BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GREG GELO, Claimant, vs. LENNOX INDUSTRIES, INC., Employer, and INDEMNITY INSURANCE CO. OF NORTH AMERICA, Insurance Carrier, Defendants.	File No. 5067251 ARBITRATION DECISION Head Note Nos.: 1402.20, 1402.40, 1402.60, 2907

STATEMENT OF THE CASE

Claimant Greg Gelo filed a petition in arbitration seeking benefits from defendants Lennox Industries, Inc., employer, and Indemnity Insurance Company of North America, insurance carrier. This matter was heard in Des Moines, Iowa, on November 21, 2019, by Deputy Workers' Compensation Commissioner Erica J. Fitch. On March 8, 2021, pursuant to Iowa Code section 17A.15(2), the Iowa Workers' Compensation Commissioner delegated authority to the undersigned to enter a proposed decision in this matter due to the unavailability of Deputy Commissioner Fitch. The parties were given 14 days from the delegation to notify me and request rehearing if they believed demeanor of a witness was a substantial factor. Neither party did so. Thus, pursuant to the Commissioner's order, demeanor of the witnesses is waived as an issue.

Pursuant to the requirements of Iowa Code section 17A.15(2), I have read the entirety of the record created before Deputy Commissioner Fitch as well as the parties' post-hearing briefs.

The parties submitted a hearing report prior to the commencement of the evidentiary hearing. On that hearing report, the parties entered into certain stipulations. Deputy Commissioner Fitch accepted that hearing report and entered an order at the time of hearing noting her approval of the stipulations and disputes noted on the hearing report. I therefore accept the stipulations noted on the hearing report,

and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are bound by their stipulations.

The record presented to and accepted by Deputy Commissioner Fitch at hearing consists of Joint Exhibits 1 through 7, Claimant's Exhibits 1 through 4, Defendants' Exhibits A through J, and the testimony of claimant. The evidentiary record closed on December 5, 2019. The case was considered fully submitted upon receipt of the parties' briefs on January 3, 2020.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury or any permanent disability to his right shoulder as a result of his stipulated work-related injury on July 24, 2017.

2. Whether claimant sustained any permanent disability as a result of the biceps tear sustained during his stipulated work-related injury on July 24, 2017.

3. The commencement date for any permanent partial disability benefits.

4. Whether claimant is entitled to reimbursement for medical expenses.

5. Costs.

FINDINGS OF FACT

The parties agree claimant sustained a work-related injury on July 24, 2017 when he tossed a hairpin into a dumpster with his right arm. (Hearing Transcript, p. 39) Claimant testified he immediately felt "excruciating pain" in his right shoulder. (Tr., pp. 39-40) He was able to finish his shift, but he returned to the plant and reported to the nurse after he noticed swelling in his arm. (Tr., pp. 40-41)

Claimant reported to the nurse that his right upper arm had been sore for a few days due to long hours at work, but he felt a pop when he tossed the metal into the dumpster. (Joint Exhibit 4, p. 35) Notably, although claimant testified he felt pain in his right shoulder, the nurse's intake form only mentions claimant's right biceps. (JE 4, p. 34)

When claimant returned to the company nurse the following day with bruising and difficulty raising his right arm, he was referred to Charles Mooney, M.D. (JE 4, p. 36) The notes from Dr. Mooney's examination indicate claimant complained of pain in his right upper arm, but there is no specific indication of shoulder pain. (JE 1, p. 3) In fact, his shoulder range of motion was normal, though there was "obviously swelling and bruising of the right arm over the area of the biceps medially." (JE 1, p. 3) Dr. Mooney

suspected a biceps tendon rupture and referred claimant for an orthopedic consultation. (JE 1, p. 3)

Before being evaluated by an orthopedist, claimant returned to Dr. Mooney on July 27, 2017, with "fairly extensive bruising" and "some pain with full motion of the shoulder." (JE 1, p. 6) Dr. Mooney indicated he did "not see evidence of a rotator tear," but he continued to recommend a consultation with an orthopedic surgeon. (JE 1, p. 6)

That consultation occurred on August 2, 2017, with Steven Aviles, M.D. Dr. Aviles' note, like the nurse's intake form and Dr. Mooney's records, indicate claimant complained of right arm pain, but not specifically shoulder pain. (JE 5, p. 39) Dr. Aviles agreed with Dr. Mooney that claimant sustained a biceps rupture, and he also indicated claimant's x-rays and examination were "concerning for cuff tear arthropathy, which is chronic and not related to his work injury."[1] (JE 5, p. 41 (emphasis added)) Dr. Aviles continued: "His work injury seems to be isolated to his biceps only." (JE 5, p. 41) However, to confirm there was no acute rotator cuff involvement associated with the chronic arthropathy, Dr. Aviles recommended an MRI. (JE 5, p. 41) For the biceps rupture, Dr. Aviles told claimant there was no need for surgical intervention. (JE 5, p. 41)

The MRI confirmed a biceps rupture and "a very chronic-looking cuff tear arthropathy with severe rotator cuff tearing," which Dr. Aviles described as "clearly not an acute injury." (JE 5, p. 44) Dr. Aviles recommended six weeks of physical therapy for the biceps rupture, and he released claimant to return to work without restrictions per claimant's request. (JE 5, p. 45)

Claimant returned to Dr. Aviles on September 25, 2017. Claimant reported he was "not perfect," but was "slowly improving" after physical therapy and returning to full-duty work. (JE 5, p. 46) Given claimant's ability to do his full-duty job, Dr. Aviles told claimant he had nothing left to offer and placed him at maximum medical improvement (MMI). (JE 5, p. 47) He assigned a zero percent permanent impairment rating. (JE 5, p. 48; Def. Ex. B, p. 6)

Then, on November 21, 2017, defendants sent claimant for a second opinion with William Jacobson, M.D., to address his shoulder pain. Dr. Jacobson opined claimant sustained a temporary aggravation to his right shoulder as a result of the July 24, 2017 injury, but any ongoing right shoulder symptoms were not related to the biceps rupture. (Def. Ex. A, p. 3)

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[1] With respect to the chronic conditions in claimant's shoulder, claimant sustained a right shoulder injury in 2003 when he fell at work. (Tr., p. 31) Claimant was evaluated by Dr. Mooney who recommended a short stint of physical therapy and anti-inflammatories, but claimant refused the physical therapy. (JE 1, p. 1; Tr., p. 32) Claimant did not return to Dr. Mooney and went back to his regular duties. (Tr., p. 33) Claimant was subsequently involved in a motorcycle accident in 2016. (Tr., p. 35) He testified he had some pain in his shoulder immediately after the accident, but it resolved after a few days. (Tr., p. 36)

In a letter signed December 4, 2017, Dr. Aviles agreed with Dr. Jacobson that any ongoing symptoms experienced by claimant were more likely related to claimant's chronic, pre-existing right shoulder condition. He reiterated his opinion that claimant's July 24, 2017 injury did not aggravate or accelerate claimant's chronic degenerative conditions. (Def. Ex. B, p. 6)

In January of 2019, more than a year and a half after being released from Dr. Aviles' care, claimant sought treatment for his shoulder with James Nepola, M.D. (Tr., p. 52) This treatment was not authorized by defendants. Dr. Nepola recommended anti-inflammatories and physical therapy. (JE 7, p. 52)

Claimant returned to Dr. Nepola roughly six months later on July 29, 2019. He reported his shoulder was "doing pretty well" and that he was "able to work and do any activity he needs to." (JE 7, p. 56) Dr. Nepola instructed claimant to return for follow-up in six months. (JE 7, p. 58)

In a letter to defendants' counsel dated August 20, 2019, Dr. Nepola opined that claimant's ongoing rotator cuff arthropathy was not related to the July 24, 2017 biceps tear. (Def. Ex. C, p. 11) He explained: "Rotator cuff arthropathy is a progressive degenerative disorder related to arthritis coupled with rotator cuff tear. [Claimant] sustained a rotator cuff tear in 2003 [and] his course has been fairly classic since then." (Def. Ex. C, p. 11)

Despite being "minimally symptomatic" at his appointment with Dr. Nepola in July of 2019, claimant testified at hearing that he has daily, constant pain in his right shoulder with limited range of motion. (JE 7, p. 58; Tr., pp. 53-54) Claimant testified at hearing that he intended to return to Dr. Nepola on a six-month basis. (Tr., p. 53)

He has received no additional treatment for his biceps since being released from Dr. Aviles' care in September of 2017. (Tr., p. 51)

Claimant was evaluated by Mark Kirkland, D.O., for purposes of an independent medical examination (IME) at the request of his attorney on May 14, 2018. Dr. Kirkland diagnosed claimant with right shoulder rotator cuff tear and biceps tendon rupture; right shoulder rotator cuff arthropathy; and right shoulder acromioclavicular joint osteoarthritis. (Claimant's Ex. 1, p. 4) Dr. Kirkland opined that claimant's biceps tendon rupture was caused by the July 24, 2017 work injury. (JE 1, p. 5)

With respect to whether claimant's work duties contributed to his rotator cuff tear, Dr. Kirkland offered the following: "Even though [claimant] had significant previous changes in his right shoulder, this injury of the biceps tendon caused a material change in the right shoulder. (Cl. Ex. 1, p. 5) Dr. Kirkland believed claimant's July 24, 2017 work injury "lit up and accelerated" his pre-existing shoulder condition. (Cl. Ex. 1, p. 5) Dr. Kirkland did not believe claimant had reached MMI for the right shoulder. (Cl. Ex. 1, p. 5)

He placed claimant at MMI for the biceps injury but indicated "[t]he percentage of impairment due to the ruptured biceps tendon would be included . . . in regard to his whole shoulder condition." (JE 1, p. 6)

Dr. Kirkland authored a supplemental report on September 24, 2019 for purposes of assigning impairment. Based on shoulder range of motion measurements obtained during his original evaluation of claimant, Dr. Kirkland assigned a nine percent impairment of the upper extremity. (Cl. Ex. 1, p. 7)

Dr. Kirkland then authored a letter on December 2, 2019, in which he clarified that the acute rupture of claimant's biceps on July 24, 2017, caused a material change in the structure of the tendon and "lit up previous lesions in the shoulder joint." (Cl. Ex. 1, p. 8a)

After reviewing Dr. Kirkland's opinions, Dr. Aviles signed off on a letter in which he again opined that claimant's biceps injury did not contribute to an acceleration of claimant's pre-existing shoulder condition. (Def. Ex. J, pp. 35-36) He indicated he believed the range of motion deficits used by Dr. Kirkland to assign impairment were caused by his pre-existing rotator cuff arthropathy. (Def. Ex. J, pp. 35-36) Therefore, he disagreed that claimant sustained any permanent impairment as a result of the July 24, 2017 work injury. (Def. Ex. J, pp. 35-36)

Defendants obtained their own IME with Scott Neff, D.O., in August of 2019. Dr. Neff opined that claimant sustaining a biceps rupture while at work was a "coincidence of location." (Def. Ex. D, pp. 17-18) He likewise opined that claimant's work activities did not contribute "to the normal expected gradual progression of rotator cuff dysfunction." (Def. Ex. D, p. 18)

Only Dr. Kirkland offered an opinion that claimant's pre-existing right shoulder injury was aggravated, accelerated or lit up as a result of the work injury on July 24, 2017. This is in contrast to the opinions of Dr. Aviles, Dr. Nepola and Dr. Neff, all of whom denied causation. Of note, Dr. Kirkland was under the mistaken understanding that most of claimant's work was done at the shoulder level, when claimant testified that only a very small percentage of his job was done at or above shoulder level. (See Tr., pp. 27, 77)

Further, while claimant testified he felt immediate shoulder pain and has ongoing symptoms that are both regular and limiting, his testimony is not consistent with the medical records. The medical records from the days and weeks following the July 24, 2017 work injury indicate claimant's complaints were focused largely, if not entirely, on his right arm and biceps, and during his most recent examination with Dr. Nepola, claimant reported no limitations due to his shoulder.

For these reasons, I do not find the opinion of Dr. Kirkland to be persuasive. I therefore find insufficient evidence that claimant sustained an injury to his right shoulder as a result of the July 24, 2017 work injury.

The only physician in this case to assign any impairment for claimant's condition is Dr. Kirkland, and this opinion was based on shoulder range of motion measurements and were not specific to claimant's biceps injury. Further, Dr. Aviles opined on several occasions, including after reviewing Dr. Kirkland's opinions, that claimant did not sustain any permanent impairment as a result of his work injury. I therefore find insufficient evidence that claimant sustained any permanent impairment or disability as a result of his biceps tear and work injury on July 24, 2017.

Having determined claimant's ongoing right shoulder complaints are not related to his July 24, 2017 work injury, I likewise find his medical treatment related to that condition is not related to the July 24, 2017 work injury.

CONCLUSIONS OF LAW

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).

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 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).

In this case, claimant had a pre-existing right shoulder injury that he asserts was aggravated by his July 24, 2017 work injury. Claimant's claim is based on the opinions of his IME expert, Dr. Kirkland. As discussed above, however, I did not find Dr. Kirkland's opinions persuasive. Not only was Dr. Kirkland the outlier in this case (as compared to the opinions of claimant's treating physicians, Dr. Aviles and Dr. Nepola, and defendants' expert, Dr. Neff), but claimant's testimony about his right shoulder symptoms was not consistent with the medical records. I therefore conclude claimant failed to carry his burden to prove his right shoulder condition is related or caused by the July 24, 2017 work injury.

Having concluded claimant's right shoulder condition is not related to his July 24, 2017 work injury, I likewise conclude claimant failed to prove his entitlement to medical treatment relating to the right shoulder condition.

As discussed in the fact findings, I also found insufficient evidence that claimant sustained any permanent impairment or disability as a result of his biceps tear. Dr. Kirkland's rating were based on claimant's shoulder condition, which I found to be unrelated to his work injury. Further, Dr. Aviles specifically opined claimant did not sustain any permanent impairment due to the July 24, 2017 work injury. As a result, I conclude claimant failed to carry his burden to prove he sustained any permanent disability as a result of the July 24, 2017 work injury.

Because claimant failed to prove his entitlement to any permanent partial disability benefits, the commencement date is moot.

The last remaining issue is costs. Claimant seeks reimbursement for his filing fee ($100.00); the costs for serving his petition ($6.67); and the charge for Dr. Kirkland's September 24, 2019 supplemental report ($450.00).

Assessment of costs is a discretionary function of this agency. Iowa Code § 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33.

Defendants are assessed the costs of claimant's filing fee and service fee. 876 IAC 4.33 (3), (7). However, because I did not find Dr. Kirkland's opinions persuasive, I decline to tax defendants with the cost of his supplemental report.

Claimant was generally successful in his claim. As such, I find a taxation of costs is appropriate in this case.

ORDER

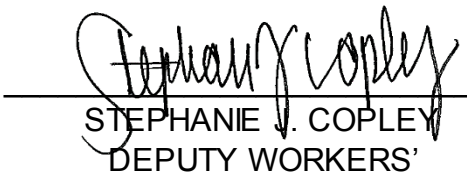
THEREFORE, IT IS ORDERED:

Claimant shall take nothing further.

Pursuant to rule 876 IAC 4.33, defendants shall reimburse claimant's costs in the amount of one hundred six and 67/100 dollars ($106.67).

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 26th day of March, 2021.



STEPHANIE J. COPLEY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James Ballard (via WCES)

Gregory Michael Taylor (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.