BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

NORMA LUND, Claimant, vs. MERCY MEDICAL CENTER, Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	File No. 5066398 ARBITRATION DECISION Head Note Nos.: 1801, 1803

STATEMENT OF THE CASE

Claimant, Norma Lund, has filed a petition for arbitration seeking workers' compensation benefits against Mercy Medical Center, employer, and Indemnity Ins. Co. of North America, insurance carrier, both as defendants.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner in the matter of the Coronavirus/COVID-19 Impact on Hearings, the hearing was held on October 20, 2020, via Court Call. The case was considered fully submitted on November 10, 2020, upon the simultaneous filing of briefs.

The record consists of Claimant's Exhibits 1-6 and Defendants' Exhibits A, B, D, E, and F along with the testimony of the claimant.

This matter comes before the undersigned following a previous hearing which determined causation. In the arbitration decision issued on February 10, 2020, claimant's bilateral injuries were found to be caused by an acute injury arising out of and in the course of employment, entitling claimant to workers' compensation benefits. After the Commissioner affirmed the decision on October 8, 2020, defendants filed a petition with the Polk County District Court for further review. The District Court appeal is still pending.

ISSUES

Whether claimant is entitled to temporary disability;

The nature or extent of claimant's permanent disability, if any is awarded;

The assessment of costs.

STIPULATIONS

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 claimant seeks temporary and permanent benefits. While defendants dispute entitlement to either benefits, they agree that if they are liable for the alleged injury, claimant was off work from May 18, 2018, through March 6, 2020, and she would be entitled to benefits for this period of time.

It is further stipulated that claimant sustained injuries to her right and left shoulders but dispute that these injuries extend into her whole body. Should disability benefits be awarded, the parties agree that the commencement date for permanent partial disability benefits is March 7, 2020.

In the hearing report, the parties stipulate defendants are entitled to reimbursement of sick/disability pay and a credit for medical and / or hospitalization expenses in the amount previously paid by CHI's health carrier. At hearing, defendants stipulated that claimant was entitled to reimbursement of the 85.39 examination and the medical bills itemized in Exhibit 7.

At the time of her alleged injury, claimant's gross earnings were $616.10 per week. She was single and entitled to one exemption. Based on the foregoing, her weekly benefit rate was $383.07.

FINDINGS OF FACT

Claimant, Norma Lund, seeks workers' compensation benefits from Mercy Medical Center, employer, and Indemnity Insurance Company of North America. At the time of the hearing she was 69 years old. Claimant's past work history includes odd jobs as a clerk at a convenience store, mailroom work for a life insurance company, a warehouse worker, laborer at a sand paper manufacturer, telemarketer for a financial company, and deli manager for Hy-Vee.

Claimant is ambidextrous.

Claimant believes that it would be difficult to return to any of these past positions because she cannot lift or extend her arm. Working as a telemarketer required holding the phone part to her ear.

Claimant was terminated on January 16, 2019, when the short-term disability benefits were exhausted. (CE 6:34) Defendants say that she is eligible for rehire. (Ex. 6:36-37) Claimant has not returned to any type of employment since January 16, 2019.

Jeffrey Davick, M.D., found claimant at maximum medical improvement (MMI) on March 6, 2020, and recommended she undergo a functional capacity evaluation (FCE). (CE 1:1) Based on the range of motion measurements he took on March 6, 2020, he assessed a six percent impairment to the right shoulder and a ten percent impairment to the left shoulder. (CE 1:1)

The FCE took place on April 13, 2020. (CE 2) The results were deemed valid as the claimant gave maximum, consistent effort throughout all areas of the test. (CE 2:5) She performed tasks at a slower rate with coordinated movement and her mechanisms were consistent with her symptoms and physical limitations. Based on the test results, claimant's capabilities placed her in the sedentary work category for 8 hours per day and 40 hours per week. (CE 2:5) She exhibited difficulty lifting from waist to crown, and had trouble with left-sided carrying, elevated work, and ladder climbing. She could sit, stand, and kneel without issues. (CE 2:5) The evaluator recommended specific restrictions of carrying up to 10 pounds occasionally and over 15 pounds rarely. (CE 2:5) For right carry, front carry, and waist–to-floor, the evaluator recommended up to 15 pounds occasionally and 20 pounds rarely. (CE 2:6) The FCE charge was $992.00. (CE 5:30)

Following the FCE, Dr. Davick issued permanent restrictions. (CE 1:3) He noted the FCE was valid and that as a result of the test, the evaluator placed claimant in the sedentary work capacity. Based on those results, Dr. Davick adopted the aforementioned FCE restrictions. (CE 1:3) Dr. Davick charged $250.00 for the attorney conference, $372.00 for the evaluation and $620.00 for the report. (Ex 5:28)

In response to an inquiry from the defendants, Dr. Davick opined that claimant could be able to do more than she presented at the FCE as she gained strength over time. He reiterated that she would be able to work within the restrictions outlined in the FCE. (DE A:3)

At the request of the defendants, Ted Stricklett, M.S., performed an employability assessment. (DE B) Mr. Stricklett reviewed claimant's answers to interrogatories, average weekly wage records, reports and records of Dr. Davick, records from the Orthopaedic Outpatient Surgery Center, and the FCE. (DE B:5) Based on the FCE results and the opinions of Dr. Davick, Mr. Stricklett opined claimant could work in the general labor market as a telemarketer, customer service representative, office

assistant, receptionist or front desk clerk and the resulting loss of earning capacity would be in the range of 0-17 percent. (DE B:6)

Claimant applied for and was granted social security disability with the benefits backdating to November 2018 with a disability date of May 17, 2018.

Claimant testified her current symptoms include pain in the right and left shoulders. If she does not use her shoulders, she is pain-free although her left shoulder is frozen which prevents most activities. She has difficulty wiping down her counters, driving, changing lightbulbs, and moving a chair to vacuum underneath. Her son helps her do over-the-shoulder activities and she has moved things to the lower shelves. Driving can pull on her shoulder and she feels pain when turning the wheel. She has difficulty sleeping and is unable to get comfortable at night.

Claimant has previous experience in the remote past as a telemarketer. She does not believe that this is a job she could perform now because holding a phone to her ear presents a strain on her shoulders. However, telemarketing positions these days do not have the requirement of holding a receiver to an ear. Claimant has the capability to serve in a telemarketing or a customer service position that does not require heavy lifting or repetitive use of her shoulders.

Claimant has not been offered any vocational assistance by the defendant employer and she is unsure of what work she could perform. She has not looked for work, is not currently working, and does not appear motivated to return to work.

CONCLUSIONS OF LAW

As stated in the hearing report, this hearing was for the purpose of deciding the conversion date and entitlement to permanent partial disability benefits including whether claimant's injury extended into the whole body.

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 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 Elec. 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).

Dr. Davick opined that the injury was lateral to the glenohumeral joint. Based on the decisions of the Commissioner, injuries lateral to the glenohumeral joint are scheduled member injuries pursuant to Iowa Code section 85.34(2)(n).

Claimant argues that the bilateral shoulder injuries should be treated as an industrial disability under Iowa Code section 85.34(2)(v). The reasoning for this is that the scheduled member refers to a single member injury such as a single arm, leg, foot, hand and shoulder. See Iowa Code section 85.34(2)(a)-(n) et seq. The subsection that deals with bilateral injuries does not include shoulders. See Iowa Code section 85.34(2)(t). Thus, the bilateral shoulders, according to claimant, must fall under a catch-all provision of Iowa Code section 85.34(2)(v).

This reasoning is not consistent with the intent of the legislature. The intent of the legislature was to carve out the shoulder as a specific scheduled member injury. The lack of inclusion of the shoulder in 85.34(2)(t) does not move the shoulder from a scheduled member loss to an industrial one. The lack of inclusion means bilateral shoulder injuries are to be evaluated under Iowa Code section 85.34(2)(n). Each shoulder shall be separately assessed pursuant to Iowa Code section 85.34(2)(n).

According to Iowa Code § 85.34(2)(x), "when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment pursuant to paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity."

There is only one expert who provided guidance in this case and therefore those impairments are adopted. See Deng v. Farmland Foods, File No. 5061883, (App. September 20, 2020, pages 11-12); Chaves v. MS Technology, LLC, (App. September 30, 2020, p. 7). Claimant is entitled to a 6 percent impairment to the right shoulder and a 10 percent impairment to the left shoulder or 24 weeks for the right shoulder and 40 weeks for the left shoulder.

The temporary benefits issue has previously been decided in the arbitration decision of February 10, 2020. The defendants have stipulated that the claimant was off work from May 18, 2018, through March 6, 2020, and that the commencement date of permanent partial disability benefits, if any are awarded, is March 7, 2020.

Both parties seek an assessment of costs; however, given that defendants did not prevail, no costs will be awarded to them. Claimant seeks costs, including the consultation fees of Dr. Davick and the FCE report. The commissioner has express statutory authority to tax costs in workers' compensation cases. Iowa Code § 86.40 (2009) ("All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner."). The commissioner has implemented this authority through an administrative rule specifying the categories of taxable costs. Iowa Administrative Code rule 876—4.33. The rule provides that costs may include "the reasonable costs of obtaining no more than two doctors' or practitioners' reports." Id.

The preparation of a vocational expert report is a cost that can be taxable. Rodriguez-Contreras v. JBS Swift & Company, File No. 5029197 (App. May 8, 2012) Claimant is entitled to reimbursement of the costs in Exhibit 5.

ORDER

THEREFORE, it is ordered:

Defendants shall pay the claimant sixty-four (64) weeks of permanent partial disability benefits at the rate of three hundred eighty-three and 07/100 dollars ($383.07) per week from January 7, 2019.

Defendants shall pay the claimant temporary benefits from May 18, 2018, through March 6, 2020, at the rate of three hundred eighty-three and 07/100 dollars ($383.07).

Defendants shall pay accrued weekly benefits in a lump sum.

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

Defendants shall be given credit for the weeks previously paid.

Costs of the case are taxed to defendants and claimant is entitled to reimbursement of costs in Exhibit 5.

Signed and filed this 9th day of March, 2021.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Robert McKinney (via WCES)

Charles Cutler (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.