BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FIKRET KARAJIC, Claimant, vs. TYSON FRESH MEATS, INC., Self-Insured Employer, Defendant.	:	File No. 5048565 ARBITRATION DECISION Head Note No: 1108

STATEMENT OF THE CASE

Fikret Karajic, the claimant, seeks workers' compensation benefits from defendant, Tyson Fresh Meats, Inc., a self-insured employer, as a result of an alleged injury on April 3, 2012. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on April 29, 2015, but the matter was not fully submitted until the receipt of the parties' briefs and argument on May 29, 2015. Oral testimonies and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Claimant's exhibits were marked numerically. Defendants' exhibits were marked alphabetically. References in this decision to page numbers of an exhibit shall be made by citing the exhibit number or letter followed by a dash and then the page number(s). For example, a citation to claimant's exhibit 1, pages 2 through 4 will be cited as, "Exhibit 1-2:4." References to a page of a transcript shall be to the actual page number of the original transcript, not to the page number of a copy containing multiple pages of the original transcript.

The parties agreed to the following matters in a written hearing report submitted at hearing:

1. An employee-employer relationship existed between claimant and defendant employer at the time of the alleged injury.

2. Claimant is not seeking temporary total or healing period benefits, but is seeking temporary partial disability benefits from May 19, 2012, through December 14, 2013, as set forth in Exhibit 13.

3. The weekly rate of compensation for this alleged injury is $530.30.

ISSUES

At hearing, the parties submitted the following issues for determination:

I. Whether claimant received an injury arising out of and in the course of employment;

II. The extent of claimant's entitlement to weekly temporary partial disability benefits and permanent disability benefits; and,

III. The extent of claimant's entitlement to medical benefits.

FINDINGS OF FACT

In these findings, I will refer to the defendant employer as Tyson.

Claimant has worked for Tyson since 1997 and continues to do so at the present time. He was born in Bosnia and came to this country shortly before starting work with Tyson. Tyson has been his only employer in this country. Claimant testified that he graduated from what he terms "high school" before leaving Bosnia. His high school education included two years of training as a mechanical technician.

At Tyson, claimant was initially assigned to a job on the production line, but he later moved to the job of knife room assistant and then knife room technician. The knife room technician work mostly consists of sharpening the various knives used on the production line. He also unloads freight and maintains the supply and knife rooms. He remains in this job at the present time, although he states that he cannot perform all of the duties due to limitations in lifting, pushing and pulling. His supervisor testified that claimant is being accommodated for his current physical limitations.

Claimant asserts a disability from a cervical, thoracic and lumbar spine condition which claimant attributes to an incident on April 3, 2012, while performing his duties at Tyson. He asserts that he had no significant neck or back pain prior to April 3, 2012. He passed a pre-employment physical in 1997. At hearing, claimant testified that while attempting to place a 45-pound box on a shelf above his head, the box fell onto the back of his head, neck and upper back causing him to fall to the floor. This incident was not witnessed by anyone. He testified that initially he was only dizzy, but the next day he had a painful and stiff neck. He stated his pain shot down to his mid-back between his shoulder blades when he turned his head. He also said that pain included his low back as well. He also had upper right arm pain. He did not report this injury to his supervisor until the next day because there was no one to report it to at 2:00 A.M. when it occurred and Tyson's health services were closed. This testimony was similar to the description of his alleged injury in his deposition. (Ex. L-21:25)

Claimant said that he was treated for a time by nurses at Tyson's health services department, but was not allowed to immediately see a doctor. He states that he then obtained care for his injury from his family doctor, Vinco Bogdanic, M.D. He eventually was allowed to see the company doctor, Robert Gordon, M.D., an occupational medicine physician, on May 15, 2012. Dr. Gordon diagnosed a thoracic strain and based on improved symptoms and no loss of functionality, Dr. Gordon released clamant from his care and to full duty work on May 23, 2012. (Ex. 3-1:6)

Clamant then returned to full duty work, but stated that he continued to have pain and sought continued care from Dr. Bogdanic, his family doctor. This doctor reports treatment on only two occasions, June 15, 2012, and March 14, 2013, for upper mid-back or thoracic pain which the doctor felt was probably work related. (Ex. 4-1:6)

On May 1, 2013, claimant submitted a written request for additional care for pain from Tyson stating that his job and his medical condition had not changed and he has not suffered a new injury. (Ex. N-1)

Claimant was allowed by Tyson to return to Dr. Gordon on May 14, 2013. In addition to continued complaints of thoracic and some lumbar pain, Dr. Gordon reports that claimant also complained of neck or cervical spine pain. The doctor states that claimant did not report any neck pain during this last treatment of claimant in 2012. (Ex. 3-7:8) Dr. Gordon then continued to treat cervical, thoracic and lumbar pain over the next several months with medications and physical therapy. He also imposed work restrictions. MRIs revealed disc bulging at the one level in the thoracic spine, myelomalacia at C5-C6 and a disc herniation at C6-C7. (Ex. 2-2:4) Upon referral by Dr. Gordon, Chad Abernathy, M.D., a neurosurgeon, evaluated claimant and recommended cervical spine surgery which claimant declined. (Ex. F-1) Claimant subsequently received a series of injections from Frank Hawkins, M.D. (Ex. 5) Dr. Hawkins and Dr. Gordon report some improvement from these injections. Dr. Gordon continued to follow claimant until April 9, 2014. He offered claimant a return to Dr. Abernathy, but claimant declined. Tyson's authorization for his treatment ended when Dr. Gordon opined on April 23, 2014, that claimant's current symptoms were unrelated to the April 3, 2012, incident and unrelated to his continued work at Tyson since that time. (Ex. G-5) This opinion is shared by Dr. Abernathy. (Ex. E-2:3) On April 9, 2014, Dr. Gordon reported the majority of claimant's complaints were in the thoracic region. At this time, the doctor continued a work restriction to work on a 3-2-3 schedule, or in other words, work full duty 3 hours, light duty 2 hours and return to full duty for 3 hours. (Ex. 3-50)

Claimant returned to Dr. Bogdanic on May 7, 2014, who recommended a neurologic and orthopedic/neurosurgeon re-evaluation. (Ex. 4-10:11) Claimant began treating with Gregory Brandenberg, M.D., a neurosurgeon in July 2014 for cervical and interscapular region pain. Dr. Brandenberg returned claimant to physical therapy and

continued pain management with Dr. Hawkins. Claimant continues to decline any surgical intervention. (Ex. 7)

At the request of his attorney, claimant was evaluated by David Segal, M.D., a neurosurgeon, in December 2014. In his report, Dr. Segal diagnosed a C5 traumatic compression fracture with disc herniation at C5-6 and C6-C7 and causally related this to the April 3, 2012, work injury. He stated that the compression fracture was noted in an initial x-ray ordered by Dr. Bogdanic in April 2012, but no one else had addressed it. He also opined that claimant reached maximum medical improvement six months after his injury and now suffers a 38 percent permanent impairment to the body as a whole due to his cervical disorders. He recommends permanent work restrictions of no lifting more than 20 pounds and to minimize activities where he has to look up repeatedly. He felt that surgery is still an option but the more time goes by, the less effective that surgery will be. (Ex. 10-1:3)

In a lengthy critical analysis of Dr. Segal's views and in his deposition testimony, Dr. Gordon disputes Dr. Segal's conclusions primarily because Dr. Segal is operating on an incorrect history of how the injury occurred and when the cervical pain developed. He also does not believe the compression fracture can be correctly diagnosed without a bone scan.

There are a number of significant problems with claimant's claim for permanent disability in this case. First, although he attributes his disability to neck, mid-back and low-back problems, the only physician to opine that he suffers a permanent impairment from the injury is Dr. Segal and Dr. Segal only provides a permanency rating and permanent restrictions for the neck or cervical problems, not any mid or lower back problems. Although claimant testified that he has permanent loss of functioning due to his mid and lower back problems, there is no medical evidence to support claimant's testimony. There are doctor reports showing that he has smaller muscles in his right chest than his left. However, Dr. Gordon points out that this is not necessarily atrophy, but simply a feature of his anatomy since he has not complained of significant weakness in his right extremity.

Secondly, as repeatedly pointed out by Dr. Gordon, claimant did not report any neck or cervical pain until a year after his claimed injury when he returned to Dr. Gordon on May 14, 2013. Dr. Gordon's opinion that the type of traumatic injury to the cervical spine asserted by claimant would have precipitated immediate pain is uncontroverted. (Ex. J-43:44, 93) There is no reference to neck pain or neck stiffness in claimant's initial reports of the injury to Tyson. He only reported mid- back pain. (Ex. O, P, Q, & R) Claimant testified that he sought care from his family doctor, Dr. Bogdanic, for his neck and pain from the April 3rd incident before seeing Dr. Gordon. However, the medical records for office visits with Dr. Bogdanic on April 10 and April 13, 2012, only indicate complaints of chest and back pain. The doctor on both occasions reported that he found a normal neck with no neck swelling or stiffness, and there is no mention of an

incident at work on April 3, 2012. (Ex. A-1:6) Dr. Bogdanic reports that claimant told him on April 13, 2012, that he exercises 40 minutes, 3 times a week and that his pain at that time began after doing some bench press exercises. (Ex. A-4, 6) After the April 13th medical record was pointed out to claimant by defendants in claimant's deposition, claimant asked the doctor to change that report. The doctor noted this request in his records, but apparently did nothing more. (Ex. 4-12) On April 16, 2012, claimant sought treatment for shortness of breath from another provider and the report of that visit does not show any complaint of neck pain. In four diagrams of the human body containing marks to show the location of pain during the course of Dr. Gordon's initial treatment in 2012, which Dr. Gordon states were completed by claimant, the claimant did not indicate any pain or symptoms in the neck. The markings only indicate mid and lower back pain and later on bilateral shoulder complaints. (Ex. C-1:9) As stated by Dr. Gordon, he did not receive a complaint of neck pain until May of 2013.

Also, as pointed out by Dr. Gordon, claimant's account of how the injury occurred evolved over time. Initially, claimant stated that the pain developed after lifting a heavy box overhead. However, he then changed his story and claimed for the first time a year later than the box fell and hit the back of his head and neck which caused him to fall to the ground. (Exs. A, O, P, Q, & R)

Claimant denies the accuracy of the initial reports from his family doctor and Dr. Gordon. He denies he exercises. He denies that he completed the pain diagrams contained in Dr. Gordon's treatment records. In his post-hearing brief, claimant's attorney argues that I should disregard the lack of neck pain complaints in the 2012 reports from Dr. Gordon due to the large amount of money his clinic receives from Tyson for treating their workers. He also argues that claimant's severe pain in the back masked the pain in the neck and distracted claimant from reporting all of his pain to Dr. Bogdanic and Dr. Gordon. He also attributes the inconsistencies of claimant's assertions and the medical records to claimant's lack of English communication skills.

I do not find claimant's arguments persuasive. Although Dr. Gordon's financial relationship with Tyson may impact the persuasiveness of his medical opinions when compared to the views of more independent physicians, to suggest that Dr. Gordon and his staff along with claimant's own family doctor are deliberately lying and falsifying medical documents to help out Tyson is simply not believable. Although he may very well have problems reading or writing English, claimant demonstrated a considerable ability at hearing to orally communicate in English and he did not require a translator. He did not appear at hearing to be a timid individual who could not adequately articulate in English his many complaints. He appeared the opposite. Given claimant's numerous statements and testimonies there is even some doubt in my mind whether the alleged April 3, 2012, incident occurred at all. His testimony simply cannot be relied upon.

Although I do find that claimant suffered an injury to the back arising out of and in the course of his employment at Tyson on April 3, 2012, I am unable to find that this

injury is a cause of permanent impairment or permanent disability. I find that he reached maximum medical improvement from this work injury when he was released from care and returned to full duty work by Dr. Gordon on May 23, 2012. I am unable to find that this work injury is a cause of his pain complaints and loss of functioning to Dr. Gordon on May 14, 2013, and thereafter.

I find that the reduced earnings contained in Exhibit 13 from May 15, 2012, through May 23, 2012, are the result of the work injury on April 3, 2012. Two-thirds of the total lost earnings of $285.47 is $190.41. I am unable to find that lost earnings in 2013 are related to the work injury.

Claimant seeks reimbursement for medical expenses set forth in Exhibit 14. However, all of the listed expenses where either for care other than the authorized care by Dr. Gordon in 2012 or care after Dr. Gordon ended his treatment of the work injury on May 23, 2012. Such care is not related to the April 3, 2012, work injury.

CONCLUSIONS OF LAW

I. The claimant has the burden of proving by of 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 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.

In this case, I found that claimant only carried his burden of proof and demonstrated by the greater weight of the evidence that he suffered a temporary injury arising out of and in the course of employment with Tyson. I was unable to find the work injury to be a cause of any of his complaints on and after May 23, 2012.

II. Claimant seeks temporary partial disability benefits as set forth in Exhibit 13. Temporary partial disability is defined in Iowa Code section 85.33(2) as the condition of an employee for whom it is medically indicated that the employee is not capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability. Pursuant to Iowa Code section 85.33(4), an employer for whom an employee was working at the time of the work injury is obligated

to pay temporary partial disability consisting of 66 2/3 percent of the difference between the employee's weekly earnings at the time of injury, computed under Iowa Code section 85.36, and the employee's actual gross weekly income from employment during the period of temporary partial disability.

In this case, I found that the only reduced earnings to qualify for temporary partial disability benefits occurred from May 15, 2012, through May 23, 2012. I also found that two-thirds of the difference in earnings totals $190.41. Claimant shall be awarded these benefits accordingly.

III. Claimant is entitled to payment of medical expenses he incurred to treat the work injury. Iowa Code section 85.27. However, only authorized expenses can be awarded because defendants have the right to choose the medical care. Id. In this case, claimant seeks payment of expenses set forth in exhibit 14. The only expenses causally related to the work injury in this case would be those prior to Dr. Gordon's release from care on May 23, 2012. Also, there are expenses requested for treatment other than Dr. Gordon, the only authorized physician. Therefore, the requested medical expenses are not reimbursable.

Claimant succeeded in an award of only a very small portion of the benefits sought. Given this and his lack of credibility, I will not award clamant costs. Each party will pay their own costs.

ORDER

IT IS THEREFORE ORDERED:

1. Defendant shall pay to claimant the sum of one hundred ninety dollars and 41/100 cents ($190.41) in temporary partial disability benefits.

2. Each party shall pay its own costs of this action pursuant to administrative rule 876 IAC 4.33.

Signed and filed this 20th day of July, 2015.

LARRY WALSHIRE
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.