

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RAMONA KUCERA,	:	
	:	
Claimant,	:	File No. 5066604.01
	:	
vs.	:	
	:	
ADVANCE SERVICES, INC.,	:	ARBITRATION DECISION
	:	
Employer,	:	
	:	
and	:	
	:	
ACE AMERICAN INSURANCE CO.,	:	
	:	Headnotes: 1402.40, 1803.1, 2501,
Insurance Carrier,	:	2907
Defendants.	:	

STATEMENT OF THE CASE

Ramona Kucera, claimant, filed a petition for arbitration against Advance Services, Inc., as the employer and Ace American Insurance Company, as the insurance carrier. This case came before the undersigned for an arbitration hearing on January 31, 2022. Pursuant to an order from the Iowa Workers' Compensation Commissioner, this case was heard via videoconference using CourtCall.

The parties filed a hearing report at the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed in this decision. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 9, Claimant's Exhibits 1 through 6, as well as Defendants' Exhibits A through M. Claimant testified on her own behalf. No other witnesses testified live at the hearing. The evidentiary record closed at the conclusion of the arbitration hearing.

Counsel for the parties requested an opportunity to file post-hearing briefs. This request was granted and both parties filed briefs on March 21, 2022. The case was considered fully submitted to the undersigned on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant is entitled to healing period benefits between October 1,

2018, and October 1, 2019;

2. The nature and extent of claimant's entitlement to permanent disability benefits;
3. The proper commencement date for permanent disability benefits;
4. Whether claimant is entitled to payment of past medical expenses; and
5. Whether costs should be assessed against either party.

FINDINGS OF FACT

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

Ramona Kucera, claimant, is a 55-year-old individual who sustained a slip and fall injury in a dining hall kitchen at Iowa State University on October 1, 2018. She is a high school graduate, who also attended college for digital design. (Hearing Transcript, pages 10-11) Her employment history largely consists of work involving cooking and/or food preparation. (Exhibit 4, pages 7-9) Ms. Kucera began working for the defendant employer, a temporary staffing agency, in August 2018. During her employment with Advance Services, Ms. Kucera was assigned to work as a kitchen helper in dining services at Iowa State University. (Hr. Tr., p. 14)

On October 1, 2018, Ms. Kucera was preparing lunch when she slipped on some grease that had accumulated on the floor. (Hr. Tr., pp. 14-15) She fell to the ground and experienced immediate pain in her upper back. (See Joint Exhibit 7, page 1) Upon learning of the injury, the defendant employer directed claimant's medical care.

Claimant first presented to the McFarland Clinic, where she described pain in the mid back. (JE7, p. 1) Notably, she did not describe pain in her neck and she demonstrated full range of motion in the cervical spine, without issue. She was prescribed medications, placed on modified duty, and instructed to follow-up with the clinic in three days. (JE7 pp.1-2) On October 4, 2018, she was seen in follow-up. She described the pain in the middle of her back as burning and constant. She further described radiating pain into her shoulders. She was tolerating work activities but reported that she was sore after each shift. She was prescribed physical therapy and light duty work restrictions. (JE7, p. 6)

Ms. Kucera was not satisfied with the care she was receiving and requested a transfer to another provider. (See JE7, p. 50)

Ms. Kucera presented to Kelly Jo Balignasay, ARNP on October 9, 2018. (JE8, page 1) Ms. Kucera relayed her frustrations with McFarland Clinic to Ms. Balignasay. (See *id.*) Ms. Balignasay described claimant's injury as a "left middle back and upper back injury[.]" (*Id.*) However, claimant's intake form was positive for back pain, myalgias, and neck pain. (*Id.*) On examination, Ms. Kucera demonstrated full, active, and pain-free range of motion in the cervical spine, mild paraspinal muscle tightness, and muscle tenderness in the sternocleidomastoid and trapezius. (*Id.*) Ms. Balignasay diagnosed claimant with muscle strains in the thorax and neck. (*Id.*) Like the McFarland

Clinic, Ms. Balignasay referred claimant to physical therapy and recommended work restrictions. (JE8, p. 2)

At her initial physical therapy session on October 12, 2018, Ms. Kucera described pain in the back of her head, the base of her neck, her midthoracic spine, right trapezius, and over the top of her shoulder. (Id.) Again, claimant demonstrated full active range of motion throughout her spine, and her pain indicators were largely noted to be in her thoracic spine and right shoulder. (JE8, p. 3) The physical therapist noted that claimant presented with an “evolving clinical presentation with changing clinical characteristics which could impact the plan of care[.]” (Id.) He ultimately assessed claimant with right shoulder and thoracic pain. (Id.)

On October 16, 2018, the same physical therapist noted that claimant’s body mechanics, active range of motion, and strength were all intact; however, she complained of pain throughout her entire session. (JE8, p. 5) It is documented that claimant asked questions and made conversation without noticeable increases in pain or distress following her session. It is also noted that claimant carried her winter coat without difficulty in either upper extremity. (Id.) The physical therapist would later document that claimant tucked her right upper extremity – flexed at the elbow – into her body while she was in the clinic; however, after her sessions she would walk through the parking lot at a faster pace and with a natural arm swing, bilaterally. (JE8, p. 25)

Ms. Kucera cancelled her October 17, 2018, physical therapy appointment due to an increase in pain she experienced following the October 16, 2018, session. (JE8, p. 6) When speaking with her physical therapist, Ms. Kucera listed several seemingly new pain complaints. She described pins and needles in her mid and low back, with radiating pain down her leg, up her back, over her shoulder, and into her face. (Id.)

In addition to the above pain complaints, claimant described intermittent pain, numbness, and tingling in her right upper extremity and hand when speaking with Ms. Balignasay on October 18, 2018. (JE8, pp. 6-7) Claimant reported no improvement in the severity of her pain since the date of injury, and expressed her belief that physical therapy was making her symptoms worse. (JE8, p. 7) In her assessment of claimant’s condition, Ms. Balignasay noted that Ms. Kucera’s subjective pain complaints were inconsistent on examination. (Id.) Ms. Balignasay prescribed a cervical MRI, “to determine if the reported right upper extremity pain, numbness, and tingling are originating from her neck.” (JE8, pp. 7-8)

Ms. Kucera submitted to an MRI of the cervical spine on October 25, 2018. (See JE8, p. 9) The imaging revealed mild to moderate cervical spondylosis. (JE8, p. 9)

After reviewing the October 25, 2018, MRI, Ms. Balignasay reiterated to claimant that her pain was “primarily myofascial.” (JE8, p. 13) She then referred claimant back to physical therapy and stressed the importance of attending her physical therapy appointments and performing home exercises as prescribed. (JE8, pp. 13-14) Lastly, Ms. Balignasay referred claimant for a pain management consultation and estimated that claimant would be released to full duty at her next appointment. (JE8, p. 14)

Similar to her initial transition from the McFarland Clinic to Story County Medical

Center, Ms. Kucera returned to the McFarland Clinic on December 1, 2018, reporting that she did not want to follow-up with her provider at Story County because she “knows nothing.” (See JE7, pp. 35, 38)

Ms. Kucera would eventually present for an MRI of the right shoulder. (See JE8, p. 10) The December 6, 2018, MRI revealed supraspinatus, infraspinatus, and subscapularis tendinopathy without full-thickness tear. (JE8, p. 10) It also showed mild degenerative changes and a slight irregular tear of the proximal long head biceps tendon, without rupture. (Id.; see JE7, p. 39)

Ms. Balignasay referred claimant for an orthopedic evaluation of her right shoulder and placed her at maximum medical improvement for her muscle strains to the posterior thorax and neck on December 11, 2018. (JE8, pp. 36-37)

Two days later, Ms. Kucera presented to the emergency department at McFarland Clinic and asked if she could be seen by one of its orthopedic surgeons. (JE7, p. 39)

Timothy Vinyard, M.D. performed surgery on claimant’s right shoulder on January 29, 2019. (JE4, pp. 5-6) The surgery consisted of a right shoulder arthroscopic rotator cuff repair, a biceps tenodesis, a subacromial decompression, and a distal clavicle excision. (Id.) Despite undergoing surgery, claimant continued to complain of pain in the posterior aspect of the shoulder, between her shoulder blades, in her neck, and in the back of her head. (Hr. Tr., p. 24; JE4, pp. 24-25, 29)

In a letter to defendants, dated May 30, 2019, Dr. Vinyard addressed claimant’s alleged neck injury. He opined that he did not have any objective evidence to support ongoing pathology for claimant’s subjective complaints in the neck region. He further opined that he did not believe claimant suffered any injury, beyond her right shoulder injury, as it related to the October 1, 2018, work incident. (JE4, p. 25)

Dr. Vinyard discussed the above opinions with Ms. Kucera at her July 8, 2019, follow-up appointment. (JE4, p. 30) He told Ms. Kucera that he did not believe her back and neck symptoms were coming from her shoulder. He further explained that he is a shoulder specialist and may not be the best physician to evaluate her neck. He then told Ms. Kucera that she had the right to seek a second opinion. (Id.)

On August 12, 2019, Dr. Vinyard placed claimant at maximum medical improvement (MMI) and released her to return to work, without restrictions. (JE4, p. 32) Shortly thereafter, Dr. Vinyard assessed claimant’s permanent impairment. Utilizing the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition, Dr. Vinyard assigned 3 percent upper extremity impairment for the decrease in claimant’s shoulder flexion. (JE4, p. 33)

There is no evidence claimant presented for medical treatment related to her alleged injuries between August 14, 2019, and July 23, 2020.

On July 24, 2020, Ms. Kucera presented to Staci Little, ARNP, as a self-referral for an evaluation of her upper back and neck pain. (JE3, p. 1) She reported continuous stabbing and burning pain throughout her cervical spine, in the upper portion of her

thoracic spine, and into her right shoulder and arm. (Id.) Ms. Little assessed claimant with right neck pain secondary to cervical spondylosis without myelopathy and ordered an updated MRI of the cervical spine. (JE3, p. 3)

The MRI, dated July 30, 2020, returned negative for any findings that would explain claimant's ongoing symptoms. (JE2, p. 1; see JE3, p. 5) There was no neuroforaminal or central canal narrowing and no significant disc changes. (See JE3, p. 5) After reviewing the diagnostic imaging, Ms. Little recommended claimant return to Dr. Vinyard for further evaluation. (JE3, p. 5) Ms. Kucera told Ms. Little that "the surgeon at Iowa Ortho" told her she likely had a re-tear of the rotator cuff but no follow-up evaluation was performed. Ms. Kucera then requested a referral to a new orthopedic surgeon. (See id.) More specifically, she requested a referral to see Jeffrey Davick, M.D. (See id.) There is no evidence to support claimant's assertion that Dr. Vinyard told her she likely sustained a re-tear of the rotator cuff.

Ms. Kucera presented to Dr. Davick for an evaluation on September 23, 2020. (JE3, p. 14.) Following his examination, Dr. Davick ordered an MR Arthrogram of claimant's right shoulder to evaluate her rotator cuff and the previous repair. (JE3, p. 15)

The September 29, 2020, MRI revealed post-surgical changes without evidence of a re-tear. (JE2, pp. 3, 5)

Ms. Kucera sought an independent medical evaluation, performed by Jacqueline Stoken, D.O. on February 3, 2021. (Ex. 3, p. 1) Dr. Stoken issued her report on March 8, 2021. (Id.) Dr. Stoken placed claimant at maximum medical improvement as of October 1, 2019, and opined that claimant sustained permanent impairment to the right upper extremity, neck, back, and body as a whole as a result of the October 1, 2018, work injury. (Ex. 3, pp. 18, 24) Notably, she did not provide a causation analysis.

With respect to claimant's right shoulder condition, Dr. Stoken assigned 11 percent upper extremity impairment for deficits in range of motion, 10 percent upper extremity impairment for the distal clavicle excision, 6 percent upper extremity impairment due to deficits in flexion strength, 3 percent upper extremity impairment due to deficits in abduction strength, and 2 percent upper extremity impairment due to deficits in adduction strength, for a combined total of 28 percent upper extremity impairment. (Ex. 3, p. 19) Utilizing the Combined Values Chart, 28 percent upper extremity impairment converts to 17 percent whole person impairment.

Turning to the alleged neck condition, Dr. Stoken placed claimant's condition in DRE Category II and assigned 5 percent whole person impairment due to claimant's asymmetric range of motion and muscle spasms. (Ex. 3, p. 19) Combining the impairment ratings for claimant's neck and right shoulder results in a total of 21 percent whole person impairment. (Ex. 3, p. 19)

Dr. Stoken imposed permanent work restrictions that required claimant to avoid work at or above the shoulder level, lifting more than 10 pounds on a frequent basis, 15 pounds on an occasional basis, or 20 pounds on a rare basis. (Ex. 3, p. 24) In other words, Dr. Stoken placed claimant in the light functional demand category. (See id.)

Claimant sought additional treatment following Dr. Stoken's examination. She presented to Joseph Brunkhorst, D.O. for an evaluation of her ongoing right shoulder pain. (JE3, p. 9) Dr. Brunkhorst documented that while claimant was providing her oral history, she consistently pointed to her shoulder when describing where she felt pain. (Id.) Claimant further reported that she sometimes felt radiating pain into the base of her neck. (Id.) Dr. Brunkhorst reviewed the 2020 MRI and confirmed it did not show a rotator cuff tear. (JE3, p. 10) He assessed claimant with chronic right shoulder pain and recommended subacromial injections. (JE3, p. 11)

Dr. Brunkhorst administered a subacromial injection on August 9, 2021. (JE3, p. 11) Claimant reported that the injection helped significantly at first; however, the pain returned by her September 13, 2021, follow-up appointment. (JE3, p. 12) Given claimant's complaints, Dr. Brunkhorst recommended and administered a second injection. (JE3, pp. 12-13)

Following the October 1, 2018, work injury, claimant worked a series of light duty positions, first handling odd jobs at Iowa State University, then as a bell ringer for the Salvation Army. (Hr. Tr., pp. 16-18) She last worked for Advance Services on December 17, 2018, when she was terminated for allegedly falsifying a medical record providing her temporary work restrictions. (Hr. Tr., pp. 18-21)

Claimant presented for an appointment with Dr. Vinyard on the same date, December 17, 2018. (See JE4, p. 2) Following the appointment, Dr. Vinyard produced a patient status report, indicating claimant could return to work with a 10-pound lifting restriction. (JE4, p. 2) The report also recommended that claimant avoid repetitive lifting, pulling, pushing, climbing, reaching overhead, and working above shoulder level. (Id.) At some point in time following the appointment, Ms. Kucera produced a copy of the patient status report to the defendant employer. The defendant employer also received a copy directly from Iowa Ortho. When comparing the two reports, defendants noticed that the report provided by Ms. Kucera contained an extra recommendation to avoid repetitive sitting. (See Ex. I, p. 2) After contacting Iowa Ortho regarding this discrepancy, the defendant employer determined that claimant had doctored her patient status report and terminated her employment.

I have reviewed the patient status report in question and can confirm the report provided by Ms. Kucera contained an extra recommendation to avoid repetitive sitting. At hearing, claimant denied modifying the December 17, 2018, patient status report. (Hr. Tr., p. 20)

After being terminated by the defendant employer, claimant sought and obtained employment as a kitchen lead for Casey's General Store in Story City, Iowa. (Hr. Tr., pp. 26-27) As a kitchen lead, claimant organized the kitchen and managed kitchen employees. Claimant testified that she left her job at Casey's to pursue a better opportunity. (Hr. Tr., p. 27) The better opportunity was Bethany Life, a retirement community in Story City, Iowa. (See Hr. Tr., p. 25)

Ms. Kucera started working as a cook for Bethany Life in August 2019. (Hr. Tr., p. 25) When questioned about her job application, Ms. Kucera testified she did not disclose her work restrictions or the October 1, 2018, work injury. (Hr. Tr., pp. 27-28)

Claimant testified she left her job with Bethany Life because it caused her too much pain. (Hr. Tr., p. 29) The personnel documents note that claimant quit to pursue personal interests. (Ex. B, p. 2)

Claimant next worked for Cost Cutters as a receptionist; however, Cost Cutters ended up cutting claimant's position in August 2020. (Hr. Tr., p. 31) It appears that claimant was unemployed for the following 12 months.

In September 2021, Ms. Kucera accepted a teaching position with Child Care Junction in Boone, Iowa. (Hr. Tr., p. 32) She was still employed by Child Care Junction at the time of hearing. Ms. Kucera teaches four-year-olds and works approximately 79 hours every two weeks, earning \$12.00 per hour. (Id.)

Defendants introduced approximately 21 minutes of surveillance video taken on March 27, 2019, and March 28, 2019. (Ex. C) In the video, claimant can be seen exiting a vehicle with her right arm in a sling. She subsequently enters her home and shortly thereafter walks outside with one of her large dogs and without her sling. For the majority of the video, claimant is outside walking or brushing hair off of her two large dogs. I did not observe any specific activities on the surveillance footage that would clearly violate the medical restrictions recommended at that time by Dr. Vinyard. On February 13, 2019, Dr. Vinyard recommended that claimant continue to wear a sling for an additional 4 weeks, and to use caution and common sense as she progresses through her recovery. (JE4, p. 13) The dates of the surveillance footage fall outside of the 4-week sling recommendation, and the videos do not show claimant using her right arm to a significant extent.

Defendants also introduced approximately 5 minutes of surveillance video captured on March 20, 2021. In the video, claimant is seen driving her vehicle and running errands. At one point in the video claimant can be seen carrying her purse with her right arm flexed at a 90-degree angle. The video ends with footage of claimant walking her two large dogs. Again, I did not observe specific activities on the surveillance footage that would clearly violate the medical restrictions recommended by Dr. Vinyard.

In addition to the surveillance footage, defendants introduced a physical health screening Ms. Kucera performed prior to accepting a position with Bethany Life in 2019. (Ex. B, pp. 12-13) At the screening, claimant demonstrated the ability to two-hand lift and transfer 75 pounds for 10 repetitions. (Ex. B, p. 13) She also demonstrated the ability to two-hand push/pull 75 pounds of force, for one foot, eight times at a height of 23 inches, 50 pounds of force at 23 inches for five feet, and 50 pounds of force at 41 inches for 200 feet. (Id.) Lastly, she demonstrated the ability to lift 10 pounds from waist to overhead five times. (Id.) It was determined that claimant met the functional requirements of the job description at Bethany Life. (Id.)

The first issue to be addressed in this case is whether claimant's injury extends beyond the right shoulder and into the neck and/or back.

In this respect, claimant relies on the expert medical opinions of Dr. Stoken. As previously discussed, Dr. Stoken did not provide a significant amount of analysis when

causally connecting claimant's alleged neck and back injuries to the events of October 1, 2018, and assigning permanent impairment to the same.

While Dr. Stoken explained why claimant's various injuries cannot be classified as injuries to the shoulder (Ex. 3, pp. 19-21), she never specifically connected any of the injuries to claimant's cervical or thoracic spine. Moreover, Dr. Stoken failed to provide an objective diagnosis for claimant's alleged neck condition. Instead, Dr. Stoken broadly diagnosed claimant with chronic pain of the upper back and neck, and assigned permanent impairment based on asymmetric range of motion and muscle spasms. (Ex. 3, pp. 18-19)

Dr. Stoken's report also failed to address the lack of objective medical evidence supporting her conclusion that claimant sustained permanent disability to the neck. Claimant has obtained multiple MRIs of the cervical spine. The October 25, 2018 MRI showed only mild/moderate cervical spondylosis. (JE8, p. 9) The July 30, 2020, MRI revealed no focal abnormalities, and the ordering nurse practitioner opined there were no findings that would explain claimant's then-current symptoms. (JE3, p. 5) When asked to address causation for claimant's alleged neck condition, Dr. Vinyard opined that he did not have any objective evidence to support ongoing pathology for her subjective complaints involving the neck region. (JE4, p. 25) Dr. Vinyard's opinion is supported by the medical records and opinions of Ms. Little, Dr. Davick, and Dr. Brunkhorst. While these three medical professionals did not expressly opine on causation, they each evaluated claimant's neck and independently determined the right shoulder was the source of claimant's pain.

Claimant's first provider, Ms. Balignasay, diagnosed muscle strains in the thorax and neck. After reviewing the October 25, 2018, MRI of the cervical spine, Ms. Balignasay reiterated to claimant that her pain was "primarily myofascial." (JE8, p. 13) When diagnostic imaging revealed issues within the right shoulder, Ms. Balignasay placed claimant at maximum medical improvement for the muscle strains to the posterior thorax and neck on December 11, 2018. (JE8, pp. 36-37)

When claimant attempted to establish care for the alleged neck condition in August of 2020, Ms. Little reported that there were no findings on her cervical MRI that would explain her symptoms. Instead of recommending further treatment of the cervical spine, Ms. Little recommended claimant return to Dr. Vinyard for a re-evaluation of her right shoulder. (JE3, p. 5) Dr. Davick, the specialist claimant decided to see instead of Dr. Vinyard, solely focused on the right shoulder. (JE3, pp. 14-15)

Claimant then presented to Joseph Brunkhorst, D.O. for an evaluation of her ongoing right shoulder pain. Dr. Brunkhorst documented that while claimant was providing her oral history, she consistently pointed to her shoulder when describing where she felt pain. (JE3, p. 9) Dr. Brunkhorst assessed claimant with chronic right shoulder pain and recommended subacromial injections. (JE3, p. 11)

Lastly, Dr. Stoken's report does not address claimant's pain complaints when she initially presented for medical treatment. There is no credible evidence that claimant reported neck pain to her treating physicians immediately following the work injury. At the McFarland Clinic, claimant reported "middle back pain" on October 1, 2018 and

October 4, 2018. (JE7, pp. 1, 6) Claimant also demonstrated full, painless range of motion in her cervical spine upon examination on October 1, 2018, and October 9, 2018, (JE7, p. 2; JE8, p. 1) Additionally, when claimant did report neck pain, she noted that the pain radiated from her shoulder to her neck, not from the neck down to her shoulder. (JE8, pp. 7, 8; JE3, pp. 5, 9, 12) She continued to describe pain radiating from her shoulder up into her neck at her deposition and the evidentiary hearing. (Ex. G, Depo. p. 31; Hr. Tr., p. 54)

Given Dr. Stoken's lack of analysis, and the objective medical evidence to the contrary, I am not persuaded by Dr. Stoken's opinion that claimant sustained a permanent injury to the cervical spine as a result of the October 1, 2018, work injury. I therefore find insufficient evidence that claimant's work-related injury extends beyond the shoulder and into her neck and/or back.

When comparing the impairment ratings assigned to claimant's right shoulder, I note that Dr. Vinyard performed, but did not assign permanent impairment for, a distal clavicle excision. As noted in Dr. Stoken's report, Table 16-27 on page 506 of the AMA Guides, Fifth Edition provides that a distal clavicle excision warrants an impairment rating of 10 percent. (Ex. 3, p. 19)

The Iowa legislature has mandated that determinations of functional impairment under the Iowa Workers' Compensation Act must be made solely by utilizing the AMA Guides, Fifth Edition. In this instance, the AMA Guides allow for an additional 10 percent upper extremity impairment for a distal clavicle excision. Dr. Vinyard provided no explanation as to why he did not include an impairment rating for the distal clavicle resection, and it does not appear as though defendants followed up with Dr. Vinyard to address the same following Dr. Stoken's report. Consequently, Dr. Vinyard's impairment rating is afforded less weight. As such, I accept Dr. Stoken's impairment rating as the more accurate representation of claimant's permanent impairment to the right shoulder.

The next issue to be addressed is the proper commencement date for permanent partial disability benefits. Claimant relies on the opinions of Dr. Stoken and asserts an MMI date of October 1, 2019. Defendants rely on the opinions of Dr. Vinyard and assert an MMI date of August 12, 2019, or approximately six months after claimant's right shoulder surgery.

Dr. Stoken did not provide an explanation for the MMI date of October 1, 2019, and a review of the evidentiary record does not reveal anything significant about October 1, 2019, outside of it being one year after the date of injury. Claimant did not present for any medical treatment relating to her right shoulder for nearly a year after being released by Dr. Vinyard on August 12, 2019. Dr. Vinyard's opinion that claimant reach MMI six months after surgery is reasonable and convincing in this matter. Therefore, I accept Dr. Vinyard's opinion and find claimant reached MMI on August 12, 2019. As such, I find the commencement date for permanent partial disability benefits is August 13, 2019.

Ms. Kucera seeks an award of healing period benefits from October 1, 2018, through October 1, 2019. Defendants dispute whether claimant is entitled to benefits

and whether claimant was off work during this period of time. Claimant did not provide argument regarding the same in her post-hearing brief.

As an initial matter, I found claimant reached MMI on August 12, 2019. As such, I find claimant is not entitled to healing period benefits between August 13, 2019, and October 1, 2019.

After the October 1, 2018, work injury, claimant continued working for Advance Services until December 17, 2018, when she was terminated. Dr. Vinyard performed surgery on claimant's right shoulder on January 29, 2019. After surgery, Dr. Vinyard returned claimant to modified duty work, which included no use of the right upper extremity. (JE4, p. 10) At hearing, claimant testified to working for several employers between December 2018 and August 2019; however, she could not provide her dates of employment. Claimant did not address this issue in her post-hearing brief. As such, I find the evidence submitted is insufficient to show what periods of time claimant was off work and in a period of recovery.

Ms. Kucera also seeks an award of past medical expenses. The expenses are outlined in Exhibit 2. Claimant is requesting reimbursement for \$802.00 owed to Des Moines Orthopaedic Surgeons, P.C. for treatment she received between August 6, 2020, and August 28, 2020. Claimant selected this provider. The care claimant received was for the alleged neck condition. Accordingly, I find the medical care claimant received from Ms. Little was unauthorized care. The expenses related to cervical spine treatment claimant received, if any, between August 6, 2020, and August 28, 2020, are not causally related to the work injury. The cervical spine care did not provide significant benefits for claimant's injuries or symptoms. I find that claimant failed to prove the same was reasonable and beneficial care.

The issue of costs will be addressed in the conclusions of law section.

CONCLUSIONS OF LAW

The first issue to be determined is whether claimant's injury is limited to her right shoulder, or if she has also sustained an injury to her neck, back, and body as a whole.

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 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" refer 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.

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).

Claimant asserts that her work injury extends beyond the right shoulder into the body as a whole. Defendants contend that the injury is limited to the right shoulder and should be compensated as a scheduled member injury pursuant to Iowa Code section 85.34(2)(n) (2017).

The Iowa legislature enacted significant amendments to the Iowa workers’ compensation laws, which took effect in July 2017. As part of those amendments, the legislature specified that injuries to the shoulder should be compensated as scheduled member injuries on a 400-week schedule. Iowa Code section 85.34(2)(n) (2017).

This case involves injuries to several of the muscles that make up the rotator cuff, including the subscapularis, supraspinatus, and infraspinatus. This case also involves a distal clavicle excision and a biceps tendon tear. (Ex. 3, pp. 19-23)

Injuries to the rotator cuff and biceps tendon constitute injuries to the shoulder under Iowa Code section 85.34(2)(n). Deng v. Farmland Foods, Inc., 972 N.W.2d 727, 728 (Iowa 2022) (injuries to the infraspinatus and labrum are included in the definition of the shoulder); Chavez v. MS Tech. LLC, 972 N.W.2d 662, 665 (Iowa 2022) (claimant who underwent extensive debridement of the labrum, biceps tendon, and subacromial space with biceps tenotomy and a subacromial decompression sustained an injury to the shoulder and not the body as a whole). Additionally, under agency precedent, distal clavicle excisions are compensated as a shoulder injury. Welch v. Seneca Tank, File

No. 1647781.01, (App. Oct. 20, 2021) (claimant's distal clavicle excision for a shoulder surgery should be compensated as a shoulder injury).

With these cases in mind, as well as the accepted medical opinions provided by Dr. Vinyard, I conclude claimant failed to prove that any of her injuries or conditions are compensable as unscheduled, whole body injuries under section 85.34(2)(v). Instead, I find claimant is entitled to compensation for her scheduled member shoulder under section 85.34(2)(n).

Having concluded that the disability is a scheduled member evaluated under Section 85.34(2)(n), I must now assess the degree of disability to the claimant's right shoulder.

In all cases of permanent partial disability described in paragraphs "a" through "t", or paragraph "u" 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 "t", or paragraph "u" when determining functional impairment and not loss of earning capacity.

After reviewing all evidence in the record related to claimant's extent of impairment under the AMA Guides, I found Dr. Stoken's right shoulder impairment rating to be most persuasive. I conclude claimant has sustained 28 percent right upper extremity impairment as a result of the October 1, 2018, work injury.

Permanent partial disability compensation for the shoulder shall be paid based on a maximum of 400 weeks. Iowa Code § 85.34(2)(n). Having adopted Dr. Stoken's 28 percent upper extremity impairment rating, I conclude claimant is entitled to 112 weeks of PPD benefits. Having found Ms. Kucera reached MMI on August 12, 2019, I find PPD benefits shall commence on August 13, 2019.

Ms. Kucera is also seeking an award of healing period benefits from October 1, 2018, through October 1, 2019.

Iowa Code section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Having found that claimant achieved maximum medical improvement on August 12, 2019, I conclude that claimant failed to prove entitlement to any healing period benefits after August 12, 2019. I further found that claimant failed to prove the dates in

which she was off work and in a period of recovery between December 18, 2018, and August 12, 2019. Therefore, I conclude claimant failed to establish entitlement to healing period benefits between October 1, 2018, and October 1, 2019.

Next, Ms. Kucera seeks payment of the past medical expenses contained in Exhibit 2.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Review of Exhibit 2 demonstrates that claimant seeks payment of outstanding medical expenses from Des Moines Orthopaedic Surgeons, P.C., all for care rendered between August 6, 2020 and August 28, 2020. It is important to note that the service dates for the documents provided are July 24, 2020, and August 6, 2020. (See Ex. 2, p. 3)

On July 24, 2020, claimant presented to Ms. Little as a self-referral for an evaluation of her upper back and neck pain. (JE3, p. 1) Claimant reported continuous stabbing and burning pain throughout her cervical spine, in the upper portion of her thoracic spine, and into her right shoulder and arm. (Id.) Ms. Little assessed claimant with right neck pain secondary to cervical spondylosis without myelopathy and ordered an updated MRI of the cervical spine. (JE3, p. 3)

On August 6, 2020, claimant returned to Ms. Little to go over her July 30, 2020, MRI of the cervical spine. (JE3, p. 5) After opining that the MRI revealed no findings to explain the symptoms in claimant's neck, Ms. Little recommended claimant return to Dr. Vinyard for further evaluation of her right shoulder. (Id.) When claimant requested a different orthopedic surgeon, Ms. Little told her the same would not qualify as an approved visit through workers' compensation. (Id.)

Defendants denied compensability for claimant's alleged neck injury. Claimant was seeking treatment for the alleged neck injury at the July 24, 2020, and August 6, 2020, medical appointments. After seeking treatment for the alleged neck injury, and obtaining imaging related to the alleged neck injury, Ms. Little, like Dr. Vinyard, determined the issue was within claimant's shoulder and referred her for further evaluation of the same. Based on this information, I cannot award the medical expenses for the July 24, 2020, and August 6, 2020, appointments.

Lastly, Ms. Kucera seeks assessment of her costs. Costs are assessed at the discretion of the agency. Iowa Code section 85.40. In this case, claimant recovered permanent partial disability benefits. Exercising the agency's discretion, I conclude it is appropriate to assess claimant's costs in some amount.

Claimant identifies her requested costs in Exhibit 1. The first and only cost is a request for reimbursement of claimant's filing fee (\$103.00). This is a permitted cost pursuant to 876 IAC 4.33(7) and is assessed against defendants.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant one hundred twelve (112) weeks of permanent partial disability benefits commencing on August 13, 2019. Weekly benefits are payable at the stipulated weekly rate of three hundred eighty and 23/100 dollars (\$380.23).

Defendants shall pay accrued weekly benefits in a lump sum together with interest 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.

Defendants shall reimburse claimant's costs in the amount of one hundred three and 00/100 dollars (\$103.00).

Defendants 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 25th day of August, 2022.



MICHAEL J. LUNN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Erik Luthens (via WCES)

Timothy Wegman (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.