BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JORGE ALVAREZ a/k/a EDGAR ALVAREZ,

Claimant,

vs.

IOWA BRIDGE AND CULVERT,

Employer,

and

BITUMINOUS INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

File No. 5044156

REVIEW-REOPENING

DECISION

Head Note Nos.: 1802, 2801, 2700, 1703

STATEMENT OF THE CASE

Claimant, Jorge Alvarez a/k/a Edgar Alvarez, filed a review-reopening claim against Iowa Bridge and Culvert, employer, and Bituminous Insurance Company, insurer, both as defendants. The hearing took place on November 28, 2016, in Des Moines, Iowa and was considered fully submitted on December 19, 2016.

The underlying case found that the claimant had established a cumulative injury which arose out of and in the course of his employment on March 16, 2012. The deputy commissioner awarded a claimant a running award of healing period and/or temporary partial disability benefits.

This case was appealed and the appeal decision was issued on February 18, 2016 which upheld the arbitration decision of December 2, 2014 in its entirety.

ISSUES

1. Whether claimant is entitled to a running healing period award;
2. Whether claimant has achieved maximum medical improvement and is entitled to a permanent disability award;
3. The commencement date of such award;
4. Reimbursement of an IME under Iowa Code section 85.39;

5. Alternate care under Iowa Code section 85.27;

6. Whether defendant is entitled to reimbursement or credit for the amounts previously paid;

7. Whether claimant is entitled to an assessment of costs.

STIPULATIONS

The parties filed a hearing report at the commencement of the review-reopening hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this review-reopening 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 agree the claimant sustained an injury on March 16, 2012 which arose out of and in the course of his employment. They further agree that the injury was the cause of some temporary disability during a period of recovery and that the injury was the cause of some permanent disability.

The parties disagree as to whether the claimant is currently entitled to a running healing award.

They agree that the disability is industrial in nature but disagree as to the commencement date of any permanent partial disability benefits.

At the time of the injury, the claimant's gross earnings were $737.00 per week. He was married and entitled to four exemptions. Based on those foregoing numbers, the parties believe the weekly benefit rate to be $508.20.

Prior to the hearing the claimant was paid approximately 20 weeks of permanent partial disability benefits.

FINDINGS OF FACT

Claimant is a 37 year old male and father of five children. He has an eighth grade education and speaks only some English. He has utilized the services of interpreters during doctors' appointments, depositions and during the hearing. He has worked as a laborer his entire adult life. At the time of the hearing of April 1, 2014, claimant was working for Southern Iowa Mechanical in the laborer and fire watch position.

On December 2, 2014, it was found that claimant sustained an aggravation to a pre-existing shoulder injury. He was awarded a running healing period award, primarily based on the opinions of Dr. Jabbari and Dr. Manshadi who recommended additional care such as orthopedic treatment for the labral tear and EMG testing of the right upper extremity.

Claimant continued to work for Southern Iowa Mechanical until March 2016. The position with Southern Iowa Mechanical did not require lifting or carrying. His primary duty was to ensure that no fires occurred during welding. At some point, claimant also worked as a laborer's assistant where he would finish concrete, cut metal with a grinder, band saw or powerband, and sweep. It was more physically demanding than the fire watch position.

He worked through the pain.

Claimant testified that he would often need to miss work due to pain in his shoulder but rather than tell his employer he was injured and needed accommodation, claimant would use childcare duties as an excuse. Indeed, when claimant did report to his supervisor issues with his shoulder, the claimant was told to return home and not return until after his shoulder was fixed.

Sharon Anderson, an employee of Southern Iowa Mechanical, testified at hearing that claimant had been hired as a general laborer and received regular pay raises for being a good employee. She agreed that claimant was primarily a weekend worker doing fire watch duties. She was unaware of the claimant's injury until she received paperwork from the defendant employer. It was approximately this period of time, however, that claimant was discharged. Southern Iowa Mechanical received a request to produce claimant's employment file to defendants. (Exhibit 7, page 4) Following that, claimant was asked not to return until he was fully healed.

Ms. Anderson testified that there has been fire watch positions available since claimant left Southern Iowa Mechanical, but that no work was extended to the claimant because he had not called in. She did not dispute that claimant had been sent home by the supervisor. She did not speak to the supervisor about this issue and had no testimony regarding the supervisor's decision at hearing.

Despite the finding in the arbitration decision, defendants did not authorize care until 2016, after the agency's appeal decision upheld the arbitration decision in its entirety.

On April 25, 2016, claimant was sent to Kyle Galles, D.O., for his right shoulder pain. Claimant reported "persistent pain, popping, and weakness and intermittent tingling in his RIGHT upper extremity." (Ex. 4, p. 1) Pain was aggravated by movement and reaching overhead and was relieved by ice and over-the-counter medicines. (Ex. 4, p. 1) On examination, Dr. Galles recorded that claimant suffered from "[r]ight shoulder pain with crepitus and intermittent parasthesias, concerning for posterior labral tear and some residual glenhumeral instability." (Ex. 4, p. 1)

Dr. Galles recommended a repeat MRI and imposed work restrictions of no lifting more than 10 pounds and no work over the shoulder. (Ex. 4, p. 1)

On May 2, 2016, the MRI was conducted which showed tendinitis in the supraspinatus tendon. (Ex. 3, p. 3) On June 23, 2016, Dr. Galles opined that claimant sustained a 4 percent whole body impairment rating for reduced range of motion in the right upper extremity. (Ex. 4, p. 5)

He also recommended claimant see John Rayburn, M.D., for pain management. Dr. Rayburn recommended injection therapy. On July 19, 2016, claimant was seen for a right acromial joint injection. (Ex. 4, p. 7)

On August 1, 2016, Dr. Galles wrote again to confirm that claimant could work full duty without restrictions. "It is my hope that, although there does not appear to be any significant structural abnormalities, Dr. Rayburn may be able to offer something to Mr. Alvarez to diminish his component of pain." (Ex. 4, p. 9)

Claimant was seen on August 22, 2016 by Dr. Rayburn. Dr. Rayburn relayed that the MRI was negative for any pathology and the EMG was negative for nerve injury. Dr. Rayburn concluded that "within a reasonable degree of medical certainty and probability... Mr. Alvarez's biceps tendonitis is related to his employment at Iowa Bridge and Culvert in March 2012." (Ex. 4, p. 14)

Dr. Galles disagreed. On November 10, 2016, Dr. Galles opined that the biceps tendinitis was not related to the 2012 injury due to the lack of apparent injury or inflammation of the biceps tendon. Dr. Galles did not rule out or deny that claimant suffered from biceps tendinitis but that claimant's symptoms were not work-related.

Dr. Galles did not believe claimant would improve from additional physical therapy or treatment. Dr. Rayburn was given another chance to review his opinion in light of Dr. Galles' opinion.

Dr. Rayburn confirmed his original opinion noting that the claimant had not had any additional injuries to the shoulder or the biceps tendon since August 22, 2016, and that claimant's injury remained consistent. (Ex. 4, p. 17-18)

At hearing, claimant testified consistently with his medical records.

Claimant was also seen by Farid Manshadi, M.D., on August 12, 2016. Dr. Manshadi concluded claimant was not at maximum medical improvement (MMI). Claimant had not undergone much of any treatment other than the injection. (Ex. 5) Dr. Manshadi agreed with Dr. Rayburn that claimant could benefit from physical therapy.

> At this point, I do not feel that Mr. Alvarez is at MMI as his only treatment has been just an injection to the right shoulder. He has not had any physical therapy for his right shoulder. As such, I do recommend further treatment in the form of physical therapy. If the physical therapy does not afford significant pain relief and improved range of motion, I recommend a second opinion for orthopedic evaluation and I cannot rule out an arthroscopic surgery to the right shoulder either.

(Ex. 5, p. 3)

Claimant has not worked since March 2016. He testified he was sent home due to shoulder issues by Southern Iowa Mechanical. However, he also was confronted with his right to work card. There was an issue with his e-verify card and he did not want to straighten it out. He was terminated. It is more likely than not, claimant was terminated, in part, because of his medical condition. The problems with his citizenship status could also be at issue. Claimant testified credibly that he worked through the pain and once his employer learned of his injury, either through the claimant or documentation sent to Southern Iowa Mechanical by the defendants, claimant was released from work.

Claimant has a current and valid right-to-work permit. He has not been offered employment from defendant employer.

Defendants take issue with claimant's credibility. They point to his behavior around his employment status. At times, it does not appear that claimant was a legal citizen. He drove without a valid license and provided various social security numbers and dates of birth to avoid apprehension as an undocumented worker. Almost all of claimant's past behavior that could be deemed criminal or was found to be criminal related to his legal status in the U.S. and not about his health condition.

Defendants argue that claimant should have gotten more medical care after March 2012 under his wife's insurance plan, but make no showing that he was covered by his wife's insurance plan. Further, this was for a time period that predated this hearing. After December 2014, claimant's medical care should have been provided by the defendant. Defendants failed to provide that care.

Defendants also take issue with the fact that claimant accepted temporary total disability benefits from defendants despite being employed by Southern Iowa Mechanical from June 13, 2013, through March 4, 2016. Again, defendants knew claimant was employed at Southern Iowa Mechanical during the April 2014 hearing. Claimant was working a part-time position, primarily on the weekends. This was unchanged up until the time of his March 2016 termination.

His testimony and behaviors surrounding his physical condition were consistent throughout the medical records. There was no indication by any of the doctors that treated him that claimant was malingering or conjuring up false injuries. It is explicitly found that claimant, by his consistent testimony and demeanor at hearing, was a credible witness.

On a day to day basis, he has trouble with his shoulder. He has difficulty carrying his newborn daughter. He helps around the house but has limits. In 2015, their garden generated a good deal of produce and they made "lots of salsa."

He acquired a driver's license in 2016.

His 2015 earnings were greater than his 2013 earnings. (Ex. 7)

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. 6.14(6).

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).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about,

not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

Defendants do not dispute that something happened to claimant's shoulder; rather, they assert that the claimant sustained a temporary aggravation of a pre-existing injury and that any long term symptomatology is unrelated to the work injury. It seemed, in part, the defendants wish to re-litigate the underlying findings that claimant sustained a cumulative trauma which resulted in a permanent aggravation of claimant's shoulder condition. (See pages 1-3 of the defendant's brief reciting past facts and page 12 which references claimant's 2011 petition).

The underlying case is helpful, if only to provide a consistent opinion. At the time of the hearing, claimant was under the same restrictions as he is now—as imposed by Dr. Manshadi. He has had little care despite the ruling in his favor. Care was delayed until 2016 when he finally was authorized to see Dr. Galles. Dr. Galles ordered diagnostic testing that showed no obvious signs of injury but Dr. Galles did refer claimant to pain management.

Dr. Rayburn injected claimant but has recommended physical therapy in addition to possibly other treatment such as more injections. This has not been authorized or followed through. Dr. Rayburn's recommendations are backed by those of Dr. Manshadi.

If claimant was not at MMI in December 2014, wherein he needed additional treatment, it is difficult to find that he would be at MMI now, over two years later with almost no treatment and no improvement in his shoulder. Claimant worked the same position at Southern Iowa Mechanical before the December 2014 hearing and after, continuing as fire watch until March 2016.

There has been no documented improvement in his condition.

Upon review-reopening, the party bringing the claim has the burden to show a change in condition related to the original injury since the original award or settlement was made. The change may be either economic or physical. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Henderson v. Iles, 250 Iowa 787, 96

N.W.2d 321 (1959). A mere difference of opinion of experts as to the percentage of disability arising from an original injury is not sufficient to justify a different determination on a petition for review-reopening. Rather, claimant's condition must have worsened or deteriorated in a manner not contemplated at the time of the initial award or settlement before an award on review-reopening is appropriate. Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957). A failure of a condition to improve to the extent anticipated originally may also constitute a change of condition. Meyers v. Holiday Inn of Cedar Falls, Iowa, 272 N.W.2d 24 (Iowa App. 1978).

There is not sufficient evidence to find that claimant has had a change in his condition. He was not at MMI before under similar diagnostic conditions and therefore, he is not at MMI currently. He is entitled to an ongoing healing period award until such time as treatment can no longer reasonably be expected to improve his condition.

The other two issues include claimant's entitlement to medical benefits and alternate care. The medical care that claimant has been provided has been disappointing. The defendants waited over a year, until the appeal's decision affirmed the proposed arbitration decision, to provide medical care that was ordered in the arbitration decision.

During that time, claimant attempted to work through his pain. Once his supervisor at Southern Iowa Mechanical learned of the injury, claimant was sent home and advised to return when his shoulder was healed.

Claimant has not reached MMI and is currently not working. He is entitled to an ongoing healing period award. He is also entitled to temporary partial disability benefits during the time period he was working but not in a position that was substantially similar to his work prior to his injury.

It was previously found and upheld on appeal that claimant's work as a fire watch on the weekends was not substantially similar employment. While claimant did do increasingly more duties in 2014 and 2015, they were still on the weekend and still limited in scope.

Therefore it is determined that claimant's entitlement to temporary partial disability benefits continues from the date previously awarded up to the date of his termination on March 4, 2016. On March 5, 2016, up to the point at which claimant meets one of the three criteria in Iowa Code section 85.34.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v.

Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Claimant is entitled to reasonable care associated with his work injury. They have provided only some, not all, of the recommended care. Dr. Rayburn, an authorized treating physician, recommends physical therapy and other treatment modalities. Dr. Galles may disagree, but reasonable care would be the care recommended by the treating pain management physician. Dr. Galles, after all, referred claimant to Dr. Rayburn for further treatment.

When a designated physician refers a patient to another physician, that physician acts as the defendant employer's agent. Permission for the referral from defendant is not necessary. Kittrell v. Allen Memorial Hospital, Thirty-fourth Biennial Report of the Industrial Commissioner, 164 (Arb. November 1, 1979) (aff'd by industrial commissioner). See also Limoges v. Meier Auto Salvage, I Iowa Industrial Commissioner Reports 207 (1981).

Defendants have not provided that care. Claimant has expressed his disagreement with the denial of care.

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

Defendants argue that the alternate care request was a surprise and that claimants should have filed a petition for alternate care. The alternate care provisions provide a quick way in which a claimant can seek redress from the agency for requested care without availing themselves of a formal arbitration hearing. There is no law that alternate medical care petitions are the exclusive remedy for a petitioner seeking medical care. Iowa Code section 85.27(4) lays out the employer's responsibilities as it relates to medical services and supplies. It also states that the commissioner may, upon application and reasonable proofs of the necessity therefore allow and order care.

Further, the defendants did not object to the presentation of the alternate care claim.

Therefore, claimant is entitled to the care recommended by Dr. Rayburn and Dr. Manshadi.

Claimant also seeks reimbursement under Iowa Code section 85.39. Generally, claimants are allowed a single IME.

In Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009), claimant sought a second IME reimbursement in a second proceeding – a claim in review reopening. Reimbursement was denied where no second employer evaluation was obtained in the review-reopening and Kohlhaas was actually seeking to attack an evaluation performed in connection with an earlier and independent arbitration claim. In Thorson v. Larson Mfg. Co. Inc., 682 N.W.2d 448 (Iowa 2004), the court denied a straightforward claim for a second IME based on the plain language of the statute. While Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 847, (Iowa 2015), does take issue with some of the Thorson decision, there was no explicit overruling of the finding regarding disallowance of the second IME.

Claimant is not entitled to a second IME reimbursement under Iowa Code section 85.39.

The final issue is whether defendants are entitled to a credit. Defendants argue that they are entitled to a credit of benefits previously paid. They have paid 151 5/7 weeks of compensation at $508.20. They characterize this as permanency benefits. Claimant is not yet at MMI and therefore these payments are appropriately deemed temporary benefits.

The credit for the overpayment of the weekly rate is governed by Iowa Code section 85.34(5). As all the benefits paid are permanent benefits, Swiss Colony, Inc. Deutmeyer, 789 N.W.2d 129 (Iowa 2010) applies. The Supreme Court held,

> The plain language of section 85.34(5) directs that the overpayment of any weekly benefits be credited to payments for subsequent injuries. 'Any' is commonly understood to have broad application. See Merriam-Webster's Collegiate Dictionary 53 (10th ed.2002) (defining 'any' as 'every' or 'used to indicate one selected without restriction'); see also State v. Owens, 635 N.W.2d 478, 486 (Iowa 2001) (reading 'any state or federal statute' broadly); Fisher Controls Int'l, Inc. v. Marrone, 524 N.W.2d 148, 149 (Iowa 1994) (holding phrase 'any legal action' broader than 'an action'); Iowa Realty Co. v. Jochims, 503 N.W.2d 385, 386 (Iowa 1993) (interpreting 'antennas of any kind' not to create an ambiguity and to include satellite dishes). By using a word with an expansive import, we conclude that section 85.34(5) must be interpreted to apply to all overpayments of benefits, including an overpayment of weekly benefits and not simply an overpayment of the entire benefit award. As a result, Swiss Colony is only entitled to a credit for the overpayments against future benefits for a subsequent injury and not against future benefits for this injury.

Deutmeyer, p. 137.

According to Deutmeyer, defendants are not allowed a credit against any overpayments of past benefits. Defendants are entitled to a credit of temporary or

healing period benefits paid. Per the claimant's brief, defendants paid healing period benefits through July 31, 2014, and is therefore entitled to a credit of those payments. (Ex. 8, p. 1)

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay claimant temporary partial disability benefits beginning August 1, 2014, through March 4, 2016.

Defendants shall pay healing period benefits beginning March 5, 2016, and continuing until such time as claimant returns to work, returns to substantially similar work he was performing at the time of injury, or achieves maximum medical improvement, whichever occurs first.

All weekly benefits shall be paid at the stipulated rate of five hundred eight and 20/100 dollars ($508.20).

Defendants shall pay all accrued weekly benefits in a lump sum.

Defendants shall pay interest on any accrued weekly benefits pursuant to Iowa Code section 85.30.

Defendants shall provide the medical care recommended by Dr. Rayburn and Dr. Manshadi.

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Defendants are entitled to a credit of the benefits previously paid as laid out in claimant's briefs, pages 7-8.

Signed and filed this 22nd day of February, 2017.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JGL/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.