BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
SEP 10 2015
WORKERS' COMPENSATION

NAIMA CERWICK,	:	File No. 5047247
Claimant,	:	ARBITRATION
vs.	:	DECISION
TYSON FRESH MEATS, INC.,	:	
Employer, Self-Insured, Defendant.	:	Head Note Nos.: 1108, 1402.40, 1803

STATEMENT OF THE CASE

Naima Cerwick, claimant, filed a petition in arbitration seeking workers' compensation benefits from Tyson Fresh Meats, Inc., self-insured employer. Hearing was held on February 2, 2014. The record was left open for additional evidence to be submitted by the parties.

Raymond Cerwick, Naima Cerwick, and Francis Carpenter all testified live at trial. The evidentiary record also includes joint exhibits 1-14, claimant's exhibits, 15-25 and defendant's exhibits A-I. The parties submitted a hearing report and attachments. On the hearing report, the parties entered into certain stipulations. Those stipulations are accepted and relied upon in this decision. No findings of fact or conclusions of law will be made with respect to the parties' stipulations.

The parties request the opportunity for post-hearing briefs which were submitted on June 1, 2015.

ISSUES

The parties submitted the following issues for resolution:

1. What, if any, permanent disability was caused by the February 28, 2013 injury.

2. What, if any, temporary disability was caused by the February 28, 2013 injury.

3. Whether defendant is responsible for payment of past medical expenses.

4. Whether claimant is entitled to future medical benefits pursuant of Iowa Code section 85.27.

5. Whether claimant is entitled to reimbursement for an independent medical examination pursuant to Iowa Code section 85.39.

6. Assessment of costs.

FINDINGS OF FACT

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

There is no dispute that claimant, Ms. Cerwick, sustained a compensable fall on February 28, 2013. Ms. Cerwick contends she sustained injury to her low back, right hip, and right shoulder. Defendant admits claimant sustained a temporary injury to her back but denies all other injuries.

I find claimant has failed to show by a preponderance of the evidence that she sustained any injury beyond a temporary aggravation of her back as a result of the February 28, 2013 fall at Tyson.

Ms. Cerwick lived in Morocco as a child and moved to the United States at the age of 20. At the time of hearing she was 33 years of age. She testified that she could not read or write English; she requires assistance to complete or read English forms. She speaks English with her husband and children and also speaks English while working at Tyson. The claimant requested the use of an interpreter at the hearing. At the hearing Ms. Cerwick started her testimony using an interpreter. However, during her testimony it became apparent that it was easier for Ms. Cerwick to testify in English than in Arabic. The only time Ms. Cerwick had difficulty finding words was when she was trying to think of an Arabic word. Ms. Cerwick testified that it had been a long time since she spoke Arabic. She said, "I'm not really speaking Arabic at all every day." (Transcript, page 105) During the hearing it was eventually determined that she would testify without the use of the interpreter, as an interpreter was not necessary and it was actually more difficult for Ms. Cerwick to speak Arabic than to speak English. At that point, Ms. Cerwick specifically waived her right to an interpreter and confirmed that all of her answers to that point had been correctly interpreted. Based on my observations at hearing I find that Ms. Cerwick does not have any difficulty speaking English. I also note that when claimant's counsel sent her for IMEs with Sunil Bansal, M.D. and Mark Kirkland, D.O., there was not an interpreter at those appointments. It is troubling to the undersigned that an interpreter was requested because Ms. Cerwick demonstrated that her ability to speak English is greater than her ability to speak Arabic.

Ms. Cerwick began working for Tyson in October of 2003. Ms. Cerwick slipped on ice and fell in the parking lot at Tyson on February 28, 2013. She said that the fall happened very quickly. At hearing she testified that her hands and back hit the ground

first. She was able to get back up by herself. She reported the fall to one of her supervisors at Tyson who then took her to the health department where an injury report was completed. Ms. Cerwick reported that she fell on her hands and kind of jerked her back. She believed her hands braced her fall. She also reported that her upper back and hands were injured. This is consistent with the pain diagram on the injury report that Ms. Cerwick signed. (Joint Exhibit 1, p. 1) Although Ms. Cerwick cannot read or write English she is able to understand the pain diagram and sign her name in English. After the form was completed she was able to return to her utility operator job. (Testimony)

Ms. Cerwick returned to Tyson Health Services on March 6, 2013. She reported an increase in her back pain and asked to see a doctor. (Jt. Ex. 2, p. 13) She was directed to see Sherry S. Hutchins, D.O. at Concentra. On March 6, 2013, Ms. Cerwick saw Dr. Hutchins and reported that her back was injured in the February fall. (Jt. Ex. 3, p. 1) She reported she "fell backwards and put both arms behind her to catch her fall." (Jt. Ex. 3, p. 5) She reported pain in her bilateral shoulders, upper back, and neck. The diagnosis was thoracic strain/pain. The clinical notes indicate Ms. Cerwick had full range of motion without restrictions or tenderness, and impingement signs were negative. She was prescribed physical therapy and released to return to work with restrictions. (Jt. Ex. 3, pp. 5-10) On March 7, 2013, she was seen at Accelerated Rehabilitation. She reported that she fell backwards and put her arms back to brace her, landing on her hands. (Jt. Ex. 4, p. 8) Ms. Cerwick saw Dr. Hutchins again on March 25, 2013. She reported continued thoracic pain and also some lower back pain. She was referred to orthopedics. (Jt. Ex. 3, pp. 14-17)

Ms. Cerwick continued to attend physical therapy. On March 28, 2013, the therapist noted she still had pain in her low back. The hand-written note is difficult to read, but it appears she was given exercises of bridges, piriformis, and Ustretch. The assessment included a rotated pelvis and a notation that the piriformis was very tight on the right. (Jt. Ex. 4, p. 18)

She saw Cassim M. Igram, M.D. at Iowa Ortho on April 8, 2013. She complained of back and right leg pain. On exam he noted that she had full range of motion of her right hip. His assessment was lumbar radiculopathy right lower extremity. He ordered a lumbar MRI and kept her on regular duty. (Jt. Ex. 5, pp. 15-16) The April 12, 2013, MRI showed no nerve root compression or displacement at any level but did show very minimal degenerative changes at L3-L4 and L4-L5. (Jt. Ex. 5, p. 6) Ms. Cerwick returned to Dr. Igram on April 19, 2013. She was still having symptoms in her back and right leg. Dr. Igram felt her MRI was pretty unimpressive, and he felt she had low back pain that was most likely myofascial. He ordered additional physical therapy and allowed her to continue working without restrictions. (Jt. Ex. 5, pp. 7-8)

She returned to see Dr. Igram on May 24, 2013. The note indicates she had pain about the right sacroiliac joint. She had made some progress with physical therapy, but her symptoms still persisted. He noted that her problem was fluctuating. Her pain was in the lower back and had started radiating to her right ankle, calf, and right thigh. She

was tender about the right SI joint. His assessment was low back pain with possible right SI joint pain. She was referred to pain management. (Jt. Ex. 5, pp. 9-10)

On June 13, 2013, Ms. Cerwick was seen by Steven R. Quam, D.O. at Metro Anesthesia & Pain Management. (Jt. Ex. 6, pp. 5-6) She reported discomfort in her right low back with some radiation into her buttock and hip that has been bothering her since February 28, 2013. On that date she was at work, slipped on ice and "irritated her low back landing on her right buttock when she fell." (Jt. Ex. 6, p. 5) Dr. Quam observed her walk and stated that there was no obvious limp. There was minimal tenderness in the lower lumbar area on the left, but the tenderness was more significant in the mid and lower lumbar area on the right. There was no specific sacroiliac pain. Ms. Cerwick underwent a right lumbar medial branch block. (Jt. Ex. 6, pp. 6-14)

On June 24, 2013, Ms. Cerwick returned to see Dr. Igram and reported that the injection did not have any effect. His assessment was right-sided low back pain. Dr. Igram felt the problem was not surgical. He recommended consult with physical medicine and rehabilitation for other treatment options. Again, he kept her on regular duty. (Jt. Ex. 5, pp. 11-12)

Ms. Cerwick was seen by Michael Jackson, M.D. at the Center for Occupational and Physical Medicine on July 3, 2013. She had chief complaint of right-sided low back and hip pain. She reported that on February 28, 2013, she slipped and fell on ice. Dr. Jackson's assessment was right sacroiliac dysfunction, right trochanteric bursitis, right piriformis syndrome, and right iliotibial band syndrome. Dr. Jackson noted that she had not received the appropriate injections from Dr. Quam. He returned her to physical therapy, prescribed medication, and an SI belt. He said she could continue working full duty because she had been tolerating this without difficulty. (Jt. Ex. 7, pp. 6-7)

She saw Dr. Jackson again on July 17, 2013, and reported right hip and groin pain. He recommended an MRI of her right hip. (Jt. Ex. 7, pp. 9-11) The MRI was performed on July 29, 2013. The report indicated Ms. Cerwick had an anterior superior and superior labral tear. (Jt. Ex. 7, p. 13)

Ms. Cerwick returned to Dr. Jackson on August 1, 2013. Dr. Jackson questioned her further about her February fall. She reported her "initial incident was a fall backwards and her first complaints were essentially thoracic pain, which she had been treated for, but it did progress to low back pain." (Jt. Ex. 7, p. 14) At the time of her appointment she complained of primarily right-sided low back pain. She was still able to tolerate full duty. Dr. Jackson opined that her right anterior labral tear was not related to her fall at work because the mechanism of injury was not consistent with a labral tear. He placed her at MMI and returned her to work without restrictions for her original back injury. (Jt. Ex. 7, pp. 14-15)

On August 22, 2013, Ms. Cerwick sought treatment on her own with her primary care physician, Michael Sargent, D.O. She reported right trochanter tenderness and

right low back pain. She was prescribed medication and referred for a second opinion. (Jt. Ex. 8, pp. 4-5)

On September 12, 2013, she saw Jeffrey R. Wahl, D.O., an orthopedic surgeon. He noted that her MRI did not show any significant pathology around the greater trochanter/bursal region, which is where the majority of her pain was coming from. He agreed it was unlikely that the injury caused her labral tear. However, he recommended obtaining an opinion from someone who does hip arthroscopy and labral work. (Jt. Ex. 9, pp. 1-2) He recommended that she see Steven A. Aviles, M.D. (Jt. Ex. 2, p. 23)

On November 11, 2013, Ms. Cerwick was seen by Dr. Aviles at Iowa Ortho. He noted that she had initially complained of low back pain radiating down her leg. In July she began complaining of snapping in her hip. Dr. Aviles felt that the MRI which was officially read as a labral tear was actually a cleft labrum. Dr. Aviles did not feel that her hip condition was related to her February fall. (Ex. A, pp. 1-5)

On November 6, 2013, claimant's counsel sent a letter to Chris Nelson, D.O. along with medical records. (Jt. Ex. 10, pp. 1-2) Dr. Nelson saw Ms. Cerwick on February 3, 2014, for evaluation of her right hip. She reported that she fell on ice on February 28, 2013, and that her hip went into a hyperabduction-type splits position. (Jt. Ex. 3, p. 10) This is the first time this history is recorded by any medical provider. Dr. Nelson noted she had a slight limp. His impression was severe right hip trochanteric bursitis and right hip labral tear. He felt that her severe trochanteric bursitis was overriding and obscuring her physical examination. He gave her a trochanteric bursa injection. (Jt. Ex. 10, pp. 9-10) Ms. Cerwick returned to Dr. Nelson on February 12, 2014. She reported that the injection improved her pain. She now described a more noticeable deep pain which was not present prior to her fall. Dr. Nelson noted that she walked without a limp. She reported that this was the first time in one year that she had been without "this pain." (Jt. Ex. 10, p. 5)

Ms. Cerwick went to her primary care physician's office on March 17, 2014 and reported bilateral shoulder and right hip pain, which she reported began after the February 2013 fall. The notes indicate her gait was normal, she had tenderness of her right anterior hip joint and right groin, and her range of motion was within normal limits. She was taken off work from March 17 to March 18, 2014 and released to work without restrictions on March 19. (Jt. Ex. 8, pp. 6-9) She returned again on April 15, 2014, with a main concern of bilateral shoulder pain. She also reported she was experiencing some back pain and some right hip discomfort. Exam revealed decreased range of motion in her right shoulder. She was assessed with right shoulder and right hip pain. She was referred for an orthopedic consult. (Jt. Ex. 8, pp.10-16)

On April 21, 2014, Dr. Nelson authored a letter to claimant's counsel. He opined that the cause of Ms. Cerwick's torn labrum was her fall. He felt that the mechanism of injury she reported to him was very consistent with a torn labrum. He noted that the position of her hip at the time of her fall was consistent with hip labral tears. He also noted that she did not have any pain in her hip prior to the fall. He did not find it

surprising that she did not initially have complaints of pain in her hip. He explained that pain from labral tear can fluctuate. He felt that Ms. Cerwick would require surgical care for her hip. He stated that he had shown her pain was coming from the intraarticular space with the relief she obtained from the injection. (Jt. Ex. 10, pp. 8-10)

On May 13, 2014, Ms. Cerwick sought treatment on her own. She was seen by William Jacobson, M.D. at Capital Orthopaedics & Sports Medicine. Dr. Jacobson's impression was shoulder pain. He provided conservative treatment which provided no relief. (Jt. Ex. 11, pp. 1-6) She underwent a right shoulder arthrogram on July 1, 2014 which showed anterioinferior labral tear and mild supraspinatus tendinosis. (Jt. Ex. 11, p. 8) After the arthrogram she advised Dr. Jacobson that she wanted surgical treatment. (Jt. Ex. 11, p. 11) At the request of defendant's counsel Dr. Jacobson issued a letter addressing causation. (Ex. 11, p. 13) Dr. Jacobson opined that her bilateral shoulder complaints were not caused by the February fall. Dr. Jacobson noted that her original complaints did not involve her shoulders, and her examination showed excellent range of motion, no tenderness, and excellent strength. He noted that it appeared she had been evaluated by multiple physicians for approximately one year without shoulder complaints.

Because Ms. Cerwick continued to complain of back pain Tyson authorized a return visit to Dr. Igram in April of 2014. He advised he did not have anything to offer her. She was allowed to continue working regular duty. (Jt. Ex. 5, p. 14)

On October 10, 2014, at the request of her attorney, Ms. Cerwick saw Dr. Bansal for an IME.

Claimant underwent a second IME at her attorney's request on November 24, 2014, with Dr. Kirkland.

Tyson scheduled an IME for Ms. Cerwick with Charles D. Mooney, M.D. on January 20, 2015; however, she refused to attend. Dr. Mooney reviewed the records and issued a report with his opinions regarding her right shoulder. (Def. Ex. B, p. 22) Claimant was ordered by this agency to attend an IME with Dr. Mooney; she went on February 20, 2015. Following the IME Dr. Mooney issued a report with his opinions concerning Ms. Cerwick's back, right shoulder, and right hip. (Ex. B, p. 25A)

At the time of hearing Ms. Cerwick continued to perform her utility operation job at Tyson. This was her regular full-duty job. At the time of the February fall she was paid $14.20 per hour. At the time of hearing she was paid $14.70 per hour. She has not missed any time from work at Tyson as a result of her fall on February 28, 2013. (Def. Ex. G, pp. 41, 43)

Francis Carpenter also testified live at hearing. He has worked at Tyson in Perry for 26 years. He is the converting supervisor on the ham line. He is one of two direct supervisors for Ms. Cerwick; the other is Angela Cerwick. He is able to observe the claimant on a daily basis. He estimates he can see her 75 percent of the day. He has

never observed Ms. Cerwick having any difficulties performing her duties. He testified that he believes Ms. Cerwick feels comfortable talking with him about any problems she has at Tyson. When they speak to one another they speak in English, and he does not have any problems understanding her. He testified that he has had to help her complete forms written in English because she cannot read or write English.

First, we turn to the issue of Ms. Cerwick's back claim. Tyson does not dispute that she injured her back in the fall; the only dispute is whether she sustained any permanent injury. There is no indication in the record that she had any low back problems which required treatment prior to the February fall. When she initially reported the fall to Tyson she indicated that she jerked her back when she fell. (Ex. 1) Following the fall Ms. Cerwick reported to Tyson Health Services that she had pain in her upper back and hands. (Jt. Ex. 1, p. 1) When she was seen by Dr. Hutchins on March 6, 2013, the doctor noted moderate to severe muscle pain in her thoracic spine with pain in all planes during active range of motion. She was assessed as having thoracic strain/pain and treated conservatively. (Jt. Ex. 3, pp. 5-6) The records show she received physical therapy, and by the time she returned to Dr. Hutchins on March 25, 2013, she did not have any tenderness to palpation of the thoracic spine or along the lumbar spine or SI joints bilaterally. She was noted to have full range of motion without restrictions or tenderness. (Jt. Ex. 3, p. 14) The lumbar MRI ordered by Dr. Igram was unremarkable. (Jt. Ex. 5, pp. 6-8) Dr. Igram did not issue any restrictions. She was allowed to continue to work her regular job. On May 13, 2013, Ms. Cerwick reported to Tyson Health Services that she had no back pain and the pain was in her buttock and hip on the right. (Jt. Ex. 2, p. 20) Dr. Igram referred Ms. Cerwick to Dr. Jackson. When she saw Dr. Jackson in July of 2013, her complaints were related to her right-sided low back and hip. Dr. Jackson placed her at MMI for her back injury on August 1, 2013 and returned her to work without restrictions. (Jt. Ex. 7, p. 14)

When Ms. Cerwick saw her family doctor in August of 2013, she reported some back pain, but her focus was on her right hip and shoulder. She saw Dr. Igram again who concluded she did not require any surgery and returned her to work without restrictions. (Jt. Ex. 5, pp. 13-14)

There are several opinions regarding Ms. Cerwick's back. At the request of her attorney claimant saw Dr. Bansal for an IME on October 10, 2014. He placed Ms. Cerwick in the DRE category II due to loss of range of motion, radicular complaints, and guarding. He diagnosed her with right sacroiliac dysfunction. Dr. Bansal's opinions are based on the history of Ms. Cerwick falling flat onto her back with both of her hands outstretched, and her legs doing the splits. He recommended some restrictions, but unfortunately his report is not clear what, if any, restrictions are for her back. Dr. Bansal stated given Ms. Cerwick's short stature and his recommended restrictions "it would not be medically advisable for her to engage in continued line work at Tyson." (Clmt. Ex. 19, p. 20)

Claimant's counsel sent her for an IME with Dr. Kirkland on November 25, 2014. Unfortunately, the IME only addressed claimant's right hip and right shoulder; he did not address Ms. Cerwick's back. (Ex. 17)

Dr. Mooney conducted an IME at the request of the defendant on February 20, 2015. Dr. Mooney opined that she had reached MMI for her thoracic back pain approximately six weeks after the fall. With regard to her sacroiliac dysfunction lumbar symptoms he felt she reached MMI on or about August 1, 2013. He further opined there was no evidence of permanent disability related to her low back. He placed her in the DRE category I and assigned zero percent impairment. Dr. Mooney is the physician who examined Ms. Cerwick most recently. He examined her approximately four months after Dr. Bansal. On exam he noted no evidence of spasm or asymmetry, no radicular findings, no weakness findings, normal range of motion, and no tenderness over the lumbar spinous processes or interspaces. (Def. Ex. B, p. 25H) He stated that she did not require any restrictions in activity. It was also noted it was evident that she has been able to continue her usual activities of daily living and her normal work duties. (Ex. B, pp. 25A-N)

At the arbitration hearing claimant did not provide much testimony regarding her back. She did testify that she believes if her right hip improves her back will too. (Tr. 114)

I find that claimant has failed to carry her burden of proof to show that she sustained any permanent impairment to her back as a result of the February fall at Tyson. I find she had a temporary aggravation to her back and reached MMI on August 1, 2013. The preponderance of the evidence does not support her claim of permanent impairment. Neither Dr. Jackson, Dr. Igram, nor Dr. Mooney assigned any permanent restrictions to her activities. Dr. Jackson had the advantage of seeing and treating Ms. Cerwick on numerous occasions. Dr. Mooney had the advantage of examining Ms. Cerwick most recently and therefore had the best opportunity to examine her current condition. I find the opinions of Dr. Jackson and Dr. Mooney to be persuasive on the issues regarding Ms. Cerwick's back. Furthermore, these opinions are supported by the clinical notes of Dr. Igram.

We now turn to the right hip claim. Ms. Cerwick alleges she sustained a right hip labral tear when she fell in February of 2013. However, Ms. Cerwick's claim is troubling for several reasons. First, the histories she provided to the medical providers are not consistent and become more detailed as time goes by. It is not until almost one year after the fall that she first reported that her legs went into a hyperabduction-type splits position when she fell. (Jt. Ex. 10, p. 3) Prior to that time she had seen numerous providers and not one of them recorded this history. Dr. Wahl's September 12, 2013 note does state that she landed directly on her back with her legs "extended and relatively abducted." (Jt. Ex. 9, p. 1) However, she did not provide this history to any providers who she saw closer in time to the fall including Tyson Health Services, Dr. Hutchins, Accelerated therapists, Dr. Igram, Dr. Quam, Dr. Jackson, and Dr. Aviles. Rather, her description was that her fall happened very quickly and she fell backwards

and braced herself with her hands behind her. During the first several months following the fall there is no mention of any type of abduction of her legs. Additionally, she reported to Dr. Quam that she landed directly on her right buttock; this is a different history than she gave to other providers. It is not logical that claimant would have reported that her legs hyperabducted to these numerous providers and that all of the providers failed to document the pertinent history.

Her right hip claim is also troubling because her onset of symptoms does not appear to be consistent with a traumatic labral tear. Dr. Aviles, Dr. Jackson, and Dr. Mooney have all indicated that such a tear would cause immediate pain. (Def. Ex. A, pp. 12, 17; Def. Ex. B, p. 25M; Jt. Ex. 7, p. 27) Yet, Ms. Cerwick did not report right hip pain until months after the fall. There is a notation by a therapist at the end of March that her piriformis was very tight on the right on March 28, 2013, but there is no mention of any pain. Beginning in the later part of April there are some notations in the physical therapy notes of pain in the piriformis, SI, and greater trochanter. The therapist noted symptoms of trochanteric bursitis and an unstable pelvis. When Ms. Cerwick saw Dr. Igram on April 8, 2013, he performed a hip examination and noted normal passive pain-free range of motion for both hips. (Jt. Ex. 5, p.4) He also noted her complaints changed over time from thoracic, to low back, to down her right leg, and then to her right hip. (Def. Ex. B, p. 23; Cl. Ex. 29; Deposition p. 33)

With regard to her right hip I find the opinions of Dr. Aviles persuasive. The record demonstrates that Ms. Cerwick was not directed to Dr. Aviles by the defendant. Rather, she was referred to orthopaedic surgeon, Dr. Wahl, by her family physician. However, Dr. Wahl felt she should see a surgeon who performs hip arthroscopy and labral work. In light of this recommendation her family physician then referred her to Dr. Aviles. (Def. Ex. A, p. 3) Because Ms. Cerwick was referred to Dr. Aviles by her own personal physician it is difficult to argue that Dr. Aviles would somehow be biased against Ms. Cerwick. Dr. Aviles is a medical doctor, and for approximately seven years 50 percent of his orthopedic practice has involved hip arthroscopy. For these reasons I place great weight on the opinions of Dr. Aviles. It is his expert opinion that Ms. Cerwick's MRI was misread and that she has a cleft labrum rather than a labral tear. He further opined that her hip pain was not caused by the February fall. (Def. Ex. A, p. 17)

Claimant also sought treatment on her own for her hip with Dr. Nelson. Dr. Nelson does causally connect her hip to the fall, but this is based in part on the position of her hip at the time of her fall. (Ex. 10, p. 8) Thus, his opinion is based on a history that was first documented by a medical provider approximately one year after her fall. (Ex. 10, p. 3) Furthermore, Dr. Aviles points out that Dr. Nelson indicated that her abnormal gait caused her low back pain. However, the records show that Ms. Cerwick complained of thoracic and low back pain before she complained of hip pain. Thus, Dr. Nelson's opinion is erroneous. Furthermore, Dr. Aviles stated there is significant literature to refute the opinions of Dr. Nelson regarding traumatic and degenerative labral tears. (Def. Ex. A, p. 12) For these reasons I do not find Dr. Nelson's opinions as persuasive as the opinions of Dr. Aviles.

Several IME physicians have also rendered opinions regarding Ms. Cerwick's right hip.

Dr. Bansal and Dr. Kirkland both find a causal connection between the labral tear to the February fall. I do not find the opinions of Dr. Bansal or Dr. Kirkland regarding Ms. Cerwick's right hip to be persuasive in this matter. According to Dr. Aviles, both Dr. Bansal and Dr. Kirkland's physical exams were poor. Dr. Aviles also pointed out that their rationale that Ms. Cerwick did not have pain before the fall, she has pain after the fall, therefore the fall must have caused the pain, is flawed. He explains the rationale is flawed because it does not account for degenerative labral tears which develop gradually and can be present without symptoms, and this also does not account for a cleft labrum rather than a labral tear. (Def. Ex. A, p. 17) With regard to the right hip, I find the opinions of Dr. Aviles to carry greater weight than those of Dr. Bansal or Dr. Kirkland.

Defendant sent claimant to Dr. Mooney for an IME. Dr. Mooney also does not causally relate the right hip problems to the February fall. Dr. Mooney's opinion is based on the lack of a temporal relationship between the February fall and her right hip pain. He noted that the mechanism of injury was not consistent with the diagnosis. He also pointed out the inconsistencies in the histories that Ms. Cerwick has given to various providers. (Def. Ex. B)

Claimant has the burden to show that the February fall caused the alleged injury to her right hip. I find claimant has failed to show by a preponderance of the evidence that she injured her right hip as a result of the fall. Therefore, any remaining issues regarding claimant's right hip are moot.

The next issue to be addressed is claimant's right shoulder claim. With regard to Ms. Cerwick's right shoulder claim, her petition, answer to interrogatory number 7, and her testimony at hearing clearly indicate she is alleging an acute trauma as the cause of her injuries. The Petition states that the injury occurred when "Claimant slipped and fell on ice/slick area in employee parking lot." (Petition) During discovery claimant was asked to set forth a detailed description for the occurrence of the injury. Claimant provided a detailed paragraph response but never asserted any type of repetitive or cumulative claim. (Cl. Ex. 15, p. 3) At hearing claimant was asked, "Q: Ms. Cerwick your workers' compensation claim is based upon your slip and fall in Tyson's parking lot on February 28, 2013; correct? A: Yes." (Tr. p. 75) Yet in claimant's post-hearing brief she seemingly argues that her right shoulder injury is due to repetitive right upper extremity work at Tyson. However, claimant failed to plead a cumulative/repetitive injury. I find that defendant did not have notice that claimant was asserting a cumulative/repetitive injury and therefore, my analysis will only address the acute claim.

We now turn to the issue of whether Ms. Cerwick's right shoulder problems were caused by her February fall at Tyson. Based on the medical evidence in this matter I find that claimant has failed to carry her burden of proof to show that her right shoulder symptoms are related to her fall at Tyson. When Ms. Cerwick saw Dr. Hutchins on

March 6, 2013, she reported pain in both shoulders. Dr. Hutchins examined her shoulders and noted: "No edema, erythema, or ecchymosis. No tenderness to palpation along the shoulder joint. Full AROM without restriction or tenderness. Impingement signs are negative. Strength 5/5 bilaterally." (Jt. Ex. 3, p. 5) Similarly, when claimant reported for physical therapy on March 7, 2013, the therapist examined her shoulders and noted that she had good shoulder strength in all planes and full range of motion of her shoulder. Her condition was consistent with thoracic and lumbar strain. (Jt. Ex. 4, p. 8) Ms. Cerwick did not report or diagram any shoulder complaints when she went to see Dr. Igram at Iowa Ortho. (Jt. Ex. 5, pp. 1-3) She also did not mention or diagram any shoulder complaints when she went to see Dr. Quam at Metro Anesthesia and Pain Management. (Jt. Ex. 6, pp. 1, 5) Likewise, when she treated with Dr. Jackson she did not report or diagram shoulder pain. (Jt. Ex. 7, pp. 1, 4, 6, 28) Additionally, following the fall Ms. Cerwick's shoulder was examined several times. She denied shoulder pain and had a normal shoulder exam with Dr. Hutchins. She also did not report any shoulder problems to her own family doctor on August 22, 2013. (Jt. Ex. 8, p. 4) At hearing Ms. Cerwick testified that she told her medical providers everything about her symptoms. There is no mention of symptoms in the records; therefore, it is reasonable to conclude she was not having shoulder symptoms at that time.

Ms. Cerwick really did not seek treatment for her shoulder until March 17, 2014; more than one year after the February fall. (Jt. Ex. 8, p. 6) Once she did report shoulder problems she was referred to Dr. Jacobson by Mercy Family Care. Dr. Jacobson is an orthopedic surgeon who opined that her bilateral shoulder complaints were not caused by the February fall. (Jt. Ex. 11, p. 13) Dr. Jacobson noted the lack of temporal relationship between the fall and shoulder complaints that were significant enough to seek treatment. He also stated that "an injury of this degree typically would be painful at the time of injury." (Jt. Ex. 11, p. 15)

There are several opinions from physicians who performed IMEs in this case. Ms. Cerwick sought IMEs from Dr. Bansal and Dr. Kirkland. Dr. Bansal felt that her right shoulder labral tear was caused by her fall based on the history that she fell onto her outstretched arm. (Clmt. Ex. 19, p. 5) This history is not consistent with the history she provided to Dr. Jacobson. Additionally, neither Dr. Kirkland nor Dr. Bansal explain how Ms. Cerwick could have a normal shoulder examination by Dr. Hutchins following the fall. The lack of objective findings following claimant's February fall and her failure to seek treatment do not support the conclusions of Dr. Bansal and Dr. Kirkland.

Defendant sent Ms. Cerwick to Dr. Mooney for an IME. Dr. Mooney does not relate her shoulder symptoms to the February fall. Dr. Mooney utilized the Bradford-Hill criteria regarding temporality, strength of association between injury and diagnosis, consistency between examiners regarding diagnosis and history, specificity of events related to the findings and plausibility of the injury. (Def. Ex. B, p. 25K) It is Dr. Mooney's opinion that the medical records do not support a temporal relationship between the labral tear and the February fall. (Def. Ex. B, p. 25K-L) According to Dr. Mooney the records also lack consistency as it relates to her fall and shoulder pain. (Def. Ex. B, p. 25L)

With regard to claimant's right shoulder claim I find the opinions of Dr. Jacobson carry the greatest weight. Dr. Jacobson is an orthopedic surgeon with the expertise to address shoulder injuries. Ms. Cerwick was not sent to Dr. Jacobson by her own attorney, by the defense attorney, or by Tyson. Ms. Cerwick was sent to Dr. Jacobson by her own family practice clinic; thus, it can hardly be said that Dr. Jacobson is biased towards or against either party in this case. Furthermore, the medical evidence as a whole supports the opinions of Dr. Jacobson. Therefore, I find claimant has failed to carry her burden of proof to show that she sustained an injury to her right shoulder as a result of the February 28, 2013 fall at Tyson. Therefore, any remaining issues regarding claimant's right shoulder are moot.

Thus, I conclude claimant has failed to show she sustained any permanent impairment as a result of the February 28, 2013 fall at Tyson.

We now turn to Ms. Cerwick's claim for temporary benefits. Claimant asserts entitlement to healing period and/or temporary partial disability benefits on the basis that she missed overtime due to her injury. Claimant asserts that it is Tyson's policy to refuse overtime hours to anyone who is on light duty. Claimant specifically asserts that she had an 85 percent to 90 percent decrease in overtime due to her injury. In support of her claim she compares the amount of overtime she worked in the prior year to the amount she worked after her February fall. However, claimant's supervisor testified that when she was working light duty she worked the same number of hours that were available to the other utility operators. (Tr. p. 125) Defendant has shown that claimant missed time from work for personal reasons; reasons which include a sick child, anniversary holiday, tardy, or off for personal business. (HR-1, p. 3A) While claimant demonstrated that she was given restrictions and placed on light duty work she has not shown that there was overtime work available to other workers in her position during the time that she was on light duty work. I find claimant has failed to show that she missed any time or overtime from work as a result of the February 2013 fall.

Claimant is also asserting a claim for payment of past medical expenses as set forth in hearing report attachment 2. The medical records demonstrate that most of these expenses are for treatment she obtained on her own for her right hip and right shoulder. Because I found that her right hip and right shoulder are not causally connected to the February 2013 fall at Tyson claimant is not entitled to payment for those past expenses. However, there is a charge for services rendered on March 17, 2014 at Mercy – Perry. Claimant contends the treatment was for right shoulder, right hip, and back. However, a review of the treatment records shows the chief complaints at the visit did not include the back. Therefore, I find defendant is not responsible for any of the past medical expenses.

Claimant is also seeking reimbursement for the cost of the IME by Dr. Kirkland in the amount of $4,052.10. (HR-3) However, defendant has already paid for the cost of another of claimant's IMEs. Specifically, defendant paid for the IME report of Dr. Bansal in the amount of $3,695.00. Dr. Bansal's report clearly states it is an independent medical evaluation. (Clmt. Ex. 19, p. 1) Dr. Kirkland's report also clearly states he is

seeing her for an independent medical evaluation. (Clmt. Ex. 17, p. 1) Claimant's counsel has also specifically noted that they have obtained "two independent medical evaluations." (Def. Ex. I, p. 57) Under Iowa law claimant is only entitled to reimbursement for one IME in each case. I find that because defendant previously reimbursed claimant for the cost of Dr. Bansal's IME defendant is not responsible for the second IME performed by Dr. Kirkland.

Finally, claimant is seeking an assessment of costs. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. In the present case, claimant was generally not successful, and therefore I exercise my discretion and do not award any costs in this matter.

CONCLUSIONS OF LAW

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

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).

For the reasons set forth above I conclude claimant has failed to carry her burden of proof to show that she sustained any permanent disability to her back as a result of the February fall at Tyson.

Furthermore, for the reasons noted above I conclude claimant has failed to carry her burden of proof to show that she sustained injury to her right shoulder or right hip as a result of the February 28, 2013 fall at Tyson. Therefore, any remaining issues regarding the right shoulder or right hip are moot.

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1).

Based on the above findings of fact I conclude claimant has failed to prove by a preponderance of the evidence that she is entitled to any additional temporary total disability benefits as a result of the February 28, 2013 work injury.

We now turn to the issue of medical benefits. 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).

Because I concluded that claimant failed to show any additional treatment for her back was caused by the February 28, 2013 fall defendant is not responsible for additional treatment for her back.

Claimant was generally not successful in her claim; therefore I conclude it is not appropriate to assess costs pursuant to 876 IAC 4.33.

ORDER

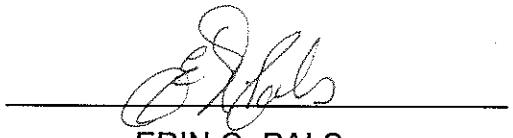
THEREFORE, IT IS ORDERED:

Claimant shall take nothing from these proceedings.

Each party shall bear their own costs in this matter.

Defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1 (2) and 876 IAC 11.7.

Signed and filed this 10th day of September, 2015.



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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.