BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CHAD LEWIS, Claimant, vs. HY-VEE, INC., Employer, and UNION INSURANCE COMPANY OF PROVIDENCE, Insurance Carrier, Defendants.	File No. 19700629.01 ARBITRATION DECISION Head Note Nos.: 1402.40, 2907

STATEMENT OF THE CASE

Claimant Chad Lewis filed a petition in arbitration seeking workers' compensation benefits from defendants Hy-Vee, Inc., employer, and Union Insurance Company of Providence, insurer. The hearing occurred before the undersigned on December 7, 2020, via CourtCall video conference.

The parties filed a hearing report at the commencement of the arbitration hearing. In the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision, and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The evidentiary record consists of: Joint Exhibits 1 through 3, Claimant's Exhibits 1 through 4, and Defendants' Exhibits A through H. Claimant testified on his own behalf. The evidentiary record was closed at the end of the hearing, and the case was considered fully submitted upon receipt of the parties' briefs on January 11, 2021.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained a permanent disability as a result of his stipulated October 1, 2018 work injury.

2. The extent of claimant's permanent disability, if any, including whether his injury is limited to a scheduled member or extends into his body as a whole.

3. Costs.

FINDINGS OF FACT

The parties agree claimant sustained a work injury on October 1, 2018, when he was unloading boxes of whole chickens and chicken breasts and felt a pain in his left shoulder area. (Hearing Transcript, p. 15) When the pain did not subside after several days, claimant requested medical care from defendant-employer. (Tr., p. 17)

Defendants authorized care with Daphney Myrtil, M.D., an occupational medicine physician, who initially believed claimant's left shoulder and upper back pain were due to left rotator cuff tendinitis/impingement syndrome and a thoracic strain involving the left trapezius. (Joint Exhibit 1, p. 1) After some conservative treatment, including work restrictions and physical therapy, Dr. Myrtil sent claimant for an MRI of his shoulder. When the MRI was negative for rotator cuff or labral pathology, Dr. Myrtil offered additional physical therapy and an injection. (JE 1, pp. 11-13) By January of 2019, claimant continued to have pain and indicated he was concerned about advancing to full duties, but because he was not a surgical candidate, Dr. Myrtil placed claimant at maximum medical improvement (MMI) and released him to return to full-duty work without restrictions. (JE 1, p. 20)

Due to his ongoing symptoms, claimant requested a second opinion. (Tr., pp. 18-19) Defendants authorized treatment with orthopedist Kary Schulte, M.D. Claimant reported "[m]ixed neck and left shoulder symptoms," and Dr. Schulte was concerned that claimant's symptoms were coming from his neck. He recommended an evaluation with his clinic partner, Zachary Ries, M.D. (JE 2, p. 25)

Dr. Ries ordered an MRI of claimant's cervical spine, which was deemed "essentially normal" with a mild C6-7 bulge. (JE 2, p. 30) Based on the MRI, Dr. Ries opined claimant's cervical spine was not the cause of his symptoms. (JE 2, p. 30)

Claimant then returned to Dr. Schulte on April 11, 2019, with continued pain "medial to his left scapula." Dr. Schulte recommended an additional course of physical therapy for claimant's shoulder and released claimant to return to work without restrictions. (JE 2, p. 33) This was claimant's last appointment with Dr. Schulte.

Claimant continued to attend physical therapy through May 3, 2019. (JE 3, pp. 91-93) At his final session, he reported improvement but continued weakness and pain, especially with repetitive lifting of heavy objects. (JE 3, p. 92)

In a letter to defendants dated July 26, 2019, Dr. Schulte indicated claimant reached MMI as of the April 11, 2019 clinic visit. Dr. Schulte also opined claimant would not require permanent restrictions or additional medical treatment and sustained "no measurable impairment" because he had full range of motion of the left shoulder and normal motor strength during the April 11, 2019 appointment. (JE 2, p. 37)

Claimant was evaluated by John Kuhnlein, M.D., for purposes of an independent medical examination on January 14, 2020. In his report, dated February 7, 2020, Dr. Kuhnlein opined claimant sustained cervical myofascial pain syndrome and left shoulder pain complaints as a result of his October 1, 2018 work-related injury. (Cl. Ex. 1, pp. 7-8) He assigned a three percent upper extremity/two percent whole body impairment rating for claimant's shoulder and a five percent whole body impairment for claimant's neck, when combined converted to a seven percent whole person impairment rating. (Cl. Ex. 1, p. 9) Dr. Kuhnlein also recommended lifting restrictions of 20 to 30 pounds and continued conservative management, including trigger point injections, massage, and chiropractic therapy. (Cl. Ex. 1, p. 8)

Dr. Schulte reviewed Dr. Kuhnlein's IME but stood by his original opinion that claimant's October 2, 2018 injury "resolved" and no further treatment was necessary. (JE 2, p. 38)

Defendants then authorized the recommended trigger point injections with Mark Fox, M.D. The injections were performed on September 24, 2020. (JE 2, pp. 39-41) Claimant testified the injections were not beneficial. (Tr., p. 20) He has had no additional care since Dr. Fox's injections. (Tr., p. 20)

Claimant was continuing to work for defendant-employer at the time of the hearing. After his injury, he was moved from his job in the kitchen to the gas station, which was a less physically demanding job. (Tr., pp. 23-24) Then, in the weeks before hearing, claimant was moved back to his job in the kitchen, though he is no longer required to do any heavy lifting. (Tr., pp. 25-26) In addition to having his limitations accommodated, claimant was also working 30 hours at the time of the hearing, as compared to the 40 he was working at the time of his injury. (Tr., p. 26) He was, however, earning more per hour at the time of the hearing ($15.90 per hour compared to slightly less than $15.00 per hour). (Tr., p. 37)

Claimant continued to be symptomatic at the time of the hearing as well, noting "pain and burning" from his neck to the top of his shoulder and into his back. (Tr., pp. 20-21)

Again, the parties agree claimant sustained an injury on October1, 2018, but they dispute whether his injury extends into his body as a whole and whether he sustained any permanent disability.

With respect to the issue of permanent disability, I turn first to claimant's left shoulder. Defendants assert claimant's left shoulder injury resolved without any permanent impairment. They rely on the opinions of Dr. Schulte.

As discussed, Dr. Schulte opined claimant had no measurable impairment of the left shoulder because he had full range of motion and normal motor strength at the time of his last clinic visit on April 11, 2019. (JE 2, p. 37) Dr. Schulte did not, however, indicate specifically what his measurements were.

Notably, when claimant attended physical therapy on April 15, 2019, just days after seeing Dr. Schulte, his range of motion measurements were 148 degrees for flexion and 140 degrees for abduction at the start of the appointment (but increased to 161 and 164 respectively after treatment). (JE 3, p. 80) These measurements, according to Figures 16-40 and 16-43 of the AMA's Guides to the Evaluation of Permanent Impairment, Fifth Edition (hereinafter "Guides,") are not full ranges of motion. Claimant's measurements on April 30, 2019 and May 3, 2019, during his discharge re-evaluation, likewise indicated losses of extension and abduction. (JE 3, pp. 88, 92) While these losses were minor, they still indicate some level of impairment per the Guides, contrary to Dr. Schulte's opinion.

During claimant's IME, Dr. Kuhnlein measured claimant's left shoulder flexion range of motion at 130 degrees and his abduction at 125 degrees. (Cl. Ex. 1, p. 6) In other words, Dr. Kuhnlein's measurements indicate claimant sustained a reduction in his shoulder range of motion since his final physical therapy appointment, which was more than six months before the IME.

Notably, in April of 2019, when claimant began his second stint of physical therapy, he told his therapist that his symptoms worsened after he stopped physical therapy in January. (JE 3, p. 80) Thus, a worsening of his range of motion after six months without physical therapy prior to the IME is consistent with claimant's earlier symptom patterns.

I recognize Dr. Fox indicated claimant had normal range of motion of both shoulders when he administered trigger point injections in September of 2020, months after Dr. Kuhnlein's IME. (See JE 2, p. 40) However, unlike Dr. Kuhnlein's examination, which was for purposes of determining whether claimant sustained any permanent impairment, and claimant's physical therapy, which tracked claimant's progress, Dr. Fox's appointment was solely for purposes of administering an injection. (JE 2, p. 41) Thus, I give Dr. Fox's measurements less weight.

Dr. Kuhnlein's opinion that claimant sustained permanent impairment to his left shoulder is also consistent with claimant's testimony at hearing that he continues to be symptomatic. (Tr., pp. 27-28) It is also consistent with the medical records. When claimant was released from Dr. Schulte's care, for example, he continued to report pain in his left scapula. (JE 2, p. 33) During his final physical therapy visits, he continued to report shoulder soreness with repetitive lifting and weakness. (JE 3, pp. 90-92) Thus, claimant's ongoing symptoms are more consistent with Dr. Kuhnlein's opinion that he sustained a permanent impairment to his left shoulder.

For these reasons, I find Dr. Kuhnlein's opinions regarding claimant's shoulder impairment the most credible. I therefore find claimant sustained a three percent left upper extremity impairment due to his work-related injury. (Cl. Ex. 1, p. 9)

I now turn to whether claimant's permanent disability extended into his body as a whole. As discussed, Dr. Kuhnlein opined that claimant sustained a five percent whole person impairment for cervical myofascial pain. Defendants assert this rating is not persuasive given Dr. Ries' opinion that claimant's cervical spine was not the cause of his symptoms and because Dr. Kuhnlein failed to explain how he arrived at the rating.

Dr. Kuhnlein, however, noted correctly that claimant's symptoms have persisted, and they have persisted "in a general C5-C7 cervical myofascial pain distribution." (CL. Ex. 1, p. 8) As a result, he placed claimant into DRE Cervical Category II of the Guides, which indicates an impairment rating is appropriate for cervical disorders when examination findings include muscle guarding or spasm, asymmetric loss of range of motion or nonverifiable radicular complaints ("defined as complaints of radicular pain without objective findings")—without alteration of the structural integrity. (Cl. Ex. 1, p. 8; Guides, Table 15-5, p. 392). Claimant's cervical MRI was essentially normal, but as noted by Dr. Kuhnlein, claimant's pain, while not true radiculopathy, "radiate[d] into the arm.") (Cl. Ex. 1, p. 8) In other words, claimant had nonverifiable radicular complaints, which is consistent with DRE Cervical Category II.

While I recognize Dr. Ries' opinion that the cervical spine was not the cause of claimant's symptoms, claimant continued to report neck pain after being released from Dr. Ries' care, and he testified these same symptoms continued through the date of the hearing. (See JE 3, p. 83 (noting pain from the scapula into the neck); Tr., pp. 20-21)

Nothing in the record leads me to believe claimant was not being truthful regarding his neck symptoms and their ongoing nature. To the contrary, I find claimant to be a credible witness. Despite continuing to report ongoing symptoms before being released from Dr. Ries' care and Dr. Schulte's care, claimant was continuing to work for defendant-employer at the time of the hearing, he testified he "really like[s]" his job, and he indicated he was still doing "all the neck exercises" he learned at physical therapy to help lessen and control his symptoms. (Tr., pp. 29-30) In light of claimant's ongoing symptoms, I find Dr. Kuhnlein's opinion regarding claimant's neck to be more persuasive than that of Dr. Ries.

Thus, relying on claimant's testimony and Dr. Kuhnlein's opinion that claimant sustained a five percent impairment of his whole person due to his cervical condition, I find claimant sustained a permanent disability that extended beyond a scheduled member and into his body as a whole.

Claimant, who was 44 at the time of the hearing, has a combined seven percent whole person impairment along with lifting restrictions that preclude him from performing the full extent of his regular job with defendant-employer. He also continues to have pain.

Claimant continued to be employed by defendant-employer at the time of the hearing and indicated he loves his job. To defendants' credit, they are accommodating claimant's restrictions and limitations, and there is no indication the relationship between claimant and defendant-employer has soured in any way.

Still, I find claimant was earning less per week at the time of the hearing than he was at the time of his injury. The parties stipulated claimant's gross earnings on his date of injury were $525.00 per week. At the time of the hearing, however, at 30 hours per week at the rate of $15.90 per hour, claimant was earning roughly $477.00 per week at the time of the hearing. This represents a loss of weekly earnings of about 10 percent since the date of injury.

Considering these and all relevant factors, I find claimant sustained a 15 percent loss of earning capacity as a result of his non-surgical work-related injuries.

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).

As discussed above, I found the opinions of Dr. Kuhnlein to be more persuasive than those of Dr. Schulte and Dr. Ries. Dr. Kuhnlein's opinion that claimant sustained permanent impairment as a result of his shoulder and neck conditions is most consistent with claimant's ongoing and continuing symptoms. Thus, relying on the opinions of Dr. Kuhnlein, I conclude claimant sustained permanent disability both to his shoulder, a scheduled member under the legislature's 2017 amendments, and to his neck, which extends his injury into the body as a whole. I therefore conclude claimant is entitled to industrial disability benefits.

Because claimant has an impairment to the body as a whole, an industrial disability has been sustained. Defendants argue that per the legislature's 2017 amendments to Iowa Code section 85.34(2)(v), claimant is entitled to compensation based only upon his functional impairment and not in relation to his earning capacity.

The section states, in relevant part:

> If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity.

Iowa Code § 85.34(2)(v) (post-July 1, 2017).

While it is true that claimant's hourly wage was higher at the time of the hearing than it was at the time of his injury, he was working 10 less hours per week, resulting in what I found to be a loss of weekly earnings. Thus, I conclude claimant is entitled to compensation in relation to his earning capacity and not limited to his functional impairment.

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

Functional impairment is an element to be considered in determining industrial disability, which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted, and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). A determination of the reduction in an employee's earning capacity must additionally consider the employee's permanent partial disability and the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury. Iowa Code § 85.34(2)(v) (post-July 2, 2017).

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. Iowa Code § 85.34.

Considering all the relevant factors of industrial disability, I found claimant sustained a 15 percent loss of earning capacity. I therefore conclude claimant sustained a 15 percent industrial disability for which he is entitled to 75 weeks of permanent partial disability (PPD benefits).

Claimant also seeks reimbursement for costs in the amount of $100.00 for his filing fee and $13.60 for service of the petition. (Cl. Ex. 3)

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.

Claimant was generally successful in his claim. As such, I find a taxation of costs is appropriate in this case. Claimant is entitled to reimbursement for the filing fee and service fee per 876 IAC 4.33(3) and (7).

Defendants agreed at hearing to pay Dr. Kuhnlein's IME and some mileage associated with claimant's medical treatment, so those issues will not be addressed herein. (Tr., pp. 5-6)

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant seventy-five (75) weeks of permanent partial disability benefits commencing on the stipulated date of January 25, 2019, at the stipulated rate of three hundred seventy-three dollars and 58/100 ($373.58) per week.

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 for his IME and mileage expenses as agreed upon at hearing.

Pursuant to rule 876 IAC 4.33, defendants shall reimburse claimant's costs in the amount of one hundred thirteen and 60/100 dollars ($113.60).

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 __4th__ day of March, 2021.

STEPHANIE J. COPLEY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

David Lawyer (via WCES)

Lindsey Mills (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.