BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PATRICIA MYERS, Claimant, vs. MENARD, INC. d/b/a MENARDS, Employer, and XL INSURANCE AMERICA, INC., Insurance Carrier, Defendants.	:	File No. 1634962.01 A R B I T R A T I O N D E C I S I O N Head Note No: 1803

STATEMENT OF THE CASE

The claimant, Patricia Myers, filed a petition for arbitration on April 30, 2021, against Menard, Inc., d/b/a Menards, employer, and XL Insurance America, Inc., insurance carrier. The claimant was represented by Laura Pattermann. The defendants were represented by Timothy Clarke.

The matter came on for hearing on September 12, 2022, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa via Zoom videoconferencing. The record in the case consists of Joint Exhibits 1 through 7; Claimant's Exhibits 1 through 7; and Defense Exhibits A through G. The claimant testified at hearing, as did her sister, Debra Jo Miller, in addition to Mark Gunderson, a supervisor for the employer. Buffy Nelson served as the court reporter for the proceedings. The matter was fully submitted on October 31, 2022.

ISSUES

The parties submitted the following issues for determination:

1. Whether the claimant's work injury is a cause of permanent disability.

2. Whether the claimant is entitled to permanent disability benefits, and if so, the nature and extent of her entitlement to such benefits.

3. Whether claimant is entitled to past or future medical expenses.

STIPULATIONS

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

1. The parties had an employer-employee relationship.

2. Claimant sustained an injury which arose out of and in the course of employment on March 24, 2017. This injury is a cause of some temporary disability during a period of recovery.

3. Temporary disability/healing period and medical benefits are no longer in dispute.

4. The commencement date for any permanent disability benefits is January 4, 2018.

5. The weekly rate of compensation is $456.20.

6. Defendants have paid and are entitled to a credit of 28 weeks of compensation (permanent partial disability).

7. Affirmative defenses have been waived.

FINDINGS OF FACT

Claimant Patricia Myers was 66 years old as of the date of hearing and she resided in St. Peters, Missouri with her nephew and his children. She testified live and under oath at the video hearing. Ms. Myers is found to be a highly credible witness. Her answers were simple and straightforward. Her testimony was consistent with other key portions of the record of evidence. There was nothing about her demeanor which caused the undersigned concern for her truthfulness. In fact, the opposite is true.

Ms. Myers obtained her GED in approximately 1973. She went on to take college courses at Elkhorn Community College. She has worked her entire life and supported herself. She appeared to be a proud person, if not somewhat stubborn. A great deal of time was spent at hearing reviewing her work history. She worked for a long time for a demolition company called Anderson Excavating which was owned by her father. During her lengthy tenure there, she performed numerous tasks from general labor to office work to truck driving. (Transcript, pages 15 to 19) She testified in detail regarding her various work activities for Anderson.

Ms. Myers began working at Menards in Council Bluffs in approximately 2008. At Menards, she started working in the paint department mixing paints. She eventually moved to the grocery department, stocking shelves. (Tr., p. 21) Later, she applied for and was hired for a position at Menards in the Shelby, Iowa Distribution Center. She was initially hired to unload trucks. She eventually transferred to a new position which moved heavier items, such as appliances and required the use of forklifts. At the end of her tenure with Menards, Ms. Myers was earning $15.25 per hour. The record reflects

she was a good employee for Menards.

On March 24, 2017, Ms. Myers sustained an injury which arose out of and in the course of her employment. On that date she was pushing a heavy fireplace onto a pallet. In the process of doing so, she tripped and fell onto her right side. She testified in detail about the injury at hearing. (Tr., pp. 27-28) She testified that following the injury, she had difficulty raising her right arm. A supervisor ended up transporting her to Mercy Emergency. (Joint Exhibit 2) From there, claimant began a fairly routine period of authorized treatment for her shoulder injury. Her initial treatment included medications, light-duty restrictions and physical therapy. (Jt. Exs. 3 and 4)

While she was in her healing period, Ms. Myers testified that she began to feel "harassed" by her supervisor. She testified the following:

> The harassment had got really bad. I couldn't even answer a question if somebody asked me a question. I wasn't allowed to talk to anybody. And when I was up for - - 98 percent of the time I was up on that rollers. And there is nobody to talk to up there. So I mean, I was - - I was just harassed really bad by Chris even before the accident, but after the accident it was just impossible.

(Tr., p. 34) She testified that while she was on light-duty, she had to sign papers relating to her work assignments or she was not allowed to work. She testified that she always had good work reviews prior to her work injury. (Tr., p. 35) She testified she feared she was going to be terminated. In May 2017, she resigned her position. (Def. Ex. E) There was no testimony presented by the employer. Menards did present portions of her personnel file which documented her light-duty assignments. (Def. Ex. F, pp. 39-41)

Ultimately, she was referred to a specialist and underwent a surgery to repair her torn rotator cuff in July 2017. (Jt. Ex. 6, pp. 107-108) Following surgery, Ms. Myers underwent a course of post-surgical care with her surgeon, Jeffrey Tiedeman, M.D. (Jt. Ex. 5) This care included routine follow-ups and more physical therapy. (Jt. Exs. 5, 4) At her last visit on January 4, 2018, he released her to return to work with no restrictions. (Jt. Ex. 5, p. 105)

At the conclusion of her treatment, Dr. Tiedeman prepared a report outlining his medical opinions regarding her disability. (Jt. Ex. 5, p. 106) He opined that she sustained a 7 percent impairment to her "shoulder" and she reached maximum medical improvement on January 4, 2018. He attributed her shoulder condition to her March 24, 2017 work injury. The defendants paid 28 weeks of permanent partial disability to Ms. Myers. (Hearing Report, *see also* Def. Ex. B)

Ms. Myers was next evaluated by Michael McGuire, M.D., for an independent medical examination under Iowa Code section 85.39, at the direction of her counsel. Dr. McGuire met with Ms. Myers, took history, examined her and reviewed appropriate records. (Cl. Ex. 1, p. 1) He prepared a report containing expert medical opinions on

April 17, 2018. He opined that her work injury caused her shoulder condition, and she sustained a 7 percent whole body impairment as a result. (Cl. Ex. 1, p. 3) He concurred with Dr. Tiedeman's MMI date but recommended permanent restrictions of no "work at shoulder height or above" and no lifting more than 25 pounds with the right arm. (Cl. Ex. 1, p. 3)

Patricia Conway, M.S., provided an expert vocational report on behalf of Ms. Myers. She opined that Ms. Myers had lost access to "75% of her pre-injury labor market" due to her work restrictions. (Cl. Ex. 3, p. 21)

Since quitting her employment with Menards Ms. Myers has been unable to secure alternate employment. She did seek employment with McDonald's, however, testified that she was unable to perform the work. She moved to the St. Louis, Missouri area to reside with her nephew because of financial stress. She applied for and is receiving Social Security retirement benefits. Her sister, Debra Jo Miller, testified at hearing. Her testimony was highly credible. She testified regarding her observations of Ms. Myers since her work injury. (Tr., pp. 94-97) She testified that Ms. Myers is depressed and has difficulty performing routine activities involving the use of her right shoulder. She testified that Ms. Myers was not planning to retire when she did.

Mark Gunderson testified on behalf of the employer. His testimony is credible as well. He testified that Ms. Myers was in no danger of being terminated when she quit. He testified that Menards always offered her work that was within her medical restrictions. He testified that the supervisor Ms. Myers accused of harassing her is no longer employed by Menards.

Two short videos were also reviewed of the conveyor area where Ms. Myers worked on light-duty. (Def. Ex. G) These videos were of little probative value. They do demonstrate that the conveyor area was very light work most of the time.

CONCLUSIONS OF LAW

The first question submitted is whether claimant's work injury is a cause of any permanent disability. Her injury occurred on March 24, 2017, prior to the 2017 legislative changes which likely would have affected the outcome of this case.

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).

I find that the medical evidence in this case clearly establishes that claimant sustained permanent disability to her right shoulder as a result of the stipulated work injury based upon the medical opinions of Dr. Tiedeman and Dr. McGuire.

The next issue is the nature and extent of such disability.

Ms. Myers' disability is located in her right shoulder.

When disability is found in the shoulder, a body as a whole situation may exist. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949). In Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Comm'r. Report 281 (App. 1982), a torn rotator cuff was found to cause disability to the body as a whole.

Since her disability is in the right shoulder and her injury predates the 2017 legislative changes, I find her disability is industrial.

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 Ry. Co. of Iowa, 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 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.

Having considered all of the evidence of industrial disability, I find that the claimant has sustained a 45 percent loss of earning capacity as a result of her work injury. Ms. Myers is a 66-year-old technologically challenged woman with primarily a manual labor work history. The medical experts had fairly similar expert opinions. To that end, I find the medical opinions of both medical providers to be generally compelling, however, I find Dr. McGuire's recommendation for permanent restrictions to be more realistic given Ms. Myers' age and overall condition of her shoulder. Dr. Tiedeman's opinion recommending no restrictions was not contained in his expert opinion report and is unexplained in this record. It is likely that his opinion may have been colored by the fact that Ms. Myers was not working at the time. In any event, it is well-documented in this record that Ms. Myers has a moderate functional impairment in her right shoulder from a rotator cuff tear which significantly impairs her ability to engage in much of her past employment. I suspect that she would have been able to secure employment with a more substantial job search, however, her decision to retire after quitting is perfectly reasonable. She has continued to take prescription pain medications due to her ongoing symptoms.

There was a significant amount of evidence at hearing about how Menards treated Ms. Myers following her injury. She testified that she felt harassed by her supervisor at the time and did not believe her light-duty assignments were entirely appropriate. Specifically, she testified she felt that her employer was setting her up to terminate her, possibly in part because of her injury, noting that her evaluations had always been good prior to her work injury. I do find that it is likely her work productivity suffered following her work injury and this may have been a source of tension between the parties. In any event, at a minimum she had a personality conflict with her direct supervisor. I find that none of this is significantly relevant to her industrial disability. She chose to quit at a time while she was still on light-duty. It is unknown in this record whether she would have been able to return to work for Menards following recuperation from her surgery. There is not enough evidence in this record to make a finding that the employer was attempting to terminate her because of the work injury.

Having found that Ms. Myers sustained a 45 percent industrial disability, I conclude that this entitles her to two hundred twenty-five (225) weeks of compensation commencing on January 4, 2018, as stipulated by the parties. The defendants are entitled to a credit for benefits paid as stipulated.

The next issue is whether Ms. Myers is entitled to the medical expenses set forth in Claimant's Exhibit 8.

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 included in Claimant's Exhibit 8. These expenses are compensable.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay the claimant two hundred twenty-five (225) weeks of permanent partial disability benefits at the rate of four hundred fifty-six and 20/100 dollars ($456.20) per week commencing January 4, 2018.

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 twenty-eight (28) weeks previously paid.

Defendants are responsible for the medical expenses set forth in Claimant's Exhibit 8.

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

Costs are taxed to defendants.

Signed and filed this ___17th___ day of February, 2023.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Laura Pattermann (via WCES)

Timothy Clarke (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.