BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

AZRA SEHIC,

Claimant,

vs.

TYSON FRESH MEATS, INC.,

Employer,
Self-Insured,
Defendant.

File No. 5050655

ARBITRATION

DECISION

Head Note Nos.: 1402.30; 1803; 2501
2502

STATEMENT OF THE CASE

Claimant, Azra Sehic, filed a petition in arbitration seeking workers' compensation benefits from Tyson Fresh Meats, Inc., self-insured, employer, as defendant. This case was heard in Waterloo, Iowa on September 24, 2015 with a final submission date of November 20, 2015.

The record in this case consists of claimant's exhibits 1 through 8, defendants exhibits A through Q, and the testimony of claimant, Enes Sehic, claimant's husband, and Jennifer Brustkern. Serving as interpreter was Karmela Lofthus. Claimant was allowed to submit, after the taking of testimony, Exhibit 7, pages 5-6, due to the untimely submission of an opinion by Thomas Gorsche, M.D.

ISSUES

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

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

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

4. The commencement date of permanent partial disability benefits.

5. Whether there is a causal connection between the injury and the claimed medical expenses.

6. Whether claimant is due full reimbursement for an independent medical evaluation (IME) performed by Sunil Bansal, M.D.

The parties stipulated at hearing defendants were liable for an injury to claimant's bilateral upper extremities occurring on April 22, 2013. They dispute claimant had an injury to her neck and shoulders on April 22, 2013 that arose out of and in the course of

employment. A settlement for a bilateral upper extremity injury was approved by this agency on December 9, 2015.

The parties also stipulated defendants had paid half of the IME expenses for Dr. Bansal, as part of the IME related to claimant's accepted bilateral upper extremity injury.

FINDINGS OF FACT

Claimant was 44 years old at the time of the hearing. Claimant graduated from high school in Bosnia. Claimant immigrated to the United States in 1999. (Exhibit 5, page 2) Claimant testified she can speak and read a little English. Claimant testified she passed the test to become a United States Citizen.

Claimant began employment with Tyson in March 1999. Claimant testified that in approximately 2010 or 2011, she began to have neck and upper extremity problems. Claimant bid on an easier job called the whiz button bones. (Ex. 5, pp. 3-4)

Claimant testified that in approximately 2012, she stood in line where loins passed on a line at a rate of approximately 12 loins every minute. Claimant testified that in 2012 she removed 10 to 12 small button bones out of a loin with a knife. She said that in 2012 she would cut 6 loins every minute, and a coworker would work on the other 6 loins. She said that after removing button bones out of a single loin, she sharpened her knife. She said she sharpened the knife approximately 6 times every minute when this procedure was used.

Claimant testified that in approximately 2012 the job changed. In 2012, claimant was required to work on all 12 loins every minute, but only cut out half of the button bones out of a single loin. Claimant sharpened her knife after working a loin. She said that because, in 2012, she began cutting on every loin, this required her to sharpen her knife approximately 12 times every minute.

Claimant testified this change in her job dramatically increased the up and down motion of her neck as she needed to look up and down to sharpen her knife and work on loins.

On May 3, 2013, claimant was seen by the plant nurse with complaints of bilateral pain in the hands, arms, shoulders, and pain in the neck. Claimant was returned to work at a reduced work rate. (Ex. 6, p. 6)

On August 2, 2013, claimant was evaluated by Sangeeta Shah, M.D., for pain and tingling in the upper extremities. Notes indicate claimant complained of neck pain that was resolving. EMG's revealed carpal tunnel syndrome on the left and right upper extremities. EMG's also suggested a C8 radiculopathy. (Ex. 2, pp. 1-2)

On August 29, 2013, claimant was evaluated by Dr. Gorsche for symptoms in the left and right upper extremities. Dr. Gorsche's notes also indicated claimant could have a C8 radiculopathy. An MRI of the cervical spine was recommended. (Ex. B, pp. 1-2; Ex. 6, p. 10)

On September 1, 2013, claimant was involved in a motor vehicle accident. Claimant was a passenger in a car that was "T-boned" by a truck that ran a stop sign while going approximately 45 miles per hour. (Ex. G) Claimant's airbag was deployed. (Ex. G, p. 2) Claimant was taken to Covenant Medical Center. At the time of injury, claimant denied a head or neck injury. Claimant complained of abdominal and chest pain. Claimant also complained of lower back pain. (Ex. G, pp. 2-4)

On September 13, 2013, claimant had a cervical MRI. It showed a two-level disc herniation at the C5-6 and C6-7 levels with an indentation on the spinal cord. (Ex. 4, p. 1)

On October 9, 2013, claimant was evaluated by Robert Gordon, M.D. He assessed claimant as having bilateral upper extremity parasthesia. Claimant had clinical findings consistent with carpal tunnel syndrome. Electrodiagnostic studies did show possibility of a C8 radiculopathy. The MRI showed a two-level disc herniation. Dr. Gordon opined that the disc herniation in the cervical spine was not work related and probably due to the motor vehicle accident. (Ex. C, pp. 4-6)

In an October 9, 2013 note, written by defendants, Dr. Gordon indicated that claimant's cervical condition was not caused by her work. (Ex.C, pp. 7-8)

In an October 23, 2013 note, Tyson gave claimant notice they would not consider her neck condition a work-related injury. (Ex. P, p. 1) Claimant testified that after the denial of the neck condition by Tyson, she began treating for her neck on her own at Covenant Hospital in Waterloo. On December 2, 2013, claimant was evaluated by Gregory Brandenburg, M.D. Notes indicate neck pain began in April 2013. Symptoms were exacerbated by a motor vehicle accident. Dr. Brandenburg recommended against surgery. (Ex. 2, pp. 3-4)

Claimant returned in follow up with Dr. Brandenburg on January 15, 2014. Claimant indicated neck and shoulder pain began in April 2013. Claimant had a motor vehicle accident on September 1, 2013 that did not change her symptoms. Claimant was told to return to treatment for neck pain after her carpal tunnel surgery. (Ex. 2, pp. 5-12)

On March 3, 2014, claimant had a carpal tunnel release on the right. On March 26, 2014 she had a carpal tunnel release on the left. Surgeries were performed by Dr. Gorsche. (Ex. B, p. 3)

On January 2, 2015, claimant had an MRI of the cervical spine. It showed degenerative spondylosis at the C5-6 through C6-7 levels. (Ex. 2, pp. 16-17)

On February 5, 2015, claimant was seen by Marek Rozek, PA-C. Claimant had neck and upper extremity pain. Claimant was referred to pain management for potential C4-5 for a minimal foraminal injections. (Ex. 2, pp. 20-21)

On March 10, 2015, claimant was given a cervical epidural steroid injection (ESI) by Robert Federhofer, D.O. (Ex. 2, pp. 29-30)

On March 23, 2015, claimant returned in follow up with Dr. Gorsche. The ESI's had helped claimant's neck for a short period of time. Claimant still had shoulder pain. (Ex. B, p. 6)

Claimant returned to Dr. Federhofer on April 1, 2015. Claimant had a 20 percent improvement in symptoms but still had problems with her neck and upper extremities. The second cervical ESI at the C7-T1 levels was performed by Dr. Federhofer on April 7, 2015. (Ex. 2, pp. 31-37)

On July 28, 2015, John Kruzich, MS, OTR\L, performed a job analysis of claimant's jobs of remove button bones and labeling/packing ribs. He opined neither job caused claimant's neck injury due to the injury. (Ex. D)

An August 6, 2015 report, Dr. Bansal gave his opinions of claimant's condition following an IME. Claimant had ongoing neck pain and bilateral upper extremity pain radiating from the neck. Dr. Bansal opined claimant's job duties at Tyson were a significant factor in the development of aggravation of claimant's cervical spondylosis. He opined claimant's continually looking up and down at work aggravated her cervical condition. He opined claimant's condition fell in the DRE Category II, under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, for an impairment for the cervical spine. He found claimant had a 5 percent permanent impairment to the body as a whole. (Ex. 1, p. 1-21) Dr. Bansal recommended claimant avoid work activities requiring repeated neck motions. He recommended claimant have pain management with a pain specialist. (Ex. 1, pp. 1-21)

In a September 15, 2015 addendum, Dr. Bansal indicated he had reviewed the job analysis performed by Mr. Kruzich. Dr. Bansal opined the constant repetitive moving of claimant's neck was a significant contributing factor to a work related neck injury. (Ex.1, p. 22)

In a September 17, 2015 letter, Dr. Gorsche indicated he reviewed the job analysis performed by Mr. Kruzich. Based on the job analysis he opined claimant's job activity was less likely than not to have caused a cervical condition. (Ex. B, pp. 11-12)

In an October 21, 2015 letter, Dr. Federhofer opined claimant had degenerative changes in her neck at the C4-5 and C6-7 levels. He opined claimant's neck condition was aggravated by her work at Tyson. (Ex. 2, pp. 50-51)

At the time of hearing, claimant said she had undergone three ESI's. She said she was scheduled to undergo trigger point injections.

Enes Sehic testified he is claimant's husband. He said he works at Tyson. He said in 2012 and 2013 he saw his wife at work. He said that his wife's job at the button bone station required that she look up and down all day long.

At the time of hearing, claimant was still employed at Tyson. She said her job at the time of hearing required her to put ribs in a box and label the box. She said she

could not return to the button bones job as she was currently restricted from using vibratory tools.

CONCLUSIONS OF LAW

The first issue to be determined is if claimant sustained an injury that arose out of and in the course of employment.

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).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

The record indicates that prior to her job at Tyson, claimant had no problems with her cervical spine. She credibly testified that her job in the remove button bones job required her to initially remove 10-12 small button bones from a loin and look up to sharpen her knife. Claimant did this to 6 of the 12 loins that came down a line every minute. This required claimant to move her head up and down approximately 6 times every minute.

Claimant credibly testified that in 2012 the job changed. The change required claimant to work on 5-6 button bones on every 12 loins every minute. This required claimant to sharpen her knife approximately two times more during the course of a minute. This resulted in claimant's neck moving up and down approximately 12 times every minute. Claimant credibly testified this change in work caused her neck pain.

The record indicates that in approximately April 2012, claimant gave notice of both her neck and upper extremity pain. (Ex. 6, p. 6)

Records from Dr. Shaw and Dr. Gorsche suggest claimant had a potential C8 radiculopathy. A cervical MRI was recommended. (Ex. 2, pp. 1-2; Ex. 6, p. 10; Ex. B, pp. 1-2)

Before the cervical MRI could be performed, claimant was involved in a motor vehicle accident. (Ex. G, p. 2) Records indicate claimant complained of chest and lower back pain. There was no indication in any of the records that the September 2013 motor vehicle accident resulted in neck symptoms to claimant. (Ex. G)

A cervical MRI performed approximately two weeks after the motor vehicle accident showed a disc herniation at the C5-6 and C6-7 levels. (Ex. 4, p. 1)

Dr. Gordon opined that degenerative changes shown in claimant's neck are not the result of claimant's work but were caused by the motor vehicle accident. (Ex. C, pp. 4-8) As noted, there is nothing in the medical records indicating claimant's motor vehicle accident caused claimant any neck pain or neck symptoms. Given this, Dr. Gordon's opinion regarding causation is found not convincing.

Medical records from Dr. Brandenburg noted claimant had neck and shoulder pain beginning at least back to April 2013. Claimant indicated the motor vehicle accident in December 2013 did not change her symptoms. (Ex. 2, pp. 5-12)

Mr. Kruzich indicated he reviewed claimant's job of remove button bones and labeling. He opined the job did not cause claimant's neck injury. (Ex. D) However, Mr.

Kruzich's opinion does not take into account the change occurring in claimant's job in 2012. This change caused claimant to look up and down approximately twice as much during the course of a minute. Mr. Kruzich's opinion also does not address the thousands of times per day claimant was required to look up and down on her job. Mr. Kruzich's opinion does not address if claimant's job aggravated a pre-existing condition. Based on this, Mr. Kruzich's opinions regarding causation are found not convincing.

Dr. Gorsche indicated he reviewed the job analysis performed by Mr. Kruzich. Based upon his review of Mr. Kruzich's report, Dr. Gorsche did not believe claimant's job at Tyson caused a cervical condition. However, as noted, Mr. Kruzich's report is flawed. Dr. Gorsche also offers no opinion if claimant's job materially aggravated claimant's underlying neck condition. Other than reading the flawed Kruzich's report, there is no indication that Dr. Gorsche had any other knowledge of claimant's job. For these reasons, Dr. Gorsche's opinions regarding causation are also found not convincing. (Ex. B, pp. 11-12)

Dr. Bansal found claimant's job at Tyson's, which required her to look up and down thousands of times per day, materially aggravated her degenerative condition. (Ex. 1) Dr. Federhofer, who treated claimant for an extended period of time, and who was still treating claimant at the time of hearing, agreed with Dr. Bansal's opinion. (Ex. 2, pp. 50-51) Claimant's credible and unrebutted testimony was that a change in her job in 2012 dramatically increased the number of times she had to look up and down during the course of her work shift. The opinions of Dr. Gorsche and Dr. Gordon are found not convincing regarding causation. The opinion of Mr. Kruzich is also found unconvincing. Based on this record, claimant has carried her burden of proof she sustained a neck injury on April 22, 2013 that arose out of and in the course of her employment.

The next issue to be determined is whether claimant's injury is a cause of permanent disability.

Claimant alleges the injury occurring on April 22, 2013. More than two years after the date of injury, claimant still has symptoms and pain in her neck and upper extremities. Dr. Bansal opined claimant has a permanent disability. Given this record, claimant has carried her burden of proof that her injury resulted in a permanent disability.

The next issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

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).

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.

Industrial disability can be equal to, less than, or greater than functional impairment. Taylor v. Hummel Insurance Agency, Inc., 2-2, Iowa Industrial Comm'r Dec. 736 (1985); Kroll v. Iowa Utilities, 1-4, Iowa Industrial Comm'r Dec. 937 (App. 1985); Birmingham v. Firestone Tire & Rubber Company, II, Iowa Industrial Comm'r Rep., 39, (App. 1981).

Claimant was 44 years old at the time of hearing. She speaks and understands a little English. Claimant's native language is Bosnian. Claimant has been employed at Tyson since 1999. At the time of hearing, claimant was still working at Tyson doing labeling. At the time of hearing, claimant was restricted from using vibratory tools. There is little evidence to suggest that claimant required any other restrictions as recommended by Dr. Bansal. Claimant has not had surgery. At the time of hearing, no physician has recommended claimant undergo surgery for her neck condition. Claimant testified she has not missed work for reasons related to her neck injury. When all relevant factors are considered, it is found claimant has a 10 percent loss of earning capacity or industrial disability.

In an August 6, 2015 report, Dr. Bansal found that claimant had a 5 percent permanent impairment to the body as a whole. Permanent partial disability benefits shall commence on August 6, 2015.

The next issue to be determined is whether there is a causal connection between the injury and the claimed medical expenses.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

As noted above, claimant's neck injury is found to have been caused by the April 2013 work injury. There is no evidence in the record that the costs related to claimant's injury are not fair and reasonable. There is no evidence that the medical expenses claimed are not causally connected to the treatment for claimant's neck. Given this record, defendants are liable for medical expenses related to care and treatment of claimant's neck injury.

The final issue to be determined is if claimant is due reimbursement for the full cost of the IME by Dr. Bansal.

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).

As noted above, defendants have paid half the costs of Dr. Bansal's IME. This was done as defendants accepted liability for claimant's carpal tunnel syndrome.

In an October 2013 report, Dr. Gordon opined that claimant's neck injury was not work related. (Ex. C, pp. 4-8) In an August 6, 2015 report, Dr. Bansal, the employee retained physician, gave his opinion of claimant's condition. Based on this record, defendants are liable for the full cost of Dr. Bansal's IME.

ORDER

THEREFORE IT IS ORDERED:

That defendant shall pay claimant fifty (50) weeks of permanent partial disability benefits at the rate of four hundred twelve and 23/100 dollars ($412.23) per week commencing on August 6, 2015.

That defendant shall pay accrued weekly benefits in a lump sum.

That defendant shall pay interest on unpaid weekly benefits as ordered above and as set forth in Iowa Code section 85.30.

That defendant shall pay claimant's medical expense as detailed above.

That defendant shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

That defendant shall pay the costs of this matter as required under rule 876 IAC 4.33.

Signed and filed this 19th day of January, 2016.

JAMES F. CHRISTENSON
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.