BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PAUL BEYER,	FILED	
Claimant,	JUN 20 2016	File No. 5051906
vs.	WORKERS COMPENSATION	ARBITRATION
JOHN DEERE DUBUQUE WORKS OF DEERE & COMPANY,		DECISION
Employer, Self-Insured, Defendant.		Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Paul Beyer, filed a petition in arbitration seeking workers' compensation benefits from John Deere Dubuque Works, self-insured employer.

The hearing was held on March 22, 2016, in Davenport, Iowa. The record was held open until April 8, 2016, to accept an affidavit regarding the issue of rate. The case was considered fully submitted on April 22, 2016, upon the simultaneous filing of briefs.

The record consists of the testimony of the claimant, the Affidavit of Robert T. Harbin, Joint Exhibits A-O, and Claimant's Exhibits 1-3, 5-7.

In a post-hearing filing, the parties agreed to a rate of $559.10.

ISSUE

What is the extent of the claimant's industrial disability, if any?

STIPULATIONS

The parties agree claimant sustained an injury on April 10, 2013, which arose out of and in the course of his employment. The parties further agree the injury was the cause of some permanent disability and that the commencement date for permanent partial disability benefits is January 19, 2016.

At the time of the injury, claimant was married and entitled to 2 exemptions. Originally, the parties disputed the rate but in a post-hearing filing, the parties stipulated to the rate of $559.10 per week.

FINDINGS OF FACT

Claimant, Paul Beyer, was a 61-year-old man at the time of hearing. He graduated from high school in 1973 and in 1984 took short courses in electronics at Northern Iowa Community College.

He began work for defendant in 2011 and was cleared through a pre-employment physical. (Exhibit C, page 80-B) His past employment includes machine operator for The Adams Company and pizza delivery and kitchen work in the remote past. (Ex. H, p. 126)

On April 10, 2013, claimant sustained a work related injury to his right shoulder while using an overhead torque wrench to tighten a grill bracket. (Ex. M, p. 144) The following day, claimant was examined by Theresa Kaufman, a nurse in the employ of the defendant, who concluded that claimant had shoulder popping, reduced range of motion, and pain. (Ex. C, p. 78-79) Ms. Kaufman recommended claimant take ibuprofen, ice the shoulder and engage in home therapy. (Ex. C, p. 79) Lester Kelty, M.D., noted that the job had been changed, presumably to avoid similar injuries in the future. (Ex. C, p. 78)

Juan Salinas, an engineer, fixed the job so that claimant would use a tool at chest level and below. Claimant was then transferred to a fork truck job that did not impact his shoulder. At some point, he found his way back to department 143, the department he was working in when he was injured. He worked there for a short time before transferring to the fork truck job again. From there, around March 2015, claimant bid into an inspection position that he knew was suited to his physical condition and paid more.

Claimant continued to have pain. During a routine hearing examination, claimant brought up his shoulder injury again. (Ex. C, p. 76) MRIs were ordered which showed degenerative changes in the glenohumeral & AC joints, diffuse label degeneration and partial thickness intrasubstance tears of the insertions of the supraspinatous and subscapularis tensions with mild strain of the infraspinatus muscle. (Ex. A, p. 3, Ex. C, pp. 83-84)

Dr. Hunt medically cleared claimant to perform all of his job duties of material storage/retrieval without restrictions in March of 2015. (Ex. C, p. 101) Soon after, claimant won his bid for inspections.

Claimant was referred to Dan Johnson, D.C., a chiropractor, for manipulation and treatment to his right shoulder. (Ex. C, p. 99) He had a number of treatments and appeared to be improving under the care of Dr. Johnson. On April 8, 2015, claimant reported that his right shoulder was better and that he was back to sleeping in a bed. (Ex. C, p. 90)

He was sent to David S. Field, M.D., for another evaluation. Dr. Field injected claimant on May 18, 2015. Claimant had good results. (Ex. E, p. 108) Dr. Field did suggest claimant consider arthroscopic surgery but claimant did not want to pursue that.

The pain continued, however, and claimant was then referred to the University of Iowa Hospitals and Clinics (UIHC) by Jill Hunt, M.D., due to "right shoulder pain and popping which he feels is instability [*sic*]." (Ex. A, p. 2)

James V. Nepola, M.D., reluctantly accepted the referral, noting in his letter to Dr. Hunt that his clinic was only accommodating a limited number of new patients per month and requiring a pre-payment of $1,500.00 before agreeing to schedule an appointment. (Ex. A, p. 3)

Dr. Nepola's examination on October 20, 2015, noted reduction in range of motion and pain upon movement. (Ex. A, pp. 5-6) His diagnosis was arthritis of the right shoulder region secondary to right shoulder injury. (Ex. A, p. 7) A corticosteroid injection was administered and while painful at first, it provided claimant "excellent relief." (Ex. A, p. 10)

He was seen in follow up on November 3, 2015, and continued work without restrictions. Claimant reported his job could be performed without aggravation to his shoulder. Claimant was seen for this third consultation with Dr. Nepola on December 1, 2015. (Ex. A, p. 15) He had good range of motion with some pain.

On January 19, 2016, Dr. Nepola deemed claimant at maximum medical improvement (MMI).

> 60-year-old male with right glenohumeral arthritis which has been responsive to injections and meloxicam. At this point, he has reached MMI. He may need repeat injections in the future. He may need an arthroplasty in the future. He will continue work without restrictions. Follow-up PRN. All questions answered.

(Ex. A, p. 21-C)

At the request of the defendant, Dr. Nepola issued an opinion finding claimant sustained a two percent impairment rating. (Ex. A, p. 23)

> Although he may benefit from future treatment for pre-existing osteoarthritic changes, at the time of MMI he reported no pain and had near full range of motion of the shoulder, therefore, he has returned to his pre-injury "baseline" and I do not anticipate he will require future treatment due to the work related exacerbation of his pre-existing, underlying condition.

(Ex. A, p. 23)

On February 24, 2016, defendant communicated via email to claimant's attorney that it would pay four percent industrial disability. (Ex. K, p. 138)

Claimant returned to the defendant's medical clinic with continued reports of pain. On examination, he had pain and reduced range of motion. (Ex. C, p. 61) He reported sleeping in his recliner because of pain and felt that Dr. Nepola was not helpful. (Ex. C, p. 61) On February 25, 2016, he returned again and during the examination, Dr. Hunt recorded "[t]enderness . . . over the anterior right shoulder." (Ex. C, p. 61)

Claimant saw Richard L. Kreiter, M.D., on February 24, 2016, for an independent medical evaluation (IME). During the examination, Dr. Kreiter noted a reduction in the range of motion on the right as opposed to the left along with irregularity over the right AC joint and tenderness over the joint. Claimant had no significant crepitation upon rotation. He diagnosed claimant as follows:

> My diagnosis of Paul's condition includes posttraumatic degenerative joint disease with chondromalacia and synovitis of the right glenohumeral joint with degenerative arthritis of the right acromioclavicular joint, with chronic pain. The delay in both diagnoses and work place modification accelerated and permanently aggravated a pre-existing condition in both the glenohumeral and acromioclavicular joints. Intermittent, chronic pain and functional loss continues depending on activity.

(Ex. L, p. 140)

As a result, Dr. Kreiter found the following impairment:

> There is permanent impairment in the right shoulder as a result of the original injury of 04/11/13. This based on a permanent aggravation of a pre-existing condition in the right shoulder. I will use the AMA Guide to Permanent Impairment, 5th Edition. Since there is no significant range of motion loss, I will refer to page 499, table 16-18, impairment values due to specific joints. In regard to the posttraumatic glenohumeral joint with documented specific injury, an estimated 10% upper extremity impairment is present. The AC joint arthritic condition also aggravated, would be a 5% upper extremity impairment. Therefore, from the combined values chart, this would be a 15% upper extremity impairment. From page 439, table 16-3, the 15% upper extremity impairment equals a 9% whole person impairment.

(Ex. L, p. 140)

He also recommended the following restrictions:

> Permanent work restrictions are needed, and include no overhead work with the right arm. Bench level work primarily. Pulling and pushing

> of 20 to 25 pounds occasionally on the right as tolerated could be allowed. Avoid torquing [*sic*], hammering, or use of a rope start mechanism on engines. Lifting occasionally of 35 to 40 pounds floor to bench level two handed, with arms to the sides could be tolerated.

(Ex. L, p. 141)

Exhibit 3 is a print out from the American Academy of Orthopaedic Surgeons regarding a shoulder joint replacement which claimant may have to undergo in the future per the opinion of Dr. Nepola.

At the present time, claimant has reduced use of his right shoulder. While he enjoys most of his previous leisure activities, they are constrained by the pain and discomfort in his right shoulder. When changing the water heater or smoke alarm in a rental, claimant had the assistance of his brother. A tenant replaced the screens and storm windows and painted the rental unit. Claimant used to tinker with automobiles but has not in recent years and while he has changed the oil in his truck, he is concerned about whether he will be able to change the brakes or tires.

He is still active with fishing, camping, and mountain biking. He is able to use the computer to enter data from his inspections.

Defendant suggests claimant is not credible citing to small inconsistencies between claimant's testimony and the medical records. For instance, Dr. Nepola recorded that claimant was working on his cars while claimant testified at hearing that he had given up on working on his cars other than to change the oil. Defendant complained that the claimant's possession of all his car-related tools implied that he intended to return to car repair work as soon as the decision was rendered. Failing to dispose of belongings merely because claimant is no longer in a position to use them is not a sign of a lack of credibility. It could be one of attachment to expensive items that claimant has likely taken years to accumulate. There could be any number of reasons claimant has not disposed of them and defendant's suggestion is one of the lesser plausible ones. Defendant was also hypercritical that claimant changed the oil in his car. Changing the oil in a car or truck while lying on one's back is not overhead work. It is at chest level. Further, changing the oil occasionally is a far cry of having to do that type of work repetitively day in and out. Finally, claimant does do physical work as inspector such as crawling in and around machines to ensure that they are in good working order, likely engaging the same type of physical exertion that changing the oil in one's car would require.

These small attacks on claimant's credibility are unsuccessful. Claimant was a credible witness. His testimony was largely consistent with his medical records and previous statements. He answered cross-examination questions in a direct fashion. There was no evasiveness or hesitation in his answers. It is found that based on the consistency of the testimony combined with claimant's demeanor that he is deemed credible.

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 Rule of Appellate Procedure 6.14(6)(e).

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.

Claimant was asymptomatic before his work injury on April 10, 2013. Prior to his injury, claimant worked a position that required the consistent use of his shoulders and arms and he engaged in overhead work on a regular basis.

Dr. Hunt recorded claimant as having full range of motion on August 12, 2015, and only "rare pain but feels that the shoulder is loose in the joint." (Ex. C, p. 69) By January 2016, Dr. Nepola felt claimant had full range of motion and no pain. (Ex. A, p. 23) Dr. Kreiter also noted that claimant had "no significant range of motion loss." (Ex. L, p. 140)

Defendant also points out that claimant exhibited good range of motion during his testimony at hearing, moving his arm and shoulder to demonstrate how the incident occurred and how he used his arms to conduct his job duties.

Dr. Nepola assessed a two percent permanent impairment but imposed no restrictions. He did believe that claimant may need future treatment such as a possible shoulder replacement surgery for the looseness in claimant's shoulder.

Currently claimant is making more money as an inspector than he made previously. He continues to perform most of his leisure activities with only some modifications.

At best, defendant argues, claimant has only a slight loss of internal rotation. (See Defendant's Post-Hearing Brief, p. 17)

There is no surgery currently scheduled and while he may need it in the future, a decision today is based on probabilities and restriction on current activities, not potential impairments in the future. That would be more properly a subject for a review-reopening.

However, the aforementioned facts do not result in a finding of no permanent impairment. While the defendant argues that Dr. Nepola's opinion should carry more weight because of his credentials—his education, training, and experience are superior to that of Dr. Kreiter's, Dr. Kreiter's opinions are more closely aligned with the complaints of the claimant whom the undersigned deemed credible in the above findings of fact.

Defendants pointed out claimant moved his arm freely during hearing. Making motions during a hearing is not the same as conducting the same repetitive tasks, with force, during a work day just as changing the oil once in a while is not indicative of one's abilities to do certain tasks throughout the course of an eight-hour work day.

Claimant is a hard worker, motivated to return to work (as evidenced by his work history), but concerned with the limits of his shoulder. It is loose and he fears it will not be capable of the tasks he performed in the past. The fact that the claimant has not looked for other employment or tested the market post-injury does not mean he is not a hard worker nor does it imply that claimant has no loss of access to the labor market.

Based on the claimant's education, his many years of working as an unskilled or semi-skilled laborer, the findings and restrictions of Dr. Kreiter, and claimant's own testimony regarding his ongoing pain, reduced range of motion, and looseness, claimant's industrial loss is 25 percent.

ORDER

THEREFORE IT IS ORDERED:

That defendant is to pay unto claimant one hundred twenty-five (125) weeks of permanent partial disability benefits at the rate of five hundred fifty-nine and 10/100 dollars ($559.10) per week from January 19, 2016.

That defendant shall pay accrued weekly benefits in a lump sum.

That defendant shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendant is to be given credit for benefits previously paid.

That defendant shall pay the costs of this matter.

Signed and filed this 20th day of June, 2016.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JGL/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.