ELECTRONICALLY FILED 2019-Jul-31 16:11:39 DIVISION OF WORKERS' COMPENSATION

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

WENDY JIMENEZ,	:	
	:	File Nos. 5065916, 5065917, 5065918
Claimant,	:	
	:	ARBITRATION
vs.	:	
	:	DECISION
TYSON FRESH MEATS, INC.,	:	
	:	
Employer,	:	
Self-Insured,	:	
Defendant.	:	Headnotes: 1803, 2502

FILED
JUL 23 2019
WORKERS' COMPENSATION

STATEMENT OF THE CASE

Claimant, Wendy Jimenez, filed petitions in arbitration seeking workers' compensation benefits from Tyson Fresh Meats, Inc. (Tyson), self-insured employer, as defendant. This matter was heard in Sioux City, Iowa on April 5, 2018 by Deputy Workers' Compensation Commissioner Erica Fitch.

The record in this case consists of Joint Exhibits 1-8, Claimant's Exhibits 1-10, Defendant's Exhibits A through J, and the testimony of claimant and William Sager.

By order of delegation of authority, Deputy Workers' Compensation Commissioner, Jim Christenson was appointment to prepare the finding of facts and the proposed decision in this case.

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.

ISSUES

For File No. 5065916 (date of injury May 9, 2015):

1. Whether the injury resulted in a permanent disability; and if so

2. The extent of claimant's entitlement to permanent partial disability benefits.

3. Whether claimant is entitled to reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39.

For File No. 5065917 (date of injury July 14, 2015 or July 22, 2015):

1. The date of injury.

2. Whether the injury is a cause of permanent disability; and if so

3. The extent of claimant's entitlement to permanent partial disability benefits.

4. Whether claimant is entitled to reimbursement of an IME.

The parties stipulated at hearing if any permanency was awarded regarding the May 9, 2015 date of injury, the defendant would be entitled to a credit. (Transcript page 6)

For File No. 5065918 (date of injury July 11, 2016):

1. Whether the injury resulted in a permanent disability; and if so

2. The extent of claimant's entitlement to permanent partial disability benefits.

3. Whether claimant is entitled to reimbursement for an IME.

The parties stipulated if any permanency is awarded regarding the May 9, 2015 date of injury and/or the July 22, 2015 date of injury, defendant would be entitled to a credit. (Tr. p. 7)

FINDINGS OF FACT

Claimant was 44 years old at the time of hearing. Claimant was born in the Dominican Republic.

Claimant testified she is a native Spanish speaker. She said she was able to speak English. Claimant can also read and write in English. Claimant came to the United States when she was 17. (Tr. pp. 11-12)

Claimant graduated from high school. She attended nine months of school in a business program but did not graduate. (Tr. p. 13) Claimant also attended beauty school for nine months but also did not graduate. (Ex. 2, p. 26)

Claimant has worked at an ice cream store and a Kentucky Fried Chicken restaurant. Claimant also supervised in a cafeteria. (Ex. 2, p. 27) Claimant testified she thought she could return to work at those jobs given her physical limitations. (Tr. 17-19)

Claimant began working for Tyson in 2014. In May of 2015 claimant worked on the belly line at Tyson as a "skinner." (Tr. p. 39) Claimant said in the "skinner" position she worked on a conveyor belt. Bellies, weighing between 20-30 pounds, came down the belt. Claimant used a hook with her left hand to reach and pull the bellies to her body. She lifted the bellies once every minute and moved them to a skinner machine. The skinner machine removed a layer of skin from the belly. Claimant testified she sometimes worked the skinner position all day or for several days. (Tr. pp. 33-37)

Claimant said she would be rotated to a "move bellies" job on the line. In this job claimant lifted the bellies once every five minutes and put them on a table behind her. (Tr. pp. 37-38) Claimant said she hurt her left shoulder and left elbow while working on the "skinner/move bellies" jobs.

Claimant's prior medical history is relevant. In July of 2014, while in the Dominican Republic, claimant contracted a virus called chikungunya, from a mosquito bite. The virus caused flu-like symptoms. Claimant had fevers, chills and joint pain. Claimant testified she received treatment for the symptoms in the Dominican Republic. She returned to Storm Lake and received additional treatment from her personal provider. Claimant said she received treatment until September of 2014 when her symptoms resolved. (Tr. pp. 22-24; Ex. A, pp. 6-8)

Claimant testified she also has diabetes and takes medication for this condition. (Tr. pp. 21-22)

Claimant said on May 9, 2015 she injured her left shoulder and left elbow while doing the "skinner/move bellies" job. (Tr. p. 39) On that day claimant was seen by a Tyson nurse. Claimant complained of left elbow and shoulder pain from repetitive lifting and pulling bellies with a hook. Claimant was moved to a lighter duty job where she worked at half pace for a week. (Jt. Ex. 1, p. 2)

Claimant testified when she was moved to half paced duty, her shoulder problems relaxed to where her pain only came and went. (Tr. pp. 40-41)

Claimant was kept on the half pace work for approximately one week when she was returned to work at full duty on the "skinner/move bellies" job. Claimant said when she returned to her full-time job, the pain became worse in her left shoulder and left arm. Claimant said she also began to develop pain in her right shoulder. Claimant said in July of 2015 she began to complain to the nurse again regarding the left shoulder and arm pain. (Tr. pp. 41-42)

On July 14, 2015 claimant was seen by a Tyson nurse. Claimant had left shoulder and upper extremity pain and right thumb pain. Claimant indicated she saw her personal physician, Shannon Letsche, ARNP, who ordered a left shoulder x-ray. Claimant returned to light duty with no use of the hands. (Jt. Ex. 1, p. 3; Jt. Ex. 2, p. 59; Tr. p. 43)

On July 22, 2015 claimant was evaluated by Seth Harrer, M.D. Claimant had left shoulder and right trigger thumb pain. Claimant did not indicate a traumatic event at work but indicated her pain increased when working on the belly line and using her hand to grab and pull. Dr. Harrer assessed claimant as having left shoulder acromioclavicular arthropathy and right trigger finger. Claimant was given an injection in the left shoulder and right thumb. He recommended claimant have no use of the upper extremities. (Jt. Ex. 3, pp. 82-83; Jt. Ex. 1, p. 4)

On July 30, 2015 claimant was seen at the Buena Vista Medical Center with complaints of muscle cramps all over her body. Claimant indicated she was given cortisone shots in the left shoulder and right hand one week prior. Claimant was returned home. (Ex. B, pp. 19-23)

Claimant returned to Dr. Harrer on August 19, 2015. Claimant had minimal pain and wanted to return to work. Claimant was assessed as having a resolved right trigger thumb and improved left shoulder pain. Claimant was returned to work at full duty with no permanent restrictions. (Jt. Ex. 3, p. 84)

Nurse's notes from Tyson dated September 15, 2015 indicate claimant was not having pain and the case was resolved. (Jt. Ex. 1, p. 6)

On September 18, 2015 claimant underwent EMG testing. It showed a peripheral neuropathy consistent with diabetic neuropathy and a bilateral distal median neuropathy consistent with bilateral carpal tunnel syndrome. (Jt. Ex. 5)

Claimant testified that in January of 2016 she was moved to the "butt line" and worked the "CT butts" job. She said the job required her to repetitively reach at pieces of meat weighing between four to five pounds. Claimant put the pieces in a box and lifted the box to a table behind her. Claimant said the box weighed approximately 20 pounds. Claimant said the repetitive lifting of boxes and moving them to a table behind her and looking down at a conveyor belt, caused injury to her bilateral shoulders and neck. (Tr. pp. 48-52)

On July 11, 2016 claimant was evaluated by a Tyson nurse for left shoulder and neck pain. Notes indicate claimant complained she was too tall for her work station. Claimant was told to use cold packs. Claimant was moved to light duty consisting of 15 minutes of a regular job and 45 minutes rest for every hour on the job. (Jt. Ex. 1, p. 9; Tr. pp. 52-54)

From July 25, 2016 through August 16, 2016 claimant treated with the Tyson nurse for pain in the shoulders and neck. (Jt. Ex. 1, pp. 9-10)

On August 17, 2016 claimant was seen by Dr. Harrer. Claimant complained of bilateral upper extremity pain, back pain, and arm pain. Claimant was assessed as having left shoulder impingement, left shoulder AC arthritis, and upper spinal peritrapezial pain. Dr. Harrer gave claimant a left shoulder injection. He recommended

physical therapy. He restricted claimant to work at a reduced pace. (Jt. Ex. 3, pp. 85-86; Jt. Ex. 1, p. 49)

On September 17, 2016 claimant was seen by David Archer, M.D. Dr. Archer found claimant had shoulder and neck pain associated with repetitive motion at work. He found the injury was probably work related. (Jt. Ex. 6, p. 119)

Claimant returned to Dr. Harrer in follow up on September 28, 2016. Claimant had bilateral upper extremity pains and cervical pain. Claimant also had right shoulder pain. Claimant indicated her left shoulder had improved following the injection. Claimant was assessed as having left shoulder impingement, left shoulder AC joint arthritis, right shoulder impingement, and right shoulder AC joint arthritis. (Jt. Ex. 3, p. 87; Jt. Ex. 1, p. 55)

On October 8, 2016 claimant went to the emergency room at the Buena Vista Medical Center for cramping in the legs. Claimant testified this was for leg cramps caused by her diabetes. (Tr. pp. 56-57; Ex. B, pp. 32, 67) There is a reference in these records to shoulder and neck pain. (Ex. B, p. 25) However, the majority of these records refer to cramping in the legs. (Ex. B, pp. 32, 67) Claimant testified this visit was for leg cramps, which usually was a symptom of her diabetes. (Tr. pp. 56-58)

Claimant returned to the emergency room at Buena Vista on October 19, 2016 with continued complaints of shoulder and left arm pain. Claimant was noted to have a history of polymyalgia rheumatica. A CT of claimant's neck was negative. Claimant was recommended to see a rheumatologist. (Jt. Ex. 2, pp. 77-81)

Claimant returned to Dr. Harrer on November 9, 2016. Claimant complained of bilateral upper extremity pain. Dr. Harrer noted claimant had recently been diagnosed with having polymyalgia rheumatica and had been started on steroids. Claimant was assessed as having left shoulder and right shoulder impingement and left and right shoulder AC joint arthritis. Claimant was continued on physical therapy. (Jt. Ex. 3, pp. 89-90; Jt. Ex. 1, p. 56)

On December 7, 2016 claimant saw Dr. Harrer for ongoing bilateral upper extremity pain and neck pain. He again recommended claimant see a rheumatologist. (Jt. Ex. 3, p. 91; Jt. Ex. 1, p. 57)

On December 15, 2016 claimant was evaluated by Jay Kenik, M.D., a rheumatologist. Claimant was seen for generalized myalgia that began six months prior. Claimant associated her pain with repetitive lifting and rotating at work. Dr. Kenik assessed claimant as having fibromyalgia and treated her with pain medication. (Jt. Ex. 7, pp. 122-123)

On December 26, 2016 claimant underwent a cervical MRI. It showed a small disc bulge at the C6-7 level causing a C7 nerve root compromise. (Jt. Ex. 2, p. 81)

Claimant was seen by Dr. Harrer on December 28, 2016. Claimant was assessed as having bilateral upper extremity pain. He recommended continued physical therapy. He suggested claimant get a second opinion. Claimant was kept on the same light duty restrictions. (Jt. Ex. 3, p. 92)

Claimant testified the last time she saw Dr. Harrer he told her he had nothing more to offer her and recommended a second opinion. (Tr. p. 61)

Between January 4, 2017 and March 27, 2017 claimant continued to see the nurses at Tyson for bilateral shoulder and neck pain. (Jt. Ex. 1, pp. 16-17)

Claimant returned to Dr. Kenik on January 19, 2017. Claimant remained symptomatic. She was assessed as having fibromyalgia and was treated with medication. (Jt. Ex. 7, p. 124)

On February 15, 2017 Dr. Harrer found claimant at maximum medical improvement (MMI). He assessed claimant as having left shoulder impingement subacromial bursitis, left shoulder AC joint osteoarthritis and fibromyalgia. He believed her "personal diagnosis" was aggravated by her work at Tyson. He found the aggravation was a temporary aggravation. He did not believe claimant required further treatment. He found any permanent restrictions related to claimant's fibromyalgia, which was not work related. He opined claimant had no permanent impairment. (Jt. Ex. 3, pp. 94-95)

On or about March 27, 2017 claimant was returned to work. Claimant said she returned to the "butt stuffer" job. Claimant testified this was a new job for her. (Tr. pp. 53-54, 61-62, 66-67)

Claimant testified in the "butt stuffing" job she worked 30 minutes pushing meat into a machine (called a cannon). The meat weighed between 8 to 10 pounds apiece. Claimant pushed a button on the cannon with her thumbs that shot the meat into a bag held by a coworker. Claimant would then stand for 30 minutes holding the bag and catching the meat coming from the cannon. Claimant was working this job at the time of hearing. (Tr. pp. 66-71)

Claimant testified the "butt stuffer" job was physically easier than the "CT butts" job she held at the time of her July of 2016 injury. (Tr. pp. 70-71)

Between March and April of 2017 claimant had several chiropractic treatments for shoulder and neck. (Jt. Ex. 8; Tr. pp. 62-63)

In an April 21, 2017 letter, written by claimant's counsel, Dr. Kenik agreed claimant likely had a work-related bilateral shoulder cuff tendinitis and impingement that was substantially contributed to by her work at Tyson. This opinion was based, in part, on claimant's December 26, 2016 MRI. (Jt. Ex. 7, pp. 130-131) Dr. Kenik also opined claimant had fibromyalgia in her neck substantially aggravated by the effects of the repetitive work she did at Tyson on or about July 11, 2016. He also opined claimant

should have permanent restrictions for the July of 2016 injury to her neck and shoulders and that she should avoid sustained repetitive motion at work. (Jt. Ex. 7, pp. 130-131)

In a December 19, 2017 report, Sunil Bansal, M.D., gave his opinions of claimant's condition following an IME. Claimant complained of aching neck pain and constant aching in the left and right shoulders. Regarding the May of 2015 and July of 2015 injuries, Dr. Bansal assessed claimant as having a left shoulder sprain and a right trigger thumb injury resolved. Regarding the July of 2016 injury, he assessed claimant as having a C6-7 disc bulge aggravating her fibromyalgia and an aggravation of her bilateral AC joint arthritis and rotator cuff tendinopathy. (Jt. Ex. 1, pp. 11-12)

Dr. Bansal found claimant was at MMI for the May of 2015 and July of 2015 shoulder injury as of August 19, 2015. Regarding the July of 2016 injury he found claimant at MMI for the neck and bilateral shoulders as of May 5, 2017. (Ex. 1, p. 13)

Dr. Bansal found claimant had a 5 percent permanent impairment to the neck, a 2 percent permanent impairment to the body as a whole for the right shoulder, and a 3 percent permanent impairment to the body as a whole for the left shoulder. Dr. Bansal recommended claimant avoid repetitive neck motions. He recommended claimant be limited to lifting up to 10 pounds. (Ex. 1, pp. 13-15)

In a February 27, 2018 report, Trevor Schmitz, an orthopedic surgeon, gave his opinions of claimant's condition following an IME. He assessed claimant as having fibromyalgia not caused by her work at Tyson. He believed claimant was at MMI as of December 28, 2016. He opined claimant had no permanent impairment, as her fibromyalgia was a personal condition. (Ex. C, pp. 74-89)

In a March 8, 2018 report, Dr. Bansal indicated he had received additional records concerning claimant's care and treatment. He also had reviewed the IME report from Dr. Schmitz regarding claimant's work injury at Tyson. Dr. Bansal opined claimant's work at Tyson did not cause her fibromyalgia but aggravated the condition. He also indicated claimant's cervical MRI showed a C6-7 disc bulge. Dr. Bansal agreed with Dr. Schmitz that claimant had a chronic history of fibromyalgia. Dr. Bansal disagreed with Dr. Schmitz regarding causation and found claimant's work at Tyson aggravated her condition. (Ex. 1, pp. 17A through 17G)

In a March 18, 2018 report Dr. Schmitz indicated he had reviewed Dr. Bansal's most recent report. Dr. Schmitz believed Dr. Bansal found claimant had AC joint and rotator cuff pathology, yet claimant had no imaging of the right shoulder. Dr. Schmitz noted medical research and literature on the cause of fibromyalgia indicates the cause of the disease is unknown. He opined since the cause of claimant's fibromyalgia is unknown, it is equally unclear what causes claimant's fibromyalgia to be more symptomatic or aggravated. He again opined it was unclear if claimant's work at Tyson aggravated her fibromyalgia. (Ex. C, pp. 90-92)

In a March 28, 2018 note, Dr. Bansal indicated he had reviewed Dr. Schmitz's March 18, 2018 supplemental report. Dr. Bansal noted claimant did have x-rays and treatment for the right shoulder. He also noted Dr. Harrer also assessed claimant as having right shoulder impingement with AC joint osteoarthritis. (Ex. 1, p. 17H)

Claimant testified that prior to her work injuries with Tyson she had no prior shoulder problems. (Tr. p. 19) Claimant testified that before starting with Tyson she had a physical indicating she had no limitations regarding what work she could perform at the plant. (Tr. p. 24)

Claimant said at the time of hearing, she continued to treat with Dr. Kenik. She said Dr. Kenik told her she has tendonitis in both shoulders and fibromyalgia in the neck related to her work at Tyson. (Tr. pp. 62-64) Claimant received an injection every three months in her shoulders from Dr. Kenik for pain. (Tr. pp. 72-73) Claimant indicated she took over-the-counter medications for pain. (Tr. pp. 72-74)

Claimant testified that given her current limitations, she would not be able to do any of her prior jobs at Tyson. (Tr. pp. 26-27, 37-39, 50) At the time of hearing claimant was still employed with Tyson. (Tr. p. 89)

Will Sager testified he is the human resources manager for the complex at the Tyson plant in Storm Lake, Iowa. In that capacity he is familiar with claimant's workers' compensation claim and the jobs performed by claimant with Tyson. (Tr. p. 92)

Mr. Sager testified given Dr. Bansal's restrictions, claimant could probably work twelve different jobs at Tyson. This was out of the approximate 200-250 jobs at the Storm Lake plant. (Tr. pp. 92-93)

CONCLUSIONS OF LAW

The first issue to be determined is whether claimant sustained a permanent impairment from her work injury.

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. App. P. 6.14(6).

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).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

Regarding the date of injury of May 9, 2015 (file number 5065916), claimant had a June 22, 2015 x-ray indicating mild degenerative changes in the left shoulder. (Jt. Ex.

2, pp. 59-60) Claimant was put on limitations for approximately a week and returned to regular duty sometime in approximately June of 2015. Claimant received minimal medical care for the May 9, 2015 date of injury. Dr. Harrer found claimant was at MMI for the left shoulder on August 19, 2015. He found claimant had a zero percent permanent impairment. (Jt. Ex. 3, p. 84) Dr. Bansal did find claimant had a permanent impairment to the shoulder and neck. However, he did not indicate if the permanent impairment was specific to the May 9, 2015 date of injury. Given this record, claimant has failed to carry her burden of proof she sustained a permanent impairment regarding the May 9, 2015 date of injury.

As claimant failed to carry her burden of proof she sustained a permanent disability regarding the May 9, 2015 date of injury, the issue regarding the claimant's entitlement to permanent partial disability for the May 9, 2015 injury is moot.

Regarding file number 5065917, the records indicate on July 14, 2015 claimant reported an injury to the nurse's station at Tyson. Claimant later treated with Dr. Harrer for that injury on June 22, 2015. As claimant first reported the injury of the left shoulder to Tyson on July 14, 2015, the date of injury for file number 5065917 is found to be July 14, 2015.

The next issue to be determined is whether the July 14, 2015 date of injury is a result of a permanent disability. The law detailed above regarding file number 5065916 is applicable to this issue but will not be repeated here.

Claimant was found to be at MMI for the left shoulder by Dr. Harrer as of August 19, 2015 and found to have a zero percent permanent impairment. (Jt. Ex. 3, p. 84) The records from Tyson indicate on September 15, 2015 claimant's case was resolved, as claimant was not having pain. (Jt. Ex. 1, p. 6) The records indicate claimant did not express pain in her neck or shoulders until she began working a different line job, sometime around January of 2016. (Tr. pp. 48-52) As noted, while Dr. Bansal opines claimant had a permanent impairment to the shoulders, he did not specifically find claimant had a permanent impairment for the July 14, 2015 date of injury. Given this record, claimant has failed to carry her burden of proof the July 14, 2015 date of injury resulted in a permanent disability.

As claimant failed to carry her burden of proof she sustained a permanent disability regarding the July 14, 2015 date of injury, the issue regarding claimant's entitlement to permanent partial disability benefits for the July 14, 2015 date of injury is moot.

The next issue to be determined is whether the July 11, 2016 date of injury resulted in a permanent disability. The law detailed above for file numbers 5065916 and 5065917 is applicable but will not be repeated.

The record indicates claimant had no prior shoulder problems before working at Tyson. Claimant had a physical before she began working at Tyson. The physical

allowed claimant to work at any job at Tyson without limitations. (Tr. p. 24) Claimant testified at hearing she had continued pain in both her neck and shoulders.

Four experts have opined regarding whether claimant's July 11, 2016 date of injury resulted in a permanent disability.

Dr. Kenik is a rheumatologist. He actively treats claimant and was still treating claimant at the time of hearing. He opined claimant had a work-related bilateral shoulder cuff tendonitis and an impingement caused by repetitive work at Tyson. He also opined claimant had fibromyalgia substantially aggravated by repetitive activity at Tyson. He recommended claimant avoid repetitive activities at Tyson and recommended further work restrictions. (Jt. Ex. 7, pp. 130-131)

Fibromyalgia is an inflammatory disease. Diagnostic criteria have been established for fibromyalgia by the American College of Rheumatology. (Ex. 1, p. 17F; AMA Guides to the Evaluation of Disease and Injury Causation, pp. 226-227)

Dr. Harrer is an orthopedic surgeon who actively treated claimant. He opined claimant's fibromyalgia is a personal condition. Dr. Kenik is a rheumatologist. Given his area of expertise, his opinions regarding fibromyalgia are more convincing than the opinions of Dr. Harrer. Dr. Harrer found claimant's July of 2016 injury was temporary. This opinion is problematic. Dr. Harrer limited claimant to light-duty work for approximately eight months. Because this extended work restriction is inconsistent with a finding that claimant's condition in her shoulder and neck is temporary, Dr. Harrer's opinion regarding permanent impairment is found not convincing.

Dr. Schmitz evaluated claimant one time for an IME. He also opined the cause of claimant's fibromyalgia is unknown. Dr. Schmitz is an orthopedic surgeon. As noted above, Dr. Kenik is a rheumatologist. Given his experience and training, Dr. Kenik's opinions regarding permanent impairment and the cause of claimant's aggravation of her fibromyalgia are found to be more convincing than that of Dr. Schmitz.

Both Dr. Harrer and Dr. Bansal assessed claimant as having bilateral shoulder impingement and bilateral AC joint arthritis. (Ex. 1, p. 17I; Jt. Ex. 3, pp. 85-86, 89-90) Dr. Schmitz makes little reference to either of these pathologies in assessing claimant's permanent impairment. Dr. Schmitz's assessment of claimant primarily is focused on claimant's fibromyalgia, which he indicates is an unknown condition. As Dr. Schmitz's opinion fails to assess the diagnosis as made by both Dr. Bansal and Dr. Harrer, and for the other reasons as detailed above, Dr. Schmitz's opinion regarding permanent impairment is also found not convincing.

Dr. Bansal evaluated claimant once for an IME. His opinions corroborate the opinions of Dr. Kenik. Dr. Bansal also evaluated, assessed and analyzed claimant's chronic bilateral shoulder condition and bilateral AC joint arthritis. For these reasons, the opinions of Dr. Bansal regarding permanent impairment are found more convincing than those of Dr. Harrer and Dr. Schmitz.

Claimant had no prior shoulder problems before working at Tyson. Claimant had no restrictions when she first began working at Tyson. One and a half years after the date of injury, claimant was still receiving treatment for her shoulders and neck with Dr. Kenik. The opinions of Drs. Kenik and Bansal regarding permanent impairment are more convincing than those of Dr. Harrer and Dr. Schmitz. Given this record, claimant has carried her burden of proof her July 11, 2016 injury resulted in a permanent disability.

The next issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

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.

Claimant was 44 years old at the time of hearing. Claimant graduated from high school. Claimant speaks both Spanish and English. Claimant's unrebutted testimony is she cannot return to work at any of her prior jobs at Tyson. Claimant graduated from high school.

As noted, the opinions of Dr. Harrer and Dr. Schmitz regarding permanent impairment are found not convincing. Dr. Bansal found claimant had a five percent permanent impairment to the neck, a two percent permanent impairment to the body as a whole for the right shoulder, and a three percent permanent impairment to the body as a whole for the left shoulder. According to the combined values chart and the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, the combined values for all of these impairments results in a ten percent permanent impairment to the body as a whole. Therefore, it is found claimant has a 10 percent permanent impairment to the body as a whole.

Dr. Bansal restricted claimant to limit her repetitive neck activity. He also restricted claimant to a ten-pound lifting restriction. The record indicates this restriction is not being applied for claimant's work at Tyson. Claimant testified her current job, at the time of hearing, was consistent with the restrictions given by Dr. Bansal. Mr. Sager testified that given Dr. Bansal's work restrictions, claimant could only do a dozen jobs, out of the approximately 200, at the Tyson plant in Storm Lake. (Tr. pp. 94-95) At the time of hearing claimant was still employed with Tyson. Claimant was earning $16.00 an hour.

Given this record, it is found claimant has a 20 percent loss of earning capacity or industrial disability.

The final issue to be determined is whether claimant is due reimbursement for the IME by Dr. Bansal.

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). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Regarding the IME, the Iowa Supreme Court provided a literal interpretation of the plain-language of Iowa Code section 85.39, stating that section 85.39 only allows the employee to obtain an independent medical evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 847 (Iowa 2015).

Under the Young decision, an employee can only obtain an IME at the employer's expense if an evaluation of permanent disability has been made by an employer-retained physician.

Iowa Code section 85.39 limits an injured worker to one IME. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842 (Iowa 2009).

The Supreme Court, in Young noted that in cases where Iowa Code section 85.39 is not triggered to allow for reimbursement of an independent medical examination (IME), a claimant can still be reimbursed at hearing the costs associated

with the preparation of the written report as a cost under rule 876 IAC 4.33. Young at 846-847.

On August 19, 2015 Dr. Harrer, the employer-retained physician, found claimant had no permanent impairment. (Jt. Ex. 3, p. 84) On December 19, 2017, Dr. Bansal, the employee-retained expert, found claimant had permanent impairment. Given this chronology, defendant is liable for the reimbursement of the IME for Dr. Bansal.

ORDER

Therefore, it is ordered:

For file number 5065916:

Claimant shall take nothing in the way of additional benefits.

For file number 5065917:

Claimant shall take nothing in the way of additional benefits.

For file number 5065918:

That defendant shall pay claimant one hundred (100) weeks of permanent partial disability benefits at the rate of four hundred forty-one and 34/100 dollars ($441.34) per week commencing on July 11, 2016.

Defendant 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 Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

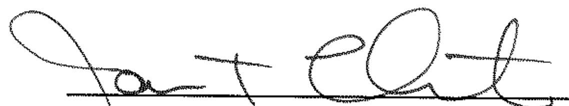
For file numbers 5065916, 5065917 and 5065918:

That defendant shall reimburse claimant for Dr. Bansal's IME.

That defendant shall pay costs.

That defendant shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

Signed and filed this 23rd day of July, 2019.



JAMES F. CHRISTENSON
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JFC/sam

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.