BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

WANDA LONG, Claimant, vs. AYM, INC., Employer, Self-Insured, Defendant.	FILED AUG 22 2016 WORKERS COMPENSATION	File No. 5048675 ARBITRATION DECISION Head Note Nos.: 1100; 1803

STATEMENT OF THE CASE

Claimant, Wanda Long, has filed a petition in arbitration and seeks workers' compensation benefits from, AYM, Inc., self-insured employer, defendant.

Deputy workers' compensation commissioner, Stan McElderry, heard this matter in Des Moines, Iowa.

ISSUES

The parties have submitted the following issues for determination:

1. Whether the claimant suffered an injury arising out of and in the course of employment on August 1, 2013;

2. Whether the alleged injury is the cause of any permanency, and if so, the extent;

3. Temporary benefits;

4. Commencement date;

5. Independent medical evaluation (IME); and

6. Penalty.

FINDINGS OF FACT

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

The claimant was 64 years old at the time of hearing. She is not a high school graduate, having left school in the 11th grade. She believes she obtained a GED later,

but does not have and never has had the certificate. Her previous work history consists of heavy CNA work (certificate long since lapsed), clerk at a retail store, and laborer for a manufacturer. She started with the employer herein in 1989.

She had a right shoulder injury at work in 2000. That injury resulted in permanent restrictions of a maximum limit of lifting floor to waist of 40 pounds, 20 pounds frequently, and overhead lifting with a maximum of 20 and 10 pounds frequently. (Exhibit 1, page 2) In 2011 she had a back injury at work. Permanent restrictions of a maximum lift of 30 pounds, and to avoid work below waist and above the shoulders were imposed. (Ex. 3, p. 27) She was released to return to work on January 5, 2012 and worked in that capacity for the next 18 months or so before August 1, 2013.

On August 1, 2013, the claimant was operating a machine with an auger to remove metal chips (which are an unwanted byproduct of the manufacturing process). Since the machine was not operating properly she had to hand-scoop the chips. As she stepped back and placed a shovelful of metal chips in a barrel, she left a sharp pain in her back. On August 5, 2013, the claimant was seen by Patricia Blackledge, ARNP. (Ex. 4, p. 32) ARNP Blackledge diagnosed sciatica and lumbar back pain. (Ex. 4, p. 36) On September 9, 2013 an MRI was performed and showed multilevel spondylosis and a right intraforaminal and lateral disc herniation at L3-4. (Ex. 5, p. 69)

Dr. Hatfield examined the claimant on October 18, 2013. He determined that the claimant was not a surgical candidate, but might be helped by an epidural steroid injection. (Ex. 1, p. 4) He also referred the claimant to Dr. Ledet, a pain specialist. Dr. Ledet saw the claimant on November 7, 2013. (Ex. 1, p. 6) He performed a right-sided L3 epidural injection, but it did not improve the claimant. He later referred the claimant to Todd Troll, M.D., as Dr. Ledet was changing his practice. Dr. Troll was unavailable so the claimant saw ARNP Rebecca Blair. (Ex. 3, p. 28)

Thomas Hansen, M.D., was questioned regarding the claimant's condition. On March 10, 2014, Dr. Hansen opined that the employment at AYM was a substantial contributing factor in the claimant's back condition and was the reason she needed treatment, and that she had not returned to her pre-injury baseline. (Ex. 3, p. 30) He also opined that future treatment should include test blocks for lumbar radiofrequency. (Id.)

On April 18, 2014, Kenneth Pollock, M.D., refusing to accept defense counsel's assertions to the contrary, opined that the injury of August 1, 2013 was a low back injury occurring at work and was a material aggravation of her pre-existing right L3-4 protrusion. (Ex. 1, p. 13) He further opined that this was not simply a flare-up. (Ex. 1, p. 14) In May 2014 the defendants authorized Dr. Pollack to provide care. He did not provide care because of a medical leave he took. ARNP Blackledge was reauthorized and she referred the claimant to Dr. Hansen. Dr. Hansen was not authorized and the claimant was instead sent to Andrew Spellman, D.O. Dr. Spellman essentially agreed with all other providers that the continued care was needed for the work injury herein. (Ex. 7, p. 80) On July 2, 2014, he performed bilateral diagnostic medial branch blocks

and then medial branch blocks with bilateral lumbar radiofrequency ablation on July 30, 2014. (Ex. 7, pp. 81-83) The blocks provided little or no relief, as did ongoing pain therapy.

The claimant had an IME with Sunil Bansal, M.D., on July 16, 2015. Dr. Bansal casually connected the August 1, 2013 shoveling accident to a material aggravation of the claimant's low back condition. He assigned an 11 percent impairment rating, with 65 percent attributable to the August 1, 2013 work injury. He also opined restrictions of lifting limited to 15 pounds occasionally and 10 pounds frequently. Also no frequent squatting, bending, climbing, twisting; and to sit, stand and walk as tolerated with no more than 2 hours sitting and no more than 30 minutes walking. (Ex. 8, pp. 125-126)

The defendants sent the claimant to John Kuhnlein, D.O., for an IME. (Ex. A) Although he disagreed with some opinions of other doctors herein, his ultimate conclusion was that the claimant suffered a work related injury on August 1, 2013, which is a true aggravation of her pre-existing conditions. (Ex. A, p. 18) He opined a five percent impairment. (Ex. A, p. 20)

In essence, there is not one medical opinion that the work injury of August 1, 2013 was not a true aggravation of the claimant's pre-existing back condition. The aggravation is permanent and caused impairment.

She has suffered no decline in her hourly pay rate as of yet. Her work duties have changed. Although the employer is changing its processes so that more employees work like the claimant now does, she did it first at her facility, and it was out of necessity due to her restrictions and limitations. Considering the claimant's medical impairments, training, permanent restrictions, cognitive disorder, daily pain, as well as all other factors of industrial disability, the claimant has suffered a 40 percent loss of earning capacity.

On the date of injury the claimant had gross weekly earnings of $834.22, was married, and entitled to 2 exemptions. As such, her weekly rate is $538.14. She was last medically excused from work on September 11, 2014 so the commencement date of permanent benefits would be September 12, 2014. Claimant seeks temporary benefits from August 2, 2013 through October 12, 2013. From this record it is unknowable what days or hours of work she missed, and what hours of work were available to work.

Claimant seeks the Dr. Bansal IME fee of $2,975.00. The IME was before an evaluation by the defendants. Of the $2,975.00 fee, $350.00 was for the examination, $2,625.00 for the report.

REASONING AND CONCLUSIONS OF LAW

Permanency.

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 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 August 1, 2013 incident was found to be a permanent substantial aggravation of a pre-existing condition. As such, permanency has been established.

The next issue is the extent of permanent disability.

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 Rule of Appellate Procedure 6.14(6).

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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.

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). Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

Based on the finding that the claimant has suffered a 40 percent loss of earning capacity, she has sustained a 40 percent permanent partial industrial disability entitling her to 200 weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(u).

Temporary benefits.

From this record it is unknown what work hours or days were missed due to the work injury. As such, claimant has not met her burden of proof for an award of temporary benefits.

IME.

Iowa Code section 85.39 provides in relevant part:

> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination. The physician chosen by the employee has the right to

confer with and obtain from the employer-retained physician sufficient history of the injury to make a proper examination.

Iowa Code section 85.39 only authorizes one independent medical examination when requested by the employee. Stevenson v. Metro Temp, File No. 974182 (App. October 30, 1996).

In a recent opinion, the Iowa Supreme Court provided a literal interpretation of the plain-language of Iowa Code section 85.39, stating that section 85.39 ". . . only allows the employee to obtain an independent evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer." Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 847 (Iowa 2015). Claimant had not had an evaluation of permanent impairment made by a physician retained by the employer before claimant had an IME by Dr. Bansal. For this reason, claimant's petition for an independent medical evaluation under Iowa Code section 85.39 is denied. The report fee of Dr. Bansal of $2,625.00 is allowed as a cost, the $350.00 examination fee is not allowable under Des Moines Area Regional Transit Authority.

ORDER

THEREFORE IT IS ORDERED:

That the defendant shall pay the claimant two hundred (200) weeks of permanent partial disability benefits commencing August 15, 2015 at the weekly rate of five hundred thirty-eight and 14/100 dollars ($538.14).

Costs are taxed to the defendant pursuant to rule 876 IAC 4.33.

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30 with subsequent reports of injury pursuant to rule 876 IAC 3.1.

Signed and filed this 22nd day of August, 2016.

STAN MCELDERRY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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SRM/srs

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.