BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

NICHOLAS JOHNSON, Claimant, vs. CARRY-ON TRAILER, INC., Employer, and THE HARTFORD, Insurance Carrier, Defendants.	File No. 21700162.01 ARBITRATION DECISION Head Note Nos.: 1108.50, 1402.40, 1803, 2502, 2907

STATEMENT OF THE CASE

Nicholas Johnson, claimant, filed a petition in arbitration seeking workers' compensation benefits from Carry-On Trailer, Inc., employer and The Hartford, insurance carrier, as defendants. Hearing was held on January 31, 2022. This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the declaration of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via Internet-based video. Accordingly, this case proceeded to a live video hearing via CourtCall with all parties and the court reporter appearing remotely.

The parties filed a hearing report 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.

Nicholas Johnson and Brian Barker were the only witnesses to testify live at trial. The evidentiary record also includes joint exhibits JE1, claimant's exhibits 1-3, and defendant's exhibits A-B. All exhibits were received without objection. The evidentiary record closed at the conclusion of the arbitration hearing.

In the process of reviewing the hearing report in preparation for writing this decision the undersigned noticed that the weekly rate that the parties believed applied in this case did not correlate with the information in the appropriate rate book. On April 25, 2022, the undersigned issued an order to show cause ordering the parties to confer regarding their hearing report stipulations and file a response within 14 days. On May 4, 2022, the parties filed a joint stipulation that the claimant's weekly rate is $363.54. I

accept the parties' stipulation. The hearing report in this case is hereby amended to reflect that the parties believe the weekly rate to be $363.54 and not $356.38.

The parties submitted post-hearing briefs on February 11, 2022, at which time the case was fully submitted to the undersigned.

ISSUES

The parties submitted the following issues for resolution:

1. The nature and extent of permanent partial disability, if any, claimant sustained as the result of the stipulated April 29, 2019 injury.
2. Whether claimant is entitled to reimbursement for an Independent Medical Examination pursuant to Iowa Code section 85.39.
3. Assessment of costs.

FINDINGS OF FACT

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

The parties stipulate that Mr. Johnson sustained an injury to his bilateral shoulders that arose out of and in the course of his employment with Carry-On Trailer, Inc., on April 29, 2019. The central dispute in this case is what, if any, permanent impairment he sustained as the result of the stipulated work injury.

Carry-On Trailer, Inc., manufactures enclosed trailers. Mr. Johnson has worked there since 2017. In late April 2019, Mr. Johnson was manually positioning trailer racks several times per day when he began to have symptoms in his shoulders. (Testimony)

Mr. Johnson saw Sharon Pitt, APRN at CHI Health on May 8, 2019. He presented with bilateral shoulder pain that started at work on April 29, when he was pushing a roof rack. He has tried Tylenol, ibuprofen, and Biofreeze but these have not been helpful. The assessment included acute pain of left and right shoulders. Conservative treatment and limited work were recommended, and he was to return to the clinic on May 16, 2019. (JE1, pp. 1-7)

At the May 16, 2019, appointment Mr. Johnson reported that he has been taking his medication and was restricted at work. He stated he was not having any more pain. He felt much improved and almost back to normal. He was ready to return to full duty at work. Mr. Johnson was released to return to work with no restrictions. He was instructed to return to the clinic with any concerns. (JE1, pp. 8-11)

Mr. Johnson returned to the clinic on October 21, 2020. He presented with left shoulder pain due to repetitive movements at work. He stated it was a recurrent problem and the current episode began weeks ago. The assessment was strain of left biceps muscle and acute pain of left shoulder. Physical therapy was recommended. He was to return to the clinic if his symptoms worsened or failed to resolve. (JE1, pp. 12-15)

Mr. Johnson attended physical therapy from October 28, 2020 to December 4, 2020 for a total of 12 sessions. He was seen for a strain of the left biceps muscle and acute pain of the left shoulder. He showed improvement over the course of his therapy. He did not schedule more sessions with physical therapy despite having more sessions approved. (JE1, pp. 15-56)

On December 7, 2020, Mr. Johnson returned to Sharon L. Pitt, APRN for follow-up of his bilateral shoulder pain. He reported his left side was worse than his right. He has constant pain, deep in his shoulder and in the collarbone and scapular area. Physical therapy felt he may have a labrum tear. Mr. Johnson was referred to orthopedic surgery and an MRI of each shoulder was recommended. He was to continue physical therapy. (JE1, pp. 57-60)

Mr. Johnson saw Jason J. Mickels, M.D. on January 19, 2021. The doctor noted that bilateral shoulder MRI with contrast had been performed and the radiologist interpreted a SLAP tear on both. Dr. Mickels impression was diffuse shoulder, shoulder girdle pain, both shoulders; left acromioclavicular joint popping; and bilateral shoulder superior labrum anterior and posterior tear on MRI. Dr. Mickels stated that even though Mr. Johnson has a SLAP tear, he could not say for certain that shoulder surgery would be beneficial. Dr. Mickels did not know if the SLAP tears were even symptomatic. He recommended additional physical therapy to try to build him back to performing his regular job. (JE1, pp. 61-65)

Dr. Mickels saw Mr. Johnson again on February 9, 2021. The doctor wrote him a prescription for additional physical therapy, but he has all the exercises at home, so he has been doing this at home. Dr. Mickels notes he had full forward flexion of both shoulders and full lateral abduction. He did not have as much tenderness along his shoulder blades. The impression was diffuse shoulder and shoulder girdle pain, bilateral; left acromioclavicular joint popping; and bilateral shoulder superior labrum anterior and posterior tear on MRI. He is able to do his job with restrictions of no above shoulder level work; Dr. Mickels continued these restrictions. He was to return in 4 weeks. (JE1, pp. 66-67)

Mr. Johnson continued to follow-up with Dr. Mickels. On July 21, 2021, Mr. Johnson reported he had been back to work without restrictions for approximately four weeks and was doing well. He does some stretching exercises for his shoulders before going to bed and before work and those seem to help. Dr. Mickels' impressions were diffuse shoulder girdle pain, bilateral improved; left acromioclavicular joint popping, improved; and bilateral shoulder superior labral anterior-posterior tear on MRI, questionably symptomatic and questionable whether this is work related. Mr. Johnson was instructed to continue to work without restrictions. He was placed at MMI). Dr. Mickels noted he would be happy to see Mr. Johnson back at any point, as needed. (JE1, pp. 68-71) Mr. Johnson has not sought treatment for his shoulders since July 21, 2021.

On October 1, 2021, Dr. Mickels issued a letter to the defendants. He released him back to work at full capacity. He noted that Mr. Johnson had normal range of shoulder motion and he did not notice any gross weakness. Dr. Mickels opined that per the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Mr. Johnson has a zero percent impairment to his bilateral shoulders based on the work injury from April 29, 2019. Dr. Mickels further opined that he may resume all work without restrictions. (Def. Ex. A, p. 1)

At the request of his attorney, Mr. Johnson saw David Segal, M.D., for an independent medical examination on September 23, 2021. He reviewed the records provided to him and examined Mr. Johnson. On October 4, 2021, Dr. Segal issued a report with his opinions regarding Mr. Johnson and his injuries. Dr. Segal felt Mr. Johnson was at maximum medical improvement. He did note some potential future treatments which included an evaluation with an orthopedic surgeon. Dr. Segal is board certified in neurological surgery. (Cl. Ex. 2)

Dr. Segal offered his opinions regarding permanent functional impairment that Mr. Johnson sustained as the result of the work injuries. Dr. Segal opined that as the result of Mr. Johnson's work injuries, he sustained a total of 34 percent whole person impairment. In reaching that conclusion, Dr. Segal assigned 5 percent left upper extremity impairment and 6 percent right upper extremity impairment for range of motion. He cited Figure 16-40, page 476, Figure 16-43, page 477 and figure 16-46 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Next, Dr. Segal assigned 10 percent left upper extremity impairment and 3 percent right upper extremity impairment for strength deficit. He cited Table 16-35, p. 510 of the Guides. Dr. Segal then assigned additional 3 percent impairment of the left shoulder for pain. Although Dr. Segal cited chapter 18 of the Guides, it is not clear exactly which portion of the chapter he relied on. Next, Dr. Segal assigned additional impairment for sleep disturbance and fatigue. He relies on page 317, subsection 13.3c of the Guides and assigned an additional 5 percent whole person impairment. Finally, Dr. Segal assigned impairment based on loss of motor strength, grip. He cites page 509 of the Guides and assigned 20 percent left upper extremity and 10 percent right upper extremity impairment for grip strength loss. (Cl. Ex. 2, pp. 1-32)

At the time of hearing, Mr. Johnson was still employed with Carry-On Trailer, Inc., working full-time, full duty. At the time of the injury, he was earning $16.00 per hour. At the time of hearing, he was earning $18.00 per hour. I find that Mr. Johnson returned to work and is receiving the same or greater wages then he received at the time of the injury. (Testimony)

Two physicians have rendered their opinions regarding permanent functional impairment in this case. Dr. Mickels assigns zero percent impairment. Although he cites the AMA Guides, Fifth Edition, he unfortunately does not cite to a specific section of table of the Guides. In contrast, Dr. Segal did, at times, cite to specific sections of the Guides; however, I find his impairment rating is not consistent with the Guides.

This agency has cautioned against impairment ratings that do not comply with the Guides. See Hill v. Vermeer Corporation, File No. 5066032 (App. January 30, 2020). That decision states,

> [T]he AMA Guides caution physicians against assigning impairment for loss of strength. Section 16.8 on page 507 provides the AMA Guides do not assign a large role to strength measurements due to the fact strength measurements are functional test influenced by subjective factors that are difficult to control. Review of Section 16.8a of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, page 508, indicates:
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> > In a rare case, if the examiner believes the individual's loss of strength represents an impairing factor that has not been considered adequately by other methods in the *Guides*, the loss of strength may be rated separately. An example of this situation would be loss of strength due to a severe muscle tear that healed leaving a palpable muscle defect. If the examiner judges that loss of strength should be rated separately in an extremity that presents other impairments, the impairment due to loss of strength could be combined with the other impairments, only if based on unrelated etiologic or pathomechanical causes. *Otherwise, the impairment ratings based on objective anatomic findings take precedence*. Decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities, or absence of parts (eg, thumb amputation) that prevent effective application of maximal force in the region being evaluated.

See Hill, at p. 4.

Dr. Segal provides his impairment rating without explanation or confirmation the impairment due to loss of strength is based on unrelated etiologic or pathomechanical causes. Additionally, the Guides state that the results of strength testing should be reproducible on different occasions or by two or more trained observers. The Guides, Section 16.8c. I find that Dr. Segal only saw Mr. Johnson on one occasion and there is no evidence that the results were observed by two or more trained observers. Thus, I find Dr. Segal's opinion regarding permanent functional impairment is not consistent with the Guides and therefore is not based solely on the Guides and cannot be relied upon. Thus, I find Mr. Johnson has failed to demonstrate by a preponderance of the evidence that under the Guides he sustained any permanent partial disability as the result of the work injuries.

Next, Mr. Johnson is seeking reimbursement for the IME pursuant to Iowa Code section 85.39. I find that the defendants obtained an impairment rating that Mr. Johnson felt was too low on October 1, 2021. Dr. Segal's IME took place on September 23, 2021, which was prior to the employer's impairment rating. I find that at the time of

the Dr. Segal IME, an evaluation of permanent disability had not been made by a physician retained by the employer.

Finally, claimant is seeking an assessment of costs. Costs are to be assessed at the discretion of the Iowa Workers' Compensation Commissioner or at the discretion of the deputy hearing the case. I find that claimant was generally not successful in his case and therefore exercise my discretion and do not assess costs against the defendants. Each party shall bear their own costs.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3)(e).

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).

In the present case, there is no dispute that the work caused injury to Mr. Johnson's bilateral shoulders. This agency has found that sustaining two shoulder injuries as the result of a single incident entitles claimant to be compensated under Iowa Code section 85.34(2)(v). Carmer v. Nordstrom, Inc., File No. 1656062.01 (App. December 29, 2021).

Iowa Code section 85.34(2)(v) states that:

> If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the

> employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity.

Based on the above findings of fact, I conclude that claimant returned to work and received the same or greater wages or earnings than he received at the time of the injury. Thus, claimant shall be compensated based only upon his functional impairment resulting from the injury and not in relation to his earning capacity.

According to Iowa Code section 85.34(2), functional impairment is "the extent of loss or percentage of permanent impairment can be determined by use of 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."

Iowa Code section 85.34(2)(x) (2017) further provides:

> [W]hen 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.

In the present case, the treating orthopaedic surgeon opined that the pursuant to the AMA Guides claimant did not sustain any permanent functional impairment. Unfortunately, Dr. Mickels did not provide a specific citation for the section of the Guides that he relied upon. It is noted that in the letter where he provides his impairment rating, he does state the claimant has normal range of shoulder motion. However, without a citation to a specific portion of the Guides it is not known what portion Dr. Mickels utilized to reach his conclusion. The other opinion in this case was rendered by Dr. Segal. Based on the above findings of fact, I conclude that Dr. Segal's impairment rating is not consistent with the Guides. Therefore, I conclude that Dr. Segal's impairment rating was not determined solely by utilizing the Guides and therefore, cannot be relied upon in this case. Under the statute, the functional disability shall be determined solely by utilizing the Guides. In this case, claimant has failed to demonstrate by a preponderance of the evidence that he sustained any permanent partial disability as the result of the work injuries.

Claimant is seeking reimbursement for the IME of Dr. Segal. Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. Based on the above findings of fact, I conclude that at the time of the Dr. Segal IME, an evaluation of permanent disability had not been made by a physician retained by the employer. Thus, I conclude the prerequisites of Iowa Code section 85.39 were not met.

Claimant has failed to demonstrate entitlement to reimbursement for the IME pursuant to Iowa Code section 85.39.

Finally, claimant is seeking an assessment of costs. Costs are to be assessed at the discretion of the Iowa Workers' Compensation Commissioner or the deputy hearing the case. 876 IAC 4.33. Based on the above findings of fact, I exercise my discretion and 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 25th day of May, 2022.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Joanne Reed (via WCES)

Brian Marty (via WCES)

Tracy Vetter (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.