BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JASMINKA ALIBEGIC,	:	
Claimant,	:	File Nos. 5045259; 5045260
vs.	: FILED	ARBITRATION
TYSON FRESH MEATS, INC.,	: MAR 04 2015	DECISION
Employer, Self-Insured, Defendant.	: WORKERS COMPENSATION	Head Note Nos.: 1100; 1803

STATEMENT OF THE CASE

Claimant, Jasminka Alibegic, has filed petitions in arbitration and seeks workers' compensation benefits from Tyson Fresh Meats, Inc., self-insured employer, defendant.

Deputy workers' compensation commissioner, Stan McElderry, heard this matter in Waterloo, Iowa on October 30, 2014.

ISSUES

The parties have submitted the following issues for determination:

For File No. 5045259:

1. Whether the injury of November 23, 2011 is the cause of any permanency, and if so, the extent; and

2. Medical benefits.

For File No. 5045260

1. Whether the claimant suffered an injury arising out of and in the course of employment on March 20, 2012;

2. Whether the alleged injury is the cause of any temporary disability;

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

4. Whether timely notice was provided pursuant to Iowa Code section 85.23; and

5. Medical benefits.

FINDINGS OF FACT

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

The claimant was 42 years old at the time of hearing. Her formal education in Bosnia was limited. She came to the U.S. in 1996 and is unable to read or fluently speak English. She has worked at Tyson (or its predecessor IBP) since 1997.

On November 23, 2011, the claimant was working the Box Sirloin line at Tyson when she suffered an injury to her right arm and shoulder which the parties stipulated arose out of and in the course of her employment with Tyson. On December 7, 2011, the claimant was placed on the job of Boxing Tenders, which did not require as much reaching as the Box Sirloin job.

The first medical treatment was provided on February 7, 2012 by plant physician Gregory E. Clem, M.D. (Exhibit 8, page 21) He prescribed a splint and kept the claimant off her regular job and declared the claimant at maximum medical improvement (MMI). (Ex. 8, p. 21) The doctor then closed his file and ordered no other treatment. Since the claimant was still experiencing symptoms and pain, and the employer offered no additional care, the claimant went to Vinko M. Bogdanic, M.D. (Ex. 9) On October 24, 2012, the employer authorized more care for the right shoulder with Robert L. Gordon, M.D. Dr. Gordon ordered an MRI. The MRI revealed a partial-thickness tear of the supraspinatus tendon. (Ex. 10, p. 41) Dr. Gordon then referred the claimant to Thomas Gorsche, M.D., an orthopedist. Dr. Gorsche saw the claimant on November 21, 2012 and injected her right shoulder. (Ex. 15, p. 65) That was the last time claimant was provided any treatment herein for the shoulder.

Farid Manshadi, M.D., performed an independent medical evaluation of the claimant. He causally connected the claimant's shoulder complaints to the work at Tyson. (Ex. 19, p. 87) He opined an eight percent body as a whole (BAW) impairment and restrictions of avoiding activity requiring repetitious reaching, shoulder height or above lifting, and no lifting over ten pounds with the right arm. (Ex. 19, p. 88)

On or about March 20, 2012, the claimant began experiencing significant pain in her back, which she associated with the work at Tyson. There are no records of the claimant reporting the injury to Tyson within 90 days. The claimant did fill out a claim for disability on May 18, 2012. The box for whether the disability was work related was left unchecked. (Deposition Transcript, p. 48) The first notice to Tyson was on or about September 26, 2012. (Ex. B) The claimant testified that she reported the symptoms to

plant nurse "Linda" in about March, 2012. The only nurse named Linda in the facility at the time was Linda McMahon, R.N. Ms. McMahon testified at hearing that she had no recollection of any report of a back injury from work from the claimant. She also credibly testified that if such a report had been made that she would have documented it as required by the employer. Interestingly, the claimant testified at hearing that she did not inform her supervisor, testimony contrary to her earlier deposition testimony.

Eventually the claimant's back required surgery. Russell Buchanan, M.D., performed an anterior lumbar interbody fusion on July 27, 2012. (Ex. 13, p. 53) The surgery was a failure, and it was later determined that further surgery would not benefit the claimant. (Ex. 18, p. 81) Dr. Manshadi, in his IME of the claimant, opined that the back surgery was the result of the work activities aggravating the claimant's pre-existing back condition.

On the November 23, 2011 date of injury pled, the claimant was married, entitled to 4 exemptions, and had gross earnings of $600.01 per week. The weekly rate is therefore $422.46. Commencement date for permanent disability was stipulated as October 30, 2013 for this injury. On the March 20, 2012 date of injury pled, the claimant was married, entitled to 4 exemptions, and had gross earnings of $621.42 per week. The weekly rate is therefore $435.60.

The claimant seeks $7,165.50 in medical bills relating to treatment of her right shoulder and arm. Those bills were reasonable and necessary for the treatment of the work injury to the right upper extremity.

The claimant did not timely inform the employer of her belief that she suffered a work injury to her back since she did not report a work injury until at least September of 2012. The claimant also seeks medical benefits of payment of medical bills. The lack of timely notice defense defeats this request.

The majority of the claimant's industrial loss is due to her back condition for which no award can be made as found above. As to the right shoulder, there is also some loss. It is significant, but not extreme. Her inability to speak or write English is also limiting. Given the claimant's pain, claimant's medical impairment, training, permanent restrictions, as well as all other factors of industrial disability, the claimant has suffered a 25 percent loss of earning capacity from the right upper extremity injury.

REASONING AND CONCLUSIONS OF LAW

The first issue is timely notice as to the March 20, 2012 injury.

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

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.

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

The alleged date of the back injury herein is March 20, 2012. Yet she did not inform the employer until at least September of 2012 that she believed that the conditions for which she had applied and received private disability were work related. She attempted to correct this hole in her case by testifying in her deposition that she had informed her supervisor at some time of the pain complaints she had. She changed that at hearing to acknowledge no such report was made to her supervisor. She also claimed she had told Nurse Linda about the pain complaints. There were no records to support this allegation, and Nurse Linda McMahon denied that it had occurred. The claimant was not credible given her prior work injury and her knowledge of how and to whom to report a work injury, and her knowledge of how to seek treatment through the employer for a work injury. The claimant had knowledge of a potentially serious work injury that was affecting her ability to work, which she then did not report within the 90 days required. All other issues are therefore moot on the back injury.

For the November 23, 2011 injury, the first question is whether there is any permanency, and if so, the extent.

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 25 percent loss of earning capacity, she has sustained a 25 percent permanent partial industrial disability entitling her to 125 weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(u).

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 16, 1975).

The claimant seeks $7,165.50 in medical bills relating to treatment of her right shoulder and arm. Those bills were reasonable and necessary for the treatment of the work injury to the right upper extremity. The defendant shall pay/reimburse the medical bills for the right shoulder as appropriate.

ORDER

THEREFORE IT IS ORDERED:

For File No. 5045260:

That the claimant take nothing on File No. 5045260.

For File No. 5045259:

That the defendant pay the claimant one hundred twenty-five (125) weeks of permanent partial disability commencing June 10, 2013 at the weekly rate of four hundred twenty-two and 46/100 dollars ($422.46).

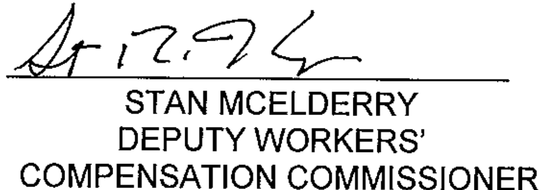
The defendant shall pay/reimburse the medical bills as detailed above.

Defendant shall receive credit for all benefits previously paid.

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 4th day of March, 2015.



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DEPUTY WORKERS'
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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.