BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JANICE BRANDENBURG,

Claimant,

vs.

BROADLAWNS MEDICAL CENTER,

Employer,

and

SAFETY NATIONAL CASUALTY CORPORATION,

Insurance Carrier,
Defendants.

File Nos. 5042783 and 5051068

A P P E A L

D E C I S I O N

Head Note No.: 1803

Claimant Janice Brandenburg appeals from an arbitration decision filed on February 24, 2015. Defendants Broadlawns Medical Center (Broadlawns), employer, and its insurer, Safety National Casualty Corporation, respond to the appeal. The case was heard on September 25, 2014, and it was considered fully submitted in front of the deputy workers' compensation commissioner on December 1, 2014.

This case involves consolidated claims for two separate and distinct alleged right shoulder injuries. In File No. 5042783, claimant alleges a work-related cumulative trauma injury to her right shoulder with an injury date of January 26, 2012. In File No. 5051068, claimant alleges a work-related single trauma injury to her right shoulder which allegedly occurred on April 26, 2012.

The deputy commissioner found claimant failed to carry her burden of proof in both claims that she sustained permanent disability arising out of and in the course of her employment with Broadlawns. The deputy commissioner found both work-related injuries were only temporary aggravations of claimant's pre-existing underlying degenerative right shoulder condition and claimant was awarded no permanent partial disability benefits. The deputy commissioner awarded healing period benefits starting April 27, 2012, through July 12, 2012. The deputy commissioner found claimant is not entitled to alternate medical care. The deputy commissioner awarded claimant the independent medical evaluation (IME) fees of Jacqueline Stoken, D.O., totaling $3,200.00. The deputy commissioner also awarded claimant's costs at hearing.

Claimant asserts on appeal that the deputy commissioner erred in finding claimant failed to carry her burden of proof that she sustained permanent disability as a result of the work-related injury of April 26, 2012, and in failing to award claimant industrial disability benefits for that injury. Claimant asserts the deputy commissioner erred in failing to award additional healing period benefits from July 13, 2012, through November 8, 2012. Claimant also asserts the deputy commissioner erred in failing to award alternate medical care.

Defendants assert on appeal that the arbitration decision should be affirmed in its entirety.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, pursuant to Iowa Code sections 86.24 and 17A.15, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed in this matter on February 24, 2015, which relate to the issues raised on appeal.

I find the deputy commissioner provided sufficient analysis of all of the issues raised in the arbitration proceeding. I affirm the deputy commissioner's finding that claimant failed to carry her burden of proof that she sustained permanent disability as a result of the work-related injury of April 26, 2012. I affirm the deputy commissioner's finding that claimant is not entitled to industrial disability benefits for that injury. I affirm the deputy commissioner's finding that claimant is not entitled to additional healing period benefits from July 13, 2012, through November 8, 2012. I affirm the deputy commissioner's finding that claimant is not entitled to alternate medical care. I affirm the deputy commissioner's findings, conclusions and analysis regarding those issues with the following analysis:

FINDINGS OF FACT

Claimant was 60 years old at the time of the hearing, single, with no dependents. (Transcript page 14; Exhibit D, pages 4-5) She is a high school graduate and has post-high school certificates from Des Moines Area Community College for Life's Calling and Essentials for Health Care which she obtained in connection with her work at Broadlawns. (Tr. pp.14-15; Ex. D, p. 6)

Claimant's previous employment history includes being a cashier in a grocery store, waitress, mail extractor, stocker, manufacturing inspector, school custodian, and material handler. (Tr. pp. 54-61; Ex. 5, pp. 3-5; Ex. A, pp. 7-9; Ex. D, pp 51-54)

Claimant began her employment with Broadlawns on July 18, 2011, as an environmental services tech, a job involving primarily housekeeping tasks, at a wage of $10.00 per hour. (Tr. pp. 15-16; Ex. 6, pp. 3-4; Ex. A, pp.5-6)

In November 2011, claimant began working in the dental clinic and, after a couple of months of vacuuming there, she complained of irritation in her right shoulder. (Tr. pp.20-21; Ex. D, pp. 29-31) On January 26, 2012, claimant reported her symptoms to her supervisor and an appointment was made for her to be seen at Safeworks on January 27, 2012. (Ex. 7, p.1; Ex. B, pp. 6-11) Although claimant first indicated she did not want to be seen by a doctor, she was seen for five visits at Safeworks and she received treatment which included medications and work restrictions for a diagnosis of right shoulder strain or right bicipital tenosynovitis and right rotator cuff impingement. (Tr. pp. 72-73, Ex. 1, pp. 1-13; Ex. B, p. 9) Claimant was provided with a backpack vacuum to use rather than a standard vacuum, and she testified her shoulder pretty much returned to normal and her pain resolved. (Tr. p. 75; Ex. D, pp. 31-32) Claimant lost no time from work following the injury of January 26, 2012, no suggestions were made for additional medical treatment, and claimant was assigned no permanent impairment or permanent restrictions for that injury. (Tr. pp. 73-74; Ex. 1, pp. 12-13) Based on the evidence in the record regarding the January 26, 2012, work injury, I affirm the deputy commissioner's finding that the January 26, 2012, injury was only a temporary aggravation of claimant's pre-existing non-work-related degenerative right shoulder condition.

On April 26, 2012, claimant reported a second injury to her right shoulder which occurred that day when she lifted a box of hand sanitizer weighing approximately 80 ounces off a shelf. (Tr. p. 27; Ex. 7, p. 2; Ex. B, pp. 1-5; Ex. D, pp. 26-29) Claimant received treatment on the day of the injury at the Broadlawns emergency room, where x-rays were done which showed degenerative changes of her right shoulder. (Tr. p. 28; Ex. 2, pp. 1-4) Claimant was taken off work by the emergency room physicians and defendants began paying claimant temporary total disability (TTD) benefits. (Ex. 6, p. 8)

On April 27, 2012, the day following the date of injury, claimant underwent an arthrogram of her right shoulder which showed severe degenerative changes of the right acromioclavicular joint and a full thickness rotator cuff tear. (Ex. 2, p. 5) Claimant was then referred to Jon Gehrke, M.D., an orthopedic surgeon at Des Moines Orthopedic Surgeons, P.C., (DMOS) who first evaluated claimant on May 23, 2012. (Ex. 3, p. 1) Dr. Gehrke recommended an MRI of claimant's right shoulder, which was done on June 6, 2012. (Ex. 2, pp. 6-7) The MRI showed a massive tear of the rotator cuff involving the supraspinatus with significant retraction back to the acromioclavicular joint, as well as changes in the subscapularis and the infraspinatus. (Ex. 3, pp. 2-4) Based on those findings, Dr. Gehrke referred claimant to Kary Schulte, M.D., a shoulder specialist at DMOS. (Tr. pp. 30, 78; Ex. 3, p. 2)

Dr. Schulte evaluated claimant on July 12, 2012. (Ex. 3, pp. 3-4) Dr. Schulte noted claimant's prior right shoulder problems in January 2012 from vacuuming, as well as the incident on April 26, 2012, when claimant lifted a box weighing approximately five pounds, which claimant told Dr. Schulte caused her to feel a "snap" in her right shoulder. (Ex. 3, pp. 3-4) It is noted that neither the Broadlawns emergency room records nor Dr. Gerhke's records indicate claimant reported a "snap" in her right

shoulder when the injury occurred on April 26, 2012. (Ex. 2, pp. 1-2; Ex. 3, p. 1; Tr. pp. 75-77, 79)

Based on his review of the MRI and his evaluation of claimant, Dr. Schulte diagnosed a work-related right shoulder strain and a non-work-related rotator cuff tear arthropathy. (Ex. 3, pp. 3-4) Dr. Schulte determined claimant's work injuries caused temporary aggravations of her underlying right shoulder condition, but did not cause the significant structural changes in the shoulder. (Ex. 3, pp. 3-4) Dr. Schulte provided an injection and work restrictions, but noted both were for the non-work-related rotator cuff tear and were not due to any work injury. (Ex. 3, p. 4) Based on Dr. Schulte's opinion that claimant's ongoing condition was not related to her injury at Broadlawns, TTD benefits paid to claimant were stopped effective December 13, 2012. (Ex. 6, p. 8).

For further explanation of Dr. Schulte's opinions, defendants obtained a report from him dated July 21, 2014. (Ex. 3, pp. 8-9) In that report, Dr. Schulte again expressed the opinion that claimant sustained only temporary aggravations of her pre-existing right shoulder condition as a result of her injuries at Broadlawns. (Ex. 3, pp. 8-9) In the July 21, 2014, report, Dr. Schulte refers to injury dates of July 12, 2012, and April 26, 2012. (Id.) It is assumed those references to an injury date of July 12, 2012, are typographical errors, because Dr. Schulte first evaluated claimant on July 12, 2012, and he correctly referenced the January 2012 injury in his clinical note for the July 12, 2012, evaluation. (Ex. 3, p. 3) In the July 21, 2014, report, Dr. Schulte explained that the MRI evidence of significant retraction of the rotator cuff showed a chronic and long-standing condition which was most likely the result of either a previous large trauma or a chronic impingement occurring over a period of time much longer than since claimant's injuries at Broadlawns. (Ex. 3, pp. 8-9) Dr. Schulte also stated in the July 21, 2014, report that claimant needed no work restrictions as a result of her injuries at Broadlawns and claimant had no measurable impairment related to those injuries. (Id.)

Following her evaluation by Dr. Schulte on July 12, 2012, Broadlawns offered claimant the option of taking an unpaid leave of absence for her shoulder condition, but claimant refused to take unpaid leave claiming she should continue to receive workers' compensation benefits. (Tr. pp. 37, 81-83) Because no leave of absence was requested by claimant, she was considered to have voluntarily quit her position as of July 2, 2012. (Ex. A, pp. 1-4)

After seeing Dr. Schulte in July 2012, claimant next sought medical treatment through her IowaCares plan, a state-paid health insurance program. On October 30, 2012, claimant was seen at the Primary Care Clinic at Broadlawns. (Tr. pp. 41-43; Ex. 2, pp. 8-10; Ex. D, pp. 12-13) She was given an injection to her right shoulder and she advised the physician she was trying to arrange for surgery. (Ex. 2, pp. 8-10) Claimant received similar injections at Broadlawns on March 14, 2013, June 28, 2013, and October 29, 2013. (Ex. 2, pp. 11-15) After the end of 2012, with the availability of the Affordable Care Act and coverage through a state-paid program with Coventry, claimant sought medical treatment at Mercy South Medical Clinic, including care for her right shoulder. (Tr. pp. 70-71, 90-91) At the time of hearing, claimant was pursuing

further injections for her shoulder, but had not mentioned the possibility of surgery to her new physician. (Tr. pp. 91-92; Ex. D, pp. 40-41)

On January 21, 2013, at the request of her attorneys, claimant was seen by Jacqueline Stoken, D.O., for the first of two IMEs. (Ex. 4, pp. 1-15) Although Dr. Stoken reviewed claimant's medical records, Dr. Stoken did not have claimant's MRI films or other films to review. (Tr. p. 102) Dr. Stoken's opinion was that claimant sustained a right shoulder strain, a massive rotator cuff tear, and chronic right shoulder pain as a result of the January 26, 2012, work injury. (Ex. 4, pp. 1-4) In the report for her first IME, Dr. Stoken expressed no opinion regarding the work injury claimant sustained on April 26, 2012. Contrary to Dr. Schulte's opinion that claimant's rotator cuff repair was not repairable, Dr. Stoken suggested surgical repair. (Ex. 4, p. 6) Dr. Stoken stated claimant has permanent impairment of eight percent of the body and recommended restrictions, which Dr. Stoken related to claimant's injury on January 26, 2012. (Ex. 4, p. 5-6) Dr. Stoken recommended that claimant avoid work at or above shoulder level and avoid lifting more than 10 pounds on a frequent basis with the right arm. (Ex. 4, p. 6)

On August 11, 2014, Dr. Stoken performed a second IME of claimant at the request of claimant's counsel. Dr. Stoken issued a report dated August 27, 2014. (Ex. 4, pp. 16-19) In that report, Dr. Stoken increased her previous eight percent whole-body impairment rating to nine percent and she left her recommended restrictions the same. (Ex. 4, pp. 18-19) Again, there is no suggestion in Dr. Stoken's second IME report that she reviewed any diagnostic films. (Ex. 4, pp 16-20)

Dr. Stoken again stated her diagnosis for claimant included a right shoulder strain, a massive tear of the right rotator cuff, and chronic right shoulder pain, but this time Dr. Stoken related those problems to claimant's work-related injury of April 26, 2012. (Ex. 4, pp. 16, 18) No mention was made in Dr. Stoken's second IME report of any recommendations for further medical care for claimant's right shoulder including the suggestion for surgical repair included in Dr. Stoken's first IME report. (Ex. 4, pp. 16-20)

I affirm the deputy commissioner's finding that the opinions of Dr. Schulte are more convincing than the opinions of Dr. Stoken. I affirm the deputy commissioner's finding in that regard because Dr. Schulte treated claimant and because Dr. Schulte is an orthopedic surgeon who is a shoulder specialist. He reviewed claimant's diagnostic films in addition to reviewing claimant's medical records. Dr. Stoken did not treat claimant. Dr. Stoken is not an orthopedic surgeon, she is not a shoulder specialist, and there is no indication she reviewed any of claimant's diagnostic films. Furthermore, Dr. Stoken's opinions are confusing because in her first IME report, she attributed claimant's alleged permanent disability to the work injury of January 26, 2012, and then she changed her opinion to state in her second IME report that the alleged permanent disability is the result of the work injury of April 26, 2012. Dr. Stoken does not explain the reasons for changing her opinion in that regard. Therefore, based on what clearly is the greater weight of the evidence in this case, I affirm the deputy commissioner's

finding that Dr. Schulte's opinions are controlling, i.e., that claimant's work injuries of January 26, 2012, and April 26, 2012, were only temporary aggravations of claimant's pre-existing degenerative right shoulder condition.

In a report dated October 4, 2012, as of which date claimant was still receiving voluntary weekly benefit payments (Ex. 6, p. 8), Dr. Schulte stated claimant reached maximum medical improvement (MMI) as of July 12, 2012. Nowhere in Dr. Stoken's two IME reports does she state an opinion regarding claimant's MMI dates. Because I find Dr. Schulte's opinions in this matter more convincing, and because Dr. Stoken does not state an opinion regarding claimant's MMI date, I affirm the deputy commissioner's finding that claimant reached MMI on July 12, 2012.

CONCLUSIONS OF LAW

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).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961). Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

Based on the finding that claimant's two injuries in this matter were only temporary aggravations of a pre-existing non-work-related right shoulder condition, I affirm the deputy commissioner's finding that claimant is not entitled to permanent disability benefits.

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker could not work. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33 (1).

Because claimant reached MMI on July 12, 2012, I affirm the deputy commissioner's finding that claimant is not entitled to temporary benefits for the period

of July 13, 2012, through November 8, 2012, as requested. I affirm the deputy commissioner's finding that claimant is entitled to temporary benefits for the period of work missed from April 27 through July 12, 2012.

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. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Claimant requests the additional medical care recommended by Dr. Stoken. Dr. Schulte determined claimant reached MMI as of July 12, 2012. (Ex. 3, p. 6) Dr. Schulte also determined claimant's two work injuries on January 26, 2012, and April 26, 2012, caused only temporary aggravations of claimant's pre-existing underlying degenerative right shoulder condition. (Ex. 3, p. 4) Because Dr. Schulte determined claimant's work injuries caused only temporary aggravations of claimant's pre-existing right shoulder condition, I find that any medical treatment required by claimant for her right shoulder condition after her MMI date of July 12, 2012, is not related to the work injuries and is not the responsibility of defendants.

On appeal, defendants do not challenge the deputy commissioner's award of $1,600.00 for each of Dr. Stoken's two IMEs for a total award of $3,200.00. Therefore, that award is affirmed.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of February 24, 2015, is affirmed in its entirety.

Defendants shall pay temporary total disability benefits from April 27, 2012, through July 12, 2012, at the rate of two hundred sixty three and 45/100 dollars ($263.45) per week, to the extent not already paid.

Defendants shall pay or reimburse the IME fees of Dr. Stoken totaling $3,200.00.

Defendants shall pay accrued weekly benefits in a lump sum.

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

Defendants shall receive credit for benefits previously paid.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Pursuant to rule 876 IAC 4.33, defendants shall pay the costs of the arbitration proceeding and claimant shall pay the costs of the appeal, including the cost of the hearing transcript.

Signed and filed this 1st day of August, 2016.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

Copies To:

Thomas A. Palmer
Elizabeth Flansburg
Attorneys at Law
4090 Westown Parkway, Ste E
West Des Moines, IA 50266
tap@wdmlawyer.com
beth@wdmlawyer.com

Valerie A. Landis
Attorney at Law
2700 Grand Ave., Ste. 111
Des Moines, IA 50312
vlandis@hhlawpc.com