

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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DAVID ROQUET,

Claimant,

vs.

RINK MANAGEMENT SERVICES,

Employer,

and

TECHNOLOGY INSURANCE  
COMPANY,

Insurance Carrier,  
Defendants.

**FILED**

JAN 11 2016

WORKERS COMPENSATION

File No. 5049538

ARBITRATION DECISION

Head Note No.: 1803

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STATEMENT OF THE CASE

Claimant, David Roquet, filed an arbitration petition seeking workers' compensation benefits from Rink Management Services, employer, and Technology Insurance Company, insurance carrier.

The record consists of Joint Exhibits A-R and the testimony of the claimant.

The case was heard on November 18, 2015, in Des Moines, Iowa, and considered fully submitted on the same.

ISSUES

The extent of claimant's disability; and

Whether claimant is entitled reimbursement of the independent medical evaluation fees of Dr. Kuhnlein.

STIPULATIONS

The parties agree that claimant sustained an injury on February 21, 2014, arising out of and in the course of employment.

The injury is industrial in nature and the commencement date for permanent partial disability is July 18, 2015.

The parties further agree that claimant's gross earnings were \$852.32 per week and that he was married and entitled to 6 exemptions. Based on those foregoing numbers, the claimant's benefit rate is \$580.70.

Prior to hearing, defendants have paid permanent partial disability beginning July 18, 2015, and continuing up to and beyond the hearing date.

The cost of Dr. Kuhnlein's examination was \$1,975.00 and \$2,059.60. Claimant has paid a filing fee of \$100.00.

### FINDINGS OF FACT

David Roquet, claimant, was a 35-year-old person at the time of hearing. At all pertinent times, he was married with 4 minor children.

His past work history includes firefighting, EMT work, construction, and ice rink management.

Claimant has lived in the Des Moines area since 2003. He went to high school in Grimes. At the start of his senior year, he was two credits short of graduation. He entered DMACC and completed the adult diploma program in November 1998. During that year, he was taking classes through DMACC, playing hockey, and working full time.

He began working for defendant employer in 2007 as an operations worker. By February 2014 he had been promoted to assistant manager. He also serves as a part-time volunteer firefighter working up to 30 hours a week.

His work includes overseeing the day-to-day operations, scheduling of workers, ordering of equipment, supplies, and concessions. There is some lifting involved, such as the matting on the floor, the setup and removal of tables and chairs for events, the carrying of supplies and equipment.

He is also tasked with operating an ice resurfer. The machine requires the use of two arms, as the operator is required to utilize the shifter as well as levers that drop conditioner, operate the board brush and the ice breaker.

On February 21, 2014, the ice resurfer malfunctioned. A hose had sprung a leak. Because of an impending event, the claimant attempted to operate the vehicle. As he was getting out of the machine, the ice resurfer went in reverse. Claimant attempted to prevent it from going backward and striking any patrons. He held it back until he was able to get the machine into neutral.

He told his manager, who happened to be his mother, that he thought he had done something to his right side. By the end of the day, the pain had worsened and an incident report was filed.

The pain worsened over his days off and his manager directed him to Mercy Campus Medical Clinic where his sister worked. Claimant was seen by Susan Kennedy, D.O. on April 17, 2014. (Exhibit A, page 19) He reported pain in both upper extremities, including his shoulder and elbows and left hand. (Ex. A, p. 20) Claimant was referred for an orthopedic consult.

On March 26, 2014, claimant was seen by Steven A. Aviles, M.D. (Ex. F, p. 81) His presentation during this visit was markedly different than previous orthopedic visits. He was in serious pain and the severity level was at 6. (Ex. F, p. 78) Dr. Aviles ordered an MRI, which revealed an extensive SLAP tear in the right shoulder. (Ex. F, p. 86)

The initial plan was to send claimant to physical therapy, but Dr. Aviles worried claimant would need surgical repair. (Ex. F, p. 86) On May 7, 2014, claimant returned to Dr. Aviles, but this time complained of left shoulder pain in addition to the right shoulder. (Ex. F, p. 89) Dr. Aviles ordered physical therapy to include both shoulders.

By July 2014, claimant decided to undergo surgical repair. "He feels like he cannot live with these pains the way that they are. He has tried conservative care with failure." (Ex. F, p. 98)

Surgery took place on the right side on August 7, 2014. (Ex. F, p. 101) The surgery was successful and by October claimant was not experiencing pain on the right side. (Ex. F, p. 110)

On January 8, 2015, claimant underwent surgical repair of the left side. (Ex. F, p. 117) The post-surgery recovery was not as frictionless as the right-sided one. On March 3, 2015, claimant returned to Dr. Aviles with a report that he had developed pain in his left posterior subacromial space and along the scapula. (Ex. F, p. 127)

A month later, claimant still had problems on the left side. "He states that he is better than he was prior to surgery but he still is not where he wants to be. He still has pain that begins in the front of the shoulder radiating to the posterior shoulder." (Ex. F, p. 130)

With a break from physical therapy, claimant's pain subsided, but his range of motion did not improve. By July 2015, claimant had improved in both pain and range of motion, but still had bilateral elbow pain and shoulder pain at a severity level of 5. (Ex. F, p. 137)

Dr. Aviles found claimant to be at maximum medical improvement on August 17, 2015, but at that time claimant still had stiffness on the left side. (Ex. F, p. 140) Dr. Aviles opined on September 14, 2015, that claimant had a zero percent impairment

on his right side, but a six percent impairment on the left. (Ex. F, p. 144) Dr. Aviles did not impose any restrictions.

Claimant's past medical history is significant for a knee arthroscopy, an L5-S1 lumbar discectomy, a laminectomy, a left shoulder injury and subsequent surgery.

On March 8, 2012, claimant was seen by Dr. Kennedy after slipping on his deck. He reported decreased range of motion in the left shoulder and x-rays were ordered to rule out dislocation. The x-rays were negative but an MRI was ordered. (Ex. A, p. 1) Only a few weeks later, claimant underwent a physical for the fire department and was cleared to do the essential functions of the job, although it was noted that he had mild decreased range of motion in the shoulder. (Ex. C, p. 64)

The MRI revealed minimal rotator cuff tendinopathy and a SLAP tear with a final paralabral cyst. (Ex. A, p. 3) He was referred to an orthopedic specialist. Surgery was performed on May 17, 2012, at the University of Iowa by Brian Wolf, M.D. (Ex. B) After a course of physical therapy, claimant was released to return to work with no restrictions on February 11, 2013. (Ex. B, p. 61)

After his 2012 surgery and recovery, claimant undertook a Candidate Physical Aptitude Test (CPAT) with the Des Moines Fire Department in 2013. Claimant was cleared, physically, through the City of Clive. (Ex. D, p. 66)

"He is here today fit for duty. He has a release from Dr. Wolfe who did his SLAP lesion repair on his shoulder. He also took the physical capacity profile test and passed that with almost a perfect score." (Ex. D, p. 66) The medical note signed by Von L. Miller, PA-C, indicated that claimant had full range of motion of his left shoulder, no discrepancies, and no pain mannerisms during exam. (Ex. D, p. 66)

On October 7, 2013, claimant was seen for a routine clinic follow-up of chest pain, unrelated to his work injury. He also complained of pain upon flexion of the elbow, but exhibited no stiffness or decreased range of motion. (Ex. A, p. 9) On February 21, 2014, claimant was back to Dr. Kennedy with reports of left hand pain associated with a different work incident. (Ex A, p. 11)

On February 27, 2014, claimant was seen again by Dr. Kennedy for pain in the right shoulder and left elbow. He was ordered to go to physical therapy and consult with Iowa Orthopedic. (Ex. A, p. 16) Claimant was seen by Michael A. Gainer, M.D., for mild numbness and tingling in his hand going up to the elbow. (Ex. E, p. 73) Dr. Gainer found nothing out of the ordinary and instructed the claimant to return to work.

On December 8, 2014, John D. Kuhnlein, D.O. issued a report finding that claimant was not at maximum medical improvement. Claimant reported a constant dull aching, pulling sensation that waxes and wanes in the bilateral shoulders. (Ex. F, p. 153) While the right shoulder, contusion to the left hand and left elbow had resolved,

claimant still exhibited range of motion difficulties and pain with use of the left shoulder. (Ex. F, p. 156) Dr. Kuhnlein opined that the left shoulder injury was associated with the original injury and recommended the claimant return for a subsequent examination after the surgery to the left side. (Ex. F, p. 157)

A second examination was conducted on August 31, 2015, with a report issued on September 25, 2015. (Ex. F, p. 160)

Claimant reported at that time that he had intermittent aching pain in the right shoulder, underneath the clavicle and the acromioclavicular joint. He estimated his range of motion on the right side was about 90 percent. (Ex. F, p. 161) He reported pain with over-the-shoulder activity. On the left side, claimant had intermittent pain that was activity-dependent. (Ex. F, p. 161)

During the examination, claimant had stiffness with Yergason's, O'Brien's, Neer's and Hawkins' testing. (Ex. F, p. 163) Tinell's testing was mildly positive over the left median nerve. (Ex. F, p. 164) Dr. Kuhnlein found that claimant needed additional treatment and that claimant was not at maximum medical improvement. (Ex. F, p. 165)

Dr. Kuhnlein assigned three percent right upper extremity impairment for "decrements in the range of motion" and an eight percent left upper extremity impairment for decreased range of motion on the left side. (Ex. J, p. 165)

He included restrictions:

Mr. Roquet continues to have problems working at or above shoulder height, and I would place restrictions to have him work occasionally at or above shoulder height. He can work with vibratory or power tools occasionally at or above shoulder height. There would be no need for specific material handling restrictions, other than to be cautious when working at or above shoulder height.

(Ex. J, p. 165)

Claimant testified that Dr. Kuhnlein used tools to measure each range of motion test and spent extensive time assessing his current physical condition and that Dr. Aviles did not.

Currently, claimant reports that his right shoulder gets sore from use. It has not returned to its pre-injury state. His left shoulder has restricted range of motion. He is hopeful he can work through his condition and eventually return to full range of motion on the left side, but does worry that his limited range of motion will eliminate him from a future in firefighting.

Due to injury and extensive medical leave he was advised to sign resignation papers for Clive. His goal is to become a full time firefighter with the city of Des Moines.

He has applied several times since 2003 and in every instance he has progressed further in the hiring process. During the last two hirings, he has not been able to apply because of his shoulder.

He currently lives on a small farm and gets what he can done by himself. He has done home repair, brush clearance, renovated his home, but had to rely on his wife to do much of the overhead work.

Up until the injury, claimant enjoyed playing hockey. He would like to return, but he has a fear of being injured and his wife was not thrilled with the idea of him rejoining a league.

He hunts and fishes. This year he will be using a crossbow as he is not able to use a regular stick bow.

Since the injury, he has undergone an abbreviated application process with Clive Fire Department and has successfully made it through the application process. He has not yet returned, believing himself to be a liability for his fellow firefighters due to his reduced range of motion on the left side.

He still has to undergo a physical test with a doctor as well as an agility test and a shortened written EMT test. He is unsure of whether he would pass at this time. He has set up mock tests at home, but not the overhand raising of extension ladders.

In large part, he believes he would be able to do most of his prior jobs but for the firefighter and EMT positions. He is physically capable of doing the present job and any tasks that pose physical problems, he delegates. His real concern is high-end physical activity work. He is generally capable of working at rink management.

#### 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 Rule of Appellate Procedure 6.14(6).

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).

On July 6, 2015, claimant was seen by Dr. Aviles for follow-up of his bilateral shoulder pain. Claimant reported pain in the shoulders and elbow with a severity level of five. (Ex. F, p. 137) Dr. Aviles returned claimant to full duty work with no restrictions.

Claimant's final visit with Dr. Aviles was on August 17, 2015. (Ex. F, p. 140) Claimant's severity level was mild-moderate radiating from the shoulder into the elbow. Dr. Aviles documented, "Right shoulder is fine. He is mainly having trouble with the left shoulder and overhead activity." (Ex. F, p. 140) Dr. Aviles continued claimant on work with no restrictions. He instructed the claimant to undertake activities as tolerated and set his maximum medical improvement date as of August 17, 2015. (Ex. F, p. 141)

As to the right shoulder, claimant testified that he has no problems with his right shoulder. Dr. Aviles gave him a zero percent impairment. Dr. Kuhnlein found claimant to have no evidence of lingering injury on the right side but for modest range of motion deficits.

The claimant's testimony was credible and therefore useful in buttressing the expert testimony. As to the right shoulder, claimant's testimony is more closely aligned with Dr. Aviles' opinions. When it comes to his left shoulder, claimant's testimony is more in sync with the opinions of Dr. Kuhnlein.

Based primarily on the credible testimony of claimant and in combination with Dr. Aviles, it is found that claimant has not sustained any permanent disability on the right side.

As for the left side, Dr. Aviles assigned a six percent upper extremity impairment rating for the left shoulder stiffness, while Dr. Kuhnlein assessed an eight percent impairment rating to the upper extremity or five percent whole body impairment.

Even Dr. Kuhnlein is hopeful that claimant will be able to regain full range of motion at some point. However, at the time of the hearing, he did not have full range of motion. If the claimant does improve and returns to pre-injury status at some unforeseen point in the future, there are mechanisms within the system to address that.

The claimant's disability is measured by his status at the time of the hearing, not potential healing in the future.

Based on claimant's credible testimony, which aligns more closely with Dr. Kuhnlein's assessments than that of Dr. Aviles, it is found that claimant has sustained a 15 percent whole body impairment due to his lack of range of motion and the firefighting jobs that are currently foreclosed to him because of that.

The next issue is whether claimant is entitled to the section 85.39 fees of Dr. Kuhnlein. Dr. Kuhnlein testified via his reports that his fees were reasonable. (Ex. J, pp. 158, 166)

An 85.39 fee is allowed when the employer's retained physician has provided a low rating with which the employee does not agree.

Dr. Aviles provided no impairment rating until September 14, 2015, when he opined that claimant had a zero percent impairment on his right side, but a six percent rating on the left. (Ex. F, p. 144) Dr. Kuhnlein's first report was issued on December 8, 2014. (Ex. J, p. 144) Therefore, under Dart v. Young, 867 N.W.2d 839 (Iowa 2015), claimant would not be entitled to an 85.39 evaluation. Further, it cannot be assessed as a cost through rule 876 IAC 4.33.

We conclude section 85.39 is the sole method for reimbursement of an examination by a physician of the employee's choosing and that the expense of the examination is not included in the cost of a report. Further, even if the examination and report were considered to be a single, indivisible fee, the commissioner erred in taxing it as a cost under administrative rule 876—4.33 because the section 86.40 discretion to tax costs is expressly limited by Iowa Code section 85.39.

Id.

The second report and examination of Dr. Kuhnlein were conducted on August 31, 2015, and September 14, 2015, respectively, but most importantly, after the report of Dr. Aviles. Dr. Kuhnlein's examination fees for the August 31, 2015 report, are reimbursable in the amount of \$997.50. (See hearing report).

#### ORDER

THEREFORE, IT IS ORDERED:

That defendants are to pay unto claimant one hundred (100) weeks of permanent partial disability benefits at the rate of five hundred eighty and 70/100 dollars (\$580.70) per week from July 18, 2015.

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.

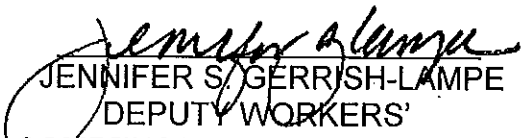
That defendants are to be given credit for benefits previously paid.

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, which consists of the filing fee.

That defendants shall reimburse claimant for the section 85.39 examination of Dr. Kuhnlein in the amount of nine hundred ninety-seven and 50/100 dollars (\$997.50).

Signed and filed this 14<sup>th</sup> day of January, 2016.

  
JENNIFER S. GERRISH-LAMPE  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

Copies to:

Nathaniel R. Boulton  
Attorney at Law  
100 Court Ave., Ste. 425  
Des Moines, IA 50309-1307  
nboulton@hedberglaw.com

Andrew T. Tice  
Attorney at Law  
100 Court Ave., Ste. 600  
Des Moines, IA 50309-2346  
atice@ahlerslaw.com

JGL/srs

**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.