BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROSE MORAN, Claimant, vs. PRAIRIE VIEW MANAGEMENT, INC., Employer, and ACCIDENT FUND GENERAL INS. CO., Insurance Carrier, Defendants.	File No. 20700374.01 ARBITRATION DECISION Head Note Nos.: 1801, 1803.1, 1803, 2503, 3000, 3003, 4000

STATEMENT OF THE CASE

Claimant, Rose Moran, has filed a petition for arbitration seeking workers' compensation benefits against Prairie View Management, Inc., employer, and Accident Fund General Insurance Company, insurer, 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 August 9, 2021, via Court Call. The case was considered fully submitted on September 7, 2021, upon the simultaneous filing of briefs.

The record consists of Joint Exhibits 1-4, Claimant's Exhibits 1-5, Defendants' Exhibits A-D, along with the testimony of claimant.

ISSUES

1. Whether the alleged injury was the cause of any temporary disability from 12/21/19 to 9/23/20 and from 11/19/20 to 12/18/20;

2. Whether the alleged injury is a cause of permanent disability;

3. Whether the alleged injury is a scheduled member disability to the right arm or an industrial disability;

4. The extent of permanent disability, if any is awarded;

5. The appropriate rate;

6. Entitlement to reimbursement under Iowa Code section 85.39;

7. Whether voluntary resignation constitutes a refusal of light duty work;

8. Whether claimant is entitled to penalty benefits;

9. 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 parties stipulate claimant sustained an injury which arose out of and in the course of employment on December 9, 2019.

While the nature and extent of the claimant's work injury is in dispute as is the permanency, the parties agree that if the injury is found to be a cause of permanent disability, the disability is a scheduled member disability to the right arm and the commencement date for PPD benefits, if any are awarded, is February 17, 2021.

At the time of the injury, claimant's gross earnings were $627.67 per week. Claimant was single.

Defendants waive all affirmative defenses.

Prior to the hearing, claimant was paid 12.5 weeks of compensation at the rate of $402.16 per week. Defendants claim a credit of $3,400.12 for TTD paid.

FINDINGS OF FACT

Claimant is a 61-year-old person. At all relevant times, claimant was single. She testified at hearing that she claimed one of her twin daughters on her tax returns while her ex-husband claimed the other. Per her Iowa income tax return, claimant had one dependent. (CE 2:26) She testified in her deposition dated September 24, 2020, that as of September 11, 2018, both her twins lived with her but by 2019, the twins were not living with her on a full-time basis. (CE 4) However, one was claimed on her tax return. (CE 4) It is found that claimant's status for benefit calculations is single with two

exemptions due to her the dependent claimed on her tax return. Based on the foregoing, claimant's weekly benefit rate is $412.40.

She graduated from high school but has no other formal education. With the exception of two years as a stay at home mother of four, claimant has been employed in the workforce.

She began working for defendant employer on September 19, 2019, as a community service assistant. Her duties included working with five clients on issues concerning budgeting, banking, personal care, cooking, cleaning, scheduled appointments and transporting clients to appointments and shopping.

On December 11, 2019, claimant was seen at MercyOne Occupational Health for pain in the right arm and right hip and buttock with pain radiating into the right leg. (JE 1:1) The claimant explained that she was exiting a client's house when she slipped on ice and braced herself with the right arm/hand and landed on the right hip/buttock. Id. Claimant had pain upon palpation in the right shoulder, right wrist and back. Id. X-rays revealed a nondisplaced fracture of the right radial styloid process. (JE 1:2)

She was placed in a short arm waterproof cast and restricted from use of her right arm at work. (JE 2:7) Six weeks out from her facture, she had minimal tenderness to palpation over the fracture site and some limitations to range of motion. (JE 2:11) Dr. Richard Naylor, D.O., referred claimant to physical therapy and provided a cock-up wrist splint. (JE 2:11)

Claimant returned to MercyOne on February 13, 2020, where she was seen by Gary Knudson, M.D., for redness and swelling on the wrist and hand along with pain and limited range of motion in the right wrist and hand. (JE 2:13) Dr. Knudson discussed surgical intervention and "after careful consideration the patient has made the informed decision to proceed with continued conservative management." (JE 2:13)

Claimant's condition continued to deteriorate. During the March 12, 2020, visit, claimant reported numbness and tingling in her fingers with the inability to move her fourth and fifth finger without pain. (JE 2:15) Dr. Naylor ordered a CT scan to rule out a scaphoid fracture and an MRI of her hand. (JE 2:15) The tests showed no scaphoid fracture but a degenerative TFCC tear and first dorsal compartment tendinitis. (JE 2:17, JE 4:42-44) An injection of 40 mg of Kenalog and 1 cc of 1 percent lidocaine was administered into the first dorsal compartment. (JE 2:17) Dr. Naylor continued claimant's use of the splint and started claimant on meloxicam. (JE 2:17) The injection had good results with her thumb side pain completely resolved at the May 20, 2020 visit. (JE 2:19) However, she continued to have pain and clicking in the wrist. (JE 2:19) On June 15, 2020, claimant underwent surgical debridement of the TFCC tear and chondromalacia. (JE 4:50)

On July 28, 2020, she returned for follow up reporting minimal tenderness in the wrist but increased numbness in the fifth finger. (JE 2:21) A subsequent EMG revealed

neuropathy at the Guyon's canal, which necessitated a second surgery on November 19, 2020. (JE 2:23, 3:47-49; 4:52)

In a follow-up visit on December 2, 2020, claimant reported improvement in her symptoms. (JE 2:26) At the February 17, 2021, visit, Dr. Naylor found claimant to be at MMI with a return to full duty status. (JE 2:28) He noted she had a 20 percent loss of grip strength on the right compared to the left. (JE 2:28) He gave her a 0 percent impairment rating and no restrictions. (JE 2:29)

Farid Manshadi, M.D. performed an IME on June 18, 2021, and issued a report on July 7, 2021. (CE 1) Upon review of the medical records and an examination, Dr. Manshadi concluded claimant sustained injuries to the right wrist including fracture of the right distal radius, mild radiocarpal chondromalacia, as well as degeneration within the TFCC and finally right ulnar neuropathy at the Guyon's canal. (CE 1:10) Based on his examination, Dr. Manshadi concluded claimant had reduced range of motion of the right wrist, reduced sensation to light touch and pinprick along the right ulnar digits and reduced strength of the right hand interossei. (CE 1:10) Dr. Manshadi opined claimant's treatment was reasonable and necessary and that she sustained a permanent impairment resulting from the injury. Based on the AMA Guides, 5th Edition, Dr. Manshadi assigned a 4 percent impairment of the right upper extremity due to lack of range of motion in extension and flexion, 2 percent impairment to the RUE for lack of sensation, 9 percent to the RUE for impairment of motor deficit. The total was 14 percent to the RUE. (CE 1:11) He recommended restrictions of no sustained pushing, pulling or gripping. (CE 1:11)

One of the main issues of contention is over claimant's request for temporary benefits from December 21, 2019, through September 23, 2020, and again from November 19, 2020, through December 18, 2020. Claimant asserts defendants withdrew the offer of light duty work while defendants argue claimant voluntarily quit.

Four days prior to the injury, claimant submitted her resignation. (DE C:3) The reason for the resignation stemmed from conflicts in communication with supervisor and/or management. Defendant employer accepted the resignation. (DE C:2)

On or about December 9, 2019, claimant suffered an injury to her right wrist or forearm.

Claimant offered to rescind the resignation but this was denied. (Ex 5:36)

On December 10, 2019, claimant completed a letter of resignation, as required by her employer. (See C:1)

Defendants offered claimant light duty work through December 20, 2019. (DE C:4) After December 20, 2019, no further offers of light duty were extended as defendants considered claimant had voluntarily resigned. (CE 5:37) Claimant accepted the light duty work. (Ex 5:36)

Claimant was off work and under restrictions by Dr. Naylor from December 21, 2019, through September 23, 2020 (JE 2:30-38).

On September 24, 2020, claimant started work with Imagine the Possibilities where she provides care to disabled individuals in their homes in a capacity similar to the work she performed for defendant employer. (DE D:3) Claimant testified that she assists these individuals in their activities of daily living but with significant pain. She has difficulty carrying things with her right hand and she needs to pace herself to do chores due to pain in the right wrist and reduced grip strength.

She was off work again from November 19, 2020, through December 18, 2020, returning to work on December 19, 2020. Defendants paid some healing period benefits during this time. (DE A:2-4) On February 22, 2021, defendants voluntarily paid 5 percent or 12.5 weeks of benefits. (DE B:4)

Claimant seeks recovery of costs in the amount of $1913.80 which includes the IME of Dr. Manshadi for $1800.00 (CE 3) Dr. Manshadi's bill is broken down into $400.00 for the examination and $1400.00 for the report.(CE 3:30)

CONCLUSIONS OF LAW

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. 6.904(3).

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" refer 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).

The parties dispute the extent of claimant's disability. The shoulder is considered a scheduled member injury and under the changes to Iowa Code chapter 85, the extent of scheduled member injuries are measured by the AMA guidelines, 5th Edition. Iowa Code § 85.34(2)(x) (2017). "Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment…when determining functional disability and not loss of earning capacity." Id.

Dr. Naylor, the treating doctor, assigned a 0 percent impairment while the claimant's expert, Dr. Manshadi, assigned a total of 14 percent right upper extremity impairment. Dr. Naylor noted that claimant had suffered a 20 percent loss of grip strength on the right compared to the left but returned her to full duty work without restrictions. Dr. Manshadi assigned 4 percent impairment of the right upper extremity due to lack of range of motion in extension and flexion, 2 percent impairment to the RUE for lack of sensation, 9 percent to the RUE for impairment of motor deficit. Dr. Manshadi's opinions were more consistent with claimant's credible pain and function presentation and therefore his impairment rating is adopted here.

Claimant is found to have sustained a 14 percent loss of impairment to the right upper extremity.

The parties agree that the commencement of PPD benefits is February 17, 2021.

The parties disagree as to whether claimant is entitled to temporary benefits from December 21, 2019 through September 23, 2020, and then again from November 19, 2020, until December 19, 2020. During those two periods of time, claimant was taken off of work by Dr. Naylor due to her work-related injury.

Defendants argue that Schutjer v. Algona Manor Care Center, 780 N.W.2d 549, 559 (Iowa 2010) controls. In Schutjer, the injured worker was offered light duty work which she initially accepted. Id. at 553. After a dispute arose over whether the work was outside of claimant's restrictions, claimant quit. Id. The court held that the claimant was not entitled to temporary benefits pursuant to Iowa Code section 85.33(3). The Schutjer

court clarified that the test to be applied was first whether the employee was offered suitable work and second that the employee refused that suitable work. Id. at 559. In agency decisions, it has been found that resignation does not automatically terminate benefits. See e.g. Brenda Lynn Lange, Claimant, File No. 5002953, 2005 WL 3730686, at *5 (Dec. 27, 2005) (finding resignation did not disqualify claimant from temporary benefits because the work the employer offered was not suitable because it demonstrated retaliatory conduct).

In Neal v. Annett Holdings, Inc., the Supreme Court of Iowa held that refusal to perform work that was outside a reasonable geographic area did not disqualify claimant from temporary benefits. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 524 (Iowa 2012)

Given that an injured worker can refuse work proffered and still qualify for temporary benefits, it is consistent to find that a resignation that occurred before an injury followed by a rescission of that resignation after the injury would not disqualify an injured worker from temporary benefits. The evidence shows that no light duty work was offered after December 20, 2019. Because no light duty work was offered after December 20, 2019, and that claimant was willing to continue to work for the defendants in a light duty capacity, the elements of 85.33(3) are not met and therefore, claimant is entitled to temporary benefits from December 21, 2019 through September 23, 2020, and then again from November 19, 2020, until December 19, 2020.

Claimant seeks the recovery of costs including $1913.80 in the form of the IME and report of Dr. Manshadi. Iowa Code section 85.39 permits an injured worker to obtain a medical opinion regarding his injury. This right is triggered when there is an employer-retained physician who issues a low opinion. Iowa Code Section 85.39. Dr. Naylor issued his 0 percent impairment rating on February 24, 2021. Therefore the right to a medical examination by a doctor of claimant's choice was triggered as of February 24, 2021.

According to the Iowa Supreme Court's literal interpretation of Iowa Code section 85.39 in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 847 (Iowa 2015), the examination is reimbursable under 85.39 and the costs associated with the preparation of a written report can be reimbursed as a cost. See DART 867 N.W.2d, at 846-847.

876 IAC 4.33 allows for the assessment costs at the discretion of the deputy. Given that claimant has prevailed in this matter, the assessment of costs against defendants is appropriate including the report fee of Dr. Manshadi.

The final issue is one of penalty. Claimant asserts penalty benefits for the nonpayment of temporary benefits and the underpayment of benefits pursuant to Iowa Code section 86.13. Iowa Code section 86.13(4) provides:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or

> insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> > (1) The employee has demonstrated a denial, delay in payment, or termination in benefits.
> >
> > (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.
>
> c. In order to be considered a reasonable or probable cause or excuse under paragraph "b," an excuse shall satisfy all of the following criteria:
>
> > (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.
> >
> > (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.
> >
> > (3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

According to the timeline, defendants initially believed that the claimant had no dependents. (See CE 2:25) Defendants did not have claimant's tax returns to confirm the number of exemptions and set the exemption at 1 for a benefit rate of $402.16. (CE 2:25) As of September 24, 2020, defendants were on notice that the claimant was maintaining one dependent. Defendants argue that claimant did not timely produce her tax returns. Requests for admissions served on July 28, 2020, asked claimant about the dependents but those specific requests were not answered.

Defendants had the right to rely on the statements of the claimant, or, in this case, the non-answers to the requests for admissions up until the deposition of September 24, 2020. The burden on the defendants is one of continual investigation. Defendants state that claimant did not produce her tax returns in a timely fashion but it is unclear from the record when the tax returns were produced. As of September 24,

2020, the testimony of the claimant put defendant on notice that their rate may have been incorrect. The lack of an investigation abrogates any reasonable or probable cause or excuse for the delay of benefits.

The second issue for penalty is whether defendants had a right to terminate benefits upon claimant's resignation. The law from the Supreme Court of Iowa requires an offer of suitable work and a refusal before temporary benefits can be terminated. Neither occurred in this case. Therefore the nonpayment of temporary benefits after December 20, 2019, was not reasonable. However, defendants did voluntarily pay a 5 percent permanent partial disability benefit despite Dr. Naylor issuing a 0 percent impairment. Due to this, the penalty imposed is 25 percent of the total late paid and underpaid benefits.

ORDER

THEREFORE, it is ordered:

That defendant employer and insurer are to pay unto claimant thirty-five (35) weeks of permanent partial disability benefits at the rate of four hundred twelve and 40/100 dollars ($412.40) per week from February 17, 2021.

That defendants are to pay unto claimant temporary total disability benefits from December 21, 2019 through September 23, 2020, and from November 19, 2020, until December 19, 2020, at the rate of rate of four hundred twelve and 40/100 dollars ($412.40).

That defendants are to pay the underpayment of weekly benefits.

That defendants are to pay the 85.39 examination.

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

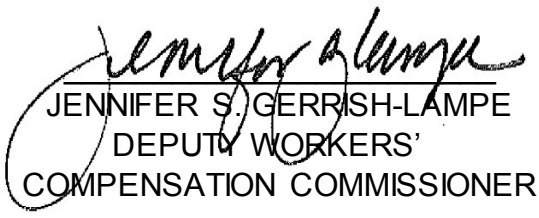
That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants shall pay the costs of this matter pursuant to rule 876 IAC 4.33 including the report fee of Dr. Manshadi.

That defendants shall pay penalty benefits in the amount of 25 percent of all unpaid or underpaid benefits.

That defendants shall be given credit for benefits previously paid.

Signed and filed this ___21st____ day of January, 2022.



JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Gary Nelson (via WCES)

Laura Ostrander (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.