

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

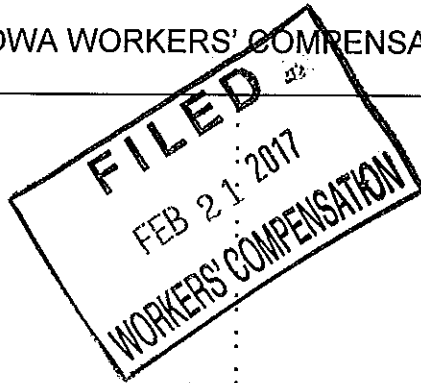
KEVIN MILLER,
Claimant,

vs.

ROQUETTE AMERICA,
Employer,

and

LIBERTY MUTUAL INSURANCE
COMPANY,
Insurance Carrier,
Defendants.



File No. 5055169

ARBITRATION

DECISION

Head Note Nos.: 1108.50, 1402.20,
1402.40, 1802. 2501

STATEMENT OF THE CASE

Kevin Miller, claimant, filed a petition in arbitration seeking workers' compensation benefits from Roquette America, employer and Liberty Mutual Insurance Company, insurance carrier, both as defendants. Hearing was held on December 8, 2016 in Des Moines, Iowa.

Kevin Miller and Rodney Boyle both testified live at trial. The evidentiary record also includes claimant's exhibits 1-8 and defendants' exhibits A-G. 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.

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The parties requested the opportunity for post-hearing briefs which were submitted on December 23, 2016.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant sustained an injury on January 22, 2015, which arose out of and in the course of employment?
2. Whether the injury was the cause of permanent disability, if so, the extent of disability?
3. Whether claimant sustained temporary disability as a result of the alleged January 22, 2015 injury?
4. Whether defendants are responsible for payment of past medical expenses?
5. Whether claimant is entitled to reimbursement for an independent medical evaluation under Iowa Code section 85.39?

FINDINGS OF FACT

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

Claimant, Kevin Miller, ("Miller") filed a petition alleging he sustained an injury on January 22, 2015, to his right shoulder, neck, upper body, and body as a whole. Defendants, Roquette America, employer, and Liberty Mutual Insurance Company, insurance carrier, (hereinafter "Roquette") have denied that claimant sustained a compensable injury on January 22, 2015.

Kevin was hired by Roquette as an SAP/ERP Technician in 2003. His job duties included information technology and computer support, which included sitting in a chair and monitoring the network on the ERP site. In 2006, he took a new position in the information technology support department in which he worked with just about anything that involved computers at Roquette's plant. His new job duties did not involve extensive physical activity except when installing or decommissioning the printers used by Roquette; this involved some lifting. Roquette had a contract with an outside vendor, HP but has since switched over to Lexmark; the third party vendors are generally the ones to switch out and lift printers when they are changed every three years. Kevin has to lift computers infrequently; although the frequency does vary from one a month to once every six months. The computers he usually lifts weigh a maximum of 15-20 pounds and the new computers are even lighter. (Testimony)

Claimant's supervisor, Rodney Boyle, is an IT Client Services Team Leader at Roquette. According to Rodney, the printers in the IT department are changed out every three years for life-cycle changes; these are done by the third-party vendor that has the printer contract. Printers are also changed out on an as-needed basis. If there

is an emergency situation the printers are changed by Roquette staff; however, this only occurs in rare circumstances. (Testimony)

At the time of the injury Kevin was working on computer and network support. He contends he was injured while attempting to put the seat of a car into the stowaway position so he could place a printer into his work vehicle for transport. Kevin explained that the injury occurred when he tried to adjust the passenger side headrest by hitting it with his right arm to allow for enough space for the printer. However, the lock on the headrest was engaged so when he hit the headrest he felt pain in his right shoulder area that almost dropped him to his knees. He went to the office and sat down; he could barely move his right arm. (Testimony)

On January 28, 2015, Kevin saw Robert Gordon, M.D. of MOHA on-site Physician Services for right shoulder pain/strain. Kevin reported that one week ago he was in the company van and had to use his right hand to put down the passenger side headrest. While doing this he experienced excruciating pain on the anterior aspect of his right shoulder and he was not able to push it down. He then used his left arm to push it down without any problems. He has had right shoulder pain since that time. The doctor's diagnosis was right shoulder strain/pain. He recommended that Kevin continue his current anti-inflammatory medication and pain medication which he had been using for knee pain. Dr. Gordon also recommended ice. (Ex. C, pp. 14-15)

Kevin returned to see Dr. Gordon on February 4, 2015. He reported no significant improvement. He had been able to perform regular work and it was going well for him. He had not done any heavy lifting with his job. Dr. Gordon recommended that he continue conservative treatment for one week and if no improvement then a referral for physical therapy would be considered. (Ex. C, pp. 16-17)

By February 11, 2015, Kevin reported just a little bit of improvement. Dr. Gordon assessed him with right rotator cuff tendonitis. He prescribed prednisone. Kevin was to continue his regular duty. (Ex. C, pp. 18-19)

On February 25, 2015, Dr. Gordon noted that Kevin was doing better. He reported continued popping in his right shoulder but overall he was much improved. The assessment was right rotator cuff tendonitis, subjectively 70-75 percent improved. (Ex. C, pp. 20-21)

Kevin returned to see Dr. Gordon on March 11, 2015. He reported that after he stopped taking prednisone his pain had a resurgence. The assessment was right shoulder strain phenomena with impingement features. Dr. Gordon performed a right shoulder subacromial corticosteroid injection. Kevin was allowed to continue full duty work. (Ex. C, pp. 22-23)

On March 25, 2015, Dr. Gordon's office recorded that Kevin's shoulder was improved. He still has good days and bad days but overall he had improved. He noted continued decreased strength to his right shoulder. Kevin reported an improvement in

symptoms after he received the injection. Kevin was referred to physical therapy. (Ex. C, pp. 24-25)

Kevin returned to Dr. Gordon's office on June 24, 2015. (Ex. C, pp. 26-28) He still had shoulder pain. He had full range of motion of his right shoulder; however, the strength in his right shoulder was not the same. Dr. Gordon noted that the MRI arthrogram revealed osteoarthritis at the AC joint with a type II acromion with mild lateral downsloping. A massive full-thickness tear of the supraspinatus tendon was also noted. Additionally, the MRI revealed rupture of the long head of the biceps tendon. Kevin reported that prior to the work injury he never had a change in the strength of his right shoulder. Prior to the work injury he did have a known biceps tendon tear dating back about three years. Dr. Gordon and Kevin went out to the parking lot to the work van to re-create the incident of January 2015. Based on Dr. Gordon's investigation, he opined that "it is not plausible an individual would have incurred, aggravated, or accelerated a rotator cuff tear/labral disorder/biceps disorder or any other pathological shoulder derangement with this incident due to the lack of putative sufficient biomechanical risk factors to cause such." (Ex. C, p. 28) Dr. Gordon recommended that Kevin be evaluated by orthopedics. However, Dr. Gordon noted that it was his opinion that Kevin's right shoulder condition was not a work-related disorder or a work-aggravated disorder. He returned Kevin to continue full duty work.

On September 14, 2015, Kevin presented to Adam D. Derhake, M.D. at Quincy Medical Group with complaints of right shoulder pain for the past nine months since he had an incident at work. Dr. Derhake noted it was unfortunate that he was not present for the initial evaluation back in January. He stated:

I think it is going to be very difficult to prove that this pathology was caused by the stated injury in January. I certainly believe that he could have had a smaller rotator cuff tear that was asymptomatic that was exacerbated or worsened by the accident in January. However, I think it is difficult to prove that that episode actually caused the initial pathology.

(Ex. 3, p. 36) Dr. Derhake noted that the biceps tendon had been torn for quite some time and did not recommend addressing this operatively. Kevin opted to proceed with the other recommended surgical treatment. Dr. Derhake performed right shoulder arthroscopy with subacromial decompression and partial rotator cuff repair on October 1, 2015. (Ex. 3)

Kevin testified that he was off work for three weeks following the surgery. Following surgery he also underwent physical therapy. (Ex. 4; testimony)

On March 23, 2016, Kevin saw Dr. Derhake for routine postoperative visit. The doctor noted that overall Kevin had done exceedingly well. He informed Kevin that he needed to be careful with his shoulder and avoid excessive exertion of the shoulder. Dr. Derhake advised him that if he wore this shoulder out and continued to use and

abuse the rotator cuff then the next surgery would likely be shoulder replacement. (Ex. D, pp. 29-30)

On June 17, 2016, Kevin was evaluated by Richard F. Neiman, M.D.; this was done at the request of claimant's counsel. (Ex. 8) Dr. Neiman noted that he did not have Dr. Derhake's operative report. Dr. Neiman measured Kevin's range of motion. He assigned 10 percent functional impairment of the whole person. He also assigned restrictions as follows: try to avoid excessive flexion, extension, abduction, adduction, and internal and external rotation as far as the right shoulder. Try to avoid the use of the right shoulder or arm above shoulder level. Dr. Neiman opined that Kevin could continue in his current IT position. Dr. Neiman stated,

I am quite confident that this injury occurred on January 22, 2015, was responsible for the tear of the rotator cuff; at this time, he had absolutely no difficulty prior to the event. The shoulder basically became severely weak after the injury. Really was a forceful attempt to bring the back headrest down.

(Ex. 8, pp. 177-78)

Dr. Gordon evaluated Kevin on October 18, 2016. Dr. Gordon did not have Dr. Derhake's operative report. Kevin reported that since the surgery he has done well. He is able to perform all of his activities of daily living and all of his instrumental activities of daily living without any issue. Kevin was performing his full work duties in the IT department at Roquette without any difficulty. Dr. Gordon again discussed how he re-created the work incident and felt that a right shoulder derangement from a causation or aggravation standpoint was not plausible due to the lack of necessary sufficient biomechanical stressors. He noted that Kevin has excellent range of motion. He also noted that Dr. Neiman's range of motion measurements were quite reduced compared to his and Dr. Derhake's. He also criticized Dr. Neiman's report for including an impairment rating due to loss of strength secondary to the biceps tendon origin tear. However, according to the medical records, that had been present several years before the January 2015 work incident. He also felt that Dr. Neiman provided arbitrary restrictions. Neither the surgeon, nor Dr. Gordon felt restrictions were necessary. However, the surgeon did caution Kevin about performance of heavy manual labor. Dr. Gordon agreed with the surgeon that Kevin had reached maximum medical improvement as of March 26, 2016 and that no further treatment was indicated. Dr. Gordon opined that Kevin did not sustain any permanent impairment. (Ex. E)

Other than the three weeks after surgery Kevin has not missed any work due to the January 22, 2015 work injury. He continues to work at Roquette in the same position he held on the date of injury. He is able to perform all of the duties of his job. (Testimony)

The first issue that must be addressed is whether Kevin sustained an injury on January 22, 2015 that arose out of and in the course of his employment. There are several expert medical opinions in this matter regarding causation.

As previously noted, Dr. Gordon opined that it was not plausible that Kevin's right shoulder symptoms were caused by his actions on January 22, 2015. His opinion was based on his examination of the claimant and on his re-creation of the event. (Ex. C, p. 28)

The surgeon, Dr. Derhake, stated,

I think it is going to be very difficult to prove that this pathology was caused by the stated injury in January. I certainly believe that he could have had a smaller rotator cuff tear that was asymptomatic that was exacerbated or worsened by the accident in January. However, I think it is difficult to prove that that episode actually caused the initial pathology.

(Ex. 3, p. 36)

Dr. Neiman, claimant's IME doctor stated,

I am quite confident that this injury occurred on January 22, 2015, was responsible for the tear of the rotator cuff; at this time, he had absolutely no difficulty prior to the event. The shoulder basically became severely weak after the injury. Really was a forceful attempt to bring the back headrest down.

(Ex. 8, pp. 177-78)

The record demonstrates that Kevin's right shoulder was not symptomatic prior to the alleged January 22, 2015, event. Kevin testified that when he struck the headrest on January 22, 2015, he experienced immediate pain in his right shoulder; pain that was so severe it almost dropped him to his knees. Kevin could not even lift his right arm after the injury. The on-site physician, Dr. Gordon, has opined that the stated mechanism of injury could not have caused Kevin's condition. However, Dr. Gordon's report offers no explanation or rationale as to why Kevin was asymptomatic prior to the event. I do not find Dr. Gordon's opinions to carry much weight. Dr. Neiman, claimant's IME doctor, is confident that the injury was responsible for the tear of the rotator cuff. Finally, the surgeon, Dr. Derhake, thought it would be difficult to prove that the episode actually caused the initial pathology. He did certainly believe that Kevin could have had a smaller rotator cuff tear that was asymptomatic that was exacerbated or worsened by the accident in January. I find that Kevin has demonstrated by a preponderance of the evidence that he sustained an injury to his right shoulder which arose out of and in the course of his employment on January 22, 2015.

The next issue to address is whether Kevin sustained permanent disability as a result of the work injury. As previously noted, I found that the opinions of Dr. Gordon do

not carry much weight. Dr. Neiman evaluated Kevin and assigned 10 percent permanent functional impairment to the body as a whole. The record does not contain Dr. Derhake's opinion regarding permanent impairment. However, Dr. Derhake does recommend Kevin be careful with his shoulder and avoid excessive exertion of the shoulder. Dr. Neiman assigned permanent restrictions as follows: to avoid excessive flexion, extension, abduction, adduction, and internal and external rotation as far as the right shoulder. Kevin was also to try and avoid the use of the right shoulder or arm above shoulder level. I conclude that the preponderance of the evidence demonstrates that Kevin sustained permanent disability as a result of the work injury.

Pursuant to the parties' stipulation on the hearing report, any permanent disability sustained by claimant is to be compensated on an industrial disability basis. At the time of hearing Kevin was in his mid-50's. Even after surgical repair of his right shoulder he continues to have difficulties. He testified that he can no longer lie on his shoulder. He cannot lift with his right arm extended outward to the same extent or sideways to the same extent he did prior to the injury. Likewise, he cannot bend it back nor reach overhead like he was able to prior to the injury. He manages his pain with over-the-counter Advil. He continues to work in his same job with the same duties as prior to the injury. He currently works between 50 and 60 hours per week. Considering Kevin's age, educational background, employment history, ability to retrain, lack of motivation to obtain a job, length of healing period, permanent impairment, and permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that he has sustained a 15 percent loss of future earning capacity as a result of his work injury with Roquette.

Kevin is also seeking an award of healing period benefits. Specifically, benefits from October 1, 2015 through October 22, 2015. Kevin testified that these are the three weeks he missed from work following the right shoulder surgery. The parties have stipulated that if the defendants are liable for the alleged injury, claimant is entitled to healing period benefits during this period of time. Because I have found that claimant sustained an injury to his right shoulder on January 22, 2015, which arose out of and in the course of his employment it follows that claimant is entitled to healing period benefits from October 1, 2015 through October 22, 2015.

Claimant is seeking an award for past medical expenses as set forth in his list of medical bills. A review of the medical bills indicates that the treatment was for claimant's right shoulder injury. Kevin testified that his condition did improve after the treatment. Defendants offer no argument in their post-hearing brief why they should not be responsible for the listed expenses. Therefore, I find defendants are responsible for the medical expenses set forth in claimant's list of medical bills.

Finally, claimant is seeking reimbursement for the independent medical evaluation of Dr. Neiman in the amount of \$850.00. Dr. Neiman's IME was performed on June 17, 2016. Prior to the IME, defendants had denied that Kevin's right shoulder condition was work-related. This agency has long held that a denial of liability is the equivalent of a zero percent impairment rating. I conclude that the prerequisites of Iowa

Code section 85.39 have been met. Defendants shall reimburse claimant for the IME of Dr. Neiman in the amount of eight hundred fifty and no/100 dollars (\$850.00).

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. 6.14(6)(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 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

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.

Based on the above findings of fact, I conclude that claimant carried his burden of proof to demonstrate by a preponderance of the evidence that he sustained an injury to his right shoulder which arose out of and in the course of his employment on January 22, 2015. I further concluded that as a result of that injury he sustained fifteen (15) percent industrial disability entitling him to seventy-five (75) weeks of permanent partial disability benefits.

Claimant is also seeking payment of healing period benefits for the time he missed from work after his shoulder surgery. Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986). I concluded that claimant's right shoulder injury is compensable. As such, claimant is entitled to healing period benefits for the time he missed from work due to the injury. Defendants shall pay claimant healing period benefits from October 1, 2015 through October 22, 2015.

We now turn to the issue of past medical expenses. The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow

reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975). Based on the above findings of fact, I conclude defendants are responsible for the medical expenses set forth in claimant's list of medical bills.

The last issue is whether claimant is entitled to reimbursement for the IME with Dr. Neiman. Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008). I conclude that the prerequisites of Iowa Code section 85.39 were met. Defendants shall reimburse claimant for the IME with Dr. Neiman.

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the rate of seven hundred fifty-five and 22/100 dollars (\$755.22).

Defendants shall pay claimant seventy-five (75) weeks of permanent partial disability benefits commencing on the stipulated date of October 23, 2015.

Defendants shall pay claimant healing period benefits from October 1, 2015 through October 22, 2015.


All past due weekly benefits shall be paid in lump sum with applicable interest pursuant to Iowa Code section 85.30.

Defendants shall reimburse claimant for Dr. Neiman's independent medical evaluation fee in the amount of eight hundred fifty and no/100 dollars (\$850.00).

Defendants shall be entitled to credit for all weekly benefits paid to date.

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 21st day of February, 2017.


ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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EQP/sam

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.