BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ALUEL BIOR, Claimant, vs. HORMEL, Employer, Self-Insured, Defendant.	:	File No. 20003216.01 ARBITRATION DECISION Head Notes: 1402.30, 2502

STATEMENT OF THE CASE

Claimant, Aluel Bior, filed a petition in arbitration seeking workers' compensation benefits from Hormel, self-insured employer, as defendant. This matter was heard on September 9, 2021, with a final submission date of September 30, 2021.

The record in this case consists of Joint Exhibits 1 through 11, Claimant's Exhibits 1 through 4, Defendant's Exhibits A through K, and the testimony of claimant.

Serving as interpreter was Dhoal Larjin.

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

1. Whether claimant sustained an injury that arose out of and in the course of employment.

2. Whether the injury is a cause of a temporary disability.

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

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

5. The commencement date of permanent partial disability benefits.

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

7. Costs.

FINDINGS OF FACT

Claimant was 49 years old at the time of hearing. Claimant was born in South Sudan in Africa. Claimant came to the United States in 1995. (Defendant's Exhibit K, p. 134) Claimant testified she did not attend school. (Ex. K, p. 135) Claimant said her first language is Dinka. Claimant said she took ESL classes. Claimant speaks English. She does not read or write English. Claimant had an interpreter at hearing. (Ex. K, p. 133)

Claimant has worked with numerous meat production facilities performing production line work. (Ex. C-G)

Claimant began with Hormel in October of 2019. Claimant testified her job required her to put meat in a box on a production line. (Ex. K, p. 135)

Claimant's prior medical history is relevant. A Minnesota work comp claim indicates claimant alleged an injury to her bilateral wrists, hands and neck on October 10, 2001, while employed with Dairy Farmers. (Ex. A, p. 1) That claim was denied. Claimant testified she was not injured at Dairy Farmers. (Ex. K, p. 139; Tr. pp. 42-44)

Claimant alleged a work-related left shoulder injury while employed with Farmland Foods in October of 2010 and December of 2014. (Ex. C, pp. 21, 23) Claimant was evaluated by Sunil Bansal, M.D., in June of 2016 regarding the left shoulder injury with Farmland. Claimant was, at that time, assessed as having adhesive capsulitis in the left shoulder. Dr. Bansal found claimant had an 8 percent permanent impairment to the upper extremity, converting to a 5 percent permanent impairment to the body as a whole. (Joint Exhibit 7, p. 54) Dr. Bansal restricted claimant to lifting no more than 10 pounds occasionally and 5 pounds frequently on the left. (JE 7, p. 54) Claimant settled her left shoulder injury with Farmland for $35,000.00. (Ex. B, pp. 5-8)

On June 1, 2015, claimant was taken off work indefinitely due to her left knee problems while employed with Farmland. (Ex. C, pp. 27, 34)

Claimant did not work between 2015 and 2017. (Tr. p. 46) In June of 2015 claimant applied for Social Security Disability benefits. Claimant alleged she was unable to work due to arthritis in her knees and migraine issues. (Ex. H, p. 74) Claimant was denied benefits and appealed that decision. Claimant's appeal was denied, and claimant was found to have permanent restrictions allowing her to work in the light work level. (Ex. H, pp. 73, 80)

In March of 2018, claimant injured her left hand/thumb and bilateral shoulders when pulling frozen meat at Tyson. (Ex. F, p. 47)

In June of 2019, claimant again applied for Social Security Disability benefits due to bilateral knee pain and a left shoulder condition. Claimant was found not disabled in a 2019 decision. (Ex. H, p. 99)

Claimant began her employment with Hormel in October 2019. She indicated on her employment form that she had no prior problems with her right shoulder, knees, neck, or back. (Ex. G, p. 66)

Claimant testified that on November 9, 2019, she tripped on a pallet and fell on her knees, left wrist and right shoulder. (Tr. p. 24; JE 1)

Claimant was evaluated by a Hormel plant nurse after falling on her knees and left wrist. Claimant indicated she also injured her right shoulder. Claimant was given ice packs and over-the-counter pain medication. (JE 2, p. 2)

Claimant returned to the Hormel plant nurse on approximately nine other occasions with complaints of right shoulder and left hand pain. Claimant had no swelling or bruising on any of those dates. Claimant was treated with ice and told to use over-the-counter medication for pain. Claimant's knee pain seemed to have resolved by December 27, 2019. (JE 2, pp. 2-3)

Claimant was terminated from Hormel on January 4, 2020. Personnel records from Hormel indicate claimant "failed probation." (Ex. G, p. 69)

On March 11, 2020, claimant was evaluated at the Iowa Arthritis and Osteoporosis Center by Cory Pittman, M.D., for evaluation of myalgias and possibly polymyalgia rheumatica. Claimant's pain began 2-3 years prior, but became worse in the winter of 2019. Claimant was assessed as having generalized pain, most severe in the knees and possible plantar fasciitis. (JE 4, pp. 12-15)

Claimant returned to Dr. Pittman on March 30, 2020. Claimant was assessed as having rheumatoid arthritis with symptoms in the toes, hand pain and right wrist swelling. Claimant was also assessed as having osteoarthritis in the knees and lumbar spine. Claimant was treated with medication. (JE 4, pp. 18-22)

Claimant returned to Dr. Pittman on May 5, 2020, for osteoarthritis and rheumatoid arthritis. Claimant had pain in the ankles, feet and fingers. Claimant was treated with medication. (JE 4, pp. 25-29)

Claimant was seen at Unity Point in West Des Moines by Thomas Woodard, D.O., on June 1, 2020, for left wrist pain, right arm pain and shoulder pain. Claimant indicated problems occurred as a result of a work injury in the fall of 2019. Claimant was assessed as having arthralgia in the left wrist, rheumatoid arthritis and right upper arm joint pain. Claimant complained of left wrist pain following a benign exam. (JE 5, p. 33) Claimant was treated with medication. (JE 5, pp. 33-34)

In a January 22, 2021 report, Charles Wenzel, D.O., gave his opinions of claimant's condition following an IME. Claimant denied any past medical history, other than her left shoulder surgery. Claimant denied prior right shoulder problems, left hand problems or bilateral knee pain. (Ex. I, p. 101) Dr. Wenzel noted claimant's statements

at exam conflicted with past medical records showing, in part, a long history of bilateral knee pain, filing for Social Security Disability benefits due to bilateral knee pain, and a history of arthritis. (Ex. I, pp. 107-108)

Based on claimant's numerous inconsistencies on exam when compared with her prior medical records, as well as a five-month gap in treatment from the time of her termination from Hormel, Dr. Wenzel was unable to state that claimant's bilateral shoulder, bilateral knee and bilateral upper extremity symptoms were related to a November 9, 2019 work injury. (Ex. I, pp. 109-110) He also found claimant had no permanent impairment nor permanent restrictions. (Ex. I, p. 111)

In a January 26, 2021 IME report, Dr. Bansal gave his opinions of claimant's condition following an IME. Claimant had right shoulder and neck pain. Claimant also had pain in her left wrist and bilateral knee pain. Dr. Bansal found claimant's left wrist pain was caused by her November 9, 2019, fall at work. He recommended an MRI. In the absence of further treatment, he found claimant at MMI as of November 11, 2020. He recommended an MRI of the left wrist. He opined claimant had a 5 percent permanent impairment to the left upper extremity. He recommended claimant limit her lifting on the left to 10 pounds. (Claimant's Exhibit 1, pp. 1-27)

CONCLUSION OF LAW

The first issue to be determined is whether claimant has carried her burden of proof she sustained an injury that arose out of and in the course of employment on November 9, 2019.

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. 6.904(3).

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" refer 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).

Claimant alleges an injury to her bilateral knees, her right shoulder and her left wrist.

As detailed above, claimant has a long history of chronic bilateral knee problems. Claimant filed for Social Security Disability benefits on two occasions, indicating she was unable to work due to pain and arthritis in her knees. (Ex. H, pp. 74, 99) Claimant has also been assessed as having osteoarthritis and rheumatoid arthritis. (JE 4, pp. 12-15, 18-22)

Two experts have opined regarding claimant's alleged work injury at Hormel. Neither Dr. Bansal nor Dr. Wenzel opined that claimant had a bilateral knee condition or right shoulder injury caused by her alleged fall at Hormel on November 9, 2019. (Ex. I, pp. 109-111; Ex. 1, p. 26)

Claimant has a long history of chronic bilateral knee pain. Claimant has been assessed on numerous occasions as having osteoarthritis and rheumatoid arthritis. No expert has opined that claimant's alleged injury on November 9, 2019, caused her bilateral knee or right shoulder condition. Given this record, claimant has failed to carry her burden of proof she sustained a bilateral knee injury or right shoulder injury that arose out of and in the course of employment with Hormel.

Regarding the left wrist injury, Dr. Wenzel found that claimant's alleged left wrist injury was not caused by her work at Hormel. (Ex. I, pp. 109-111) Dr. Bansal found that claimant's left wrist sprain was caused by her alleged injury at Hormel. (Ex. 1, p. 26) Dr. Bansal's opinion is problematic for several reasons. Dr. Bansal assessed claimant as having "characteristics" of a cartilaginous injury. It is unclear what this actually means. It is also unclear how he assigned a permanent impairment and permanent restrictions based on an injury referred to as "characteristics." (Ex. 1, p. 26)

As noted above, on March 30, 2020, claimant was evaluated by Dr. Pittman. He assessed claimant as having left wrist pain caused by rheumatoid arthritis. (JE 4, p. 21) On May 5, 2020, Dr. Pittman also found that claimant's wrist condition was due to rheumatoid arthritis. (JE 4, pp. 27-28)

As noted above, I found Dr. Bansal's causation opinion regarding the left wrist to be unclear. Dr. Bansal's causation opinion regarding the left wrist also offers no explanation how claimant's rheumatoid arthritis affects his causation opinion. Based on this, Dr. Bansal's opinion regarding causation is found to be not convincing.

In response to interrogatories, claimant was asked to identify what activity she was limited to following her alleged injury at Hormel. Claimant indicated she could not move her right hand. There is nothing in claimant's response to discovery indicating the injury impacted her left hand or wrist. (Ex. J, p. 129)

Dr. Bansal's opinion regarding causation is found not convincing. Claimant has been assessed as having problems in her wrist caused by rheumatoid arthritis. Claimant did not identify any problems in her left wrist in discovery. Dr. Wenzel's opinion regarding claimant's left wrist problems is that they were not caused by her alleged injury at Hormel. Given this record, claimant has failed to carry her burden of proof she sustained an injury to her left wrist that arose out of and in the course of employment with Hormel.

As claimant failed to carry her burden of proof she sustained an injury to her bilateral knees, right shoulder and left wrist that arose out of and in the course of employment, all other issues, except for reimbursement of the IME, are found to be moot.

The final issue to be determined is whether claimant is entitled to reimbursement for costs associated with Dr. Bansal's IME.

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.

Dr. Wenzel, defendant's expert, issued a report regarding claimant's permanent impairment on January 22, 2021. Dr. Bansal, the expert retained by claimant, issued a report regarding claimant's permanent impairment on January 26, 2021. Given this chronology, claimant is entitled to reimbursement for Dr. Bansal's IME.

ORDER

Therefore, it is ordered:

That claimant shall take nothing in the way of benefits from this matter.

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

That both parties shall pay their own costs.

Signed and filed this 29th day of December, 2021.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Greg Ebgers (via WCES)

Abigail Wenninghoff (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.