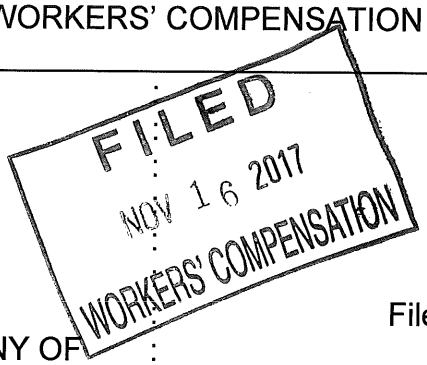
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



KENNETH ROWE,

Claimant,

vs.

TRI-CITY ELECTRIC COMPANY OF IOWA,

Employer,

and

ILLINOIS NATIONAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5055464

ARBITRATION

DECISION

Head Note No.: 1402.30

STATEMENT OF THE CASE

Claimant, Kenneth Rowe, filed a petition in arbitration seeking workers' compensation benefits from Tri-City Electric Company of Iowa (Tri-City), employer, and Illinois National Insurance Company, insurer, both as defendants. This case was heard in Des Moines, Iowa on June 28, 2017 with a final submission date of July 31, 2017.

The record in this case consists of Joint Exhibits 1-4, Claimant's Exhibits 1-10, Defendants' Exhibits A through H, 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. Whether claimant sustained an injury that arose out of and in the course of employment.

2. Whether the injury resulted in a temporary disability.

3. Whether the injury resulted in a permanent disability; and if so
4. The extent of claimant's entitlement to permanent partial disability benefits.
5. Commencement date for permanent partial disability benefits.
6. Rate.
7. Whether there is a causal connection between the injury and claimant's medical expenses.

FINDINGS OF FACT

Claimant was 71 years old at the time of hearing. Claimant graduated from high school. Claimant was in the Army from 1965 through 1968. In 1969 claimant began his apprenticeship as an electrician. Claimant became a journeyman electrician in 1973. In 2008 claimant received a two-year associate's degree in construction applications. (Exhibit E, page 2; Ex. B, p. 4)

Claimant testified that as an electrician he would install electrical systems into newer or remodeled buildings. Claimant testified the work as an electrician was very physical. Beginning in 1980 claimant traveled around the United States seeking work as an electrician. In 1988 claimant returned to the Chicago area. Claimant said in approximately 2002 he began transitioning into the job of an electrical inspector. In 2006 claimant began work as an electrical inspector. He worked as an electrical inspector until 2008 when construction in the Chicago area slowed. Claimant testified that between 1995 and 2008 he also did some work on the side that included remodeling and repair work.

In November of 2011 claimant went to Afghanistan to work as an inspector on electrical systems. (Ex. B, p. 6)

Claimant's wife passed away in 2013. Claimant said he initially considered himself retired when he completed his job in Afghanistan. Claimant said he got tired of sitting around and began looking for work. Claimant said he began working for Freeman Electrical in the Chicago area. He said his job with Freeman consisted of four-day jobs at McCormick Place, a convention center in Chicago. Claimant's job required taking care of electrical issues for trade shows. (Ex. B, p. 6)

Claimant began working for Tri-City on July 19, 2015. Claimant was working at a Keokuk corn plant. Claimant testified he did maintenance repair and electrical updates at the Keokuk plant.

Claimant's prior medical history is relevant. Records indicate claimant has had bilateral shoulder pain since 1995. (Joint Ex. 2, p. 28) In August 2010 claimant was seen for bilateral shoulder problems. (Jt. Ex. 1, pp. 3-4)

In November of 2010 claimant was evaluated by Gregory Drake, D.O. for bilateral shoulder problems. Clamant was reluctant to have an MRI given his application to work overseas. Claimant was given an injection in the right shoulder. Dr. Drake indicated that because claimant's right shoulder had been painful for several years, he did not believe claimant's right shoulder could be repaired. (Jt. Ex. 2, pp. 28-30)

In April 2014 claimant returned to Dr. Drake with bilateral shoulder complaints. Claimant had disability and loss of range of motion in both shoulders with more pain on the left than right. (Jt. Ex. 2, pp, 37-40)

In April of 2014 claimant had x-rays of the left and right shoulder, which were consistent with the right rotator cuff tear. (Jt. Ex. 2, pp. 34-36)

Claimant testified that a lot of the work he did with Tri-City involved pulling and feeding wire off of large spools. Claimant testified that for five to six hours every day he would pull and feed wire. (Ex. B, p. 8)

On August 25, 2015 claimant told his employer he strained a muscle while pulling and pushing cables. (Ex. 9)

On August 26, 2015 claimant quit his employment with Tri-City with no notice. (Ex. H, p. 1) Claimant testified he left the job shortly after his injury, as he physically could not perform the work.

On September 1, 2015 claimant was evaluated by Gaston Carrasco, M.D. Claimant had complaints of pain after pulling wire at work. Clamant was referred to Dr. Drake. (Jt. Ex. 1, pp. 10-11)

On September 14, 2015 claimant was evaluated by Dr. Drake for right shoulder pain at work caused by doing repetitive overhead pushing and pulling of cable. Claimant was assessed as having a right shoulder rotator cuff tear. Dr. Drake believed claimant had an exacerbation of a preexisting issue. Physical therapy was recommended. (Jt. Ex. 2, pp. 70-72)

Claimant returned to Dr. Drake on October 13, 2015. Claimant had completed physical therapy but did not have appreciable increase in range of motion of his right shoulder. A right reverse total shoulder arthroplasty was recommended. Claimant was assessed as having a complete rotator cuff tear. (Jt. Ex. 2, pp. 96-99)

In an October 20, 2015 letter, Dr. Drake indicated claimant had a complete rotator cuff tear on the right shoulder. Dr. Drake recommended an MRI and a reverse total right shoulder arthroplasty. (Jt. Ex. 2, p. 104)

On January 21, 2016 claimant underwent an MRI of the right shoulder. It showed a chronic retracted tear of the supraspinatus and infraspinatus tendon and a suspected SLAP tear. (Jt. Ex. 2, pp. 113-114)

On March 21, 2016 claimant underwent surgery consisting of a right reverse total shoulder arthroplasty and a biceps tenotomy. Surgery was performed by Dr. Drake. (Ex. 3) Claimant testified that after having surgery his range of motion improved. Claimant testified he still is not able to raise his arm above his head. He says he still has decreased strength in his right arm.

On August 5, 2016 claimant saw Dr. Drake in followup. Claimant had been crushing cans at home and noticed decreased range of motion in the right shoulder. Dr. Drake indicated claimant needed to continue physical therapy. He believed claimant had injured his subscapular repair crushing cans at home. (Jt. Ex. 2, pp. 162-163)

In an October 3, 2016 report Theron Jameson, D.O. gave his opinions of claimant's condition following an independent medical examination (IME). Dr. Jameson did not believe claimant had a work-related injury to his bilateral shoulders. Dr. Jameson noted claimant had a longstanding preexisting irreparable rotator cuff tear. He opined that based on claimant's history, this condition was not caused by claimant's work in August 2015. He opined claimant's employment with Tri-City, for approximately five weeks, did not light up, accelerate or cause the need for treatment. (Ex. A, pp. 1-5)

In a December 29, 2016 report, Robin Sassman, M.D., gave her opinions of claimant's condition following an IME. Claimant had pain in the shoulder and neck. It was not until he began repetitively unwinding cables, pulling cables and installing pipe fittings that he began to notice pain in the right shoulder. (Ex. 3, pp. 12-19)

Dr. Sassman recommended claimant have a cervical MRI. She found claimant had a 23 percent permanent impairment to the body as a whole based on AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. She restricted claimant to lifting, pushing, pulling and carrying up to 20 pounds occasionally. (Ex. 3, pp. 19-21)

In a January 5, 2017 letter, Dr. Sassman responded to Dr. Jameson's report. Claimant indicated to Dr. Sassman that prior to August 2015 he had loss of range of motion in his shoulders, but could still put his hands above his right shoulder. Claimant denied having any pain in the right shoulder prior to his work injury of August 2015. After pulling cables with Tri-City, claimant began experiencing pain in the back of his right shoulder. Based on this information, Dr. Sassman opined that the work activity for approximately five weeks was a substantial aggravating factor in the right shoulder and possible cervical injury. (Ex. 5)

In a May 15, 2017 letter Dr. Jameson indicated he reviewed Dr. Sassman's report. Dr. Jameson indicated medical records show claimant had right shoulder pain back to 1995. Claimant had pain and limits in range of motion with overhead activity. Dr. Jameson opined a reverse shoulder replacement is a "salvage" operation for older patients with non-repairable rotator cuff tears. He indicated he had performed this procedure hundreds of times. He opined claimant's need for a reverse shoulder replacement was not due to the five weeks of employment with Tri-City. (Ex. A, pp. 6-8)

In a May 30, 2017 letter, Dr. Sassman indicated she reviewed Dr. Jameson's May of 2017 letter. Dr. Sassman opined claimant's work activities substantially and materially aggravated claimant's right shoulder and possible cervical injury. (Ex. 7)

Dr. Sassman noted Mr. Rowe told her he had some loss of range of motion before the alleged work injury of August 2015, but he did not have shoulder pain and could raise his hand above his right shoulder. Mr. Rowe told Dr. Sassman that after performing repetitive activities with Tri-City, including pulling cables, he had pain in the back of the shoulder. Claimant could then not move his arm. Claimant told Dr. Sassman it was not until he did overhead work with Tri-City that he noticed pain in his right shoulder. Given this information, she opined claimant's work activities were a substantial material aggravating factor in his right shoulder injury. (Ex. 7)

In a June 10, 2017 letter, written by defendants' counsel, Dr. Jameson opined there was no documentation or objective finding to support a cervical injury. He opined claimant's work at Tri-City did not play a role in claimant's need for the shoulder replacement. (Ex. A, p. 13)

In a June 11, 2012 letter, written by defendants' counsel, Dr. Jameson opined he did not see any indication that claimant had a cervical injury in either the exam or the review of medical records. (Ex. A, p. 14)

Claimant testified that given his limitations, he could not return to work as an electrician or electrical inspector. He said his inspector's license is still valid. Claimant said since leaving Tri-City he has applied for two jobs. Claimant testified he wants to have a cervical MRI.

CONCLUSIONS OF LAW

The first issue to be determined is if claimant sustained injury that arose out of and in the course of employment.

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. 6.14(6).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a

period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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

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

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated,

accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

Claimant contends he had a preexisting shoulder problem that was materially aggravated by his work at Tri-City. Two experts have opined regarding the causal connection between claimant's injury, and his need for surgery, and his work with Tri-City.

Dr. Sassman evaluated claimant on one occasion for an IME. Dr. Sassman opined claimant's work activities were a substantial material aggravating factor in his right shoulder injury. This was based on claimant telling Dr. Sassman that, while he did have some loss of range of motion prior to the date of injury, it was not until after August 2015 that claimant noticed pain in the right shoulder. (Ex. 3, p. 19; Ex. 5; Ex. 7)

In August of 2010 claimant was evaluated by Dr. Carrasco for shoulder pain. (Jt. Ex. 1, pp. 3-4) In November of 2010 claimant saw Dr. Drake for shoulder pain, right greater than the left. Claimant said he had shoulder pain since 1995. Claimant said he had intermittent pain, which was worse when he was working overhead. The pain woke claimant up at night. At that time Dr. Drake believed that because claimant had shoulder pain for an extended period, claimant's right shoulder was probably not repairable. (Jt. Ex. 2, pp. 28-30)

In April 2014 claimant again saw Dr. Drake for bilateral shoulder pain. Dr. Drake notes claimant had disability and loss of range of motion. (Jt. Ex. 2, pp. 37-40)

Dr. Sassman's causation opinion is based on a history, given by claimant, that he had no right shoulder pain until the August 2015 incident. Medical records indicate claimant had right shoulder pain going back to 1995. On approximately four occasions, prior to the August 2015 injury, claimant complained of right shoulder pain to different providers. In November 2010 claimant had right shoulder pain that woke him up at night. In November 2010 Dr. Drake opined that because claimant's right shoulder pain had been going on for so long, claimant's shoulder was probably not repairable. Dr. Sassman's causation opinion is based, in large part, on a false history from claimant indicating no right shoulder pain until after the August 2015 incident. Based on this, Dr. Sassman's causation opinion is found not convincing.

Dr. Jameson is an orthopedic surgeon. He indicated he had performed hundreds of the reverse total shoulder arthroplasties. He typified the surgery as a salvage procedure used for older patients with non-repairable rotator cuff tears. He opined claimant's need for a shoulder replacement was not related to the five weeks claimant worked for Tri-City. Dr. Jameson has experience with the type of surgery claimant underwent. His opinions regarding causation are more consistent with claimant's medical history. Based on this, it is found Dr. Jameson's opinions regarding causation are found more convincing.

Dr. Jameson's opinions regarding causation are found to be more convincing. Dr. Sassman's opinions regarding causation are found not convincing. Given these facts, it is found claimant has failed to carry his burden of proof that his preexisting shoulder condition was entirely aggravated during the five weeks he performed work at Tri-City. Claimant has failed to carry his burden of proof his shoulder condition, and the subsequent surgery, arose out of and in the course of employment.

As claimant has failed to carry his burden of proof his injury arose out of and in the course of employment, all other issues are moot.

ORDER

Therefore it is ordered:

That claimant shall take nothing from these proceedings.

That both parties shall pay their own costs.

Signed and filed this 16th day of November, 2017.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.