BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RANDY NANK, Claimant, vs. UNIVERSAL TANK – FABRICATION, Employer, and TRAVELERS INDEMNITY INS. CO., Insurance Carrier, Defendants.	File No. 5056865 A P P E A L D E C I S I O N Head Note Nos: 1803, 1804, 1703, 2401, 2700, 3001

Defendants Universal Tank – Fabrication, employer, and Travelers Indemnity Insurance Company, insurer, appeal from a proposed arbitration decision filed on June 20, 2018. Claimant Randy Nank cross-appeals. The case was heard on August 9, 2017, and it was considered fully submitted in front of the deputy workers' compensation commissioner on October 19, 2017.

In the arbitration decision, the deputy commissioner found claimant sustained work-related injuries to his left and right shoulders on January 12, 2015. The deputy commissioner determined defendant-employer was aware of these injuries no later than January 20, 2015, meaning claimant provided timely notice. The deputy commissioner found claimant was permanently and totally disabled as a result of his bilateral shoulder injuries. Lastly, the deputy commissioner found claimant's weekly benefit rate to be $505.72.

On appeal, defendants assert claimant failed to satisfy his burden of proof to establish he sustained a work-related right shoulder injury. In the alternative, defendants argue claimant failed to provide timely notice of his right shoulder injury. Finally, defendants assert claimant is not permanently and totally disabled as a result of his work-related injury or injuries.

On cross-appeal, claimant asserts the correct rate of weekly compensation is $530.90.

I performed a de novo review of the evidentiary record before the presiding deputy workers' compensation commissioner and the detailed arguments of the parties.

Pursuant to Iowa Code section 86.24 and 17A.15, those portions of the proposed arbitration decision filed on June 20, 2018, that relate to issues properly raised on intra-agency appeal and cross-appeal are affirmed in part without additional comment, affirmed in part with additional analysis, and modified in part.

I affirm the deputy commissioner's finding that claimant's weekly workers' compensation benefit rate is $505.72 without additional comment. I find the deputy commissioner provided a well-reasoned analysis regarding this issue. I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to claimant's weekly rate.

With the additional findings of fact, analysis, and conclusions of law as set forth below, I affirm the deputy commissioner's finding that claimant sustained a work-related injury to his right shoulder that manifested on January 12, 2015, and for which claimant provided timely notice. The deputy commissioner's determination that claimant is permanently and totally disabled as a result of his work-related injuries is modified to an award of 75 percent industrial disability.

FINDINGS OF FACT

Claimant's job with defendant-employer required him to tighten wingnuts on large tanks made of carbon steel. (Hearing Transcript, pp. 29, 40-41) Claimant tightened the wingnuts using a six-foot-long pole which was roughly three-inches in diameter. (Tr., p. 42) Sometimes this task would take two to three workers. (Tr., p. 41) As described by claimant, "So when we get [the pole] up to our shoulder, I'd try to use my arms mostly, but we'd stoop down and stand up, and once my arms would wear out, I would just rest it on my shoulder and stand up as hard as I could." (Tr., p. 42)

Claimant initially performed this task with his right shoulder, but when it "got sore," he started using his left shoulder. (Tr., p. 43; Defendants' Exhibit C, p. 22) On January 11, 2015, claimant was having problems getting a tank sealed at work when he "stood up too hard with that pipe" on his left shoulder. (Tr., pp. 75, 78; Ex. C, p. 21) Claimant noticed "clicking" in his left shoulder the next day. (Tr., 78)

Although claimant's left shoulder began clicking on January 12, 2015, his right shoulder had been hurting for several months to a year before this incident. (Tr., p. 75; Ex. C, p. 22) Claimant acknowledged there was never any question in his mind that his right shoulder symptoms were due to his work duties. (Tr., p. 77) However, he also explained that when he first starting having symptoms in his right shoulder he "didn't know if it was sore muscles," "didn't realize [he] was doing permanent damage," and "thought maybe it would heal up." (Tr., p. 77) This is consistent with the fact that claimant did not request or require any medical treatment for his right shoulder in the year before January 12, 2015. (See Def. Ex. C, p. 23)

It was not until claimant's left shoulder began clicking that he reported the problems with both of his shoulders to defendant-employer and requested medical treatment. (Tr., p. 78) Claimant told the safety supervisor on January 12, 2015, that he

was "having a problem with [his] left shoulder and it's clicking and that [his] right shoulder was also injured." (Ex. C, p. 24)

Consistent with this testimony, claimant told his authorized treating physician, Jill Hunt, M.D., that he had noticed soreness in both shoulders for a year and the clicking in his left shoulder for only one to two weeks. (See Joint Exhibit 1, pp. 1, 10, 12) In March of 2015, claimant told Dr. Hunt he believed tightening the wingnuts with the pipe caused problems with his shoulders but that he "did not become concerned with the pain in his shoulders until he started noticing a clicking sound when he would move the shoulders in certain ways." (JE 1, p. 14) Claimant told Dr. Hunt "he felt up until that time that this was all a muscular problem and that it would improve on its own." (JE 1, p. 14)

Dr. Hunt shared claimant's statements in a letter to defendants on March 20, 2015. In her letter, she again noted claimant told her "he did not report the pain in his shoulders until he started noticing a clicking sound . . . around January 12th" because "at that point, he began to believe it was more than just a muscular problem." (JE 1, p. 17) In that letter, Dr. Hunt opined that the physical demands of claimant's job caused the current condition of his bilateral shoulders. (JE 1, p. 18)

Upon being transferred to the care of James Nepola, M.D., orthopedic surgeon and shoulder specialist, in April of 2015, claimant again reported a year-long history of "bilateral shoulder pain which has been indolent and progressive," along with "an acute exacerbation of his left shoulder pain on January 12, 2015." (JE 2, p. 20)

Shortly after Dr. Nepola performed the first of two surgeries on claimant's left shoulder, claimant asked Dr. Nepola to address his right shoulder pain. (JE 2, p. 47) In a letter to defendants, Dr. Nepola opined as follows:

> Mr. Nank does not have any work related RIGHT shoulder injury. He reported insidious onset of bilateral shoulder pain for more than 1 year at his first visit to my clinic, on April 14, 2015. The patient reported history as well as provided documentation indicated he had sustained a work-related LEFT shoulder exacerbation, but no reported RIGHT shoulder injury. Any RIGHT shoulder complaints should be considered to be non-work-related, to the nearest degree of medical certainty.

(Def. Ex. A, p. 1)

Claimant also sought an independent medical examination with Robin Sassman, M.D. Dr. Sassman opined that claimant's work duties, particularly the use of the pipe to tighten wingnuts, were a substantial factor in the development of claimant's bilateral shoulder symptoms. (Ex. 3, p. 19)

I agree with the deputy commissioner and find that the opinions of Dr. Hunt and Dr. Sassman are more convincing than the opinion of Dr. Nepola. As noted by the deputy commissioner, Dr. Nepola did not address whether claimant's right shoulder injury could have been a cumulative injury.

On appeal, defendants criticize the opinions of Dr. Hunt and Dr. Sassman because neither provided a specific diagnosis for claimant's right shoulder pain. (Defendants' Appeal Brief, p. 12) By the time claimant's care had been transferred from Dr. Hunt to Dr. Nepola, however, claimant's right shoulder had improved and his left shoulder was the focus of attention. (See JE 1, p. 12) Defendants subsequently denied liability for claimant's right shoulder, and by the time claimant had his IME with Dr. Sassman, he did not have health insurance and could not afford treatment for his right shoulder. (Tr., p. 52) Dr. Sassman suspected a rotator cuff tear or labral tear but could not diagnose with certainty given claimant's inability to pay for imaging. (Ex. 3, p. 19) For these reasons, I am not persuaded by defendants' criticism of Dr. Hunt or Dr. Sassman. Both agreed claimant's work duties caused claimant's bilateral shoulder condition.

Relying on the opinions of Dr. Hunt and Dr. Sassman, I affirm the deputy commissioner's finding that claimant sustained an injury to his right shoulder that arose out of and in the course of his employment with defendant-employer.

As discussed, claimant testified he always knew the symptoms in his right shoulder, which began six months to a year before his left shoulder injury on January 12, 2015, were related to his job. Importantly, however, he also testified that before January 12, 2015, he thought he was just experiencing common muscle soreness that would heal on its own. (See Tr., p. 77; JE 1, pp. 14, 17) While he started using his left shoulder to carry out his tasks, he did not seek medical treatment for his right shoulder, nor did he believe he had sustained any permanent damage. (Tr., p. 77, Ex. C, p. 23) I find it was not until claimant began experiencing a new clicking sensation in his left shoulder on January 12, 2015, that he realized he may have an actual injury to both shoulders that needed to be reported to defendant-employer.

Ultimately, I find claimant's right shoulder soreness during the year leading up to January 12, 2015, was not enough to make it plainly apparent to a reasonable person that an injury had been sustained. Instead, I find claimant's right shoulder injury would not have become plainly apparent to a reasonable person until January 12, 2015, when claimant began experiencing the new clicking in his left shoulder.

Thus, I find neither claimant nor a reasonable person would have known he sustained a right shoulder injury and that this injury was caused by his employment until January 12, 2015.

Claimant did not return to his job with defendant-employer after April of 2015. (Tr., p. 45) From that point through the time of the hearing, claimant made no attempt to return to work. He did not contact any employers, he did not fill out any applications, nor did he complete the blank resume given to him by Dr. Nepola's return-to-work specialist. (Tr., pp. 63, 88) Claimant likewise did not seek additional assistance from Dr. Nepola's return-to-work specialist after being released from Dr. Nepola's care, nor did claimant register with the Iowa Workforce Center for job leads. (Hrg. Tr., pp. 84-85, 88)

Defendants obtained a vocational assessment from Lana Sellner. Claimant made no attempt to apply for any of the jobs listed in Ms. Sellner's report. (Tr., p. 89) While some of the jobs identified in Ms. Sellner's report may have proven to be physically difficult for claimant, claimant simply just did not want to try any of the identified jobs. When asked about the retail sales jobs, for example, claimant testified, "I think I would be a terrible salesperson." (Tr., p. 55) For these reasons, I find claimant was not motivated to return to work.

Claimant participated in a functional capacity evaluation (FCE) and met the material handling demands for a medium demand vocation. (JE 3, p. 90) Claimant testified he pushed himself to the limits during the FCE and does not believe he could work at that level on a day-to-day basis. (Tr., p. 48) Dr. Sassman's restrictions of limiting lifting to 20 pounds at waist height put claimant in the light physical demand category. (Ex. 3, p. 20; Ex. B, p. 5) Claimant indicated these restrictions more appropriately align with his actual physical abilities. (Tr., p. 50)

Ms. Sellner identified several jobs that fall within the restrictions identified by Dr. Sassman. (Ex. B, pp. 7-9) While I acknowledge claimant's testimony that he would have difficulty performing some of these positions, claimant's failure to attempt any of the jobs identified by Ms. Sellner makes it difficult to assess the accuracy of this testimony. This is particularly true in light of the fact that Ms. Sellner used the restrictions identified by claimant's IME physician, Dr. Sassman. As a result, I find Ms. Sellner's report is evidence that there are occupations and actual jobs available that fall within Dr. Sassman's restrictions.

I agree with the deputy commissioner as follows:

> Mr. Nank has inability to tolerate sitting, has a gait deficit and diminished abilities to work above chest level. Mr. Nank's left arm is not able to perform the full range of light work. Claimant is limited in frequently using his left arm. He has a foot drop which limits climbing and walking. Mr. Nank has only a GED and a machinist certificate he earned in 1978. Mr. Nank's age is not a positive factor. He has had two left shoulder surgeries and will need a left shoulder replacement in the future. His primary occupations have been as either a laborer or painter. As a painter he was always performing physical work, even when he worked for himself. Mr. Nank's bilateral injuries are a severe limitation for his ability to work. Mr. Nank was found eligible for Social Security Disability which requires a finding that a claimant is unable to perform substantial gainful activity in the national economy.

(Arbitration Decision, p. 12)

These factors support a finding of significant industrial disability. Based on claimant's lack of motivation and the availability of jobs within claimant's permanent work restrictions, however, I find there is work available which claimant could perform based on his training, education, intelligence, and physical capabilities. I therefore

respectfully modify the deputy commissioner's finding that claimant is permanently and totally disabled and, instead, I find claimant has sustained 75 percent industrial disability as a result of his work-related bilateral shoulder injuries.

CONCLUSIONS OF LAW

The first issue to be addressed is whether claimant's right shoulder condition arose out of and in the course of his employment. 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).

On appeal, defendants argue claimant did not satisfy his burden to prove he sustained a work-related right shoulder injury because neither Dr. Hunt nor Dr.

Sassman provide an actual diagnosis for claimant's right shoulder condition. (Defendants' Appeal Brief, p. 12) I found this criticism by defendants to be unpersuasive given the fact that Dr. Hunt's focus was on claimant's left shoulder and by the time claimant had his IME with Dr. Sassman his right shoulder claim had been denied by defendants and claimant was without health insurance to pursue treatment on his own. Furthermore, the law does not require a specific "diagnosis" before a condition or injury can be found to have arisen out of and in the course of one's employment.

In this case, both Dr. Hunt and Dr. Sassman opined that claimant's right shoulder pain was causally related to his job duties with defendant-employer, and I found those opinions to be more convincing than the causation opinion of Dr. Nepola, who did not address whether claimant's work activities could have caused a cumulative injury to claimant's right shoulder. I therefore affirm the deputy commissioner's determination that claimant satisfied his burden to prove he sustained a right shoulder injury that arose out of and in the course of his employment.

The question then becomes when claimant's right shoulder injury, which came on over the course of several months to a year, actually manifested. As explained by the Iowa Supreme Court in Herrera v. IBP, Inc., "a cumulative injury is manifested when the claimant, as a reasonable person, would be plainly aware (1) that he or she suffers from a condition or injury, and (2) that this condition or injury was caused by the claimant's employment." 633 N.W.2d 284, 288 (Iowa 2001).

In choosing a manifestation date, this agency "is entitled to a substantial amount of latitude" because it "is an inherently fact-based determination." Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824, 829 (Iowa 1992). The fact-finder "is entitled to consider a multitude of factors such as absence from work because of inability to perform, the point at which medical care is received, or others, none of which is necessarily dispositive." Id. at 830.

In this case, defendants argue the manifestation date for claimant's right shoulder injury was six months to a year before he gave notice of his injuries to defendants in January of 2015. Defendants are correct that claimant knew in the months and even year leading up to January 12, 2015, that he had right shoulder soreness and that this soreness was related to his job duties. However, I found claimant did not recognize that this soreness could be a true "condition" or "injury" until his left shoulder started clicking on January 12, 2015. Until that point, claimant believed his symptoms were just muscle soreness which would heal on its own.

As noted by the Iowa Supreme Court in Oscar Mayer Foods Corp. v. Tasler, the date of manifestation "is best characterized as 'the date on which both the fact of the injury and the causal relationship of the injury to claimant's employment would have become plainly apparent to a reasonable person.'" 483 N.W.2d at 829 (citation omitted). In this case, I found "the fact of" claimant's right shoulder injury would not have been plainly apparent to a reasonable person until he experienced something out of the ordinary and beyond his normal muscle soreness: the clicking sensation in his left shoulder on January 12, 2015.

I acknowledge this analysis overlaps somewhat with the point at which claimant likely also recognized the "nature, seriousness, and probable compensable character" of his shoulder injuries, which is the "discovery rule" test. See Herrera, 633 N.W.2d at 288 (citing Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256, 257 (Iowa 1980)). While the cumulative injury rule and discovery rule are no doubt separate and "distinct," the court has also acknowledged the tests for these rules are "related" and often times involve the same facts, consideration, and analysis. See id. at 287-88. This is one of those cases.

Based on the record in this case, neither claimant nor a reasonable person would have known until January 12, 2015, that he had sustained a right shoulder injury and that the injury was caused by his employment. Thus, I conclude the manifestation date of claimant's right shoulder injury is January 12, 2015, the same day as his left shoulder injury. With this additional analysis, the deputy commissioner's determination that claimant sustained a work-related right shoulder injury that manifested on January 12, 2015 is affirmed.

Iowa Code section 85.23 requires claimants to give notice of an injury within 90 days of its occurrence. In this case, defendants acknowledge in their brief that they had notice of claimant's right shoulder injury no later than January 20, 2015, when claimant was authorized to seek treatment with Dr. Hunt. Having determined claimant's right shoulder injury manifested on January 12, 2015, defendants' notice of the injury on or before January 20, 2015, falls within the 90-day statutory requirement. I therefore affirm the deputy commissioner's determination that defendants had timely notice of claimant's right shoulder injury.

The final issue to be addressed is the extent of claimant's industrial disability. Industrial disability was defined in Diederich v. Tri-City R. Co., 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).

Considering all of the appropriate industrial disability factors, I found claimant sustained 75 percent industrial disability as a result of his bilateral shoulder injuries. Significant in this determination was claimant's lack of motivation, along with evidence of work available within his permanent restrictions. The deputy commissioner's award of permanent and total disability is therefore reduced.

Compensation for permanent partial disability shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Iowa Code section 85.34. A finding of 75 percent industrial disability therefore entitles claimant to receive 375 weeks of permanent partial disability benefits.

ORDER

Defendants shall pay claimant 375 weeks of permanent partial disability benefits commencing on the stipulated commencement date of April 18, 2017, at the weekly rate of five hundred five and 72/100 dollars ($505.72).

Defendants shall provide medical care for claimant's right shoulder.

Defendants are entitled to a credit as set forth in the arbitration decision.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten (10) percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable 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 (2) percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Defendants shall pay two thousand one hundred eighty-five and 00/100 dollars ($2,185.00) for the cost of Dr. Sassman's report.

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

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

Signed and filed on this 6th day of December, 2019.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Dirk J. Hamel Via WCES

Peter J. Thill Via WCES