

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LAFE THOMAS,

Claimant,

vs.

RIVER CITY BARRICADE
COMPANY,

Employer,

and

CAROLINA CASUALTY INSURANCE
COMPANY,

Insurance Carrier,
Defendants.

FILED

MAY 07 2018

WORKERS COMPENSATION

File No. 5053321

ARBITRATION DECISION

Head Note Nos.: 1108, 2701

STATEMENT OF THE CASE

Claimant, Lafe Thomas, filed a petition in arbitration seeking workers' compensation benefits from River City Barricade Company, employer, and Carolina Casualty Insurance Company, insurance carrier, both as defendants, as a result of a stipulated injury sustained on August 5, 2014¹. This matter came on for hearing before Deputy Workers' Compensation Commissioner Erica J. Fitch, on November 17, 2017, in Des Moines, Iowa. The record in this case consists of Joint Exhibits 1 through 5, Claimant's Exhibits 1 through 20², Defendants' Exhibits A through D, and the testimony of the claimant and Sally Sales. The parties submitted post-hearing briefs, the matter being fully submitted on February 19, 2018.

¹ At the time of evidentiary hearing, claimant moved to amend the date of injury to August 5, 2014, from the pleaded date of August 4, 2014. Defendants did not object. Leave to amend was granted.

² At the time of evidentiary hearing, claimant offered exhibits 1 through 19, which were admitted into evidence. Claimant was also provided leave to submit a rebuttal report by Dr. McCarthy. This report was submitted post-hearing and the undersigned identified the report as Exhibit 20, for ease of reference.

ISSUES

The parties submitted the following issues for determination:

1. Whether claimant's ongoing complaints of the right elbow, right shoulder, and bilateral wrists are causally related to the stipulated work injury of August 5, 2014;
2. Whether claimant is entitled to an award of alternate medical care under Iowa Code section 85.27;
3. Whether the surgical procedures recommended by Dr. McCarthy are reasonable and necessary in treatment of claimant's work-related injury;
4. Rate of compensation;
5. Whether defendants are responsible for claimed medical expenses;
6. Whether claimant is entitled to reimbursement of an independent medical examination pursuant to Iowa Code section 85.39; and
7. Specific taxation of costs.

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.

The parties agreed that the threshold question of causal connection between the ongoing conditions and the work injury must be determined and claimant must undergo the requested medical treatment before any other issues can become ripe for consideration. Due to potential statute of limitations concerns, claimant moved to bifurcate any other issues, including any indemnity benefit entitlements, from the present proceeding. Defendants did not object. Claimant's request to bifurcate is therefore, granted.

FINDINGS OF FACT

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

Claimant's testimony was clear and consistent as compared to the evidentiary record. His demeanor at the time of evidentiary hearing was excellent and gave the undersigned no reason to doubt claimant's veracity. During the course of hearing,

claimant maintained his right elbow in a position close to his body and refrained from lifting his right hand above elbow-level. The undersigned also viewed claimant grimace slightly on occasion. Claimant is found credible.

Claimant was 52 years of age at the time of hearing. He is a lifelong resident of Council Bluffs, Iowa. Claimant attended formal school through the 9th grade; he subsequently earned his GED. He began working with his family garbage hauling business at age 8 and left school to perform such work full time following 9th grade. In 1992, claimant suffered a fractured pelvis and L1-L2 injury as a result of a snowmobile accident. The rehabilitation process was long, exceeding one year, but claimant was ultimately able to return to work full duty for the family garbage hauling business. Claimant continued working in this role until his father sold the company. From 1995 to 1999, claimant was incarcerated for dealing drugs; he has not used illicit drugs since December 1994. (Claimant's testimony)

Following his incarceration, claimant obtained work at defendant-employer in 1999. He began as a seasonal employee, setting up barricades for road construction activities. Claimant denied any right elbow, right shoulder, or bilateral wrist complaints at the commencement of his employment with defendant-employer. Claimant was laid off during the winter months, but was called back to work in 2000. He has remained a permanent, full time employee since that time. For a period, claimant acted as a working supervisor, but ceased filling this role due to a paperwork error. (Claimant's testimony) In the 13 weeks preceding the stipulated work injury, claimant earned \$11,890.73. (DED, pages 31-32) The resultant gross average weekly wage during this period is \$914.67.

On August 5, 2014, claimant and a coworker were setting up a barricade between two lanes of traffic. Claimant fell from the back of a truck and landed upon on an outstretched right arm when he attempted to catch himself. As the incident occurred at the end of a work day, claimant went home and attempted to rest his arm. His complaints worsened overnight, leading claimant to report the injury to defendant-employer's owner, Jay Preister. Mr. Preister directed claimant for medical care. (Claimant's testimony)

At Mr. Preister's direction, on August 6, 2014, claimant presented to Heartland Emergicare for evaluation. The record notes complaints of right arm pain at the elbow and wrist. Toradol was administered. X-rays of the wrist were negative for fracture. X-rays of the elbow revealed a radial head fracture. The provider assessed right elbow pain, right wrist pain, and a right elbow radial head fracture. Claimant received a prescription for hydrocodone-acetaminophen and a referral to GIKK Ortho Specialists (GIKK). (JE1, pp. 1-2)

Claimant testified Mr. Preister advised claimant to follow up with the referral and telephoned GIKK to provide payment information for defendant-employer. (Claimant's testimony)

The same date, August 6, 2014, claimant presented to GIKK and was examined by orthopedic surgeon, John McCarthy, M.D. (CE19, pp. 1-3) Claimant reported he had fallen out of a truck onto an outstretched right hand and complained of acute discomfort over the right lateral elbow, with effusion. Dr. McCarthy noted claimant had been diagnosed with a radial neck fracture. Following examination, Dr. McCarthy assessed a right radial neck fracture; and probable medial collateral ligament injury at the elbow, associated with the fracture. Dr. McCarthy recommended conservative measures: observation, gradual increase in activities, and restrictions to light duty, with no "power work activities." (JE2, p. 1)

Claimant returned to Dr. McCarthy on August 15, 2014. Claimant reported performance of significant heavy work duties, with increased pain and limitations. Dr. McCarthy ordered updated x-rays and examined claimant. He issued diagnoses of fracture of the right radius and right lateral epicondylitis. Dr. McCarthy ordered a course of physical therapy, prescribed use of a posterior elbow splint, and imposed a work restriction of no lifting over 1 pound. (JE2, pp. 2-3)

On September 3, 2014, claimant returned to Dr. McCarthy with reports of continued difficulties. Dr. McCarthy recommended further observation and splinting. He altered claimant's work restrictions to allow for a 10-pound lift with the right arm. (JE2, p. 4)

Claimant remained under Dr. McCarthy's care for the right radial head neck fracture and ligament injury on October 1, 2014. At that time, Dr. McCarthy lessened claimant's restrictions to allow for a 20-pound lift with the right arm. (JE2, p. 5)

At Dr. McCarthy's recommendation, on March 4, 2015, claimant underwent EMG/NCS studies. Administering physician, John Hannam, M.D. opined the studies yielded results of a normal right upper extremity and very mild left median neuropathy, but asymptomatic in nature. (JE4, p. 1)

Claimant was scheduled to undergo right upper extremity surgery with Dr. McCarthy in April 2015. This surgery was cancelled and subsequently denied by defendants. (Claimant's testimony) On April 29, 2015, claimant's counsel authored a letter to York Risk Services Group requesting the basis for the cancellation and denial of surgery. (CE2, p. 1)

On June 2, 2015, Dr. McCarthy authored a letter to claimant's counsel. He identified claimant's injuries as: right radial neck fracture; right radial collateral ligament injury of the elbow; secondary contracture to the right elbow, associated with the fracture; and cubital tunnel syndrome secondary to the fracture. He opined each of these conditions were secondary to claimant's fall on his outstretched right hand in August 2014. Dr. McCarthy noted claimant continued to experience significant limitations as a result of these conditions. In terms of treatment, Dr. McCarthy recommended proceeding with right elbow arthroscopy with release of contracture, and

right cubital tunnel decompression with possible ulnar nerve transposition. (JE2, p. 6) In the event claimant elected not to proceed with surgery, Dr. McCarthy opined claimant sustained permanent impairment of 15 percent right upper extremity secondary to the work injury. (JE2, p. 10)

On September 1, 2015, claimant's attorney authored a letter to defendants' counsel and thereby represented that claimant desired to undergo the right elbow arthroscopy and cubital tunnel release recommended by Dr. McCarthy. Claimant requested authorization of the procedures. (CE5, p. 1) Claimant, via counsel, made a second request for such care on September 15, 2015. (CE6, p. 1)

Claimant testified he began to notice numbness of his left hand, a symptom he related to compensating for decreased use of his dominant right arm. (Claimant's testimony) On December 2, 2015, claimant's counsel contacted defendants' counsel and requested return evaluation by Dr. McCarthy, given claimant's ongoing symptomatology. (CE7, p. 1)

Claimant returned to Dr. McCarthy on December 9, 2015 with continued complaints. Dr. McCarthy ordered and reviewed updated x-rays; he also performed a physical examination. Thereafter, he assessed: healed radial head fracture; contracture of the right elbow with osteophyte formation; possible loose body in the right elbow; right cubital tunnel syndrome; right ring mallet finger; left carpal tunnel syndrome; and right ulnar impaction syndrome. Dr. McCarthy again recommended surgery, consisting of right elbow arthroscopy to address claimant's elbow and cubital tunnel. Dr. McCarthy also recommended left carpal tunnel release. In addition, Dr. McCarthy recommended splinting of the mallet finger. He made no treatment recommendations with respect to right ulnar impaction syndrome, as he opined this condition did not reflect a work-related process. (JE2, pp. 7-8)

By a letter to defendants' attorney dated January 4, 2016, claimant's counsel requested authorization of the surgery recommended by Dr. McCarthy. (CE8, p. 1) Counsel made a second request for this care on January 27, 2016. (CE9, p. 1)

Claimant testified he developed symptoms of his right shoulder approximately 1 1/2 years following the right elbow injury. Claimant related the development of right shoulder symptoms to altered mechanics in his work duties, due to limited use of his right elbow. (Claimant's testimony)

On March 3, 2016, Dr. McCarthy authored a letter to claimant's counsel. He identified claimant's work-related diagnoses as: right radial neck fracture; contracture of the right elbow; right carpal tunnel syndrome; right cubital tunnel syndrome; and impingement of the right shoulder with bursitis tendinitis. Dr. McCarthy opined these conditions were directly related to claimant's work activities, with significant soft tissue problems and nerve irritation which developed post-injury, most likely due to swelling.

He further opined claimant's conditions were related to either the initial trauma or due to secondary problems that developed over time thereafter. (JE2, p. 9)

Claimant testified Dr. McCarthy performed two injections to claimant's right shoulder, in hopes of bringing his symptoms under control. (Claimant's testimony)

On March 10, 2016, claimant's attorney authored repeat correspondence to defendants' counsel. Thereby, claimant again requested authorization of the treatments recommended by Dr. McCarthy relative to the right radial neck fracture, right elbow contracture, right carpal tunnel syndrome, right cubital tunnel syndrome, and right shoulder impingement. (CE10, p. 1)

At the referral of defendants, on April 6, 2016, claimant presented to Nebraska Hand & Shoulder Institute for an independent medical examination (IME) with Dolf Ichtertz, M.D. Dr. Ichtertz interviewed claimant and noted complaints of weakness; right medial, greater than lateral, elbow pain with associated tenderness; and right upper/dorsal forearm swelling. (DEA, p. 2) He noted claimant's history of fractured pelvis and lumbar spine fusion at L1-L2, with chronic low back pain. (DEA, p. 7) Dr. Ichtertz performed a medical records review and authored a care summary. (DEA, pp. 1-7) Dr. Ichtertz's care summary includes commentary. Dr. Ichtertz noted Dr. McCarthy had related claimant's right elbow contracture to the right radial neck fracture and secondary cubital tunnel syndrome. Dr. Ichtertz opined ulnar nerve entrapment at the elbow results from prolonged elbow flexion due to improper nocturnal sleeping posture. (DEA, p. 6) Dr. Ichtertz reviewed claimant's x-rays and performed a physical examination. (DEA, pp. 13-15) The examination also included an NCS study of claimant's right upper extremity; results were compatible with chronic, right median and ulnar nerve entrapment at the wrist. (DEA, p. 12)

Following records review, interview, and examination, Dr. Ichtertz issued the following assessments:

1. Healed right radial head fracture without posttraumatic arthritis.
2. Chronic, right lateral humeral epicondylalgia (epicondylitis) *possibly* related to occupational incident, though extremely unlikely.
3. Some restricted right elbow motion possible worsened by occupational injury and treatment for same, though based upon history provided it is suspicious that he had part if not all of the motion deficit prior to his occupational injury/radial head fracture.
4. Non-work-related right shoulder impingement with prominent acromion, AC joint arthritis and early glenohumeral arthritis.
5. Chronic, right carpal and cubital tunnel syndrome, non-work-related.

6. Chronic left carpal tunnel syndrome with indolently developing left cubital tunnel syndrome, non-work-related.

7. Weak grip and pinch developed because of non-work-related ulnar neuropathy.

8. Morbidly overnourished and physically deconditioned.

(DEA, pp. 15-16) (Emphasis in original.)

Dr. Ichtertz opined claimant achieved maximum medical improvement (MMI) from the work-related conditions as of October 22, 2014. He recommended no permanent restrictions or further treatment relative to the work injury. (DEA, pp. 16, 20) Dr. Ichtertz commented claimant likely demonstrated some symptom magnification, based upon variable examination findings in his medical history. In the event claimant's right elbow motion was restricted due to the work injury, Dr. Ichtertz opined there was no guarantee surgery would improve the complaint, as claimant was not rigidly immobilized for a prolonged period post-injury and should not have lost such motion. (DEA, p. 19) With respect to permanent impairment resulting from the work injury, Dr. Ichtertz opined claimant sustained impairment of 4 percent right upper extremity based upon reduced elbow flexion. (DEA, p. 17)

With respect to questions of causal connection between the work injury and claimant's conditions, Dr. Ichtertz opined claimant's tennis elbow, cubital tunnel and impingement conditions were "reasonable" problems for a person of claimant's age and physical condition. He opined the conditions did not appear to be directly related to the work injury. (DEA, p. 16) He indicated tennis elbow is a degenerative tendon condition and would not have occurred as a result of trauma. He further opined claimant demonstrated early degenerative arthritis of the right shoulder and elbow. (DEA, p. 18) Dr. Ichtertz opined claimant's ulnar nerve irritability was related to improper nocturnal posture, specifically sleeping with the elbow bent at greater than 45 degrees; he therefore opined the condition was not work-related. (DEA, p. 17) Dr. Ichtertz opined the cubital tunnel condition was attributable to improper sleeping posture, age, and genetics. He opined the condition may benefit from release, but the surgery would be non-work related. With respect to elbow treatment, Dr. Ichtertz also opined a more preferable surgery than that recommended by Dr. McCarthy would be a percutaneous right lateral elbow tenotomy; however, he commented such a procedure would not be work related. (DEA, p. 19)

On April 13, 2016, claimant's counsel authored correspondence to defendants' counsel and requested repeat evaluation by Dr. McCarthy with respect to the right carpal tunnel and cubital tunnel, right shoulder, and left carpal tunnel. (CE11, p. 1) Claimant's counsel made a repeat request for surgery via letter dated May 12, 2016. (CE12, p. 1)

At the referral of claimant's counsel, on August 18, 2016, claimant presented to board certified orthopedic surgeon, Michael McGuire, M.D., for IME. (CE19, pp. 4-5) Dr. McGuire authored a report containing his findings and opinions dated November 11, 2016. As elements of his IME, Dr. McGuire performed an interview, examination, and medical records review. (CE1, pp. 1-2) Claimant expressed complaints of right elbow pain, decreased range of motion at the elbow, and right shoulder pain which claimant related to loss of elbow function. (CE1, p. 2)

Following records review, interview, and examination, Dr. McGuire offered opinions with respect to causation, treatment, and permanent impairment. Dr. McGuire opined as a result of the work injury, claimant suffered a minimally displaced radial neck fracture and clinical findings suggested ligamentous and soft tissue injuries to the medial aspect of claimant's right elbow. He noted that two years later, claimant had not regained normal range of motion of the right elbow. In addition to these complaints, Dr. McGuire noted claimant demonstrated clinical signs of right carpal tunnel and cubital tunnel syndrome. Dr. McGuire opined claimant was a surgical candidate and supported Dr. McCarthy's treatment recommendations. (CE1, p. 2) However, Dr. McGuire opined it was unreasonable to relate claimant's left-sided carpal tunnel symptoms to the right elbow injury. (CE1, pp. 2-3) Dr. McGuire did relate claimant's left carpal tunnel syndrome and right shoulder pain to repetitive trauma over the course of 17 years of employment at defendant-employer. Dr. McGuire opined claimant had achieved MMI and sustained a combined impairment of 29 percent right upper extremity or 17 percent whole person due to the conditions of claimant's right elbow, forearm, carpal tunnel, cubital tunnel, and shoulder. He recommended a functional capacity evaluation to determine appropriate work restrictions. (CE1, p. 3)

Claimant returned to Dr. McCarthy on April 12, 2017 with continued complaints of significant pain of his arm and shoulder. At that time, Dr. McCarthy noted he had followed claimant over the preceding few years after an injury to claimant's right upper extremity, which began as a fracture dislocation of the right elbow. Dr. McCarthy assessed: progressive right shoulder pain secondary to elbow contracture; associated scapular winging; longstanding long head biceps rupture; status post right radial head fracture with associated elbow subluxation, possible dislocation; contracture of the right elbow; and right cubital tunnel syndrome. (JE2, p. 11) The treatment record entered into evidence is incomplete and may have truncated additional diagnoses and the plan of care.

At Dr. McCarthy's direction, claimant underwent an MRI of his right shoulder on April 13, 2017. (JE5, pp. 1-2)

Dr. McCarthy authored a letter to claimant's counsel dated June 28, 2017. He noted claimant had asked Dr. McCarthy to explain how his opinions varied so significantly from those of Dr. Ichtertz. For that reason, Dr. McCarthy requested counsel supply a copy of Dr. Ichtertz's report for review. (CE13, p. 1) Claimant's counsel

obliged and on July 11, 2017, provided copies of the IME reports of both Dr. Ichtertz and Dr. McGuire for review. (CE14, p. 1)

On August 23, 2017, claimant returned to Dr. McCarthy with continued complaints of the right arm, shoulder, and subscapular area. Dr. McCarthy performed a physical examination and an ultrasound, which revealed significant carpal tunnel changes on the right side. (JE2, pp. 12-13) Thereafter, Dr. McCarthy assessed: winging of the right scapula; subscapular crepitation consistent with winging; shoulder arthrosis with rotator cuff tendinitis; contracture of the right elbow, status post fracture; bilateral carpal tunnel syndrome; and left cubital tunnel syndrome. Claimant reported he wanted to continue at his current level of functioning, a request Dr. McCarthy described as reasonable. He, however, opined claimant would ultimately require surgical intervention. In the event surgery was performed, Dr. McCarthy opined he would recommend an aggressive stance. For the right shoulder: right shoulder arthroscopy, biceps tenotomy, tenodesis, debridement, and possible rotator cuff repair and decompression. (JE2, p. 13) With respect to the right elbow: release, ulnar nerve decompression, and transposition. He also recommended carpal tunnel release on the right and possibly upon the left arm. In the interim, he opined claimant could continue regular duties. (JE2, p. 14)

At Dr. McCarthy's referral, on September 5, 2017, claimant returned to Dr. Hannam for repeat EMG/NCS studies. Dr. Hannam opined the studies revealed bilateral distal median mononeuropathies, localized to each wrist, and findings consistent with carpal tunnel syndrome. (JE4, p. 3)

Following review of the IME reports of Dr. Ichtertz and Dr. McGuire, Dr. McCarthy authored a letter to claimant's counsel dated September 15, 2017. With respect to Dr. McGuire's report, Dr. McCarthy noted Dr. McGuire felt claimant's right shoulder, elbow, and hand conditions were work-related, but the left carpal tunnel condition was not. Dr. McCarthy also noted Dr. McGuire had opined claimant's shoulder, elbow, and hand conditions warranted a permanent impairment rating of 29 percent upper extremity. Dr. McCarthy opined Dr. McGuire's ratings were reasonable and only slightly different from his own computations. With respect to Dr. Ichtertz's report, Dr. McCarthy opined Dr. Ichtertz's findings and opinions were not consistent with Dr. McCarthy's records or with Dr. McGuire's noted history. He further opined Dr. Ichtertz's evaluation did not correspond with claimant's history or treatment received. (JE2, pp. 15-16)

On September 27, 2017, claimant's attorney authored correspondence to defendants' counsel. Thereby, claimant again requested authorization of the right shoulder and elbow procedures recommended by Dr. McCarthy. (CE15, p. 1)

On October 3, 2017, Dr. McCarthy authored a letter directed to claimant's attorney. Thereby, he opined claimant presented with work related conditions that were directly related to trauma, as well as cumulative in nature. He explained the original work injury caused a right radial head fracture which healed. However, claimant

secondarily developed significant contracture of the elbow and claimant developed right lateral humeral epicondylitis as a direct result. Dr. McCarthy opined claimant also developed a significant "associated condition" involving peripheral nerve entrapment and ongoing shoulder problems; he opined each of these were also directly related to the work injury. (JE2, p. 17)

On October 13, 2017, via correspondence to defendants' counsel, claimant's attorney again requested treatment per Dr. McCarthy's recommendations. (CE16, p. 1)

Dr. Ichtertz reviewed updated medical records and authored a supplemental IME report on November 6, 2017. (DEB, pp. 21-24) Dr. Ichtertz offered some critique of Dr. McCarthy's care and expressed belief Dr. McCarthy appeared to "be behaving as a patient advocate, not an impassive examiner." He opined claimant's work-related right radial neck fracture should have healed within six weeks. (DEB, p. 23) With respect to the right elbow arthroscopy recommended by Dr. McCarthy, Dr. Ichtertz described the procedure as unnecessary and poorly advisable, opining claimant did not present with a functional problem which could be remedied by a release. Dr. Ichtertz opined claimant's shoulder condition represented spontaneous degenerative processes and was not work-related. (DEB, p. 24) He similarly opined claimant's median nerve entrapment and ulnar nerve dysfunction were spontaneous and aggravated by claimant's sleep posture. Dr. Ichtertz was emphatic in his opinions these conditions were not work related. Additionally, Dr. Ichtertz opined Dr. McGuire's assigned impairment rating was clearly in error, as claimant did not demonstrate a work-related impairment beyond some possible loss of motion at the elbow. (DEB, p. 25)

At the time of evidentiary hearing, claimant continued to follow up with Dr. McCarthy for care; he uses his personal health insurance for such treatment. Claimant presented to Dr. McCarthy approximately three weeks prior to evidentiary hearing, at which time Dr. McCarthy recommended surgery. Claimant expressed desire to undergo surgery with Dr. McCarthy and scheduled surgery for December 4, 2017. However, shortly prior to evidentiary hearing, claimant's health insurance provider denied payment for surgery on the expressed belief the care should have taken place under workers' compensation insurance. Claimant testified Dr. McCarthy informed him that claimant's bilateral hand and shoulder complaints were related to his ongoing work duties following the work injury on August 5, 2014. (Claimant's testimony)

Claimant's counsel provided Dr. McCarthy with Dr. Ichtertz's supplemental IME report for review. Following review, on December 21, 2017, Dr. McCarthy expressed disagreement with the content of Dr. Ichtertz's report. (CE20, p. 2)

Sally Sales testified at evidentiary hearing. She described herself as claimant's spouse and testified she and claimant represent themselves as a married couple. They have been together for approximately 19 years. At the time of their meeting, she testified claimant did not suffer with any problems of his right arm, right shoulder, or bilateral wrists. Since the work injury, Ms. Sales testified claimant complains of pain of

his right elbow, right shoulder and both wrists. As a result, he utilizes over-the-counter pain medication and she applies a topical gel to his areas of concern. She testified claimant has faith in Dr. McCarthy; she believes surgery is in claimant's best interest. (Ms. Sales' testimony)

Ms. Sales' testimony was clear and consistent with the evidentiary record. Her demeanor at hearing gave the undersigned no reason to question her veracity. Ms. Sales is found credible.

CONCLUSIONS OF LAW

The first issue for determination is whether claimant's ongoing complaints of the right elbow, right shoulder, and bilateral wrists are causally related to the stipulated work injury of August 5, 2014.

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 Rule of Appellate Procedure 6.14(6).

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).

This case presents as a classic battle-of-the-experts. In support of his contention that the ongoing right elbow, right shoulder, and bilateral wrist conditions are related to the work injury of August 5, 2014, claimant relies upon the opinions of Dr. McCarthy. Defendants rely upon the opinions of Dr. Ichtertz to reach a contrary finding.

Following review of the entirety of the evidentiary record, I award greatest weight to the opinions of orthopedic surgeon, Dr. McCarthy. Dr. McCarthy began treating claimant one day following the work injury at defendant-employer's direction. His course of care spanned a period of over three years at the time of evidentiary hearing. As such, Dr. McCarthy is in the unique position to be able to observe claimant's conditions and complaints over time. Dr. McCarthy possessed the opportunity to examine claimant on multiple occasions relative to the multiple conditions claimant claims are work-related.

I am presented with no convincing evidence that Dr. McCarthy's methodologies are somehow flawed. To the contrary, Dr. McGuire opined Dr. McCarthy's treatment recommendations were reasonable. Dr. McGuire reached a consistent medical history as Dr. McCarthy and also found the majority of claimant's conditions to be work-related. Dr. Ichtertz vehemently disagreed with Dr. McCarthy and Dr. McGuire's findings and conclusions; however, I award his opinions no weight based upon the inconsistencies present between his opinions and those of Drs. McCarthy and McGuire, as well as incompatibility with the greater weight of the medical records in evidence.

Following review of the entirety of the evidentiary record, I adopt the opinions of Dr. McCarthy with respect to causal connection between claimant's stipulated work injury of August 5, 2014 and his ongoing medical conditions of the right shoulder, right elbow/arm, and bilateral wrists.

The next issue for determination is whether claimant is entitled to an award of alternate medical care under Iowa Code section 85.27. The next issue for determination is whether the surgical procedures recommended by Dr. McCarthy are reasonable and necessary in treatment of claimant's work-related injury. These issues will be considered together.

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 16, 1975).

Defendants have failed to provide prompt, consistent medical care relative to claimant's work-related medical conditions. Dr. McCarthy has provided claimant intermittent care from one day following the work injury to the present. The reasonableness of his care and treatment is substantiated by the opinions of Dr. McGuire. As set forth *supra*, I award no weight to the contrary and inconsistent opinions of Dr. Ichtertz. Claimant has an established physician-patient relationship with Dr. McCarthy and desires the opportunity to follow through with Dr. McCarthy's

treatment recommendations. I am presented with no compelling reason to disrupt this physician-patient relationship. Dr. McCarthy is, therefore, designated as claimant's authorized treating physician with respect to medical care causally related to the August 5, 2014 work injury. This designation includes authorization of surgical intervention recommended by Dr. McCarthy; such care is found to be both reasonable and necessary in treatment of claimant's work-related injury.

The next issue for determination is claimant's rate of compensation.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6).

As set forth *supra*, claimant's gross average weekly wage at the time of the work injury was \$914.67. The parties stipulated at the time of the work injury, claimant was married and entitled to 5 exemptions. Claimant's proper rate of compensation, if indemnity benefits come due, is therefore, \$612.21.

The next issue for determination is whether defendants are responsible for claimed 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 16, 1975).

Claimant incurred medical expenses in treatment of conditions found to be work-related by this decision, as detailed in Exhibit 18, pages 1 through 3, and as attached to the hearing report. Defendants failed to provide proof claimant's care with authorized physician Dr. McCarthy was revoked and such revocation was properly conveyed to claimant. Defendants are found responsible for the claimed medical expenses and as such, are responsible for payment thereof. Defendants shall also hold claimant harmless for the detailed expenses and shall reimburse claimant directly for any out of pocket medical expenses incurred.

The next issue for determination is whether claimant is entitled to reimbursement of an independent medical examination pursuant to Iowa Code section 85.39.

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).

Prior to Dr. McGuire's IME, defendants retained Dr. Ichtertz to perform an IME and offer opinions with respect to the extent of claimant's permanent disability. Dr. Ichtertz's IME triggered claimant's right to a compensable section 85.39 IME. Dr. McGuire charged \$2,500.00 for this service and report. I find nothing inherently unreasonable regarding this fee. Defendants shall reimburse claimant for Dr. McGuire's IME in the amount of \$2,500.00.

The final issue for determination is a specific taxation of costs pursuant to Iowa Code section 86.40 and rule 876 IAC 4.33.

Iowa Code section 86.40 states:

Costs. All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

Costs. Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called

or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Claimant requests taxation of the costs of: filing fee (\$100.00); records procurement from multiple medical providers; three reports authored by Dr. McCarthy (\$150.00, \$150.00, and \$100.00); and Dr. McGuire's IME. As defendants were ordered to reimburse claimant for Dr. McGuire's IME under section 85.39, taxation of this cost is moot. The cost of filing fee is an allowable cost and is taxed to defendants (\$100.00). Rule 4.33 does not specifically allow for taxation of the costs of medical records procurement; therefore, I decline to tax the costs of records procurement to defendants. Rule 4.33 allows for taxation of the costs of two practitioner's reports; accordingly, I tax defendants with the costs of two of Dr. McGuire's reports (\$150.00 each).

Defendants are taxed with total costs in the amount of \$400.00 (\$100.00 + \$150.00 + \$150.00 = \$400.00).

ORDER

THEREFORE, IT IS ORDERED:

The parties are ordered to comply with all stipulations that have been accepted by this agency.

Claimant shall take nothing by way of indemnity benefits from these proceedings.

Dr. McCarthy is designated as an authorized treating physician pursuant to section 85.27; defendants are therefore responsible for payment of medical treatment recommended by Dr. McGuire for medical conditions causally related to the August 5, 2014 work injury.

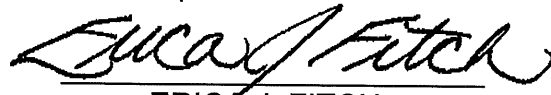
Defendants shall pay claimant's prior medical expenses submitted by claimant at the hearing as set forth in the decision.

Defendants shall reimburse claimant for Dr. McGuire's IME in the amount of two thousand five hundred and 00/100 dollars (\$2,500.00).

Defendants shall file first and subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Costs are taxed to defendants pursuant to 876 IAC 4.33 as set forth in the decision.

Signed and filed this 7th day of May, 2018.


ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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EJF/srs

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.