had been shown a video of the job that Mr. Weimerskirch had been performing at the time his left shoulder injury occurred. You do not have a copy of that video, but it is your recollection that the video showed a stock example of somebody performing the position that Mr. Weimerskirch had been performing while the individual on the video was using both hands. It was the manner in which the job was being perform on the video which most influenced the opinion you gave on that date that his work activities were not more than 50 percent contributor in producing his left shoulder injury. . . .
>
> During our conversation, I shared with you that Mr. Weimerskirch was actually performing this duty one-handed. In order to accomplish this, he was tilting the cases of meat to the side, placing them on the floor, and then lifting them upwards using only his left hand to locations that were up to shoulder level. This type of activity would be much more stressful on the shoulder than what you were shown on the video. Assuming that this description of the activities he was performing on the date in question is accurate, you believe that his one-handed duties on January 16, 2019, were more than likely a contributing factor in producing his left shoulder rotator cuff tear.

(Ex. 2, p. 5) Dr. Bartelt added the comment, "if he was lifting the cases one handed to shoulder height." (Id.)

Dr. Field responded to a form letter from claimant's counsel agreeing it is more likely than not the incident claimant experienced on January 16, 2019, was a contributing factor in his need for the treatment Dr. Field provided between October 10, 2019, and July 27, 2020. (Ex. 1, p. 2) Dr. Field also agreed with the statement "[y]ou also believe that it is more likely than not that Mr. Weimerskirch's prior right shoulder injury was a contributing factor in producing his left shoulder injury inasmuch as Mr. Weimerskirch would not have been lifting the cases of meat with only one arm had the right shoulder not been injured and restricted." (Ex. 1, p. 2)

Claimant retained David Segal, M.D., neurosurgeon, to conduct an independent medical examination (IME) of claimant. (Ex. 3) Dr. Segal opined:

> Were it not for the work-related injury of April 5, 2018, Mr. Weimerskirch would not have needed to work under restrictions in January of 2019. Were it not for the restrictions, Mr. Weimerskirch would not have had the work injury on January 16, 2019, because he was using only his left arm for a two-handed task. The diagnoses listed above for Mr. Weimerskirch's left shoulder as well as the symptoms that continue and the need for past and future treatment are directly caused by the work injury of

> January 16, 2019, which occurred because of the work injury of April 5, 2018.

(Ex. 3, p. 23)

Defendant retained Robert Broghammer, M.D., an occupational medicine physician, to perform an IME. (Ex. C) Dr. Broghammer opined claimant sustained a work-related injury to his left shoulder on or about January 16, 2019, noting an MRI completed a few months after the work injury "demonstrated and acute/subacute injury consistent with the timeframe that Mr. Weimerskirch reports. In addition, there was fluid present on the MRI which is seen in acute and subacute injuries, not chronic injuries. My diagnosis for this would be an aggravation of a more likely than not pre-existing partial rotator cuff tear and degenerative labrum." (Ex. C: pp. 52-53) Defendant did not ask Dr. Broghammer for his opinion as to whether claimant's one-handed duties on January 16, 2019 were more than likely a contributing factor in producing his left shoulder rotator cuff tear or whether the prior right shoulder injury was a contributing factor in producing claimant's left shoulder injury.

Claimant has not alleged an overuse or cumulative injury to his left shoulder caused by his right shoulder. Claimant alleges he sustained an acute injury to his left shoulder caused by performing his job with one hand, as a result of his right shoulder injury and restrictions. Defendant asserts claimant's left shoulder injury is not the proximate result of his right shoulder injury.

The video defendant produced to Dr. Bartelt showed a worker performing the job claimant was performing in January 2019, using two arms. Because of claimant's right shoulder injury and restrictions, he could not perform the job with two arms and he only used his left arm. Both Dr. Bartelt and Dr. Segal opined claimant sustained the injury to his left shoulder because he was restricted from using his right arm as a result of the April 2018 injury to his right shoulder.

This is not a situation where claimant tripped and fell on a pallet while walking, injuring his leg, head, hip, or back, which clearly are not injuries that would be proximately caused by an injury to a shoulder. Claimant sustained a left rotator cuff injury while moving 24 cans of Spam at a time with his left arm.

Defendant argues claimant has not established he sustained a sequela injury to his left shoulder caused by his right shoulder injury, relying on Johnson v. Second Injury Fund of Iowa, 2016 WL 1533144, File No. 5048878 (Iowa Workers' Comp. Comm'n Apr. 5, 2016), an arbitration decision. I disagree.

In Johnson, claimant sustained a right arm injury caused by significant repetitive work in a bakery. Following surgery the treating physician imposed right arm restrictions on claimant. Claimant returned to her job and her employer accommodated her right arm restrictions, but she had to perform the duties with her left arm only. She

then developed similar symptoms in her left arm to those she developed in her right arm.

The Second Injury Fund of Iowa argued claimant's left arm injury was a sequela of her right arm injury. Claimant's treating physician, and a physician who performed an IME, noted that following surgery on her right arm claimant compensated by using her left arm and her left wrist pain became worse. The deputy commissioner determined claimant's left arm injury was not a sequela of her right arm injury, finding:

> [there] is not a direct correlation between the right arm injury and the development of left arm symptoms. This is not a situation in which someone injures a knee, requires crutches, and develops arm or shoulder problems or that limps on an injured knee and causes hip, or back problems. Such developments are the direct and proximate result of a knee injury and a true sequela of a knee injury.
>
> In this case, there is no evidence that it was inevitable or even likely that Ms. Johnson would have sustained a left arm injury as a proximate result of her right arm injury. Instead, it appears that she started performing her work differently at Hy-Vee as a result of the right arm injury. However, it was the repetitive nature of her left handed work that ultimately caused the cumulative injury in her left arm.

(Arbitration Decision, pp. 3-4)

Unlike the claimant in Johnson, Dr. Bartelt agreed performing the job claimant performed with only one arm in this case "would be much more stressful on the shoulder joint" than performing the job with two arms. (Ex. 2, p. 5) Both Dr. Bartelt and Dr. Segal opined the restrictions in place caused claimant's left shoulder injury. But for the restrictions, claimant would have been using two arms to perform his job duties. The increased stress on the shoulder joint created by the one-arm activity is akin to the development of lower back pain caused by an altered gait following an injury to the leg. I find claimant has established his January 2019 left shoulder injury is a sequela of his April 2018 right shoulder injury.

The deputy commissioner found permanency benefits commence on the date of the parties' stipulation. On de novo review I find the parties did not stipulate to a commencement date. No commencement date is listed in the arbitration decision. The hearing report order lists a commencement date of August 9, 2020, as disputed. At hearing the deputy commissioner noted claimant alleged the commencement date for permanency benefits is August 9, 2020, which was disputed by defendant. The parties did not stipulate to the commencement date. Defendant did not state they had stipulated to a commencement date in their post-hearing brief.

Under Iowa Code section 85.34(2), compensation for permanent partial disability commences "when it is medically indicated that maximum medical improvement from

the injury has been reached and that the extent of loss or percentage of permanent impairment can be determined" under the AMA Guides. Dr. Segal was the first expert to provide an impairment rating with respect to claimant's left shoulder. I find the commencement date for permanency is December 9, 2020, the date of Dr. Segal's report.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on October 21, 2022, is affirmed as modified, and reversed in part, with my additional and substituted analysis.

Defendant shall pay claimant healing period benefits from October 28, 2019, through August 8, 2020, subject to a credit for the short-term disability benefits claimant received at the weekly rate of five hundred fifteen and 32/100 dollars ($515.32).

Defendant shall pay claimant 175 weeks of healing period benefits at the weekly rate of five hundred fifteen and 32/100 dollars ($515.32) commencing on December 9, 2020.

Defendant shall receive credit for benefits previously paid in the stipulated amounts of:

a) Fourteen thousand four hundred twenty-eight and 96/100 dollars ($14,428.96) for permanent partial disability benefits paid relating to claimant's right shoulder.

b) Twenty-one thousand twenty-one and 60/100 dollars ($21,021.60) for permanent partial disability benefits paid relating to claimant's left shoulder.

c) Nine thousand one hundred sixty-six and 26/100 dollars ($9,166.26) for short-term disability benefits paid between October 25, 2019, and August 8, 2020, applied to healing period benefits claimant is entitled to.

Defendant shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

Pursuant to rule 876 IAC 4.33, defendant shall pay claimant's costs of the arbitration proceeding in the amount of five hundred nineteen and 72/100 dollars ($519.72), and defendant shall pay the costs of the appeal, including the cost of the hearing transcript.

Pursuant to rule 876 IAC 3.1(2), defendant shall file subsequent reports of injury as required by this agency.

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Signed and filed on this 21st day of March, 2023.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Jason D. Neifert (via WCES)

Abigail A. Wenninghoff (via WCES)