BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JAMES THOMPSON, Claimant, vs. CITY OF DES MOINES, Employer, Self-Insured, Defendant.	File No. 5068182 ARBITRATION DECISION Head Note Nos.: 1803

STATEMENT OF THE CASE

Claimant, James Thompson, has filed a petition for arbitration seeking workers' compensation benefits against City of Des Moines, self-insured employer, defendant.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner in the matter of the Coronavirus/COVID-19 Impact on Hearings, the hearing was held on October 21, 2020, via Court Call. The case was considered fully submitted upon the simultaneous filing of briefs on November 11, 2020.

The record consists of Joint Exhibits 1-6 and Claimants Exhibits 1-7 along with the testimony of the claimant and James Bennett.

ISSUES

1. The extent of claimant's permanent disability;
2. The assessment of costs.

STIPULATIONS

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 agree claimant sustained an injury which arose out of and in the course of his employment on May 10, 2017. The injury was the cause of a temporary and permanent disability but parties disagree as to the extent and the nature of the disability.

While the extent of the disability is in dispute, the parties agree that the disability is industrial in nature. The parties agree that claimant reached maximum medical improvement (MMI) on May 2, 2018.

At the time of the injury, claimant's gross earnings were $1,297.20 per week. He was married and entitled to two exemptions. Based on those foregoing numbers, claimant's weekly benefit rate is $801.81.

All affirmative defenses are waived. There are no medical benefits in dispute.

FINDINGS OF FACT

Claimant, James Thompson, was a 52 year old person at the time of the hearing. His past education includes high school and a GED obtained after high school. He served as an apprentice in the painter's union from 2007 to 2008.

His work history includes temporary work as a laborer, construction laborer, a painter, and then full time employment with defendant employer as a painter beginning in 2013. (CE 1:1, Ex 2:2-3)

His past and current work requires a healthy body as the job duties included lifting and carrying. As a painter with the City of Des Moines, claimant performs skilled interior and exterior painting of buildings and fixtures; refinishes furniture and wood paneling; and other work as required. (CE 3) He has to lift, kneel, climb, reach and work overhead. As a Park Technician, claimant does semi-skilled and unskilled work in the operation and maintenance of city parks and facilities including turf grass maintenance, renovation projects, landscaping, general building maintenance, and grounds cleaning. (CE 4)

His past medical history is significant for COPD and hypertension. He also suffered from tennis elbow but has since recovered along with a foot injury necessitating surgery in 2016. These conditions have not impacted his ability to perform his job. Before May 2017, he was able to perform all his jobs and tasks by himself with no assistance from co-workers.

On or about May 10, 2017, a co-worker tossed claimant a 50-pound bag. When he caught it, he heard a popping sound and felt immediate pain in the right shoulder. (JE 1:1) He was seen two days later by Richard S. McCaughey, D.O., for pain in the shoulder. (JE 1:1) Dr. McCaughey was hopeful that claimant had experienced ligament strain given that the right shoulder range of motion was relatively full and fluid and claimant had only mild impingement signs. (JE 1:1) On May 19, 2017, claimant exhibited slightly worsening symptoms with giveaway and impingement signs and thus Dr. McCaughey ordered an MRI. (JE 1:2)

The June 2, 2017, MRI showed signs of chronic degenerative disease in the mild supraspinatus and infraspinatus with a suggestion of a superior labral tear. (JE 2:5) On June 6, 2017, a partner of Dr. McCaughey's recommended claimant be seen by an orthopaedic specialist for claimant's ongoing shoulder pain. (JE 1:3)

As a result of the referral, claimant was seen by Joseph Brunkhorst, D.O., on June 14, 2017. (JE 3:6) Claimant described pain in the rotator cuff, migrating into the anterior aspect of the shoulder. (JE 3:9) He experienced increased pain with repetitive movements and activities. Id. A recent subacromial injection was not helpful. Id . On

examination, he had good range of motion with mild pain during Speed's and O'Brien's testing and mild pain with biceps provocation. He was tender to palpation over the bicipital groove. (JE 3;9) Dr. Brunkhorst diagnosed claimant with right shoulder biceps tendonosis. Id. An ultrasound guided injection was administered and claimant was instructed to follow up in six weeks. (JE 1:9-10)

On August 30, 2017, claimant returned to Dr. Brunkhorst with largely the same complaints. (JE 3:11) The pain was present anteriorly and over the top of the shoulder. (JE 3:11) Given the lack of response to conservative treatment, Dr. Brunkhorst recommended surgery. Id.

Surgery took place on September 19, 2017. (JE 5:56) The biceps was repaired. The rotator cuff had some mild fraying superiorly and there was degenerative tearing of the superior labrum. (JE 5:57)

On September 25, 2017, claimant presented for his first post-operative visit to Dr. Brunkhorst. (JE 3:13) At this time, claimant was sore but experiencing a normal recovery. (JE 3:13) Physical therapy (PT) was to start the following week and claimant was to abide by no weight bearing restrictions. (JE 3:14)

Claimant returned to Dr. McCaughey on October 16, 2017, following his surgery. (JE 1:4) Restricted duty at work was scheduled to begin and Dr. McCaughey judged claimant as doing "reasonably well." (JE 1:4)

On November 13, 2017, claimant was seen by Dr. Brunkhorst with complaints of weakness and stiffness in the last three fingers of the right hand and reduced grip strength. (JE 3:15) Claimant had no significant problems with pain. Id. The plan was to monitor the hand issues but continue with PT. (JE 3:15)

A month later, claimant reported some soreness but overall improvement. (JE 3:17) Another injection was administered and claimant was instructed to follow up in six weeks. (JE 3:17) On January 24, 2018, claimant reported "significant improvement in his range of motion" but he still had pain with overhead activities which Dr. Brunkhorst attributed to the surgery. (JE 3:19). Dr. Brunkhorst kept claimant on PT and restrictions. Id.

On February 9, 2018, the therapist at Athletico's center in East Des Moines determined claimant to be able to conduct 88.24 percent of the demands of his current job. (JE 4:44) Claimant demonstrated the physical capabilities and tolerances to function in the Heavy physical demand level with two hand occasional lift up to 75 pounds. (JE 4:44) He was unable to perform constant sustained overhead reaching and unable to perform a right SA lift and carry of more than 50 pounds for 100 feet. (JE 4:45)

On February 21, 2018, claimant returned, having transitioned to at-home exercises. (JE 3:20) He still had pain with abduction. Another injection was administered. (JE 3:21) On April 4, 2018, he returned with the report that the toradol injection of February 21, 2018, was not helpful. (JE 3:22) He continued to have

significant soreness through the shoulder and near the biceps tendonosis. (JE 3:21) Dr. Brunkhorst prescribed a Medrol Dosepak and naproxen 500 mg twice a day. (JE 3:22)

On May 2, 2018, Dr. Brunkhorst deemed claimant at MMI. (JE 3:24) Claimant had improvement and was lifting at least 30 pounds but complained of hand numbness and periodic cramping. (JE 3:24)

Claimant continued to have pain and returned to Dr. Brunkhorst on July 23, 2018, for follow up regarding the pain. (JE 3:26) Dr. Brunkhorst recommended a second MRI. Id.

The MRI showed supraspinatus and infraspinatus tendinopathy with no evidence of a tear. (JE6:58) A subacromial toradol injection was administered which helped for a couple of months. (JE 3:28, 3:30) After the injection wore off, claimant returned to Dr. Brunkhorst for treatment on February 27, 2019. Another injection was administered. (JE 3:30)

During his March 2019 physical therapy appointments, claimant still exhibited mobility deficits, muscle tightness and weakness and range of motion (ROM) stiffness. (JE 4:52)

On April 10, 2019, claimant saw Dr. Brunkhorst. (JE 3:32) Claimant's physical therapist was present and noted claimant had plateaued with physical therapy. (JE 3:32) The therapist notes that at the time, claimant could work full duty without restrictions but he still experienced pain, stiffness with use. (JE 4:55) Dr. Brunkhorst reviewed the MRI again, provided another injection, and returned claimant to work with no restrictions. Id.

Claimant underwent an IME on December 16, 2019, with Morgan T, LaHolt, M.D. (CE 5) At this visit, claimant described persistent, intermittent right shoulder pain that was localized anteriorly and would migrate into the biceps on occasion. (CE 5:8) Exacerbating factors include any type of overhead activity, rolling a paint brush at or above shoulder level, and increased activity at work. Id. Rest, ibuprofen, and ice alleviates the pain. Id. Claimant was working full-time and able to drive independently. (CE 5:9) He rated his pain as a 1/10 on a ten scale and his worst pain level currently was between 5-6 on a ten scale. (CE 5:9)

Based on his own review of the medical records, claimant's history, and the examination conducted on December 16, 2019, Dr. LaHolt concluded that claimant experienced a shoulder strain that aggravated a previously asymptomatic degenerative condition in the rotator cuff and superior labrum. Due to the failure of conservative treatments, claimant underwent right shoulder surgery. (CE 5:15) He opined that claimant reached MMI as of May 2, 2018, and that the appropriate impairment rating was 10 percent of the right upper extremity or 6 percent of the whole person.

As for restrictions, Dr. LaHolt recommended limiting overhead activity to no more than 10-15 minutes at a time and no overhead lifting above 20 pounds. (CE 5:16) Claimant could also continue to use ibuprofen but may need injections or future surgical interventions. Id.

Dr. Brunkhorst, the authorized treating doctor of the claimant, reviewed the medical report and evaluation of Dr. LaHolt and agreed with the restrictions and limitations included in the report. (Ex 7:21)

Claimant still has pain with overhead activities along with stiffness and believes that because he cannot do overhead work, he is less employable. He self limits how much he carries and avoids carrying buckets of paint or drywall mud, particularly with the right hand. He takes breaks more frequently to allow the pain to subside before resuming tasks that aggravate his shoulder.

He does not have computer skills or the skillset necessary to work an office job.

James Bennett, facilities maintenance supervisor, testified at hearing that claimant has not approached him about modifications or accommodations for the current position claimant works. No other employee has complained or indicated that they are helping claimant with his tasks. Mr. Bennett acknowledged that while they are not firing the claimant, they likely would not hire someone who could not do overhead work or had lifting restrictions.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

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.

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).

Because claimant has sustained a whole body injury, he is entitled to be compensated pursuant to Iowa Code section 85.34(u) (2017).

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).

Claimant argues that his employability has been devastated due to his work injury of May 10, 2017. He has a GED and has worked as a laborer for his entire work history. He testified that he does not believe that he could find employment outside his current position given his work restrictions. This belief was confirmed by the testimony of Mr. Bennett, his direct supervisor, who testified that he would not hire claimant as a painter.

Claimant is an older worker and one motivated to return to work. He followed his doctor's restrictions as it related to work and is currently working his pre-injury job with self-assigned accommodations. In the February 2019, therapist assessment, claimant could perform approximately 88 percent of his essential job duties. His work restrictions are no overhead work for more than 10-15 minutes and no lifting overhead above 20 pounds. Dr. LaHolt assessed a 6 percent impairment of the whole person as a result of claimant's physical condition.

All the foregoing considered, it is determined claimant sustained a 35 percent industrial loss.

Costs are awarded to claimant pursuant to Iowa Administrative Code 4.33.

ORDER

THEREFORE, it is ordered:

That defendant is to pay unto claimant one hundred seventy-five (175) weeks of permanent partial disability benefits at the rate of eight hundred and one and 81/100 dollars ($801.81) per week from May 2, 2018.

That defendant employer shall pay accrued weekly benefits in a lump sum.

That defendant employer shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendant employer shall pay the costs of this matter pursuant to rule 876 IAC 433.

Signed and filed this 9th day of March, 2021.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Thomas Spellman (via WCES)

Christine Creighton (via WCES)

Michelle Mackel-Wiederanders (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.