

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

STEVEN MUSEL,

Claimant,

vs.

WINNEBAGO INDUSTRIES, INC.,

Employer,

and

LIBERTY MUTUAL INSURANCE
COMPANY,

Insurance Carrier,
Defendants.

FILED

MAY 29 2019

WORKERS' COMPENSATION

File Nos. 5061328, 5061329

ARBITRATION

DECISION

Head Notes: 1402.40, 1803, 2907

STATEMENT OF THE CASE

Steven Musel, claimant, filed a petition in arbitration seeking workers' compensation benefits from Winnebago Industries, Inc., employer and Liberty Mutual Insurance Company, insurance carrier as defendants. Hearing was held on April 10, 2019 in Des Moines, Iowa.

At the onset of the hearing, claimant made a motion to dismiss agency file number 5061329 (DOI: 01/13/15). Claimant's motion is granted. Agency file number 5061329 is dismissed.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. However, at the time of hearing defendants stated that they did not dispute claimant's entitlement to the independent medical examination (IME) and that they would reimburse claimant for the IME. Therefore, the issue of IME reimbursement is not at issue. All of the stipulations on the hearing report 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 hearing report indicates that claimant is seeking reimbursement for an IME.

Claimant, Steven Musel, was the only witness to testify live at trial. The evidentiary record also includes joint exhibits JE1-JE9, claimant's exhibits 10-15, and defendants' exhibits A, C, E, F, and G. All exhibits were received without objection. The evidentiary record closed at the conclusion of the arbitration hearing.

The parties submitted post-hearing briefs on May 17, 2019, at which time the case was fully submitted to the undersigned.

ISSUES

The parties submitted the following issues for resolution:

1. The extent of industrial disability sustained by claimant as the result of the stipulated January 6, 2015 injury.
2. Assessment of costs.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Claimant, Steven Musel, is 56 years old. Mr. Musel is right-handed. He began working for the defendant-employer, Winnebago Industries, Inc., ("Winnebago") in November of 2013. He was a full-time employee who worked in the ship-out area. Prior to this workers' compensation injury, he worked 50-60 hours per week. His job was to check the interior and exterior of completed motorhomes for defects before they shipped out. He would then try to fix the problem. The heaviest item he would lift by himself was a toolbox that he estimates weighed 30-40 pounds. Ms. Musel stated he spent about one-third of his day working from waist to shoulder, one-third of his day working from floor to waist, and one-third working at or above shoulder height. He was paid \$13.35 per hour. (Testimony; Exhibit 10)

On January 6, 2015, Mr. Musel was at Winnebago working on a ladder to repair an awning when the awning began to retract. He attempted to quickly get down the ladder; however, his boot got caught on a rung, and he fell backwards onto the concrete floor. He immediately felt pain in his left side, both shoulders, left hip, and left leg. He also had bruises on his right hip, low back, right elbow and forearm. The ladder came down toward him and he reached out to stop the ladder from landing on him. Mr. Musel reported the injury to Kevin Bunger who advised Mr. Musel to watch it and let him know if he did not get any better. (Testimony)

Mr. Musel sought treatment at Wells Chiropractic Clinic in Wells, Minnesota. On January 14, 2015, Mr. Musel reported falling about three feet off of a ladder at work the day before. He fell backwards to the right side, hitting his right hip and right elbow on the ground. The record states that he noticed cervical, thoracic, lumbar, and left anterior thigh pain during the remainder of his shift. The diagnosis was lumbar

subluxation, lumbar sprain, cervical subluxation, and sprain of other sites, hip and thigh. Mr. Musel was restricted to work as tolerated for two weeks. I note that Mr. Musel had been seen at Wells Chiropractic prior to the alleged date of injury, but that was back in October of 2014. (Ex. 1, pp. 1-4)

Mr. Musel returned to Wells Chiropractic on January 17, 2015, where he received manual manipulation to the cervical, thoracic, and lumbar spine. He also received manual manipulation to his left shoulder and left hip. Trigger point and massage therapy was done to his cervicothoracic, lumbosacral spine, and left thigh. (Ex. 1, p. 5)

On February 3, 2015, at the direction of Winnebago, Mr. Musel went to Mercy Family Clinic in Forest City where he saw James McGuire, PA-C. The handwritten diagnoses are back, right hip, shoulders. He was to continue regular duties without restrictions other than a five-day work week. (Ex. 2, p. 11)

Mr. Musel returned to Wells Chiropractic on February 9, 2015. He reported continued cervical, thoracic, and lumbar pains. Manual manipulation was performed to the cervical, thoracic, and lumbar spine, left shoulder, and left hip. Trigger point and massage therapy was performed to the cervicothoracic, lumbosacral spine, and left thigh. (Ex. 1, p. 7)

On February 10, 2015, Mr. Musel began physical therapy at Accelerated Rehabilitation Centers. It appears he was referred to therapy by James McGuire, PA-C with a diagnosis of low back pain. The therapist noted that Mr. Musel presented with impaired joint mobility, motor function, muscle performance, and range of motion associated with spinal disorders secondary to falling off a ladder. The plan was for Mr. Musel to attend therapy two to three times per week for four weeks. (Ex. 3, pp. 32-33)

Mr. Musel reported to Wells Chiropractic on February 17, 2015 that he had great temporary impairment after his last chiropractic treatment. He felt he was receiving limited results from physical therapy. Mr. Musel recently slipped on ice in the parking lot at work and aggravated his neck and back. (Ex. 1, p. 8)

Mr. Musel continued to treat with Wells Chiropractic and follow-up with Mercy Family Clinic in Forest City. By March 13, 2015, Mr. Musel reported to physical therapy that he was feeling approximately 85-90 percent better overall. (Ex. 1 & 2)

Ms. Musel saw James E. McGuire, PA-C on March 19, 2015. He reported he was doing quite a bit better. He was not really having any problems with his neck or back. His left shoulder was still an issue at times. He was continuing to do all of his regular work duties, but he was slower than he would normally be. He was allowed to continue regular work duties and physical therapy. (Ex. 2, pp. 15-16)

On March 30, 2015, Mr. Musel saw James McGuire, PA-C. Mr. Musel reported that once he stopped going to physical therapy his symptoms returned. According to

the notes, his motion and flexibility were doing well. PA McGuire did not think he needed to resume any type of physical therapy. (Ex. 2, pp. 17-19)

Mr. Musel continued to follow-up with PA McGuire. On May 11, 2015, he reported persistent low back pain. Mr. Musel was unsure if his back pain was related to his shoulder. He also noted he had been wearing rubber boots lately. The June 1, 2015 notes state that PA McGuire's office would see if worker's compensation would approve an appointment for an orthopedic evaluation for the left shoulder. He was allowed to continue regular work duties. (Ex. 2, pp. 20-31)

At the request of the defendants, Mr. Musel saw Charles Mooney, M.D., an occupational medicine doctor, on September 1, 2015. He reported waxing and waning low back pain, without radicular symptoms. He reported significant night pain in his left shoulder and some radiation to his elbow. He had some mild stiffness and pain in his hip. The doctor examined Mr. Musel and took several x-rays. He diagnosed him with left rotator strain. Dr. Mooney released Mr. Musel to regular duty on September 1, 2015. He ordered an MRI arthrogram of the left shoulder. (Ex. 4)

The MRI arthrogram was performed on October 19, 2015. Mr. Musel had a full-thickness tear of the supraspinatus tendon, degenerative acromioclavicular joint, and a superior glenoid labral tear. (JE5, pp. 48-49)

Timothy A. Gibbons, M.D., an orthopaedic doctor, saw Mr. Musel on January 12, 2016. Dr. Gibbons noted that claimant's hip and back complaints were age related and probably not associated with his fall at work. However, he opined that the left shoulder rotator cuff tear was directly related to the work injury. He recommended surgical repair and stated that any delay in treatment will negatively affect his long term outcome. (Ex. 6, pp. 50-52)

Dr. Gibbons performed a diagnostic arthroscopy with subcoracoid decompression and an arthroscopic supraspinatus tear repair and biceps tenotomy on February 3, 2016. (Ex. 6, pp. 53-54)

Mr. Musel followed up with Dr. Gibbons post-surgery. He reported improvement. He underwent physical therapy and was given work restrictions. Dr. Gibbons placed him at MMI as of January 26, 2017. Dr. Gibbons assigned 4 percent upper extremity (equivalent of 2 percent of the body) impairment based on the AMA Guides, Fifth edition. He released Mr. Musel to regular duties with some permanent restrictions. The restrictions were lifting above 21 pounds on an occasional basis only; push/pull on an occasional basis, and reach above shoulder level occasionally. Dr. Gibbons later stated that he would adjust his restrictions to be consistent with the restrictions recommended by Dr. Kuhnlein. (Ex. 6, pp. 55-84)

On February 7, 2017, Mr. Musel went to the United Hospital District with lower back pain that radiated to his left hip. He reported that he fell off of a ladder onto concrete in 2014. The assessment was sacroiliac joint dysfunction and piriformis

syndrome of the left side. Mr. Musel was told he could try chiropractic treatment and stretching if he wanted. (Ex. 8, pp. 88-91)

On February 10, 2017, Mr. Musel went to Greg E. Oleson, D.C. He noted continuous diffused, dull and aching discomfort in his low back. The chiropractor performed 3-4 region manipulation. (Ex. 9) Thereafter, Mr. Musel continued to receive conservative care from Wells Chiropractic and United Hospital District. (Ex. 1, Ex. 8)

At the request of his own attorney, Mr. Musel underwent an IME with John D. Kuhnlein, D.O. on October 9, 2017. Dr. Kuhnlein's diagnoses included: left shoulder rotator cuff tear and partial biceps tear with February 3, 2016 arthroscopic cuff repair, biceps tenotomy, and subcoracoid decompression; cervical strain; low back strain; right elbow contusion; right hip contusion; complaints of right shoulder pain; and complaints of left hip pain. Dr. Kuhnlein opined that Mr. Musel sustained the cervical strain, low back strain, the left shoulder injury, right elbow contusion and right hip contusion directly and causally related to the January 2015 work injury. He did not attribute the left hip pain to the work injury. He agreed that Mr. Musel reached MMI as of January 26, 2017. With regard to permanent impairment Dr. Kuhnlein stated:

Based on the reasonably demonstrable objective findings, and using the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition*, I would assign impairment as follows:

The DRE method is indicated according to pages 379 – 380. Turning to Table 15-5, page 392, I would place Mr. Musel into DRE Cervical Category I and assign 0% whole person impairment for the cervical strain, based on the physical examination. The DRE method is indicated according to pages 379 – 380. Turning to Table 15-3, page 384, I would place Mr. Musel between DRE Lumbar Categories I and II and assign 3% whole person impairment.

Turning to Figures 16-40, 16-473 and 16-46, in this case, the right shoulder cannot be used as a control, based on his complaints, and so impairment values are assigned solely for the left shoulder measurements. There is a total of 2% left upper extremity impairment for deficits in range of motion. Turning to Table 16-35, page 510, there is 1% left upper extremity impairment for the motor deficits. Turning to the Combined Values Chart on page 604, when these values are combined (2% x 1%) this is a 3% left upper extremity impairment. Turning to Table 16-3, page 439, this would convert to a 2% whole person impairment.

At this time, there would be no impairment for the right elbow contusion or right hip contusion. At this time, I'm not able to attribute the left hip pain to this injury. At this time, I'm not able to attribute the right shoulder pain to this injury.

Using the Combined Values Chart on page 604, when these values are combined (3% x 2%) this is a 5% whole person impairment.

(Ex. 10, p. 107)

Dr. Kuhnlein restricted Mr. Musel to lifting 40 pounds occasionally from floor to waist, to 50 pounds occasionally from waist to shoulder as long as the weights were kept close to the axial plane of the body, and 10 pounds occasionally over the shoulder or reaching away from the axial plane of the body. He also stated Mr. Musel should be allowed to change positions for comfort. He could stoop, squat, bend or crawl occasionally. He could work on ladders or at height occasionally. Mr. Musel could work at or above shoulder height occasionally. (Ex. 10)

I find the opinions of Dr. Kuhnlein to be most persuasive. His report is thorough and well-reasoned. I find Mr. Musel sustained injury to his cervical spine, lumbar spine, left shoulder, right elbow, and right hip as the result of the work injury. I find that his left hip symptoms are not related to the work injury. I further find that Mr. Musel sustained permanent disability as the result of the work injury. Dr. Kuhnlein assigned 3 percent whole person impairment for Mr. Musel's lumbar spine and 2 percent whole person impairment for the left shoulder. Dr. Kuhnlein did not assign any permanent functional impairment for any other body parts. Dr. Kuhnlein assigned a total of 5 percent whole person functional impairment as the result of the work injury.

Defendants argue that no physician has opined that claimant sustained any permanent impairment to his low back. I do not find defendants' argument to be persuasive because it is not accurate. Dr. Kuhnlein opined that the low back strain was causally connected to the work injury and assigned 3 percent functional impairment of the whole person. I find Mr. Musel sustained 3 percent of the whole person functional impairment to his low back due to the work injury. (Def. post-hearing brief, p. 9)

Defendants criticize Dr. Kuhnlein for assigning 3 percent impairment of the whole person for claimant's neck. However, defendants' criticism is misplaced because Dr. Kuhnlein did not assign any permanent functional impairment for the neck. A review of his report demonstrates that Dr. Kuhnlein opined Mr. Musel sustained zero percent impairment for the cervical strain. (Def. post-hearing brief, p. 10; Ex. 10, p. 107)

Based on the record as a whole and on Dr. Kuhnlein's opinions, I find claimant sustained 5 percent whole person functional impairment as the result of the work injury. I further find claimant has the following permanent restrictions: lifting 40 pounds occasionally from floor to waist, to 50 pounds occasionally from waist to shoulder with the weights kept close to the axial plane of the body, and 10 pounds occasionally over the shoulder or reaching away from the axial plane of his body; he may only work at or above shoulder height occasionally.

Mr. Musel continues to experience pain in his left shoulder and back. He has not received any treatment for his left shoulder since January of 2017. He does take

ibuprofen as needed for his pain. Since the time of the injury he has continued working, but with help from his co-workers. (Testimony)

Prior to the work injury, Mr. Musel typically worked 50-60 hours per week at Winnebago. He was paid \$13.35 per hour. After the injury, he continued to work in his regular job, but his hours were limited. He was restricted to working 5 days per week and a total of 8 hours per day. He also modified the way he performed his work duties. It took Mr. Musel longer to perform his duties after the injury than it did prior to the injury. His co-workers helped Mr. Musel with the more difficult tasks. For example, he would do more tasks on the exterior of the trailers and his partner did the more difficult tasks which were on the interior of the trailers. (Testimony)

Mr. Musel voluntarily resigned his employment from Winnebago on March 27, 2015. His voluntary quit notice stated he was leaving for other employment and due to health reasons. He testified he left Winnebago to take a less physically demanding job at Rembrandt Foods. Admittedly, the Rembrandt job was also closer to his home. At Rembrandt, Mr. Musel works tending chickens for an egg supplier. He is paid \$17.69 per hour, plus an incentive of \$2.50 per hour based on his attendance. He has a lot less overhead reaching than he did when he was at Winnebago. Rembrandt is aware of his injuries and has other workers do certain tasks for Mr. Musel. For example, he is not able to lift the floors in the chicken houses, so other workers do this for him. His job at Rembrandt is a 40-hour a week job. He does not work overtime on a regular basis like he did at Winnebago. (Testimony; Ex. 13 & 15)

Mr. Musel testified that while he worked at Winnebago, but prior to his injury, every once in a while he would work installing floor coverings. It is not clear how often or how much money he made performing this side work. Mr. Musel has not done any of this side work since the injury.

Mr. Musel graduated from high school. He has also earned a certification for floor covering installation. Mr. Musel spent much of his work life as a floor covering installer and farmer. He was self-employed in this work from 1983-2013. His income varied. He left this work when he was hired by Winnebago in November of 2013. Prior to 1983, Mr. Musel worked at Associated Lumber Mart. His duties included maintaining construction inventories, running forklifts and dump trucks, and making deliveries. He also worked for the City of Waseca, Minnesota where he maintained baseball fields, and performed general lawn care. He also held a job at a lumber yard as a yardman. He delivered and put away materials. Mr. Musel's work history also included working for a farm drainage company. He worked in trenching, connection of water tile drainage systems. He also operated a Caterpillar to level off farmland. He believes that his injury prevents him from returning to any of his prior jobs. (Testimony; Ex. 13)

To his credit, Mr. Musel has remained employed since his injury. Mr. Musel did undergo a pre-employment physical for Rembrandt. The examiner found that he was qualified to meet the requirements of the job description for a cage free pullet technician. Mr. Musel credibly testified that Rembrandt is aware of his work injury. This

is supported by the documents from the portions of his Rembrandt personnel file which are in evidence. Additionally, Mr. Musel testified that his employer has graciously worked with his limitations by having other employees perform duties that are too difficult for him. (Testimony)

Considering Mr. Musel's age, educational background, employment history, ability to retrain, motivation to maintain employment, length of healing period, permanent impairment, and permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that Mr. Musel has sustained a 25 percent loss of future earning capacity as a result of his work injury with Winnebago.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6)(e).

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).

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. 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).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Based on the above findings of fact, I conclude claimant sustained a 25 percent loss of earning capacity as the result of his work injury with Winnebago. As such, Mr. Musel is entitled to 125 weeks of permanent partial disability benefits commencing on the stipulated commencement date of January 26, 2017.

Claimant is seeking an assessment of costs in the amount of one hundred and no/100 dollars (\$100.00) for reimbursement of the filing fee. Costs are to be assessed at the discretion of the deputy hearing the case. Because claimant was generally successful in his claim I find that an assessment of costs is warranted. The filing fee is an appropriate cost under 876 ICA4.33(7). Defendants shall pay costs totaling one hundred and no/100 dollars (\$100.00).

ORDER

THEREFORE, IT IS ORDERED:

Agency file number 5061328:

All weekly benefits shall be paid at the stipulated rate of four hundred sixty-five and 14/100 dollars (\$465.14).

Defendants shall pay one hundred twenty-five (125) weeks of permanent partial disability benefits commencing on the stipulated commencement date of January 26, 2017.

Defendants shall be entitled to credit for all weekly benefits paid to date.

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 Deciga Sanchez v. Tyson Fresh Meats, Inc., File No. 5052008 (App. Apr. 23, 2018) (Ruling on

Defendants' Motion to Enlarge, Reconsider or Amend Appeal Decision re: Interest Rate Issue).

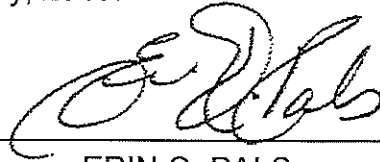
Defendants shall reimburse claimant costs in the amount of one hundred and no/100 dollars (\$100.00).

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.

Agency file number 5061329:

Claimant's motion to dismiss agency file number 5061329 is granted. Agency file number 5061329 is hereby dismissed.

Signed and filed this 29th day of May, 2019.



ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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EQP/sam

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.