BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GARY CROSS, Claimant, vs. CITY OF DES MOINES, Employer, Self-Insured, Defendant.	:	File No. 1626330.01 ARBITRATION DECISION Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Gary Cross, has filed a petition for arbitration seeking workers' compensation benefits against City of Des Moines, a self-insured employer.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner in the matter of the Coronavirus/COVID-19 Impact on Hearings, the hearing was held on December 1, 2020, via Court Call. The case was considered fully submitted on December 21, 2020, upon the simultaneous filing of briefs.

The record consists of Joint Exhibits 1-6 and the testimony of the claimant.

ISSUES

1. The extent of claimant's industrial disability;
2. The assessment of costs.

STIPULATIONS

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.

The parties stipulate the claimant sustained an injury arising out of and in the course of his employment on August 26, 2016. They further agree the injury was a cause of some temporary disability entitlement which is no longer in dispute. The parties agree claimant sustained a permanent disability arising out of the accepted work injury, but disagree as to the extent of that injury.

The parties are in agreement that the injury is industrial in nature and that the commencement date for permanent partial disability benefits is September 18, 2019.

Defendant waives all affirmative defenses. The parties agree that the defendant would be entitled to a credit, and a standard order identifying that the defendant shall receive credit for benefits previously paid is appropriate.

At the time of the injury, the claimant's gross earnings were $1089.00 per week. He was married and entitled to two exemptions. Based on the foregoing, the weekly benefit rate is $684.30.

FINDINGS OF FACT

At the time of the hearing, claimant was a sixty-seven-year-old person. He obtained a degree in horticulture in 1975 and has worked in that industry since his graduation. His past relevant work history includes work at a wholesale greenhouse operation growing plants for grocery, mass market retailers and florists. At one point, he was responsible for up to five thousand plants.

He testified that the most physically demanding part of the job was mixing soil. It required him to bring soil into a separate house and then volcanic rock and peat moss would be added. This combination would be sterilized by steam and then put through a soil grinder. Wheelbarrows were used to transport the materials.

He left this position to work for defendant employer in 1990. Initially, he was hired to be a grower at the Botanical Center. The Botanical Center held eleven shows a year and his team was responsible for changing the beds inside the dome for each show. His duties included actual gardening in addition to supervision of volunteers and other workers. When the City granted Botanical Center to Waterworks Park, claimant moved to a different position for the defendant, landing at the greenhouses on Murray. There he grew fall chrysanthemums and poinsettias. His physical duties included picking up 25-pound bags of soil and emptying them onto potting benches.

A position opened up for him to do ground maintenance at the south zone or Ewing Park. In the summer he would mow, maintain trees, plant beds, and in the winter remove snow. The city outsourced this work and claimant moved to the municipal cemetery. He helped with the digging of graves, although that was mostly completed by a backhoe operator. He was in charge of planting flower beds and flower pots in the spring and digging foundation holes for gravestones.

He was physically able to do all the work although digging the foundation holes pushed him to his limit.

On August 26, 2016, claimant was at the Laurel Hill Cemetery. A concrete truck was coming to fill three of the foundation hills. It had rained heavily the day prior and he needed to dig the mud out of the holes to make sure that there was enough space for the necessary amount of concrete. He had to climb into the hole and shovel the mud

into a truck situated above his head. While completing the last hole, he felt an intense pain in the left shoulder. He reported this to his supervisor and was seen by Richard S. McCaughey, M.D., at Methodist Occupational Clinic on August 29, 2016. (JE 1:1) Claimant's left shoulder appeared normal with pain complaints. Id. He was given modified work duties and ordered to use a gel pack several times a day. (JE 1:2)

He was then seen in follow-up on September 6, 2016, with continued complaints of left shoulder pain. (JE 1:3) His range of motion was limited by pain. Id. X-rays were negative for injury. Id. Duane V. Wilkins, M.D., advised claimant to continue with therapy, heat/ice, naproxen and baby aspirin. (JE 1:4) When claimant had not fully improved by October 18, 2016, Dr. McCaughey ordered an MRI. (JE 1:6) The MRI revealed a moderate-sized full-thickness cuff tear of the supraspinatus, tendinosis and partial-thickness tearing of the long head of biceps, infraspinatus tendinosis, and some mild ACJ arthrosis. (JE 1:7; JE 3:24) Claimant was referred to orthopedics.

On November 3, 2016, claimant sent a notice of voluntary retirement to be effective on December 31, 2016. (JE 6:96)

On November 30, 2016, claimant sought additional care for his left shoulder injury following a work incident where he attempted to use a backpack leaf blower but had increased left shoulder pain as a result. (JE 1:8) Dr. McCaughey recommended no work with the left upper extremity and no backpack leaf blower use. Id. Claimant was provided a sling and he was instructed to cease driving. Id.

On December 8, 2016, claimant underwent surgical repair of his rotator cuff and biceps tenotomy. (JE 4:28) At his follow-up visit on December 14, 2016, claimant was given a script for physical therapy which he could begin sometime after Christmas along with tramadol to help ease the shoulder and neck pain. (JE 4:30)

Claimant was seen on December 22, 2016, at Methodist Occupational Clinic for a work release. (JE 1:10) PA-C Brian P. Neurohr authorized the return to work with modified work duties recommended by Dr. Brunkhorst of no lifting, twisting, pulling, repetitive bending, or twisting of the left arm. Id. No overhead work with the left arm and no left arm use. Id. The claimant was to wear his sling at all times, begin physical therapy and return for follow-up in five weeks. Id.

On March 15, 2017, claimant was seen in follow-up for the left shoulder rotator cuff repair and tenotomy. (JE 4:32) He showed improvement with limitations in range of motion and improving strength. He was to continue with physical therapy and return in two months. (JE 4:32)

On May 17, 2017, claimant presented for a five month follow-up for his right shoulder. (JE 4:33) He was continuing with physical therapy and reported that he was progressing well. (JE 4:33) He was working on strengthening, but was frustrated that his recovery was not faster. Id. It was noted the claimant had been retired since December 2016. Id. His examination showed good range of motion which was mildly limited by

pain. Id. A steroid injection was administered and claimant was instructed to continue physical therapy. Id. The injection relieved approximately 75% of his pain, but he continued to have localized pain in the biceps area that radiated proximally. (JE 4:35)

He continued with physical therapy but still had pain and limited range of motion in his eight month follow-up visit on August 21, 2017. (JE 4:37) He was given another steroid injection. Id. At this visit, Dr. Brunkhorst released claimant to return to work as tolerated with no restrictions. (JE 4:38)

During the November 8, 2017 visit with Dr. Brunkhorst, claimant reported worsening pain. (JE 4:39) A second MRI on November 28, 2017, showed a large recurrent full-thickness rotator cuff tear of the supraspinatus tendon with moderate atrophy involving the supraspinatus muscle belly. (JE 3:25) Claimant opted to go forward with a second surgery which took place on January 4, 2018. (JE 4:42-44)

Because the second surgery was a revision and involved a graft, Dr. Brunkhorst's recovery plan for claimant was going to be slower. (JE 4:46) Claimant was ordered to begin physical therapy at the end of February. (JE 4:48) On April 13, 2018, claimant returned to Dr. Brunkhorst who administered a subacromial injection of Toradol for pain and advised claimant to hold off on strengthening until claimant's range of motion improved. (JE 4:50) Unfortunately, at the May 23, 2018 visit, claimant reported he only received four days of relief. (JE 4:51) Claimant continued with physical therapy with strengthening added. (JE 4:52)

On July 16, 2018, claimant presented to Dr. Brunkhorst with pain but improvement in range of motion. (JE 4:53) He was unsure that further physical therapy would be useful. Id. Dr. Brunkhorst administered another steroid injection and discontinued physical therapy, advising claimant to continue with home exercises. Id.

Due to an ongoing chronic left rotator cuff tear, claimant underwent left reverse total shoulder arthroplasty on November 15, 2018. (JE 4:57) On November 26, 2018, claimant's staples were removed and a script for PT was issued. (JE 4:61) On January 4, 2019, in a follow-up visit, it was noted that claimant had symptoms of carpal tunnel syndrome. (JE 4:63) By April 10, 2019, claimant was still reporting a lot of pain, regularly taking tramadol and Tylenol. (JE 4:66) He had difficulty lifting more than 10 pounds and Dr. Brunkhorst noted that claimant was suffering from depression. Id. New x-rays were taken that showed stable component placement. (JE 4:67) Dr. Brunkhorst refilled the tramadol prescription and wrote out a new script for Celebrex. Id. On May 10, 2019, claimant returned for a follow-up appointment reporting overall improvement but continuing pain and inability to raise his arm above his head. (JE 4:68) No more physical therapy was ordered and claimant was instructed to continue all activities as tolerated. (JE 4:69)

On September 18, 2019, claimant saw Dr. Brunkhorst again in follow-up. (JE 4:70) His pain had abated slightly since surgery but seemed unchanged since the last visit. Id. Dr. Brunkhorst believed claimant had reached MMI. (JE 4:71) Due to the

anterior pain in the shoulder joint, Dr. Brunkhorst administered an injection and then released claimant from care to return on an as needed basis. (JE 4:71)

Dr. Brunkhorst authored an opinion letter dated November 11, 2019. (JE 4:72) He noted claimant had improved pain but significant difficulty. Id. Based on the AMA Guides to the Evaluation of Permanent Impairment, fifth edition, Dr. Brunkhorst assigned a rating of 24 percent to the upper extremity or 14 percent impairment whole person. Id.

On August 6, 2020, Dr. Sunil Bansal examined claimant and issued an opinion letter regarding claimant's left shoulder. (JE 5) At the time of the examination, claimant continued to have pain in the left shoulder. (JE 5:83) His arm was stiff and sometimes felt like it would not move. He was able to reach in front of him but could not do this while holding any weight. (JE 5:83) He had reduced strength and trouble lifting or carrying. (JE 5:83) Claimant also reported right shoulder pain from overcompensation. (JE 5:83) Dr. Bansal assessed a 30 percent upper extremity impairment rating or 18 percent impairment of the whole body. He gave an 8 percent impairment for the combined range of motion loss in addition to a 24 percent impairment for the implant arthroplasty. (JE 5:86)

Dr. Bansal recommended permanent restrictions of no lifting greater than 10 pounds with the left arm and no over shoulder lifting, no frequent reaching, no overhead reaching with the left arm and no overhead reaching or lifting with the right arm. (JE 5:86)

Dr. Bansal also opined the claimant was suffering from right shoulder sequelae pain from overcompensation to the right arm secondary to his left shoulder pathology. Id.

Claimant testified that he retired due to a number of reasons including his injury, but also to take care of his wife. He admitted that he talked about retiring with his coworkers prior to the injury. He has not worked since retirement and is the recipient of IPERS benefits along with Social Security.

His current symptoms include limitations in lifting with his left arm and shoulder. When he carries things, he can't hold them over his head or carry them over his head. There is not a day in the past month he hasn't had pain in his left arm and shoulder. He has experienced some depression since the injury. He has given some thought to working part time, but has not applied given that he is not certain of the work he would be able to perform given the pain on his left side.

CONCLUSIONS OF LAW

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

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" refer 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 Elec. 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).

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Ry. Co. of Iowa, 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 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).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Claimant asserts that he has been rendered permanently and totally disabled as a result of his stipulated left shoulder injury and the right complete replacement of that shoulder.

At the time of the hearing, claimant was an older worker. The entirety of his work history is in the horticulture industry. His postsecondary education was also in horticulture. His past work required physical labor and in the most recent past this labor included digging graves with a backhoe and foundation holes for headstones. It was while he was shoveling mud out of a foundation hole that his left shoulder was injured.

Based upon the restrictions of Dr. Bansal, claimant could not return to his prior job and perform all of the essential duties of his work. Prior to his injury, claimant had been able to perform his work tasks without accommodation or restrictions. Dr. Brunkhorst gave no formal restrictions, but instead advised the claimant to work as tolerated. Dr. Brunkhorst did acknowledge that claimant was suffering from significant difficulty following claimant's third surgery.

The two experts in this case have given similar opinions. Both assess a 24 percent upper extremity rating for the rotator cuff arthropathy, but Dr. Bansal gave an additional 8 percent due to range of motion losses.

Claimant did retire from his employment for reasons that included his physical condition following the injury and three surgeries, but also due to personal reasons.

His current condition includes shoulder pain varying in intensity, along with the inability to work overhead, lift overhead or reach overhead without pain.

Claimant has not looked for work and does not appear to be motivated to return to work. This last factor makes it challenging to find that claimant is completely and totally disabled. Based on the foregoing, it is found that claimant did not meet the burden to carry the claim that he is completely and totally disabled. His injury was serious, and his recovery was incomplete. He has ongoing pain and discomfort and reduced ability to lift, reach, and work with his left arm. As a result, it is found the claimant has sustained an 85 percent industrial disability.

Pursuant to 876 IAC 4.33, costs are assessed in favor of claimant.

ORDER

THEREFORE, it is ordered:

That defendant's employer and insurer are to pay unto claimant four hundred twenty-five (425) weeks of permanent partial disability benefits at the rate of six hundred eighty-four and 30/100 dollars ($684.30) per week from September 18, 2019.

That defendant's employer and insurer shall pay accrued weekly benefits in a lump sum.

That defendant's employer and insurer shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendant's employer and insurer shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

Signed and filed this 15th day of June, 2021.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Jason Neifert (via WCES)

John Haraldson (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.