BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

| | | |
|---|---|---|
| WENDY L. SEGURA, Claimant, | : | FILED APR 13 2017 WORKERS' COMPENSATION |
| vs. | : | File No. 5046348 |
| KRAFT FOODS GROUP, INC, Employer, | : | A P P E A L |
| and | : | D E C I S I O N |
| INDEMNITY INS. CO. OF NORTH AMERICA Insurance Carrier, Defendants. | : | Head Note Nos: 2401, 1701, 1802, 1803 |

Defendants Kraft Foods Group, Inc., employer, and its insurer, Indemnity Ins. Co. of North America, appeal from an arbitration decision filed on September 10, 2015. Claimant Wendy L. Segura responds to the appeal. The case was heard on March 4, 2015, and it was considered fully submitted in front of the deputy workers' compensation commissioner on April 4, 2015.

The deputy commissioner found claimant carried her burden of proof that she sustained a compensable cumulative trauma injury to her low back which arose out of and in the course of her employment with defendant-employer. The deputy commissioner found claimant's injury had a manifestation date of October 1, 2012. The deputy commissioner found claimant provided notice of the work injury to defendants on December 27, 2012. The deputy commissioner therefore found defendants failed to prove a 90-day notice defense pursuant to Iowa Code section 85.23. The deputy commissioner found claimant is permanently and totally disabled as a result of the work injury, which entitles claimant to permanent total disability benefits commencing on October 1, 2012. The deputy commissioner found claimant's correct weekly benefit rate for the injury is $442.81. The deputy commissioner found defendants are entitled to a credit for wages paid to claimant by defendant-employer after October 1, 2012. The deputy commissioner found defendants are entitled to an additional credit of $2,017.79 for payment of short term disability benefits. The deputy commissioner found claimant is entitled to payment of past medical charges, medical mileage and out-of-pocket medical expenses as set forth in Exhibits 29, 30, 32 and 33. The deputy commissioner ordered defendants to provide ongoing medical treatment for claimant's injury. The

deputy commissioner also ordered defendants to pay claimant's costs of the arbitration proceeding in the amount of $187.57.

Defendants assert on appeal that the deputy commissioner erred in finding claimant carried her burden of proof that she sustained a compensable cumulative trauma injury to her low back and in finding the injury had a manifestation date of October 1, 2012. Defendants assert the deputy commissioner erred in finding defendants failed to prove a 90-day notice defense. Defendants assert the deputy commissioner erred in finding claimant is permanently and totally disabled as a result of the work injury, and in finding claimant is entitled to permanent total disability benefits. Defendants assert the deputy commissioner erred in finding claimant is entitled to payment of past medical charges, medical mileage and out-of-pocket medical expenses as set forth in Exhibits 29, 30, 32 and 33. Defendants assert the deputy commissioner erred in ordering defendants to provide ongoing medical treatment for claimant's injury. Defendants also assert the deputy commissioner erred in ordering defendants to pay claimant's costs of the arbitration proceeding in the amount of $187.57.

Claimant asserts on appeal that the arbitration decision should be affirmed in its entirety.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, pursuant to Iowa Code sections 86.24 and 17A.15, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed in this matter on September 10, 2015, which relate to the following issues:

I affirm the deputy commissioner's finding that claimant carried her burden of proof that she sustained a compensable cumulative trauma injury to her low back which arose out of and in the course of her employment with defendant-employer.

I affirm the deputy commissioner's finding that claimant's injury had a manifestation date of October 1, 2012.

I affirm the deputy commissioner's finding that claimant provided notice of the work injury to defendants on December 27, 2012.

I affirm the deputy commissioner's order that defendants failed to prove a 90-day notice defense pursuant to Iowa Code section 85.23.

I affirm the deputy commissioner's finding that claimant's correct weekly benefit rate for the injury is $442.81.

I affirm the deputy commissioner's finding that defendants are entitled to a credit of $2,017.79 for payment of short term disability benefits.

I affirm the deputy commissioner's finding that claimant is entitled to payment of past medical charges, medical mileage and out-of-pocket medical expenses as set forth in Exhibits 29, 30, 32 and 33.

I affirm the deputy commissioner's order that defendants provide ongoing medical treatment for claimant's injury.

I affirm the deputy commissioner order that defendants pay claimant's costs of the arbitration proceeding in the amount of $187.57.

I affirm the deputy commissioner's findings, conclusions and analysis regarding those issues.

I reverse the deputy commissioner's finding that claimant is permanently and totally disabled as a result of the work injury, and I reverse the deputy commissioner's finding that claimant is entitled to permanent total disability benefits commencing on October 1, 2012. I find claimant is entitled to temporary total disability (TTD) benefits from October 1, 2012, through June 1, 2014. I find defendants are entitled to a credit against temporary total disability benefits for 5.5 weeks when claimant worked at defendant-employer between November 26, 2012, and April 28, 2013. I find claimant sustained 75 percent industrial disability as a result of the work injury, which entitles claimant to 375 weeks of permanent partial disability (PPD) benefits commencing June 2, 2014. I provide the following analysis regarding those issues:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant was referred to Robert Chesser, M.D., pain specialist at Trinity Specialty Clinic in Rock Island, Illinois, by her primary care physician, Rupa Bontu, M.D. Dr. Chesser treated claimant for her injury on the following dates:

March 28, 2013

April 11, 2013

April 23, 2013

April 29, 2013

May 28, 2013

June 18, 2013

July 8, 2013

(Exhibit 8)

On July 8, 2013, Dr. Chesser issued the following permanent restrictions:

> I feel she can resume work with restricted activities on July 8, 2013. Patient must alternate sitting/standing every 45 minutes and a permanent restriction of lifting no more than 15 lbs. and not working longer than 8 hours per work day.

(Ex. 8, p. 25)

When claimant presented Dr. Chesser's restrictions of July 8, 2013, to defendant-employer, claimant was told those restrictions could not be accommodated and claimant never returned to work. (Transcript pp. 46-48)

In a report dated September 9, 2014, Dr. Chesser stated claimant's work for defendant-employer materially aggravated and accelerated claimant's back problems:

> The job duties performed by Ms. Segura which involved repetitive bending, twisting or lifting imposed more trauma on her disc. This caused the disc to significantly worsen and accelerated its decline. The work duties materially aggravated the inflammation of the disc which produced pain as well as a decrease in function. Ms. Segura went from asymptomatic to symptomatic because of her work duties. She gradually worsened to the point she could no longer perform her job duties because of pain problems.

(Ex. 27, p. 7)

In that same report, Dr. Chesser provided the following additional information regarding claimant's restrictions:

> Squatting/deep bending: None; avoid.
> Kneeling/climbing: none; avoid.
> Bending: A few times per hour.
> Twisting: rare.
> Sitting/standing: No more than 8 hours per day. Ms. Segura should be allowed to change positions as needed. The time spent between sitting and standing should be close to equally divided.
>
> Lifting: Must be close to the body. No lifting of weight out in front of her or away from the body.
> Floor to waist: up to 5 lbs. on a rare basis.
> Knee to waist: up to 10 lbs. on a rare basis.
> Waist to shoulder level: up to 5 lbs. on a rare basis.
> Reaching and pushing or pulling: up to 5 lbs. of force on a rare basis.
> Rare, as used above, is defined as only once per hour.

(Id.)

Richard Kreiter M.D., orthopedic surgeon, examined claimant on August 27, 2014, at the request of claimant's counsel. Dr. Kreiter's impressions were:

1. Degenerative arthritis of the lumbosacral spine, primarily L4-5 and L5-S1 with bilateral facet arthritis, neurologically intact with chronic pain and limited motion.

2. Hypertension.

3. History of CVA with acute stroke and good recovery.

4. Hypothyroidism.

(Ex. 13, p. 9)

Dr. Kreiter responded to a series of questions from claimant's attorney. He stated it was likely the work performed by claimant at defendant-employer materially aggravated claimant's back condition. (Ex. 13, p. 10) Dr. Kreiter also opined claimant's work probably accelerated claimant's back problems. (Id.) Dr. Kreiter provided an eight percent whole body impairment rating and he found claimant was at maximum medical improvement (MMI) as of June 1, 2014. (Id.) Dr. Kreiter recommended restrictions of alternating standing, walking and sitting. He limited lifting to ten pounds on an occasional basis. (Id.)

On September 15, 2014, Michael Cullen, M.D., neurologist, performed an independent medical examination of claimant at the request of defendants. Dr. Cullen found claimant did not sustain an injury to her low back at any time during her employment at defendant-employer. Dr. Cullen found claimant's low back pain was not related to her employment and therefore claimant has no restrictions due to an employment-related injury. (Ex. 14, p. 12)

Steve Mootz M.A., CRC, conducted a vocational assessment of claimant. Claimant's attorney did not consent to allow claimant to meet with Mr. Mootz. In his assessment, Mr. Mootz used restrictions of limiting claimant to sedentary to light work, with the need to change positions every 45 minutes. (Ex. 15, p. 8) Mr. Mootz identified three positions in the Davenport labor market which claimant could perform. Two of the three were part-time positions. The full-time position was with APAC, a telemarketing firm. Claimant attempted to work at APAC, but was not successful for reasons unrelated to her injury. (Ex. 21, p. 22, Tr. pp. 70-71)

Claimant applied for and was awarded Social Security Disability Benefits with an onset date of December 31, 2012. (Ex. 16, p. 9) Claimant requested disability based upon degenerative disc disease, herniated discs, spinal stenosis and arthritis pain. (Ex. 16, p. 2)

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).

Claimant argues her back condition was materially aggravated and/or accelerated as a result of her work at defendant-employer. Based on the opinions of Dr. Chesser and Dr. Kreiter, I affirm the deputy commissioner's finding that claimant carried her burden of proof she sustained a compensable cumulative trauma injury to her low back which arose out of and in the course of her employment with defendant-employer. As stated above, I affirm the deputy commissioner's finding claimant's injury had a manifestation date of October 1, 2012, and I also affirm the deputy commissioner's finding defendants failed to prove a 90-day notice defense pursuant to Iowa Code section 85.23 because claimant provided notice of her injury to defendant-employer on December 27, 2012.

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.

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).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

The restrictions recommended by Dr. Chesser and by Dr. Kreiter are significant, but they do not prevent claimant from working. In fact, no physician has stated in this matter that claimant cannot work. While clamant has been awarded Social Security Disability benefits, that by itself is not dispositive under an industrial disability analysis as to whether claimant is capable of working in some capacity.

Mr. Mootz's vocational assessment identified three jobs claimant could perform. Two were part-time and the third was a telemarketing position at APAC which claimant attempted in December 2014, but was unsuccessful for reasons unrelated to her injury. (Ex. 21, p. 22, Tr. pp.70-71) This indicates claimant is capable of obtaining and performing at least sedentary employment. The record in this case establishes that other than her brief attempt to work at APAC in December 2014, claimant has not

attempted to find employment since 2013. (Tr. p. 73) Claimant has not shown good motivation to return to work.

While it is clear claimant has sustained substantial industrial disability as a result of the work injury of October 1, 2012, I find claimant is not permanently and totally disabled. Considering all of the factors of industrial disability, I find claimant has sustained 75 percent industrial disability, which entitles claimant to 375 weeks, commencing on June 2, 2014.

Because I find claimant is not entitled to permanent total disability benefits, I find she is entitled to temporary total disability (TTD) benefits from the October 1, 2012, date of injury through June 1, 2014, which is the date Dr. Kreiter determined claimant reached MMI. However, pursuant to the information contained in Exhibit 31, page 3, I find defendants are entitled to a credit against TTD for 5.5 weeks when claimant worked at defendant-employer between November 26, 2012, and April 28, 2013.

## ORDER

IT IS THEREFORE ORDERED that the arbitration decision of September 10, 2015, is MODIFIED as follows:

Defendants shall pay claimant temporary total disability benefits commencing October 1, 2012, through June 1, 2014.

Defendants shall receive a credit against temporary total disability benefits for 5.5 weeks when claimant worked at defendant-employer between November 26, 2012, and April 28, 2013.

Defendants shall pay claimant permanent partial disability benefits commencing on June 2, 2014, at the weekly rate of four hundred forty two and 81/100 dollars ($442.81).

Defendants are entitled to an additional credit of two thousand seventeen and 79/100 dollars ($2,017.79) for payment of short term disability benefits.

Defendants shall pay accrued weekly benefits in a lump sum together with interest pursuant to Iowa Code section 85.30.

Defendants shall pay past medical charges, medical mileage and out-of-pocket medical expenses for claimant's injury as set forth in Exhibits 29, 30, 32 and 33.

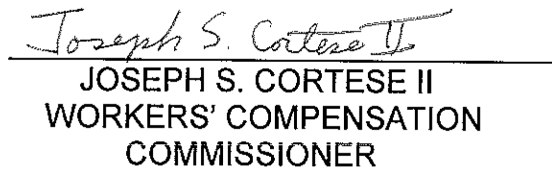
Defendants shall provide ongoing medical treatment for claimant's injury.

Defendants shall file subsequent reports of injuries (SROI) as required by this agency.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding in the amount of $187.57 and the parties shall split the costs of the appeal, including the cost of the hearing transcript

Pursuant to rule 876 IAC 3.1(2), defendants shall file subsequent reports of injury as required by this agency.

Signed and filed this 13th day of April, 2017.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

Copies To:

Michael T. Hines
Attorney at Law
326 West Third Street, #701
Davenport, IA 52801
attymhines@qwestoffice.net

Peter J. Thill
Paul M. Powers
Attorneys at Law
1900 East 54th Street
Davenport, IA 52807
pjt@bettylawfirm.com
pmp@bettylawfirm.com