BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ALBERTO CHAVEZ-FLORES,

Claimant,

vs.

TYSON FOODS, INC.,

Employer,
Self-Insured,
Defendants.

File Nos. 5044174, 5044426

ARBITRATION

DECISION

Head Note Nos.: 1100; 1803, 2500

STATEMENT OF THE CASE

Claimant, Alberto Chavez-Flores, has filed petitions in arbitration and seeks worker's compensation benefits from, Tyson Foods, Inc., self-insured employer, defendant.

Deputy workers' compensation commissioner, Stan McElderry, heard this matter in Waterloo, Iowa.

ISSUES

The parties have submitted the following issues for determination:

For File No. 5044174:

1. Whether the claimant suffered an injury arising out of and in the course of employment on or about December 17, 2012;

2. Whether the alleged injury caused any permanent disability, and if so, the extent;

3. Industrial versus scheduled member;

4. Independent Medical Examination (IME) under Iowa Code section 85.39; and,

5. Costs.

For File No. 5044426:

1. Whether the claimant suffered an injury arising out of and in the course of employment on or about December 18, 2012;

2. Whether the alleged injury caused any permanent disability, and if so, the extent;

3. Independent Medical Examination (IME) under Iowa Code section 85.39; and,

4. Costs.

FINDINGS OF FACT

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

The claimant was 56 years old at the time of hearing. The claimant was born in Mexico and has a limited education. He cannot read English, but does speak some.

The claimant has worked for Tyson during two periods. The last period began in 2003. In March of 2011 he was moved to the Whiz Boneless line. It is this position that he claims he injured his shoulders and back on December 17, 2012. He was moved to a job making boxes and claims that work injured his right knee on December 18, 2012.

Unfortunately this is not a difficult case. Claimant underwent an IME with Farid Manshadi, M.D., on February 19, 2014. (Exhibit 5) Dr. Manshadi diagnosed bilateral shoulder impingement syndrome with reduced range of motion (ROM). He rated the right shoulder at 12 percent and the left at 13 percent impairment. He gave a 5 percent impairment for the back. He also causally connects the right knee complaints to work activities and opined a 5 percent impairment to the right lower extremity. Dr. Manshadi is the only doctor herein to make a connection to work and the right knee complaints. Claimant's own testimony at hearing was contradictory regarding the right knee. As part of the IME Dr. Manshadi took a patient questionnaire but chose to destroy it. (Ex. Q, p. 7) He also destroyed all notes of range of motion testing that he performed on the claimant. This is particularly notable because for reasons to be addressed later, claimant's ROM is obviously much greater than Dr. Manshadi finds in his IME report based on other medical records and claimant's incredible testimony and actions at hearing.

Claimant had a second IME with Arnold Delbridge, M.D., on July 17, 2014. (Ex. 6) Dr. Delbridge does not connect any right knee complaints to work activities. Nor does any other doctor, other than Dr. Manshadi. It is so found. As to the shoulders and back, Dr. Delbridge found the 5 percent back rating of Dr. Manshadi reasonable. He felt no further treatment for the shoulders was necessary. He noted the large variance

between Dr. Manshadi's ROM figures and the ones from doctors chosen by Tyson. He opined an 11 percent right upper extremity impairment and 12 percent for the right. (Ex. 6)

The claimant saw Dr. Lee on January 22, 2013 with complaints of upper back pain and right knee pain dating from November of 2013. He claimed that injuries were due to the production line having been sped up at work. At hearing the claimant stated that the line speed had doubled. This is not true as the line had remained at 13 pieces per minute. (Ex. 1, p. 12) Claimant first saw Robert L. Gordon. M.D., on February 12, 2013 with complaints regarding both hands and wrists, both elbows and arms, both shoulder girdle pain, right knee pain. The claimant had full ROM with his shoulders and walked with a normal gait. (Ex. B) Claimant saw Dr. Gordon with the same complaints on February 27, 2013. On March 12, 2013, Dr. Gordon noted full ROM in the shoulders. On April 16, 2013, Dr. Gordon noted that he had reviewed and discussed the Job Site Analysis and agreed that claimant's job would not precipitate or aggravate the conditions the claimant was alleging.

On May 7, 2013, the claimant was seen by Thomas Gorsche, M.D. (Ex. 4) Dr. Gorsche found full range of motion of the shoulders, elbows and wrists and no objective finding to explain the claimant's pain complaints. Dr. Gorsche referred the claimant back to Dr. Gordon. The claimant returned to Dr. Gordon on May 12, 2013. He ordered an MRI. On June 26, 2013 the claimant saw Dr. Gordon who noted that the MRI findings were inconsistent with the clinical exam. Claimant saw Dr. Gordon again on July 9, 2013 with bilateral wrist pain and claimant was given injections. Claimant reported on July 23, 2013 that the injections had helped very little. Claimant saw Dr. Gordon on August 27, 2013. Dr. Gordon found no specific tenderness, no atrophy, no edema, no loss of range of motion, and that claimant reported symptoms that did not fit any specific anatomical pattern. The claimant saw Dr. Gordon again on September 9, 2014. Dr. Gordon noted that the physical exam of the claimant revealed inconsistencies. Claimant had greater range of motion when not being directly tested for example. Again atrophy was not present. No restrictions or impairment was assigned. (Ex. B, pp. 32-33)

Claimant saw Dr. Gorsche again on September 24, 2014. Dr. Gorsche noted that the prior MRI was not consistent with clinical symptoms and that the claimant freely moved his arms and shoulders without discomfort when describing lumbar and shoulder pain. (Ex. F, p. 62) Dr. Gorsche found no atrophy and found no objective findings to substantiate claimant's subjective complaints. (Ex. F, pp. 63-64) Dr. Gordon released the claimant to return to work full duty with restrictions effective August 27, 2013. The claimant did not return and has sought no other employment.

At hearing, claimant testified that he had difficulty sitting, standing up, and even problems washing his hair. He stated he has not looked for work due to too much pain. On cross-examination the claimant was shown a video of the job he performed. He was asked to demonstrate how high he had to reach in order to place the whizzer knife on the hook where it was stored. He easily and without pain reached way above his head

while testifying: "A. I barely reach it. It's high. Q. Is it at this height, or is it up higher (indicating)? A. It's higher." (Transcript page 28) And with the "It's higher" reached even higher without any observable pain. On direct at pages 36-37 he would only reach to the bottom of his head and grimaced and said "so this is the point where after this it's starting to hurt a lot." The claimant then when questioned admitted he had reached much higher earlier. Given the claimant's actions at hearing, and notations from two treating physicians of inconsistencies and no objective findings to validate claimant's subjective complaints, it is clear that the claimant has no real permanent injury from work activities herein.

Claimant also seeks the IME fee of Dr. Manshadi in the amount of $1,100.00. (Ex. 9, p. 4)

REASONING AND CONCLUSIONS OF LAW

The first issue is whether the claimant suffered any injury arising out of and in the course of employment on December 17, 2012 and/or December 18, 2012.

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

The claimant has the burden of proving by of preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Ciha v. Quaker Oats Co., 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred 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. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 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. Cedar Rapids Community School v. Pease, 807 N.W.2d 839, 845 (Iowa 2011). 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). The finder of fact, must determine the credibility of the witnesses, weigh the evidence, and decide the facts at issue in a case. See Arndt v. City of LeClair, 728 N.W.2d 389, 394-95 (Iowa 2007). One factor the commissioner considers is whether an expert's opinion is based upon an incomplete medical history. Dunlavey v. Econ. Fire & Cas. Co., 526 N.W.2d 845, 853 (Iowa 1995).

No evidence in the record is convincing enough to establish that it is probable that the claimant suffered an injury while working at Tyson to his upper extremities, back, or right knee. In fact the evidence was clear that the claimant subjective complaints could not be believed. The evidence even suggests that IME doctor Manshadi destroyed his testing records of the claimant when it became apparent that they were not supportable.

Independent Medical Examination.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Defendants' liability for claimant's injury need not ultimately be established before defendants are obligated to reimburse claimant for an independent medical examination.

The claimant chose to get an evaluation/examination to establish whether the injury which arose out of and in the course of employment caused permanent impairment or disability. The claimant got that exam from Dr. Manshadi, who charged a

reasonable fee of $1,100.00 for the rating. Defendants shall pay/reimburse the fee as appropriate.

ORDER

THEREFORE, IT IS ORDERED:

That the claimant take nothing other than the defendant shall pay/reimburse one thousand one hundred and no/100 dollars ($1,100.00) IME fee of Dr. Manshadi.

Defendants shall receive credit for all benefits previously paid.

Costs are taxed to the claimant pursuant to 876 IAC 4.33.

Defendants shall file subsequent reports of injury as required by the agency.

Signed and filed this 6th day of August, 2015.

STAN MCELDERRY
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.