BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SHELLY R. NEWTON, Claimant, vs. LENNOX INDUSTRIES, INC., Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	File No. 5064234 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1402.40, 1803, 2907

STATEMENT OF THE CASE

Claimant Shelly Newton filed a petition in arbitration seeking workers' compensation benefits from defendants Lennox Industries, Inc., employer, and Indemnity Insurance Company of North America, insurer. The hearing occurred before the undersigned on October 10, 2019, in Des Moines, Iowa.

The parties filed a hearing report at the commencement of the arbitration hearing. In 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 evidentiary record consists of: Joint Exhibits 1 and 2, Claimant's Exhibits 1 through 8, and Defendants' Exhibits A through F. Claimant testified on her own behalf, and no other witnesses were called to testify.

The evidentiary record closed on October 10, 2019. The case was considered fully submitted upon receipt of the parties' briefs on November 15, 2019.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant's stipulated work-related right shoulder injury on June 20, 2016 caused any permanent disability.
2. If claimant sustained a permanent disability, the extent of her industrial disability.
3. If claimant sustained a permanent disability, the appropriate commencement date for permanent partial disability benefits.
4. Whether claimant is entitled to any additional reimbursement for her independent medical examination.
5. Costs.

FINDINGS OF FACT

Claimant sustained a stipulated work-related injury to her right shoulder on June 20, 2016. Claimant's right shoulder injury was cumulative in nature due to her work on defendant-employer's assembly line. (Hearing Transcript, pages 15, 17) More specifically, in the months leading up to June 20, 2016, claimant was working on the assembly of air conditioning units. This sometimes required claimant to manually rotate whole units. (Hrg. Tr., pp. 17-18)

Claimant initially believed she "had just slept on [her right shoulder] wrong." (Hrg. Tr., p. 18) When symptoms persisted, she sought treatment through defendant-employer's medical department before being transferred to an occupational medicine clinic. (Hrg. Tr., p. 18; Joint Exhibit 1, p. 1)

After a failed attempt at conservative care, an MRI was obtained. It revealed a rotator cuff tear, for which surgery was recommended. (JE 1, pp. 8-11) That surgery was performed by David Sneller, M.D., on January 18, 2017. (JE 3, p. 1)

Claimant participated in physical therapy through July of 2017. (See JE 1, pp. 19-23) At claimant's appointment with Dr. Sneller on July 26, 2017, Dr. Sneller was "very pleased" with claimant's recovery. (JE 1, p. 23) He gave her a full-duty release. (JE 1, p. 23)

By this point, claimant had returned to work with defendant-employer, but in a different position than her assembly line job. Instead, after being off work for six weeks

post-surgery, claimant returned in a light-duty capacity[1] and then trained to become a copper brazer. (Hrg. Tr., pp. 20-21) This job required her to bind metal parts with copper. (Hrg. Tr., p. 21) By the fall of 2017, however, claimant could no longer maintain her job as a copper brazer because—like her assembly line job—it required her to manually rotate the air conditioning units. (Hrg. Tr., pp. 22, 37)

Defendant-employer then trained claimant to be an aluminum brazer. (Hrg. Tr., p. 22) This position also involved binding metal parts, but the parts were small and the job required no heavy lifting. (Hrg. Tr., p. 23) Claimant told Dr. Sneller this job was "easier." (JE 1, p. 38)

Claimant did not return to Dr. Sneller until April 11, 2018, at which point she was evaluated to determine whether she had reached maximum medical improvement (MMI). Claimant reported "a little weakness" but 70 percent improvement overall. (JE 1, p. 28) As a result, Dr. Sneller placed her at MMI and released her without any permanent work restrictions. (JE 1, p. 28) Dr. Sneller also assigned claimant a two percent whole person impairment based on his range of motion measurements. (JE 1, pp. 28-30)

Claimant required no additional treatment for her right shoulder except for an injection on January 16, 2019 due to increased pain. (JE 1, p. 38)

Since being released from Dr. Sneller's care, claimant has participated in two independent medical examinations (IMEs). Claimant was evaluated by Daniel Miller, D.O., at the request of defendants on September 4, 2019. Like Dr. Sneller, Dr. Miller placed claimant at MMI as of April 11, 2018 and agreed that no permanent work restrictions were necessary. (Defendants' Ex. A, p. 5) Based on his own range of motion and strength measurements, Dr. Miller assigned a three percent whole person impairment rating. (Def. Ex. A, p. 5)

Claimant was then evaluated by Jacqueline Stoken, D.O., on September 9, 2019. Dr. Stoken opined claimant reached MMI as of September 1, 2017, and required the following restrictions: avoid work at or above shoulder level; avoid lifting more than 10 pounds on a frequent basis, 15 pounds on an occasional basis; and 20 pounds on a rare basis. (Claimant's Ex. 6, p. 26) Dr. Stoken also assigned a 12 percent whole body impairment rating based on her own range of motion and strength measurements. (Cl. Ex. 6, p. 25)

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[1] Per Dr. Sneller's notes, claimant was allowed to return to work as of February 28, 2017. (JE 1, p. 20) This corresponds with defendants' indemnity payments log, which indicates temporary benefits were paid through February 27, 2017. (Def. Ex. E) I therefore find claimant returned to work as of February 28, 2017. Because Dr. Sneller did not release claimant to return to work before this point, I also find claimant was not medically capable of returning to substantially similar work before February 28, 2017.

It is not clear why Dr. Stoken chose September 1, 2017 as claimant's MMI date. This date does not appear to correspond with any treatment dates or claimant's return to work, for example. The MMI date chosen by Dr. Sneller and Dr. Miller, on the other hand, corresponds with the appointment that occurred roughly a year after claimant's surgery, which is when Dr. Sneller originally predicted claimant would be at MMI. I therefore find claimant reached MMI as of April 11, 2018.

Every medical expert in this case (including Dr. Miller, who was obtained by defendants) opined that claimant sustained some degree of permanent impairment. I therefore find claimant sustained a permanent disability as a result of her June 20, 2016 work-related injury to her right shoulder.

With respect to the extent of that permanent disability, I find the impairment ratings of Dr. Sneller and Dr. Miller to be more persuasive than that of Dr. Stoken. The measurements taken by Dr. Sneller and Dr. Miller were very similar, while Dr. Stoken's was the outlier. (Compare JE 1, p. 30 and Def. Ex. A, p. 5 with Cl. Ex. 6, p. 29)

I am not, however, persuaded by Dr. Sneller and Dr. Miller's opinions that claimant does not require any permanent work restrictions. Claimant was physically unable to maintain her position as a copper brazer because it required manual manipulation of the air conditioning units. Even Dr. Sneller acknowledged that claimant's aluminum brazer job—which is "easier" and does not require any heavy lifting—"is much more appropriate for her." (JE 1, p. 38)

That said, I am likewise not fully persuaded by Dr. Stoken's recommended restrictions. As mentioned, Dr. Stoken's range of motion and strength deficits appear exaggerated when compared to the measurements of Dr. Sneller and Dr. Miller, and claimant has been able to work without restriction in her job as an aluminum brazer. Claimant has likewise required no additional medical treatment since being released from Dr. Sneller's care in April of 2018 except for a single injection in January of 2019. While I recognize claimant's aluminum brazer position requires no heavy lifting, Dr. Stoken's severe restrictions are simply not consistent with claimant's return to work and recovery.

Ultimately, therefore, while I am unwilling to adopt the specific restrictions recommended by Dr. Stoken, I find claimant's physical abilities have been permanently negatively impacted by her work-related right shoulder injury.

At the time of the hearing, claimant was still employed as an aluminum brazer. (Hrg. Tr., p. 24) She was making roughly one dollar more per hour than she was in her assembly line job. (Hrg. Tr., p. 23) She was also working overtime before she was placed on short-term disability leave for an unrelated condition. (Hrg. Tr., p. 35) While claimant testified she believed she was earning less "incentive pay" when compared to her assembly line job, she had no specific numbers and later acknowledged on cross-examination that her testimony was speculative. (Hrg. Tr., p. 31) Thus, I find at the time of the hearing claimant was not experiencing an actual loss of earnings.

Claimant, who has a high school diploma and was 57 years old at the time of the hearing, testified she plans to work for defendant-employer until she can retire, though she does not believe she could return to the assembly line job she held prior to her work-related right shoulder injury. (Hrg. Tr., pp. 28, 30, 32) I find this testimony credible, as claimant was physically unable to continue working as a copper brazer.

Outside of her assembly line and copper brazing positions, however, claimant offered no compelling evidence as to which of her prior jobs, if any, she is now precluded from performing. Thus, while I find claimant's earning capacity has been negatively impacted by her right shoulder injury, I also find this impact to be minimal.

In summary, while claimant was unable to continue working in the position she held at the time of her work-related injury, she successfully returned to work in a higher-paying, less physically demanding position that she intends to maintain until she retires. Furthermore, though claimant's physical capabilities have been permanently impacted by her right shoulder injury, she presented little evidence that her injury would preclude her from returning to the jobs she held prior to being hired by defendant-employer. For these reasons, along with all other relevant industrial disability factors, I find claimant sustained a 15 percent industrial disability.

CONCLUSIONS OF LAW

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).

All of the medical experts who offered their opinions in this case, including the expert obtained by defendants, opined that claimant sustained a permanent impairment

due to her right shoulder injury. As a result, I found claimant sustained a permanent disability. I therefore conclude claimant satisfied her burden to prove she sustained a permanent disability entitling her to some amount of permanent partial disability benefits.

The parties stipulated that any permanent disability would be an industrial disability. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Relying on these factors, I found claimant sustained a 15 percent industrial disability. Of significance was the fact that claimant was able to find a higher-paying, less physically demanding position with defendant-employer, but only after she struggled to perform a job that required heavy lifting and manipulation. Claimant offered no compelling evidence, however, that she would not be capable of returning to the work she performed before being hired by defendant-employer. I therefore conclude claimant satisfied her burden to prove she sustained a 15 percent industrial disability, which entitles her to 75 weeks of permanent partial disability benefits.

The parties dispute the appropriate commencement date for these benefits. Claimant asserts September 1, 2017, which was the date of MMI chosen by Dr. Stoken, and defendants assert April 11, 2018, which was the date of MMI chosen by Dr. Sneller and Dr. Miller. I found April 11, 2018 to be the correct date of MMI.

However, claimant returned to work post-surgery long before she reached MMI. As discussed, claimant testified she was off work for six weeks before she returned to defendant-employer, first in a light-duty capacity and then as a copper brazer. I found this return to work occurred on February 28, 2017. I also found claimant was not capable of returning to substantially similar work until this point.

The Iowa Supreme Court has specifically noted that permanent partial disability benefits commence whenever the first factor of Iowa Code section 85.34(1) is met. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360 (Iowa 2016). The factors are whether (1) "the employee has returned to work," (2) "it is medically indicated that significant improvement from the injury is not anticipated" (MMI), or (3) "the employee is

medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury." Iowa Code § 85.34(1).

Having found claimant returned to work on February 28, 2017, did not reach MMI until April 11, 2018, and was not medically capable of performing substantially similar work before February 28, 2017, I conclude claimant's return to work is the first factor in Iowa Code section 85.34(1) to occur. I therefore conclude claimant's healing period terminated on February 28, 2017, meaning claimant's permanent partial disability benefits commenced on March 1, 2017.

Claimant also seeks reimbursement for the remainder of Dr. Stoken's bill. Dr. Stoken's evaluation of permanent disability came after the evaluations of permanent disability conducted by both Dr. Sneller and Dr. Miller, both of whom appear to have been retained by defendants. Thus, the evaluations by Dr. Sneller and Dr. Miller triggered the reimbursement provisions of Iowa Code section 85.39.

The holding in Des Moines Area Regional Transit Authority v. Young (hereinafter "DART") did not limit the reimbursement provisions of Iowa Code section 85.39. DART, 867 N.W.2d 839, 846 (Iowa 2015) ("We agree that a physician's written report of an examination and evaluation under section 85.39 would be a reimbursable expense under section 85.39 . . . ."). It only limited what could be assessed as a cost pursuant to rule 876 IAC 4.33. Id. at 844, 846-47 ("We must decide if the assessment-of-costs rule is limited to the cost of the doctor's report or whether the rule also includes the fees of the underlying medical examination that was the subject of the report."). In other words, while the holding in DART suggests the cost of an IME report must be itemized separately from the cost of the evaluation to be assessed as a *cost* under Iowa Administrative Code rule 876-4.33, the same is not true when the IME is under the umbrella of Iowa Code section 85.39. See Henry-Pete v. Medical Associates of Clinton, Iowa, P.L.C., File No. 5055779 (App. Feb. 4, 2019).

Thus, because the reimbursement provisions of Iowa Code section 85.39 were triggered in this case, claimant is entitled to reimbursement of Dr. Stoken's bill in its entirety. Because defendants have already made a partial payment, defendants must reimburse claimant for the portion of Dr. Stoken's bill that remains unpaid.

Lastly, claimant seeks an assessment of costs for her filing fee ($100.00) and service fees ($13.82). (Cl. Ex. 8, pp. 1-3) Assessment of costs is a discretionary function of the agency. Iowa Code § 86.40. Because claimant was generally successful in her claim, I conclude it is appropriate to assess claimant's costs in some amount.

Claimant's filing fee and service fees are taxable pursuant to 876 IAC 4.33 subsections (3) and (7). Defendants are therefore taxed claimant's costs in the amount of $113.82.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant seventy-five (75) weeks of permanent partial disability benefits commencing on March 1, 2017.

Defendants shall be entitled to the stipulated credit against this award.

All weekly benefits shall be paid at the stipulated rate of four hundred fifty-seven and 88/100 dollars ($457.88).

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable 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. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Defendants shall reimburse claimant for the portion of Dr. Stoken's bill that remains unpaid.

Defendants shall reimburse claimant's costs in the amount of one hundred thirteen and 82/100 dollars ($113.82).

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 6th day of December, 2019.

STEPHANIE J. COPLEY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Erik Luthens (via WCES)
Robert Gainer (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 in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.