

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KELLY VAN VALKENBURG,

Claimant,

vs.

BRIDGESTONE AMERICAS, INC.,

Employer,

and

OLD REPUBLIC INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 19003419.01

ARBITRATION DECISION

Head Note Nos.: 1108.50, 1402.40,
1803, 2907

STATEMENT OF THE CASE

Kelly Van Valkenburg, claimant, filed a petition in arbitration seeking workers' compensation benefits from Bridgestone Americas, Inc., employer and Old Republic Insurance Company, both as defendants. Hearing was held via Zoom on January 19, 2023.

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. The parties are now bound by their stipulations.

Claimant, Kelly Van Valkenburg was the only witness to testify live at trial. The evidentiary record also includes joint exhibits 1-4, claimant's exhibits 1-3 and defendant's exhibits A-E. All exhibits were received without objection. The evidentiary record closed at the conclusion of the arbitration hearing. The parties chose not to submit post-hearing briefs. Therefore, this case was considered fully submitted on January 19, 2023.

ISSUES

The parties submitted the following issues for resolution:

1. The amount of permanent partial disability benefits claimant is entitled to receive as the result of the stipulated June 26, 2019 shoulder injury.
2. Whether an assessment of costs against the defendants is appropriate.

FINDINGS OF FACT

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

Claimant, Kelly Van Valkenburg, sustained an injury to his right shoulder on June 26, 2019, while working as a maintenance worker for Bridgestone Americas, Inc. ("Bridgestone"). At the time of the injury, Mr. Van Valkenburg was squatting, using a pry bar when the pry bar slipped and caused him to fall to his knees onto the floor. He felt some discomfort in his right shoulder. (Testimony)

Mr. Van Valkenburg received treatment for his injury. (Testimony) An MRI of the right shoulder was performed in August 2019 which revealed full-thickness rotator cuff tearing involving central subscapularis tendon, partial thickness articular sided tearing of the supraspinatus, and signal changes in posterior and posterior inferior glenoid labrum. (JE1, p. 1) Steven A. Aviles, M.D. performed right shoulder arthroscopy surgery on September 26, 2019. (JE3) Dr. Aviles placed Mr. Van Valkenburg at maximum medical improvement (MMI) on January 29, 2020. (JE2, p. 21)

Mr. Van Valkenburg testified that the surgery improved his shoulder pain, but he feels he has not had a complete recovery. He still has shoulder pain and difficulty with overhead work. Since the injury, he does not perform heavy contact tasks at work. He receives help from his coworkers. (Testimony) The work injury to his right shoulder resulted in permanent disability. (Hearing Report)

The central dispute in this case is the amount of permanent disability Mr. Van Valkenburg sustained as the result of the injury. Three physicians have rendered their opinions regarding permanent functional impairment in this case.

Dr. Aviles assigns 2 percent upper extremity impairment. (JE 2, p. 21) Although Dr. Aviles cites the AMA Guides to the Evaluation of Permanent Impairment Fifth Edition, he unfortunately does not cite to a specific section or table of the Guides. Without specific citations to portions of the Guides it is difficult for the undersigned to determine the method and bases he used to assign impairment to determine if his rating is consistent with the Guides.

Jacqueline M. Stoken, D.O. was another physician to render an opinion regarding impairment. She conducted an IME at the request of claimant's attorney. In contrast to Dr. Aviles, Dr. Stoken did cite to specific sections of the Guides; however, I find her impairment rating is not consistent with the Guides.

Dr. Stoken provides her impairment rating without explanation or confirmation that the impairment due to loss of strength is based on unrelated etiologic or pathomechanical causes. Additionally, the Guides state that the results of strength testing should be reproducible on different occasions or by two or more trained observers. The Guides, Section 16.8c. I find that Dr. Stoken only saw Mr. Van Valkenburg on one occasion and there is no evidence that the results were observed by two or more trained observers. Thus, I find Dr. Stoken's opinion regarding permanent

functional impairment is not consistent with the Guides and therefore is not based solely on the Guides and cannot be relied upon.

The third physician to provide an impairment rating is Peter G. Matos, D.O. At the request of the defendants, he performed an independent medical examination on November 18, 2022. (Def. Ex. E, pp. 3-8) Dr. Matos assigned 3 percent upper extremity impairment pursuant to the AMA Guides due to the work injury. Dr. Matos provided specific citations and measurements to show how he reached the 3 percent rating. Dr. Matos utilized Table 16-40 on p. 476 to assign 1 percent upper extremity impairment due to flexion to 160 degrees; table 16-43 on p. 477 to assign 1 percent upper extremity impairment due to abduction to 160 degrees; and table 16-46 on p. 479 to assign 1 percent upper extremity impairment due to internal rotation (IR) to 70 degrees. (Def. Ex. E, p. 5) I find that Dr. Matos' impairment rating is consistent with the Guides. Thus, I find Mr. Van Valkenburg has demonstrated by a preponderance of the evidence that he sustained 3 percent impairment of his right upper extremity due to the stipulated work injury.

CONCLUSIONS OF LAW

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).

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). In determining the extent of permanent disability sustained in a scheduled member injury,

“the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment.” Iowa Code section 85.34(2)(x). Moreover, “Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment ... when determining functional disability.” Iowa Code section 85.34(2)(x).

This agency has cautioned against impairment ratings that do not comply with the Guides. See Hill v. Vermeer Corporation, File No. 5066032 (App. January 30, 2020). That decision states:

[T]he AMA Guides caution physicians against assigning impairment for loss of strength. Section 16.8 on page 507 provides the AMA Guides do not assign a large role to strength measurements due to the fact strength measurements are functional test influenced by subjective factors that are difficult to control. Review of Section 16.8a of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, page 508, indicates:

In a rare case, if the examiner believes the individual's loss of strength represents an impairing factor that has not been considered adequately by other methods in the *Guides*, the loss of strength may be rated separately. An example of this situation would be loss of strength due to a severe muscle tear that healed leaving a palpable muscle defect. If the examiner judges that loss of strength should be rated separately in an extremity that presents other impairments, the impairment due to loss of strength could be combined with the other impairments, only if based on unrelated etiologic or pathomechanical causes. *Otherwise, the impairment ratings based on objective anatomic findings take precedence.* Decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities, or absence of parts (eg, thumb amputation) that prevent effective application of maximal force in the region being evaluated.

See Hill, at p. 4.

Based on the above findings of fact, I conclude that claimant sustained 3 percent impairment of the right upper extremity as the result of the work injury.

The parties have stipulated that claimant's injury should be compensated as a shoulder under section 85.34(2)(n). The Commissioner has concluded that it is appropriate to apply the upper extremity impairment rating for a shoulder injury. See Deng v. Farmland Foods, Inc., File No. 5061883 (App., September 29, 2020). See also; Chavez v. MS Technology, LLC, File No. 5066270 (App., September 30, 2020); Smidt v. JKB Restaurants, LC, File No. 5067766 (App., December 11, 2020).

The shoulder is specifically noted as a scheduled member injury in Iowa Code section (2)(n). According to the statute, the shoulder is compensated on a 400-week schedule. Iowa Code section 85.34(2)(n). Having found claimant proved a 3 percent

permanent impairment of the shoulder, I conclude claimant is entitled to an award of 12 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(n). Prior to the hearing, defendants paid claimant 8 weeks of permanent partial disability benefits at the stipulated rate. (Hearing Report) Defendants shall be entitled to credit for the weekly benefits paid to date. Thus, defendants shall pay an additional 4 weeks of permanent partial disability benefits.

The final disputed issue is whether costs should be assessed against the defendants. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. Claimant has prevailed on the disputed issues submitted for resolution. Therefore, I conclude it is appropriate to assess claimant's costs against defendants in some amount. Mr. Van Valkenburg submitted a request for the filing fee. Filing fees are reasonable and appropriate costs pursuant to rule 876 IAC 4.33(7). I conclude it is reasonable to assess the filing fee in the amount of \$100.30. In total, I conclude that defendants should be assessed and reimburse costs totaling \$100.30.

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of nine hundred eighty-eight and 21/100 dollars (\$988.21).


Defendants are responsible for twelve (12) weeks of permanent partial disability benefits commencing on the stipulated commencement date of January 29, 2020. Prior to the hearing, defendants paid claimant eight (8) weeks of permanent partial disability benefits at the stipulated rate. (Hearing Report) Defendants shall be entitled to credit for the weekly benefits paid to date. Thus, defendants shall pay an additional four (4) weeks of permanent partial disability benefits.

Defendants 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.

Defendants shall reimburse claimant costs as set forth above.

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.

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


ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Jerry Jackson (via WCES)

Timothy Wegman (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.