State of Wisconsin

Labor and Industry Review Commission

Nancy Acosta Applicant **Menomonee Falls Health Service** Employer **SFM Mutual Ins. Co.** Insurer Claim No. 2017-026698	**Worker's Compensation Decision**[1] **Dated and Mailed:** August 30, 2024 acostana_wsd.docx:190

Interlocutory Order

The commission **affirms** the decision of the administrative law judge. Accordingly, within thirty (30) days, if it has not already done so, the respondent shall pay:

1. To the applicant, the sum of five thousand, fifty-four dollars and forty cents ($5,054.40) as compensation.
2. To the applicant's attorney, Douglas Phebus, the sum of one thousand, two hundred sixty-three dollars and sixty cents ($1,263.60) in attorney fees.

The respondents are also responsible for the medical treatment expenses identified in the WKC-3 (Exhibit E) up until April 30, 2018. The order is interlocutory only to the extent that a revised WKC-3 may be submitted that includes medical bills through April 30, 2018, that were not already paid by the respondents. The order is final as to all other matters.

By the Commission:

/s/
Michael H. Gillick, Chairperson

/s/
Georgia E. Maxwell, Commissioner

/s/
Marilyn Townsend, Commissioner

[1] **Appeal Rights**: See the yellow enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you **must** name the following as defendants in the summons and the complaint: the Labor and Industry Review Commission, and all other parties in the caption of this decision or order (the boxed section above). Appeal rights and answers to frequently asked questions about appealing a worker's compensation decision to circuit court are also available on the commission's website, http://lirc.wisconsin.gov.

Procedural Posture

This case is before the commission to consider the applicant's eligibility for worker's compensation benefits. The applicant filed a hearing application dated October 11, 2018, claiming that she sustained neck and right arm injuries while turning a resident on November 11, 2017. The applicant later amended the hearing application to claim 15% permanent partial disability to the body as a whole, 25% permanent partial disability to the right shoulder, and a period of temporary total disability, as well as medical expenses. The applicant also claimed that as a result of her work injuries, she was permanently totally disabled. The employer and insurance carrier (collectively, the respondent) conceded jurisdictional facts and an average weekly wage of $600. The respondent also paid some medical expenses and temporary total disability benefits. An administrative law judge for the Department of Administration, Division of Hearings and Appeals (Division), Office of Worker's Compensation Hearings, held a hearing on this matter on May 3, 2023, and issued a decision, finding that the applicant sustained cervical spine and right shoulder strains in the work incident and ordering additional temporary total disability benefits and medical expenses. The applicant then filed a timely petition for commission review.

The issues are the nature and extent of the applicant's disability from the work injury. The commission has considered the petition and the positions of the parties and has independently reviewed the evidence submitted at the hearing. Based on its *de novo* review, the commission affirms the decision of the administrative law judge and makes the following:

Findings of Fact and Conclusions of Law

As supplemented by the commission's memorandum opinion,[2] the commission makes the same findings of fact and conclusions of law as stated in the decision of the administrative law judge and incorporates them by reference.

Memorandum Opinion

The applicant, who was born in 1961, worked as a certified nursing assistant (CNA), and alleged that she injured her neck and right shoulder when she was turning a 280 to 300-pound patient in a bed. The applicant claims that as a result of the injuries, she needed medical treatment, including a three-level cervical disc fusion, and that based on permanent partial disability and restrictions, she is now permanently totally disabled. Prior to the hearing, the respondent paid some medical expenses and temporary disability benefits. An administrative law judge found the applicant sustained cervical spine and right shoulder strains that resolved in 5 months with no permanent disability, and awarded additional temporary disability benefits and medical expenses to the end-of-healing date. The applicant then filed a timely petition for commission review.

The Applicant's Medical History Prior to the November 11, 2017, Work Injury

The applicant had some prior medical treatment for her right shoulder and periscapular area shortly before the work injury. She treated with Dr. Joselito A.

[2] The commission's memorandum opinion may be the basis for more formal findings of fact. *Manitowoc Boiler Works v. Indus. Comm'n,* 165 Wis. 592, 594-95, 163 N.W. 172 (1917).

Baylon, M.D., on July 18, 2017, for right arm/shoulder pain. Dr. Baylon noted the applicant had no swelling or lesions in the right shoulder, but she was tender in acromioclavicular and periscapular areas. He assessed right shoulder tendinitis and prescribed naproxen for pain. The applicant treated with Dr. Baylon again on August 28, 2017, for her persistent right shoulder pain. The applicant was unable to sleep due to the pain. The acromioclavicular joint was still tender and the applicant had very limited range of motion secondary to the pain. Dr. Baylon again assessed right shoulder tendinitis. On September 11, 2017, Dr. Baylor noted the applicant had done 2 weeks of physical therapy and felt much better and wanted to return to work. The applicant had full right shoulder range of motion and was very strong, and Dr. Baylon assessed right shoulder tendinitis, resolved. She was given no work restrictions.[3]

At the hearing, the applicant testified that prior to the work injury, she treated for her *elbow*, not her arm. She thought she had hit her elbow when leaning over in her vehicle, so she went to the doctor, and she thought it was arthritis. She indicated that her elbow pain had cleared up by the time of the work incident, and she was having no problems turning the patients or handling other cares.[4] She disputed the accuracy of the 3 medical records of Dr. Baylon, and insisted that she sought treatment for her elbow, and she did not know why the medical records did not mention her elbow.[5] The applicant testified that before the work incident, she had no problems with her neck or right shoulder or anywhere in her body. "I was lifting everything and doing everything. I didn't have no problem with my shoulder." She indicated that she enjoyed walking about 5 miles per day and she played volleyball.[6]

The Work Incident on November 11, 2017

The applicant had been a CNA at various places since 1989. For the employer, the applicant worked in the dementia unit. She was responsible for 24 residents on her shift and had to turn the patients every 2 hours. The applicant testified that on November 11, 2017, she went to turn a 280 to 300-pound patient and he rolled over. According to the applicant, the patient "just got aggressive, and he pushed back. He pushed back like real hard on me. Here, I'm going flying backwards. All of a sudden I had to catch the bed…." The applicant testified that she had had her hands on the patient pushing him over, "And then all of a sudden he just got aggressive. He just like pushed his arm and pushed back on me. I felt myself like going backwards. And so I had to catch the bed to keep from falling on that bed. …" The applicant indicated that she felt a sharp pain in her shoulder and down the right side of her neck. After the incident, the applicant put the covers back on the patient and told the nurse about the incident. The nurse wrote it up and told the applicant to take Tylenol. When the applicant went home, she felt her symptoms worsen, and she called and told the employer she could not work the next night. The applicant then made an appointment for treatment with her doctor.[7]

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[3] Exhibit (Ex.) 1.
[4] Transcript of Proceedings dated May 3, 2023 (Tr.), pp. 17-18.
[5] Tr., pp. 25-26, 35.
[6] Tr., pp. 16-17.
[7] Tr., pp. 10-16.

The Subsequent Medical Treatment

On November 14, 2017, the applicant treated with Dr. Baylon for her right shoulder pain. Dr. Baylon noted the applicant had been lifting/pushing a patient and pulled her shoulder muscle. The right shoulder was swollen and tender. The applicant had full range of motion with pain. Dr. Baylon assessed right shoulder tendinitis and recommended physical therapy. Despite Dr. Baylon mentioning only the applicant's right shoulder pain, the applicant testified that she told the doctor that she had pain from her shoulder and neck.[8] On November 27, 2017, Dr. Baylon did note that the applicant reported right shoulder pain and neck pain. The applicant had tender right para cervical and periscapular areas. The applicant was very weak and unable to raise her arm over her shoulder. He assessed right shoulder/paracervical strain secondary to a work injury. The applicant was to continue physical therapy and could return to work with a 5-pound lifting restriction and no overhead activity. On December 28, 2017, Dr. Baylon noted the applicant was worse. She was to continue physical therapy, and he ordered an MRI of the neck and right shoulder.[9]

On January 9, 2018, Dr. Baylon noted the applicant had finished 8 physical therapy sessions and still had pain and was unable to do overhead lifting with the right shoulder. The applicant was working 12 hours/week light duty, and he continued her work restrictions. An MRI of the right shoulder on January 12, 2018, showed mild diffuse supraspinatus tendinosis with mild multifocal partial-thickness minimally retracted intrasubstance tearing. There was no complete rotator cuff tear. The MRI of the cervical spine showed multilevel degenerative disc disease with mild reversal of cervical spine curvature. There was no significant canal stenosis. Disc protrusions were noted at C4-5 (right) and C5-6 (left). Shallow disc protrusions were also noted at C3-4 and C6-7. Multilevel facet and uncovertebral joint hypertrophy was most pronounced on the left at C5-6, with severe stenosis of the left C5-6 neural foramen. There was also moderate stenosis of the right C5-6 neural foramen and mild stenosis of the left C3-4, bilateral C4-5 and left C6-7 neural foramina. There was normal signal in the cervical cord.[10]

On January 23, 2018, Dr. Baylon noted the MRIs showed degenerative joint disease in the cervical spine and a partial rotator cuff tear. The applicant had very limited range of motion. The applicant was to continue light duty work 4 hours/day, 3 days/week. On February 27, 2018, Dr. Baylon noted the applicant had seen a Dr. Boyle, who did not recommend surgery, but had recommended a steroid injection, but the applicant refused an injection. (There are no records from Dr. Boyle in the record.) On March 27, 2018, Dr. Baylon noted the applicant was not really working within her restrictions and "works like regular work" 4 hours/day, 3 days/week. He indicated that due to non-accommodation of the restrictions, the applicant's pain was getting worse with her regular job despite the shorter hours. On April 23, 2018, Dr. Baylon again noted that the applicant refused injections. She was non-surgical for now according to ortho. Her right shoulder was very limited. She was to continue home physical therapy.[11]

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[8] Tr., p. 28.
[9] Ex. 1.
[10] Ex. 1.
[11] Ex. 1.

The applicant had another cervical MRI on June 1, 2018. This again showed the multilevel degenerative disc disease and disc protrusions. On June 7, 2018, Dr. Baylon noted the applicant refused injections and just wanted her shoulder to heal on its own. "I explained to her that she might develop frozen shoulder until she is more active with working towards recovery." On September 7, 2018, Dr. Baylon decided to refer the applicant to the pain and joint clinic for further management.[12]

The applicant first treated with Dr. Kelly Von Schilling Worth on September 20, 2018. Dr. Von Schilling Worth described the work incident as:

> At 2am she was performing her rounds, she had to wake a resident to turn him to his side. The patient states that he was a big heavier man. As she was turning the resident to his side she had to use both hands to assist her with this movement. The resident jerked his body onto the patient pushing her back. The patient quickly reacted by letting go of the resident. Immediately after, she felt a sharp pain in her right shoulder that extended into her neck. The patient continued working her shift thinking that the pain would disappear. The pain persisted throughout her shift, the patent went to the nurse and explained the incident that led to her neck and right shoulder injury. The nurse reported the injury and gave the patient Tylenol. After the patient's 8 hour shift she was on her way home when her pain worsened.[13]

The applicant rated her shoulder pain as 7/10. She could not lift her arm up. With the neck pain, the applicant also experienced headaches. The applicant reported that she had never experienced this pain prior to her accident. Dr. Von Schilling Worth indicated that the mechanism of injury was "being forcefully jerked/pushed by one of the elderly patients." She opined that the abnormal physiological stresses on the neck and right shoulder caused the applicant's symptoms. Since the applicant had been a CNA for nearly 30 years with no injuries, Dr. Von Schilling Worth opined that "thus it is with high medical certainty that the patient suffered a work-related injury that created the patient's neck and right shoulder symptomatology." The applicant was recommended to do physical therapy and rehabilitation. Subsequent imaging on September 13, 2018, showed advanced degenerative disc disease.[14]

An EMG and nerve conduction study conducted by Dr. Shaku Chhabria, M.D., on October 11, 2018, showed no electrodiagnostic evidence of left or right cervical radiculopathy. On October 11, 2018, the applicant saw Dr. Von Schilling Worth for mild to moderate neck and right shoulder pain with tingling descending into the right arm. The history noted, "On 11/12/2017, the patient was injured on the job while working for North Shore Healthcare. On that day, she was performing her rounds and had to wake a patient to turn him to his side. As she was moving the large heavier patient, the patient jerked his body causing pain to Ms. Acosta's right neck and shoulder

[12] Ex. 1.
[13] Ex. 1.
[14] Ex. 1.

regions." She recommended the applicant follow up with the referring physician to review the nerve conduction study/EMG.

On November 15, 2018, the applicant first treated with Dr. Ryan J. Kehoe, M.D., for her right shoulder and neck pain. He noted that "On 11/11/17 she was turning a patient and he pushed back against her arms. It jostled her shoulder and neck a bit. She has had symptoms ever since." The pain was on the right side of her neck into the chest strap musculature, radiating across the right shoulder and down into the upper arm. Dr. Kehoe noted that "The left side is actually starting to hurt a bit as well." He noted that she had done physical therapy in August and had a cortisone injection, which made her symptoms worse. In his exam, Dr. Kehoe noted that the right shoulder range of motion was well maintained without discomfort. There was slight pain at the extremes of overhead motion. There was no weakness in the rotator cuff. Impingement testing was negative. The most recent MRI showed multilevel degenerative disc disease with several levels of disc protrusion. Dr. Kehoe assessed cervical spine stenosis with right greater than left radiculopathy; right shoulder partial-thickness supraspinatus tearing; and right shoulder mild osteoarthritis of the acromioclavicular joint. Dr. Kehoe noted that the applicant did not have any symptoms prior to the work incident, and they discussed that the work incident likely aggravated her underlying cervical stenosis, causing her radicular symptoms; and the incident likely directly caused the partial-thickness intrasubstance tearing of the rotator cuff. Treatment options included injections and physical therapy. The applicant was not interested in injections and was referred to Dr. Maciolek for further care.[15]

On December 14, 2018, Dr. Lawrence J. Maciolek, M.D., in orthopedics, treated the applicant for neck pain radiating into the left upper extremity, extending into the arm. He described the work incident as "She was working with a resident when she was pushed. She felt a snapping sensation in her neck with subsequent pain radiating into the left upper extremity." Dr. Maciolek's exam showed full range of motion through the shoulders, elbows, wrists, and digits, and strength of 5/5. Dr. Maciolek reviewed the MRIs, and also noted that the EMG of the right upper extremity was negative. He assessed neck pain radiating into the right upper extremity consistent with cervical radiculopathy, which correlated with the foraminal stenosis seen on the MRI. He noted that at this time the applicant had significant issues regarding her right shoulder as well and had significant impingement signs. He felt the applicant's shoulder was the main pain generating culprit and should be addressed first.[16]

On January 18, 2019, Dr. Baylon noted the applicant was not working and was scheduled for cervical spine surgery in the next month. Dr. Maciolek performed the anterior cervical diskectomy and fusion at C4-7 on February 19, 2019.[17]

The applicant treated with Dr. Maciolek post-surgery and was noted to be doing well. On April 5, 2019, PA Corina G. Welch noted the applicant was 6 weeks post-surgery. Range of motion of the shoulder, elbows, and wrists was full with no excessive

[15] Exs. D, 1.
[16] Exs. D, 1.
[17] Exs. D, 1.

laxity/instability or joint contractures. On May 17, 2019, Dr. Maciolek noted the applicant was 3 months post-surgery and doing quite well. On July 12, 2019, Dr. Maciolek noted the applicant was doing very well post-surgery. Her preoperative radicular symptoms were much improved, but she did have lingering left shoulder pain. An MRI of the *left* shoulder on July 23, 2019, showed a small partial-thickness articular sided tear involving the anterior supraspinatus. There was no full-thickness rotator cuff tear. There were moderate degenerative changes at the acromioclavicular joint and mild nonspecific signal abnormality in the superior labrum.[18] On July 26, 2019, Dr. Maciolek noted the applicant had full range of motion in her cervical spine. There was full range of motion of the upper extremities bilaterally, with 5/5 strength through all major muscle groups. Dr. Kehoe indicated that the MRI of the left shoulder showed moderate acromioclavicular degenerative change on the left side and small partial thickness articular side tear involving the anterior supraspinatus. Dr. Maciolek diagnosed unspecified arthritis, and he recommended the applicant see Dr. Kehoe for injections or other options.[19]

On August 23, 2019, Dr. Kehoe noted the applicant continued to have left shoulder pain. Dr. Kehoe assessed impingement syndrome of the left shoulder. They discussed continued conservative management versus injection versus surgery. The applicant elected to proceed with the injection.[20]

On January 14, 2020, Dr. Von Schilling Worth discharged the applicant from treatment. She noted the applicant had a permanent 10-pound lifting restriction for the neck and was permanently totally disabled for her right shoulder. Permanent partial disability for the for the neck was assessed at 15% and the applicant was to continue with her home exercise program.[21]

On January 28, 2020, Dr. Maciolek saw the applicant one-year after the cervical surgery. She had done quite well. She developed left shoulder pain for which she saw Dr. Kehoe. "Since I saw her last, she has now developed right shoulder pain with difficulty elevating or abducting the shoulder past 80 to 90 degrees." He suggested she return to him for a final check at the 2-year mark following surgery.[22] An MRI of the right shoulder on January 29, 2020, showed mild tendinopathy of the supraspinatus and infraspinatus tendons. No partial-thickness or full-thickness tear. There was an infraspinatus muscle belly tear, and chronicity was noted as likely subacute. "This is new since the previous exam."[23]

On February 6, 2020, Dr. Kehoe saw the applicant for persistent right lateral and superior shoulder pain that bothered her with activities. The applicant was frustrated with the pain. The new shoulder MRI from January 29, 2020, showed some partial thickness irregularities with the rotator cuff without any obvious full thickness tearing. He assessed impingement syndrome of the right shoulder and persistent shoulder pain,

[18] Exs. D, 1.
[19] Exs. D, 1.
[20] Exs. D, 1.
[21] Exs. C, 1.
[22] Exs. D, 1.
[23] Exs. D, 1.

consistent with impingement and possible biceps tendinitis. They discussed options, such as injection and surgical intervention. The applicant would contact him if she wished to pursue any further intervention, but otherwise, Dr. Kehoe declared a healing plateau and end of healing for the shoulder.[24]

On January 27, 2021, Dr. Maciolek saw the applicant and noted that she was doing well with regard to neck pain and radiculopathy. She continued to complain of right shoulder pain, consistent with impingement and rotator cuff pathology. "She has opted for nonsurgical management at this point." Dr. Maciolek noted the applicant had functional range of motion of the cervical spine without significant pain. There was limitation of right shoulder range of motion in abduction and internal rotation with positive impingement signs. The applicant was doing well after her surgery. "At this point, I suggested that she proceed with activities as tolerated. Her main limiting issue is the shoulder at this point." The applicant was opting for conservative care with Dr. Kehoe.[25]

As of the date of the hearing, the applicant testified that she still has bad headaches and sometimes the back of her neck hurts. She cannot lift her right shoulder with the right side. She uses her left shoulder. She no longer walks because her back starts hurting, and she does not do the laundry or cooking. She indicated that the heaviest thing she would lift with her right arm now is a book or a fork. She is now on Social Security Disability Insurance (SSDI) benefits.[26] The applicant testified that the employer fired her, and she had not applied for any jobs since, and she had not consulted with the Division of Vocational Retraining.[27]

The Applicant's Medical Opinions

The applicant submitted a WKC-16-B from Dr. Von Schilling Worth dated February 4, 2020.[28] Dr. Von Schilling Worth described the work incident as she had in her September 20, 2018, medical note.[29] Dr. Von Schilling Worth indicated the applicant had permanent limitations and was restricted to sedentary work for the cervical spine and permanent total disability or no work for the right shoulder/right upper extremity. She opined that the work incident directly caused the applicant's disability and also precipitated, aggravated, and accelerated a preexisting degenerative condition beyond its normal progression. Dr. Von Schilling Worth assessed 15% permanent partial disability for the cervical spine and 25% for the right shoulder. She based this on an MRI that exhibited findings of disc bulges and nerve root compression in the cervical spine; a positive EMG for the upper extremities; MRI exhibit full thickness tear in the right shoulder rotator cuff; decreased range of motion in the cervical spine and right shoulder; orthopedic tests in the right shoulder and cervical spine; 70% Oswestry disability with the right shoulder and 65% for the cervical spine; and grade II-III pain with the cervical spine and III-IV with the right shoulder. Dr. Von Schilling Worth indicated that the applicant would need further treatment and noted, "Patient needs

[24] Exs. D, 1.
[25] Ex. 1.
[26] Tr., pp. 18-21, 34.
[27] Tr., pp. 33-34.
[28] Exs. A, C.
[29] Ex. A.

surgery for the right shoulder. Until then, she will not be able to utilize her right shoulder or right upper extremity; she will need f/up MD visits with post-surgical C-SP."

The Respondent's Medical Opinions

The respondent submitted Independent Medical Evaluations (IMEs) and WKC-16-Bs from Dr. James B. Stiehl, M.D., with a specialty in orthopedic surgery. In his first evaluation on May 30, 2018, Dr. Stiehl noted the applicant described the work incident as injuring her neck and right shoulder while turning a resident, and she felt a pull in her neck and right shoulder. She denied any prior problems with her neck or right shoulder. Dr. Stiehl reviewed medical records both before and after the work incident. In his examination, Dr. Stiehl did not find any obvious impingement signs or other evidence of internal derangement of the right shoulder. He diagnosed fairly advanced degenerative arthritis of the cervical spine with fairly significant symptomatic radiculopathy of her right upper extremity and development of arthrofibrosis of her right shoulder. He noted that the problem the applicant had was with her neck and arthrofibrosis, which was not atypical for the condition. He felt that appropriate treatment would be aggressive physical therapy for her neck and upper extremity, so she had not yet reached a healing plateau. During six weeks of physical therapy, he opined that she should have a 10-pound lifting restriction with the right extremity. Dr. Stiehl opined that the applicant did sustain injury to her neck and right shoulder by a sudden strain, but the work incident did not aggravate, accelerate, and precipitate a preexisting condition beyond its ordinary progression. He noted, "I am quite concerned that there is a fairly significant potential pre-existing condition that exists in this case."[30] Dr. Stiehl provided a supplemental report dated November 8, 2018, in which he reviewed additional medical records. Dr. Stiehl noted the applicant entered a new healing period in September 2018 when she initiated rehabilitation therapy. If no additional therapy was sought, she was at an end of healing in October. He did not believe there was any need for the applicant to be off work since there was no documentation of any change in her condition. She could do light duty work with the 10-pound lifting restriction. He continued to opine that the applicant had not sustained any permanent disability.[31]

Dr. Stiehl again examined the applicant and prepared another IME and WKC-16-B dated December 2, 2020.[32] Dr. Stiehl reviewed additional medical records, including records related to the surgery. Dr. Stiehl indicated that his positions had not changed. He had not found any evidence of a permanent right shoulder injury or condition, and the applicant's cervical spine problems were not related to the claimed injury. Aside from possible minor sprains, Dr. Stiehl did not find evidence of a work-related condition affecting the cervical spine or right shoulder. Regardless of causation, the applicant would have reached an end of healing by the date of October 8, 2018, which he felt was consistent with other doctor opinions. According to Dr. Stiehl, there was clear evidence the applicant had a preexisting condition and no evidence of a fall. "The simple activity of turning a patient is not the type of activity which would result in the chronic

[30] Ex. 2.
[31] Ex. 3.
[32] Ex. 4.

problems Ms. Acosta has. Therefore, I do not believe there is any possibility of permanency in this case." Regardless of causation, Dr. Stiehl opined the applicant had sustained 20% permanent partial disability for the right shoulder, based on forward flexion and abduction of 90°. For restrictions, Dr. Stiehl opined the applicant should not lift more than 10 pounds with her right upper extremity or do overhead lifting. He did not impose restrictions for the cervical spine. He opined that there was no need for medical treatment after his examination of April 30, 2018, and that the principal indication for treatment at that time was not due to the work injury. He noted that consistent with non-injury degenerative conditions, the problem continued to worsen.

The Vocational Expert Reports

The applicant submitted a Vocational Expert Report from Bryan Schuyler, MS, CRC, LPC, dated September 13, 2021.[33] Mr. Schuyler opined that under Dr. Von Schilling Worth's restrictions, the applicant was permanently restricted to sedentary work for her neck and could not work at all for her right shoulder. The applicant had few, if any, transferable skills, and he did not think she could realistically expect to obtain and maintain gainful employment. Therefore, she did not retain access to a reasonably stable labor market and would be odd lot for vocational purposes. The respondent submitted a Vocational Expert Report from Mandy M. Krueger, MS, CRC, LPC, dated November 14, 2022.[34] Ms. Krueger opined that under Dr. Stiehl's opinions, the applicant did not sustain any permanent disability related to the work injury and would not have a loss of earning capacity. Under Dr. Von Schilling Worth's restrictions, although the applicant's right shoulder condition was a scheduled matter, it would apply to her loss of earning capacity since Dr. Von Schilling Worth indicated she was not able to work at all. The scheduled and unscheduled matters rendered the applicant permanently and totally disabled.

Analysis

The issues are the nature and extent of the applicant's disability from the work injury. The applicant has the burden of proving beyond a legitimate doubt all the facts necessary to establish a claim for compensation.[35] The commission must deny compensation if it has a legitimate doubt regarding the facts necessary to establish a claim, but not every doubt is automatically legitimate or sufficient to deny compensation.[36] Legitimate doubt must arise from contradictions and inconsistencies in the evidence, not simply from intuition.[37]

The Parties' Arguments

The applicant did not file any briefs in this case. Only the respondent filed a brief/statement of the respondent's position.

The respondent argues that the applicant did not prove beyond legitimate doubt that she was entitled to benefits beyond those consistent with Dr. Stiehl's opinion. For the

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[33] Ex. B.

[34] Ex. 5.

[35] *Leist v. LIRC,* 183 Wis. 2d 450, 457, 515 N.W.2d 268 (1994); *Erickson v. DILHR*, 49 Wis. 2d 114, 118, 181 N.W.2d 495 (1970).

[36] *Erickson, supra,* at 119*; Leist, supra*, at 457.

[37] *Erickson, supra; Richardson v. Indus. Comm'n,* 1 Wis. 2d 393, 396-97, 84 N.W.2d 98 (1957).

right shoulder, the respondent argues that the applicant had prior medical treatment for the same condition of her right shoulder shortly before the work incident. She was suffering from shoulder tendinitis before and after the date of loss, which supports Dr. Stiehl's position that the applicant's ongoing symptoms after the strain were due to a preinjury shoulder condition. Moreover, the applicant had gaps in treatment for her right shoulder, which showed a pattern consistent with someone who had a degenerative right shoulder condition and preinjury shoulder tendonitis that waxed and waned before and after the date of loss. The respondent asserts that there is no evidence that Dr. Von Schilling Worth was aware the applicant had a pre-date-of-loss right shoulder condition, and she had indicated that the applicant had never experienced right shoulder pain prior to her injury. Under *Pressed Steel,*[38] the commission cannot credit Dr. Von Schilling Worth.

Dr. Stiehl, by contrast, was aware of the applicant's preexisting condition. The respondent asserts that the post-injury medical records also support Dr. Stiehl's opinion because the MRI showing the infraspinatus muscle belly tear in 2020 was not present on her earlier, post-date-of-loss MRI in January 2018. The MRIs show the applicant's shoulder condition continued to degenerate and result in new degenerative tearing after the date of loss. In addition, the medical treatment records show the applicant complained of *left* shoulder pain at times that was worse than her right shoulder. The applicant's right shoulder examination findings were essentially normal during a visit with the physical therapist, which would not have happened if her right shoulder was injured. At other appointments, the applicant did not even mention her right shoulder. Though the applicant claims 25% permanent partial disability to the right shoulder, the respondent argues that Dr. Von Schilling Worth based this assessment on false assumptions, including: assuming that the MRI scan showed a full-thickness rotator cuff tear, which it did not; asserting that the right shoulder range of motion had decreased, but her therapist had measured good range of motion, as did Dr. Maciolek, and Dr. Baylon did not observe any shoulder range of motion deficits; and that unspecified orthopedic tests showed an Oswestry score that is contradicted by the medical evidence. According to the respondent, both Dr. Von Schilling Worth's assessment of 25% permanent partial disability, and Dr. Stiehl's assessment of 20% regardless of causation, are not supported by the medical evidence. Similarly, Dr. Von Schilling Worth's opinion that the applicant would need surgery for her shoulder was contradicted by the medical evidence, since no doctor had recommended surgery. According to the respondent, Dr. Von Schilling Worth's opinion that the applicant will not be able to utilize her shoulder until she undergoes surgery is also "nonsense." The medical exams showed she had good range of motion and strength in her upper extremities. Dr. Kehoe and Dr. Maciolek ascribed only slight limitations. As a result, the respondent argues that Dr. Von Schilling Worth's restrictions are not credible and the applicant has failed to prove permanent total disability.

For the applicant's cervical spine claim, the respondent argues that the contradictions and inconsistencies in the evidence show that the applicant sustained only a cervical

[38] *Pressed Steel Tank v. Indus. Comm'n,* 255 Wis. 333, 335, 38 N.W.2d 354 (1949)(When a worker's physician bases his or her opinion on an inaccurate history of events, that opinion cannot credibly carry the worker's evidentiary burden).

spine strain. Though Dr. Baylon focused predominantly on the applicant's right shoulder prior to the work incident, he also noted that the applicant had pain in her periscapular area, which includes the neck muscles and cervical spine structures. This supports Dr. Stiehl's opinion that the applicant's predominant cervical spine condition is a chronic degenerative disease condition present before the work injury. The respondent argues there are also post-injury contradictions and inconsistencies that show the applicant did not sustain a greater cervical injury. When the applicant first treated after the injury, she did not report a neck injury. When she did treat with Dr. Baylon in November 2017, she complained of pain in her neck/right shoulder, which included pain in the periscapular area – similar to her preinjury condition. Also, no acute injuries were noted on the MRI, only multilevel degenerative change, and there is no WKC-16-B from Dr. Maciolek that the degenerative changes were caused by the work injury.

The respondent also argues that the initial claimed mechanism of injury supports Dr. Stiehl's opinion, and the applicant's later versions are not credible as her story began to evolve. The most credible evidence shows the applicant was injured when she was turning a resident, not being jerked, pushed, or falling backwards, as she later claimed. For the claimed permanent restrictions, Dr. Von Schilling Worth's opinion is not credible that the applicant is restricted to sedentary work. Dr. Maciolek specifically opined the applicant could proceed with activities as tolerated for her cervical spine. She also had functional spine range of motion and strength in all muscle groups. She also had normal cervical exams with Dr. Baylon. Also, Dr. Von Schilling Worth cited a positive EMG as supporting her opinion on severe disability for the cervical spine, however, her EMG was negative. To the extent Dr. Von Schilling Worth asserted the disability was caused by disc bulges and root compression, this would have been resolved by the surgery. Therefore, Dr. Von Schilling Worth's opinion should be rejected.

Finally, the respondent argues that the applicant was not credible. At the hearing, she presented as severely disabled, but that was rebutted by the medical treatment records that showed she can lift with her right side, does not have significant neck pain or headaches, and had good range of motion and strength. Dr. Maciolek never assigned any specific work restrictions for the cervical spine, and the medical records do not show someone who cannot use her right arm or perform activities of daily living. At the hearing, the applicant also denied that she had had prior treatment for her right shoulder, despite being shown the treatment records for this on cross-examination.

What is the extent of the applicant's disability from the work injury?

The applicant's claims as to causation and extent of disability are supported by the medical opinion of Dr. Von Schilling Worth. However, there are several problems with Dr. Von Schilling Worth's medical opinions that render them not credible. First, for the applicant's neck claim, Dr. Von Schilling Worth assessed disability based on a positive EMG and disc bulges and nerve root compression. This was clearly erroneous, since the EMG was negative, not positive, and the disc bulges and nerve root compression were addressed with the fusion surgery from which the applicant had healed well. Those could not be a basis for permanent disability. Dr. Von Schilling Worth also assessed disability for the neck based on limited range of motion and pain, but Dr. Maciolek

found the applicant had full range of motion without pain after the surgery. Dr. Maciolek also did not assign limitations for the applicant's neck, and he indicated that the applicant could proceed with activities as tolerated. Dr. Maciolek, who performed the surgery and treated the applicant post-surgery, was in the best position to determine the applicant's neck condition after the surgery. It is significant that the applicant did not present a causation opinion from Dr. Maciolek. Dr. Von Schilling Worth's causation opinions are also not consistent with other medical evidence in the record that the applicant did not report a neck injury when she first sought treatment, and that the MRI showed no acute injuries, only degenerative changes. Thus, the commission cannot credit Dr. Von Schilling Worth as to the applicant's neck claim.

For the applicant's right shoulder claim, Dr. Von Schilling Worth's opinions also are based on erroneous assumptions. Dr. Von Schilling Worth was not aware of the applicant's prior treatment for her right shoulder. Though the applicant denied prior treatment for her shoulder and asserted that she treated for her elbow, this is not credible. Dr. Baylon's medical records refer several times in 3 visits to her right shoulder complaints and treatment. The applicant previously was diagnosed with shoulder tendinitis, which was her diagnosis after the injury, and this would be critical for Dr. Von Schilling Worth to understand prior to making a medical diagnosis. It is significant that there is no medical opinion from Dr. Baylon, who treated the applicant before and after the injury. Dr. Baylon knew the applicant's prior condition, and when he treated her immediately after the injury, he described the incident as pulling her shoulder muscle and again diagnosed shoulder tendinitis. Dr. Von Schilling Worth did not have this accurate medical history. Dr. Von Schilling Worth also assessed disability for the right shoulder based on a misunderstanding that the applicant had a full-thickness rotator cuff tear. This was erroneous because no MRI showed a full-thickness rotator cuff tear. Dr. Von Schilling Worth also indicated that the applicant would need shoulder surgery, but while this had been discussed, the medical records do not show that the applicant's treating doctors had recommended shoulder surgery. Dr. Von Schilling Worth also did not explain why the applicant would have had gaps in her medical treatment for her right shoulder, or the fact that the applicant had similar degenerative issues in her left shoulder that were not attributed to the work injury. Finally, Dr. Von Schilling Worth's limitation that the applicant can do no work because of her right shoulder situation is not credible. Dr. Kehoe and Dr. Maciolek did not provide such extreme limitations. Dr. Stiehl is credible that the applicant could do light duty work with a restriction of not using her right shoulder. Based on these erroneous assumptions and incredible limitations, the commission cannot credit Dr. Von Schilling Worth's opinions regarding the neck claims either. As a result, the applicant failed to prove beyond a legitimate doubt all of the facts to support her claims, and the commission affirms the administrative law judge's decision.

cc: Atty. Douglas Phebus
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