BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| EUGENE ASWEGAN,<br><br>Claimant,<br><br>vs.<br><br>CITY OF DES MOINES,<br><br>Employer,<br>Self-Insured,<br>Defendant. | FILED<br>MAY 22 2018<br>WORKERS COMPENSATION | File No. 5065430<br><br>ARBITRATION<br><br>DECISION<br><br>Head Note Nos.: 1402.40, 1803 |

## STATEMENT OF THE CASE

Eugene Aswegan, claimant, filed a petition in arbitration seeking workers' compensation benefits from City of Des Moines, self-insured employer, as defendant. Hearing was held on April 5, 2018 in Des Moines, Iowa.

Claimant, Eugene Aswegan, was the only witness to testify live at trial. The evidentiary record also includes Joint Exhibits JE1-JE6, and Defendant's Exhibits A-D. Claimant did not feel it was necessary to submit any additional exhibits.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The parties submitted post-hearing briefs on May 8, 2018.

## ISSUES

The parties submitted the following issues for resolution:

1. The extent of permanent disability claimant sustained as a result of the stipulated May 4, 2016 work injury.

2. Extent of defendant's credit.

## FINDINGS OF FACT

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

At the time of the hearing Mr. Aswegan was 61 years of age. He left high school after the tenth grade. His work history consists of a few years working at a video arcade and on an assembly line for AMF Manufacturing. The remainder of his work history is working as a painter. For the past 21 years he has worked for the City of Des Moines as a painter in their maintenance department for wastewater treatment. His job duties include painting, sandblasting, carpentry work, erecting scaffolding, using and moving ladders, and painting with brushes, sprayers, and rollers. (Testimony; Exhibit A)

Mr. Aswegan sustained a work-related injury to his left shoulder on May 4, 2016. Stephen A. Ash, M.D. performed surgery on Mr. Aswegan's left shoulder on October 19, 2016. The diagnosis was left partial cuff tear and acromioclavicular joint arthrosis. Dr. Ash performed left shoulder arthroscopy, arthroscopic subacromial decompression, arthroscopic distal clavicle excision, arthroscopic rotator cuff repair with findings of a 90 percent articular-sided supraspinatus tear. (JE4, pages 14-15) Dr. Ash recommended a functional capacity evaluation (FCE), which was carried out on May 23, 2017. The FCE placed Mr. Aswegan in the heavy physical demand category. The FCE determined that Mr. Aswegan could lift 65 pounds up to his waist, 30 pounds to his shoulders, and 25 pounds overhead on an occasional basis. Dr. Ash adopted the FCE restrictions as permanent. Dr. Ash advised Mr. Aswegan to follow-up as needed. On June 14, 2017, Dr. Ash issued an impairment rating. The surgeon utilized Table 16-27 on page 506 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, for the distal clavicle resection rating. He then modified the rating from Table 16-18. He ultimately assigned 4 percent impairment of the upper extremity, which is the equivalent of 2 percent impairment of the whole person. (JE4)

At the request of his attorney, Mr. Aswegan underwent an independent medical evaluation (IME) with Jacqueline M. Stoken, D.O. on September 5, 2017. Dr. Stoken reviewed the medical records and examined Mr. Aswegan. Dr. Stoken assigned 20 percent impairment to the upper extremity, which amounts to 12 percent of the whole person. Dr. Stoken disagreed with the rating and method of impairment rating as assigned by Dr. Ash. Dr. Stoken also did not agree with the restrictions as set forth in the valid FCE. Rather than relying on the FCE, Dr. Stoken based her opinions on claimant's subjective reports. Dr. Stoken restricted claimant to limit his lifting to 25 pounds frequently, 35 pounds occasionally, and 50 pounds rarely. She also felt he should avoid repetitive work at or above the shoulder level. Dr. Stoken stated this placed him in the medium category of work. (JE6)

For the reasons articulated by Dr. Stoken on pages 8 and 9 of Dr. Stoken's IME report, I find her impairment rating to carry greater weight than the impairment rating

assigned by Dr. Ash. As such, I find that Mr. Aswegan has sustained 12 percent whole person functional impairment as a result of the work injury.

However, with regard to Mr. Aswegan's permanent restrictions, I find the opinions of Dr. Ash to be more persuasive than those of Dr. Stoken. Dr. Ash assigned permanent restrictions based on the objective findings of the FCE, not based on the subjective reports of the claimant. Therefore, I find that the opinions of orthopaedic surgeon, Dr. Ash, carry greater weight than those of Dr. Stoken. I find that as a result of the work injury Mr. Aswegan has permanent restrictions as set forth by Dr. Ash in his June 26, 2017 missive. (JE4, pp. 32-33) These restrictions place Mr. Aswegan in the heavy physical demand level. (JE5, p. 1)

It should be noted that Mr. Aswegan also had a work-related injury to his right shoulder with the City on October 9, 2013. As a result of that injury Mr. Aswegan and the City entered into an Agreement for Settlement which was approved by this agency on January 25, 2016. As part of that settlement the parties agreed that Mr. Aswegan sustained 25 percent loss of earning capacity. The City paid Mr. Aswegan 25 percent of the body which amounted to $93,811.25. (Def. Ex. D) When he returned to work following the right shoulder injury Mr. Aswegan was allowed to return to work without restrictions. However, he admitted that he did perform less sandblasting after the right shoulder injury. He estimated that he was able to perform 90 percent of his normal duties. He is right-hand dominant. His left shoulder is in worse shape than his right shoulder. If he had the operation on the left shoulder first, based on his results, he would not have had an operation on the right shoulder. As a result of that first injury, Mark B. Kirkland, D.O. assigned 10 percent impairment of his whole person. (Testimony; Ex. D)

At the time of the arbitration hearing, to the credit of both parties, Mr. Aswegan continued to work for the City as a painter. However, his injury does prevent him from performing some of his job duties. He can no longer use ladders, sandblast, or crawl inside things. He testified that he is able to paint at waist or chest height but he cannot paint above chest height or at a height that would require a ladder. He can still scrape, but he has help if the scraping is at shoulder height or above. He is restricted to five pound lifting overhead with his left arm. He testified that the five-pound restriction is a drastic change for him. He has constant pain in his left shoulder which increases with activity. His FCE lasted approximately four hours. At the end of the FCE he was hurting so the therapist iced his shoulder for him and recommended he continue icing it. Mr. Aswegan enjoys his job at the City and plans to continue working there. (Testimony)

Although the FCE placed Mr. Aswegan in the heavy demand category, he has some restrictions which affect a painter. For example, he may only use a ladder on an occasional basis and is to avoid crawling all together. He may only overhead lift with his left upper extremity five pounds on an occasional basis. Mr. Aswegan has worked as a painter for the vast majority of his work life. Additionally, Mr. Aswegan testified that

there are activities that he is not restricted from but still cause him difficulty. He does not perform his job duties the same as he did prior to the May 4, 2016 injury.

Considering Mr. Aswegan'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 he has sustained a 60 percent loss of future earning capacity as a result of his October 9, 2013 and May 4, 2016 injuries with the City.

We now turn to the issue of credit. Claimant contends that any credit given to the defendant in this case should be pursuant to Iowa Code section 85.34(7)(b)(1). Claimant argues that the City must compensate him for all of his disability when it is measured in relationship to his condition immediately prior to the first injury. Mr. Aswegan had no pre-existing disability before his first injury. Thus, Mr. Aswegan argues the City should compensate him for the combined total disability from his two separate shoulder injuries. The first injury resulted in an agreement for settlement for 25 percent industrial disability. Mr. Aswegan then returned to his job without restrictions and performed the job for an additional 3 years before he sustained his left shoulder injury. Claimant urges that the sum of his 2 injuries is greater than its parts. Defendant argues that claimant should be awarded 40 percent industrial disability as a result of the left shoulder injury. Defendant further contends that the award should be reduced by the 25 percent industrial disability it previously paid for the first injury.

I found Mr. Aswegan had sustained 60 percent combined disability from the 2 work injuries with the City. I further find that the City's liability is considered to be partially satisfied to the extent of 25 percent industrial disability for which Mr. Aswegan was previously compensated for by the City. Thus, I determine that the City shall pay Mr. Aswegan an additional 35 percent industrial disability.

Claimant is seeking an assessment of costs. Specifically, for the filing fee and certified mail fee. I find that these are appropriate costs under 876 IAC 4.33.

## 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 Rule of Appellate Procedure 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.

Iowa Code section 85.34(7)(a) makes defendants responsible for compensating all of an employee's disability that arises out of and in the course of the employee's employment with the employer.

Iowa Code section 85.34(7)(b)(1) states:

> If an injured employee has a preexisting disability that was caused by a prior injury arising out of and in the course of employment with the same

> employer, and the preexisting disability was compensable under the same paragraph of subsection 2 as the employee's present injury, the employer is liable for the combined disability that is caused by the injuries, measured in relation to the employee's condition immediately prior to the first injury. In this instance, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer.

Based on the above findings of fact, I conclude that claimant sustained 60 percent combined disability from the two work injuries with the City. I further conclude that the City's liability is considered to be partially satisfied to the extent of 25 percent industrial disability for which Mr. Aswegan was previously compensated for by the City. Thus, I conclude that the City shall pay Mr. Aswegan an additional 35 percent industrial disability which amounts to 175 weeks of permanent partial disability at the stipulated rate of eight hundred ten and 10/100 dollars ($810.10) commencing on the stipulated date of May 26, 2017.

Claimant is seeking an assessment of costs in the amount of one hundred six and 66/100 dollars ($106.66) for the filing fee and certified mail fee. Costs are to be assessed at the discretion of the deputy hearing the case. 876 IAC 4.33. Because claimant was generally successful in his claim I conclude that an award of costs is appropriate. I found that the costs claimant is seeking are appropriate. Thus, defendant is assessed costs in the amount of one hundred six and 66/100 dollars ($106.66).

## ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of eight hundred ten and 10/100 dollars ($810.10).

Defendant shall pay one hundred seventy-five (175) weeks of permanent partial disability benefits commencing on the stipulated commencement date of May 26, 2017.

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

Defendant shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten (10) 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 (2) 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).

Defendant shall reimburse claimant costs as set forth above.

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 22nd day of May, 2018.

ERIN Q. FALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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EQP/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.