

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DELORIES BOLINGER,

Claimant,

vs.

TRILLIUM HEALTHCARE GROUP,
LLC,

Employer,

and

AMERICAN HOME ASSURANCE,

Insurance Carrier,
Defendants.

File No. 5060856

ARBITRATION DECISION

Head Note Nos: 1803.1, 2502

STATEMENT OF THE CASE

Claimant, Delories Bolinger, filed a petition in arbitration seeking workers' compensation benefits from Trillium Healthcare Group, LLC, (Trillium), employer, and American Home Assurance, insurer, both as defendants. This matter was heard on November 10, 2020, with a final submission date of December 11, 2020. The record in this case consists of Joint Exhibits 1-7, Claimant's Exhibits 1-6, Defendants' Exhibits A-G, 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

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

FINDINGS OF FACT

Claimant was 67 years old at the time of hearing. Claimant has a GED. Claimant has worked as a cook, dishwasher, and dietary supervisor. (TR pp. 12, 27-28)

Claimant began with Crest Haven Care Center in Creston, Iowa in February 2008. When claimant began with Crest Haven, it was privately owned. Crest Haven was later purchased by Trillium. (TR pp. 14-15)

Claimant was a kitchen supervisor at Crest Haven. Her job duties included cooking, food ordering, inventorying, organizing care plans and hiring and firing kitchen staff. (TR pp. 14-15)

Claimant's prior medical history is relevant. In 2004, claimant injured her right shoulder and had surgery. (TR p. 14)

In 2010, claimant was assessed as having left shoulder bursitis with capsulitis. (JE 1, p. 2)

A 2013 MRI showed a complete tear of the supraspinatus and subscapularis tendons with medial subluxation of the biceps tendon. (JE 1, p. 5)

On October 21, 2017, claimant fell while putting away dishes and landed on her left side. Claimant testified she realized after falling that her shoulder was dislocated. (TR p. 19)

Claimant was taken to the Greater Regional Health Emergency Department at Creston, Iowa. She was assessed as having an inferior dislocation of the left humeral head. (JE 4, p. 32) Claimant was put under sedation and the left shoulder was reduced. Claimant was put in a sling and released. (JE 4, p. 37)

Claimant was seen by Jake Davis, PA, on October 26, 2017. Claimant had continued pain and decreased range of motion. An MRI was recommended. (JE 5, p. 40)

Claimant underwent an MRI of the left shoulder on November 7, 2017. It showed a posterior subluxation of the glenohumeral joint and a full thickness tear of the supraspinatus tendon with tendon retraction. The MRI also showed a partial thickness tear of the infraspinatus tendon, a full thickness tear of the subscapularis tendon with tendon retraction, and a nonvisualization of the biceps tendon suggesting a torn biceps tendon. (Ex. 2, p. 3)

On December 13, 2017, claimant was evaluated by Steven Aviles, M.D., an orthopedic surgeon. Dr. Aviles noted the MRI showed a rotator cuff tear with severe retraction and atrophy. Dr. Aviles did not believe claimant's shoulder was fixable. A left reverse shoulder replacement was discussed and chosen as a treatment option. (JE 6, pp. 42-44)

On May 18, 2018, claimant underwent a left reverse shoulder replacement. Surgery was performed by Dr. Aviles. (Ex. 1, p. 1)

On May 30, 2018, claimant saw Dr. Aviles in follow-up. Claimant was restricted from using her left arm. (JE 6, p. 53)

Claimant returned to Dr. Aviles on August 8, 2018. Claimant was given work restrictions that limited her to lifting up to 10 pounds and to avoid work at shoulder level or above. (JE 6, pp. 63-64)

Claimant returned to Dr. Aviles on September 19, 2018. Claimant was found to be at maximum medical improvement (MMI). Claimant still had limitations in range of motion and strength. Claimant was given permanent restrictions of no lifting more than 10 pounds and no lifting above the shoulder level. (JE 6, p. 67)

In a January 9, 2019 report, Dr. Aviles found claimant had a 24 percent permanent impairment to the upper extremity. (JE 6, p. 70)

In a July 23, 2019 report, Jacqueline Stoken, D.O., gave her opinions of claimant's condition following an independent medical evaluation (IME). Claimant had continued pain in the left shoulder. (Ex. 2, p. 7)

Dr. Stoken noted that as claimant had a reverse shoulder replacement, in which the ball and socket parts of the shoulder switched sides, "This means their natural position is reversed. Therefore, it involves the shoulder blade which anatomically extends beyond the glenohumeral joint." (Ex. 2, p. 9)

Dr. Stoken found claimant at MMI as of September 19, 2018. She found claimant had 24 percent permanent impairment to the upper extremity using the AMA Guides to the Evaluation of Permanent Impairment, fifth edition. This converted to a 14 percent permanent impairment to the body as a whole. Dr. Stoken indicated claimant should avoid lifting more than 10 pounds and doing overhead work. (Ex. 2, pp. 9-10)

In an April 2, 2020 letter, Dr. Stoken indicated:

The Reverse Total Shoulder Arthroplasty involves not only the shoulder joint but the scapula and the periscapular musculature. The ball of the joint is pinned into the scapula as illustrated in the picture below.

Physical therapy rehabilitation involves strengthening the deltoid and periscapular muscles to promote stability of the joint. These muscles include the serratus anterior, levator scapula [*sic*], pectoralis minor, rhomboids and trapezius. . . . The expansive muscle originates from the occiput, nuchal ligament and spinous processes of C7 through T12. The upper trapezius inserts across the distal third of the clavicle and the acromion.

(Ex. 3, p. 1)

In an August 28, 2020 letter, Dr. Stoken wrote:

The shoulder joint is a ball and socket joint, with a ball (or humeral head) that is part of the humerus and a flat surface (which is called the socket) which is part of the shoulder blade or known as the scapula. In

reverse shoulder replacement, the ball and socket parts of the shoulder joint switch sides. This means that their natural position is reversed. Therefore, it involves the shoulder blade/scapula, which anatomically extends beyond the glenohumeral joint.

.....

The reverse shoulder replacement extends proximally beyond the glenohumeral joint. The injury includes the muscles and tendons of the rotator cuff – the supraspinatus, infraspinatus, teres minor and subscapularis, and the periscapular muscles and tendons including the rhomboids, serratus anterior, levator scapulae and trapezius muscles. This entire region is involved and is included in the postoperative physical therapy rehabilitation program.

(Ex. 4, p. 1)

Claimant returned to her job at Crest Haven following her surgery. Claimant's salary increased from \$18.89 to \$19.22 on February 21, 2018. (Ex. E, p. 15) Claimant continued to work at Crest Haven until November 11, 2018, when she retired. (Ex. E, p. 16) Claimant testified in deposition that she has no intention of returning to work. At the time of hearing claimant was receiving Social Security retirement benefits. (Ex. F, p. 21)

CONCLUSION OF LAW

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

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. 6.904(3).

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).

The main issue in this case is whether claimant's injury extends to the body as a whole, and is considered as an industrial disability under Iowa Code section 85.34(2)(v), or whether the injury is limited to the shoulder and is compensated functionally under Iowa Code section 85.24(2)(n).

In 2017 the Iowa Legislature amended Iowa Code section 85.34. Before the 2017 changes, shoulder injuries were considered proximal to the arm and compensated as a body as a whole injury, under Iowa Code section 85.34(2)(u). Prior to the 2017 changes to Iowa Code section 85.34, a shoulder injury was compensated as an unscheduled injury, and based on industrial disability. See Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161(1949).

One of the changes made to Iowa Code section 85.34 in 2017 dealt with the shoulder. Through the change, the legislature added the shoulder to the list of scheduled members. Iowa Code section 85.34(2)(n) states: "[f]or the loss of a shoulder, weekly compensation during four hundred weeks." Iowa Code section 85.34(2)(n)(2018). This amendment went into effect on July 1, 2018. It should be noted that the legislature did not define the term "shoulder."

The Iowa Supreme Court has said that this agency does not have the authority to interpret worker's compensation statutes. See Ramirez-Trujillo v. Quality Egg, LLC, 878 N.W.2d 759, 770 (Iowa 2016). However, the agency is the front-line in interpreting recently amended statutes. The Iowa Workers' Compensation Commissioner has issued several decisions regarding the amended Iowa Code section 85.34(2)(n) which provide agency precedent for the shoulder amendment. See Deng v. Farmland Foods, Inc., File No. 5061883 (App. September 29, 2020); 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 commissioner determined that under Iowa Code section 85.34(n), the "shoulder" is not limited to the glenohumeral joint. The commissioner also determined that the muscles that make up the rotator cuff are considered part of the "shoulder." Deng v. Farmland Foods, Inc., File No. 5061883 (App. September. 29, 2020).

In Deng, the Commissioner determined the muscles that make up the rotator cuff are included within the definition of "shoulder" under section 85.34(2)(n). In Chavez, the Commissioner determined both the labrum and the acromion are likewise included in the definition.

Claimant had a left reverse shoulder replacement. Only one expert, Dr. Stoken, has opined that claimant's surgery extends to the body as a whole. Dr. Stoken

indicates claimant's surgery also involves the scapula. (Ex. 3, p. 1) The surgery extended proximally beyond the glenohumeral joint. (Ex. 2, p. 9; Ex. 4, p. 1). The surgery did include the muscles and tendons of the rotator cuff. However, the surgery also involved the rhomboids, the serratus anterior, the levator scapulae and the trapezius muscles. (Ex. 4, p. 1; Ex. 6, pp. 5-6)

Dr. Stoken's opinion and physical therapy protocol also indicates that physical therapy post-surgery involves strengthening of the deltoids and the periscapular muscles to aid in the stability of the replaced joint. (Ex. 3, pp. 1, 4-5, 9-11)

The facts of this case are different from those found in Deng, Chavez, and Smidt. This case involves more than a rotator cuff surgery. According to Dr. Stoken, the claimant's surgery impacts and involves not only the muscles of the shoulder, but the muscles of the back, including, but not limited to the rhomboids, the serratus and the trapezius muscles. There is no opinion or evidence that contradicts Dr. Stoken's opinions.

Dr. Stoken opined that claimant's reverse shoulder replacement involves and impacts the muscles in claimant's upper back. There is no opinion that contradicts this evidence. Based on the record, it is found that claimant's injury extends into the body as a whole.

The finding that claimant's injury extends into the body as a whole, does not amend the analysis of how this injury is compensated.

Iowa Code section 85.34(2)(v) indicates, in relevant part,

In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs "a" through "u" hereof, the compensation shall be paid during the number of weeks in relation to five hundred weeks as the reduction in the employee's earning capacity caused by the disability bears in relation to the earning capacity that the employee possessed when the injury occurred. . . . **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.** Notwithstanding section 85.26, subsection 2, if an employee who is eligible for compensation under this paragraph returns to work with the same employer and is compensated based only upon the employee's functional impairment resulting from the injury as provided in this paragraph and is terminated from employment by that employer, the award or agreement for settlement for benefits under this chapter shall be reviewed upon commencement of reopening proceedings by the

employee for a determination of any reduction in the employee's earning capacity caused by the employee's permanent partial disability. (Emphasis added)

In this case, claimant returned to her employer. The record indicates when she returned to work claimant's hourly wage increased from \$18.89 an hour to \$19.22 an hour. For this reason, the provisions of Iowa Code section 85.34(2)(v), highlighted above, apply. Claimant's permanent partial disability benefits are statutorily limited to the functional impairment of her injury. Claimant was found to have a 24 percent permanent impairment to the shoulder. Claimant is due 96 weeks of permanent partial disability benefits (400 weeks x 24 percent).

Claimant contends in her post-hearing brief that because she voluntarily left her job at Trillium, her injury should still be analyzed as an industrial disability. (Claimant's post-hearing brief pp. 16-18)

This is incorrect. As noted, claimant voluntarily left her job at Trillium and retired.

A loss of earning capacity due to voluntary choice or lack of motivation to return to work is not compensable. Malget v. John Deere Waterloo Works, File No. 5048441 (Remand Dec. May 23, 2018); Rus v. Bradley Puhmann, File No. 5037928 (App. December 16, 2014); Gaffney v. Nordstrom, File No. 5026533 (App. September 1, 2011); Snow v. Chevron Phillips Chemical Co., File No. 5016619 (App. October 25, 2007). Copeland v. Boones Book and Bible Store, File No. 1059319 (App. November 6, 1997). See also, Brown v. Nissen Corp., 89-90 IAWC 56, 62 (App. 1989) (no prima facie showing that claimant is unemployable when claimant did not make an attempt for vocational rehabilitation).

Claimant chose to retire. She voluntarily left the workforce. The fact that claimant voluntarily chose to retire does not change the analysis that claimant's remedy is limited to the functional impairment of her shoulder.

The final issue to be determined is costs. Claimant's reimbursement for an IME was noted as an issue in dispute on the hearing report. The parties indicated at hearing that defendants would voluntarily pay Dr. Stoken's IME once they received the bill for the July 23, 2019 report. (TR p. 5) Defendants consented in the post-hearing brief that they were willing to pay the cost of the July 23, 2019 IME report from Dr. Stoken. They are unwilling to pay for the April 2, 2020 and August 28, 2020 reports. Claimant did not indicate at hearing that she was seeking reimbursement for the April 2, 2020 or August 28, 2020 reports. Iowa Code section 85.39 limits an injured worker to just one IME. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842 (Iowa 2009). Given this record, defendants are not liable for payment of the April 2, 2020 or August 28, 2020 reports from Dr. Stoken.

ORDER

Therefore, it is ordered:

That defendants shall pay claimant 96 (ninety-six) weeks of permanent partial disability benefits at the rate of four hundred ninety-eight and 26/100 dollars (\$498.26) per week commencing on September 19, 2018.

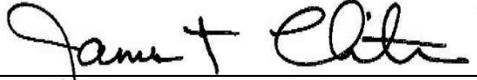
Defendants shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

That defendants shall receive credit for benefits previously paid.

That defendants shall reimburse claimant only for costs associated with Dr. Stoken's July 23, 2019 report.

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

Signed and filed this 17th day of June, 2021.



JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Gary Mattson (via WCES)

Jean Zetta Dickson (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.