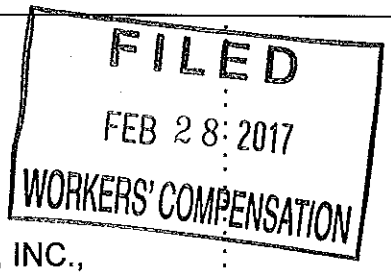
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JAY GUARIN, Claimant, vs. KOELKER EXCAVATION, INC., Employer, Le MARS INSURANCE COMPANY, Insurance Carrier, Defendants.		File No. 5047597 ARBITRATION DECISION Head Note Nos. 1108; 1804

STATEMENT OF THE CASE

Jay Guarin filed a petition for arbitration seeking workers' compensation benefits from Koelker Excavation, Inc., and Le Mars Insurance Company.

The matter came on for hearing on January 12, 2016, before deputy workers' compensation commissioner Joseph L. Walsh. The record in the case consists of claimant's exhibits 1 through 23, defendants' exhibits A and B; as well the sworn testimony of claimant, Jay Guarin and a physical therapist, Martin Foxen. The parties briefed this case and the matter was fully submitted on February 12, 2016.

ISSUES

1. Whether the stipulated work injury is a cause of any temporary or permanent disability.

2. Claimant seeks healing period from August 22, 2014, through July 30, 2015. The defendants have stipulated that if they are liable for the injury; claimant is entitled to benefits during this period of time.

3. Claimant seeks permanent total disability benefits for his injuries. Defendants dispute his entitlement to any permanency benefits on the basis of medical causation. Claimant alleges he is qualified as an odd-lot worker.

4. Whether the claimant is entitled to medical expenses as outlined in Exhibit 11. The defendants dispute these bills on the basis of causal connection. None of the treatment was authorized by the defendants, however, authorization is not a defense since the claim was denied.

5. Whether the claimant is entitled to independent medical evaluation expenses under Iowa Code section 85.39.

6. The defendants claim entitlement to a credit for 63 weeks of temporary disability or healing period benefits paid and 50 weeks of permanency. Claimant acknowledges that benefits were paid for these weeks, but disputes the characterization based upon the date of maximum medical improvement.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship at the time of the injury.

2. The parties stipulated that the claimant suffered an injury which arose out of and in the course of employment on June 6, 2013.

3. The parties stipulate that the claimant has been off work from the date of injury through the date of hearing.

4. Elements which comprise the rate of compensation are stipulated. The claimant had gross earnings of $904.00 per week. He was single and entitled to one exemption for income tax purposes. His rate is $552.90 per week.

5. Affirmative defenses have been waived.

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.

FINDINGS OF FACT

Jay Guarin testified he was 56 years old as of the date of hearing. Mr. Guarin testified live and under oath at hearing. I find him to be credible. His sworn testimony at hearing was generally consistent with his medical reports in the record. His live testimony is also consistent with his deposition testimony. (Claimant's Exhibit 19) There was nothing about his demeanor which caused me any concern regarding his truthfulness. On the contrary, his demeanor was honest and forthright.

Mr. Guarin completed the 10th grade and later received his GED from Spoon River College. (Cl. Ex. 19, p. 5) He went to work for his father's construction company (drilling wells) in approximately 1973, and stayed there until approximately 1990. During this timeframe, he also performed some auto mechanic work and other miscellaneous jobs in his small community. Mr. Guarin has a varied and interesting work history described in detail at his deposition. (Cl. Ex. 19, pp. 5-75) His work

primarily revolved around the fields of construction, machine operating, truck driving and auto repair. He has a number of skills, although they are almost exclusively in manual labor.

Mr. Guarin began working for Koelker Excavation in approximately May 2013. (Cl. Ex. 19, p. 76) He was hired as a dump truck driver but performed a number of functions based upon his skills. He earned $16.00 per hour.

In February and April 2013, Mr. Guarin was seen at Community Health Free Clinic for bilateral shoulder arthritis. (Def. Ex. A, pp. 1-2) It appears that claimant attended those visits to treat other conditions, however, his bilateral shoulder arthritis and pain were mentioned on each occasion. When he visited the clinic on May 29, 2013, there was no mention of arm or shoulder pain. (Def. Ex. A, p. 3)

On June 6, 2013, Mr. Guarin was moving a "curb stop", which is made of cast iron, out of a hole. As he did so, his bicep snapped loudly. (Cl. Ex. 19, p. 79) He experienced an immediate burning pain in his right bicep area. He testified his muscle was laying over. He testified when he got out of the hole he called Ron Koelker and told him he injured his arm. He testified Mr. Koelker told him to keep working. After work, he informed Mr. Koelker he was going to the emergency room at St. Luke's.

The following is documented in the St. Luke's emergency records on June 6, 2013. "On exam patient appears to have a minor rupture of the biceps tendon is tenderness over palpation of the long head. He also has some symptoms suggestive of a rotator cuff injury." (Cl. Ex. 1, p. 2) He was instructed to follow up the following day.

On June 7, 2013, he saw John Wellman, M.D., at St. Luke's Work Well Solutions. Dr. Wellman understood the correct history, consistent with the description provided by the claimant at hearing and deposition. "He stated that he was lifting a cover of drainage system up out of a hole and through [sic] the cover over his shoulder and out of the hole, has felt a snap in the right shoulder area, pain and burning feeling almost instantly." (Cl. Ex. 2, p. 1) Dr. Wellman noted the abnormal appearance of the right biceps and the probability of a rotator cuff injury. He ordered an MRI and recommended an orthopedic referral. (Cl. Ex. 2, p. 29)

Following an MRI, Daniel Fabiano, M.D., evaluated the claimant. Dr. Fabiano did not feel that the biceps rupture was surgical. It "is a non surgical issue and tenodesis reattachment is purely a cosmetic procedure functional outcome is no different." (Cl. Ex. 3, p. 2) Mr. Guarin did not accept this. He returned to St. Luke's Clinic. His course of treatment over the next several months included treatment by orthopedic surgeon, John Langland, M.D., (Cl. Ex. 4) and physical therapy at Linn County Physical Therapy (Cl. Ex. 5, pp. 1-21). Mr. Guarin remained off work during this period of time.

In November 2013, claimant was evaluated by Richard Naylor, D.O., another orthopedic shoulder surgeon. (Cl. Ex. 6, p. 1) Dr. Naylor immediately arranged surgery he described as a "shoulder scope with subacromial decompression, possible rotator

cuff tear." (Cl. Ex. 6, p. 2) Dr. Naylor, for the first time, also evaluated the left shoulder and arm. Surgery was performed on the right on December 13, 2013. (Cl. Ex. 6, p. 8)

Following the surgery, claimant underwent additional physical therapy at Linn County Physical Therapy. (Cl. Ex. 5, pp. 23-38)

The claimant alleges that during therapy, he suffered a sequela injury to his left shoulder and biceps muscle. He testified to this at hearing in a manner which was consistent with his testimony at his deposition. (Cl. Ex. 19, pp. 102-104) Mr. Guarin testified that the therapists were not around when he began to feel this pain and he left without telling anyone. The primary dispute, other than the extent of his industrial disability, is whether this event really happened.

The therapy notes from February 2014, confirm that he consistently began complaining of left bicep soreness after his February 10, 2014, visit. (Cl. Ex. 5, pp. 29-31) On February 24, 2014, Mr. Guarin reported to Dr. Naylor that "he thinks he ruptured his left biceps tendon during therapy." (Cl. Ex. 6, p. 20) He noted the positive "Popeye sign" which refers to the knotted bicep muscle and Dr. Naylor sought authorization to treat the condition. (Cl. Ex. 6, p. 21) The claimant reached maximum medical improvement from the right shoulder surgery on April 21, 2014.

Authorization to treat the condition, however, was not provided. In January 2015, the defendants formally denied the claim after claimant filed an alternate medical care petition. Mr. Guarin then underwent a course of medical treatment with Dr. Naylor for his left shoulder from April 2015, through July 2015, which included surgery and physical therapy. (Cl. Exs. 8, 9) He was released by Dr. Naylor on July 29, 2015. (Cl. Ex. 8, p. 17) The medical bills are set forth in claimant's exhibit 10 and the Iowa Department of Human Services has a lien in the amount of $9,646.29 for this treatment. (Cl. Ex. 11)

In August 2015, claimant underwent a functional capacity evaluation at WorkWell Systems, Inc., with Laura Ericson, P.T. The test was valid and he was placed in the light work category. He was provided with a number of specific, significant limitations therein. (Cl. Ex. 15) An Addendum was provided to address specific reaching restrictions in September 2015. (Cl. Ex. 15, pp. 11-12)

In October 2015, Dr. Naylor provided causation ratings; 8 percent whole person for the right and 11 percent whole body for the left. At the same time he recommended permanent restrictions: No lifting more than 10-15 pounds, occasional lift of 5 pounds away from body and rarely 10-15 pounds away from body. No repetitive work at or above shoulder height. (Cl. Ex. 14) Dr. Naylor was deposed in November 2015. (Cl. Ex. 20) His testimony substantially confirmed his written medical opinions.

In November 2015, claimant secured an expert vocational report concerning his employability from Barbara Laughlin, M.A. Ms. Laughlin reviewed Mr. Guarin's medical restrictions and work history and prepared a report relating to his disability and the

injury's impact on his employability. (Cl. Ex. 16, pp. 1-20) Her report is thorough and logical. She concluded that Mr. Guarin had suffered a total or near total loss of access to his past employment. (Cl. Ex. 16, p. 14) Mr. Guarin's attorney had referred him to Iowa Vocational Rehabilitation in September 2015, and he completed an application for such services. (Cl. Ex. 18) In November 2015, he was denied a commercial drivers' license due to poor range of motion in his shoulders. (Cl. Ex. 17)

CONCLUSIONS OF LAW

The first question is whether the admitted June 2013, work injury is a cause of any temporary or permanent disability in claimant's bilateral shoulders. The defendants admit that claimant suffered a right shoulder injury on June 6, 2013. While the defendants initially accepted and paid the claim, they eventually denied that any of claimant's ongoing disability was related to the original work injury. Claimant further alleges that his left shoulder condition deteriorated as a sequela of his original right shoulder injury.

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).

When an injury occurs in the course of employment, the employer is liable for all of the consequences that "naturally and proximately flow from the accident." Iowa Workers' Compensation Law and Practice, Lawyer and Higgs, section 4-4. The Supreme Court has stated the following. "If the employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury, such further disability is compensable." Oldham v. Scofield & Welch, 222 Iowa 764, 767, 266 N.W. 480, 481 (1936). The Oldham Court opined that a claimant must present

sufficient evidence that the disability was naturally and proximately related to the original work injury.

By a preponderance of evidence, I adopt the medical causation opinions of Dr. Naylor with regard to both the right and left shoulders.

Right Shoulder

While the defendants disputed whether the work injury caused any temporary or permanent disability on the hearing report, the defendants admitted in the discovery process that the work injury caused temporary disability during a period of recovery. (Cl. Ex. 22, Req. for Admission 8) Mr. Guarin's sworn explanation of the injury, both at hearing and deposition, is entirely consistent with his resulting disability on the right side. The greater weight of the evidence supports the finding that the right shoulder injury caused both temporary and permanent disability. (Cl. Ex. 6, p. 10; Cl. Ex. 12; *also see generally* Cl. Ex. 20, Naylor Deposition, pp. 6-8) I find the claimant's sworn testimony combined with the medical reports is the most compelling evidence in the record.

Instead of obtaining an expert report, the defendants chose to attack the opinion of their authorized treating physician, by suggesting he did not have the entire medical history. Specifically, defendants pointed out that Dr. Naylor was unaware that Mr. Guarin had complained of symptoms in his bilateral shoulders on two occasions leading up to his work injury. (Def. Ex. A) Dr. Naylor was admittedly unaware of these treatment notes before rendering his causation opinions. (Cl. Ex. 20, Naylor Depo, pp. 8-12) Dr. Naylor, however, appeared largely unconcerned about the type of symptoms he had prior to his work injury. I agree with the claimant that these documents demonstrate that the claimant had some preexisting symptoms in his shoulders, his condition dramatically changed when he tore his right bicep while throwing the piece of metal from the hole on June 6, 2013. This incident was a substantial causal or aggravating factor in bringing about both his temporary and permanent disability.

Left Shoulder

The question of causation regarding the left shoulder is one of sequela. The claimant alleges that during the course of his physical therapy treatment following his authorized right shoulder surgery, he damaged his left bicep and rotator cuff. He prepared a detailed sworn statement which was provided to Dr. Naylor. (Cl. Ex. 12) This sworn statement is consistent with his testimony, both at hearing and deposition. He recounted that during the week of February 10, 2014, after doing rowing exercises for 15 to 20 minutes, he developed a significant burning sensation in his left shoulder. The following day, he noted a knot in his left bicep similar to the one that occurred on the right. The therapy notes document that he consistently began complaining of left bicep soreness after his February 10, 2014, visit. (Cl. Ex. 5, pp. 29-31) Mr. Guarin testified that he had been experiencing more left-sided symptoms ever since the right shoulder surgery, probably from overuse.

With this information, Dr. Naylor causally connected this incident as a natural sequela of his right shoulder injury. (Cl. Ex. 12, p. 4) Again, Dr. Naylor is the authorized treating physician.

The defendants did not obtain a contrary expert opinion, rather, they questioned whether this incident occurred at all. In argument, they point to other, inconsistent evidence in the record.

The physical therapist Martin Foxen testified live at hearing. His testimony was generally credible, although his presentation was somewhat defensive. He testified that no one has ever injured a shoulder under his care while performing rowing exercises. I believe him on this. Moreover, I generally believe him that he did not believe Mr. Guarin suffered a shoulder injury while performing therapy. Mr. Foxen was rather incredulous that the claimant did not tell anyone before he left that day. I believe Mr. Guarin though, that he did experience a burning pain and he did not tell anyone before he left for the day.

The next issue is medical expenses on the left shoulder. Defendants have paid all expenses related to the right.

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 1975).

Claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. See, Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Defendants should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc., File No. 1020226 (App., February 27, 1995).

I have reviewed the medical expenses in Claimant's Exhibit 11. Defendants are liable for these expenses pursuant to the foregoing guidelines.

The next issue is the nature and extent of the claimant's industrial disability. The claimant alleges he is permanently and totally disabled, while the defendants argue he is employable. The claimant has also plead and asserted the odd-lot doctrine.

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.

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935). A finding that claimant could perform some work despite claimant's physical and educational limitations, does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Comm'r. Report 134 (App. May 1982).

Although claimant is close to a normal retirement age, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund of Iowa v. Nelson, 544 N.W. 2d 258 (Iowa 1995). However, this agency does consider voluntary retirement or withdrawal from the work force unrelated to the injury. Copeland v. Boones Book and Bible Store, File No. 1059319, (App. November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id., at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not

employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

Having reviewed all of the evidence in the record, I find the claimant permanently and totally disabled. The claimant was 56 years old at the time of hearing with a GED. He has a number of demand skills, primarily in the areas of construction (well drilling), machine operating, truck driving and auto repair. Mr. Guarin has been a hard worker since he dropped out of high school to help his father dig wells. This work injury has left claimant with damaged shoulders. His functional disability ratings are 8 percent whole body for his right shoulder and 11 percent whole body for his left. (Cl. Ex. 14) He has severe functional limitations of no lifting more than 10 to 15 pounds. Away from his body, he can lift no more than 5 pounds rarely. He is not to perform any work at or above shoulder height with any repetitive use. (Cl. Ex. 14)

Claimant retained a vocational expert, Barbara Laughlin, who opined that he had a total or near total loss of access to the job market. (Cl. Ex. 16) Essentially all of the claimant's skills require working away from his body and above shoulder height reaching. With this evidence, the claimant met his initial burden under the Guyton test.

The defendants argue that Dr. Naylor was more optimistic about his chances for employment. And this is true. Dr. Naylor would allow the claimant to attempt certain jobs, such as dump truck driver. (Cl. Ex. 21, pp. 61-64) Dr. Naylor is an expert in medicine, however, not employment. At age 56, the likelihood of the claimant obtaining and maintaining employment in a physically demanding field such as dump truck driving is minute. Just getting in and out of a dump truck would be challenging. Moreover, claimant failed his Department of Transportation physical in November 2015, due to range of motion issues in his shoulders.

Considering all of the factors of industrial disability, and applying the odd-lot burden shifting analysis in Guyton, I find the claimant is permanently totally disabled.

ORDER

THEREFORE IT IS ORDERED:

The defendants shall pay claimant permanent total disability benefits at the stipulated and adjudicated rate of five-hundred and fifty-two and 90/100 dollars ($552.90) commencing the date of injury.

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.

Defendant shall be given credit for the weeks previously paid.

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

Defendants are not responsible for payment of an independent medical examination since no 85.39 IME was obtained.

Reasonable costs are taxed to defendant.

Signed and filed this 28th day of February, 2017.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Darin H. Luneckas
Attorney at Law
866 1st Ave NE
Cedar Rapids, IA 52402
darin@crlawyers.com

Thomas B. Read
Attorney at Law
PO Box 1968
316 2ND ST SE, Ste. 124
Cedar Rapids, IA 52401
read@elderkinpirnie.com

JLW/kjw

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.