

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

COLEEN VIEYRA,

Claimant,

vs.

ABCM CORPORATION,

Self-Insured Employer,

Defendant.

FILE NO.: 21701101.01

ARBITRATION

DECISION

HEAD NOTE NOS.: 1108, 1402.30,
1802, 1803, 3000**STATEMENT OF THE CASE**

Claimant Coleen Vieyra filed a petition in arbitration seeking worker's compensation benefits against ABCM Corporation, self-insured employer, for an alleged work injury date of October 22, 2019. The case came before the undersigned for an arbitration hearing on November 17, 2022. Pursuant to an order of the Iowa Workers' Compensation Commissioner, this case proceeded to a live video hearing via Zoom, with all parties and the court reporter appearing remotely. The hearing proceeded without significant difficulties.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 17. Claimant testified on her own behalf. Rhonda Boelkes testified on behalf of the employer. The evidentiary record closed at the conclusion of the evidentiary hearing on November 17, 2022. The parties submitted post-hearing briefs on December 28, 2022, and the case was considered fully submitted on that date.

ISSUES

1. Whether claimant sustained an injury arising out of and in the course of her employment on October 22, 2019;
2. If so, whether claimant is entitled to temporary disability benefits;
3. Whether claimant is entitled to permanent partial disability benefits;
4. The proper rate of compensation;
5. Payment of medical expenses;

6. Payment of claimant's independent medical examination under Iowa Code section 85.39; and,
7. Taxation of costs.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Claimant's testimony was consistent as compared to the evidentiary record, and her demeanor at the time of hearing gave the undersigned no reason to doubt her veracity. Claimant is found credible.

At the time of hearing, claimant was a 40-year-old person. (Hearing Transcript, p. 8) Claimant is married and has two children. She graduated from high school in 2001. Prior to graduating from high school, claimant obtained her CNA (certified nursing assistant) certification. (Tr., p. 9) Most of claimant's work history involves working as a CNA, although she has also worked as a nanny. (Joint Exhibit 1, pp. 1-2)

Claimant started working at Concord Care Center in Garner, Iowa, on August 11, 2015. (Tr., pp. 9-10) Concord is an ABCM facility. (Jt. Ex. 16, p. 153; Deposition Transcript, p. 7) At the time of hearing, claimant was still employed as a CNA at Concord. (Tr., p. 10) As a CNA at Concord, claimant's job duties include assisting residents with dressing, grooming, toileting, transfer, ambulation, and eating and bathing needs in accordance with each resident's plan of care. (Jt. Ex. 2, p. 3) As such, the position requires the ability to lift over fifty pounds; twisting between 121 and 480 times per day; bending between 121 and 480 times per day; and heavy energy and endurance, among other physical abilities. (Jt. Ex. 2, p. 4) The job also involves a "slight likelihood" of significant traumatic bodily injury and/or significant injury from moving objects. (Jt. Ex. 2, p. 5) Claimant testified that her typical day includes helping the residents get up and dressed for the day, including showering and brushing their teeth; taking them back and forth to meals, either by wheelchair or assisting with ambulation; getting them up and down to change them; helping them lay down and get up to rest; and transferring them for other activities. (Jt. Ex. 16, p. 154; Depo. Tr., pp. 11-12)

At the time of the alleged injury, claimant worked the night shift, from 10:00 p.m. until 6:00 a.m. (Tr., p. 12) Prior to the date of the alleged injury, claimant had been off work for about six weeks after having bariatric surgery for weight loss. The night of October 21, 2019 was her first shift back to work after surgery. Prior to her return to work, claimant participated in core-strengthening exercises as part of her recovery from surgery. (Tr., pp. 36-37) Claimant testified that she had no physical complaints or pain at the beginning of her shift on October 21, 2019. (Tr., p. 13) Likewise, she has never had any issues with her right shoulder in the past. (Tr., p. 28) However, by the end of her shift the morning of October 22, 2019, she was experiencing "major burning" in her right shoulder, which she knew was not normal. At her deposition, claimant went into more detail, indicating that she was not sure exactly when she started to have shoulder

pain, but she started to have soreness around the middle of her shift. (Jt. Ex. 16, p. 158; Depo. Tr., pp. 25-27) She said at first she just figured she was out of shape since it was her first night back. (Jt. Ex. 16, p. 158; Depo. Tr., p. 27) However, by the end of her shift she had burning pain in her shoulder, and it was significant enough to report to her employer. (Tr., pp. 13-14)

She reported her symptoms that morning and was subsequently seen in the emergency room. (Tr., pp. 14-15; Jt. Ex. 2, p. 7) She reported to the emergency room doctor, Brian Kuchay, M.D., that she did not recall a single moment during her shift where there was an acute injury. (Jt. Ex. 6, p. 33) Rather, she reported a gradual onset of worsening right shoulder pain until she could no longer comfortably move the arm. After examination, Dr. Kuchay's impression was right shoulder impingement syndrome/rotator cuff tendinitis. (Jt. Ex. 6, p. 38) He recommended limited work and follow up with occupational medicine and physical therapy through workers' compensation.

On October 23, 2019, claimant saw Anthony Ellis, D.O., at Garner Medical Clinic. (Jt. Ex. 7, p. 43) Dr. Ellis noted that claimant was sent to the clinic as a workers' compensation claim. She reported injuring her shoulder on her first night back to work following gastric sleeve surgery, but no definite mechanism or incident for the injury was identified. Dr. Ellis prescribed physical therapy and medication, and released claimant to work with no use of her right arm. (Jt. Ex. 7, pp. 43; 46) At a follow up appointment on November 5, 2019, claimant reported no improvement, despite physical therapy and medication. (Jt. Ex. 7, p. 51) On physical examination, Dr. Ellis noted decreased range of motion in the right shoulder with obvious stiffness in putting her hand behind her head or behind her back. (Jt. Ex. 7, pp. 51-52) In fact, Dr. Ellis noted interval worsening since her prior visit. (Jt. Ex. 7, p. 52) He prescribed a shoulder immobilizer for one week while at work, to be followed by another appointment.

Claimant's next follow up was moved up due to her concerns that she was not being supported at work with her restrictions. (Jt. Ex. 7, p. 53) As such, she was seen on November 11, 2019. (Jt. Ex. 7, p. 54) Dr. Ellis recommended an MRI and possible referral for an orthopedic evaluation. (Jt. Ex. 7, p. 55) The MRI took place on November 22, 2019, and showed a mild bursal surface tear in the infraspinatus and supraspinatus tendon, and an anterior superior labral tear with paralabral cyst. (Jt. Ex. 13, pp. 139-140) At her follow up with Dr. Ellis on November 25, 2019, he also noted mild acromioclavicular arthropathy with undersurface spurring, although he had only received the preliminary MRI report at that time. (Jt. Ex. 7, p. 56) Dr. Ellis recommended an orthopedic referral pending receipt of the final MRI report. (Jt. Ex. 7, p. 57)

Defendants sent claimant for an independent medical examination (IME) with Charles Mooney, M.D., on December 3, 2019. (Jt. Ex. 8, p. 64) Dr. Mooney reviewed the medical records, including the MRI results, and interviewed claimant regarding her job duties, medical history, and symptoms related to the alleged shoulder injury. (Jt. Ex. 8, pp. 64-66) He noted that claimant reported increasing symptoms of right shoulder pain during her first shift back after bariatric surgery, but could not recall any specific

event or incident that caused her pain. (Jt. Ex. 8, p. 65) He also noted she reported no prior history of injury to her shoulder, although she did have a cervical fusion surgery in 2015. At the time of the IME, claimant told Dr. Mooney she had ongoing pain in the top of her shoulder, primarily burning, worse with activity. (Jt. Ex. 8, p. 66) She continued with physical therapy, with no improvement. On physical examination, he noted decreased range of motion on the right compared to the left, as well as pain with all motion. (Jt. Ex. 8, pp. 66-67) His assessment was right shoulder pain with underlying rotator partial-thickness tearing and SLAP lesion affecting the biceps anchor. (Jt. Ex. 8, p. 67)

Dr. Mooney answered specific questions provided by defendant employer. Regarding diagnosis, his opinion was that claimant demonstrated evidence of a labral tear of the right shoulder including the biceps anchor, and associated minor degeneration of the acromioclavicular joint with spurring and partial-thickness tearing of the superior rotator fibers. (Jt. Ex. 8, p. 67) Dr. Mooney opined that "the activities described as a CNA would not advance or aggravate the underlying condition." He further opined that the onset of claimant's symptoms was "coincidental" with her employment, and not caused by her work activity. Rather, he stated that the findings in her shoulder were "most consistent with a traumatic event despite the fact that she recalls none." (Jt. Ex. 8, p. 67) He agreed that she should see an orthopedic surgeon, however, and continue with restrictions for the right arm.

On December 9, 2019, claimant saw Dr. Ellis for follow up, noting that her condition had not improved, and she continued to have decreased range of motion and pain. (Jt. Ex. 7, p. 58) On December 10, 2019, defendant's representative sent claimant a letter denying her workers' compensation claim, based on Dr. Mooney's report. (Jt. Ex. 2, p. 9)

After her claim was denied, claimant sought care on her own with Lynn Lindaman, M.D., at Lindaman Orthopedics. (Jt. Ex. 9, p. 75) Claimant testified that Dr. Lindaman had previously treated one of her children, so she trusted him. (Tr., pp. 20-21) Her first visit with Dr. Lindaman took place on January 13, 2020. (Jt. Ex. 9, p. 75) She reported the same history of the shoulder injury as previously reported. Dr. Lindaman examined claimant and reviewed the MRI. (Jt. Ex. 9, p. 76) He discussed attempting to alleviate her discomfort nonoperatively prior to considering a labral repair, and claimant agreed to attempt a cortisone injection first, which was provided that day. (Jt. Ex. 9, p. 77)

On February 27, 2020, claimant was seen by Roger Barillas, ARNP at Dr. Mooney's office. (Jt. Ex. 8, pp. 68-72) The record indicates she reported a burning sensation extending from the right side of her neck down to her right upper arm into her elbow, along with numbness and tingling in her right arm and hand. (Jt. Ex. 8, p. 68) She reported the symptoms while working, and was sent to Dr. Mooney's office for evaluation. The record states she denied right shoulder pain at the time. (Jt. Ex. 8, pp. 69-70) After examination, ARNP Barillas did not find any cause for her symptoms, and advised she avoid heavy lifting over the weekend and follow up with Dr. Mooney the

following week. (Jt. Ex. 8, p. 71) Claimant returned on March 2, 2020, and saw Dr. Mooney. (Jt. Ex. 8, p. 73) At that time, Dr. Mooney noted her symptoms as a burning sensation over the lateral deltoid, associated with right shoulder motion. His assessment was symptomatic right rotator partial-thickness tear, and he opined that claimant had a temporary increase in her chronic shoulder symptoms, but had not had a significant aggravation of the underlying condition. (Jt. Ex. 8, p. 74) He also opined that the incident was consistent with an activity of daily living, rather than any direct injury, and released claimant to full duty.

Claimant returned to Dr. Lindaman on May 4, 2020. (Jt. Ex. 9, p. 78) She reported that the cortisone injection had not helped much, and she continued to have limited motion, especially overhead. She also continued to experience discomfort in the superior aspect of her shoulder and anterior to the shoulder. After examination and discussion, Dr. Lindaman recommended an arthroscopic evaluation and debridement and repair of the labrum. (Jt. Ex. 9, p. 79) As such, claimant had arthroscopic debridement and labral repair on June 24, 2020. (Jt. Ex. 9, pp. 80-82)

Claimant followed up with Dr. Lindaman on July 7, 2020. (Jt. Ex. 9, p. 83) She was still reporting discomfort but Dr. Lindaman said she was coming along well. (Jt. Ex. 9, p. 84) At her next appointment on August 13, 2020, her discomfort had significantly improved, but she reported a “fuzzy feeling” over the radial aspect of the radius at the distal third of the forearm. (Jt. Ex. 9, p. 86) Dr. Lindaman thought that was due to mild irritation of the sensory branch of the radial nerve due to traction on the arm during surgery. (Jt. Ex. 9, p. 87) He advised claimant to start physical therapy at that time, but continued to restrict her work as her CNA duties involved significant lifting and pushing.

Claimant began physical therapy and by her next appointment with Dr. Lindaman on September 24, 2020, she was making progress. (Jt. Ex. 9, p. 88) She had good stability, but Dr. Lindaman felt she should be pain free by that time, so he prescribed medication and additional physical therapy. (Jt. Ex. 9, p. 89) At her next visit on December 15, 2020, she reported being back to working full duty, and reported some additional shoulder pain. (Jt. Ex. 9, p. 90) She reported no instability or sharp pain, just a “general ache” when doing anything involving lifting or moving patients. Dr. Lindaman noted she could have some scarring and bursitis with the prior surgery, and provided another injection. (Jt. Ex. 9, p. 91) At that point she was released from his care to follow up as needed.

Claimant testified that after surgery with Dr. Lindaman, her pain never really went away. (Tr., p. 22) Eventually, she returned to Dr. Ellis. At her visit on April 6, 2021, she reported ongoing right shoulder pain. (Jt. Ex. 7, p. 60) She testified that Dr. Ellis suggested she see a pain management specialist at Iowa Specialty Pain Clinic. (Tr., p. 23) As such, claimant saw Shelley Wells, D.O., on August 2, 2021. (Jt. Ex. 10, p. 92) She reported right shoulder and neck pain, as well as weakness, numbness, and tingling in both arms, although the right was worse than the left. (Jt. Ex. 10, p. 93) Due to the issues in both arms, Dr. Wells was concerned her issues were related to her prior cervical fusion, and recommended an MRI of the cervical spine. (Jt. Ex. 10, p. 97) The

MRI showed some foraminal stenosis, which Dr. Wells opined was causing the pain into the shoulder region. (Jt. Ex. 10, p. 102) Claimant, however, felt the issue was with her right shoulder, and was referred for a second opinion with orthopedics.

Claimant saw Andrew Odland, M.D., on September 2, 2021, for chronic right shoulder pain. (Jt. Ex. 11, p. 103) She reported that her right shoulder pain returned after returning to work as a CNA, as well as some numbness and tingling in her right hand that was likely from her neck issues. After examination, Dr. Odland recommended a right shoulder MRI. (Jt. Ex. 11, p. 106) The MRI took place on September 20, 2021. (Jt. Ex. 13, p. 141) On follow up with Dr. Odland on October 7, 2021, he noted the MRI showed mild to moderate edema in the acromioclavicular joint and possibly a cyst in the distal clavicle, but no recurrent labral tear. (Jt. Ex. 11, p. 108) He felt her pain was likely coming from the acromioclavicular joint, and discussed a possible distal clavicle excision. Claimant opted to continue with nonoperative treatment at that time.

Claimant returned to Dr. Odland on December 2, 2021, at which time her pain had not improved. (Jt. Ex. 11, p. 109) She agreed to proceed with surgery, which took place on December 20, 2021. (Jt. Ex. 11, pp. 110-111) During surgery, additional issues were discovered, and Dr. Odland ultimately performed a right shoulder arthroscopic distal clavicle excision; arthroscopic excision of anterior subacromial spur; arthroscopic debridement of anterior labral fraying and arthroscopic debridement of low-grade undersurface supraspinatus tear involving less than 10 percent of the tendon thickness. (Jt. Ex. 11, p. 111)

Claimant followed up with Dr. Odland on December 30, 2021, at which time she was doing well. (Jt. Ex. 11, p. 115) She was instructed to begin physical therapy the following week. She called Dr. Odland's office on January 6, 2022, and requested to return to work doing office work only, which was approved. (Jt. Ex. 11, p. 116) By her next follow up appointment on February 3, 2022, she reported moderate pain, but no numbness like she had prior to surgery. (Jt. Ex. 11, p. 119) She felt she was making slow progress, so Dr. Odland provided a corticosteroid injection in the area of the distal clavicle excision, which was performed that day. (Jt. Ex. 11, p. 120) She continued with physical therapy, and at her next visit on March 10, 2022, she reported that her range of motion had improved significantly. (Jt. Ex. 11, p. 121) However, she continued to experience pain, although her pain was gradually improving. She also expressed concerns about returning to her regular work duties, especially lifting patients. However, she felt she would be able to perform her regular work duties three days per week, with light duty two days per week. Dr. Odland agreed, as he felt regular full-time work would result in too much lifting. (Jt. Ex. 11, p. 122)

Claimant returned for follow up on May 24, 2022. (Jt. Ex. 11, p. 123) The record of that date states claimant had been working 100 hours per week, but claimant clarified at hearing that she has never worked 100 hours per week. (Tr., p. 26) She thought Dr. Odland misunderstood as she likely told him she was working 100 hours per pay period, which is longer than a week. In any event, at that visit, she reported her only issues were a constant burning sensation, along with some soreness and tightness in her

shoulder. (Jt. Ex. 11, p. 123) She had good range of motion, and Dr. Odland advised she continue to protect the shoulder and “hopefully decrease the amount of manual labor.” (Jt. Ex. 11, p. 124) She was released from his care at that time, to follow up as needed or if things became worse.

Claimant testified that Dr. Odland told her that she should find a different job that would benefit her body better. (Tr., p. 26) She testified that at the time of hearing, she continued to have the burning pain in her shoulder, and has difficulty lifting her arm overhead without pain. (Tr., p. 27) She has trouble mowing the lawn, doing laundry, and doing dishes, but she continues to work at her job because she loves what she does.

Claimant saw Sunil Bansal, M.D., for an IME on September 28, 2022. (Jt. Ex. 12, p. 125) Dr. Bansal reviewed the medical records and interviewed claimant. (Jt. Ex. 12, pp. 125-135) Under the subjective portion of his report, Dr. Bansal noted that at the time of her injury, claimant had just returned from having weight loss surgery. (Jt. Ex. 12, p. 135) His record states that she had already done her full shift, and at the end of her shift, “after taking trash out, she felt pain and a pull in her right shoulder.” (Jt. Ex. 12, p. 135) On physical examination, he documented decreased range of motion on the right shoulder compared to the left. (Jt. Ex. 12, p. 136)

Dr. Bansal provided an impairment rating using the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Jt. Ex. 12, pp. 137-138) He provided a 7 percent upper extremity rating based on range of motion, and a 10 percent upper extremity rating for the distal clavicle resection. (Jt. Ex. 12, p. 137) Combined, this results in a total impairment of 16 percent of the upper extremity. (Jt. Ex. 12, p. 138)

With respect to causation, Dr. Bansal opined that claimant’s injury occurred while working. He noted that she had “just returned from a period of convalescence from her weight loss surgery, implying a generalized state of deconditioning.” (Jt. Ex. 12, p. 138) He then stated that against that backdrop, “she threw out trash at the end of her shift and felt pain in her right shoulder. Throwing trash would necessitate the shoulder being in a rotated and abducted position, stressing the labrum.” He recommended restrictions of no lifting greater than 15 pounds with the right arm, and no overhead lifting with the right arm. He also noted she may benefit from intermittent steroid injections to the right shoulder for maintenance in the future.

At hearing, claimant was questioned regarding whether she told Dr. Bansal that she felt a pop in her shoulder while taking out trash at work. (Tr., pp. 43-44) Claimant denied ever telling Dr. Bansal that she felt a pop while taking out trash. (Tr., p. 44) Claimant consistently testified in both her deposition and at hearing that her shoulder pain came on gradually over the course of her shift, intensifying and becoming a burning pain at the end of her shift. (Tr., pp. 41-44; Jt. Ex. 16, p. 158; Depo. Tr., pp. 25-28) This is also consistent with her statements to medical providers over the course of her treatment. Claimant clarified that taking out the trash at the end of her shift was a part of her work duties, but she did not feel a pop when taking out the trash on the date of injury. (Tr., p. 46) She testified taking out the trash happens at the very end of the

shift, and involves consolidating the trash from of all her patients' rooms, including soiled disposable undergarments, which makes it somewhat heavy. (Tr., pp. 49-50) The trash then goes into a dumpster, which requires that she throw the trash bag over the top of the dumpster. (Tr., p. 50) Claimant did recall mentioning to Dr. Bansal that removing the trash was part of her job duties, but again, she denies telling him she felt a pop.

It should be noted that Dr. Bansal's report does not actually mention anything about claimant reporting or feeling a pop in her shoulder. His report states that she felt pain and a pull in her right shoulder, after taking out the trash. (Jt. Ex. 12, p. 135) This is fairly consistent with claimant's testimony, as she has repeatedly stated that she started to feel general soreness about midway through her shift, but it was not until the end of her shift she experienced more severe, burning pain. Considering she takes out the trash at the end of her shift, it is accurate to say she felt pain after taking out the trash. Claimant does not relate her injury to the specific incident of taking out the trash, but Dr. Bansal pointed out that the motion of throwing the trash would stress the labrum, which is where the tear occurred. I find this a more likely explanation for claimant's injury than that offered by Dr. Mooney, which is to say she experienced a traumatic event that she does not recall. (Jt. Ex. 8, p. 67) I also do not find Dr. Mooney's opinion that claimant's work activities as a CNA would not advance or aggravate her shoulder condition to be convincing, especially in light of the other medical evidence in the record. It is especially clear that claimant's work as a CNA can cause stress to her shoulder when considering Dr. Lindaman's advice that claimant continue to protect the shoulder and try to decrease the amount of manual labor she performs. (Jt. Ex. 11, p. 124) Finally, there is no evidence that claimant had any prior issues with her right shoulder, and she testified that she did not have any pain or issues at the start of her shift on the date of injury. Based on all of the evidence in the record, I find that claimant has met her burden to prove her right shoulder injury arose out of and in the course of her employment.

Because claimant's injury arose out of and in the course of employment, she is entitled to medical benefits pursuant to Iowa Code section 85.27. She is also entitled to healing period benefits as stipulated by the parties. (Hearing Report) Claimant is also entitled to permanent partial disability benefits. The only impairment rating in the record is Dr. Bansal's rating. Defendant argues that Dr. Bansal's rating is inconsistent with the AMA Guides due to improper calculation of impairment for the distal clavicle resection. I agree with defendant to the extent that Dr. Bansal did not properly apply the 25 percent multiplier for rating the distal clavicle resection, as required by the Guides. As such, I find that portion of the rating should be reduced from 10 percent to 2.5 percent. Combined with the 7 percent rating related to range of motion, claimant is entitled to 10 percent permanent impairment of the shoulder, which is equal to 40 weeks of benefits.

The parties also dispute the proper rate calculation. Rhonda Boelkes testified on behalf of the employer. Ms. Boelkes is the corporate benefit supervisor for the employer. (Tr., p. 56) Ms. Boelkes testified that claimant is paid twice per month, on the 10th and 25th, unless that day falls on a weekend or holiday. (Tr., p. 60) Looking at the rate calculations provided by the parties, I find claimant's calculation to be a more

accurate representation of the hours claimant customarily worked. (See Jt. Ex. 17) As such, I find the proper rate to be \$410.31.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3)(e). 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, 150 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309, 311 (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, 128 (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 at 311. 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, 3 (Iowa 2000); Miedema, 551 N.W.2d at 311. 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 at 150. An employee does not cease to be in the course of employment merely because the employee is not actually engaged in doing some specifically prescribed task, if, in the course of employment, the employee does some act which he or she deems necessary for the benefit or interest of the employer. United Parcel Serv. v. Miller, No. 99-1596, 2000 WL 1421800, at *1 (Iowa Ct. App. Sept. 27, 2000) (citing Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979)).

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).

I found that claimant met her burden to prove her right shoulder injury arose out of and in the course of her employment. I found Dr. Bansal's opinion regarding causation to be more convincing and consistent with the other evidence in the record. Because claimant's injury arose out of and in the course of her employment, she is entitled to healing period benefits as stipulated by the parties.

I also found that claimant is entitled to permanent partial disability benefits. Dr. Bansal's rating is the only rating in the record. However, Dr. Bansal's rating is inconsistent with the AMA Guides due to improper calculation of impairment for the distal clavicle resection. Dr. Bansal did not properly apply the 25 percent multiplier for rating the distal clavicle resection, as required by the Guides. Table 16-27 of the AMA Guides governs impairment of the upper extremities after arthroplasty of specific bones and joints. Under Table 16-27, a distal clavicle excision is assigned ten percent impairment.

Page 498 of the AMA Guides directs the examining physician as follows:

Conditions not previously described that can contribute to impairments of the hand and upper extremity include bone and joint disorders (Section 16.7a), presence of resection or implant arthroplasty (Section 16.7b), musculotendinous disorders (Section 16.7c) and tendinitis (Section 16.7d), and loss of strength (Section 16.8). The severity of the impairment due to these disorders is rated separately according to Tables 16-19 through 16-30 and then multiplied by the relative maximum value of the unit involved as specified in Table 16-18. . . .

Under Table 16-18, the appropriate multiplier for the acromioclavicular joint is 25 percent. This results in a 2.5 percent impairment for a distal clavicle excision under the plain text of the AMA Guides. I found claimant sustained 7 percent permanent impairment for loss of range of motion, and an additional 2.5 percent impairment for the distal clavicle excision. Using the Combined Values Chart at page 604 of the AMA Guides, claimant has sustained 10 percent permanent impairment of the shoulder, which is equal to 40 weeks of benefits. I found claimant's rate calculation to be more a more accurate representation of claimant's earnings. As such, all benefits shall be paid at the weekly benefit rate of \$410.31.

Because claimant's injury arose out of and in the course of employment, defendant is responsible for all medical expenses and mileage incurred in claimant's treatment. Under Iowa law, once defendant denied compensability for claimant's alleged injuries, it lost the right to choose the medical providers for that care during the period of denial. "[T]he employer has no right to choose the medical care when compensability is contested." Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010). Further, when compensability is contested, "the employer cannot assert an authorization

defense in response to a subsequent claim by the employee for the expenses of the alternate medical care.” R. R. Donnelly & Sons v. Barnett, 670 N.W.2d at 197-198 (Iowa 2003). As such, defendant is responsible for all medical care claimant has received related to the work injury.

Claimant is not entitled to reimbursement for medical bills unless claimant shows that they were paid from her own funds. See Caylor v. Employers Mutual Casualty Co., 337 N.W.2d 890 (Iowa Ct. App. 1983). Otherwise, claimant is entitled only to an order directing the responsible defendant to make such payments directly to the provider. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Where medical payments are made from a plan to which the employer did not contribute, the claimant is entitled to a direct payment. Midwest Ambulance Service v. Ruud, 754 N.W.2d 860, 867-68 (Iowa 2008) (“We therefore hold that the commissioner did not err in ordering direct payment to the claimant for past medical expenses paid through insurance coverage obtained by the claimant independent of any employer contribution.”) See also: Carl A. Nelson & Co. v. Sloan, (Iowa App. 2015) 873 N.W.2d 552 (Iowa App. 2015) (Table) 2015 WL 7574232 15-0323. As such, defendant shall reimburse claimant for all out of pocket medical expenses, and hold claimant harmless for any claim made by her health insurance company.

Claimant seeks reimbursement for Dr. Bansal’s IME under Iowa Code section 85.39, and taxation of costs. Iowa Code section 85.39(2) states, in relevant part:

If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee’s own choice, and reasonably necessary transportation expenses incurred for the examination.

The Iowa Workers’ Compensation Commissioner has noted that the Iowa Supreme Court adopted a strict and literal interpretation of Iowa Code section 85.39 in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015) (hereinafter “DART”). See Cortez v. Tyson Fresh Meats, Inc., File No. 5044716 (Appeal December 2015). If an injured worker wants to be reimbursed for the expenses associated with a disability evaluation by a physician selected by the worker, the process established by the legislature must be followed. This process permits the employer, who must pay the benefits, to make the initial arrangements for the evaluation and only allows the employee to obtain an independent evaluation at the employer’s expense if dissatisfied with the evaluation arranged by the employer. DART, 867 N.W.2d at 847 (citing Iowa Code § 85.39). This includes an employer-chosen physician’s opinion that there was no causation, as such an opinion is tantamount to a

zero percent impairment rating. Kern v. Fenchel, Doster & Buck, P.L.C., 966 N.W. 2d. 326 (Iowa Ct. App., 2021).

In this case, the employer sought an opinion from Dr. Mooney regarding causation on December 3, 2019. Dr. Mooney opined the injury was not work related, and his opinion is tantamount to a zero percent impairment rating. Id. Claimant's IME with Dr. Bansal took place on September 28, 2022. As such, claimant is entitled to reimbursement for \$2,993.00, the full cost of the IME, under Iowa Code section 85.39.

With respect to the remainder of costs, assessment of costs is a discretionary function of this agency. Iowa Code § 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 find that claimant was generally successful in her claim, and an award of additional costs is appropriate. I exercise my discretion and award claimant the cost of the filing fee in the amount of \$103.00, and service in the amount of \$14.76, for a total of \$117.76.

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the rate of four hundred ten and 31/100 dollars (\$410.31).

Defendant shall pay claimant healing period benefits from June 24, 2020 through August 24, 2020, and from December 20, 2021 through January 6, 2022, as stipulated on the hearing report.

Defendant shall pay claimant forty (40) weeks of permanent partial disability benefits, commencing on the stipulated date of January 6, 2022.

Defendant shall be entitled to a credit for any benefits previously paid.

Defendant shall pay accrued weekly benefits in a lump sum together with interest 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 percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).


Defendant shall reimburse claimant for all out of pocket medical expenses, and hold claimant harmless for any claim made by her health insurance company.

Defendant shall reimburse Dr. Bansal's IME fee in the amount of two thousand nine hundred ninety-three and 00/100 dollars (\$2,993.00).

Defendant shall reimburse claimant's costs in the total amount of one hundred seventeen and 76/100 dollars (\$117.76)

Defendant 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.

Signed and filed this 27th day of July, 2023.


JESSICA L. CLEEREMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Janece Valentine (via WCES)

Chris Scheldrup (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.