BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

HABIBA SEHIC,

Claimant,

vs.

TYSON FRESH MEATS, INC.,

Employer,
Self-Insured,
Defendant.

File No. 5049837

ARBITRATION

DECISION

Head Note Nos.: 1801; 1803

STATEMENT OF THE CASE

Habiba Sehic, claimant, filed a petition in arbitration seeking workers' compensation benefits from Tyson Fresh Meats, Inc. (Tyson) self-insured employer, as a result of an injury she sustained on February 18, 2013 that arose out of and in the course of her employment. This case was fully submitted on April 5, 2016. It was heard in Waterloo, Iowa. The evidence in this case consists of the testimony of claimant, claimant's Exhibits 1 -5 and 7- 11 and defendant's Exhibits A – M. The hearing was interpreted. Both parties submitted briefs.

ISSUES

1. Whether the alleged injury is a cause of temporary disability and, if so, the extent;
2. Whether the alleged injury is a cause of permanent disability and, if so;
3. The extent of claimant's disability.
4. Commencement date for any permanent partial disability benefits.
5. The number of exemptions claimant may use to determine the weekly rate.
6. Claimant's weekly rate.
7. Payment of medical expenses.
8. Payment of an independent medical examination.
9. Costs.

FINDINGS OF FACT

The deputy workers' compensation commissioner having heard the testimony and considered the evidence in the record finds that:

Habiba Sehic, claimant, was 45 years old. At the time of her injury, claimant was married and had two children living with her. (Transcript, pages 12, 13) There was no other evidence to refute this testimony. I find that claimant is entitled to claim four exemptions to calculate her weekly rate.

Claimant began working for Tyson in October 2004. On February 18, 2013 claimant was working a position called inspect ham shake belt. (Ex. 3, p. 1; Ex. A, p. 1) This was a light-duty job that claimant only used her left arm. Claimant testified that she was injured at work of February 18, 2013, and the injury was to her left elbow and fingers. (Tr. p. 15; Ex. M, p. 4) Claimant experienced numbness that radiated into her fingers. (Tr. p. 17) Claimant reported her injury to the nurses' station. The report states the claimant believed the pain to her left hand and arm was caused by over using her arm. (Ex. 3, p. 1: Ex. A, p. 1) Claimant said she was off work for a few days and sent see Robert Gordon, M.D. Claimant testified that Dr. Gordon referred her to Thomas Gorsche, M.D., for an injection. Claimant was released by Dr. Gordon on July 2, 2013 finding claimant at maximum medical improvement with a zero impairment rating. (Tr. p. 18)

As Tyson was not providing care for her left upper extremity, she went to her family physician, Vinko Bogdanic, M.D., for care. Dr. Bogdanic sent claimant to Richard Naylor, D.O. Dr. Naylor eventually provided surgery on claimant's left elbow. Claimant testified that her elbow did not improve from the time Dr. Gordon released her and the time of her surgery. (Tr. p. 21) She also testified that her left extremity pain has continued to get worse since her surgery. (Tr. p. 24; Ex. M, p. 4)

Claimant testified that at the time of the hearing she has left elbow pain, half of her palm is numb and she will drop items. (Tr. p. 21) Claimant testified she is not able to perform as many household chores and her family does more of the work now.

Claimant's last day of work at Tyson was April 6, 2015. She has been off work since that date. At that time, she had surgery on her right shoulder. She had her left elbow surgery on July 21, 2015 and was taken of work for that surgery at that time. (Tr. p. 23)

On March 13, 2013 Dr. Gordon examined claimant. His diagnostic impression was, "1. Left trapezius pain. 2. Left hand paresthesias in the region of the ulnar nerve distribution." (Ex. 4, p. 2) On April 2, 2013, Dr. Gordon's diagnostic impression was:

1. Left shoulder/left trapezius pain-improving.

2. Left upper extremity paresthesias of the ulnar two digits. Exam not consistent today with a peripheral nerve entrapment or cervical nerve root disorder to cause such.

(Ex. 4, p. 3)

On May 8, 2013, Dr. Gordon examined claimant again. He noted that Brian Sires, M.D., performed an electrodiagnostic study which "[D]id not appreciate any evidence of peripheral nerve entrapment or cervical radiculopathy." (Ex. 4, p. 5; See Ex. E, p. 1) Dr. Gordon ordered an MRI. The results of the MRI were, "Mild flexor origin tendinosis without macro tear, subjacent to the region marked, may reflect slight strain or early tendinosis." (Ex. 5, p. 1; Ex. G, p. 1) On May 22, 2013, Dr. Gordon's diagnostic impression was:

DIAGNOSTIC IMPRESSION:

1. Left trapezius pain, most consistent with myofascial pain. She does not have any exam features consistent with a primary shoulder disorder either with the glenohumeral or AC joint region.

2. Left upper extremity parasthesia of ulnar two digits. Electrodiagnostic study was negative. Exam not consistent with a peripheral nerve entrapment.

3. Left medial elbow pain with MRI, which did reveal mild flexor origin tendonosis (epicondylitis).

(Ex. 4, p. 7) Dr. Gordon recommended a referral to orthopedics. Thomas Gorsche, M.D., examined claimant on June 18, 2013. His impression was:

Impression

#1 medial epicondylitis LEFT elbow. Essentially negative MRI and negative nerve conduction studies. No evidence for any cubital tunnel.

#2 most likely rupture sagittal band RIGHT fifth digit extensor tendon MCP joint I do not believe she is a trigger digit.

(Ex. H, p. 2) Dr. Gorsche injected the left medial epicondyle.

Dr. Gordon examined claimant on July 2, 2013. At this time he wrote:

DIAGNOSTIC IMPRESSION:

1. Left trapezius pain, most consistent with myofascial pain. She did have tenderness to very light palpation. No issues at the glenohumeral region or AC joint region. This is at MMI.

2. Complaints of left medial epicondylar pain. She did have MRI, which did reveal a mild flexor origin tendinosis. She did have an injection which did not help whatsoever. If this was truly her issue, the injection should have helped to some extent. Even the Lidocaine should have helped, and it did not.

3. Complaint of left hand pain of the ulnar two digits and numbness and tingling of the ulnar two digits. Electrodiagnostic study negative. Otherwise, on exam, no evidence of triggering in any of the digits of the left hand.

4. The patient reported popping of the right hand fifth digit. On my exam, there was just intermittent crepitus of the MCP joint. I am uncertain of the etiology of this. There was no true locking.

PLAN:

1. With regards to her left upper extremity symptoms, including left trapezius symptoms, left elbow symptoms, and left hand symptoms, I have discharged her today at MMI with 0% impairment.

2. With regards to her right small digit complaints/issues, I do recommend that she follow up with the hand surgeon and get their opinion on this matter.

3. With regards to work status, she is not to grasp with regards to the right hand greater than occasionally. With regards to the left upper extremity, I do not have her on any restrictions.

(Ex. 4, pp. 12, 13)

Claimant returned to Dr. Gordon on February 19, 2014 with complaints of pain in the left medial elbow and numbness into her ulnar two digits. He recommended an updated electrodiagnostic study. (Ex. 4, p. 15) On March 10, 2015, Dr. Gordon reviewed the results of the electrodiagnostic study and stated the study was normal. He found that no additional treatment was indicated for her left elbow and her left hand paresthesia of the ulnar two digits. (Ex, 4, p. 16) He found claimant to be at MMI with a zero impairment. (Ex. 4, p. 17)

On April 3, 2014, claimant went to her family physician, Dr. Bogdanic. He assessed elbow pain and said, "Pain-may be related to repetitive motion at work-will try course of antiinflammatory [sic] Rx." (Ex. 7, p. 3) On September 5, 2014, Dr. Bogdanic referred claimant for an orthopedic surgeon. (Ex. 7, p. 6) On February 10, 2015, Dr. Bogdanic noted that Dr. Naylor was recommending surgical intervention for her wrists and elbows. (Ex. 7, p. 15)

Claimant saw Dr. Naylor on November 17, 2014. He ordered repeat EMGs to rule out bilateral cubital tunnel of the left and ulnar median nerve neuropathy on the right. (Ex. 8, p. 2) On February 9, 2015, Dr. Naylor noted the, "MRIs are consistent with ulnar impaction syndrome. EMGs were otherwise negative." (Ex. 8, p. 10) Claimant had right cubital release with right wrist TFCC (triangular fibrocartilage complex) injection on April 7, 2015. (Ex. 8, p. 15) On July 21, 2015, Dr. Naylor performed a left cubital tunnel release surgery and ulnar nerve repositioning. (Ex. 8, p. 24) On November 19, 2015, claimant reported a worsening of the numbness of the left fourth and fifth fingers. (Ex. 8, p. 33) Dr. Naylor wrote claimant should remain off work until October 20, 2015. (Ex. 11, p. 1)

On December 14, 2014, Farid Manshadi, M.D., performed an independent medical examination (IME) and issued a report on January 11, 2016. (Ex. 10, pp. 1 – 4) Dr. Manshadi wrote:

> DISCUSSION: After review of the medical records and evaluation and examination of Ms. Habiba Sehic, it appears that Ms. Sehic suffered bilateral elbow injuries specifically involving the cubital tunnel and ulnar nerves for which eventually she required having cubital tunnel release by Dr. Naylor. She currently has residual weakness involving both hand grips as well as reduced sensation involving the ulnar innervated digits.

(Ex. 10, p. 3) He provided a 13 percent impairment for the left upper extremity. (Ex. 10, p. 3) He recommended restrictions of avoiding activities which require repetitious flexion and extension of either elbow and avoid any activity which requires sustained gripping activities with either hand. (Ex. 10, p. 4)

RATIONAL AND CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

The claimant has the burden of proving by a preponderance of the evidence that the 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 Electric 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).

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

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include

missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

Claimant was working a light duty job at Tyson when she reported an injury to her left arm on February 13, 2012. What is absent from the evidence in this case is a medical opinion that stated that it is more probable than not that claimant's work at Tyson is the cause of her left upper extremity symptoms.

The closest a physician comes to making such a determination is Dr. Bogdanic's statement that, "Pain-may be related to repetitive motion at work." (Ex. 7, p. 3) That is not sufficient to meet the burden of proof. Claimant believes her left arm injury is related to her work at Tyson. It is possible that her left upper extremity symptoms are work related, but claimant has failed to produce sufficient medical evidence to meet her burden of proof. Dr. Naylor and Dr. Manshadi do not provide opinions as to causation.

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).

Tyson argued that the IME was used both for a claim against the Second Injury Fund of Iowa, as well as against Tyson. And Tyson should only be responsible for one half of the costs of the IME. The IME bill was not attached to the hearing report or included as an exhibit. Claimant offered no evidence contrary to Tyson's argument that one half was reasonable. Claimant did not address this issue in her brief. I find that Tyson is liable for one half of the IME costs.

As claimant has not prevailed on this case, except for one half of the IME fees, she is not entitled payment of medical expenses.

ORDER

Defendant shall pay one half (1/2) of the expense for the independent medical examination.

Claimant shall take nothing further in this case.

Each party is responsible for their own costs.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Signed and filed this 7th day of November, 2016.

JAMES F. ELLIOTT
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.