BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| RICARDO CASTILLO,<br><br>Claimant,<br><br>vs.<br><br>CRAMER AND ASSOCIATES, INC.,<br><br>Employer,<br><br>and<br><br>TRAVELERS INDEMNITY COMPANY OF CT,<br><br>Insurance Carrier,<br>Defendants. | File No. 5064090<br><br>ARBITRATION<br><br>DECISION<br><br>Head Note Nos.: 1803, 2907 |

## STATEMENT OF THE CASE

Ricardo Castillo, claimant, filed a petition for arbitration against Cramer and Associates, Inc., as the employer and Travelers Indemnity Company of Connecticut, as the insurance carrier. This case came before the undersigned for an arbitration hearing on June 10, 2019.

The evidentiary record includes Joint Exhibits 1 through 5, Claimant's Exhibits 1 through 6, and Defendants' Exhibits A through C. All exhibits were received into the record without objection.

Claimant testified on his own behalf. Defendants called the employer's co-president, Robert Cramer, to testify. The evidentiary record closed at the conclusion of the arbitration hearing.

However, counsel for the parties requested an opportunity to file post-hearing briefs. Their request was granted. Post-hearing briefs were filed simultaneously on July 1, 2019, at which time the case was considered fully submitted to the undersigned.

## ISSUES

The parties submitted the following disputed issues for resolution:

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

2. Whether costs should be assessed against defendants.

## FINDINGS OF FACT

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

Ricardo Castillo was born in Guatemala in November 1963. Therefore, he was 55 years of age at the time of hearing. He graduated from high school in Guatemala and attended a university in his home country to study for one year. He did not receive a degree. However, Mr. Castillo did receive additional training in basic automotive mechanics and in traffic enforcement. (Claimant's Testimony)

Mr. Castillo does not speak English fluently and has not taken any English as a second language courses. He worked in Guatemala as a police officer from 1997 through 2000. He was assigned as a mechanic instructor and required to coordinate mechanic logistics for the local police department. This was a sedentary position, but he lost the job after a change in political leadership. (Claimant's Testimony)

Thereafter, Mr. Castillo worked for a neighboring city as a transit coordinator for a short period of time. From 2001 through 2007, claimant was self-employed. He purchased vehicles in Iowa, transported them back to Guatemala, performed any necessary mechanical repairs, and re-sold the vehicles. The business was lucrative for a period of time with claimant earning approximately $5,000.00 per month. However, claimant testified that it became dangerous to drive the vehicles through Mexico and that the business ultimately proved unprofitable after a period of years. (Claimant's Testimony)

Mr. Castillo elected to move to Iowa in 2007 and found employment with Dormark Construction. Dormark performed bridge construction and claimant was required to lift, carry, lay and tie rebar. The job required a significant amount of bending, but claimant was physically capable of performing these job duties. (Claimant's Testimony)

Claimant's employment at Dormark required a significant amount of travel. Mr. Castillo elected to resign that position in 2016 to be home more with his family. He went to work for Cramer and Associates, Inc., in 2016. Mr. Castillo worked as a laborer for Cramer & Associates, building bridges. (Claimant's Testimony)

During his employment with Cramer and Associates, Mr. Castillo performed general carpentry, welding, and concrete work. He used various tools including picks, hammers, shovels, drills, jackhammers and a sandblaster. He was required to lift 50 pounds, though claimant testified that he was actually required to lift 70-pound bags during his employment with Cramer and Associates. Mr. Castillo was capable of performing this employment and did so without incident until January 18, 2017.

On January 18, 2017, claimant was using a pickaxe to remove ice from a bridge. In the process, he hit metal and felt a shooting pain into his right shoulder. He reported the injury and the employer directed him for medical care.

Conservative care was initiated, including physical therapy and anti-inflammatory medications. Unfortunately, the initial care did not resolve claimant's right shoulder symptoms and an MRI was ordered. Ultimately, the occupational medicine physician referred Mr. Castillo to an orthopaedic surgeon, Steven X. Goebel, M.D.

Dr. Goebel evaluated Mr. Castillo on April 17, 2017. He diagnosed claimant with a right distal clavicle strain. (Joint Ex. 3, p. 1) He performed an injection into claimant's right shoulder, which did not prove helpful. (Joint Ex. 3-4) Ultimately, Dr. Goebel recommended and performed an arthroscopic right shoulder subacromial decompression and acromioplasty with resection of the distal clavicle and debridement of the glenoid labrum. (Joint Ex. 4, p. 1; Joint Ex. 5)

After an appropriate healing period, Dr. Goebel declared maximum medical improvement on November 15, 2017. (Joint Ex. 4, p. 11) Mr. Castillo has not obtained medical care for his right shoulder since that date. (Claimant's testimony) Dr. Goebel released Mr. Castillo to return to work without medical restrictions but opined that claimant sustained a permanent impairment ranging from 10-15 percent of the right upper extremity as a result of the January 18, 2017 work injury. (Joint Ex. 4, p. 11)

Mr. Castillo returned to work for Cramer and Associates and performed work as a general laborer throughout the 2018 construction season. Claimant and Mr. Cramer both testified that claimant performed all the typical duties of a laborer for Cramer and Associates during the 2018 season.

Claimant was placed on lay-off by the employer from November 2018 through March or April 2019. Claimant received unemployment benefits during the winter months of 2018 and 2019. Prior to being recalled for employment by Cramer and Associates, Mr. Castillo resigned his position because he did not think he could physically continue to perform the job duties. (Claimant's Testimony) Mr. Castillo's base wage with Cramer and Associates was $22.50 per hour when he quit, though his wages varied based upon the job being worked. (Claimant's Testimony; Cramer Testimony)

In April 2019, Mr. Castillo accepted a new job with Metro Concrete. Claimant is a concrete finisher for Metro Concrete. He is required to lay out all necessary tools to begin a workday. He then performs concrete finishing duties during his workday to ensure poured concrete is flattened and smooth. Claimant testified that he does not have to lift any cement in this position. Claimant continued working for Metro Concrete at the time of the hearing and was earning $22.00 per hour. (Claimant's Testimony)

Claimant sought an independent medical evaluation, which was performed by Jacqueline M. Stoken, D.O., on April 18, 2018. (Claimant's Ex. 1) Dr. Stoken diagnosed claimant with a right shoulder strain and cervical strain as a result of the January 18, 2017 work injury. She noted the right shoulder surgery and ongoing symptoms in the neck and right shoulder. (Claimant's Ex. 1, p. 6)

Dr. Stoken opined that the right shoulder injury was causally related to the January 18, 2017 work injury. She concurred that claimant has achieved maximum medical improvement. (Claimant's Ex. 1, p. 7) Dr. Stoken assigned a 20 percent permanent impairment of the whole person as a result of claimant's right shoulder injury. (Claimant's Ex. 1, p. 7) She specifically found impairment due to loss of range of motion, the distal clavicle excision, as well as loss of strength. (Claimant's Ex. 1, p. 7)

Dr. Stoken opined that Mr. Castillo required a 35-pound occasional lifting restriction and that he should not lift more than 50 pounds on a rare basis. Dr. Stoken also recommended against any work at or above the shoulder level. (Claimant's Ex. 1, p. 7) Claimant testified that Dr. Goebel provided him verbal work restrictions that contradicted his full duty release of November 15, 2017.

Claimant also obtained a functional capacity evaluation (FCE) at his lawyer's request on April 8, 2019. The FCE demonstrated consistent responses and effort by claimant and was considered a valid test. The FCE recommended medium category work for claimant, including carrying up to 40 pounds on an occasional basis and lifting from floor to waist up to 35 pounds on an occasional basis. (Claimant's Ex. 2, pp. 21-24)

Interestingly, the FCE demonstrated better muscle strength in the right shoulder than estimated by Dr. Stoken. (Claimant's Ex. 1, p. 5; Claimant's Ex. 2, p. 26) In fact, Dr. Stoken estimated 4 out of 5 muscle strength in flexion, extension, abduction, adduction, and internal and external rotation. (Claimant's Ex. 1, p. 5) The FCE documented 5 out of 5 for most of these same right shoulder strength measurements. (Claimant's Ex. 2, p. 26) Claimant's right shoulder ranges of motion also seem to have improved significantly between Dr. Stoken's evaluation and the FCE testing. (Claimant's Ex. 1, p. 5; Claimant's Ex. 2, p. 26)

Ultimately, the FCE was not adopted by any physician and is not specifically relied upon in my industrial disability analysis. However, the FCE findings pertaining to range of motion and strength make me question the accuracy of Dr. Stoken's findings at least at the present time.

Dr. Stoken assigns permanent impairment for both loss of range of motion and loss of strength in the right shoulder. However, review of Section 16.8a of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, page 508, indicates: "Decreased strength *cannot* be rated in the presence of decreased motion, painful conditions, deformities, or absence of parts (e.g., thumb amputation) that prevent effective application of maximal force in the region being evaluated." (Emphasis in

original). In this situation, Dr. Stoken clearly rates both loss of range of motion and loss of strength for the right shoulder. Given the discrepancies between Dr. Stoken's rating and the AMA Guides instructions, as well as the discrepancies between Dr. Stoken's examination findings and those of the FCE, I give Dr. Stoken's opinion pertaining to impairment rating no weight in this case.

I find claimant's testimony that he has ongoing symptoms to be credible. I similarly find Dr. Goebel's full duty release to be overly optimistic of claimant's abilities. On the other hand, I find Dr. Stoken's restrictions to be overly restrictive. At the time these restrictions were issued, claimant continued to work for Cramer and Associates performing his full range of job duties, including lifting up to 70 pounds as he testified, operating a jackhammer, pickaxe, and performing physical labor. Claimant was clearly capable of performing beyond the restrictions offered by Dr. Stoken because he continued to perform duties in excess of those restrictions from April until November 2018.

I accept claimant's testimony that he likely could not have returned to work for Dormark. The evidentiary record is not entirely clear why this is the case, but likely because claimant worked bent over with his hands extended over shoulder level. I find this would be a difficult position for claimant to work given the nature of his January 18, 2017, right shoulder injury. However, I do not accept his testimony that he was not able to continue working for Cramer and Associates. Claimant continued working that same job through the 2018 construction season without further incident or injury.

Dr. Goebel's impairment estimate cites no section or table of the AMA Guides. Nevertheless, the estimation appears reasonable given the type and severity of claimant's right shoulder injury. Therefore, I accept Dr. Goebel's estimate that claimant sustained a 10-15 percent permanent impairment of the right upper extremity. Pursuant to the AMA Guides, Fifth Edition, Table 16-3, page 439, a 10 percent impairment of the upper extremity is equivalent to a 6 percent impairment of the whole person. A 15 percent impairment of the upper extremity is equivalent to a 9 percent impairment of the whole person. I find that claimant has proven he sustained permanent impairment equivalent to 6 percent of the whole person as a result of the January 18, 2017 right shoulder injury.

Claimant did submit to surgical intervention. He has credible and ongoing symptoms in his right shoulder. He is an aging worker that is not likely capable of returning to at least one of his former positions. Yet, he has found subsequent employment with another employer that pays almost the same wage he was earning at the time of his injury. I find that claimant has proven a relatively modest loss of future earning capacity.

Considering claimant's age, the situs and severity of his injury, his lack of English skills, his ongoing symptoms and limitations, his permanent impairment, educational and employment background, his motivation to continue working, his ability to find subsequent employment, and his demonstrated ability to continue working at the pre-

injury position he held at Cramer and Associates, as well as all other factors of industrial disability outlined by the Iowa Supreme Court, I find that Mr. Castillo has proven a 20 percent loss of future earning capacity as a result of the January 18, 2017 work injury to his right shoulder.

## CONCLUSIONS OF LAW

Mr. Castillo asserts he sustained a right shoulder injury on January 18, 2017 as a result of his work duties. Defendants acknowledge that claimant sustained the injury, but dispute the extent of claimant's entitlement to permanent disability.

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).

When disability is found in the shoulder, a body as a whole situation may exist. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949). In Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Commissioner Report 281 (App. 1982), a torn rotator cuff was found to cause disability to the body as a whole.

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 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 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.

In this case, I considered all of the relevant factors outlined by the Iowa Supreme Court to assess industrial disability. I found that Mr. Castillo proved a 20 percent loss of future earning capacity. This is equivalent to a 20 percent industrial disability and entitles claimant to an award of 100 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u).

Finally, claimant seeks assessment of his costs. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. Claimant has prevailed. Therefore, I conclude it is appropriate to assess claimant's costs in some amount.

Specifically, claimant seeks assessment of his filing fee ($100.00). This is a reasonable and permitted cost. 876 IAC 4.33(7). The employer will be ordered to reimburse claimant's $100.00 filing fee.

Claimant also seeks assessment of the cost of obtaining a functional capacity evaluation pursuant to 876 IAC 4.33(6). The Iowa Supreme Court has held that rule 4.33(6) permits only the assessment of the cost of drafting a report in lieu of trial testimony by an expert. Therefore, claimant cannot recover the cost of the functional capacity evaluation itself. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 846 (Iowa 2015).

Review of Claimant's Exhibit 6, page 5 demonstrates that the physical therapist charged $620.00 to draft the FCE report. Defendants contend that this should not be assessed as a cost because no physician accepted, adopted, or relied upon the FCE. Often this might be a basis to deny award of the FCE report expense. However, in this instance, I actually found the FCE to be enlightening when compared to Dr. Stoken's evaluation and opinions.

Having found the FCE helpful in this situation, I conclude it is appropriate to assess the cost of the FCE report. Therefore, I conclude that defendants should be ordered to reimburse claimant $620.00 for the cost of the FCE report. 876 IAC 4.33(6).

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant one hundred (100) weeks of permanent partial disability benefits commencing on August 14, 2017.

All weekly benefits shall be payable at the stipulated weekly rate of eight hundred forty-two and 66/100 dollars ($842.66) per week.

Defendants shall pay claimant any stipulated underpayment of the weekly rate occurring prior to the date of the hearing.

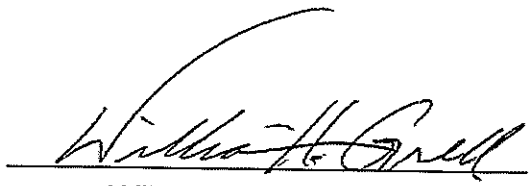
Defendants shall be entitled to the stipulated credit against this award.

Defendants shall pay accrued weekly benefits in a lump sum together with interest 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 percent, as required by Iowa Code section 85.30.

Defendants shall reimburse claimant's costs totaling seven hundred twenty and 00/100 dollars ($720.00).

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 16th day of September, 2019.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The following parties have been served via WCES.

Ashley Grieser

Julie Burger

**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.