BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TERRY HEIL, Claimant, vs. LENNOX INDUSTRIES, INC., Employer, and INDEMNITY INS. CO. OF N. AMERICA, Insurance Carrier, Defendants.	FILED FEB 11 2019 WORKERS COMPENSATION	File No. 5060284 ARBITRATION DECISION Head Note Nos.: 1108.50; 1402.40; 1802; 1803; 2907; 4000

STATEMENT OF THE CASE

Terry Heil, claimant, filed a petition in arbitration seeking workers' compensation benefits from Lennox Industries, Inc., employer and Indemnity Insurance Company of North America, insurance carrier as defendants. Hearing was held on October 23, 2018 in Des Moines, Iowa.

Claimant, Terry Heil, was the only witness to testify live at trial. The evidentiary record also includes joint exhibits JE1-JE7, claimant's exhibits 1-3, and defendant's exhibits A-F and H.

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 submitted post-hearing briefs on November 30, 2018.

ISSUES

The parties submitted the following issues for resolution:

1. Whether the appropriate date of injury in this case is October 7, 2014 or April 24, 2017?
2. The extent of permanent disability claimant sustained as a result of the left shoulder injury.

3. Assessment of costs.

FINDINGS OF FACT

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

Claimant, Terry Heil, filed a petition alleging an injury to his left shoulder which arose out of and the course of his employment with Lennox Industries, Inc. (hereinafter "Lennox"). The petition alleges the injury occurred while he was performing his job duties. The petition alleges an injury date of April 24, 2017. Defendants do not dispute that Mr. Heil sustained a compensable injury to his left shoulder. However, defendants assert that the correct injury date is October 7, 2014. The central disputes in this case are the correct date of injury and the extent of Mr. Heil's industrial disability. The parties agree on a rate for each date of injury. The rate the benefits should be paid at will be determined by the correct date of injury.

At the time of hearing, Terry was 59 years old. He lived in Marshalltown with his wife. On October 7, 2014, Terry injured his left shoulder at work. Lennox sent him for treatment with Charles D. Mooney, M.D., on October 13, 2014. The doctor's assessment included symptoms of left shoulder pain, most consistent with impingement and underlying rotator tendinitis. Dr. Mooney prescribed physical therapy and provided an injection. He did not order an MRI, nor did he refer Terry to an orthopaedic surgeon. Dr. Mooney saw Terry on December 22, 2014, and noted Terry's symptoms were essentially resolved. He had no complaints of pain or difficulties with normal activities. He had normal range of motion in all planes. The doctor also noted excellent rotator strength, no impingement findings, and negative liftoff. The assessment was improved left shoulder bursitis versus mild impingement findings. Dr. Mooney did not feel any further evaluation or treatment was indicated. Terry was released to full duty and was told to follow-up as needed. Dr. Mooney anticipated Terry would be at maximum medical improvement (MMI) as of February 13, 2015. (JE1; Testimony)

Terry did not miss any time from work as a result of the 2014 injury. He was not paid any weekly worker's compensation benefits as a result of that injury. Terry did not seek any medical treatment for his left shoulder from December 24, 2014 through April 24, 2017. He did not take any prescription medications for his left shoulder during this time. He also did not ask for any accommodation while working in the B4 expander position. Terry testified that he probably did not regain all of his strength after the 2014 injury, but he was pain free and had good range of motion. (Testimony)

At the time of the 2014 work injury, Terry was working in the sales coil group. He then bid out to the B4 expander job. Terry testified that the B4 expander job is a heavy job.

On or about April 24, 2017, Terry was lifting coils that weight 50 to 75 pounds and were stacked too high. He experienced tingling from his left shoulder to his fingers; he had never experienced this before. Terry reported this to his foreman, Kelvin House who advised Terry to tell the nurse. Terry reported pain in his left shoulder with numbness into his neck and down his arm to the nurse. He stated that the symptoms started approximately two weeks ago. Defendants were not able to get Terry into see Dr. Mooney for a couple of weeks because the doctor was on vacation. (Testimony; JE2, p. 15)

Dr. Mooney saw Terry on May 11, 2017, the doctor noted Terry was last seen on December 22, 2014 with 99 percent improvement in complaints of left shoulder pain after a course of physical therapy and a single injection. Terry reported that he had moved some very large coils and felt that irritated his shoulder. Terry reported pain in the left shoulder that he noticed the most in the evening and at night. His arm also felt weak, especially if his arm was away from his body. He also reported occasional tingling into his thumb and index finger and occasional radiation of pain into his neck from the back of the shoulder. Dr. Mooney's assessment was symptoms of chronic left shoulder pain with chronic ongoing left shoulder impingement. The doctor felt the current complaints were most consistent with the natural progression of the condition. He ordered an MRI to assess the rotator integrity. Terry was allowed to continue his normal duties without restriction. (JE1, p. 7)

The left shoulder MRI revealed a large full-thickness tear of the rotator cuff and biceps tendon tear. He was referred to Orthopedics. Dr. Mooney stated that no formal job analysis had been provided to him and causality remained undetermined. He was allowed to continue full duty. (JE1, pp.9-11)

On May 18, 2017, Troy Vander Molen, PT, DPT performed a jobsite assessment. This was done at the request of Dr. Mooney. Mr. Vander Molen visited the job site to perform an interview with the employee and a job analysis. The physical therapist's note states, "Physical stressors known to be associated with shoulder and other upper extremity cumulative trauma disorders have been found to be inherently present in the processes of the B4 Expander position . . . ." (JE6, p. 68) He then concluded,

> Given the fact that the client had a history of left shoulder impingement/tendinitis issues dating back to at least October of 2014 and he has been in this work position the entire time, it is more likely than not that this exposure was a material aggravant to his shoulder condition.

(JE6, p. 68) The therapist later signed a letter authored by defense counsel which stated that his jobsite assessment was meant to assist the doctor in determining medical causation and his report was not meant to be a medical causation report. The therapist indicated he would leave medical causation to the doctors. (JE6, p. 69)

On June 22, 2017, Timothy Vinyard, M.D., operated on Terry's left shoulder. Terry had a massive left shoulder rotator cuff tear, complete biceps tendon rupture, shoulder impingement, and acromioclavicular joint arthropathy. Dr. Vinyard was not able to repair the biceps tendon tear. (JE7, pp. 75-77). After the surgery, Terry underwent physical therapy. By October of 2017, Terry was doing very well. He reported that his pain, strength, and range of motion were all improving. (JE7)

On December 5, 2017, Dr. Vinyard issued a letter to defense counsel. With regard to causation, the doctor stated:

> It is my opinion that it is more likely than not that the patient had suffered some sort of significant injury with his original injury in October 2014. It is likely the patient had at least a small tear of his rotator cuff and likely damage to his biceps tendon at that time. Since no MRI was obtained at that time, it is very difficult to know this for sure. It is likely that his tear did not heal on its own, which is typical for a small full-thickness tear. The tear likely slowly progressed over time to a large to massive full-thickness tear with complete tearing of his biceps tendon. At minimum, I think the patient suffered a significant material aggravation of a previously underlying left shoulder condition. It is also possible that he suffered a tear with his injury in January. Again, it is very difficult to say with anything approaching absolute certainly. However, the patient's symptoms, which caused him to seek my treatment on May 25, 2017, are likely due to his original injury in October 2014.

(JE7, p. 89)

In March of 2018, Dr. Vinyard authored another letter to defense counsel in an attempt to clarify his causation opinion.

> Please allow me to further address my opinion in terms of the timing of his injury. It is clear to me that Mr. Heil had a documented injury to his left shoulder in October 2014. It is my opinion that at that time he suffered significant structural damage to his shoulder. It is more likely than not that he suffered at least a partial-thickness rotator cuff tear, if not a full-thickness rotator cuff tear at that time. It is not surprising that his symptoms improved with a cortisone injection and other conservative measures, but he continued to have weakness in his shoulder. In all likelihood that tear continued to slowly progress in size. When he reinjured his shoulder in 2017, I do not believe he suffered any material aggravation of his preexisting left shoulder condition. There is well-documented literature in the field of orthopedics demonstrating progression in tear size with a small full-thickness tear when not treated surgically. Therefore, it is my opinion, and within a reasonable degree of certainty, that Mr. Heil's left shoulder symptoms and need for surgical treatment with me, including the surgery in June 2017, are more likely

> than not due to his documented shoulder injury on October 7, 2014. Furthermore, I have reviewed the letter by Dr. Mooney on February 16, 2018 and I agree with his findings and conclusions.

(JE7, p. 92)

Dr. Vinyard also offered his opinion regarding impairment. The doctor noted he had allowed Terry to return to work without any formal restrictions. Based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, he assigned 1 percent upper extremity impairment for his shoulder flexion of 170 degrees. (JE7, p. 91)

On February 16, 2018, Dr. Mooney authored a letter to defense counsel. He had reviewed a job site assessment dated March 18, 2017 and Dr. Vinyard's letter dated December 5, 2017, as well as the records from McFarland Clinic. He opined that Terry's new presentation with left shoulder pain in May of 2017 would be considered related to the initial aggravating event in 2014, and the natural progression of shoulder impingement, rather than cumulative trauma. (JE1, pp. 12-14)

In April of 2018, at the request of his attorney, Terry underwent an IME with Mark B. Kirkland, D.O. In addition to examining Terry, Dr. Kirkland also reviewed the documentation provided to him. Dr. Kirkland opined that Terry sustained a new injury to and material aggravation of his preexisting left shoulder condition on or about April 25, 2017. He noted Terry was performing a lot of repetitive work, picking up and adding the expanding coils at shoulder level or above. Some of the coils were stacked too high. Dr. Kirkland felt that this required a lot of heavy and forceful work at shoulder level or above. Dr. Kirkland opined that the need for the left shoulder operation was caused by the April 25, 2017 left shoulder injury and/or material aggravation. He placed Terry at MMI as of January 25, 2018. Dr. Kirkland assigned 10 percent impairment to the left upper extremity secondary to excision of the distal clavicle. He cited table 15-27 on page 506 of the Guides. He also assigned 6 percent impairment to the left upper extremity due to range of motion loss. The total impairment assigned by Dr. Kirkland amounted to 15 percent of the left upper extremity which equates to 9 percent of the whole person. Dr. Kirkland noted that at the time of the IME Terry was lacing coils and seemed to be tolerating that type of work. However, Dr. Kirkland did not feel that Terry would be able to tolerate consistent or frequent work at shoulder level or above and certainly not for 9 to 10 hours per day. (Cl. Ex. 1)

Dr. Vinyard issued yet another letter to defense counsel dated July 31, 2018 regarding his impairment opinion. Dr. Vinyard reviewed Dr. Kirkland's rating. Dr. Vinyard reiterated that he was confident in the measurements he took on January 25, 2018. Dr. Vinyard did not have a reasonable medical explanation for why Terry's left shoulder motion appeared to dramatically decrease over the span of about 10 weeks. Dr. Vinyard did not believe that Terry should receive a separate 10 percent impairment rating for the arthroscopic distal clavicle excision that he performed. Dr. Vinyard felt that the procedure he performed was functionally different than the procedure in Table 16-23 of the Guides. (JE7, pp. 94-95)

The first issue to be addressed is the date of injury. I find that Terry sustained a material aggravation of his left shoulder on or about April 24, 2017. The evidence demonstrates that Terry sustained a work injury to his left shoulder in October of 2014. At the defendants' direction Terry received conservative treatment. He saw Dr. Mooney who did not feel it was necessary to order an MRI. Terry received an injection and had a 99 percent recovery. Terry did not miss any time from work and did not have any permanent restrictions placed on his activities. Terry worked in the B4 expander job without restrictions or accommodations from 2014 until April of 2017. Terry then experienced an increase in symptoms and had new symptoms into his left arm. This time when defendants sent Terry to see Dr. Mooney, the occupational doctor ordered an MRI and eventually referred him to an orthopaedic surgeon. He was diagnosed with a massive rotator cuff tear and a ruptured biceps tendon. Dr. Vinyard felt there was likely a small tear in 2014 and the tear continued to slowly progress in size. A job analysis was performed. The analysis noted physical stressors inherently present in the processes of the B4 Expander position that were known to be associated with shoulder and other upper extremity cumulative trauma disorders. Dr. Kirkland opined that Terry sustained a new injury to and/or material aggravation of his preexisting left shoulder condition on or about April 25, 2017. I find Dr. Kirkland's opinion to be the most persuasive and consistent with the record as a whole. Thus, I find the appropriate date of injury in this case is April 24, 2017.

The parties in this case have agreed that if the appropriate date of injury is April 24, 2017, then claimant's weekly workers' compensation rate would be $679.78. (Hearing Report)

Prior to hearing, claimant was paid weekly benefits based on the 2014 weekly rate. I find that defendants should have paid the weekly benefits at the rate of $679.78 per week. Defendants shall pay any underpayment of any temporary benefits, plus interest.

A determination must now be made about the extent of industrial disability, if any, that Terry sustained as a result of the April 24, 2017 work injury.

A review of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Table 16-27 on page 506 indicates that a distal clavicle resection arthroplasty is assigned a 10 percent permanent impairment of the upper extremity. According to Table 16-3 on page 439, a 10 percent permanent impairment of the upper extremity converts to a 6 percent permanent impairment of the whole person. Although Dr. Vinyard does not believe this impairment should be awarded under these circumstances, I find that the AMA Guides state that the additional 6 percent impairment of the whole person would be attributable to claimant's distal clavicle excision. In this respect, I find Dr. Kirkland's opinions regarding permanent impairment to be more persuasive. I find that as a result of the April 24, 2017, work injury Terry has sustained 9 percent whole person impairment.

I find that Terry has been medically cleared to work in his current job without restrictions. Dr. Kirkland did caution against performing any consistent, frequent, or repetitive work at shoulder level or above. (Cl. Ex. 1, p. 5) Terry testified that he continues to experience pain and popping in his left shoulder. He also feels that he does not have the strength in his left arm and shoulder that he used to have. For example, it is difficult for him to lift a gallon of milk away from his body or overhead. He still has symptoms in his thumb and finger. He has difficulty lifting 10 pounds overhead even if he uses both hands. (Testimony)

To the credit of both Terry and Lennox, Terry is still employed with Lennox. After he returned to Lennox following the surgery, he felt he was not able to perform the B4 expander job that he performed in April of 2017. He does not believe he would be able to perform the duties of that position on a full-time basis. Terry testified that the B4 expander job required too much lifting. Terry transferred into a lacing job which is performed at waist level and involves less lifting than the B4 job. The lacing job allows him to keep his arms closer to his body and not above his head. There is no evidence in the record to indicate that Terry is earning less money because of the work injury. (Testimony)

Terry graduated from high school, but has no further formal education. His work history includes foundry work and factory work. He went to work for Lennox in 1994. Terry does not believe he is physically capable of returning to foundry work because it requires more shoulder strength than he currently has. Additionally, he is not able to perform jobs that require constant or repetitive work at shoulder level.

At the request of the defendants, Rene Haigh, MS, CRC performed a vocational assessment and issued a report. The report indicates that even with Dr. Kirkland's restriction of no consistent, frequent or repetitive work at shoulder level or above, Terry is still capable of performing work in the heavy physical demand category and therefore, Ms. Haigh opined he has a minimal loss of access to pre-injury employment options. The report provides a sampling of jobs available in Terry's labor market. Unfortunately, the report does not provide sufficient information about the physical requirements of each job for the undersigned to know if Terry would be physically capable of performing those job duties. (Def. Ex. B)

Considering Terry's age, educational background, employment history, ability to retrain, motivation to maintain his current job, length of healing period, permanent impairment, and permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that he has sustained a 20 percent loss of future earning capacity as a result of his work injury with Lennox.

Finally, claimant is seeking an assessment of costs. I find that claimant was generally successful in his claim and therefore I exercise my discretion to award costs. First, claimant is seeking the filing fee in the amount of $100.00. I find this is an appropriate cost under 876 IAC 4.33(7). Second claimant is seeking the service fee in the amount of $6.46. I find this is an appropriate cost pursuant to 876 IAC 4.33(3).

Third, claimant is seeking costs in the amount of $175.00 for the report of Dr. Vinyard. I find this is an appropriate cost under 876 IAC 4.33(6). Finally, claimant is seeking costs in the amount of $250.25 for the deposition transcript of Andi Cline, R.N. I find that this is an appropriate cost under 876 IAC 4.33(2). Thus, defendants are assessed costs totaling $531.71.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6)(e).

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).

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.

Based on the above findings of fact, I conclude that Terry sustained an injury which arose out of and in the course of his employment with Lennox on or about April 24, 2017. I further conclude that he sustained 20 industrial disability as a result of that injury. As such, he is entitled to 100 weeks of permanent partial disability benefits commencing on the stipulated date of June 30, 2017.

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

Based on the above findings of fact, I conclude the healing period benefits in this case should have been paid at the rate of $679.78 per week. The record indicates these benefits were paid at the rate of $540.07 per week. I conclude defendants shall pay any underpayment of weekly benefits, plus interest.

Claimant is seeking an assessment of costs. Costs are to be assessed at the discretion of the deputy hearing the case. 876 IAC 4.33. Based on the above findings of facts, I conclude defendants are assessed costs in the amount of $531.71.

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of six hundred seventy-nine and 78/100 dollars ($679.78).

Defendants shall pay one hundred (100) weeks of permanent partial disability benefits commencing on the stipulated commencement date of June 30, 2017.

Defendants shall pay any underpayment of any healing period benefits, plus interest.

Defendants shall be entitled to credit for all weekly benefits paid to date.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable 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 Deciga Sanchez v. Tyson Fresh Meats, Inc., File No. 5052008 (App. Apr. 23, 2018) (Ruling on Defendants' Motion to Enlarge, Reconsider or Amend Appeal Decision re: Interest Rate Issue).

Defendants shall reimburse claimant costs in the amount of five hundred thirty-one and 71/100 dollars ($531.71).

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 11th day of February, 2019.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.