

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROBBYN BAIRD,

Claimant,

vs.

LINN COUNTY, STATE OF IOWA,

Employer,
Self-Insured,
Defendant.

File Nos. 5051469

REVIEW-REOPENING DECISION

Head Note Nos: 1402.40, 2905, 2907

ROBBYN BAIRD,

Claimant,

vs.

LINN COUNTY, STATE OF IOWA,

Employer,
Self-Insured,
Defendant.

File No. 5064401

ARBITRATION DECISION

Head Note Nos: 1402.40, 1803, 2907

STATEMENT OF THE CASE

Robbyn Baird, claimant, filed two petitions in this case seeking workers' compensation benefits from Linn County, self-insured employer as defendant. Ms. Baird filed a petition in review-reopening from an Agreement for Settlement (AFS). In the AFS the parties stipulated that Ms. Baird sustained an injury to her body as a whole that arose out of and in the course of employment with Linn County on November 10, 2014. The parties also stipulated that Ms. Baird was entitled to 125 weeks of permanent partial disability benefits which is the equivalent of 25 percent loss of earning capacity. The parties stipulated that the appropriate weekly workers' compensation rate is five hundred one and 08/100 dollars (\$501.08). This agency approved the AFS on November 30, 2016. Ms. Baird also filed a petition in arbitration alleging that she sustained an injury which arose out of and in the course of her employment on July 27, 2016. Both petitions allege cumulative injuries.

This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the outbreak of a pandemic in Iowa, the Iowa Workers' Compensation

Commissioner ordered all hearings to occur via video means, using CourtCall. 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 for each date of injury. The hearing reports were reviewed at the start of the hearing. The transcript of the hearing reflects any oral amendments that were made to the hearing reports. 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.

Robbyn Baird, Jerad Kelley, Melissa White, and Steve Estenson testified live at hearing. The evidentiary record also includes Joint Exhibits 1-5, Claimant's Exhibits 1-3, and Defendant's Exhibits A-D. All exhibits were received without objection. The evidentiary record closed at the conclusion of the arbitration hearing.

The parties submitted post-hearing briefs on April 2, 2021, at which time the case was fully submitted to the undersigned.

ISSUES

File No: 5051469 (DOI: 11/10/14)

The parties submitted the following issues for resolution:

1. Whether the stipulated injury is the cause of any permanent disability, if so, the nature and extent of disability she is entitled to receive.
2. Assessment of costs.

File No: 5064401 (DOI: 07/27/16)

The parties submitted the following issues for resolution:

1. Whether the stipulated injury is the cause of any permanent disability, if so, the nature and extent of disability she is entitled to receive.
2. Assessment of costs.

FINDINGS OF FACT

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

Robbyn Baird, was 48 years of age at the time of the hearing. She graduated from high school in 1991. She describes herself as a below average student who

earned Cs and Ds. After high school, Ms. Baird went to Job Corps in Kansas City where she was trained in the trade of interior, exterior, and drywall painting. She did not complete the program; she quit. She moved to Georgia and married a man who was in the Army. She worked for a short time at Pizza Inn, but then moved to Korea with her husband. Eventually she moved back to Cedar Rapids where she worked at the United States Post Office. She worked night parcels at the airport. Once her husband returned from Korea, they moved to Fort Bragg in North Carolina. She was a housewife busy raising their children while they moved from base to base with her husband. Once all of the children were in school, Ms. Baird returned to the workforce. (Testimony; Def. Ex. A, p. 3)

From approximately 2000 until 2004, Ms. Baird worked for the State of Tennessee performing highway maintenance. This work was similar to the type of work she performed for Linn County. She worked for Tennessee for approximately five years. She ended that employment in 2005 when they moved to another base. (Testimony; Def. Ex. A, p. 3)

From 2006 until 2009, Ms. Baird took some classes from the American InterContinental University. She chose this school because it was accredited online so that she could continue her schooling when they had to move from base to base. She earned several associate's degrees in healthcare administration, business administration, and a bachelor's in criminal justice, juvenile justice. She also has a master's in research assessment and evaluation, concentrating in counseling. She has never used these degrees in any paid employment. (Testimony; Def. Ex. A, p. 3)

Ms. Baird worked as a landscaper on a military installation from 2005 until 2007. Ms. Baird also has experience helping with military support groups. She helped with this work from 1990 until 2010. She helped to implement and maintain family support services for military spouses and families. From 2011 until 2012, Ms. Baird worked for a law firm in North Carolina as a post closer for a real estate attorney who did title work. (Testimony; Def. Ex. A, p. 3)

In June of 2013, Ms. Baird separated from her husband and moved back to Marion, Iowa. She began working for Linn County in November of 2013. During her entire employment at Linn County she worked as a light equipment operator. Ms. Baird testified that for the most part the job description in evidence was accurate. Her job duties varied from day to day. Her primary duties were dump truck and snow removal. Her secondary duties were maintenance of signs, putting rock on gravel roads. Her duties varied depending on the season and every day was different. At times her job was very physically demanding. Filling potholes was demanding because it involved shoveling above your head. She also described "ditching" as physically demanding. Ditching involved fixing culverts; it required the worker to go down in the culvert and clean up the area and ditch. Climbing in and out of the dump truck was also physically demanding. Ms. Baird also did a lot of mowing in her job; this was not physically demanding unless something got caught in the blades. They would manually remove

items from the ditch and when debris was heavy, like appliances, they would use equipment to get the items out of the ditch. Ms. Baird feels that over time this physically demanding work led to her injuries. (Testimony; Def. Ex. A, pp. 1-2)

As previously noted, Ms. Baird sustained a work-related injury on November 10, 2014. The parties entered into an Agreement for Settlement (AFS) of the claim. The AFS was approved by this agency on November 30, 2016. The parties stipulated that Ms. Baird sustained an injury to her body as a whole as the result of the November 10, 2014 work injury. The parties stipulated that Ms. Baird sustained 25 percent loss of earning capacity as the result of that injury. The parties attached supporting documentation to the AFS. In May of 2016, David S. Tearse, M.D. assigned permanent functional impairment for Ms. Baird's left shoulder and separate permanent functional impairment for her right shoulder. He also opined that Ms. Baird should have permanent restrictions placed on her activities due to the work injury. Dr. Tearse recommended Ms. Baird be restricted to light duty work as set forth in the Functional Capacity Evaluation (FCE). Richard F. Neiman, M.D. also assigned permanent functional impairment and stated that Ms. Baird should have permanent restrictions consistent with the FCE. (Def. Ex. B; Testimony)

Ms. Baird testified that since the time of the November 2016 AFS, her left shoulder was never as good as it was prior to the injury. Ms. Baird testified that her left shoulder was never right after her surgery and her right shoulder did not feel right before her left shoulder surgery. According to Ms. Baird, her shoulders progressively became worse and worse. She described the symptoms in both of her shoulders as including pain, numbness, and completely going dead. Her right arm locked up at times. Ms. Baird continued to work until she felt she just could not do it anymore. Ms. Baird called her supervisor at that time, Jerad Kelly, and he let her leave work to seek treatment. (Def. Ex. B; Testimony)

On October 16, 2017, Ms. Baird went to UnityPoint Health where she saw Megan Hart-Fernandez, DNP. Ms. Baird reported that her right shoulder had not improved since the 2015 cortisone shots and MRI with Dr. Tearse. She has continued to work, driving only (mowers/vehicles) with permanent restrictions in place. This morning she reached down to pull a plastic grocery sack off the mower blade and as she pulled it inward and towards her, she felt excruciating pain. The assessment was right shoulder pain, concerns for supraspinatus tear. It was recommended that Ms. Baird take naproxen, ice often, and avoid use of the right arm. (JE5, pp. 2-3)

Linn County directed Ms. Baird to see Matthew White, M.D. at Physicians Clinic of Iowa. On November 7, 2017, Ms. Baird saw Dr. White. Ms. Baird reported that she previously had left shoulder issues which were treated with scope and biceps tenotomy by Dr. Tearse. While she was recovering from surgery, she used her right arm more and has developed symptoms over the course of time. Recently, she experienced significant discomfort on the anterior aspect of the shoulder. She also has shooting pain from the shoulder down to the elbow. Dr. White reviewed the MRI of the right

shoulder. His assessment was right shoulder pain, likely biceps tendinopathy. He injected her right shoulder and recommended physical therapy. (JE2, pp. 1-4)

Unfortunately, Ms. Baird's condition did not improve. On January 12, 2018, Dr. White performed surgery on her right shoulder. The postoperative diagnosis was: right shoulder superior labrum anterior and posterior tear partial-thickness biceps tendon tear, right shoulder impingement, right shoulder partial-thickness articular sided rotator cuff tear 25 percent. During Ms. Baird's follow-up visits with Dr. White and her post-operative physical therapy, Ms. Baird mentioned problems with her right elbow locking up. As a result, the frequency of her physical therapy was increased. By April of 2018, she continued to have problems with her elbow which made operating the gearshifts at work difficult. Ms. Baird attended work conditioning and had some improvement. Dr. White placed her at maximum medical improvement (MMI) on June 26, 2018. In August 2018, using the AMA Guides 5th Edition, Dr. White assigned 3 percent impairment of the right upper extremity which equates to 2 percent impairment of the whole body. With regard to the right upper extremity, Dr. White permanently restricted Ms. Baird to 30 pounds lifting between waist and shoulder level and above head level, with 40-pound carrying limit and a unilateral overhead lifting limit of 20 pounds with the right arm. (JE2, pp. 5-14)

On February 25, 2019, Ms. Baird saw Megan Hart-Fernandez, DNP for right shoulder and right elbow pain. She reported that she had undergone a right shoulder scope and repair with Dr. White in January 2018. Since recovery she has worked with permanent restrictions without significant difficulties until about 3 weeks ago. She has been having right shoulder pain and right upper extremity pain for several weeks, which she attributes to using the controls to operate her snowplow. Because of her permanent restrictions the only job she is really able to do is driving a truck. Recently, she has been working 14-hour shifts due to snow and she began to experience right shoulder and right elbow pain which became excruciating on February 22, 2019. Currently she experiences pain, numbness, and weakness in her right upper extremity, with an inability to fully extend her right elbow. She has right shoulder pain and right elbow pain with reduced range of motion. Megan Hart-Fernandez, DNP recommended physical therapy at least 3 times per week. She recommended Ms. Baird not drive commercially due to her right elbow limited range of motion pain. She should not pull herself into a large truck. She should avoid forceful lifting and carrying to no more than 2 pounds on the right side. (JE5, pp. 8-9)

Ms. Baird testified that the surgery actually made her shoulder worse. A couple of weeks after her surgery, her elbow began locking up. On May 22, 2019, Ms. Baird returned to Dr. White with ongoing discomfort in the right upper extremity including the right shoulder and elbow. She denies recent injury. Dr. White noted that she has restrictions for both the right and left shoulder. She reported problems with daily activities and at work. Dr. White's assessment was incomplete tear of right rotator cuff, unspecified whether traumatic; and right elbow pain. He noted that the tear was not

present at the time of her preoperative MRI. He felt she would likely require surgery. Dr. White believed that her right elbow pain may represent possible radial tunnel syndrome. He referred her to Dr. Pardubsky for further evaluation of her elbow. (JE2, pp. 15-17)

On October 7, 2019, at the request of her attorney, Ms. Baird saw Mark C. Taylor, M.D. for an IME. Ms. Baird described persistent pain over portions of the glenohumeral area. While driving, her pain can increase to 7/10, but when she is not working her pain is minimal. Her elbow pain tends to occur over the back of her elbow and portions of her triceps. Dr. Taylor's diagnoses included: left glenohumeral arthralgia and biceps tendinitis with impingement; surgery, October 28, 2015, left shoulder debridement, biceps tenotomy and subacromial decompression with Dr. Tearse; persistent and worsening in right glenohumeral arthralgia with labral and biceps tendon tearing as well as impingement; surgery, January 12, 2018, right shoulder arthroscopic debridement, subacromial decompression and biceps tenodesis with Dr. White; further worsening of right glenohumeral and elbow pain with evidence of rotator cuff tear; surgery, scheduled for November 11, 2019 with Dr. White; and persistent right elbow arthralgia. Dr. Taylor opined that it was more likely than not that her work activities represented a significant contributing factor to her ongoing difficulties for which she has already undergone bilateral surgeries, and an additional surgery was planned for the right side in November 2019. Dr. Taylor provided an estimated MMI date. He also provided an impairment rating which he stated should be updated after surgery. He recommended Ms. Baird continue restrictions per Dr. White. (CI. Ex. 2)

On November 11, 2019, Dr. White performed a right shoulder arthroscopic rotator cuff repair and subacromial decompression. This was the second right shoulder surgery. (JE2, pp. 18-19)

Ms. Baird saw Tork J. Harman, M.D. at St. Luke's Outpatient Interventional Pain Clinic on February 20, 2020. She was referred there by Dr. Pardubsky. Dr. Harman evaluated Ms. Baird. His impression was complex regional pain syndrome type I right upper extremity. No improvement with a Medrol Dosepak. Ms. Baird was reluctant to take gabapentin due to side effects, but she agreed to a taper trial of gabapentin. She was also advised to take vitamin C. She was to return in 2 to 3 weeks for a ketamine infusion if her symptoms did not improve. (JE4, pp. 1-4)

On June 5, 2020, Dr. White reviewed a recent FCE. He assigned the following permanent restrictions as it relates to her right arm: waist level carry 20 pounds occasionally, waist to floor lift 20 pounds occasionally, waist to shoulder lift 20 pounds occasionally, waist to overhead (both) 15 pounds occasionally, waist to overhead (right) 5 pounds occasionally, extended reach 5 pounds occasionally, push/pull 20/45 pounds occasionally, repetitive overhead reach rarely, bilateral sustained overhead rarely. Dr. White also stated that Ms. Baird "has had direct evaluation on ability to pull herself into elevated truck seat and this can be done occasionally to avoid risk of re-injury." (JE2, p. 20) He did not place any restrictions on getting into a standard size truck. (Id.)

Ms. Baird saw Peter Pardubsky, M.D. on August 5, 2019 for her right elbow. He noted that following right shoulder surgery with her arm in a sling she developed increasing diffuse right elbow pain. Since the time she made her appointment, her symptoms had somewhat resolved. She had been working under restricted duty. Dr. Pardubsky felt she possibly had lateral epicondylitis or resolved radial tunnel. Given her resolved symptoms and minimal findings on MRI of the elbow, Dr. Pardubsky did not have any further recommendations or limitations for her right elbow. If her symptoms recurred, he would be willing to see her again. (JE3, pp. 1-3)

Steve Estenson is the risk manager for Linn County. Part of his duties included working with the different County departments to see if work restrictions could be accommodated within the essential functions of a job. He worked with Ms. Baird through her workers' compensation claims. At some point, Ms. Baird had mentioned to Mr. Estenson that she had applied for other positions at the County in the past, positions that would utilize her education and degrees, but she did not get hired. For example, she was not hired as a counselor at the County's youth detention center because she did not have any current experience. Mr. Estenson spoke with the director at the detention center to try to help Ms. Baird get some experience to meet the minimum requirements to be able to meet the requirements to get an interview for the job. Mr. Estenson spoke to Ms. Baird about this opportunity, and she seemed interested. Mr. Estenson set up a meeting between himself, Ms. Baird, and the detention center director. He described it as similar to an interview to see what interest both Ms. Baird and the detention center had in exploring an opportunity for her to obtain experience while she was rehabilitating from a shoulder injury. According to Mr. Estenson, the County was willing to move Ms. Baird from secondary roads light duty to the juvenile detention center light duty and pay her so she could gain the experience necessary to apply for a juvenile detention position. However, after her shoulder surgery Ms. Baird went back to light duty in secondary roads because she was concerned about being injured while at the detention center due to the potential fighting and hazardous environment. Ms. Baird testified that Mr. Estenson said there had been multiple employee injuries throughout the detention center. (Testimony of Estenson; Rebuttal testimony of Baird)

In June of 2020 Ms. Baird was able to return to work as a light equipment operator. Ms. Baird testified that Linn County wanted her to perform all of her regular duties other than shoveling, sand bagging, and lifting. Ms. Baird discussed this with Dr. White. On August 5, 2020, Dr. White revised his opinion regarding elevated truck seats. His amended opinion for her permanent restrictions was that she was to avoid all activities that required her to pull herself up to an elevated truck seat. (JE2, p. 21)

On August 6, 2020, Ms. Baird was called into Linn County Risk Manager Steve Estenson's office. Ms. Baird testified that Mr. Estenson slid a letter across the table, basically firing her, and she was out the door a few minutes later. The letter was dated August 6, 2020 and advised her that due to her change in restrictions, Linn County

would not be able to accommodate her in her light equipment operator position. No other reason was given for her termination. Ms. Baird testified that, although it was painful, she was able to perform her job at that time. She liked her job and wanted to continue working. (Def. Ex. C, p. 2; testimony)

On August 21, 2020, Ms. Baird wrote a "To Whom It May Concern" letter. She wrote this letter because since her termination, she needed money and had to cash out her Iowa Public Employees' Retirement System (IPERS) benefits. The letter stated that Ms. Baird's "last day as a Linn County employee will be Wednesday September 23, 2020. I will use my remaining sick leave and personal days from September 7 – September 23, 2020." (Def. Ex. A, p. 13) Ms. Baird credibly testified that the only reason she wrote this letter was so she could receive a needed lump sum payment from IPERS. Linn County Human Resource Department advised Ms. Baird that she needed to write this letter in order to withdraw money from her IPERS account. It should be noted that Ms. Baird did eventually receive unemployment benefits from the County. (Testimony)

I find that Ms. Baird was terminated from her employment with Linn County because the employer could not accommodate her work restrictions.

Ms. Baird returned to see Dr. Pardubsky on January 29, 2020, for recurrent arm pain following her second shoulder surgery. She reported severe tightness throughout the biceps and triceps region and entire limb discomfort as it radiates distally. Dr. Pardubsky's assessment included possible complex regional pain syndrome type 2 of the left upper extremity and pain in the right upper extremity. He prescribed a Medrol Dosepak for pain relief. She was to return in 6 weeks. (JE3, pp. 4-6)

On March 2, 2020, Ms. Baird called Dr. Harman's office to report that the gabapentin made her feel very weird or drunk. Ms. Baird was instructed not to take any more today. She also reported that she was not getting any pain relief. If she continues to have these symptoms from the medication, she should stop the gabapentin all together. (JE4, p. 8)

On May 20, 2020, Ms. Baird returned to Dr. Pardubsky for further evaluation of the right arm. Since her last visit she had an evaluation at a pain clinic with a trial of gabapentin. She had significant mental status changes and she tapered the drug and does not wish to resume gabapentin. Dr. Pardubsky did not recommend any surgical intervention for her right arm. He felt she had two options. Ms. Baird could adapt and use her right arm for activities as tolerated in a full duty capacity if she is able to tolerate the discomfort. The other option includes further intervention by the pain clinic for presumed complex regional pain syndrome including the possibility of a stellate ganglion block or ketamine infusion. He deferred final management of her shoulder and arm complaints to Dr. White. Dr. Pardubsky felt the possibility of an FCE and resumption of work without further pain clinic intervention was reasonable if she did not want to consider any further intervention for complex regional pain syndrome and if she

can tolerate the discomfort. Dr. Pardubsky denied a request to provide an impairment rating and deferred to Dr. White. (JE3, pp. 7-10)

Dr. White issued his opinion regarding permanent impairment on November 4, 2020. He used the Fifth Edition of the AMA Guides and opined that Ms. Baird has sustained shoulder impairment of 14 percent. Additionally, he felt she had residual limitations to the elbow. He assigned 8 percent impairment of the upper extremity which equates to 5 percent whole person impairment. (JE2, p. 22) I find Dr. White's opinions regarding permanent impairment and permanent restrictions to be persuasive.

Ms. Baird has alleged that her conditions are related to the original November 10, 2014 date of injury. Ms. Baird testified that her symptoms continued to get progressively worse. This is supported by the opinion of Dr. Taylor. Dr. Taylor stated:

Based on the records and discussions with Ms. Baird, it was my understanding that she developed bilateral symptoms around the timeframe that she was performing a significant amount of shoveling of asphalt out of the back of a dump truck. However, at least initially, the symptoms were more pronounced on the left. Once she started to recover after surgery on the left side, she was then using the right side even more. Her right-sided symptoms were then more noticeable and started to worsen, which prompted an MRI and injections with Dr. Tearse. These symptoms eventually progressed even further and she subsequently met with Dr. White and underwent the previously described surgery. Unfortunately, the symptoms worsened yet again and additional surgery was planned.

Her ongoing shoulder and elbow issues were accepted and treated as work-related. Based on the history provided, her symptoms date back to at least 2015. She had relatively brief stretches of time where the symptoms seemingly plateaued or stabilized. It appears that this has been treated as the same underlying process. I agree that it is more likely than not that her work activities represented a significant contributing factor to her ongoing difficulties and for which she has already undergone bilateral surgeries, and an additional surgery is planned for the right side in November 2019.

(Cl. Ex. 2, pp. 6-7)

I find Ms. Baird's ongoing conditions are related to the November 10, 2014 work injury. I further find that at the time of the 2016 AFS, Ms. Baird was able to perform her job with the County and the County was willing to keep her employed. However, since the 2016 AFS, Ms. Baird's permanent restrictions have changed to such an extent that the County could no longer accommodate her restrictions. Thus, I find that due to the November 10, 2014 work injury, Ms. Baird has sustained a substantial change of condition since the November 2016 AFS and is entitled to an increase of compensation.

We now turn to the issue of permanent disability. Defendant disputes that the November 10, 2014 injury caused any permanent disability. However, the defendant previously stipulated in the 2016 AFS that the November 10, 2014 work injury did in fact cause permanent disability for 25 percent loss of body as a whole. (Def. Ex. B, p. 1, numbered paragraph 4(b)). I find the November 10, 2014 work injury did cause permanent disability to Ms. Baird's body as a whole.

As noted, I find the opinions of Dr. White to be persuasive. I find Ms. Baird has permanent restrictions as assigned by Dr. White and set forth above. After the County received these restrictions, the County advised Ms. Baird that they could no longer accommodate her in her position as a light equipment operator.

Since Ms. Baird's employment with the County has ended, she has applied for several jobs. In early December 2020, she applied for a Care Coordinator position with Rock Valley Physical Therapy Center, a Family Support Specialist job at Four Oaks, an Administrative Assistant position with Roberts Technology, a Surgical Scheduler at Wolfe Eye Clinic; she did not receive any job offers as the result of these applications. In January of 2021, she indicated that she had also applied at Linn County for a tracker but was turned down. She also applied for a job with the State but did not hear back. There is no further documentation of job applications after January 2021. Ms. Baird testified that she previously worked as a substitute teacher for a few months years ago; unfortunately, this experience convinced her that teaching is not for her. (Testimony; Cl. Ex. 3, pp. 1-6)

Ms. Baird is an educated, pleasant, well-spoken individual. However, she has spent much of her working life as a light equipment operator. Because of her work injury and restrictions, she is now precluded from this type of work. Considering Ms. Baird's age, educational background, employment history, ability to retrain, level of motivation to obtain a job, 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 she has sustained a 30 percent increase in her loss of future earning capacity since the AFS as a result of her work injury with Linn County. I specifically find that Ms. Baird has proven a 55 percent loss of future earning capacity at the present time, or an increase of 30 percent since the November 30, 2016 AFS.

The parties stipulated that Ms. Baird sustained an injury that arose out of and in the course of her employment on July 27, 2016. Claimant contends she sustained permanent disability as the result of a cumulative July 27, 2016 date of injury. However, I find that claimant's ongoing complaints and conditions are not related to the July 27, 2016 injury; rather, I found that those complaints and conditions are related to the November 10, 2014 date of injury. Therefore, I find Ms. Baird failed to demonstrate that she sustained any permanent disability as the result of the July 27, 2016 work injury.

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).

Claimant brings this review-reopening proceeding. A review-reopening proceeding is appropriate whenever there has been a substantial change in condition since a prior arbitration award or settlement. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009). Under Iowa Code section 86.14(2), this agency is authorized to reopen a prior award or settlement to inquire about whether the condition of the employee warrants an end to, diminishment of, or increase of compensation. Id.

Upon review-reopening, claimant has the burden to show a change in condition related to the original injury since the original award or settlement was made. The change may be either economic or physical. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959). A mere difference of opinion of experts as to the percentage of disability arising from an original injury is not sufficient to justify a different determination on a petition for review-reopening. Rather, claimant's condition must have worsened or deteriorated since the time of the initial award or settlement. Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957). A failure of a condition to improve to the extent anticipated originally may also constitute a change of condition. Meyers v. Holiday Inn of Cedar Falls, Iowa, 272 N.W.2d 24 (Iowa App. 1978).

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).

Interestingly, in the post-hearing briefs neither party addresses whether Ms. Baird has or has not sustained a change of condition since the AFS. Based on the above findings of fact, I conclude that due to the November 10, 2014 work injury, Ms. Baird has sustained a substantial change of condition since the November 2016 AFS and is entitled to an increase of compensation. Ms. Baird has demonstrated that her condition has deteriorated since the time of the AFS. At the time of the AFS, Ms. Baird was able to perform her job and the County was willing to keep her employed. However, since the 2016 AFS, Ms. Baird's condition has deteriorated, she has had to receive additional medical treatment, including surgery. Despite this additional treatment, Ms. Baird's physical abilities have decreased. Ms. Baird's permanent restrictions have changed to such an extent that the County could no longer accommodate her restrictions.

We now turn to the issue of permanent disability. Defendant disputes that the November 10, 2014 injury caused any permanent disability. However, the defendant previously stipulated in the 2016 AFS that the November 10, 2014 work injury did in fact cause permanent disability for 25 percent loss of body as a whole. (Def. Ex. B, p. 1, numbered paragraph 4(b)). I conclude the November 10, 2014 work injury did cause permanent disability to Ms. Baird's body as a whole. I further conclude that Ms. Baird has demonstrated that since the time of the AFS, she sustained a substantial change of condition and is entitled to an increase in compensation.

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 Ry. Co. of Iowa, 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.

Defendant contends that Ms. Baird has not sustained any permanent disability or loss of earning capacity. However, based on the above findings of fact, I conclude that Ms. Baird proved a 55 percent loss of future earning capacity at the present time. This is equivalent to a 55 percent industrial disability. Ms. Baird previously received 25 percent industrial disability pursuant to the AFS. As such, she is now entitled to an

additional 30 percent industrial disability which entitles claimant to an award of 150 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u).

Claimant also alleged she sustained permanent disability as the result of a cumulative injury with an injury date of July 27, 2016. Based on the above findings of fact, I conclude claimant failed to carry her burden of proof to demonstrate by a preponderance of the evidence that she sustained any permanent disability as the result of the July 27, 2016 injury. Rather, I concluded that her ongoing symptoms and conditions in her right shoulder are related to the November 10, 2014 date of injury. Therefore, claimant has failed to demonstrate entitlement to any permanency benefits as the result of the July 27, 2016 injury.

Claimant is seeking an assessment of costs for each file. Costs are to be assessed at the discretion of the Iowa Workers' Compensation Commissioner or the deputy hearing the case.

With regard to agency file number 5051469, I find that Ms. Baird was generally successful and therefore find an assessment of costs is appropriate. Claimant is seeking reimbursement for the filing fee in the amount of one hundred and no/100 dollars (\$100.00). I find that this is an appropriate cost under 876 IAC 4.33(7). Defendant shall reimburse claimant in the amount of one hundred and no/100 dollars (\$100.00).

With regard to agency file number 5064401, I find that Ms. Baird was not successful and therefore find an assessment of costs is not appropriate. Each party shall bear their own costs.

ORDER

THEREFORE, IT IS ORDERED:

File No: 5051469 (DOI: 11/10/14)

All weekly benefits shall be paid at the stipulated rate of five hundred one and 08/100 dollars (\$501.08).

Defendant shall pay one hundred fifty (150) weeks of permanent partial disability benefits commencing on the stipulated commencement date of March 12, 2021.

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 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).

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.

File No: 5064401 (DOI: 07/27/16)

Claimant shall take nothing further from this proceeding.

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 27th day of July, 2021.



ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Matthew Petrzelka (via WCES)

Elena Wolford (via WCES)

Heidi Carmer (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.