BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

WENDY O'KEY, Claimant, vs. CUSTOM-PAK, INC., Employer, Self-Insured, Defendant.	:	File No. 5057093.01 REVIEW-REOPENING DECISION Head Notes: 1801, 2501, 2701, 2905

STATEMENT OF THE CASE

Claimant, Wendy O'Key, filed a petition in review-reopening seeking workers' compensation benefits from Custom-Pak, self-insured employer. This matter was heard on July 2, 2021, with a final submission date of July 29, 2021.

The record in this case consists of Joint Exhibits 1-13, Claimant's Exhibits 1-2, Defendant's Exhibits A-E, and the testimony of claimant.

The parties filed a hearing report at the commencement of the review-reopening hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this review-reopening 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 is entitled to additional benefits under review-reopening proceedings.

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

3. Whether claimant is entitled to alternate medical care under Iowa Code section 85.27.

FINDINGS OF FACT

Claimant was 53 years old at the time of the hearing.

Claimant began working at Custom-Pak in September 2015. Custom-Pak makes molded plastic parts. On May 20, 2016, claimant was walking around a pallet at Custom-Pak when she slipped and fell. Claimant landed on her left wrist and left side.

(Arbitration Decision pp. 2-3) Claimant was terminated from Custom-Pak on January 20, 2017. (Arbitration Decision p. 5)

In her arbitration petition claimant alleged a 2003 left lower extremity injury and a 2007 right lower extremity injury to qualify for Second Injury Fund benefits. Claimant also alleged a May 20, 2016 injury to her left upper extremity. The arbitration decision found claimant failed to carry her burden of proof she sustained qualifying injuries for the purposes of Fund benefits to the left or right lower extremities. The arbitration decision also found that claimant's May 20, 2016 left wrist injury did not result in a permanent disability. (Arbitration Decision pp. 8-9, 11-12) That decision was affirmed on intra-agency appeal.

Claimant filed a petition in review-reopening on October 8, 2019. In rulings on motions for summary judgment, the case against the Fund was dismissed, and all other claims except for the left wrist injury claim were dismissed.

On December 5, 2018, claimant was evaluated at ORA Orthopedics for left hand pain. Claimant was assessed as having left wrist pain and possible carpal tunnel syndrome. An EMG/NCV test was recommended. (Joint Exhibit 2, pp. 21-22)

On January 8, 2019, claimant underwent EMG/NCV testing. Testing did not show claimant had a carpal tunnel syndrome. (JE 10)

On January 15, 2019, claimant underwent an independent medical evaluation (IME) with Camilla Frederick, M.D., for left wrist pain. Dr. Frederick noted that a CT arthrogram scan showed a new tear at the radial aspect of the TFCC (triangular fibrocartilage complex). (JE 1, pp. 9-10) Dr. Frederick noted that the tear of the radial aspect of the TFCC was new compared with a prior CT arthrogram study. (JE 1, p. 10)

Dr. Frederick opined that claimant's left wrist strain was related to the May 20, 2016 work injury. She opined the new TFCC tear was not related to the May 20, 2016 work injury as a TFCC tear was not seen on the August 20, 2016 CT arthrogram, but shown on the December 11, 2018 CT arthrogram. Dr. Frederick did not believe the need for further care of the claimant's left wrist was related to the May 20, 2016 fall. (JE 1, p. 11)

On January 28, 2019, claimant was evaluated by Thomas VonGillern, M.D., for left wrist pain. A left wrist arthrogram of December 11, 2018, showed a tear of the radial aspect of the TFCC. Claimant was assessed as having left wrist pain, a left wrist TFCC radial aspect tear. Claimant was also found to be hostile, confrontational, and manipulative when a nonsurgical plan of care was offered. (JE 2, pp. 24-25)

In a February 15, 2019 note, Adrian Zaragoza, D.C., gave claimant an off work slip until she had an orthopedic consult. (JE 5, p. 48)

Claimant was evaluated by Irvin Wiesman, M.D., on February 22, 2019, for left wrist pain. An MR arthrogram showed a TFCC tear. Dr. Wiesman recommended a diagnostic left wrist arthroscopy and evaluation of the TFCC and scapholunate ligament. He also recommended a psychiatric referral prior to surgery due to claimant fixating on her pain. (JE 6, p. 50)

On April 26, 2019, claimant was assessed at the University of Iowa Hospitals and Clinics (UIHC) Orthopedic Hand Clinic for left wrist pain. Claimant's wrist was stable. No surgery was recommended. Claimant's pain was likely due to hypersensitivity and disuse. Claimant was recommended to return to work and gradually resume typical daily activities. (JE 7, p. 62)

On April 29, 2019, Dr. VonGillern terminated ORA Orthopedics' relationship with claimant. This was because claimant showed hostile, confrontational, and manipulative behavior when a nonsurgical treatment plan was offered. (JE 2, p. 26)

On May 3, 2019, claimant was evaluated by Thomas Ebinger, M.D. Claimant was given an ulnocarpal cortisone injection, which helped with symptoms for approximately 4 weeks. (JE 3, pp. 38-39)

Claimant returned to Dr. Wiesman on May 17, 2019. Claimant was assessed as having a scapholunate ligament injury with a radial TFC tear. Claimant wanted surgery. A psychological evaluation prior to surgery was recommended. (JE 13)

On June 25, 2019, claimant underwent a psychological evaluation with G. Narayana, M.D. Claimant was assessed as having a bipolar disorder and a generalized anxiety disorder. Dr. Narayana found claimant was capable of consenting to surgery. (JE 12)

On June 17, 2019, claimant was seen by Dr. Ebinger for follow-up of chronic left wrist pain. Claimant was assessed as having a chronic scapholunate ligament tear and a tear in the TFCC. Dr. Ebinger recommended against surgery as surgery had a high risk for patient to re-develop CRPS (complex regional pain syndrome). He opined some of claimant's pain was caused by degenerative conditions in the wrist. He also noted that claimant had significant pain behaviors on exam. (JE 3, pp. 39-41)

In an August 15, 2019 report, Dr. Frederick indicated she reviewed records from Drs. Wiesman and Ebinger. Dr. Frederick again opined that claimant's new TFCC tear was not related to her fall on May 20, 2016. This was because the tear was not shown on an October 30, 2016 CT arthrogram scan, but does show on a December 11, 2018 scan. (JE 1, pp. 12, 20)

Claimant testified she wants to have the surgery recommended by Dr. Wiesman. (Testimony pp. 15-16) Claimant said her symptoms have worsened since the time of her arbitration hearing. (TR pp. 18-19) Claimant said she has not had any new trauma to her wrist and that she barely uses her left hand. (TR pp. 17, 26)

CONCLUSION OF LAW

The first issue to be determined is whether claimant is entitled to additional benefits under review-reopening proceeding.

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).

Upon review-reopening, claimant has the burden to show a change in condition related to the original injury since the original award or settlement was made. The change may be either economic or physical. Blacksmith v. All-American, Inc., 290

N.W.2d 348 (Iowa 1980); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959). A mere difference of opinion of experts as to the percentage of disability arising from an original injury is not sufficient to justify a different determination on a petition for review-reopening. Rather, claimant's condition must have worsened or deteriorated in a manner not contemplated at the time of the initial award or settlement before an award on review-reopening is appropriate. Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957). A failure of a condition to improve to the extent anticipated originally may also constitute a change of condition. Meyers v. Holiday Inn of Cedar Falls, Iowa, 272 N.W.2d 24 (Iowa App. 1978).

In a review-reopening proceeding, claimant has the burden of proof to show she has suffered an impairment in earning capacity proximately caused by the original injury. E.N.T. Associates v. Collentine, 525 N.W.2d 827, 829 (Iowa 1994)

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 contends that she is entitled to additional benefits because at the time of the June 2018 arbitration hearing, surgery was not indicated and now it is. (Claimant's Post-Hearing Brief, p. 8)

As noted above, claimant has the burden of proof to show a change in impairment and earning capacity as proximately caused by the original injury.

Claimant was evaluated by Dr. Wiesman in February 2019 and May 2019. Dr. Wiesman recommended diagnostic left wrist surgery, in part to evaluate a torn TFCC. (JE 6) It is unclear what records Dr. Wiesman reviewed regarding claimant's 2016 injury prior to the February and May 2019 visits.

Claimant was also evaluated by Dr. Ebinger. Dr. Ebinger recommended against surgery. (JE 3, p. 40)

Claimant underwent an IME with Dr. Frederick. Dr. Frederick opined that claimant's TFCC tear was not caused by the May 20, 2016 work injury. This was because the August 20, 2016 CT arthrogram did now show a TFCC tear, while the December 11, 2018 CT arthrogram did show a tear. (JE 1, pp. 11, 12, 20; Arbitration Decision p. 4) Dr. Frederick is the only expert to opine that the TFCC tear was not related to claimant's May 20, 2016 work injury.

Dr. Wiesman recommended exploratory surgery to repair a TFCC tear. It is unclear what records Dr. Wiesman reviewed for the February and May 2019 exams of claimant. Dr. Wiesman gave no opinion regarding if the TFCC tear was caused by the May 20, 2016 injury. Dr. Frederick opined the TFCC tear, and the need for surgery, was not caused by the May 20, 2016 work injury. This was based on comparison of the August 20, 2016 and December 11, 2018 CT arthrograms. Two other providers have recommended against surgery. Based on this record, claimant has failed to carry her burden of proof the need for surgery recommended by Dr. Wiesman (i.e., the change in condition) was proximately caused by the May 20, 2016 date of injury.

As claimant failed to carry her burden of proof her change in condition was proximately caused by the May 20, 2016 date of injury, all other issues are moot.

Although all other issues are moot, additional analysis is required regarding claimant's claim for temporary benefits, alternate medical care and payment of medical expenses.

Claimant appears to contend she is due a running award of temporary total disability benefits from February 15, 2019, based upon a note from Dr. Zaragoza (Claimant's Post-Hearing Brief, pp. 3, 8) Dr. Zaragoza's note dated February 15, 2019, indicates claimant may not return to work and is to be placed on temporary total disability until the re-exam date or an orthopedic consult. (JE 5) On February 22, 2019, claimant had an exam with Dr. Wiesman, who is board-certified in hand surgery. Even

if the note from Dr. Zaragoza is accepted as credible evidence of claimant's entitlement to temporary total disability benefits, claimant would only be due benefits from February 15, 2019, through February 22, 2019.

The credibility of Dr. Zaragoza's note is questionable at best. Claimant indicated she came to be evaluated by Dr. Zaragoza as follows:

> Q: We have a work status report from a chiropractor named Adrian Zaragoza (phonetic spelling) dated February 15, 2019. How is it that you saw that chiropractor?
>
> A: The one in Chicago?
>
> Q: Yes.
>
> A: I looked it up. I thought it was a doctor's office actually. When I went there, they evaluate anybody. So if you have an eye injury, they send you to that eye surgeon. It's a place where they send you where you need.
>
> And, it was just like, you know, opening the door to go to Dr. Wiesman, the surgeon, that they recommend. I had no idea.

(TR p. 17)

There is no evidence of what records Dr. Zaragoza reviewed. It is unclear what history Dr. Zaragoza had of claimant. Claimant's visit to Dr. Zaragoza was not authorized by the employer. The record suggests that somehow claimant got a referral for a chiropractor in Chicago who then funneled her to see Dr. Wiesman. The fact that Dr. Zaragoza's excuse from work note indicates claimant is to be placed on temporary total disability is also suspect, and, in addition, the record suggests that claimant has not worked since September 2016. (Arbitration Decision p. 5) Based on these facts, the workslip from Dr. Zaragoza, dated February 15, 2019, is found not credible evidence. Given this record, claimant is not due any temporary total disability benefits.

Regarding the request for alternate medical care, claimant has the burden of proof to show she is entitled to alternate medical care.

Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such

alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

As detailed above, the only opinion regarding causation for the need for surgery is from Dr. Frederick. Dr. Frederick opined that claimant's tear in the TFCC was not related to the May 20, 2016 date of injury. There is no evidence in the record claimant communicated a basis of dissatisfaction for the offered care to defendant. Two other experts have opined that surgery was not recommended or necessary. Given this record, claimant has failed to carry her burden of proof she is entitled to alternate medical care under Iowa Code section 85.27.

Regarding payment of medical expenses, there is no evidence that any of the medical bills claimant seeks for reimbursement were authorized by defendant. Dr. Frederick opined, in January of 2019, that further medical care for claimant's left wrist was not related to the work injury of May 20, 2016. (JE 1, p. 11) Given this record, claimant has failed to carry her burden of proof there is a causal connection between the injury and the claimed medical expenses.

ORDER

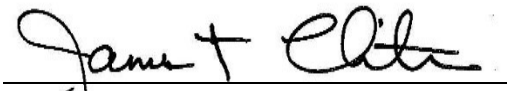
THEREFORE IT IS ORDERED:

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

That each party shall pay their own costs.

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

Signed and filed this ___27th___ day of October, 2021.



JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Robert Rosenstiel (via WCES)

Edward Rose (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.