BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

STEVE WOODARD,

Claimant,

vs.

IOWA MAIL CONTRACTORS LLC,

Employer,

and

ALLIED INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5049240

ARBITRATION DECISION

Head Note No.: 1108

STATEMENT OF THE CASE

Steve Woodard, the claimant, seeks workers' compensation benefits from defendants, Iowa Mail Contractors, the alleged employer, and its insurer, Allied Insurance, as a result of an alleged injury on August 22, 2014. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on October 27, 2015, but the matter was not fully submitted until the receipt of the parties' briefs and argument on November 23, 2015. Oral testimony and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Claimant's exhibits were marked numerically. Defendants' exhibits were marked alphabetically. References in this decision to page numbers of an exhibit shall be made by citing the exhibit number or letter followed by a dash and then the page number(s). For example, a citation to claimant's exhibit 1, pages 2 through 4 will be cited as, "Ex. 1-2:4." Citations to a transcript of testimony such as "Tr-4:5," either in a deposition or at hearing, shall be to the actual page number(s) of the original transcript, not to page numbers of a copy of the transcript containing multiple pages.

The parties agreed to the following matters in a written hearing report submitted at hearing:

1. On August 22, 2014, claimant received an injury arising out of and in the course of employment with Iowa Mail Contractors.

2. Claimant is seeking temporary total or healing period benefits from August 28, 2014 to the present time. Defendants agreed if they are liable for the claimed extent of his injury, claimant is entitled to these weekly benefits.

3. At the time of the alleged injury, claimant's gross rate of weekly compensation was $775.00. Also, at that time, he was married and entitled to 2 exemptions for income tax purposes. Therefore, claimant's weekly rate of compensation is $505.14 according to the workers' compensation commissioner's published rate booklet for this injury.

4. Prior to hearing, defendants paid no weekly compensation benefits to claimant.

ISSUES

At hearing, the parties submitted the following issues for determination:

I. The extent of claimant's entitlement to weekly temporary total or healing period benefits;

II. The extent of claimant's entitlement to medical benefits and alternate care.

III. The extent of claimant's entitlement to penalty benefits for an unreasonable delay or denial of weekly benefits pursuant to Iowa Code section 86.13.

FINDINGS OF FACT

In these findings, I will refer to the claimant by his first name, Steve, and to the defendant employer as Iowa Mail.

Steve is 61 years of age. He graduated from high school in 1971 and has had management training and sales training through his employments. He has had a commercial driver's license (CDL) for many years. Steve's work history consists of farming, working as a mechanic on heavy construction equipment, operating heavy equipment, driving trucks, and working in truck sales both a salesperson and as manager of dealerships. He returned to farm work in 2009, and continued in farm work until 2013 at Kimberley Farms hauling grain; operating equipment during harvest; and, planting and handling seed bags. He left this job in 2013 to work for AKE Companies selling fire extinguishers to farmers. The record is unclear as to how much physical labor was involved in handling the extinguishers. In his deposition, he explained that he delivered the extinguishers to his customers and they came in 70-pound boxes, which he had to lift and carry. (Exhibit B-32) At hearing, he stated the extinguishers were 3-4 pounds each and the work did not involve difficult lifting.

Steve began working for Iowa Mail only a few days before his work injury in this case. His job required him to drive a daily truck route and deliver auto parts to various locations from 8:00 p.m. until he finished his route. Before beginning his route, he had to load the truck with pallets containing the parts using a pallet jack. In his deposition,

he stated that at times he had to load and unload heavy parts onto pallets weighing 100 pounds about 1-5 times a route. (Ex. B-35) The owner of Iowa Mail testified at hearing that Steve's route job only required lifting only 20-30 pounds and drivers are not required to load pallets. Steve testified that he had no problem performing the delivery and loading tasks. The owner of Iowa Mail testified that a co-worker, who was assigned to travel with Steve during the first two night routes and teach him the tasks and delivery locations, stated to her that Steve favored his left arm and he thought Steve may not be able to perform the route job. We have no direct evidence from this co-worker in the record.

The stipulated injury on August 22, 2014 involved injury to the left shoulder. Steve testified that he had trouble opening a cargo door on the truck at the delivery location. While pulling on the door, it suddenly popped open, throwing him backwards, causing him to fall to the ground, landing on his left shoulder. He reported this to Iowa Mail and sought treatment from his family doctor, Stanton Danielson, M.D. on the same day as the injury.

According to Dr. Danielson's records, he was authorized by defendants to treat this shoulder injury. (Ex. 1-18) Dr. Danielson felt this was a torn rotator cuff. He ordered an MRI and referred Steve to either Ian Lin, M.D. or Jeffrey Davick, M.D., both of whom are orthopedic surgeons at Des Moines Orthopedists, P.C. An MRI was performed on August 27, 2014 (Ex. 2, pages 4-5) which revealed the following:

1. No acute shoulder fracture.

2. Acute full-thickness tear of the supraspinatus and infraspinatus tendons which are retracted 26 mm medially.

3. Subscapularis tendinopathy with suggestion of small partial-thickness articular surface tear.

4. Partial tear of the long head biceps tendon which is slightly subluxed medially.

(Ex. 1-22)

Steve saw Dr. Davick on August 29, 2014. Dr. Davick's note sets out the history of injury, noting immediate pain with associated difficulty raising his arm since August 22, 2014. Dr. Davick reports that Steve denied any prior issues with his left shoulder. Dr. Davick reviewed the MRI and concluded Steve suffered a full-thickness tear of the supraspinatus, a rotator cuff tear. Dr. Davick recommended surgery consisting of a decompression and rotator cuff repair. The doctor also placed restrictions on Steve of no lifting over 3 pounds and no use of the left arm. (Ex. 3-3:4)

Joann Kottlowaski (hereinafter referred to as Joann), defendants' claims adjuster, testified at hearing that she interviewed Steve over the telephone sometime after the injury. (The record does not disclose a specific date of this interview.) In that interview,

Steve denied he had any prior problems with his shoulders, denied any prior work injuries, and when asked about any prior MRIs, Steve initially paused and said no. (Ex. A-8) When asked why he paused, the transcript states as follows:

> Uh, [inaudible] one time when I dislocated my right, my, uh, [inaudible] uh, uh, my right shoulder. [Inaudible.]

(Ex. A-9)

Joann testified that when she reviewed the records of Dr. Danielson, she discovered that Steve had previously injured his left shoulder in a slip and fall in February 2010. Dr. Danielson's initial assessment after this injury was a complete tear of the rotator cuff tendon. The doctor ordered an MRI and referred claimant to Dr. Lin at Des Moines Orthopedic Surgeons, P.C. The MRI taken on February 11, 2010 states as follows:

> There is some thickening of the distal rotator cuff with some changes with tendinitis anteriorly in the rotator cuff. Near the insertion on the greater tuberosity, there is a full-thickness tear. The glenoid labrum appears intact.

(Ex. 2-1)

Steve saw Dr. Lin on February 26, 2010. Dr. Lin's assessment was left shoulder small rotator cuff tear in the anterior supraspinatus. Dr. Lin recommended home exercises to see if the shoulder would improve, but if not, the doctor recommended a left shoulder arthroscopy, subacromial decompression and subsequent mini open rotator cuff repair. The doctor did not recommend any activity restrictions. (Ex. 3-1:2)

Steve testified that he improved after seeing Dr. Lin and did not seek further treatment for his left shoulder until after his August 22, 2014 injury. Steve states that he returned to the farm employment and later on, his fire extinguisher sales position without any more shoulder problems until his August 22, 2014 injury. There are no records in evidence showing Steve returned to Dr. Lin or any other medical provider for treatment of his left shoulder between February 26, 2010 and August 22, 2014. Steve saw Dr. Danielson for other medical conditions in January 2012, March 2014 (for a general physical exam), April 2014 and July 2014. There is no mention of any ongoing shoulder problems in the office notes for these office visits.

Apparently, Joann wrote Dr. Davick a letter informing him of Steve's 2010 left shoulder problems and posed several questions to him. Dr. Davick responded as follows:

> 1. Mr. Woodard did not inform me that he had previously obtained an MRI scan due to difficulty with his left shoulder.

2. Mr. Woodard did not inform me he had been previously diagnosed with a tear in the left shoulder.

3. Mr. Woodard did not mention any injury to the right upper extremity.

4. In review of the records, I do see that he had a small tear at the insertion of his supraspinatus on his MRI scan performed 2/11/10. His recent study from 8/22/14 shows a larger tear. In an active person, even a small full-thickness tear can progress over time. Given the fact that he had a full-thickness tear in 2010, I think it is probable that his current condition is a natural progression from his 2010 full-thickness tear. It is possible that his work related injury from 8/22/14 did cause further injury and retraction of his previously diagnosed rotator cuff tear.

(Ex. 3-6)

In a subsequent letter to Joann, Dr. Davick stated that full-thickness tears of the rotator cuff never heal on their own and for active individuals; they almost always increase in size and require surgery. (Ex. 3-8)

Joann then sent a letter to Steve, dated October 1, 2014 denying his workers' compensation claim. The letter states in part as follows:

This letter is to follow-up our discussion from today. After careful review of your claim, it has been determined that your current condition and need for treatment is not related to your 8/22/14 work incident. We therefore are denying your claim for workers compensation benefits. I will be covering your visit with your family doctor on 8/22/14, the MRI on 8/27/14 and Dr. Davick's visit on 8/29/14. If you have any additional information you would like me to review for reconsideration, please submit.

(Ex. E)

In July 2015, at the request of his attorney, Steve was evaluated by Sunil Bansal, M.D., an occupational medicine specialist. Dr. Bansal opines that the MRI in August 2014 reveals a new pathology involving the subscapularis tendon, not previously mentioned in the 2010 MRI. He concludes from his review of the records and his examination that the August 22, 2014 injury aggravated the left shoulder pathology and caused new pathology requiring surgical intervention. (Ex. 4-8) Dr. Bansal recommends activity restrictions of no lifting over ten pounds occasionally, five pounds frequently and no lifting more than five pounds above shoulder level occasionally.

At hearing, Steve testified that he was not asked by Dr. Davick about any prior injuries to his shoulder and felt that he should have already known about it as he is in the same clinic as Dr. Lin. He stated that he forgot about the 2010 injury. Steve

explained that he had no intention of deceiving anyone and if that was his intent, he would not have sought care from Dr. Danielson or from Des Moines Orthopedic Surgeons, P.C., the same providers who treated him in 2010.

Steve testified that he continues to have significant left shoulder problems and has not been able to return to any employment, given the restrictions from Dr. Davick, except for a two-week period in April 2015, he sold some type of signs. He apparently, has no private medical insurance and there is no mention at hearing of any attempt to receive treatment through the state Medicaid program.

A surveillance video was submitted into evidence showing Steve performing various activities such as yard work in front of his home on May 18, 2015; June 1, 2015 and June 8, 2015. The yard work involved pushing a motorized lawn mower using both hands. Occasionally, Steve would maneuver the mower for turns using only the left or right hand, but he never pushed with only one hand. As the ground in front of his house is level and only about ten paces long and only the length of his home wide, the effort expended did not appear to be significant. Steve is also shown briefly using a long handled garden tool or hoe to remove weeds around a few bushes in front of his house. He held the end of the tool handle with his right hand and placed his left hand in the middle of the tool. Again, this activity did not appear to require significant force. Steve also is seen pulling weeds in his yard with his right hand and carrying a small spray bottle with the left hand. Steve is also seen lifting the tailgate of his vehicle and then carrying a plastic two-foot by two-foot box containing what appears to be empty aluminum cans into a grocery store can redemption area. Both hands and arms were used in this carry activity. Steve is also shown shopping, but not performing any significant lifting while doing so. The video failed to show any activity inconsistent with Steve's claim of a significant left shoulder injury. However, it does show he does have some use of the left arm and the restrictions of Dr. Bansal are more descriptive of Steve's current functional abilities.

Steve appeared sincere at hearing, but I find it hard to believe he forgot about his 2010 shoulder injury. However, if he had significant shoulder problems prior to August 22, 2014, he likely would have reported this to his family doctor and there is no evidence of any shoulder complaints for over four years after the 2010 incident. The views of a co-worker coming into the record via hearsay testimony are not convincing. I question defendants' assertion that Dr. Davick was deceived about a prior MRI. The 2014 MRI report which he said he reviewed clearly shows that there was a prior MRI in 2010. Such a report would put the doctor on notice of a prior left shoulder problem. Joann testified that many orthopedists do not read the MRI reports. She states they only want to look at the films. Well, she may be correct, but I would rather hear that from the doctor and not from a claims adjuster. I also find it hard to believe there was any intent to deceive when claimant sought initial treatment for his 2014 work injury from his family doctor who treated the 2010 injury. If Steve's intent was to deceive, he sure is not very good at it. I also find it hard to believe that Dr. Davick's clinic would not have provided him with Steve's prior treatment records by Dr. Lin.

Turing to the views of Dr. Davick, I note that the doctor several times kept referring to active individuals when opining that small tears turn into larger tears requiring surgery as a part of a natural process. I my mind, active also means "work" activity and therefore the doctor apparently concedes that work activity over time can worsen a small tear. Consequently, Dr. Davick's views are not that inconsistent with the views of Dr. Bansal who opines that Steve's injury aggravated prior pathology. Dr. Davick also appears to not be aware that there were no shoulder complaints to Dr. Danielson, the family doctor, until after the August 22, 2014 work injury. Finally, Dr. Davick does not explain the new pathology found in the 2014 MRI and by Dr. Bansal. In addition to the tear of the supraspinatus tendon found in 2010, there is now a tear of the infraspinatus tendon, a tear of the subscapularis tendon, and a tear of the biceps tendon. The seriousness of the injury is reflected in the different treatment modalities prescribed by Dr. Lin in 2010 and Dr. Davick in 2014. Dr. Lin recommended conservative exercises before going to surgery and imposed no work restrictions. Dr. Davick recommended immediate surgery and imposed a restriction of no use of the left arm.

Therefore, I find that the work injury of August 22, 2014 is a cause of the findings in the 2014 MRI and the need for further treatment of the left shoulder. Steve has not reached maximum medical improvement (MMI) from his work injury.

The work injury of August 22, 2014 is a cause of the restrictions recommended by Dr. Bansal given the surveillance video. However, these restrictions have rendered claimant unable to return to the job he had at Iowa Mail or any similar work since August 28, 2014.

I find the requested medical expenses in Exhibit 5 to constitute reasonable and necessary medical treatment of the work injury of August 22, 2014. All, but one prescription on October 9, 2014 were authorized expenses.

CONCLUSIONS OF LAW

I. 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 treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

In this case, I found the work injury to be a cause of the current condition of the left shoulder and activity restrictions which prohibit a return to the work he was performing the time of his injury or to substantially similar work since August 28, 2014 and claimant has not as yet reached MMI. Therefore, claimant is entitled to temporary total disability or healing period benefits under Iowa Code section 85.33 or 85.34. These will be awarded from August 28, 2014 as requested by claimant. A determination of claimant's entitlement to permanent disability benefits cannot occur until after he reaches MMI.

II. Pursuant to Iowa Code section 85.27, claimant is entitled to payment of reasonable medical expenses incurred for treatment of a work injury. Claimant is entitled to an order of reimbursement if he has paid those expenses. Otherwise, claimant is entitled only to an order directing the responsible defendants to make such payments directly to the provider. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988).

The expenses set forth in Exhibit 5 will be awarded. Also, it was found that claimant's left shoulder condition requires further treatment by an orthopedic specialist. Given Dr. Davick's opinions against this claim, it is best that he not be the treating physician. A treating physician needs to begin with a good relationship with his patient. However, any other orthopedist at his clinic or elsewhere would be appropriate.

III. Claimant seeks additional weekly benefits under Iowa Code section 86.13(4), That provision states that if a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the industrial commissioner shall award extra weekly benefits in an amount not to exceed 50 percent of the amount of benefits that were unreasonably delayed or denied if the employee demonstrates a denial or delay in payment or termination of benefits and the employer has failed to prove a reasonable or probable cause or excuse for the denial, delay or termination of benefits. (Iowa Code section 85.13(4)(b)). A reasonable or probable cause or excuse must satisfy the following requirements:

> (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

(Iowa Code section 86.13(4)(c)).

The employer has the burden to show a reasonable and probable cause or excuse. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable." Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996); Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

In this case, given the denials of prior problems, whether intentional or not and the views of Dr. Davick, defendants had a reasonable basis to deny this claim. Arguably, if a claimant lies about one matter, he is likely to lie about another.

While I disagree with the defendants' position, this was a reasonable denial of the claim, except for one aspect. As quoted above, our penalty statute requires contemporaneous notice of the basis for denying the claim. Simply stating a conclusion that the condition is unrelated to the injury is insufficient. If the denial was due to Dr. Davick's opinions, claimant's misrepresentation of this health history, the views of other doctors, or the statements of witnesses, employers and their insurers must set these reasons for a denial. Claimant and this agency should not have to guess as to the basis of the denial or whether the basis of the denial changed over time.

Claimant has not shown any prior penalties imposed on these defendants. Consequently, the appropriate penalty for an insufficient notice of denial is the sum of $2,000.00, which is roughly 6 percent of the weekly benefits denied.

ORDER

1. Defendants shall pay to claimant temporary total disability/healing period benefits from August 28, 2014 at the stipulated weekly compensation rate of five hundred five and 14/100 dollars ($505.14) and these shall continue until such time as they may be terminated pursuant to Iowa Code sections 85.33 or 85.34.

2. Defendants shall pay accrued weekly benefits in a lump sum and shall receive credit against this award for all benefits previously paid.

3. Defendants shall pay to claimant the sum of two thousand and 00/100 dollars ($2,000.00) as a penalty for an insufficient notice of denial.

4. Defendants shall pay interest on unpaid weekly benefits awarded herein pursuant to Iowa Code section 85.30.

5. Defendants shall authorize an orthopedic surgeon, other than Dr. Davick, to treat the conditions found in the 2014 MRI.

6. Defendants shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33, including reimbursement to claimant for any filing fee paid in this matter.

7. Defendants shall file subsequent reports of injury (SROI) as required by our administrative rule 876 IAC 3.1(2).

Signed and filed this 23rd day of December, 2015.

LARRY WALSHIRE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

David D. Drake
Attorney at Law
1415 Grand Ave.
West Des Moines, IA 50265-3473
ddrake@lldd.net

Deborah M. Stein
Attorney at Law
666 Walnut St., Ste. 2302
Des Moines, IA 50309
steind8@nationwide.com

LPW/srs

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876 4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.