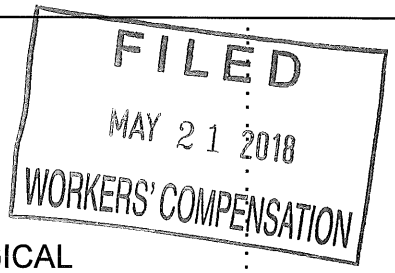
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



KENNETH VEACH, Claimant, vs. WARTBURG THEOLOGICAL SEMINARY, Employer, and TRAVELERS INDEMNITY COMPANY OF CT, Insurance Carrier, Defendants.	File Nos. 5058356, 5058357 ARBITRATION DECISION Head Note Nos.: 1803

STATEMENT OF THE CASE

Claimant, Kenneth Veach, filed petitions in arbitration seeking workers' compensation benefits from Wartburg Theological Seminary, (Wartburg), employer, and Travelers Indemnity Company of Connecticut, Insurer, both as defendants. This matter was heard on March 21, 2018 with a final submission date of April 11, 2018.

The record in this case consists of Joint Exhibits 1 through 11, Claimant's Exhibits 1 through 5, Defendants' Exhibits A through F, and the testimony of claimant.

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.

ISSUES

For File No. 5058356 (Date of Injury, November 10, 2014):

1. The extent of claimant's entitlement to permanent partial disability benefits.

For File No. 5058357 (Date of Injury, November 11, 2015):

2. Whether the injury is the cause of permanent disability regarding the left shoulder.

3. The extent of claimant's entitlement to permanent partial disability benefits.

FINDINGS OF FACT

Claimant was 58 years old at the time of hearing. Claimant graduated from high school. Claimant has worked in construction and as a laborer. Claimant began with Wartburg in 1988 as a maintenance assistant.

Claimant testified he has a wide range of job duties as a maintenance assistant. They include, but are not limited to, performing vehicle maintenance, snow removal, mowing, plumbing, electrical, carpentry, maintenance to heating and cooling systems, and repair of sewer systems. Claimant testified the job description of a maintenance assistant, found at Claimant's Exhibit 4 is an accurate description of his job duties.

Claimant's prior medical history is relevant. Claimant testified that he had a left shoulder injury in a 1976 motorcycle accident. Claimant had surgery on his shoulder approximately one year after the accident. There is no evidence in the record that claimant had any permanent impairment or permanent restrictions from the injury or surgery. (Joint Exhibit 4, page 11)

On November 10, 2014, a front loader fell on claimant forcing him to the ground. Claimant said the accident injured both knees.

On December 15, 2014, claimant was evaluated by Erin Kennedy, M.D., following an MRI. An MRI of both knees showed degenerative changes. (Jt. Ex. 1, p. 3)

In a January 20, 2015 letter, Scott Schemmel, M.D., an orthopaedic surgeon, opined that claimant had work-related meniscal tears in both knees. (Jt. Ex. 1, p. 5)

On February 18, 2015, claimant underwent partial meniscectomies on both knees. Surgery was performed by Dr. Schemmel. (Jt. Ex. 2, pp. 6-9)

In a July 24, 2015 report, Dr. Schemmel found that claimant was at maximum medical improvement (MMI) as of June 9, 2015. He opined that claimant had a 10 percent permanent impairment to the knees based upon the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, page 546, Table 17-33. (Jt. Ex. 3)

On November 11, 2015, claimant slipped and fell on stairs at a Wartburg housing unit. Claimant said he reached out to catch himself from falling and strained both of his shoulders.

On January 4, 2016, claimant underwent a right shoulder MRI. It showed a full thickness supraspinatus tear. On January 11, 2016, claimant underwent a left shoulder MRI. It showed a small full thickness tear. Records indicate that claimant had pain in both shoulders in December 2015 and January 2016 with difficulty with sleep. (Jt. Ex. 7, pp. 20-21)

On January 28, 2016, claimant was evaluated by Dr. Schemmel. Claimant had pain in both shoulders. (Jt. Ex. 4, p. 11)

On February 15, 2016, Dr. Schemmel performed a rotator cuff repair on claimant's right shoulder. (Jt. Ex. 5)

On July 21, 2016, claimant was seen in follow up by Dr. Schemmel. Claimant's right and left shoulders had good range of motion. Dr. Schemmel did not anticipate doing surgery on claimant's left shoulder, but would consider it in the future if symptoms persisted. (Jt. Ex. 6, p. 16)

On September 14, 2016, claimant was evaluated by Julie Muenster, ARNP. Claimant was working without restrictions. Claimant still had soreness in both shoulders. Claimant was found to be at MMI. (Jt. Ex. 6, p. 19)

On November 1, 2016, claimant was evaluated by Dr. Kennedy for a permanent impairment rating. Claimant had bilateral shoulder pain between zero to 3, on a scale where 10 is excruciating pain. Claimant had some difficulty with reaching due to limitations and range of motion in both shoulders. Dr. Kennedy, using the Guides at Chapter 16, found claimant had a permanent impairment to the right shoulder due to loss of range of motion. She found that claimant had a 10 percent permanent impairment to the right shoulder, converting to a 6 percent permanent impairment to the body as a whole. (Jt. Ex. 8, pp. 26-28)

Dr. Kennedy opined that claimant's reduction in range of motion in the left shoulder pre-existed the November 11, 2015 injury. She opined that claimant's left shoulder problems were the result of degenerative changes and past surgery. For that reason, she did not rate claimant's left shoulder. (Jt. Ex. 8, p. 28)

In an August 23, 2017 report, Robin Sassman, M.D., gave her opinions of claimant's condition following an independent medical evaluation (IME). Dr. Sassman assessed claimant as having a right shoulder rotator cuff tear and a rotator cuff repair, and a left rotator cuff tear. She also assessed claimant having a left and right partial medial meniscectomies. Dr. Sassman opined claimant had a bilateral shoulder injury as a result of the November 11, 2015 fall. She found claimant at MMI as of February 18,

2016 for the knee injuries, and at MMI for the shoulders on February 15, 2017. (Cl. Ex. 2, p. 6-17)

Regarding the knees, Dr. Sassman found claimant had a 10 percent permanent impairment to the right knee and a 9 percent permanent impairment to the left knee. Dr. Sassman opined that claimant has a combined value of 7 percent permanent impairment to the body as a whole for the bilateral knee injuries. Dr. Sassman indicated she used Tables 17-3, 17-10, and 17-31 of the Guides to reach her opinions of permanent impairment to the knees.

Dr. Sassman found that claimant had a 14 percent permanent impairment to the right upper extremity. She found that claimant had a 13 percent permanent impairment to the left upper extremity. Combined values resulted in a 15 percent permanent impairment to the body as a whole following the bilateral shoulder injuries. (Jt. Ex. 2, pp. 18-19)

On September 20, 2017, claimant was evaluated by Dr. Kennedy for the left shoulder. Claimant injured his left shoulder while unloading a door off a delivery truck. Claimant was assessed as having left shoulder pain. He was treated with medication. (Jt. Ex. 9, pp. 29-30)

Claimant testified he has lost strength and range of motion in both shoulders. He says that his shoulder symptoms make sleeping difficult. He said he has difficulty going up and down stairs due to his knees.

Claimant said that because of his shoulder limitations, shoveling snow is difficult. He said that he is able to get help with his job when he needs it, because of his shoulder issues. Claimant said that he could not return to work in construction given his limitations with his shoulders.

Claimant said his shoulder symptoms limit him in his recreational activities.

Claimant testified he returned to work after all surgeries to his job as maintenance assistant. He said that, at the time of hearing, he was earning more per hour than he did at the time of injury.

CONCLUSIONS OF LAW

The first issue to be determined is whether claimant's injury to his left shoulder, on November 11, 2015 resulted in a permanent disability.

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 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).

Regarding the bilateral shoulder injuries, two experts have opined regarding permanent impairment to claimant's left shoulder.

Dr. Sassman evaluated claimant on one occasion for an IME. Dr. Sassman found claimant had a 14 percent permanent impairment to the right extremity and a 13 percent permanent impairment to the left upper extremity. (Cl. Ex. 2, pp. 18-19)

Dr. Kennedy evaluated claimant for a permanent impairment evaluation. She found claimant only had permanent impairment to the right shoulder. She opined that claimant had no permanent impairment to the left shoulder as claimant had a pre-existing problem on the left due to surgery and a degenerative condition. (Jt. Ex. 8, pp. 26-28)

Dr. Kennedy's opinions regarding permanent impairment to the left shoulder are problematic. Claimant had a shoulder injury in approximately 1976. He had shoulder surgery approximately one year later. There is no medical record in evidence indicating claimant had any permanent impairment or permanent restrictions from the 1976-1977 left shoulder injury/surgery. There is no evidence of any kind in the record that claimant had any permanent impairment or permanent restrictions regarding the 1976 left shoulder injury. Both Dr. Sassman and Dr. Kennedy indicated claimant had limitations in the left shoulder. Based on this, it is found the opinions of Dr. Kennedy regarding permanent impairment of the left shoulder are found not convincing

As noted above, Dr. Sassman opined that claimant had a 15 percent permanent impairment to the body as a whole given the combined values of the right and left shoulder. Based on this, it is found that claimant has a 15 percent permanent impairment to the body as a whole for his bilateral shoulder injury.

The next issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

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 R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

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.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

Benefits for permanent partial disability of two members caused by a single accident is a scheduled benefit under section 85.34(2)(s); the degree of disability must be computed on a functional basis with a maximum benefit entitlement of 500 weeks. Simbro v. DeLong's Sportswear, 332 N.W.2d 886 (Iowa 1983).

Regarding claimant's knee injuries, two experts have opined regarding the degree of permanent impairment for claimant's bilateral knee injuries.

Dr. Schemmel treated claimant for an extended period of time and performed the bilateral knee surgeries. He opined claimant had a 10 percent permanent impairment to both knees based on Table 17-33 of the Guides. He found that claimant had a 4 percent permanent impairment to the body as a whole. (Jt. Ex. 3, p. 10)

Claimant underwent medial meniscectomies on both knees. Table 17-33 does not appear to align with any of the knee conditions regarding claimant.

Dr. Sassman opined claimant had a 9 percent permanent impairment to the left knee, and a 10 percent permanent impairment to the right. She found the combined values resulted in a 7 percent permanent impairment to the body as a whole based on Table 17-3, 17-10, and 17-31.

Claimant's condition does not appear to apply to any of the knee problems detailed in Table 17-33. In addition, it appears Dr. Schemmel did not properly use the combined values tables, found at page 604 of the Guides and Table 17-3. I am able to follow Dr. Sassman's opinions regarding permanent impairment of both knees using Table 17-3, 17-10, and 17-31. Given this record, it is found that Dr. Sassman's opinion regarding permanent impairment to the bilateral lower extremity injury is more convincing than that of Dr. Schemmel.

Based on this, it is found that claimant has a 7 percent permanent impairment to the body as a whole for his bilateral knee injuries. Claimant is due 35 weeks of permanent partial disability benefits for this injury (7 percent x 500 weeks).

Regarding claimant's entitlement to benefits for his bilateral shoulder injury, claimant was 59 years old at the time of hearing. He graduated from high school. He worked in construction. He has worked as a laborer. Claimant works at Wartburg as a maintenance assistant.

Claimant has a 15 percent permanent impairment to the body as a whole from his bilateral shoulder injury. Claimant has no permanent restrictions for his job at the time of hearing. Claimant returned to work at the same job he had before his injury. Claimant earns more per hour at the time of hearing than he did at the time of injury.

Claimant's unrebutted testimony is that he has to alter, somewhat, the way he works at Wartburg due to his bilateral shoulder injuries. Claimant has difficulties with some tasks, like snow removal. Claimant's unrebutted testimony is that, given difficulties with his shoulders, he cannot return to his prior job in construction.

When all relevant factors are considered, it is found claimant has a 20 percent industrial disability, or loss of earning capacity, due to his shoulder injury of November 11, 2015.

ORDER

THEREFORE, IT IS ORDERED:

For File No. 5058356 (Date of Injury, November 10, 2014):

That defendants shall pay claimant thirty-five (35) weeks of permanent partial disability benefits at the rate of four hundred fifty-nine and 91/100 dollars ($459.91) per week commencing on March 3, 2015.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits as ordered above and as set forth in Iowa Code section 85.30.

That defendants shall receive a credit for benefits previously paid.

Regarding File No. 5058357 (Date of Injury, November 11, 2015):

That defendants shall pay one hundred (100) weeks of permanent partial disability benefits at the rate of four hundred seventy and 30/100 dollars ($470.30) per week commencing on May 23, 2016.

That defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten (10) percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two (2) percent. (See Gamble v. AG Leader Technology, File No. 5054686 (App. April 24, 2018).

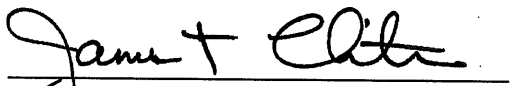
That defendants shall receive a credit for benefits previously paid.

Regarding both File Nos. 5058356 and 5058357:

That defendants shall pay costs.

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

Signed and filed this 21st day of May, 2018.



JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Dirk Hamel
Attorney at Law
770 Main St.
Dubuque, IA 52001-6820
dhamel@dbqlaw.com

Tonya A. Oetken
Attorney at Law
PO Box 64093
St. Paul, MN 55164-0093
Toetken@travelers.com

JFC/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.