BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

NORMA L. SANCHEZ,	FILED	
Claimant,	JAN 31 2019	File Nos. 5065197, 5065198
vs.	WORKERS COMPENSATION	ARBITRATION
JOHN DEERE DAVENPORT WORKS,		DECISION
Employer, Self-Insured, Defendant.		Head Note Nos.: 1100, 1108

STATEMENT OF THE CASE

The claimant, Norma Sanchez, filed two petitions for arbitration and seeks workers' compensation benefits from John Deere Davenport Works, a self-insured employer. The claimant was represented by Jerry Soper. The defendant was represented by Troy Howell.

The matter came on for hearing on February 20, 2018, before deputy workers' compensation commissioner Joe Walsh in Davenport, Iowa. The record in the case consists of joint exhibits 1 through 10, Claimant's Exhibits 1 through 18 and Defense Exhibits A through T. The claimant testified under oath at hearing. Heath Billingsley also testified under oath on behalf of the claimant. Lester Kelty, M.D., testified on behalf of the employer. A number of witnesses testified via deposition, including the claimant, Shawn Buckley, Thomas Lingafelter, Michael Perry and Zachary Waters. Victoria Fickel was appointed the official reporter for the proceedings. The hearing lasted until 7:01 p.m. The matter was fully submitted on April 2, 2018, after helpful briefing by the parties.

ISSUES & STIPULATIONS

File No. 5065197:

The parties submitted the following issues for determination:

1. The primary issue is whether the claimant sustained an injury to her left arm on April 5, 2016, which arose out of and the course of her employment.

2. The defendant disputes that the alleged injury is a cause of any temporary or permanent disability.

3. The claimant alleges she is entitled to healing period benefits from September 19, 2016, through January 26, 2017. The defendant disputes this, however, the defendant concedes that claimant was off work during this period of time.

4. The claimant alleges she is entitled to permanent disability benefits for her left arm. The defendant disputes her entitlement to any benefits.

5. Most elements of the rate or stipulated, however, the parties do dispute the number of exemptions to which claimant is entitled.

6. Claimant seeks payment of independent medical evaluation (IME) expenses.

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship at the time of the alleged injury.

2. Medical expenses are no longer in dispute. In the event that the employer is found to be liable for the alleged injury, the employer has agreed to hold claimant harmless from any causally related medical expenses.

3. If the defendant is responsible for the alleged injury, the claimant is entitled to healing period benefits from September 19, 2016, through January 26, 2017.

4. The commencement date for any permanent disability benefits is January 27, 2017.

5. The claimant's gross earnings were $908.34 per week and she was single at the time of the alleged injury.

6. Affirmative defenses have been waived.

7. Defendant has paid and is entitled to a credit under section 85.38(2) in the amount of $7,088.00.

File No. 5065198:

The parties have submitted the following issues for determination.

1. The primary issue is whether the claimant sustained an injury to her left shoulder on June 17, 2016, which arose out of and the course of her employment.

2. The defendant disputes that the alleged injury is a cause of any temporary or permanent disability.

3. The claimant alleges she is entitled to healing period benefits from January 27, 2017, through April 7, 2017. The defendant disputes this, however, the defendant concedes that claimant was off work during this period of time.

4. The claimant alleges she is entitled to industrial disability benefits for her left shoulder (body as a whole). The defendant disputes her entitlement to any benefits.

5. Most elements of the rate or stipulated, however, the parties do dispute the number of exemptions to which claimant is entitled.

6. Claimant seeks payment of IME expenses.

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship at the time of the alleged injury.

2. Medical expenses are no longer in dispute. In the event that the employer is found to be liable for the alleged injury, the employer has agreed to hold claimant harmless from any causally related medical expenses.

3. If the defendant is responsible for the alleged injury, the claimant is entitled to healing period benefits from January 27, 2017, through April 7, 2017.

4. The commencement date for any permanent disability benefits is April 8, 2017.

5. The claimant's gross earnings were $923.08 per week and she was single at the time of the alleged injury.

6. Affirmative defenses have been waived.

7. Defendant has paid and is entitled to a credit under section 85.38(2) in the amount of $4,332.00.

FINDINGS OF FACT

At the time of hearing Norma Sanchez resided in Eldridge, Iowa with her boyfriend, Heath Billingsley. Ms. Sanchez testified live and under oath at hearing. Her credibility is a key dispute in the case. While there was nothing about her demeanor which caused the undersigned concern regarding her truthfulness, much of her testimony is not consistent with other credible evidence in this record.

Norma Sanchez began working for John Deere (hereafter, "Deere") on

September 12, 2005. She was hired as an assembler and she has not had any previous injuries or conditions in her left arm or shoulder. At the time of her alleged injuries, she was a utility worker still performing assembly work. Essentially, a utility worker floats to various jobs based upon production needs. In 2016, she resided with her boyfriend, Mr. Billingsley, as well as her daughter and granddaughter, whom she testified she supported through much of 2016 and 2017.

Alleged April 5, 2016, Work Injury

Ms. Sanchez alleges she injured her left wrist and hand on April 5, 2016, when she was operating a "tugger." She described the incident in detail at hearing. (Transcript, page 27) She was using a tugger to haul a cart with two cooling packs on it. She lifted her heel off the center brake pad and the tugger shut down while the cart with the cooling packs kept moving. She testified the tugger handle "jerked" causing pain in her left wrist. (Tr., pp. 28-31) A photograph of the type of tugger is in the record. (Claimant's Exhibit 18, pp. 25-26) She then testified that later the same day, she went to Deere Occupational Health. (Tr., p. 31) She testified that no one asked her how the injury happened, rather, the Medical Department asked a series of questions. She testified that she did not tell anyone about the tugger incident.

There are two entries in the Deere Occupational Health records from April 5, 2015. The first entry was at 10:16 a.m., and was recorded by an R.N.

> Employee presented to clinic reporting bilateral hand swelling, pain and tingling, noting that specifically her index fingers are swollen today, however the swelling has decreased in her hands. Employee also stating that she has throbbing pain in her left hand that radiates up her arm, causing tingling. Employee notes that she has had this swelling in the past but did not report it, stating that the swelling always went down so she didn't worry about it. Employee states she has recently changed jobs but that all her work requires her to use her hands a lot. Employee states she uses Tylenol for the pain.

(Joint Ex. 1, p. 15)

The second entry was at 10:30 a.m., with a nurse practitioner.

> S: Norma presents ambulatory to OH today for evaluation of bilateral index fingers. Reports discomfort, swelling in bilateral index fingers. Reports discomfort in left hand along first digit carpals, posterior aspect only, as well as reporting this discomfort continues up radial aspect of forearm into middle of right upper arm, over ulnar aspect of right upper arm. Denies impactful, jarring event. Denies BUE being hit, bumped, etc. States s/s began about 2 weeks ago. Norma reports she works utility. States she began a new position about 2 ½ weeks ago but no longer

> works that job as of yesterday (4/4/16). Reports that job included her pulling 4 hoses through a hole on a rubber grommet, using her left hand. States she was working 8-9 hour days. Denies apply [*sic*] ice to area. Denies stretching. Reports she has been taking either OTC NSAID or OTC Tylenol daily for discomfort – dose she report [*sic*] for ibuprofen was 200 mg daily when taken. Denies shoulder or neck pain. States she is right-handed.

(Jt. Ex. 1, pp. 14-15)

An incident report was filled out dated April 5, 2016. (Jt. Ex. 1, p. 16) The report lists an injury date of March 14, 2016, and sets out details of the injury in a manner consistent with what is documented in the Occupational Health records. (Jt. Ex. 1, p. 16) It is signed by Ms. Sanchez.

Ms. Sanchez further testified in her deposition that, on April 5, 2016, she spoke with her union steward Shawn Buckley and asked him to file a "near miss report", which is a type of incident report to document an accident or near accident. (Def. Ex. K, Sanchez Deposition, pp. 46, 52)

Mr. Buckley testified via deposition. His testimony was under oath. He testified that he did not have any knowledge of Ms. Sanchez's alleged tugger incident and he had no recollection of her asking him to file a near miss report. (Defense Ex. L, Buckley Depo, p. 19) As her union steward, it was considered part of his job duties to file such a report on behalf of a bargaining unit member.

On April 8, 2016, Lester Kelty, M.D., from Occupational Health performed a job site visit to investigate her complaints from April 5, 2018.

> EE was with us and showed us what she did. Her primary job at the time was putting hoses and parts on the cooling unit. She does have to push the hoses through a rubber grommet. She uses her left hand and then pulls the hose through. She also attaches parts to the unit. The hardest part of the job would be routing hoses. The EE does have to use a step to reach some of her work activity. I did not see any part of the job that would cause a specific injury.

(Jt. Ex. 1, p. 14) It is noted that Dr. Kelty testified live at hearing. He was Deere's on-site plant medical doctor in 2016. (Tr., pp. 107-111) He has since retired and has no ongoing relationship with Deere. He specifically testified that Ms. Sanchez never mentioned a tugger incident during the job visit on April 8, 2016. (Tr., p. 117) He is found to be a credible witness.

On April 12, 2016, Ms. Sanchez returned to Occupational Health again. Her visit is documented by Mary Huesmann, NP, the same nurse who documented her original

visit on April 5, 2016, at 10:16 a.m. At this time, Ms. Sanchez denied any right hand or arm problems. "States she forgot to mention that she reported a near miss last week prior to coming OH – reporting a cart had stopped that she was pulling a tugger and the handle turned away from her when it stopped, describes as 'yanked the handle.'" (Jt. Ex. 1, pp. 13-14)

On April 15, 2016, Ms. Sanchez signed a Supplementary Record of Occupational Injury and Illnesses. (Jt. Ex. 1, p. 17) The copy of this report in the record is poor quality. It appears to use the same date of injury as the original incident report, March 14, 2016. It further documents that her injury was caused by repetitive job activities, such as installing brackets, removing bolts and hoisting parts. (Jt. Ex. 1, p. 17) Again, there is no mention of the tugger incident.

On April 28, 2016, she followed up for her left wrist and arm pain, noting that it had improved. (Jt. Ex. 1, pp. 11-12) On May 3, 2016, the safety director hand-delivered a denial letter to her, denying that the injury arose out of and in the course of her employment primarily on the basis of the on-site inspection by Dr. Kelty. (Cl. Ex. 1) This denial did not factor in Ms. Sanchez's claim that the injury happened on April 5, 2016, in the alleged tugger incident. It was based upon the theory that her pain came on gradually from overuse. On May 4, 2016, Ms. Sanchez returned to Occupational Health and informed Dr. Kelty, for the first time, about the alleged tugger incident. "She today tells me that she had a near miss operating a tugger." (Jt. Ex. 1, p. 11) He promised to investigate this and he did. On May 18, 2016, Dr. Kelty documented the results of an MRI.

> MRI findings of EE's wrist show possible tear of the radial collateral ligament. Exam at her last visit show [*sic*] symptoms on the ulna side of the wrist. The physical findings and the MRI findings do not match.

(Jt. Ex. 1, p. 11)

On May 25, 2016, Ms. Sanchez visited Occupational Health again. At that time, Dr. Kelty better documented his concern that the MRI findings do not match the physical findings. "I have reviewed the EE's complaint of pain in the L wrist. The pain is on the ulna side of the wrist. The MRI does not show any pathology in that area." (Jt. Ex. 1, p. 5) At hearing, Dr. Kelty testified that he had examined the tuggers. He opined that he did not believe "the tugger force was great enough to cause a serious injury to the wrist." (Tr., pp. 124-25) "Usually to get an acute tear of this complex requires a significant amount of force. Typically, like falling on an outstretched hand." (Tr., p. 126)

On June 17, 2016, Deere delivered a new letter to the claimant denying that her injury arose out of and in the course of her employment based upon the tugger incident. (Cl. Ex. 2, p. 2) The letter described in detailed fashion the reasons for the denial.

She was treated for her left hand and wrist by Tyson Cobb, M.D., beginning in

July 2016. He diagnosed "TFCC tear, left, with DRUJ instability." (Jt. Ex. 4, p. 48) He performed surgery in September 2016 and released her on December 16, 2016. (Jt. Ex. 4, p. 71) She had a good outcome, ultimately releasing her to full duty. Later, Dr. Cobb signed an opinion letter for defense counsel which outlined his expert medical opinions, including his opinion that he could not find medical causation between the alleged tugger incident and her left wrist condition. (Jt. Ex. 4, pp. 76-77)

Based upon the record before the agency, the claimant has failed to meet her burden of proof that she suffered an injury on April 5, 2016, which arose out of and in the course of her employment at Deere. Even if claimant did experience pain on that date from the alleged tugger incident, claimant has failed to prove that the alleged injury resulted in any temporary or permanent disability or any specific medical expenses.

Alleged June 17, 2016, Work Injury

Ms. Sanchez alleges she injured her left shoulder on Friday, June 17, 2016. This was the Friday before Father's Day weekend. She testified she felt a sudden onset of pain in her left shoulder when she was picking a fan guard out of a Contico. (Tr., p. 40) A Contico is essentially a large box with separations which contain parts. She continued working although she testified she told her co-worker and union steward, Shawn Buckley. (Tr., pp. 72-73) Mr. Buckley was with her at the time the injury allegedly occurred. In fact, he was training her on this job at the time. Ms. Sanchez testified that Mr. Buckley immediately notified Tom Lingafelter, the supervisor. (Tr., pp. 42, 72-73) Mr. Buckley, in his deposition testimony, did not support this version of events. In fact, he contradicted her testimony. (Def. Ex. L, Buckley Depo, p. 21-24) Mr. Lingafelter also contradicted claimant's testimony. (Def. Ex. M, Lingafelter Depo, p. 29-31)

The following day, claimant and her boyfriend, Heath Billingsley, had a kayaking trip planned for Father's Day weekend.[1] (Tr., p. 43) Ms. Sanchez testified that she was injured on Friday, June 17, 2016, but she chose to go kayaking anyway because she had already scheduled it as a Father's Day gift for Mr. Billingsley. (Tr., p. 43) At hearing, Ms. Sanchez called her boyfriend, Mr. Billingsley to testify on her behalf. He confirmed that she did not injure herself during the kayaking trip. (Tr., p. 100) I find, however, Mr. Billingsley's testimony to be quite confusing at best. He seemed to testify that Ms. Sanchez had shoulder problems for some time prior to June 17, 2018.

> A. She had difficulty raising it [left shoulder] up, her arm up to a certain point. It caused her, like, pain.
>
> Q. Was this before or after the canoeing incident, the kayaking?

[1] There is some confusion in the record as to whether this was a kayaking or a canoeing trip. It appears the claimant was kayaking based upon her testimony. (Tr., p. 43)

Q. Before the kayaking?

A. Yeah.

Q. She had trouble lifting her shoulder?

A. Yeah. Yeah.

Q. Did you notice any difference after the kayaking?

A. It was - - she still had the same problem.

(Tr., p. 98) He went on to say that his recollection was "blurred." (Tr., p. 99)

Claimant's counsel attempted to clarify this testimony, but it only got worse.

Q. I'm just surprised that you said she hurt her shoulder. She couldn't lift herself - - her hand over - - her arm over - - her left arm over her - -

A. Yeah.

Q. - - head?

A. Yeah. If she tried to raise her arm up over her head, she couldn't do it, 'cause it just hurt her too bad.

Q. Okay. And was that the way she was before you went canoeing?

A. Yeah.

Q. If she hurt herself on Friday - -

A. Uh-huh.

Q. - - and you went canoeing on Saturday, you are saying her shoulder was that way on Thursday or before?

A. Yeah, it was.

Q. Was it worse after that Friday when she claims she hurt herself?

A. No. I mean - - after Friday, I mean, it was the same.

Q. Okay.

A. It was the same.

(Tr., pp. 100-101) It appears Mr. Billingsley became somewhat confused during his testimony. He appeared nervous, talking fast and repeatedly talking the same time as claimant's counsel. His cell phone went off during his testimony and he appeared flustered. This testimony, however, is damaging and ultimately contradictory to claimant's allegation that she hurt herself on June 17, 2016, while at work.

Ms. Sanchez returned to work on Monday June 20, 2017. She did not go to Occupational Health that day. She waited until Tuesday June 21, 2016. "Employee presented to clinic reporting left shoulder pain x 3 days. RN provided ice to the area x 15 minutes." (Jt. Ex. 1, p. 5) No history is recorded about how the pain developed. She returned to Occupational Health on July 1, 2016, and, for the first time, reported the details of the alleged injury. (Jt. Ex. 1, p. 5) She returned and was evaluated by a nurse practitioner on July 5, 2016. (Jt. Ex. 5, p. 4) She saw Dr. Kelty for the first time on July 8, 2016. (Jt. Ex. 1, p. 3) Dr. Kelty performed another job site visit and ultimately determined that he could not find any work activity that would have caused a labral tear. (Jt. Ex. 1, p. 2; Tr., p. 131) Deere formally denied the claim on September 14, 2016. (Cl. Ex. 3, p. 3)

Ms. Sanchez treated for her shoulder with John Hoffman, M.D., beginning on August 16, 2016. He diagnosed "glenoid labrum lesion of left shoulder." (Jt. Ex. 7, p. 88) After conservative care failed, he performed an arthroscopic surgery on February 1, 2017. (Jt. Ex. 8, p. 112) Again, she had a good outcome from her surgery and was ultimately returned to work fully duty effective April 10, 2017. (Jt. Ex. 7, p. 104) Dr. Hoffman later signed a report for defense counsel setting forth his expert medical opinions, including his opinion that he could not find medical causation between the alleged June 17, 2016, work injury and her left shoulder condition. (Jt. Ex. 7, pp. 108-109)

Based upon the record before the agency, the claimant has failed to meet her burden of proof that she suffered an injury on June 17, 2016, which arose out of and in the course of her employment at Deere. Even if claimant did experience pain on that date from the alleged incident, claimant has failed to prove that the alleged injury resulted in any temporary or permanent disability or any specific medical expenses.

CONCLUSIONS OF LAW

The primary question submitted is whether the claimant has met her burden of proof that she suffered any injury on either April 5, 2016, or June 17, 2016. By a preponderance of evidence, I find that claimant has failed to meet her burden of proof.

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.

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.

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).

Ultimately, there are simply too many holes in claimant's cases for her to meet her burden of proof on either claimed injury. The burden of proof is on claimant and for the reasons set forth in the findings of fact, she is simply unable to meet her burden given the record before the agency. The only evidence in the record which truly supports her claims is her own testimony. Virtually all of the other corroborating evidence weighs against either the finding of an injury on either date in question, or medical causation. Claimant's counsel argued at hearing that claimant is soft-spoken and possibly naïve. She did not aggressively document her claims initially, causing a flawed record. While it is possible that the majority of the corroborating evidence is misleading for this reason, it is not probable.

ORDER

THEREFORE IT IS ORDERED

Claimant takes nothing.

Each party shall pay their own costs.

Signed and filed this 31st day of January, 2019.

JOSEPH L. WALSH
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.