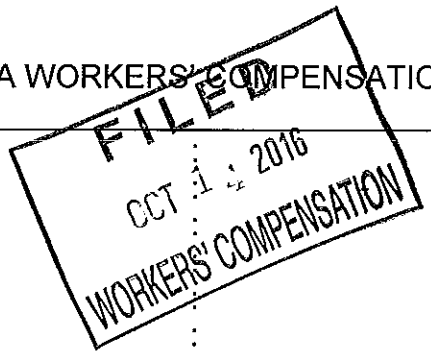
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



FRANCIS M. ZUBATY, Claimant, vs. FAMILY DOLLAR STORES, INC., Employer, and INDEMNITY INSURANCE CO. OF NORTH AMERICA, Insurance Carrier, Defendants.	File No. 5053461 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1100, 1802, 2500

STATEMENT OF THE CASE

Francis M. Zubaty, claimant, filed a petition in arbitration seeking workers' compensation benefits against Family Dollar Stores, Inc., employer, and Indemnity Insurance Co. of North America, insurer, for an alleged work injury date of May 13, 2015.

This case was heard on July 15, 2016, in Davenport, Iowa. The case was considered fully submitted on August 11, 2016, upon the simultaneous filing briefs.

The record consists of claimant's Exhibits 1-5, defendants' Exhibits A-I, and claimant's testimony.

ISSUES

1. Whether claimant sustained an injury on May 13, 2015, which arose out of and in the course of employment;

2. Whether the alleged injury is a cause of temporary disability and, if so, the extent;

3. Whether there is a causal connection between claimant's injury and the medical expenses claimed by claimant; and

4. Assessment of costs

STIPULATIONS

The parties stipulate claimant was an employee at the time of the alleged injury. Claimant was off work from March 31, 2016, through May 10, 2016.

At the time of the alleged injury, claimant's gross earnings were $547.56 per week. He was single and entitled to two exemptions. The weekly benefit rate, if benefits are awarded, is $355.07.

FINDINGS OF FACT

On June 19, 2012, claimant entered into an agreement of settlement pertaining to work injuries to his left shoulder occurring on November 7, 2007, and January 30, 2008. (Exhibit A) At the time, claimant was working for Philip Services Corporation. His position had been eliminated during a reduction in the employment force.

Claimant was given a full release by James Nepola, M.D. on October 17, 2011, nine weeks after the rotator cuff repair surgery. (Ex. 1, p. 1) At that time, claimant reported minimal pain and was eager to return to work. (Ex. 1, p. 1) Dr. Nepola returned claimant to work without restrictions, "though we did discuss with him the importance of avoiding any outward reach or lifting away from the body. He understands that he is at risk for a retear with these activities." (Ex. 1, p. 2) Tuvi Mendel, M.D. claimant's treating physician, assigned a 10 percent impairment to the upper extremity and Robert Milas, M.D. claimant's IME doc, assigned an 18 percent body as a whole (BAW) impairment rating. (Ex. A, p. 2) Under the compromised settlement, claimant received $20,000.00. (Ex. A, p. 3)

Claimant has had other injuries and surgeries predating the work injury.

> 1996 – I torn [sic] my left shoulder while sand blasting in Chicago. I don't remember who did the surgery but much of the treatment was in Freeport, IL.
>
> 2000 – I reinjured the left shoulder while water blasting – I eventually had surgery that was performed by Tyson Cobb, MD at Ortho Specialists in Davenport, IA. I think the surgery was in 2001. Cobb did a second surgery a few months later.
>
> 2005 – I had a cervical fusion performed by Tod Ridenour, MD in Davenport, IA.
>
> 2006 – hernia repair at Mercy Hospital in Clinton, IA. Right shoulder surgery by Dr. Khanna at Mercy Hospital in Clinton, IA.

2007 – left shoulder surgery by Dr. Khanna at Mercy Hospital in Clinton, IA.

2008 – 2 left shoulder surgeries by Dr. Mendel in Davenport, IA.

2011 – left shoulder surgery by Dr. Nepola at the University of Iowa.

I recovered from all of these surgeries and after each was able to work a heavy labor job.

(Ex. E, p. 22)

On May 13, 2015, claimant was lifting a 30-45 pound case of liquid detergent with the left hand and arm. The boxes were at nose level. He twisted and heard a pop in the left shoulder. When he reached for a second sack, he heard a pop in the left wrist. He attempted to continue working but could not continue because of pain. This injury was reported to the supervisor, and claimant was sent to the emergency room where he was seen by Shawn E. Goodall, M.D. (Ex. 2, p. 31) The differential diagnosis included rotator cuff injury, shoulder sprain or strain, and strain to the volar wrist. (Ex. 2, p. 33) Initial radiographs showed no recent abnormalities, and Dr. Goodall determined that the likely injury was a shoulder strain. (Ex. 2, p. 36) Claimant was referred to orthopedics for consultation due to the past surgeries.

The following day he was seen by Timothy Millea, M.D., at ORA Orthopedics. (Ex. 3, p. 42) Dr. Millea noted mild degenerative arthrosis but recommended only conservative care in the form of a sling and then later physical therapy. (Ex. 3, p. 43) An arthrogram showed postoperative changes from the prior rotator cuff repair, but the supraspinatus appeared to be intact. (Ex. 3, p. 46)

He was then seen by Andrew D. Bries, M.D., at ORA Orthopedics who diagnosed claimant with a SLAP tear. (Ex. 3, p. 28) Dr. Bries noted claimant's left shoulder had "very dysfunctional motion. He has difficulty forward elevating his arm over his head...You can get him to hold it but he does break pretty easy and has pain with scaption, external rotation, and subscap with bear hug." (Ex. 3, p. 47)

Claimant continued to have pain and limited range of motion. On August 4, 2015, Dr. Bries added biceps tendinitis to the SLAP tear diagnosis. (Ex. 3, p. 49) Despite the complicated past medical history involving the shoulder, Dr. Bries agreed to perform a diagnostic arthroscopy, biceps tenolysis, and labral debridement. (Ex. 3, p. 49)

On November 30, 2015, Dr. Nepola saw claimant for the left shoulder. A glenohumeral joint injection was performed and claimant was ordered to follow up. (Ex. 1, p. 10) A new work restriction of no lifting more than 10 pounds was instituted on January 19, 2016, after an MRI revealed postoperative changes of the RC tendon repair. (Ex. 1, pp. 15, 17)

Upon his return on January 29, 2016, claimant reported only temporary relief. (Ex. 1, p. 11) After another shot to the left subacromial space, claimant was referred to physical therapy. After yet another failed injection, it was determined claimant would undergo another surgery. (Ex. 1, p. 25) The left shoulder diagnostic arthroscopy took place on March 31, 2016. (Ex. 1, pp. 29-20)

Claimant was given work restrictions of no repetitive activity on the left side, a 5-pound weight restriction and no work overhead.

On May 10, 2016, claimant underwent an independent medical examination (IME) with Richard Kreiter, M.D. Dr. Kreiter opined claimant sustained a 13 percent whole person impairment due to loss of range of motion. (Ex. 4, p. 51)

Claimant also underwent an IME with Abdul Foad, M.D. (Ex. B) He exhibited a lot of breakthrough weakness during the range of motion tests. Dr. Foad concluded that the injury was actually a progressive SLAP tear developed from the traumatic AC joint separation suffered earlier. (Ex. B, p. 10) The work injury, in Dr. Foad's opinion, was only a temporary aggravation and that the current symptomatology relates to the earlier, settled work comp claim.

> Intrinsic factors (such as poor tissue quality from aging, poor blood supply and nicotine use) and extrinsic factors (such as AC joint degenerative changes, i.e. bone spurs, acromial morphology), chronic muscle weakness, and trauma combined will create such a picture that may be a set up for a tear as in this case. The most common mechanisms that lead to acute SLAP tears in this age group (with an intact rotator cuff) include falls directly on to the lateral aspect of the shoulder; a sudden acute jerking/traction injury to the arm; and vague discomfort with continued repetitive overhead use over time.

(Ex. B, p. 10) After this examination, a letter was sent to claimant's counsel informing him that Dr. Foad had opined that claimant sustained no permanent injury as a result of the work incident and therefore no disability benefits would be paid. (Ex. D)

Claimant continues to work for the defendant but in an accommodated position. Prior to his injury, claimant performed all aspects of his job without restrictions or accommodations. (Ex. 5, p. 61) He had moved from the bulk order filler position to forklift where his living requirements were far lower. Between December 2011 and 2015, there was significant turnover. As an individual cross trained in more than one position, he was required to help out and often found himself moving between the forklift and bulk order positions as needed.

Currently he is working the forklift position. He has weight restrictions of 5 pounds with no work overhead. He feels like he has a knife in his shoulder. The pain is sharp. He is participating in ongoing physical therapy and has a follow-up appointment scheduled with Dr. Nepola. He would like to have another surgery.

Claimant has additional medical bills in the amount of $26,674.12.

There are costs of $280.15 including the filing fee and deposition transcripts.

CONCLUSIONS OF LAW

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

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).

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).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

Defendants do not dispute that something happened to claimant's shoulder; rather, they assert that the claimant sustained a temporary aggravation of a pre-existing injury and that any long-term symptomatology is related to that prior injury. In support of their claim, they point to the expert testimony of Dr. Foad who opined that the SLAP tear was a progressive injury. In Dr. Foad's opinion, he acknowledged that SLAP tears can occur with a fall onto the lateral aspect of the shoulder, a sudden acute jerking/traction injury to the arm; or "vague discomfort with continued repetitive overhead use over time." Either of the latter two examples is consistent with the claimant's description of the mechanism of his injury. He was lifting a box weighing a significant number of pounds when he twisted and heard a pop. He had been doing more bulk work which required regular lifting at the time of his injury and had been doing this type of work on and off for the four years prior to his injury. Further, claimant's treatment has been ongoing since the injury. He recently underwent an arthroscopy on March 31, 2016, after which work restrictions of no repetitive activity on the left side, and a 5-pound weight restriction were imposed along with no work overhead. As the claimant points out, this is the opposite of a temporary exacerbation returning to baseline. Claimant has not returned to his pre-injury status.

Claimant's treating physicians such as Dr. Goodall, Dr. Bries, and Dr. Nepola agreed that claimant had suffered a SLAP tear. Dr. Nepola, who treated claimant prior to the 2015 work injury, imposed the current set of work restrictions. Dr. Foad's opinions are not in line with the other physicians, the claimant's mechanism of injury, or his course of treatment.

His opinion is given lower weight. Based on the opinions of claimant's treating physicians as well as the claimant's credible testimony and the defendants' admissions that claimant was working his job without restrictions prior to the May 2015, injury, it is found that claimant's SLAP tear and current shoulder symptomatology are related to the work injury.

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

As a result of the causation finding, the medical bills are also the responsibility of the defendants. Defendants are also responsible for the ongoing medical care.

The parties agree that claimant was off work from March 31, 2016, through May 10, 2016, due to his shoulder injury.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, Iowa App 312 N.W.2d 60 (1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Claimant is entitled to healing period benefits for March 31 2016, through May 10, 2016, due to the fact he was not able to work due to his work-related injury.

ORDER

THEREFORE, it is ordered:

Claimant's ongoing shoulder complaints are found to be causally related to his work injury of May 13, 2015.

Defendants shall pay the outstanding medical bills associated with claimant's shoulder injury and to reimburse claimant's group health insurer for any medical bills it paid for that were associated with claimant's shoulder injury.

Defendants shall pay healing period benefits in the amount of $355.07 for March 31, 2016, through May 10, 2016.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants are to be given credit for benefits previously paid.

That defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

That defendants shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

Signed and filed this 14th day of October, 2016.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Thomas E. Cady
Attorney at Law
PO Box 950
Moline, IL 61266-0950
Tcady@katzlawfirm.com

Patrick J. Sodoro
Lyndsey A. Canning
Dru M. Moses
Attorneys at Law
7000 Spring St., Ste. 200
Omaha, NE 68106
Patrick@patricksodorolaw.com
lcanning@patricksodorolaw.com
dmoses@patricksodorolaw.com

JGL/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.