

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CALVIN CHILDS,

Claimant,

v.

HIRSCHBACH, INC.,

Employer,

and

AIU INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 21701069.01

ARBITRATION DECISION

Head Note Nos.: 1803, 2907

STATEMENT OF THE CASE

Calvin Childs, claimant, filed a petition for arbitration against Hirschbach, Inc., as the employer and AIU Insurance Company as the insurance carrier. This case came before the undersigned for an arbitration hearing on May 11, 2023. Pursuant to the hearing assignment order, this case came before the undersigned via a Zoom conference call with all participants appearing remotely.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 7 and Claimant's Exhibits 1-2 and 4-5. Claimant's Exhibit 3 was withdrawn at the time of hearing and defendants did not offer a separate set of exhibits. All exhibits were received without objection.

Claimant testified on his own behalf and called his wife, Karen Childs, to testify. No other witnesses testified at the hearing. The evidentiary record closed at the conclusion of the evidentiary hearing on May 11, 2023.

However, counsel for the parties requested an opportunity to file post-hearing briefs. This request was granted and both parties filed briefs simultaneously on June 15, 2023. The case was considered fully submitted to the undersigned on that date.

ISSUES

The parties completed a hearing report prior to the commencement of hearing and submitted the following disputed issues for resolution:

1. Whether the claimant's stipulated July 7, 2021 work injury should be compensated with permanent disability benefits as a scheduled member injury to the right shoulder or as an unscheduled injury.
2. The extent of claimant's entitlement to permanent disability.
3. Whether costs should be assessed against either party and, if so, in what amount.

The parties did not complete the rate of compensation section of the hearing report. However, neither party raises the issue as disputed in their post-hearing brief and defendants refer to the issue as stipulated. I accept the parties' stipulation in this regard and will enter no findings of fact or conclusions of law related to the weekly rate.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Calvin Childs, claimant, is a 64-year-old gentleman, who was involved in a July 7, 2021 motor vehicle accident while performing his truck driving duties for Hirschbach, Inc. The parties stipulate that claimant sustained a compensable injury as a result of the accident. Claimant's injury arose following an accident in which claimant's semi rear-ended a pickup. Claimant testified that he was gripping the steering wheel at the time of the accident and could not feel his right arm or shoulder after the accident.

Mr. Childs went to the emergency room via ambulance on the date of injury and was diagnosed with a potential rotator cuff tear. Claimant returned from the location of the accident to his home in Florida and sought additional treatment with his personal physician. His doctor ordered an MRI of claimant's right shoulder.

Defendants ultimately accepted liability and directed claimant to treatment with Concentra. From there, claimant received a diagnosis of a torn rotator cuff and a referral to an orthopaedic surgeon. Sean M. McFadden, D.O., evaluated claimant on November 29, 2021 and recommended surgical intervention for claimant's right shoulder injury. Claimant consented to the recommended surgery and Dr. McFadden took claimant to surgery on January 4, 2022. Dr. McFadden performed a right shoulder

arthroscopy to repair claimant's rotator cuff as well as a subacromial decompression. (Joint Exhibit 4, pp. 5-6)

Following post-surgical care, including physical therapy, Dr. McFadden declared maximum medical improvement (MMI) on May 2, 2022. Dr. McFadden released claimant to full duty work at that time and indicated that claimant has "a 3% impairment." (Jt. Ex. 4, p. 14) Dr. McFadden re-evaluated claimant again on December 5, 2022. He reiterated MMI had been achieved and again indicated claimant has a "3% impairment." (Jt. Ex. 4, p. 19) Dr. McFadden's records do not clarify if his permanent impairment rating is performed pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, or some other standard. Dr. McFadden's impairment rating does not cite to any applicable figures or tables within the Guides to justify or verify his impairment rating is generated pursuant to those standards. Dr. McFadden's records also do not specify whether his impairment rating is to the right upper extremity or body as a whole.

Mr. Childs sought a competing permanent impairment rating via an independent medical evaluation performed by Richard C. Smith, M.D. on September 6, 2022. Dr. Smith opines that claimant sustained a 15 percent permanent impairment of the right upper extremity as a result of his work injury. Dr. Smith's report does not specifically state that his impairment rating comes from the AMA Guides, Fifth Edition. However, he indicates that his impairment rating "is calculated using Figures 16-40, 16-43, and 16-46 as well as Table 16-3." (Claimant's Ex. 4, p. 5)

Claimant's Exhibit 4, page 7 includes a letter from claimant's counsel to Dr. Smith and handwritten notes, which state, "using 5th edit. AMA ... 16-40 ... 16-43 + 16.46." The handwritten notes also reference "Table 16-3." It is not clear from the handwritten notes whether Dr. Smith or someone else generated those handwritten notes. The report is not signed by the physician. Nevertheless, the referenced figures and table are similar to Dr. Smith's formal report.

Review of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, reveals that Figures 16-40, 16-43, and 16-46, as well as Table 16-3, are contained within the Guides' chapter on rating upper extremity injuries, including shoulders. Figure 16-40 provides for impairment due to lack of flexion and extension of the shoulder. Figure 16-43 provides for permanent impairment due to lack of abduction and adduction of the shoulder. Figure 16-46 provides a method to calculate permanent impairment due to lack of internal and external rotation of the shoulder. Table 16-3 provides the methodology to convert Dr. Smith's 15 percent permanent impairment of the right upper extremity into a whole person impairment rating. Having reviewed the AMA Guides, Fifth Edition, I find that Dr. Smith's permanent impairment rating is generated using the appropriate figures and table of those guides and is issued pursuant to the Fifth Edition of the Guides.

I find that there is no convincing and credible evidence in this record to suggest that claimant's permanent impairment and resulting permanent disability extend beyond

the right shoulder. I find that claimant's injury is limited to the right shoulder. I find that Dr. Smith's permanent impairment rating is the most credible and convincing impairment rating in this evidentiary record because it is generated pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. I reject Dr. McFadden's impairment rating, accept Dr. Smith's impairment rating, and find that claimant proved a 15 percent permanent impairment of the right shoulder as a result of the July 7, 2021 motor vehicle accident.

CONCLUSIONS OF LAW

The initial disputed issue submitted by the parties is whether claimant's stipulated July 7, 2021 work injury should be compensated as a scheduled member disability of the right shoulder or as an unscheduled 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).

In this case, claimant testified to some other potential injuries and symptoms outside of his right shoulder. However, no physician has offered an opinion that claimant's July 7, 2021 injury extends beyond the right shoulder. I found that the injury involved a torn rotator cuff. Claimant's surgery involved repair of the right rotator cuff and a subacromial decompression. Claimant failed to prove treatment, injury, or permanent disability beyond the right shoulder.

Moreover, the Iowa Supreme Court held that a similar injury is limited to a scheduled member disability of the shoulder. Chavez v. MS Technology, L.L.C., 972

N.W.2d 662 (Iowa 2022). I conclude claimant's injury is limited to a scheduled member injury to the right shoulder.

In this case, I considered the impairment ratings offered by Dr. McFadden and Dr. Smith. I recognized that Dr. Smith rendered his impairment in accordance with and referenced the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Dr. McFadden did not clarify whether his impairment was rendered pursuant to the Fifth Edition of the AMA Guides.

Iowa Code section 85.34(2)(x) (2017) specifically provides:

[W]hen 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.

The Iowa Workers' Compensation Commissioner has enacted an administrative rule, which adopts the Fifth Edition of the AMA Guides to the Evaluation of Permanent Impairment for determining the extent of loss or percentage of impairment for permanent partial disabilities not involving analysis of a loss of earning capacity. 876 IAC 2.4 Therefore, I conclude that the Iowa legislature, in conjunction with the commissioner's administrative rule have adopted the Fifth Edition of the AMA Guides as the appropriate method to determine permanent functional impairment in this case. See Evans v. Bob Brown Chevrolet, Inc., File Nos. 20000128.01, 21009683.01 (Appeal August 2023).

I found Dr. Smith's opinion to be more credible and accurate with respect to the issue of permanent impairment. It also specifically complies with Iowa Code section 85.34(2)(x) (2017) and 876 IAC 2.4. Therefore, I found that claimant proved a 15 percent permanent functional impairment of the right shoulder.

Pursuant to Iowa Code section 85.34(2)(n) (2021), a shoulder injury is compensated on a 400-week schedule. Fifteen percent of 400 weeks is equivalent to 60 weeks. Iowa Code section 85.34(2)(w). I conclude that Mr. Childs is entitled to an award of 60 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(n), (w).

Finally, claimant seeks assessment of costs. Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40. Claimant prevails and receives an award of permanent disability in this case. Exercising this agency's discretion, I conclude it is appropriate to assess his costs in some amount.

Claimant seeks assessment of his filing fee (\$100.30). This is a reasonable cost and is permitted pursuant to 876 IAC 4.33(7). Claimant also seeks assessment of the

transcription cost of claimant's deposition. This case is limited to a scheduled member injury to the right shoulder. I did not find the deposition transcript to be helpful. Instead, it really was duplicative and unnecessary evidence in this case. I conclude it is not reasonable to assess the cost of claimant's deposition in this case.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant sixty (60) weeks of permanent partial disability benefits commencing on May 2, 2022.

All weekly benefits shall be payable at the stipulated weekly rate of nine hundred seventy-nine and 59/100 dollars (\$979.59) per week.

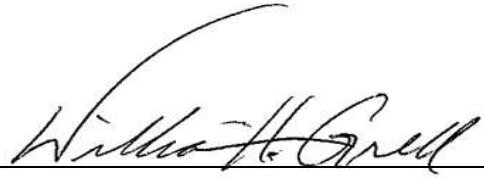
Interest shall be payable on all past-due weekly benefits at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

Defendants are entitled to the credit the parties stipulated to in the hearing report against the benefits awarded in this decision.

Defendants shall reimburse claimant's costs totaling one hundred and 30/100 dollars (\$100.30).

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 25th day of September, 2023.


WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Greg Egbers (Via WCES)

Bryan Hatch (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.