BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

REMIZA KAJTAVIC, Claimant, vs. TYSON FOODS, INC., Employer, Self-Insured, Defendant.	:	File No. 1655696.01 ARBITRATION DECISION Head Note Nos.: 1108.50, 1402.40, 1803, 2907

STATEMENT OF THE CASE

Remiza Kajtazovic, claimant, filed a petition in arbitration seeking workers' compensation benefits from Tyson Foods, Inc., self-insured employer as defendant. Hearing was held on December 3, 2021. This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the declaration of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via Internet-based video. Accordingly, this case proceeded to a live video hearing via CourtCall with all parties and the court reporter appearing remotely.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. It should be noted that at the time of the hearing defendant agreed to reimburse claimant for the independent medical examination. All 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.

Claimant, Remiza Kajtazovic was the only witness to testify live at trial. Ms. Kajtazovic testified via the use of an interpreter. The evidentiary record also includes joint exhibits JE1-JE8, claimant's exhibits 1-4, and defendant's exhibits A-F. All exhibits were received without objection. The evidentiary record closed at the conclusion of the arbitration hearing.

The parties submitted post-hearing briefs on December 30, 2021, at which time the case was fully submitted to the undersigned.

ISSUES

The parties submitted the following issues for resolution:

1. The amount of permanent partial disability benefits that claimant is entitled to receive.
2. Assessment of costs.

FINDINGS OF FACT

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

Claimant, Remiza Kajtazovic, was 48 years old at the time of hearing. She was born in Bosnia where she received an 8th grade education. She has not received any additional education. Ms. Kajtazovic testified that her English skills are sufficient to allow her to perform her normal shift at Tyson, deposit a check at her bank, or shop for groceries without an interpreter. However, for more complex tasks such as meeting with human resources at work, applying for a loan or a job she needs an interpreter. (Testimony)

Ms. Kajtazovic obtained her first job at the age of 24, when she began working for Tyson Foods, Inc. (f/k/a IBP) in 1997. Ms. Kajtazovic worked at Tyson Foods, Inc. ("Tyson") until 2000 when she voluntarily left for a few years for family reasons. Ms. Kajtazovic returned to work at Tyson in 2003 and was still working there at the time of the hearing. (Testimony)

When Ms. Kajtazovic returned to work in 2003, she did not work in the main plant, she worked in the "KPR" processed foods facility which was next door to the main plant. On January 24, 2017, Ms. Kajtazovic sustained a work-related injury to her low back. At the time of the injury, she picked up a box and felt sudden pain in her low back. (Testimony; JE3, p. 4)

Initially Ms. Kajtazovic treated with the on-site medical provider, Robert L. Gordon, M.D. She saw him on January 25, 2017, and reported lumbosacral pain along with left leg and right anterior thigh region pain. Dr. Gordon recommended an MRI of the lumbar spine. She was allowed to return to full duty work with caution. (JE6, pp. 1-2; JE7)

A February 8, 2017, MRI demonstrated evidence of moderate sized central disc protrusion at L4-L5 with compression of the ventral thecal sac; L5-S1 disc bulge with small central disc protrusion with annular tear; evidence of paracentral right sided disc extrusion at L2-L3 extending above the disc level with minimal encroachment of the ventral thecal sac. The MRI report noted that the dominant finding appeared to be at L4-L5. Dr. Gordan recommended evaluation with a neurosurgeon. (JE1; JE6, pp.3-5)

Ms. Kajtazovic saw Chad A. Abernathey, M.D., on April 28, 2017. He noted she had a history of chronic history of low back pain and intermittent lower extremity pain, left greater than right. She has not received relief with conservative treatment. Dr. Abernathey did not recommend an aggressive neurosurgical stance due to her paucity

of clinical and radiographic findings. He recommended additional conservative treatment. (JE5, p. 1)

On July 31, 2018, Ms. Kajtazovic underwent another MRI of the lumbar spine. The impression was degenerative changes in the lumbar spine, worse at L4-5 with severe spinal canal stenosis. (JE8)

Ms. Kajtazovic returned to Dr. Abernathey on August 29, 2018. She reported that approximately two months ago she developed more acute symptoms with severe left leg pain. She has pain, numbness, and tingling along the lateral aspect of the left thigh calf and foot with weakness on dorsiflexion of the ankle and toes. Dr. Abernathey discussed alternatives of conservative management versus surgical intervention. Ms. Kajtazovic wanted time to consider her options. (JE5, p. 2)

On October 12, 2018, Ms. Kajtazovic returned to Dr. Abernathey and reported that she could no longer tolerate her low back pain and left sciatica and wanted to proceed with surgery. On that same date, Dr. Abernathey replied to a letter from the defendant. Dr. Abernathey opined, based on oral history, that Ms. Ms. Kajtazovic's current lumbar complaints are related to the injury of January 24, 2017. He indicated that her work activities caused or physically worsened her pre-existing lumbar condition. Dr. Abernathey stated that the January 24, 2017 work incident was a temporary aggravation of the pre-existing lumbar condition. He related the need for L4-5 microdiscectomy to the work injury. (JE5, pp. 3-5)

Dr. Abernathey performed a left L4-L5 partial hemilaminectomy, diskectomy, microscope operation on October 30, 2018. (JE5, pp. 6-7)

Following surgery Ms. Kajtazovic followed-up with Dr. Abernathey. She had excellent relief of her preoperative pain syndrome and reported she was quite pleased with her surgical result. She made excellent progress with physical therapy. The therapists recommended an additional three to five weeks. On December 12, 2018, Dr. Abernathey gave Ms. Kajtazovic permission to return to full duty work activities as of January 14, 2019. (JE5, p. 7)

On May 1, 2019, Dr. Abernathey placed Ms. Kajtazovic at maximum medical improvement (MMI). He assigned 7 percent whole body impairment based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. He felt no further treatment was indicated for the January 24, 2017 injury. Dr. Abernathey stated that she did not have any permanent restrictions as the result of the January 24, 2017 work injury. (JE5, p. 8; Def. Ex. E)

At the request of her attorney, Ms. Kajtazovic underwent an IME with Richard L. Kreiter, M.D., on October 13, 2021. His diagnoses include postoperative left hemilaminectomy L4-5 with discectomy, removal of herniated disc with continued chronic pain secondary to facet joint hypertrophy, nerve root irritation. He noted she was neurologically intact. Dr. Kreiter opined that Ms. Kajtazovic's work activity did materially aggravate any pre-existing conditions she had at the L4-5 level. He reported that Ms. Kajtazovic believes she reached MMI 6 to 12 months ago. Dr. Kreiter stated, "[s]he is able to work on a regular basis; fortunately the work place does accommodate very restricted lifting for her." (Cl. Ex. 1, p. 1) Dr. Kreiter assigned 13 percent whole

person impairment. He based his rating on page 384, table 15-3 under lumbar spine injury DRE-category 3 of the AMA Guides to the Evaluation of Permanent Impairment. He felt that restrictions were needed for Ms. Kajtazovic. The restrictions were to allow alternating walking, standing, and sitting as tolerated. She needs to avoid a chronically flexed forward posture or significant bending or twisting at the waist level. Lifting should be not in excess of 25 to 30 pounds on only a very occasional basis utilizing proper body mechanics. Dr. Kreiter recommended additional conservative treatment including anti-inflammatory medications, home exercise program, and perhaps joining a YMCA. He noted a properly fitting lumbosacral orthosis to be used at work would also remind her to be cautious. He hoped that preventative measures will help her to avoid any back surgy in the future, which would likely include some type of fusion. (Cl. Ex. 1)

Ms. Kajtazovic testified she is happy that she underwent surgery with Dr. Abernathey because the procedure helped her symptoms. She is not 100 percent okay, but her pain has improved. She still has pain in her back that travels down her left leg and experiences numbness in her toes, but the pain is less than it was before surgery. (Testimony)

At the time of the hearing Ms. Kajtazovic was performing her pre-injury job of sample puller. She began working in this position in approximately 2015. In this position she lifted 30-pound bags of salt to her chest level and poured them into hampers full of meat. She would then pull samples of the meat, grind it, and send the sample to the lab for testing. This is the position she was working in at the time of the injury. However, since her surgery she no longer lifts the bags of salt. (Testimony)

The central dispute in this case is the extent of permanent partial disability benefits Ms. Kajtazovic should receive as the result of her work injury. There are two expert opinions in this case regarding permanent functional impairment; Dr. Abernathey and Dr. Kreiter. Dr. Abernathey is the treating surgeon in this case. He assigned Ms. Kajtazovic 7 percent whole person impairment. Although the form letter that he signed mentions the AMA Guides, Fifth Edition, Dr. Abernathey fails to fill in the portion of the letter to indicate what section of the Guides he utilized to reach his impairment rating. Even if one was to assume he utilized Table 15-3 on page 384 of the Guides, which is entitled, “Criteria for Rating Impairment Due to Lumbar Spine Injury”, his rating is not consistent with the Guides. Pursuant to that table, a 7 percent rating is not appropriate for someone who has undergone surgery. Because Dr. Abernathey failed to demonstrate how he reached his impairment rating, I do not find his rating to be persuasive. (JE5, p. 8; Def. Ex. E)

Dr. Kreiter is the other expert who rendered an impairment rating in this case. He assigned13 percent impairment of the whole person. He explained that he utilized page 384, table 15-3 of the Fifth Edition of the Guides and placed Ms. Kajtazovic in the DRE-category 3. I find Dr. Kreiter’s rating to be consistent with the Guides and more persuasive in this case. (Cl. Ex. 1)

Those same two experts provided their opinions regarding permanent restrictions due to the work injury. Dr. Abernathey released Ms. Kajtazovic to return to work with no restrictions as of January 14, 2019. Dr. Kreiter saw her in October 2021 which is more recently than Dr. Abernathey. He stated that work restrictions were needed. He felt work should allow alternating walking, standing, and sitting as tolerated. According to

Ms. Kajtazovic's testimony her current job allows for standing and walking around. However, there is no indication that she sits while performing this job. Dr. Abernathey also restricted her to avoid a chronically flexed forward posture or significant bending or twisting at the waist level. He also stated that lifting should not be more than 25-30 pounds on a very occasional basis. Ms. Kajtazovic testified that since her surgery, she has not had to lift the heavy salt bags at work. I find the restrictions of Dr. Kreiter carry greater weight than the no restrictions as set forth by Dr. Abernathey. Thus, I find Ms. Kajtazovic has restrictions as set forth by Dr. Kreiter. (JE5, pp. 7-8; Def. Ex. E; Cl. Ex. 1; Testimony)

Ms. Kajtazovic has a limited work history. While working at Tyson from 1997 to 2000 she worked packing ribs and performed another job on a meat production line. The rib packing job required standing for long periods and she described the lifting requirements as hard. The meat production line required standing for long periods of time, leaning forward to grab meat, and the lifting requirements were not difficult. Ms. Kajtazovic returned to work at Tyson in 2013. She worked in "pack off." She described this job as physical because it required her to lift and move pallets that weighed 75-90 pounds. She also worked on the taco line. This job required standing, bending, lifting, and pushing five-pound boxes. (Testimony)

Ms. Kajtazovic testified that because of her work injury she is not physically capable of performing any positions at Tyson, other than her current position. She is unable to stand in one spot for an extended period due to low back pain and radicular symptoms into her left leg and foot. She testified she would also not be able to perform a job that required leaning forward for long parts of the shift. She would not be able to lift, bend, and push as required in the positions she worked in the box shop. (Testimony)

To the credit of both Tyson and Ms. Kajtazovic, she was working full-time, plus some overtime in the same position she was working at the time of the injury. However, since her surgery, she has not had to lift the heavy salt bags at work. At the time of her injury, she was paid $14.40 per hour. At the time of the hearing, she was paid $18.15 per hour. Since the injury, she has worked full-time, 42 hours per week and sometimes an additional 8-hour shift on Saturdays. Ms. Kajtazovic owns the sample puller job and has not looked to bid into other jobs at Tyson. She also has not looked for any jobs outside of Tyson because she plans to stay working there. The work she is performing is physically the easiest job she has ever had. She may move around, pull samples of meat that do not weight much and send them to the lab. Her current position does not involve extensive bending, twisting, lifting, pushing or constant standing. (Testimony)

Although Ms. Kajtazovic has not sustained any loss of actual earnings, I find that she has sustained a loss of earning capacity because of her work injury. Considering Ms. Kajtazovic's age, educational background, employment history, ability to retrain, motivation to remain in the workforce, length of healing period, permanent impairment, and permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that she has sustained a 40 percent loss of future earning capacity as a result of her work injury with Tyson.

Claimant is seeking an assessment of costs as set forth in claimant's exhibit 2. Costs are to be assessed at the discretion of the Iowa Workers' Compensation Commissioner or the deputy hearing the case. I find that claimant was generally successful in her case. I exercise my discretion and find that an assessment of costs is appropriate. Claimant is seeking the filing fee in the amount of one hundred and no/100 dollars ($100.00). I find that this is an appropriate cost under 876 IAC 4.33(7). Defendant is ordered to pay cost in the amount of one hundred and no/100 dollars ($100.00).

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3)(e).

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).

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).

The Iowa Supreme Court stated,

> [i]n an unscheduled whole-body case, the claimant's loss of earning capacity is determined by the commissioner as of the time of the hearing based on the factors bearing on industrial disability then prevailing—not based on what the claimant's physical condition and economic realities might be at some future time. *See* Iowa Code § 85.34(3); Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 157 (Iowa 1996).

Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

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.

Based on the above findings of fact, I conclude that claimant sustained 40 percent industrial disability. Therefore, she is entitled to two hundred (200) weeks of permanent partial disability benefits. Those benefits shall be paid at the stipulated rate of four hundred eleven and 78/100 dollars ($411.78). The permanent partial disability benefits shall commence on the stipulated commencement date of January 14, 2019.

Defendant is assessed costs in the amount of one hundred and no/100 dollars ($100.00). 876 IAC 4.33(7)

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of four hundred eleven and 78/100 dollars ($411.78).

Defendant shall pay two hundred (200) weeks of permanent partial disability benefits commencing on the stipulated commencement date of January 14, 2019.

Defendant shall be entitled to credit for all weekly benefits paid to date.

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).

Defendant shall reimburse claimant costs in the amount of one hundred and no/100 dollars ($100.00).

Defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1 (2) and 876 IAC 11.7.

Signed and filed this 25th day of March, 2022.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Adnan Mahmutagic (via WCES)

Jason Wiltfang (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.