BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JODY WENTWORTH f/k/a GINTHER, Claimant, vs. QUAKER OATS COMPANY, Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	FILED FEB 19 2019 WORKERS COMPENSATION File No. 5060390 ARBITRATION DECISION Head Note Nos.: 1108.50, 1402.20, 1402.40

STATEMENT OF THE CASE

Jody Wentworth f/k/a Jody Ginther, claimant, filed a petition in arbitration seeking workers' compensation benefits from Quaker Oats Company, employer and Indemnity Insurance Company of North America, insurance carrier as defendants. Hearing was held on November 1, 2018 in Cedar Rapids, Iowa.

Claimant was the only witness to testify live at trial. The evidentiary record also includes joint exhibits JE1-JE8, claimant's exhibits 1-6, and defendant's exhibits A-J.

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 November 30, 2018.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant sustained an injury on January 7, 2016, which arose out of and in the course of her employment?

2. Whether claimant sustained permanent disability as a result of the alleged January 7, 2016 work injury? If so, the extent of permanent disability claimant sustained.
3. Claimant's gross weekly earnings at the time of the alleged injury.
4. Application of Iowa Code section 85.34(7).
5. Assessment of costs.

FINDINGS OF FACT

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

Claimant, Jody Wentworth, alleged that she sustained a work-related injury to her left shoulder on January 7, 2016. Jody had three previous work-related left shoulder injuries during her employment with Quaker Oats.

The first claim was a stipulated January 27, 2005 repetitive injury, which proceeded to an arbitration hearing in 2009 before a different deputy. Jody sustained a torn biceps tendon. David S. Tearse, M.D., performed a left shoulder arthroscopy with debridement of the biceps tendon, tenotomy of the long head of the biceps tendon, loose boy removal and a spur removal on the lateral acromion. (JE1, p. 4) Jody returned to work without restrictions. Dr. Tearse assigned 5 percent permanent functional impairment of her body as a whole. Dr. Tearse also noted that Dr. Manshadi's rating of 11 percent of the left upper extremity was reasonable. Dr. Tearse felt Dr. Manshadi's recommendations to avoid repetitive shoulder-level, overhead, and reaching activities with her left arm were reasonable. (JE2, p. 25) The arbitration decision awarded Jody 20 percent industrial disability as a result of the January 27, 2005 work injury. (Ginther v. Quaker Oats Co., File Nos. 5028037; 5028039 (Arbitration, January 6, 2010).

To the credit of both parties, Jody continued to remain employed at Quaker Oats. She continued to have problems with left shoulder pain. Dr. Tearse performed another surgery on January 30, 2013. He performed an arthroscopic debridement of the labrum and subacromial decompression (JE1, p. 11) Dr. Tearse placed her at maximum medical improvement (MMI) on October 3, 2013. He opined that Jody required no permanent work restrictions. Jody continued to have ongoing left shoulder symptoms. In 2014, she received injections for her left shoulder pain. On June 5, 2014, the parties entered into an Agreement for Settlement, wherein defendants agreed to pay an additional 5 percent industrial disability. (JE2, pp. 28-31; testimony)

Jody continued to experience left shoulder symptoms. On May 28, 2015, Jody returned to see Dr. Tearse. She reported that she had relatively constant pain in her left shoulder. Jody brought independent medical examination (IME) paperwork for permanent work restrictions to the appointments. Dr. Tearse determined that Jody should lift no more than 20 pounds above shoulder level bilaterally. He also felt that any above chest lifting should be no more than on an occasional basis. On June 8, 2015,

Quaker Oats agreed to accommodate the restrictions from Dr. Tearse and to provide Jody with a ladder with rails to help her reach product. Since that time and through the date of the hearing, Jody continued to work in the same position at Quaker Oats. On October 21, 2015, the parties entered into another Agreement for Settlement (AFS). Defendants agreed to pay an additional 7.5 percent industrial disability. Thus, prior to this pending litigation, defendants have paid a total of 32.5 percent industrial disability for the left shoulder condition. In November of 2015, claimant requested additional treatment with Dr. Tearse. A petition for alternate medical care was filed on November 20, 2015. Because Quaker Oats denied liability, the petition for alternate medical care was dismissed. (JE2, p. 32; Testimony; Def Ex. E & F)

On December 4, 2017, Jody filed a petition for arbitration in this case with an alleged injury date of January 7, 2016. Jody testified that she injured her left shoulder while she was moving a heavy tube TV from a lift to a pallet with Andrea Lurkins, a co-worker. Jody reported her injury the next day to Deb at the health center. She was given ice and ibuprofen. (JE1, p. 16)

On January 8, 2016, the same day Jody reported the injury, she completed a hand-written statement of injury. She stated the date of the incident was January 7, 2016. She was getting ready for bed at 9:00 p.m., when she experienced an onset of left shoulder pain. Jody felt that her symptoms were caused by moving a TV from a lift to a pallet at work. (Def. Ex. D) During Jody's deposition, the attorney for the defendants questioned Jody about the time of day she was moving the TV, and whether she experienced pain during the remainder of her shift; Jody testified that she did not know. She was also asked about what activities she was performing that night when she had the onset of pain. Again, Jody testified that she did not know. (Def. Ex. F)

Jody's left shoulder symptoms persisted so, on her own, she presented to Shirley Pospisil, M.D., at Work Well Clinic for treatment on January 20, 2016. (Cl. Ex. 1, p. 7) On February 4, 2016, Jody underwent an MRI of her left shoulder. The MRI was compared to prior imaging from July 14, 2014 and January 20, 2016. Jody saw Shirley J. Pospisil, M.D., on February 9, 2016. Dr. Pospisil stated that the MRI showed no new changes. The doctor noted that Jody did have a chronic long head biceps full-thickness retracted tear that was similar to the previous study. The assessment was left shoulder pain. Dr. Pospisil prescribed physical therapy. She recommended continuing her prior restrictions. She was to follow-up in three weeks. (JE1, pp. 18-20; JE8)

At the end of February 2016, Jody became extremely ill and was hospitalized for over one month. This was not related to the alleged work injury. She was off work until mid to late August of 2016. She returned to work in August, but in December she had another personal medical problem and was off work for another six months. (Testimony)

Defendants sent claimant for an IME with James V. Nepola, M.D., at the University of Iowa Hospitals and Clinics (UIHC) on June 7, 2016. Jody reported that she had never been completely better following her prior left shoulder operations. She

felt her shoulder in June of 2016 was the same as in 2005, mainly left diffuse shoulder pain and popping and painful on occasion. Dr. Nepola diagnosed Jody with a painful left shoulder with decreased range of motion, which was likely a symptomatic aggravation of her preexisting condition. Dr. Nepola stated that her impairment levels and restrictions from Dr. Tearse were appropriate. Dr. Nepola did not feel Jody needed any treatment at that time, but did note she may need further treatment for her shoulder from time to time. (Def. Ex. B)

On February 14, 2017, Jody was referred by her own attorney to Matthew J. White, M.D. She reported her left shoulder pain was worse with overhead activity and reaching out from the body. She had pain in her shoulder at rest and that it did not seem to matter if she was working a significant amount or a minimal amount. The assessment was chronic left shoulder pain. Dr. White stated that the MRI did not show any evidence of structural damage that required surgery. The doctor also noted that the MRI showed no changes from the previous study. Because the prior injections did not provide relief, Dr. White did not recommend further injections. Dr. White felt that her current restrictions were reasonable. Jody was to follow-up on an as-needed basis. (JE3, pp. 37-40)

At the request of her attorney, Jody attended an IME with Farid Manshadi, M.D., on August 2, 2018. Dr. Manshadi had evaluated Jody before the January 7, 2016 work incident. He noted the history of Jody lifting the tube television. It was Dr. Manshadi's understanding that while she was lifting the TV with her co-worker, Jody felt a pop and sudden pain in her left shoulder. He understood that Jody continued to work, but noticed that her symptoms were fairly severe through the remainder of her shift. This understanding is not consistent with the events as reported by Jody to her employer in the hand-written incident report. I find the history contained in the January 8, 2016 injury report to be more accurate than the history contained in Dr. Manshadi's August 2018 report. I find Dr. Manshadi's report contains an incorrect history of Jody's onset of symptoms.

During the IME, Jody reported that she continued to work the same job she had been performing for the past 7 years. Jody reported that by the end of her work day her pain was up to a level 8 out of 10. Dr. Manshadi stated:

> I believe the injury was an aggravation of an underlying condition. Further, she has a new injury of complete full thickness retracted tear of the long head of the biceps tendon, and she currently remains with weakness of the left shoulder, as well as significantly reduced left shoulder range of motion actively.

(Cl. Ex. 1, p. 15)

Dr. Manshadi opined that Jody had 21 percent impairment of her left upper extremity. She had previously been assigned 16 percent impairment. Thus, he felt she had an additional five percent impairment as a result of the January 7, 2016 work injury.

Dr. Manshadi also noted that because she had a complete tear of the long head of the biceps she had an additional 5 percent impairment of her left upper extremity. Thus, a total of an additional 10 percent impairment of the left upper extremity. With regard to permanent restrictions, Dr. Manshadi agreed no lifting greater than 20 pounds occasionally above chest height. He also recommended avoiding any activity which required repetitious reaching above the head. Dr. Manshadi recommended avoiding any activity which required repetitious pulling with the left upper extremity. He felt Jody might require future treatment in the form of pain medications, physical therapy, and maybe even surgery. (Cl. Ex. 1)

On October 24, 2018, Dr. Pospisil authored a letter to defendants' attorney. She disagreed with Dr. Manshadi's opinion that there was a new injury of complete full-thickness retracted tear of the long head of the biceps tendon. She noted the tear had been well documented in prior MRIs. She also stated that the January 7, 2016 incident caused a temporary exacerbation/aggravation only. (Def. Ex. I, p. 1) I find Dr. Pospisil's opinions to be persuasive because she has an accurate history. Furthermore, it was Jody's choice to seek treatment with Dr. Pospisil, therefore, the doctor's opinions can hardly be said to be biased against the claimant.

On November 5, 2018, Dr. Pospisil authored a letter to claimant's counsel. Dr. Pospisil thanked the attorney for their phone call that same day. Dr. Pospisil stated that based on her review of the clinical notes from Dr. White and Dr. Nepola, it was her understanding that Jody was reporting increased chronic pain after the January 7, 2016 injury. Dr. Pospisil felt Jody might still benefit from further noninvasive treatments. However, Dr. Pospisil had not seen Jody since February 9, 2016. (Cl. Ex. 6, p. 71) It is important to note that Dr. Pospisil did not offer an opinion as to whether Jody had increased chronic pain, she merely noted that Jody had reported increased chronic pain.

On November 14, 2018, Dr. Manshadi authored a letter to claimant's attorney. Dr. Manshadi stated, "[a]fter our phone conference today, I realize I made a mistake which was an oversight in regard to the tear of the biceps tendon which is old, and my impairment should be modified." (Cl. Ex. 7, p. 72) Dr. Manshadi then stated that the total impairment for the left shoulder should be 19 percent of the upper extremity. Only three percent of the impairment is related to the January 7, 2016 injury. Dr. Manshadi did not explain how Jody sustained the additional three percent impairment. (Id.)

I find Dr. Manshadi's report is not persuasive. Dr. Manshadi's opinions are based on an inaccurate history. Dr. Manshadi understood that Jody felt a pop and immediate pain at the time she was moving the TV and that her symptoms became fairly severe during the rest of her shift. However, the incident report completed by Jody the day after the incident clearly states that the onset of pain was when she was at home getting ready for bed around 9:00 that night. Furthermore, Dr. Manshadi's August 2018 report stated that Jody had a new injury of complete full thickness retracted tear of the long head of the biceps tendon. This is clearly incorrect. Dr. Manshadi tried to correct the report in his post-hearing letter to claimant's counsel. However, because Dr.

Manshadi's August report contained inaccurate information on such material matters, I do not find his opinions to be persuasive.

Defendants point out that there are significant differences in the active range of motion findings by Dr. Manshadi and Dr. Nepola. Active range of motion is subject to the patient's efforts, so the reason for the difference in measurements is not known. However, given the other errors in Dr. Manshadi's report, I cannot depend on the reliability of Dr. Manshadi's measurements.

The only true causation opinion in this case is from Dr. Manshadi. He is the only medical expert to causally connect Jody's ongoing symptoms to the television incident on January 7, 2016. However, for the reasons set forth above, his opinions cannot be relied upon. Dr. Manshadi understood that Jody felt a pop and had immediate pain while moving the television; this simply is not correct. The preponderance of the evidence demonstrates that Jody did not experience any symptoms until she was at home that night getting ready for bed around 9:00 p.m. The evidence also shows that Jody had been experiencing ongoing symptoms from her prior left shoulder injury. I find claimant has failed to carry her burden of proof to show that she sustained an injury to her left shoulder on January 7, 2016, which arose out of and in the course of her employment with Quaker Oats.

I further find that even if Jody had sustained her burden of proof to demonstrate she sustained a compensable injury on January 7, 2016, she did not carry her burden to show entitlement to any additional permanent partial disability benefits. At best, Jody carried her burden to show she sustained a temporary aggravation of a preexisting condition. At hearing, Jody testified about her current condition. She takes ibuprofen on a daily basis. She testified that she has more pain, popping, grinding, and clicking in her left shoulder than she did before January 7, 2016. Prior to the January 7, 2016 incident she rated her pain as a 4 or 5, but now rates it as a 7 or 8. Prior to January 2016, she volunteered for some overtime, but since the alleged injury she no longer volunteers for overtime. In 2015 she reported problems with washing and brushing her hair, washing dishes, vacuuming, fishing, picking up grandchildren, and performing repetitive activities. She also reported that overhead work bothered her shoulder. (Testimony) Many of Jody's complaints are similar to the findings in the 2010 arbitration decision. In that decision, another deputy from this agency found:

> Today, claimant is still employed at Quaker Oats at her regular job. Her shoulder continues to be painful on a daily basis. She takes Ibuprofen for pain. At home, she has pain if she tries to do housework such as dusting or dishwashing, or with any motion of her shoulder. She can only carry light groceries. Her injured left arm is her dominant arm. She is now limited in enjoying her former hobbies of fishing and golf, and cannot swim or bowl. She cannot pick up her youngest grandchild. She cannot sleep on her left side without pain. She has trouble with her personal grooming because she cannot reach with her left arm.

(Ginther v. Quaker Oats Co., File Nos. 5028037, 5028039 (Arb. January 6, 2010).

The symptoms Jody described in the prior arbitration decision are similar to her ongoing symptoms. While Jody testified to an increase in subjective symptoms, there is a lack of reliable, objective evidence to support claimant's contention that she sustained anything more than a temporary aggravation to her left shoulder. Both Dr. Pospisil and Dr. White saw Jody for treatment after the January 7, 2016 TV incident. Both of these treating doctors indicated that she did not have any new structural injury, that she did not require any additional restrictions, and she did not sustain any additional impairment as a result of the January 7, 2016 incident. Dr. Nepola's opinions are consistent with these treating doctors. As previously noted, I do not find the opinions of Dr. Manshadi to be persuasive. Additionally, Jody has not requested any additional accommodation from her employer since the January 7, 2016 incident. Jody has not missed any time from work as a result of the alleged work incident. Jody loves her job at Quaker Oats and wants to continue working there. She testified that she is able to perform all aspects of her job including the south dock, ordering parts, warranty desk, the receiving desk, and the motor storeroom position. (Testimony; Def. Ex. F, pp. 3-5)

Thus, I find that even if claimant were able to demonstrate that she sustained a compensable injury on January 7, 2016, she failed to carry her burden to show entitlement to any permanent partial disability benefits. At best, claimant demonstrated a temporary aggravation. Claimant has failed to carry her burden of proof to demonstrate entitlement to any weekly benefits.

Claimant is seeking an assessment of costs. I find that claimant was not successful in her claim. As such, I exercise my discretion and do not assess any costs against the defendants. Each party shall bear their own costs.

Because claimant failed to carry her burden of proof to show she sustained a compensable injury on January 7, 2016, all other issues are rendered moot.

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. 6.14(6)(e).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational

consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

Based on the above findings of fact, I conclude that claimant failed to carry her burden of proof to show by a preponderance of the evidence that she sustained an injury that arose out of and in the course of her employment on January 7, 2016. The incident report completed by the claimant the day after the alleged injury clearly states that the onset of symptoms occurred while she was getting ready for bed at 9:00 that night. The only medical expert to provide a true causation opinion, based his opinion on an inaccurate history and therefore, cannot be relied on. I conclude claimant did not sustain a compensable injury on January 7, 2016.

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).

Furthermore, I concluded that even if claimant had carried her burden of proof to show she sustained a compensable injury on January 7, 2016, she did not carry her burden of proof to show she sustained any permanent disability.

Claimant is seeking an assessment of costs. However, because claimant was not successful in her claim I do not assess costs against the defendants. Each party shall bear their own costs.

ORDER

THEREFORE, IT IS ORDERED:

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 19th day of February, 2019.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.