

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TROY SCHOENFELD,

Claimant,

vs.

NESTLE USA, INC.,

Employer,

and

INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA,

Insurance Carrier,
Defendants.

FILED

JUL 28 2015

WORKERS' COMPENSATION

File No. 5043761

A P P E A L

D E C I S I O N

Head Note Nos.: 1400, 1108, 1402.30

Claimant Troy Schoenfeld appeals from an arbitration decision filed on August 27, 2014. The case was heard on May 28, 2014, and it was considered fully submitted on June 30, 2014, in front of the deputy workers' compensation commissioner.

The deputy commissioner determined claimant failed to prove that the admitted work incident which occurred on October 19, 2012, caused anything more than a very brief, minor and temporary injury to claimant's left shoulder. Claimant asserts on appeal that the deputy commissioner erred in finding lack of causation, and in finding that the rotator cuff tear in claimant's left shoulder diagnosed in March 2013, and the surgery recommended for that condition, are not related to the work incident. Defendants assert on appeal that the findings of the deputy commissioner should be affirmed. Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, I reverse the determination of the deputy commissioner and I find that claimant's left shoulder rotator cuff tear and the surgery recommended for that condition are causally related to the work incident of October 19, 2012.

Those portions of the arbitration decision pertaining to issues not raised on appeal are adopted as part of this appeal decision.

Claimant's exhibits were marked numerically and defendants' exhibits were marked alphabetically.

ISSUES ON APPEAL

1. Whether claimant has proven that the rotator cuff tear in his left shoulder and the surgery recommended for that condition are casually related to the work incident of October 19, 2012.
2. Whether the injury is a cause of temporary disability during a period of recovery.
3. Whether the injury is a cause of permanent disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

As of the time of the arbitration hearing, claimant was 49 years old and he had worked at Nestle for 17 years as a forklift operator. He does have a history of prior left shoulder problems.

On June 17, 1991, claimant was involved in an accident in which he fell off his motorcycle when a car pulled out in front of him. (Ex. B, p. 1) He was evaluated for left shoulder pain by Xerxes Colah, M.D., P.H.D., orthopedic surgeon in Clinton, Iowa, on June 26, 1991. Dr. Colah recommended conservative treatment. (Ex. B, p.1) An arthrogram was performed on July 12, 1991, which indicated claimant might have a small rotator cuff tear. (Ex. B, p. 4) After continued conservative treatment, including physical therapy, Dr. Colah re-evaluated claimant on August 12, 1991, and Dr. Colah determined claimant's left shoulder exam was within normal limits. Dr. Colah advised claimant to resume full duty work. (Ex. B, p. 3)

Claimant apparently had no further problems with his left shoulder until November 28, 1999, when his vehicle was rear ended, which caused him to have pain in the shoulder. An MRI was performed on December 27, 1999. (Ex. B, pp. 5-6) Claimant was evaluated by Dr. Colah on January 14, 2000. Dr. Colah noted that the MRI showed normal appearance of claimant's left shoulder. Dr. Colah advised claimant he had clinical evidence of impingement, which could be expected to improve with time and with conservative treatment, which could include medication and injections. Dr. Colah noted that claimant declined medical treatment at that time and indicated he intended to continue treating with his chiropractor, who was providing ongoing chiropractic treatment for claimant's left shoulder. (Ex. B, p. 7)

Claimant returned to Dr. Colah on March 15, 2000. Dr. Colah noted that claimant had been evaluated by R. Kumar Kadiyala, M.D., Ph.D., at the University of Iowa Hospitals and Clinics (UIHC), who recommended a rehab program for claimant's left shoulder. Claimant advised Dr. Colah he intended to have his chiropractor supervise the rehab program recommended by Dr. Kadiyala. (Ex. B, p.8) No records from claimant's chiropractor were offered into evidence at the arbitration hearing.

The next medical record in evidence in this matter is a work excuse dated April 17, 2000, from Dr. Kadiyala at UIHC which states claimant was released to return to work on April 18, 2000, with a 20-pound lifting restriction for four weeks. (Ex. C)

On January 6, 2009, claimant was evaluated at Mercy Medical Center in Clinton for injuries caused by a fall on that date. The diagnosis was rib contusion, left shoulder strain and fracture of the fourth digit of the left hand. Claimant received a prescription for 20 500 mg tablets of Acetaminophen-hydrocodone with no refills. (Ex. D, pp. 1-3)

There are no additional medical records in evidence in this matter pertaining to claimant's left shoulder prior to Friday, October 19, 2012, when claimant sustained an injury to the shoulder while he was loading products into a truck. The driver of another forklift did not see claimant walking by and claimant was struck by product on the forklift as he jumped out of the way. Claimant's left arm was bent back and he felt a pop in his shoulder followed by immediate pain. (Tr., pp. 18-21, Ex. B, p.11)

Claimant decided not to report the injury because at that time there was a bonus employees would receive if they did not have any work injuries. (Tr., p. 22) On the way home from work on the day of the incident, claimant went to Mercy Medical Center to have the shoulder examined. (Tr., p.23) The Mercy ER record states that when claimant was asked how he injured his arm, he told the emergency room physician he injured it by falling out of his truck. According to the ER record, claimant reported the injury occurred out on a street. (Ex. 1, p. 1)

At hearing, claimant testified that the Mercy ER record was inaccurate. He testified he did not tell the physician he fell out of a truck. He stated he gave the physician an accurate report of how the incident actually occurred at work. (Tr. pp. 24 and 50) There is a major discrepancy between the emergency room record of October 19, 2012, and claimant's hearing testimony describing how the injury occurred. The incident described in the Mercy ER record is not even remotely similar to the description of the incident given by claimant at hearing. Claimant explained the discrepancy by stating that while he was in the ER, the situation there was chaotic, with the physician on duty running between rooms, trying to deal with a screaming patient, which required that the police had to be called. (Tr., p. 50)

X-rays of claimant's arm taken on the day of the incident showed no bone damage. No MRI was performed at the time of the incident. Claimant was diagnosed with sprain, strain and contusion of the left shoulder. The physician was concerned claimant might have sustained a rotator cuff tear. Claimant was advised to follow up with an orthopedic specialist. (See Ex. 1)

On Saturday, October 20, 2012, the day after the incident occurred, claimant called his supervisor at Nestle, Joe Misiag to report the incident. Claimant provided Mr.

Misiag with an accurate description of the incident. (Tr., pp. 25-26 and 85-86) On Monday, October 22, 2012, when Claimant reported to work, he was taken by Mr. Misiag to Medical Associates to be evaluated by Dr. Colah. (Tr., p. 28) Dr. Colah injected claimant's left shoulder with cortisone. The injection provided claimant with immediate relief. (Tr., p. 29, and Ex. B, pp. 14-16) Claimant took vacation the next week and he returned to Dr. Colah on October 29, 2012, for re-evaluation. (Tr., pp. 29-30) At that evaluation, Claimant told Dr. Colah he was symptom-free. Dr. Colah told claimant he believed the shoulder was sprained, the sprain was resolved, and claimant was told he could return to regular duty. (Tr., p. 30, and Ex. B, p. 20)

Claimant testified his shoulder remained pain-free until mid- February, 2013. (Tr., p. 31 and Ex. B., pp. 31 and 32) He was able to perform his regular job duties, including overtime work. He succeeded in lifting objects up to 50 pounds.

Claimant said he began feeling a sharp pain again in his left shoulder around mid-February. He returned to Dr. Colah on February 12, 2013. Dr. Colah ordered an MRI, which was performed on March 13, 2013. The MRI revealed a full thickness tear of claimant's left rotator cuff. (Ex. B, p. 36) When Dr. Colah re-evaluated claimant on March 25, 2013, he recommended surgery. (Ex. B, p. 41)

In a letter to Dr. Colah dated July 11, 2013, drafted by defendants' attorney, which Dr. Colah signed and dated on July 15, 2013, the following appears, in pertinent part:

Dear Dr. Colah:

Thank you for taking time out of your busy schedule to speak with me pertaining to your treatment of Troy Schoenfeld. Dr. Colah, as we discussed in our conference, you treated Mr. Schoenfeld for a left shoulder strain that occurred on October 19, 2012. In that regard, I would appreciate if you would address the following issues:

...

3. That as of October 29, 2012, Mr. Schoenfeld indicated that his left shoulder felt significantly better and, at that time, you felt his left shoulder strain of October 19, 2012 had resolved. At that time, Mr. Schoenfeld was returned to full-duty work without any permanent functional impairment pursuant to the AMA Guidelines, 5th Edition, and without any need for further medical treatment related to the October 19, 2012, incident.

4. That Mr. Schoenfeld returned to you on February 12, 2013, with a **recurrence** of soreness in the left shoulder. That Mr. Schoenfeld indicated to you that he had been participating in weight lifting for his physical health. That he also provided a history that two (2) weeks prior to

February 12, 2013, he had noticed soreness in his left shoulder. That in your opinion, this recurrence of soreness and pain would not be related to the incident of October 19, 2012.

5. That an MRI of the left shoulder completed March 13, 2013 showed a full thickness tear involving the supraspinatus tendon and you recommended surgical repair.

6. That in your opinion, any surgery of the left shoulder would not be related to the strain incident of October 19, 2012 but would be related to Mr. Schoenfeld's pre-existing shoulder condition, which may have been aggravated by his weight lifting activities.

Dr. Colah, thank you for your attention to these matters. If you agree with these statements, please sign and date the bottom of this report and return it back to me at your earliest convenience. If you would like to dictate a full response report, feel free to do so. Thank you for your professional assistance in this regard.

(Ex. B, pp. 43-44)

It should be noted that in Dr. Colah's clinical note dated February 12, 2013 the following appears, in pertinent part:

. . . Since then his shoulder had essentially functionally normal. He was able to do his full job description. In addition the patient participated in a weightlifting program for physical health . . .

(Ex. B, p. 32)

However, six lines later in that same report, the following appears, in pertinent part:

. . . The patient declares that since the incident he has not done any weight training . . .

(Ex. B, p. 32)

It should also be noted that in Dr. Colah's clinical note dated March 25, 2013, the following appears, in pertinent part:

. . . At the time of his visit of 02/12/2013. He declares that he no longer does weight training . . .

(Ex. B., p. 39)

In a letter to Dr. Colah dated August 16, 2013, drafted by claimant's attorney, which Dr. Colah signed and dated on August 19, 2013, the following appears, in pertinent part:

Dear Dr. Colah:

Thank you for visiting with me on August 12, 2013 to clarify the statement set out in the letter of Attorney Timothy Wegman which you acknowledged on July 15, 2013 . . .

. . .

Paragraph 4. With respect to paragraph 4 of Mr. Wegman's letter you clarified that Mr. Schoenfeld did **NOT** state that he had been lifting weights since the October 19, 2012 incident. In fact, on page 4 of your February 12, 2013 records, it states, "Patient declares that since the incident he has not done any weight training." Your medical record of March 25, 2013 further states, "He declares that he no longer does weight training."

. . .

Opinions.

You agreed with the following:

- (a) Based on the foregoing, you no longer are of the opinion that he injured his shoulder from weight lifting activities; *since the incident of 10/22/12 (handwritten and initialed)*
- (b) Having his left arm bent backwards against the joint is a mechanism which could cause rotator cuff injury;
- (c) That the history between the October 19, 2012 incident and your examinations in February and March, 2013 is critical to assessing a potential cause for the rotator cuff tear diagnosed in the March 13, 2013 MRI; and
- (d) If Mr. Schoenfeld had no trauma, accident, or injury to his left shoulder during this period of time it is probable that the rotator cuff tear is related to the forklift incident of October 19, 2012.

If you agree the foregoing is an accurate statement of our conversations, your opinions, and accurately reflects clarification of Mr. Wegman's letter dated July 15, 2013, please sign and date below and return the original to me at your earliest convenience. An extra copy of this letter is enclosed

for your records. You may make any corrections or changes necessary in your handwriting . . . (Ex. 4, pp. 1-3)

In a letter to Dr. Colah dated January 3, 2014, drafted by defendants' attorney, which Dr. Colah signed and dated on February 5, 2014, the following appears, in pertinent part:

Dear Dr. Colah:

Thank you for taking time out of your busy schedule to meet with me and Ms. Monica Murphy from Nestle as it relates to your medical treatment and opinions pertaining to Troy Schoenfeld . . .

. . . That physical examination of October 29, 2012, was entirely normal and your diagnosis at that time was that the left shoulder bursitis and strain had resolved. At that time, you indicated in your report that Mr. Schoenfeld had recovered from his recent injury of October 19, 2012, and he did not have any impairment at that time. Subsequently, your physical examination upon Mr. Schoenfeld's return visit of February 12, 2013, was abnormal in the finding that Mr. Schoenfeld had soreness, weakness as well as a clicking sensation with active range of motion of the left shoulder. He also had weakness in doing the lift off sign as well as mild weakness in the in the abduction of the shoulder in internal rotation. He also had pain on resisted forward flexion. That you noted in your report of February 12, 2013, that Mr. Schoenfeld had indicated that in the past two weeks he had observed a soreness in his left shoulder.

Dr. Colah, as we discussed, it would be your opinion that obviously the physical examinations from October 29, 2012, and February 12, 2013, were entirely different with the examination on October 29, 2012, being normal and the examination of February 12, 2013, being abnormal. That in your opinion, you cannot specifically identify the cause of the change in this physical examination between these two dates but specifically you cannot relate the findings on February 12, 2013, to the work injury of October 19, 2012.

Dr. Colah, if you agree with these statement as we discussed, I would appreciate it you would simply sign and date at the bottom of this letter or feel free to dictate your own medical report in response to these issues.

(Ex. B, pp. 45-46)

In the meantime, on September 13, 2013, claimant was evaluated by Andrew Bries, M.D., orthopedic surgeon in Bettendorf, Iowa, for a second opinion. At that evaluation, Dr. Bries recommended surgical repair of claimant's left shoulder and he

injected the subacromial space of claimant's shoulder with a mixture of 80 mg of Kenalog and 6 mL of 0.25% Marcaine. (Ex. 12, pp. 2-3) When Dr. Bries re-evaluated claimant on October 9, 2013, claimant reported 50 percent improvement in his symptoms. Dr. Bries again recommended surgery. (Ex. 13)

In his clinical note for the evaluation on September 13, 2013, Dr. Bries stated the following, in pertinent part:

Plan: Based on the history I have reviewed, it looks like this tear seems to be related to his injury in 2012. I cannot say what the exact causation is, except for the fact that the patient told me he had no pain prior to that, and he did have a documented normal MRI in 2000 indicating a normal left shoulder, then I would have to draw the conclusion, unless he has had medical care in between which we do not know about, that this rotator cuff tear is likely related to this injury, as the injury pattern does fit such that would be consistent with a rotator cuff tear . . .

(Ex. 12, p.2)

In a letter to claimant's attorney also dated September 13, 2013, Dr. Bries stated the following, in pertinent part:

. . . my present diagnosis is actually rotator cuff tear of his left shoulder with associated impingement and SLAP tear. Based on what he has told me and the information I have been able to glean from his medical record, it does appear that this injury is definitely related to his incident. It is impossible to say, without an MRI from the day before injury, afterwards whether this is just a partial tear that then progressed after the injury or if it was created by the injury is difficult to say, but it was most certainly exacerbated by, if not caused by, and I would to say that, based on the information in front of me, it is more likely than not related to the injury . . .
(Ex. 11)

In his deposition taken on May 1, 2014, Dr. Bries reiterated his opinion that claimant's rotator cuff tear was either caused by, or was exacerbated by, the October 19, 2012, work incident. (Ex. 15, p. 14) Dr. Bries stated it was his opinion that the gap in claimant's medical treatment from October 2012, to February 2013, does not mean claimant did not sustain a rotator cuff tear from the forklift incident. Dr. Bries stated he believes the injection administered by Dr. Colah on October 22, 2012, suppressed claimant's shoulder symptoms, which symptoms then "re-flared up again" in mid-February, 2013. (Ex. 15, pp. 15-16) Dr. Bries stated it was his opinion that claimant's prior left shoulder complaints in 1991, 1999-2000 and 2009 all resolved prior to the work incident of October 19, 2012. (Ex. 15, p. 21) Dr. Bries stated it is his opinion that without evidence of any other trauma after the October 19, 2012, work incident, the

logical conclusion is that claimant's rotator cuff tear relates back to the work incident. (Ex. 15, p. 30)

Claimant testified he was a weight lifter prior to the October 19, 2012, work incident, typically lifting two or three times per week. He stated he never had any injuries caused by weightlifting. He stated the last time he lifted weights was about two weeks prior to the work incident. He stated he has never lifted weights after the work incident occurred on October 19, 2012. (Tr., pp. 38-39) Claimant stated he sold his weight lifting equipment two or three months after the work incident because he knew the injection administered by Dr. Colah did not cure his shoulder condition and he knew the effects of the injection would wear off. (Tr., pp. 57-58) Claimant also stated that even though his shoulder was pain-free after the injection, he did not continue to lift weights because he did not have the same degree of strength in his left arm that he had before the work incident. (Tr., p. 61)

At the request of defendants, claimant was evaluated by Theron Q. Jameson, M.D., orthopedic surgeon in Burlington, Iowa. (Tr., pp. 63-64) However, defendants did not offer into evidence a report or a clinical note from Dr. Jameson.

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 Electric 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).

While it is clearly evident claimant had a history of prior left shoulder problems, the record in this case supports the conclusion that all of those problems resolved prior to the work incident of October 19, 2012. The record in this case also supports the conclusion that the rotator cuff tear in claimant's left shoulder was caused by the incident of October 19, 2012.

The medical evidence and claimant's testimony support the conclusion that no re-injury occurred to claimant's left shoulder between Dr. Colah's second evaluation on October 29, 2012, when claimant stated he was symptom-free, and Dr. Colah's next evaluation on February 12, 2013, after claimant's symptoms returned. The record supports the conclusion that claimant's symptoms returned because the cortisone injection administered by Dr. Colah on October 22, 2012, wore off. There is no evidence in the record which would cause me to conclude that claimant was not truthful in stating he did not lift weights after the work incident because he had a loss of strength in his shoulder and because he knew the effects of the injection given by Dr. Colah would wear off.

While Dr. Colah comes off as ambivalent regarding the issue of causation and his position is not clear, Dr. Bries does not come off at all as ambivalent, particularly in his opinion that claimant's symptoms returned in February 2013, because the injection given by Dr. Colah in October 2012, wore off. Dr. Bries' opinions in this matter clearly support the conclusion that claimant's rotator cuff tear was caused by the work incident.

It is noteworthy that defendants sent claimant to Dr. Jameson for evaluation on April 12, 2014, and defendants then did not introduce a clinical note or a report from Dr. Jameson at hearing. Where, without satisfactory explanation, relevant evidence within the control of a party whose interests would naturally call for its production is not produced, in such circumstances, it may be inferred the evidence would be unfavorable. State v. Thomas, 162 N.W.2d 724, 727 (Iowa 1968) and authorities. See also McCormick on Evidence (Second Ed. 1972) § 272, pp. 656-659; II Wigmore on Evidence (Third Ed. 1940) §§ 285-291, pp. 162-188; 29 Am. Jur.2d, Evidence, §§ 175 and 180, pp. 220 and 224-227; 31 C.J.S. Evidence § 156(1), pp. 391-396. However, even without considering Dr. Jameson's evaluation of claimant followed by the absence

of a report from him, Dr. Bries' opinion regarding causation is given the greatest weight and I based my findings in this case on Dr. Bries' opinion.

Looking at the totality of the evidence, I conclude claimant has met his burden of proving the rotator cuff tear in his left shoulder was caused by the work incident of October 19, 2012. Because this is a compensable injury, defendants must now provide claimant with reasonable medical care for the injury, including surgery if surgery is recommended by whomever defendants authorize to provide claimant with treatment. Defendants are also responsible to pay the cost of all medical treatment claimant has received to date for this injury from Dr. Colah, Dr. Bries and Dr. Jameson, if those charges have not already been paid.

Next, it must be determined whether claimant has proven that the injury in question is a cause of temporary disability during a period of recovery.

Claimant took off the week following the injury as vacation. It appears from claimant's testimony that he voluntarily took that week off because he wanted to make sure there were no further problems with his shoulder following the injection given by Dr. Colah on October 22, 2012. No physician authorized claimant to be off work and claimant's reasons for taking the week off apparently were not discussed with the defendant-employer. Because Dr. Colah's clinical note for October 22, 2012, states claimant had complete resolution of his symptoms following the injection, and because claimant was released to return to full duty, there was no medical basis for claimant to take that week off. There is no other evidence in the record that claimant has missed any other work as a result of the work incident. I therefore conclude claimant is not entitled as of this time to receive temporary disability benefits for this injury. That may change if claimant has the surgery recommended by Dr. Bries.

The next issue to determine is whether claimant has proven that the injury in question is a cause of permanent disability.

While it may eventually be determined that the injury to claimant's left shoulder is the cause of permanent disability, this issue cannot be addressed at this time because claimant has not missed any work for this injury, he has not had the recommended medical treatment, no permanent impairment ratings have been issued, and it is not possible at this time to determine whether claimant has any permanent work restrictions or any loss of earning capacity. I therefore conclude that claimant is not entitled as of this time to receive permanent disability benefits for this injury.

O R D E R


IT IS THEREFORE ORDERED that the arbitration decision of August 27, 2014, is REVERSED and claimant's left shoulder rotator cuff tear is found to be caused by the work incident of October 19, 2012.

Defendants shall authorize reasonable medical care by a provider of their choice for claimant's left shoulder injury.

If and when it becomes necessary, claimant's average weekly wage and his weekly workers' compensation benefit rate shall be calculated and defendants shall pay weekly benefits.

Defendants shall pay the costs of the appeal, including the preparation of the hearing transcript.

Signed and filed this 28th day of July, 2015.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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