

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

YVONNE ALEXANDER,

Claimant,

vs.

KUM & GO, LC,

Employer,

and

ZURICH AMERICAN INSURANCE
COMPANY,

Insurance Carrier,
Defendants.

File Nos. 20700981.01
21700110.01

ARBITRATION DECISION

Head Note Nos.: 1108.50, 1402.40, 1803,
2206, 2601.01, 2907

STATEMENT OF THE CASE

Yvonne Alexander, claimant, filed two petitions in arbitration seeking workers' compensation benefits from Kum & Go, LC, employer and Zurich American Insurance Company, insurance carrier, as defendants. Hearing was held on February 11, 2022. This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the declaration of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via Internet-based video. Accordingly, this case proceeded to a live video hearing via CourtCall with all parties and the court reporter appearing remotely.

The parties filed a hearing report in each file number. On the hearing reports, 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.

Yvonne Alexander was the only witness to testify live at trial. The evidentiary record also includes joint exhibits JE1-JE5, claimant's exhibits 1-4, and defendant's exhibits A-C. All exhibits were received without objection. At the outset of the hearing it was noted that claimant's exhibit 4, page 1 was listed in the exhibit index, but was inadvertently omitted from the exhibits. It was agreed by the parties that the record would be left open at the conclusion of the hearing for the sole purpose of allowing

claimant's exhibit 4, page 1 to be submitted. Claimant's exhibit 4, p. 1 was submitted on February 11, 2022, and the evidentiary record closed at that time.

The parties submitted post-hearing briefs on March 17, 2022, at which time the case was fully submitted to the undersigned.

ISSUES

File No: 20700981.01 (DOI: May 26, 2019)

The parties submitted the following issues for resolution:

1. Whether the stipulated May 26, 2019 work injury caused any permanent partial disability. If so, the nature and extent of disability.
2. Whether claimant is entitled to reimbursement of an IME pursuant to Iowa Code section 85.39.
3. Assessment of costs.

File No: 21700110.01 (DOI: October 8, 2020)

The parties submitted the following issues for resolution:

1. Whether the stipulated October 8, 2020 work incident caused any permanent partial disability. If so, the nature and extent of disability.
2. Whether claimant is entitled to reimbursement of an IME pursuant to Iowa Code section 85.39.
3. Assessment of costs.

FINDINGS OF FACT

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

Claimant, Yvonne Alexander, began working at Kum & Go, LC in 2018. She has worked as a sales associate, cashier, and as a food assistant. She filed a petition alleging an injury date of May 26, 2019 to her left foot, left lower extremity, and neurovascular system as the result of "performing work duties." Defendants accepted the injury as compensable and paid related medical bills. The only disputes regarding this claim is whether claimant is entitled to any permanency benefits and whether claimant is entitled to reimbursement for the independent medical examination. (Petition, Answer, Hearing Report)

On May 26, 2019, Ms. Alexander was working at Kum & Go when a nearby shelf collapsed, and cans fell onto her left foot. Ms. Alexander did not miss any time from work as the result of this injury. She testified that the only injury she sustained due to this work injury was to her left foot. (Testimony)

Ms. Alexander treated with Chelsie Snyder, D.P.M. for her left foot. Dr. Snyder's actual treatment records are not contained in the hearing record. However, according to the summary report provided by defendants, Ms. Alexander started treating with Dr. Snyder for her left foot on June 18, 2019 and completed treatment on August 20, 2019. (JE 2, p. 49) Dr. Snyder diagnosed claimant with a left foot contusion. (*Id.*) She also ordered an MRI of Ms. Alexander's left foot. (*Id.*) It revealed arthritis. (*Id.*) Dr. Snyder felt the arthritis was pre-existing and not caused by the May 26, 2019 work-incident. (JE 2, p. 50) Dr. Snyder authorized a short course of physical therapy. (JE 1, p. 21-29) Ms. Alexander was discharged from physical therapy on September 27, 2019. (JE 1, p. 28) The discharge note indicates Ms. Alexander was back working full time without restrictions at that time. (*Id.*)

Dr. Snyder did not assign any permanent impairment to Ms. Alexander's left foot as a result of the May 26, 2019 work incident, nor does she believe Ms. Alexander requires permanent restrictions for her left foot complaints. (JE 2, p. 50) At the hearing, claimant testified she still suffers from increased sensitivity in her left foot following the May 26, 2019 incident. (Tr., p. 19) She did not endorse any other ongoing symptoms. (*Id.*)

Dr. Snyder's opinions concerning claimant's left foot condition are un rebutted. I accept Dr. Snyder's opinion and find that Ms. Alexander has no permanent impairment in her left foot as a result of the May 26, 2019 work incident¹. (Testimony; JE2, pp. 49-50)

According to the hearing report, Ms. Alexander is seeking reimbursement for an independent medical examination (IME) related to the May 26, 2019 work injury. However, it is not clear what expenses she is seeking reimbursement for because Ms. Alexander did not obtain a subsequent examination of disability. I find that Ms. Alexander has failed to demonstrate entitlement to reimbursement for an IME pursuant to Iowa Code section 85.39.

Ms. Alexander is seeking an assessment of costs with regard to her May 26, 2019 work injury. Costs are to be assessed at the discretion of the Workers' Compensation Commissioner or the deputy hearing the case. I find that claimant was not successful in her May 26, 2019 claim and therefore exercise my discretion to not assess costs against the defendants. Each party shall bear their own costs.

Ms. Alexander filed a second petition alleging an injury date of October 8, 2020, to her right clavicle, acromioclavicular joint, acromion process, coracoid process, humeral head, glenoid cavity, scapula, neck, bursa, and body as a whole, while performing work duties. (Petition and addendum) Defendants admit that Ms. Alexander was involved in an incident at work, but deny that she sustained any permanent injury. The only disputes regarding this claim is whether claimant is entitled to any permanency

¹ Claimant's petition also asserts an injury to her neurovascular system as a result of the May 26, 2019 date of injury. There is no evidence in the record of any injury to her neurovascular system.

benefits and whether claimant is entitled to reimbursement for the independent medical examination.

On October 8, 2020, Ms. Alexander was on break on the employer's premises. She attempted to sit in a chair, but the chair collapsed and she fell to the floor. Ms. Alexander testified that she fell on her right shoulder and hit her head on the ground. She felt sharp pain in her neck immediately after her fall and requested medical treatment. (Testimony)

Ms. Alexander was taken to the Emergency Room at Mercy Medical Center, where she was evaluated by Gregory Taylor, PAC. (JE 3, p. 94) Ms. Alexander complained of pain in her right shoulder, right trapezius, and neck. (*Id.*) Mr. Taylor ordered an x-ray of her right shoulder and a CT scan of her cervical spine. (JE 3, p. 97) No acute injuries were noted in either scan.² (JE 3, p. 97, 101) Ms. Alexander was diagnosed with a cervical strain and a right shoulder contusion, and prescribed a neck collar and pain medication. (JE 3, p. 98)

Defendants authorized follow-up treatment with Tracie Neustel, NP at the University of Iowa Occupational Health. (JE 5, p. 120) Ms. Alexander saw Nurse Neustel on October 13, 2020. (*Id.*) She reported that, while on break at Kum & Go, a chair collapsed from under her and she fell to the floor, landing on her right shoulder. (*Id.*) She complained of right shoulder pain that extended into her neck. (*Id.*) Ms. Neustel diagnosed her with a shoulder strain. (JE 5, p. 122) She recommended physical therapy and an evaluation with an orthopedist. (JE 5, p. 123) Ms. Alexander was released to return back to work with a restriction against using her right arm. (*Id.*) Following this appointment, her care was transferred to Mathew J. Bollier, M.D., an orthopedic surgeon at the University of Iowa Hospitals and Clinics. (JE 5, p. 124)

Ms. Alexander has a history of right shoulder injuries and received treatment from Dr. Bollier prior to October 2020. (See JE 4, p. 109-119) In November 2016, Ms. Alexander injured her right shoulder while working for Sam's Club. (Tr., p. 36-37; Claimant's Exhibit 2, p. 5; Ex. B, p. 6) In connection with that injury, claimant underwent two right shoulder surgeries with Dr. Bollier—an arthroscopic repair of her rotator cuff on November 6, 2019, and an arthroscopy with capsular release, extensive debridement and subacromial decompression on June 16, 2020. (JE 4, p. 109-111) At the time of the work incident on October 8, 2020, Ms. Alexander was still receiving post-operative treatment. (*Id.*; Ex. C, p. 7) The medical records show that Ms. Alexander saw Dr. Bollier on August 31, 2020. (JE 4, p. 109) At that appointment, Ms. Alexander reported ongoing pain in her right anterior shoulder, upper trapezius, and neck, as well as occasional numbness and tingling in her upper extremity. (JE 4, p. 109, 113) Dr. Bollier recommended an additional 6 weeks of physical therapy for her shoulder and neck

² Ms. Alexander returned to the Mercy Emergency Room for continued right shoulder pain on October 17, 2020. (JE 3, p. 102) She was evaluated by physician's assistant Kimberly Ferrante. (*Id.*) Ms. Ferrante ordered a repeat x-ray. (JE 3, p. 104) It showed some mild to moderate degenerative changes in the glenohumeral and acromioclavicular joints, but no acute changes. (JE 3, p. 104, 107)

complaints. (JE 4, p. 113) He also assigned permanent restrictions of no lifting, pushing, or pulling more than 10 pounds with the right arm. (*Id.*)

Ms. Alexander underwent physical therapy for right shoulder and neck complaints at Athletico and Mercy Medical Center. (See JE 1 and JE 3) Her last appointment before the fall at Kum & Go was on October 2, 2020. (JE 3, p. 91) At that appointment, claimant reported minimal change in her neck/upper shoulder pain. (*Id.*) The physical therapist, Benjamin Kurt, noted she “presents with similar ROM measurements to previous assessment. She has been more painful lately d/t cervical spine disc derangement, resulting in radicular symptoms to shoulder.” (JE 3, p. 93)

Ms. Alexander did not return to see Dr. Bollier until January 25, 2021. (JE 4, p. 115) At this appointment, she told Dr. Bollier she had experienced “increased right shoulder pain radiating into her neck and across her back into her left shoulder” since the fall on October 8, 2020, as well as numbness and tingling in her right arm. (*Id.*) Dr. Bollier diagnosed her with increased right shoulder pain. (JE 4, p. 119) He recommended a repeat MRI, physical therapy, and subacromial corticosteroid injection to the glenohumeral joint. (*Id.*) This is the last treatment note contained in the hearing record. Correspondence from defendants’ attorney, dated March 9, 2021, indicates Ms. Alexander had a follow-up appointment scheduled with Dr. Bollier on March 1, 2021, but she did not show up. (Ex. C, p. 8) At the hearing, Ms. Alexander was asked about her failure to attend the March 1, 2021 appointment. (Tr., p. 46) She stated she was “not sure” whether she had been informed of the follow-up appointment with Dr. Bollier. (*Id.*)

On December 10, 2021, Dr. Bollier issued a report to defendants’ counsel. (Ex. A, p. 1) This report confirmed Dr. Bollier performed two prior surgeries on Ms. Alexander’s right shoulder—one in November 2019 and another in June 2020 in connection with a prior work injury. (*Id.*) Dr. Bollier’s treatment records indicated that Ms. Alexander continued to experience right shoulder and neck complaints after the surgeries and received conservative treatment for those complaints through October 8, 2020. (*Id.*) Dr. Bollier ordered a new MRI shortly after the October 8, 2020 incident. (*Id.*) It did not show any new injury or pathology in the right shoulder. (*Id.*) Based upon that study and Ms. Alexander’s prior examinations, Dr. Bollier did not believe the fall on October 8, 2020 caused any new injury to her right shoulder or cervical spine, nor did it aggravate any pre-existing condition. (*Id.*) Dr. Bollier attributed Ms. Alexander’s ongoing right shoulder and neck symptoms to her prior work injury in 2016. (*Id.*)

Claimant underwent two separate independent medical evaluations (IMEs) with Stanley Mathew, M.D., at the request of her attorney. (See Ex. 1 and 2) The first of these evaluations took place on November 24, 2020, approximately seven weeks after her fall at Kum & Go. (Ex. 2, p. 5) The language of Dr. Mathew’s report makes it clear that he was evaluating Ms. Alexander in connection with her prior 2016 right shoulder injury. (Ex. 2, p. 5-8) Dr. Mathew’s report states “She continues to be in physical therapy for her right shoulder. She continues to have weakness, limited range of motion. She also has developed neck stiffness and pain as a result of this injury.” (Ex. 2, p. 5) Dr. Mathew diagnosed her with chronic neck pain, cervical dystonia, right shoulder

rotator cuff tendinitis status post orthoscopic surgery x2, right shoulder weakness, chronic right shoulder pain, and chronic pain syndrome. (Ex. 2, p. 7) Dr. Mathew causally related these diagnoses to the November 1, 2016 work incident at Sam Club. (*Id.*) He assigned Ms. Alexander 30percent permanent impairment of the right upper extremity, citing to Table 16-35. (*Id.*) He also assigned 5percent whole person impairment to her cervical spine, citing to Table 15-5. (*Id.*) He recommended restrictions of avoid lifting over 20 pounds, repetitive overhead activities, pushing or pulling. (*Id.*) There is no mention of the October 8, 2020 fall at Kum & Go in Dr. Mathew's November 2020 report. (See Ex. 2, p. 5-8)

At the behest of her attorney, Ms. Alexander returned to Dr. Mathew on December 16, 2020. (Ex. 1, p. 1-4) After examining Ms. Alexander, Dr. Mathew diagnosed her with chronic neck pain, cervical dystonia, right shoulder rotator cuff tendonitis, chronic right shoulder pain, chronic right shoulder weakness, chronic pain syndrome and a history of arthroscopic shoulder surgery x2. (Ex. 1, p. 3) Dr. Mathew opined that the fall at Kum & Go constituted "a substantial aggravating factor resulting in injuries to the right clavicle acromial clavicular joint, acromion process, coracoid process, humeral head and right shoulder as a whole as well as the neck and body as a whole." (Ex. 1, p. 4) Dr. Mathew once again assigned Ms. Alexander 30percent permanent impairment of the right upper extremity, citing to Table 16-35 and 5%percent whole person impairment to her cervical spine, citing to Table 15-5. (Ex. 1, p. 3) His report also recommends restrictions of avoid repetitive lifting, pushing, pulling, and overhead activities with more than 10 pounds. (Ex. 1, p. 4) Dr. Mathew's December 2021 report does not mention Ms. Alexander's prior work injury in 2016. (*Id.*)

I accept the opinions of Dr. Bollier and the opinions of Dr. Mathew as contained in his 2020 IME report. These opinions are consistent with one another and the record as a whole. I do not find the opinions of Dr. Mathew contained in his 2021 report to be persuasive. In Dr. Mathew's 2021 IME he fails to explain how the same conditions and functional impairment that he related to the 2016 injury are now related to the 2020 injury. I find his 2021 report is not persuasive due to his lack of rationale or explanation. Thus, I find that Ms. Alexander did not sustain any new injury or impairment to her cervical or right shoulder. I find that any problems or associated symptoms after October 8, 2020 were attributable to her preexisting condition. Thus, I find claimant failed to demonstrate by a preponderance of the evidence that she sustained any permanent functional impairment as the result of the October 8, 2020 injury.

Next, Ms. Alexander is seeking reimbursement for the 2021 IME with Dr. Mathew. I found that Ms. Alexander did not sustain any new cervical or right shoulder injury as the result of the October 8, 2020 work incident. I find Dr. Bollier did not make an evaluation of permanent disability, rather he opined that Ms. Alexander did not sustain an injury to her right shoulder and/or neck on October 8, 2020. As such, I find that the prerequisites for reimbursement of an IME have not been met.

Finally, Ms. Alexander seeks an assessment of costs for the October 8, 2020 date of injury. Costs are to be assessed at the discretion of the Workers' Compensation Commissioner or the deputy hearing the case. I find that claimant was not successful in her October 8, 2020 claim and therefore exercise my discretion to not assess costs against the defendants. Each party shall bear their own costs.

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. 6.904(3)(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).

When an expert's opinion is based upon an incomplete or incorrect history, it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522, 133 N.W.2d 867 (1965). The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence, together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire and Casualty Co., 526 N.W.2d 845 (Iowa 1995).

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(u) or as an unscheduled injury pursuant to the provisions of section 85.34(2)(v). An injury to the foot is to a scheduled member injury pursuant to Iowa Code section 85.34(2)(o). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998).

Iowa Code section 85.34(x) permanent disabilities states:

x. In all cases of permanent partial disability described in paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment *shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association*, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. *Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment pursuant to paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity.*

Iowa Code section 85.34 (x) (emphasis added).

This agency has adopted the Guides to the Evaluation of Permanent Impairment, Fifth Edition, published by the American Medical Association for determining the extent of loss or percentage of impairment for permanent partial disabilities. See 876 IAC 2.4.

First, we will address the May 26, 2019 claim. Based on the above findings of fact, I conclude claimant failed to demonstrate by a preponderance of the evidence that she sustained any functional disability as the result of the May 26, 2019 injury. I further conclude that claimant failed to demonstrate entitlement to any permanent partial disability benefits.

Claimant is seeking reimbursement for an IME pursuant to Iowa Code section 85.39. Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low.

Based on the above findings of fact, I conclude claimant did not obtain a subsequent examination and therefore has failed to demonstrate entitlement to reimbursement. Defendants are not responsible to reimburse claimant for a medical examination fee that she did not incur. Thus, for the May 26, 2019 date of injury,

claimant has failed to demonstrate entitlement to reimbursement for an IME pursuant to Iowa Code section 85.39.

Claimant is seeking an assessment of costs under 876 IAC 4.33. Based on the above findings of fact, I conclude that an assessment of costs against the defendants in this case is not appropriate. For the May 26, 2019 date of injury each party shall bear their own costs.

We now turn to the claims for the alleged October 8, 2020 work injury. Based on the above findings of fact, I conclude the opinion of Dr. Bollier and the opinions of Dr. Mathew contained in his 2020 report carry greater weight than that of Dr. Mathew's opinions as contained in his 2021 report. As such, I conclude claimant failed to demonstrate by a preponderance of the evidence that the work injury on October 8, 2020 caused additional impairment to her right shoulder and neck. Thus, I conclude claimant failed to demonstrate by a preponderance of the evidence that she sustained any new cervical or right shoulder permanent impairment, nor did the October 8, 2020 work injury cause any new cervical or right shoulder injury, nor did it materially aggravate her condition. I conclude claimant failed to demonstrate entitlement to any permanent partial disability benefits.

Claimant is seeking reimbursement for an IME pursuant to Iowa Code section 85.39. Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. An employer is not liable for the cost of an IME if the injury is determined not to be compensable.

Finally, claimant is seeking an assessment of costs under 876 IAC 4.33. Based on the above findings of fact, I conclude that an assessment of costs against the defendants in this case is not appropriate. For the October 8, 2020 date of injury each party shall bear their own costs.

ORDER

THEREFORE, IT IS ORDERED:

File No.: 20700981.01 (DOI: May 26, 2019)

Claimant shall take nothing from these proceedings.

Each party shall bear their own costs.

Defendant 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.

File No.: 21700110.01 (DOI: October 8, 2020)

Claimant shall take nothing from these proceedings.

Each party shall bear their own costs.

Defendant 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 13th day of June, 2022.



ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Richard Schmidt (via WCES)

Ryan Clark (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.