BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PAULA SCHMITZ,	:	
Claimant,	:	File Nos. 5043359; 5043360
vs.	:	ARBITRATION
TYSON FRESH MEATS, INC.,	:	DECISIONS
Employer, Self-Insured, Defendant.	:	Head Note Nos.: 1100; 1108; 1400; 1801 1802; 1803; 2500, 2700

FILED
MAY 14 2015
WORKERS COMPENSATION

STATEMENT OF THE CASES

These are proceedings in arbitration. The contested cases were initiated when claimant, Paula Schmitz, filed her original notices and petitions with the Iowa Division of Workers' Compensation. In File No. 5043359, the petition was filed on February 25, 2013. Claimant alleged she sustained a work-related injury on September 12, 2011 in the form of a repetitive injury to her right shoulder. (Original notice and petition)

In File No. 5043360, claimant filed her petition on February 25, 2013. Claimant alleged she sustained a work-related injury on December 26, 2012 in the form of a repetitive injury to her right shoulder. (Original notice and petition)

Defendant filed answers in both contested cases on April 8, 2013. Defendant denied the occurrence of both alleged work injuries.

The hearing administrator scheduled the cases for hearing on March 10, 2014 at 1:00 p.m. The hearing took place in Waterloo, Iowa at the Iowa Department of Workforce Development. The undersigned appointed Ms. Brittney L. Frericks, as the certified shorthand reporter. She is the official custodian of the records and notes. The hearing in Waterloo did not conclude after 3.5 hours of testimony. As a consequence, the hearing was continued to Des Moines.

Part II of the hearing took place on May 21, 2014 in Des Moines, Iowa at 1000 East Grand Avenue. Ms. Roxann Zuniga was appointed by the undersigned as the certified shorthand reported in the second portion of the hearing. She is the official custodian of the records and notes. The hearing commenced at 12:44 p.m. and finally concluded at 4:38 p.m. The total time of the hearing was approximately 9 hours or more.

Claimant testified on her own behalf. Three witnesses testified for defendant: Robin Hanson, Brooke Salger, and John Kruzich.

The parties offered exhibits. Claimant offered exhibits marked 1 through 28. (Exhibit 28 was offered solely for the purpose of showing notice.) Defendant offered exhibits marked A through S. All proffered exhibits were admitted as evidence in the case. Post-hearing briefs were filed on June 30, 2014. The cases were deemed fully submitted on that date. The transcripts were submitted as well.

It is important to note that from September 9, 2014 through February 15, 2015, Governor Branstad had appointed the undersigned, acting workers' compensation commissioner. This deputy was unable to write the decisions as the acting workers' compensation commissioner.

STIPULATIONS: File No. 5043359, Date of alleged injury is September 12, 2011

The parties completed the designated hearing reports. The various stipulations are:

1. There was the existence of an employer-employee relationship at the time of the alleged injury;

2. The alleged injury was a cause of a temporary disability during a period of recovery;

3. The alleged injury was a cause of permanent disability (defendant does not admit liability for the permanent disability);

4. Although entitlement could not be stipulated; claimant was off work from September 16, 2011 through December 25, 2012 with the exception of the days claimant worked at the Primitive Peddler Antique Shop;

5. If claimant's injury is found to be a cause of permanent disability, the disability is an industrial disability;

6. Prior to the hearing, defendant paid no workers' compensation benefits; and

7. The parties are able to stipulate to the costs claimant incurred in Exhibit 12 and those costs have been paid by claimant.

ISSUES

The issues presented in File No. 5043359 are:

1. Whether claimant sustained an injury on September 12, 2011, which arose out of and in the course of her employment;

2. Whether claimant is entitled to healing period benefits, or temporary partial disability benefits;

3. Whether claimant is entitled to permanency benefits, and if so, the extent of those permanency benefits;

4. If claimant is entitled to permanency benefits, the commencement date for those permanency benefits is in dispute; claimant alleges the date is December 26, 2012; defendant maintains the date is November 1, 2012;

5. The parties disagree as to the proper weekly benefit rate if weekly benefits are due to claimant; claimant alleges the weekly benefit rate is $342.81 per week, but defendant alleges the weekly benefit rate is $336.47 per week;

6. Defendant asserts the affirmative defense of lack of timely notice under Iowa Code section 85.23;

7. Claimant seeks the payment of medical benefits and medical mileage pursuant to Iowa Code section 85.27;

8. Claimant seeks alternate medical care pursuant to Iowa Code section 85.27;

9. Whether defendant is entitled to a credit under Iowa Code section 85.38(2) for the payment of sick pay/disability income and/or the payment of medical/hospitalization expenses; and

10. Whether claimant is entitled to penalty benefits pursuant to Iowa Code section 86.13.

STIPULATIONS: File No. 5043360, Alleged date of injury is December 26, 2012

1. There was the existence of an employer-employee relationship at the time of the alleged injury;

2. The alleged injury was a cause of temporary disability during a period of recovery;

3. The alleged injury was a cause of permanent disability;

4. For purposes of determining entitlement to temporary partial disability benefits and healing period benefits, claimant was off work from December 26, 2012 through January 14, 2014 except for partial days worked by claimant with defendant on December 26, 2012 and December 27, 2012, and days when claimant worked at the Primitive Peddler Antique Shop;

5. If defendant is liable for the alleged injury; claimant is entitled to benefits for this partial period of time;

6. Although entitlement to benefits cannot be stipulated, claimant was off work during this period of time;

7. If claimant is entitled to permanency benefits, the parties agree the disability is an industrial disability;

8. If claimant is entitled to weekly benefits; the parties agree the weekly benefit rate is $337.06 per week;

9. Prior to the hearing, defendant paid no weekly workers' compensation benefits; and

10. The parties are able to agree to the costs paid by claimant.

ISSUES

The issues presented in File No. 5043360 are:

1. Whether claimant sustained an injury on December 26, 2012, which arose out of and in the course of her employment;

2. Whether claimant is entitled to healing period or temporary partial disability benefits for the period from December 26, 2012 through January 12, 2014 except for partial days worked by claimant on December 26, 2012 and December 27, 2012 and days claimant worked at the Primitive Peddler Antique Shop;

3. Whether claimant is entitled to permanent disability benefits and if so, the extent of those permanency benefits;

4. If claimant is entitled to permanency benefits there is an issue as to the commencement date, claimant alleges the date is January 13, 2014 but defendant maintains the date is December 15, 2013;

5. Defendant alleges the affirmative defense of lack of timely notice pursuant to Iowa Code section 85.23;

6. Whether claimant is entitled to medical benefits pursuant to Iowa Code section 85.27;

7. Whether claimant is entitled to alternate medical care pursuant to Iowa Code section 85.27;

8. Whether defendant is entitled to a credit under Iowa Code section 85.38(2) for payment of sick pay/disability income and/or medical or hospitalization expenses;

9. Whether claimant is entitled to penalty benefits pursuant to Iowa Code section 86.13; and

10. Whether claimant is entitled to costs.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This deputy, after listening to the testimony of claimant and the other three witnesses at hearing, after judging the credibility of all, and after reading the evidence, and the post-hearing briefs makes the following findings of fact and conclusions of law:

The party who would suffer loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

Claimant is a 50-year-old married mother of 2 adult children and 1 stepchild. She is a 1 pack per day smoker. She is 5 feet and 1 inch in height. She weighs approximately 175 pounds. She is considered morbidly obese. At the time of the hearing, claimant admitted to drinking only an occasional beer.

On April 2, 2004, claimant was convicted in federal court of various drug crimes for which she spent 78 months in federal prisons. During that time frame, claimant was unable to perform any employment on the open labor market. Claimant was addicted to methamphetamines at the time. Her substance abuse issues are in remission. Claimant testified she spent much of her prison time crocheting.

Another problem claimant incurred involved shoplifting or stealing from Wal-Mart while claimant was an employee of the company. Initially, claimant neglected to list Wal-Mart as a former employer. However, defendant discovered claimant had been terminated for stealing. There was no evidence produced to indicate whether criminal charges were ever brought against claimant. Claimant considered it a minor incident in comparison to going to federal prison for 78 months. The shoplifting incident does bear on the issue of claimant's credibility.

Currently, claimant resides in rural Jessup, Iowa on a small 30-acre farm. Jessup has a population of approximately 2,200 people and is located in Buchanan County. She holds a current license to drive a motor vehicle in Iowa.

Claimant commenced her employment with defendant at its pet product plant in Independence, Iowa on March 2, 2010. At the start of her employment, claimant earned $9.00 per hour. When she left the employ of defendant, claimant earned $12.40 per hour.

On the day claimant commenced her employment with defendant, she signed a document, "Notice to Team Members Concerning Worker's [*sic*] Compensation." (Exhibit J, page 1) The relevant portion of the document read:

> 2. I understand that I must report ALL work related injuries/illnesses, *regardless of severity*, immediately to my Supervisor or Human Resource Manager. This includes minor injuries for which I do not feel medical treatment is necessary.
>
> 3. I understand that I am to notify my Supervisor or Human Resource Manager personally to report any work related injury/illness. In the event that I feel unable to attend work due to a work related condition, I will contact one of the above persons to discuss the situation prior to (30) minutes before my start of shift. I understand that the answering machine is not to be utilized for work related injuries/illnesses. I agree to follow proper call in procedures for reporting all absences from work.

(Ex. J, p. 1)

The Independence, Iowa plant is in the business of making specialty treats for pets. There were several photographs submitted of the pet products produced. Several DVD depictions of the jobs claimant had performed were also submitted. The undersigned reviewed the photographs and the DVD depictions in depth.

Claimant has had a protracted medical history with respect to her bilateral shoulders and her right upper extremity. She had experienced previous issues with her right carpal tunnel dating back to 1997.

With respect to her September 12, 2011 right shoulder claim, claimant was a very poor historian at her hearing. She seemed very confused. It was very difficult for claimant to follow any line of questioning. Even claimant's own attorney was consistently asking very leading questions. Nevertheless, claimant had very little recall of events. Claimant insisted she was confused because she was in so much pain on the first day she testified. This deputy found claimant to be a frustration to her own case.

On June 3, 2010, claimant presented to Troy Renaud, D.O., for pain in the left shoulder. (Ex. G, p. 4) Claimant denied any numbness or tingling in her upper extremities. (Ex. G, p. 4) Claimant attributed the pain to lifting and twisting at work. (Ex. G, p. 4) Claimant was treated conservatively. (Ex. G, pp. 4-5)

On July 10, 2010, claimant returned to Dr. Renaud. This time claimant complained of problems with her right shoulder, pain in her collar bone, and upper back pain. (Ex. G, p. 6) **Claimant reported she had not sustained an injury.** (Emphasis

added.) (Ex. G, p. 6) Dr. Renaud diagnosed claimant with "Right shoulder pain." (Ex. G, p. 6) The physician prescribed Vicodin. (Ex. G, p. 6)

Two days later, claimant returned to Dr. Renaud with complaints of right shoulder pain, neck tenderness, thoracic spine tenderness, and muscle spasms in the upper left trapezius. The physician found paraspinal tightness. (Ex. 2, p. 1; Ex. G, p. 7) Dr. Renaud diagnosed claimant with somatic dysfunction of the cervical, thoracic and lumbar region of the spine. (Ex. G, p. 7) In Exhibit 2, page 1, Dr. Renaud wrote the following about claimant's right shoulder:

> 45-year[-] old female is complaining of severe right pain inside her right shoulder blade area. This was adjusted twice. The last time June 3 and she was pain-free for a while. She does stand at work with her arms stretched out in front of her. This seems to aggravate the problem. She has had a motor vehicle accident in the past and has had pain from her tailbone all the way to her skull. Has seen Pain Medicine in the past and has had required injections but no longer follows with them.

(Ex. 2, p. 1) Dr. Renaud prescribed Vicodin for claimant. (Ex. 2, p. 1; Ex. G, p. 7) Dr. Renaud prescribed five-pound dumbbell exercises for claimant to perform at home. (Ex. 2, p. 3) Dr. Renaud suggested physical therapy for the right shoulder and the thoracic spine. (Ex. 2, p.3)

Claimant did not return to Dr. Renaud until September 8, 2010. Claimant requested an osteopathic adjustment. Dr. Renaud recorded the following in his clinical notes:

> A 45 year old presents today complaining of upper shoulder pain and low back pain. She has been doing well since her last adjustment in July until she was lifting a grandchild over the weekend and doing some more strenuous activities. She has been using Vicodin very sparingly and requests a refill to help her sleep on some nights.

(Ex. G, p. 9) Dr. Renaud did not find any shoulder joint tenderness, no elbow joint tenderness or wrist joint tenderness. (Ex. G, p. 10) Once again, Dr. Renaud prescribed Vicodin for pain control. (Ex. G, p. 11)

On November 5, 2010, claimant again presented to Dr. Renaud with bilateral shoulder pain, neck, upper back complaints as well as low back complaints. (Ex. 2, p. 4) The doctor noted claimant had chronic pain. (Ex. 2, p. 4) Claimant also reported pain in her lateral elbow consistent with lateral epicondylitis. Claimant expressed concern whether the conditions were work-related. Claimant reported muscle pain. Dr. Renaud encouraged claimant to speak with her supervisors. (Ex. 2, p. 4) The physician prescribed Vicodin for pain control. (Ex. 2, p. 4)

During the summer of 2011, claimant began working as a part-time employee for the Primitive Peddler on Young Street in Jessup, Iowa. (Ex. O, p. 3) The owner of the antique shop indicated claimant worked on and off from July 27, 2011 through January 2013. Claimant testified about her various job duties during the course of her employment. Claimant answered the telephone, waited on customers, priced products by hand and with the use of a "pricing gun," made signs for the establishment, and claimant did babysitting for the owner. (Transcript I, pp. 30-33 and Tr. II, p. 48)

On July 19, 2011, claimant presented to Dr. Renaud for manipulation of the low and mid-back. (Ex. G, p. 13) Claimant reported neck and low back pain. (Ex. G, p. 13) Dr. Renaud refilled claimant's prescription for Vicodin. (Ex. G, p. 13)

On September 12, 2011, claimant returned to Dr. Renaud with renewed complaints of right shoulder pain. (Ex. 2, p. 7) Claimant requested a prescription for hydrocodone. (Ex. 2, p. 7) In the medical history for the clinical note, Dr. Renaud wrote:

> History of Present Illness
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> Shoulder Pain
> Injury: No injury of shoulder. No history of prior shoulder injury. Shoulder injury not related to work
> Pain: Shoulder pain, shoulder pain at night
> Evaluation: No stiffness at shoulder, No swelling of shoulder, Limitation of shoulder movement, No paresthesia of upper extremity, No neck pain, No history of shoulder surgery
> Comorbid Conditions: No diabetes mellitus, No osteoporosis, No rheumatoid arthritis, No seizures, vicodin [*sic*] not helping, not sleeping at night

(Ex. 2, p. 7)

Dr. Renaud examined both shoulders. Then he recorded his findings in his notes for September 12, 2011. The physician noted:

> Shoulder Exam
>
> Shoulder (R)
> Inspection: No atrophy. No deformity. No erythema. No swelling.
> Palpation: No scapula tenderness. No clavicle tenderness. Acromioclavicular joint tenderness. No acromioclavicular joint swelling. Subacromial tenderness. No bicipital groove tenderness.
> Range of Motion: Forward flexion abnormal. Extension normal. Abduction normal. Cross-chest adduction normal. Internal rotation abnormal. External rotation abnormal.

> Shoulder (L)
> Inspection: No atrophy. No deformity. No erythema. No swelling. Palpation. No scapula tenderness. No clavicle tenderness. No acromioclavicular joint tenderness. No acromioclavicular joint swelling. No subacromial tenderness. No bicipital groove tenderness.
> Range of Motion: Forward flexion normal. Extension normal. Abduction normal. Cross-chest adduction normal. Internal rotation normal. External rotation normal.
>
> Neurologic: Light touch sensation in upper extremity normal
>
> Assessment
>
> Assessments:
> Pain, shoulder – R.

(Ex. 2, p. 8)

Dr. Renaud prescribed oxycodone and physical therapy. (Ex. 2, p. 8)

On September 15, 2011, claimant composed and signed a note for a member of management of Tyson. The contents of the note discussed claimant's right shoulder. The first paragraph stated:

> I went to the dr on 9/12/11 for a right shoulder injury. I noticed right shoulder pain 7/19/11, when I had to adjust my body sleeping habits, because my back was so sore on the left side. I do not know if I hurt my right shoulder at work or at home.

(Ex. 17, p. 3)

Claimant returned to Dr. Renaud on September 30, 2012. She reported her right shoulder pain had been ongoing for three months. (Ex. 2, p. 10) Claimant requested a more aggressive treatment approach, including cortisone injections. (Ex. 2, p. 10) Claimant was taking several types of pain medication. (Ex. 2, p. 10)

On October 7, 2011, claimant underwent MRI testing of the right shoulder. (Ex. 4, p. 1) The results showed:

1. Tendinopathy, partial undersurface tear infraspinatus muscle insertion. Cannot rule out a small full thickness perforation. There is fluid in the overlying bursa but there is no cuff retraction.

2. Inflammatory thickening of the subscapularis insertion.

3. Hypertrophic change of the acromioclavicular joint.

4. Congenital thinning anterior labrum 12-3 o'clock position.

5. No other issues identified.

(Ex. 4, p. 1)

Dr. Renaud referred claimant to Richard Naylor, D.O., an orthopedic surgeon. Claimant's initial appointment occurred on October 12, 2011. Dr. Naylor indicated in the clinical notes, the right shoulder injury had an "[i]nsidious onset over the last three months." (Ex. 5, p. 1) Dr. Naylor assessed claimant's condition as:

> ASSESSMENT: Rotator cuff tear, shoulder impingement in AC joint, arthrosis to the right shoulder. We will set her up for scope with subacromion decompression, distal clavicle excision and address her rotator cuff pathology as necessary, open reverse through the scope. Risks and benefits were discussed. She understood and wishes to proceed.

(Ex. 5, p. 2)

On October 18, 2011, Dr. Renaud conducted claimant's pre-surgical physical. The doctor provided the following medical history for claimant:

> HISTORY OF PRESENT ILLNESS: This is a 46-year old with 3 month history of right shoulder pain unrelated to injury, has failed conservative management, i.e. oral meds, physical therapy and cortisone injection. She was sent for an MRI which reveals a rotator cuff tear of the infraspinatus, subacromial Impingement, AC joint arthritis and labral cysts. The above procedure has been recommended by Dr. Naylor, the patient has consented. Denies any acute complaints today.

(Ex. E, p. 1)

Dr. Naylor performed a right shoulder subacromial impingement and acromioclavicular (AC) joint arthrosis, partial-thickness rotator cuff tear and microinstability, all of the right shoulder. (Ex. 4, p. 3) Claimant's right shoulder was placed in a sling following the surgery. (Ex. 4, p. 4) The sutures were removed on November 1, 2011.

On November 30, 2011, claimant reported to her physical therapist a new injury to the right shoulder. (Ex. F, p. 2) Claimant stated the injury occurred on November 26, 2011 when she was trying to put on a tight shirt. Apparently, claimant's right arm was caught in the shirt. Claimant indicated she was in so much pain that she shed many

tears. (Ex. F, p. 2) Claimant informed the therapist she was unable to perform any therapy because of her severe pain. (Ex. F, p. 2)

Claimant presented to Dr. Naylor for a follow-up examination on December 6, 2011. At the time, claimant reported the following history:

> She presents for followup of her shoulder scope. She denies any numbness, tingling or paresthesias. No fevers, chills or night sweats. Has increasing pain. Rates her pain at 7 out of 10. She was doing just fine for her surgery on 10/18/11 until she was putting on a girdle-type structure and her right upper extremity got twisted in it. She has been using over the counter anti-inflammatories for a week with no change in her symptomatology. Otherwise, her past medical history, family history, social history, review of systems and allergies remain unchanged.

(Ex. D, p. 1)

Dr. Naylor opined the girdle incident was a new injury. (Ex. D, p. 1) The surgeon thought claimant's complaints of pain were out of proportion to the objective findings. (Ex. D, p. 1) Dr. Naylor injected claimant's right shoulder. New MRI testing was ordered. (Ex. D, p. 1)

Dr. Naylor reviewed the results of the newly ordered MRI. The results showed a high grade partial thickness rotator cuff tear where the tear had been minimal previously. (Ex. 5, p. 4) Dr. Naylor opined:

> She reinjured it, had sharp pain and felt a tearing sensation in her shoulder, all this and she is not progressing with any of the medicines or home therapy, concerning all this, we spent 15 minutes in consultation. We are going to set her up for a diagnostic shoulder scope and address her rotator cuff pathology as we can.

(Ex. 5, p. 4)

Claimant prepared for another right shoulder arthroscopy. On January 13, 2012, claimant returned to Dr. Renaud for a pre-operative physical examination. The physician noted in his medical history:

> A 46-year old female who underwent arthroscopic repair of her rotator cuff on October 18, 2011. As she was recovering she unfortunately had a fall and reinjured the shoulder. Repeat MRI showed high grade partial thickness rotator cuff tear whereas it had been minimal before according to Dr. Naylor's note. He has advised the above procedure. The patient has consented. Denies acute complaints today.

(Ex. E, p. 3)

Claimant underwent a second surgery on January 18, 2012. Dr. Naylor opined there had been a "subsequent reinjury." (Ex. 4, p. 5) Claimant saw Dr. Naylor on March 1, 2012. The orthopedic surgeon opined claimant would be ready to return to work in three weeks. (Ex. 5, p. 5) However, on March 19, 2012, claimant returned to Naylor and she explained she had once again reinjured her right shoulder. (Ex. 5, p. 6) Claimant explained her right shoulder had been stretched too far in physical therapy. (Ex. 5, p. 6) Dr. Naylor diagnosed claimant with positive impingement findings. (Ex. 5, p. 6) Dr. Naylor performed a subacromial injection. (Ex. 5, p. 6)

On April 5, 2012, claimant returned to Dr. Naylor. She had better range of motion and better strength. Nevertheless, claimant did not feel she was capable of returning to work. Dr. Naylor opined claimant could return to work in four weeks. (Ex. 5, p. 7)

Claimant underwent MRI testing on April 13, 2012. Kent Quinn, M.D. indicated the testing was necessary because of a "reinjury." Dr. Quinn interpreted the test results as:

> FINDINGS: There is a small inferior surface tear of the distal infraspinatus tendon with an extension or intrasubstance tear of this tendon extending more medially. Additional mild tendinopathy is present within the supraspinatus tendon. Rotator cuff is otherwise normal in appearance.
>
> Glenoid labrum is normal in appearance. There is a small amount of fluid within the subacromial/subdeltoid bursa. Postoperative changes within the acromion and distal clavicle. Long head of the biceps tendon is intact. MRI is otherwise unremarkable.

(Ex. 4, p. 6)

On April 25, 2012, Dr. Naylor offered to perform a third arthroscopic surgery after he reviewed the latest MRI test results. (Ex. 5, pp. 8-9) Dr. Naylor noted claimant was re-injured when she was engaging in physical therapy. (Ex. 5, p. 9) Claimant desired another arthroscopic surgical procedure. (Ex. 5, p. 9) The procedure occurred on May 7, 2012. (Ex. 4, p. 8) Claimant underwent an arthroscopic subacromial decompression, an arthroscopic debridement of type I SLAP and side-to-side repair of shoulder due to microinstability. (Ex. 4, p. 8)

On May 21, 2012, claimant returned to Dr. Naylor for follow-up care. The orthopedic surgeon prescribed additional physical therapy. Claimant improved to the point where she was able to begin gardening. (Ex. F, p. 4) Claimant reported she was able to sleep at night. (Ex. F, p. 4)

On September 13, 2012, claimant returned to see Dr. Naylor. The range of motion of claimant's right shoulder was nearly normal. (Ex. 5, p. 12) The orthopedic surgeon opined claimant could return to work in four weeks at full duty status. (Ex. 5, p. 12) Claimant was released from Dr. Naylor's care. (Ex. 5, p. 12)

Claimant returned to Dr. Renaud on October 19, 2012. (Ex. E, p. 5) Claimant informed her family physician; she had no plans to return to work at Tyson in Independence, Iowa. (Ex. E, p. 5)

On November 8, 2012, Dr. Naylor reviewed some DVD's which depicted various jobs claimant had performed at Tyson. Dr. Naylor opined claimant could perform the jobs of "Sealer and Poucher" without modification. (Ex. 5, p. 18) The surgeon stated claimant could perform the jobs of "Pizzle Unload, Chicken Unloader and Boxer" so long as claimant did not work above her shoulders. (Ex. 5, p. 19)

Claimant returned to Dr. Naylor on December 13, 2012. There were no complaints of shoulder pain. (Ex. 5, p. 20) Claimant had some limited strength in external rotation and abduction strength. She had good motion, but she lacked some full forward flexion and external rotation. (Ex. 5, p. 21) Claimant was told she could return to full duty status, but she was not to engage in repetitive use of her right arm above shoulder height. (Ex. 5, p. 21) On December 17, 2012, Dr. Naylor opined, "Paula Schmitz does lifting at her discretion with her right arm." (Ex. 5, p. 23) Medical personnel at Dr. Naylor's office recognized claimant did not have to lift 40 pounds in her job at the Tyson plant. (Ex. D, p. 2)

On December 17, 2012, Brooke Salger, HR Manager for Tyson Pet Products, Inc., contacted claimant by letter. Ms. Salger advised claimant, the company could accommodate claimant in the workplace and claimant was to report to work on December 26, 2012. (Ex. J, p. 5) Her Family Medical Leave had expired.

Claimant returned to Dr. Renaud's clinic on December 21, 2012. She tried to convince Stefani Pitkin, PA-C, to keep claimant off work. (Ex. E, pp. 7-8) The physician's assistant did not override the release Dr. Naylor had issued. (Ex. E, p. 8)

Claimant returned to work on December 26, 2012. She worked for approximately 40 minutes. Then she reported to her supervisor that she was in so much pain she had to decline work and return home.

Claimant reported to work on December 27, 2012. Again, she worked for a brief period of time. She explained she had to go home because of the severe pain she experienced. Claimant declined work and returned home. She never worked again at Tyson. She did continue her employment at the antique shop.

On December 28, 2012, claimant presented to Kathleen Megivern, D.O., with complaints of right shoulder pain, especially in the anterior shoulder area. Claimant

desired hydrocodone for pain. (Ex. 7, p. 1) Abduction and forward flexion was at about 60 degrees. Claimant's grip strengths were equal. Her biceps reflexes were normal and her motor and sensory systems were intact. (Ex. 7, p. 1) Dr. Megivern restricted claimant from working for the period December 28, 2012 through January 4, 2013. (Ex. 7, p. 2)

Claimant returned to Dr. Renaud on January 4, 2013. She provided a lengthy history regarding her return to work. Dr. Renaud wrote the following in his clinical notes for the same date:

> 47-year-old female presents today with a bit of a dilemma. She returned to work finally on 12/26. She works at Tyson. She has been off for some time having had three rotator cuff surgeries on her right shoulder. Dr. Naylor has been the surgeon. He initially wrote a release back in October, but he did not put a timeframe or limit so she did not go back to work until 12/26. Apparently there are five possible jobs at her work. He okayed her for two of those five. On the first day she did one of the jobs for 90 minutes and had to leave because of severe pain in her right arm. She feels that she may have reinjured the shoulder. She returned the next day and tried the second job, but had to leave after two hours due to the pain. The next day was a Friday. She called in sick. She went to Convenient Care later that day, received 10 Vicodin and a note excusing her from work for one week to see her family doctor. The last note by her orthopedic surgeon states she may lift at her discretion, but work is not accepting this as a valid restriction. They want more specific limitations. Apparently the patient does not think she is able to perform her job any longer at any capacity, but is reluctant to resign because she feels it would be at her advantage if they were to fire her. She is seeking legal counsel although states there is no active lawsuit. There is a question in her mind whether this is a work comp injury.

(Ex. 2, p. 19)

Dr. Renaud ordered another MRI. He believed a second opinion was in order. (Ex. 2, p. 19) The family physician restricted claimant from working until January 15, 2013. (Ex. 2, p. 21) The MRI occurred on January 8, 2013. The result was negative for a recurrent rotator cuff tear. (Ex. 4, p. 10) There was a tiny amount of bursal fluid which was not unexpected, given the rotator cuff repair. (Ex. 4, p. 10)

Claimant commenced treatment with Arnold E. Delbridge, M.D., on February 21, 2013. Dr. Delbridge ordered an arthrogram MRI. (Ex. 8, p. 1) According to Dr. Delbridge, the MRI showed, "a full thickness tear about 1 cm involving the most anterior portion of the supraspinatus tendon. There is poor visualization of the long head of biceps tendon and this is likely due to a tear." (Ex. 8, p. 2) On April 4, 2013,

Dr. Delbridge performed an open repair of the right torn rotator cuff and he repaired the acromial rim back to the acromion of claimant's right shoulder. (Ex. 10, p. 1)

On July 9, 2013, claimant complained of right hand pain. There was numbness in her little finger. (Ex. 8, p. 8) Dr. Delbridge ordered EMG studies. The EMG studies occurred on July 19, 2013. Ivo Bekavac, M.D., Ph.D., interpreted the results as:

> IMPRESSION:
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> Extensive EMG examination and nerve conduction studies of right upper extremity discloses evidence of
>
> 1. Median neuropathy at or distal to the wrist consistent with carpal tunnel syndrome moderate in degree electrically,
>
> 2. Ulnar neuropathy at the elbow, mild in degree electrically.
>
> 3. There is no EMG evidence for cervical motor radiculopathy, polyneuropathy or myopathy.

(Ex. 11, p. 1)

Dr. Delbridge performed a right carpal tunnel release and ulnar nerve compression and transfer on the right elbow. The surgical procedures occurred on August 15, 2013. By October 21, 2013, Dr. Delbridge had determined claimant was improving, but he ordered pain medication for claimant. (Ex. 8, p. 13)

On December 16, 2013, claimant returned to Dr. Delbridge with shoulder complaints after having sustained an injury lifting a container of milk from the refrigerator. She explained she heard a pop in her shoulder and experienced pain over her scar. Dr. Delbridge opined claimant could have loosened a suture. Claimant's right hand was improving; claimant was acquiring feeling in it. The surgeon prescribed pain medication. (Ex. 8, p. 15) Dr. Delbridge released claimant from his care on January 13, 2014.

The first issue to address in File No. 5043359 is whether claimant sustained an injury to her right shoulder, which arose out of and in the course of her employment at the Tyson Plant in Independence, Iowa. The alleged date of injury is September 12, 2011.

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" 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 Elec. 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.

Claimant had been treating with Dr. Renaud for right shoulder pain as early as July 2010. She indicated there was no injury involved. (Ex. G, p. 6) Claimant continued to treat with Dr. Renaud over the months for the same issue. In September of 2010, claimant reported to her physician she injured herself when she lifted a grandchild. On September 12, 2011, claimant again sought treatment from Dr. Renaud. Claimant specifically informed her family physician the shoulder condition was not work related. (Ex. 2, p. 7)

Claimant also had pre-existing elbow and carpal tunnel issues. Those issues dated back to 1997. By her own admission, claimant stated she spent her time in prison crocheting. The art of crocheting had to have some impact on claimant's upper extremities.

From day one of her employment, claimant was apprised of the procedures in place for reporting workers' compensation injuries. (Ex. J, p. 1) Nevertheless, claimant did not report a work injury. She testified she wanted to see her own doctors. She did not want "to have to do things their [Tyson's] way . . . ." (Tr. II, p.45) Claimant wanted to investigate her own health conditions. (Tr. II, p. 45)

On September 15, 2011, claimant informed her supervisors she was having sleeping issues and she did not know if her right shoulder issues occurred at home or at work. (Ex. 17, p. 3) In the Leave of Absence Application claimant signed on October 5, 2011, the box for non-work-related was checked. Claimant signed the document. (Ex. A, attachment 2 to the deposition) Claimant applied for long-term disability benefits. Those benefits were only available to employees who did not sustain work-related injuries. Claimant received long-term disability benefits through UNUM. At no time did claimant ask for those benefits to cease as her claim was work related.

The testimonies of two supervisors support the conclusion claimant's injury did not arise out of and in the course of her employment. Claimant did not report her right shoulder condition as work-related in 2011.

Ms. Robin Hanson, supervisor of the grading and packaging department at the Independence plant, testified credibly on May 21, 2014. She testified, claimant told her that she had fallen in a shower outside of work. (Tr. II, p. 73) Ms. Hanson also testified that on at least 20 occasions, claimant told Ms. Hanson, the right shoulder condition

was not work-related (Tr. II, p. 75) Ms. Hanson also testified claimant indicated the right shoulder problem could be related to the manner in which claimant slept. (Tr. II, pp. 75-76)

Ms. Hanson testified when she learned claimant was going to require right shoulder surgery, Ms. Hanson inquired whether the condition was work-related. Ms. Hanson testified:

> A. We and Brooke Salger, the HR manager, had Paula Schmitz in our office and asked her questions as far as is this work-related, is it not work-related, just so we knew how to move forwards.
>
> If it's work-related, they have to go through the channels of seeing our doctors and going that direction. If it's not, then she can make the choice to see her own doctors.
>
> Q. Okay. How many times do you think you had a conversation about whether this condition is work-related or whether it's not leading up to her surgery?
>
> A. Probably 20 or more.
>
> Q. What did she tell you during those various times that you talked to her as to whether her condition was work-related or whether it was not?
>
> A. That it wasn't work-related.
>
> Q. She affirmatively said that to you?
>
> A. Yes, sir.
>
> Q. Okay. Now, she prepared a note where she identified the specific incident while she was sleeping on her shoulder. You're aware of that.
>
> A. Yes.
>
> Q. And in there she put in I don't know whether that is - - whether it's due to that incident or work-related. You saw that note?
>
> A. Yes.
>
> Q. In any of the oral communications that you had with you - - with you and Brooke, did she ever say anything other than it was not work-related?

A. She only stated that it was not work-related. We questioned it just for the simple fact so that we could get her the proper care that she would need.

Q. Did she ever identify up to the time of her surgery that here was any aspect of her jobs that were causing problems as it pertained to the right shoulder?

A. No.

(Tr. II, pp. 75-76)

The Human Resource Manager, Brooke Salger, testified credibly on May 21, 2014. She testified she was responsible for workers' compensation benefits, short-term disability benefits and long-term disability benefits at the plant in Independence, Iowa. She testified, employees at Tyson were only entitled to long-term disability benefits if injuries were not related to work. (Tr. II, p. 110) Ms. Salger testified she never instructed claimant to place incorrect information on official business documents as claimant had testified earlier in the proceedings. (Tr. II, p. 113)

With respect to claimant's right shoulder claim, Ms. Salger testified:

Q. You're familiar [w]ith Ms. Schmitz as an employee of Tyson; correct?

A. Yes.

Q. You're aware - - or are you aware that sometime in late summer, early fall she communicated that she was going to have to have right shoulder surgery?

A. Yes.

Q. After that, did - - after that was communicated to you, did you make any inquiry as to whether there was any relationship between the right shoulder surgery and any of her work activity at Tyson?

A. Yes.

Q. Would you tell the deputy, as best you can, what type of inquiry you made, how often it was made, and in what context?

A. During the leave of absence application process, Robin Hanson and I, her supervisor, sat with her and basically had conversation at that time, and we both asked her several times during that conversation if this was work-related or not.

Because as we were going through the leave of absence application process, there is a place on that form where it needs to be identified. And I also reminded her, you know, there are proper channels to go through if this is in fact work-related.

You've got to, you know, seek our company doctors. We have to, you know, go through those channels if it is work-related. And during that process she never did say yes, this is work-related, I'd like to see the company doctor so the - -

Q. Did - - sorry.

A. Nope. I was just going to say on the LOA, leave of absence, application, we proceeded to fill it out as nonwork-related and - -

Q. Did she specifically tell you that it was not work-related when you made the inquiry to her?

A. Yes. Robin and I both sat there at the same time together with Paula and went down that road with her.

Q. At any time in 2011, did she ever share with you that she had sustained some sort of - - some sort of injury outside of the workplace?

A. Outside of the workplace? Yes.

Q. What did she share with you?

A. Basically she had been seeing a doctor for shoulder injury. I know that there was - - I don't remember the specifics on what had happened. I know there was a fall in the shower.

I honestly don't recollect the actual - - what caused the injury. I know there was a sleeping issue, sleeping on the wrong side that may have aggravated something. But other specifics, I'm not recalling.

Q. So this is your best recollection; sleeping aggravated the condition, and then you do recall a specific statement from the claimant about slipping in a shower?

A. Yeah. She didn't personally tell me that, but she did talk to her supervisor about that. And the statement came across my desk because I at that time had to file it in her medical file.

Q. Now, did you send - - how did Ms. Schmitz have the opportunity to make a statement to the long-term or short-term disability carrier as to

whether her shoulder condition was work-related or due to some other accident or event?

A. Her short-term disability was expiring. You're only eligible for the 90 days of short-term disability.

So once it starts nearing that time, I mail out the long-term disability Unum application and so -- - with direction; once completed, please return back. I then forward it to the corporate office for processing.

Q. Would you ever tell her to put down false information in regard to that question as to whether the need for the leave was work-related or not?

A. Absolutely not.

Q. And you are - - you do recall what she said as to the reason for the leave?

A. Yes.

Q. Okay. And was it work-related?

A. No.

Q. Are you aware that she indicated some other accident?

A. Yes.

(Tr. II, pp. 114-118)

The undersigned considered all of claimant's medical records, all of claimant's testimony, the behavior claimant exhibited when she talked to her supervisors about her right shoulder condition in 2011 and 2012; and the undersigned considered the very credible testimony of both Ms. Hanson and Ms. Salger in rendering this decision. After reviewing all of the above, the greater weight of the evidence establishes claimant did not sustain a right shoulder condition, a right upper extremity condition or a right hand condition as a result of an alleged work injury on September 12, 2011.

The remainder of the body of this decision involves File No. 5043360 and the alleged injury date of December 26, 2012. Claimant has failed to prove her work activities on December 26, 2012 and/or December 27, 2012 arose out of and in the course of her employment at Tyson.

Firstly, claimant's upper extremity and carpal tunnel syndrome pre-dated her employment as indicated earlier in this decision. The activities claimant performed on

December 26 and December 27 were for very short periods of time on each day. Claimant also worked at a very slow pace. Claimant did not sustain any work injuries to her right upper extremity on December 26, 2012.

With respect to claimant's right shoulder on December 26, 2012, claimant was on the clock for 1 hour and 50 minutes, but she was only on the line for 30 to 40 minutes. (Tr. II, p. 88) Ms. Hanson testified she told claimant to use her left hand only. The supervisor did not recall ever seeing claimant use her right hand when she was performing the sealer job. (Tr. II, p. 88) Claimant complained of pain; she indicated she could not perform her job; she signed a declination of light duty; and went home. (Tr. II, p. 88)

On December 27, claimant returned to the plant in Independence. Claimant remained in the plant for 2 hours and 45 minutes. She worked for 1 hour at most. (Tr. II, p. 89) She worked at her own pace. However, claimant reported to Ms. Hanson that she could not perform her assigned job duties due to excessive pain. Claimant signed a declination of light duty work and left the plant. She never returned to work at the Independence plant. (Tr. II, pp. 89-90)

Claimant did not report a separate incident occurring on either December 26 or December 27. At best, any difficulties claimant experienced on those two days were problems that were mere continuations of the pre-existing conditions claimant had and which had nothing to do with claimant's employment at Tyson.

Therefore, in light of the foregoing, claimant has failed to prove she is entitled to any benefits from either File No. 5043359 or File No. 5043360.

ORDER

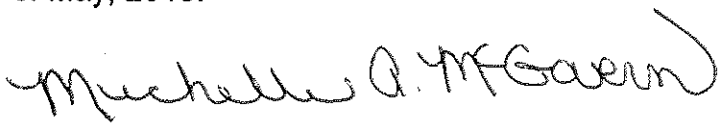
THEREFORE, IT IS ORDERED:

Claimant takes nothing in File No. 5043359.

Claimant takes nothing in File No. 5043360.

Each party shall pay her/its own costs.

Signed and filed this 14th day of May, 2015.



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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.