BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CODY HOLMAN,

Claimant,

vs.

HEADWATERS, INC.,

Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5054784

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Cody Holman, claimant, filed a petition in arbitration seeking workers' compensation benefits from defendants, Headwaters, Inc., the employer, and their workers' compensation insurance carrier, Liberty Mutual Insurance Company. The arbitration hearing was held on September 29, 2016, in Sioux City, Iowa.

The evidentiary record includes Claimant's Exhibits 1 through 13, and Defendants' Exhibits A through E, both of which were admitted into evidence without objection.

The parties also submitted a hearing report, which contains numerous stipulations. The parties' stipulations are accepted and no factual findings or conclusions of law will be made in this decision regarding the parties' stipulations. The parties are now bound by those stipulations.

Claimant testified at hearing, as did Joseph Flott, manager of Headwaters, Inc., in Council Bluffs.

Counsel for the parties submitted post-hearing briefs on November 18, 2016, and the case was considered fully submitted on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. The extent of industrial disability, if any, concerning the February 5, 2015 stipulated injury.

2. Whether the incident of October 18, 2015, was an intervening cause/injury.

FINDINGS OF FACT

At the time of the hearing, claimant, Cody Holman was 26 years old. He is right hand dominant. (Testimony) He completed high school at Logan-Magnolia High School in Iowa. After high school, claimant's education has included some on-the-job training concerning confined spaces, using harnesses and working around excessive heat. (Testimony) In addition, claimant obtained a commercial driver's license (CDL) about three to four years prior to the hearing. (Testimony)

This matter involves a stipulated work injury that occurred on February 5, 2015, involving claimant's right shoulder. The incident occurred while claimant was working for the defendant employer, Headwaters, Inc., pushing a lid on a belly dump trailer that had frozen in place. While doing so, claimant felt a "pop" in his right shoulder. (Testimony; Ex. 13, p. 5) He reported the injury to Joseph "Joe" Flott, at the end of the work day. Joe Flott is the manager of Headwaters, Inc., in Council Bluffs. (Testimony)

Headwaters, Inc., is a subcontractor for MidAmerican Energy and its business is to get rid of coal combustion residue from coal fired energy plants.

Claimant also had an injury to the same shoulder on October 18, 2015 (File No. 5054785), which was accepted by Zurich North America Insurance Company, a different insurance carrier and resolved prior to the hearing in this matter.

Claimant argues that this October 18, 2015, incident was a temporary aggravation and defendant alleges it is an intervening injury.

Claimant began working at Headwaters, Inc., on September 4, 2013 and held a variety of jobs, including mowing and weed trimming, cleaning equipment, operating a pin mixer, and moving and unloading rail cars, among other things. Claimant described his work as consisting of medium to heavy jobs. (Testimony) Mr. Flott, hired claimant and described him as a good employee. Mr. Flott stated that claimant was a capable worker and the only job that he did not do, was operate heavy equipment, although he did drive a sweeper and a truck.

Prior to working at Headwaters, claimant worked as a mechanic for two to three years at Shelby County Cookers. This job required him to keep machines operational. (Ex. E, p. 3) Claimant testified in his deposition that this job allowed him to use a cart to haul his tools around and the job did not require a lot of lifting. (Id.) However, claimant testified at hearing, that the job also included work on large air valves weighing between 100 and 150 pounds. (Testimony) He earned about $15.00 to $16.00 per hour at this job. He also worked at Menards in a warehouse putting product on a

conveyor, driving a forklift and working as a shag driver. (Ex. E, p. 3; Testimony) He earned about $15.00 per hour at Menards. Claimant testified that he did not believe that he could do the job at Menards following the injury to his shoulder. (Testimony) However, claimant stated in his deposition that the job of operating a forklift and driving a truck did not require any lifting. (Ex. E, p. 4)

Following the February 5, 2015 work incident involving claimant's right shoulder, he reported the injury at the end of his workday and was taken by Mr. Flott to Bellevue Medical Clinic where he received x-rays which appeared normal. (Testimony; Ex. 1, p. 2; Ex. 2, p. 1)

On February 17, 2015, claimant was seen by Thomas Atteberry, M.D., of Miller Orthopedic Specialists, who noted a "possible right shoulder SLAP tear." (Ex. 3, p. 1) An MRI was recommended and he was to continue with no use of the right arm at work. (Id.)

On February 27, 2015, Dr. Atteberry noted that the MRI did not show an obvious labral tear but did show a "slight" tear of the anteroinferior capsule. (Ex. 3, p. 3) He was continued on one-handed work duty, but allowed to drive a truck. He was also referred for physical therapy, with the understanding that if there was no improvement, the recommendation would be for arthroscopy. (Id.)

On March 31, 2015, claimant returned to see Dr. Atteberry and advised that he had been improving, but had been raking his yard and power washing and felt an increase in pain, although it was feeling somewhat better at the time of the exam. (Ex. 3, p. 8) He reported frequent popping and catching. Dr. Atteberry noted that there may be instability in the shoulder. (Id.) Claimant elected to go forward with surgery. (Id.)

Right shoulder diagnostic arthroscopy was performed by Dr. Atteberry on May 5, 2015, with a postoperative diagnosis of a "normal appearing right shoulder." (Ex. 5, p. 1) Dr. Atteberry also stated that:

> There was no evidence of tearing noted and it was stable to probing. The biceps tendon was intact throughout its course through the glenohumeral joint. No subluxation out of the groove was able to be achieved. The rotator cuff including the subscapularis appeared in excellent condition. There was no evidence of tearing was [sic] seen. The entirety of the shoulder capsule was carefully viewed both from the posterior portal and from the anterior portal. No evidence of tearing was noted. The capsule was well attached at all points.

(Ex. 5, p. 1)

On May 11, 2015, claimant had a post-operative appointment with Huy Trinh, M.D., who was filling in for Dr. Atteberry. Dr. Trinh recommended physical therapy and that claimant return to light-duty work the following day with little use of the right upper extremity. (Ex. 3, p. 10) Claimant had no additional follow-up with Dr. Atteberry.

Claimant's care was transferred to Darren Keiser, M.D., of Methodist Health System. On June 3, 2015, claimant saw Dr. Keiser and reported pain and popping in his shoulder. (Ex. 8, p. 2) Dr. Keiser found that claimant had full passive range of motion, with a slight hint of "end range tightness," although an "accurate exam is somewhat difficult to ascertain because of a degree of apprehension." (Id.) Dr. Keiser's recommendation was to continue with physical therapy and limited his job duties to sedentary, but he was allowed to drive a semi, operate a loader and drive a sweeper. (Ex. 8, p. 3) Dr. Keiser stated that his review of the May 5, 2015 operative report "did show essentially a normal diagnostic arthroscopy of the glenohumeral joint of the right shoulder." (Id.)

On June 22, 2015, claimant returned to see Dr. Keiser who noted that claimant was "doing fairly well." (Ex. 8, p. 7) Claimant reported occasional popping that causes enough pain that he will lose his grip. He also feels some burning sensation, but nevertheless, he was hoping to return to full-duty work. Dr. Keiser's assessment included "residual right shoulder impingement, and cuff tendinopathy, also with residual acromioclavicular (AC) arthropathy." (Id.) A steroid injection was administered. (Ex. 8, pp. 7-8) Claimant was returned to full-duty work status, and his physical therapy was continued. (Ex. 8, pp. 9-10)

On July 20, 2015, Dr. Keiser reported that the steroid injection had helped and claimant "reports feeling much better overall," and he had "good mobility." (Ex. 8, p. 11) However, it was noted that claimant had some residual burning that was described as "discomfort" rather than "true pain," and that he is able to do almost all of what he wants to do without any limitation. (Id.) He is noted to be "back to his full duties at work and tolerating this well." (Id.) Although claimant also described some popping that was still occurring, he said it does not cause pain and he was advised to continue with home exercises going forward. At that time, claimant was released from care and deemed to be at maximum medical improvement (MMI). (Ex. 8, pp. 11-12)

The exhibits include a letter from Liberty Mutual to Dr. Keiser dated July 30, 2015, seeking opinions concerning MMI and permanency. The letter has handwritten responses, which presumably were provided by Dr. Keiser, although the letter contains no signature, initials, or date that the handwritten portions were provided. (Ex. 8, p. 13) The writer indicates that claimant reached MMI on July 20, 2015 and sustained a 2 percent impairment to the right upper extremity, however, there is no mention of what the 2 percent is based on. In fact the entire hand written portion concerning permanency, includes only three words: "right upper extremity" and the single number "2" indicating a percent of impairment. (Id.) The request to circle "Y" or "N" concerning

whether or not claimant sustained permanent impairment, is not marked. (Id.) This opinion is given little weight. Although the author may be assumed to be Dr. Keiser, it is not stated as such, even by an initial. There is no date indicating when the response was completed. There is no indication of any kind, what physical findings the alleged 2 percent impairment is based on. It is also unknown how the 2 percent was derived and whether the author utilized the AMA Guides or some other basis for the assessment.

Claimant continued working full-duty up to October 18, 2015. (Testimony) On that date, claimant was cleaning a silo. He and other workers had formed a line and were passing chunks of ash weighing between 10 and 60 pounds each from one person to the next to remove them. Claimant testified that he had been doing this for three straight days for 10 to 14 hours per day. On October 18, 2015, he was carrying a chunk of ash weighing between 30 to 40 pounds and his arm gave out and he dropped it and could not move his arm. (Ex. E, p. 11; Testimony) The injury was reported and claimant testified that he was taken to Bellevue for medical care. (Testimony) The records indicate that he was seen at the emergency department of Jennie Edmonson Hospital. (Ex. 11) This incident was reported as a new injury and accepted by the new workers' compensation carrier.

Claimant was sent to Jonathan Buzzell, M.D., on October 28, 2015. (Ex. 9, p. 1) At that time, Dr. Buzzell reviewed claimant's history going back to the February 2015 injury. Concerning the October 18, 2015 incident, Dr. Buzzell stated that "this does not really sound much like an injury . . ." (Ex. 9, p. 1) Dr. Buzzell also stated that "he demonstrates very poor effort on exam with all testing," and that "it is difficult to get a good exam of his shoulder secondary to poor effort and magnification of symptoms." (Ex. 9, p. 2) Dr. Buzzell stated that there was nothing found that would be consistent with rotator cuff of labrum pathology. (Ex. 9, p. 3) Dr. Buzzell recommended x-rays, and light duty along with a prescription for physical therapy and a prednisone taper. (Id.)

On November 12, 2015, claimant returned to see Dr. Buzzell. At that time, Dr. Buzzell found that claimant appeared to move his arm comfortably during distracted activity, such as donning and doffing clothing, but upon examination, claimant had limited range of motion secondary to pain, and that there appeared to be some magnification of symptoms. (Ex. 9, p. 4) Claimant also complained of general stiffness in the cervical spine. The plan was to investigate the cervical spine by obtaining an MRI. (Ex. 9, pp. 4-5) Again, Dr. Buzzell noted apparent magnification of symptoms. (Id.)

On December 9, 2015, Dr. Buzzell concluded that the cervical MRI did not show any findings that would account for the symptoms claimant is complaining of. (Ex. 9, p. 6) Dr. Buzzell then stated that claimant was at MMI and could return to work full-duty with no impairment. (Id.) At that time, Dr. Buzzell noted that claimant had essentially full range of motion of the right shoulder and that claimant again had poor performance during the exam and was suspected of symptom magnification. There were no detectible sensory deficits or abnormal reflexes. (Id) However, Dr. Buzzell offered that

if claimant found returning to work with no restrictions to be intolerable, that a functional capacity examination (FCE) could be scheduled. (Id.) Claimant did not return to see Dr. Buzzell and apparently never requested the FCE he was offered. Claimant argues that claimant was simply unaware that this was an option. Given that this medical record is from December 9, 2015 and the hearing did not occur until over 9 months later, it seems unlikely that claimant remained unaware of the offer of the FCE contained in this record. This leads the undersigned to conclude that his return to work was, in fact, tolerable. This conclusion is also consistent with Dr. Keiser's conclusion on July 20, 2015 that claimant was tolerating his full duty return to work well, and claimant's argument that the October 18, 2015 incident was merely a temporary aggravation.

Following an independent medical examination (IME) on April 22, 2016, with Sunil Bansal, M.D., of the Iowa Injury Institute, Dr. Bansal opined that claimant suffered from right shoulder impingement syndrome and rotator cuff tendinopathy. (Ex. 13, p. 8) Dr. Bansal agreed with Dr. Buzzell that claimant had reached MMI on December 9, 2015 and that the October 18, 2015, incident was only a temporary exacerbation. (Id.) During his examination, Dr. Bansal found that claimant was cooperative and had tenderness to palpation, greatest at the AC joint into the subacromial bursa. (Ex. 13, p. 7) Shoulder testing was negative, except for impingement testing. (Id.) Dr. Bansal documented claimant's right shoulder range of motion measurements, and stated that the left shoulder had "full range of motion." Dr. Bansal did not provide the left shoulder "normal range of motion" measurements for comparison to the right shoulder being evaluated. (Ex. 13, p. 7) Dr. Bansal then assigned impairment of 3 percent to the whole person based on his measurements of range of motion for the right shoulder, according to the AMA Guides for Evaluation of Permanent Impairment, Fifth Edition. (Ex. 13, p. 9) Concerning restrictions, Dr. Bansal suggested no lifting greater than 20 pounds occasionally, or 10 pounds frequently with the right arm, and no lifting more than 10 pounds above shoulder level with the right arm. (Id.) Dr. Bansal does not give any particular rational for the restrictions. In addition, claimant has not been working under these restrictions or any other restrictions. (Ex. E. p. 13; Testimony) Claimant continues to work without restrictions.

On July 25, 2016, Dr. Buzzell confirmed his previously stated opinions in a letter to defense counsel, in which he stated that claimant did not sustain a material permanent aggravation of his pre-existing shoulder condition from carrying the chunk of coal in October, 2015, and that it was a temporary exacerbation. (Ex. 9, p. 9) Dr. Buzzell also added that claimant did not sustain any impairment from the incident of carrying the piece of coal. (Id.) This was in supplement to his prior opinion that claimant had no impairment from the February 5, 2015, work injury. (Ex. 9, p. 6)

I find based on the opinions of Dr. Buzzell and Dr. Bansal that claimant sustained a temporary aggravation on October 18, 2015. No physician has opined that claimant sustained a permanent impairment from the October 18, 2015, incident.

Claimant testified that he continues to have occasional numbness and tingling and loss of grip strength in his right arm/hand. (Testimony) He also recognized that although Dr. Bansal has recommended certain restrictions, that he is currently working without restrictions. (Testimony) Further, as noted above, claimant did not return to Dr. Buzzell to request an FCE.

Joe Flott testified that he did not seen any indications at work that claimant was having any pain or difficulty with his right shoulder upon his return to work. (Testimony) In addition, Mr. Flott testified that claimant never reported to him that there was any part of his job that he was unable to perform. (Testimony) Neither has claimant reported any problems to Mr. Flott or requested to see a doctor for his shoulder for a significant period of time prior to the hearing. (Testimony) Claimant agreed that he has not reported problems to Mr. Flott, nor asked to be returned to a doctor since being released from care by Dr. Buzzell on December 9, 2015, over nine months prior to the date of the hearing. (Testimony)

Reviewing the above, I find that the February 27, 2015, MRI was described by Dr. Atteberry as showing a "slight" tear of the anteroinferior capsule. (Ex. 3, p. 3) However, upon completing the diagnostic arthroscopy, he noted that claimant had a "normal appearing right shoulder." (Ex. 5, p. 1) Dr. Keiser agreed that the operative report noted "did show essentially a normal" shoulder. (Ex. 8, p. 3) Dr. Keiser found that claimant had full passive range of motion and that claimant's apprehension prevented an accurate exam. (Ex. 8, p. 2) Dr. Keiser also found on July 20, 2015 that claimant had returned to work full duty and was tolerating it well. (Ex. 8, p. 11) Dr. Buzzell found claimant to be engaging in symptom magnification during his exams, including moving his shoulder comfortably with "distractive procedures." (Ex. 9, p. 4) The cervical MRI did not provide any objective data to explain claimant's symptoms. (Ex. 12, p. 1) Claimant returned to work full-duty. He testified that he has some ongoing symptoms, but he has not sought medical treatment for over nine months prior to the hearing. Also, his employer has not noticed or been advised of any complaints from claimant for a significant period of time prior to the hearing. Although Dr. Bansal assigned restrictions, claimant continues to work for the defendant employer without restrictions. In short, little if anything in the record supports a finding of permanency. Presumably, Dr. Keiser, opined that claimant sustained a 2 percent impairment, but did not provide any basis for that opinion. Dr. Bansal's range of motion findings were obtained following a single evaluation and claimant's subjective complaints. Of concern, Dr. Bansal's report does not include range of motion measurements of the unaffected left shoulder, such that it is unknown what claimant's anatomical "normal" range of motion is.

Dr. Buzzell had the advantage of seeing claimant on more than one occasion compared to Dr. Bansal's one-time evaluation. Dr. Atteberry, who performed the shoulder surgery has not offered an opinion on permanency.

I find that Dr. Buzzell, claimant's last treating physician, is in the better position to evaluate claimant's physical abilities based on his multiple visits. In addition, claimant is performing his job duties consistent with Dr. Buzzell's opinion that no restrictions are needed. I accept Dr. Buzzell's opinion over Dr. Bansal's concerning permanency and restrictions. Dr. Buzzell assigned a zero (0) percent impairment and assigned no restrictions. I therefore find that claimant did not sustain permanent impairment from the February 5, 2015, work injury.

CONCLUSIONS OF LAW

The parties have stipulated that claimant sustained an injury that occurred on February 5, 2015, which arose out of an in the course of his employment with the employer.

The primary disputed issue in this case is whether the stipulated work injury is the cause of any permanent disability.

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).

The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical

impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2)(a-t), the disability is considered a scheduled member disability and measured functionally. If it is found that the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and measured industrially under Code subsection 85.34(2)(u). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. Delong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

Industrial disability was defined in Diederich v. Tri-City Ry. Co., 219 Iowa 587, 258 N.W.2d 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. However, consideration must also be given to the injured workers' medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured worker's qualifications intellectually, emotionally and physically; the worker's earnings before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted; Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616, (Iowa 1995); McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Serv. Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

In this case, I was unable to find that the work injury to the right shoulder, which occurred on February 5, 2015, was a cause of permanent disability. Therefore, weekly benefits for such disability are denied.

Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I concluded that claimant was not successful in this claim and therefore exercise my discretion concerning costs, such that each party shall bear their own costs.

Having determined that claimant has failed to carry his burden of proof that he sustained a permanent injury as a result of the February 5, 2015 work injury, the issue of whether the incident of October 18, 2015 represents intervening cause/injury is moot, although I have found above that the incident was a temporary aggravation, which would not impact permanency.

ORDER

THEREFORE, IT IS ORDERED:

1. Claimant takes nothing from these proceedings.

2. Each party shall pay their own costs.

Signed and filed this 5th day of January, 2017.

TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Al Sturgeon
Attorney at Law
911 – 6th St.
Sioux City, IA 51101
alsturgeon@siouxlan.net

Christine E. Westberg Dorn
Attorney at Law
1299 Farnam St., Ste. 260
Omaha, NE 68102
christine.westbergdorn@libertymutual.com

TJG/kjw

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.