BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ELISA TERRAZAS, Claimant, vs. TYSON FOODS, INC. Self-Insured Employer, Defendant.	:	File No. 5043767 ARBITRATION DECISION Headnote No.: 1803

STATEMENT OF THE CASE

Elisa Terrazas filed a petition for arbitration seeking workers' compensation benefits from, the employer, Tyson Foods, Inc., a self-insured employer.

The matter came on for hearing on July 25, 2016, before deputy workers' compensation commissioner Joseph L. Walsh in Des Moines, Iowa. The record in the case consists of joint exhibits A through P; claimant's exhibits 1 through 14; as well the sworn testimony of claimant. Amy Pedersen served as the court reporter. Darcy Lopez was approved to serve as the Spanish-language interpreter. The parties argued this case and fully submitted the matter October 5, 2016.

ISSUES AND STIPULATIONS

The stipulations contained in the hearing order have been approved and are deemed ordered with the consent of the parties. The parties have done an excellent job of narrowing down the real dispute in the case, which is the nature and extent of the claimant's disability. Claimant contends she is permanently and totally disabled, while defendant alleges she has only suffered a permanent partial disability.

FINDINGS OF FACT

The parties have stipulated that claimant suffered a cumulative injury which arose out of and in the course of employment on February 10, 2012.

Ms. Terrazas, claimant, was born in Mexico. She was 59 years old at the time of hearing. She has a sixth grade education from Mexico. She began working at Tyson Foods in August 2004. Claimant cannot read or write English yet has limited verbal communication skills in English.

Elissa Terrazas testified under oath at hearing through a Spanish-language

interpreter. I find her to be credible. Her live, sworn testimony was generally consistent with her deposition testimony and other discovery answers. There was nothing about her demeanor which caused the undersigned concern about her veracity.

Claimant went through a pre-employment physical before starting work with employer, Tyson Foods. She has no proven prior disability or work restrictions attributable to the left arm, shoulder or neck. Claimant's work with employer was mostly repetitive in nature. Claimant worked the box shop at a rate of about 1,800 boxes and 1,800 bags a day. Claimant's painful affliction started in February of 2012 with pain in her arm, shoulder and neck. Claimant had a carpal tunnel surgery and was given light duty work in a job known as "detection". She then, after surgery, had another job of removing fat. This was considered light duty work. Claimant underwent shoulder surgery in August of 2013 and went back to a light duty detection job in the pic-nic department. Brian D. Adams, M.D., performed the left shoulder surgery consisting of left rotator cuff repair and arthroscopy of the left shoulder biceps tendon.

The initial medical diagnosis stated was left shoulder subacromial bursitis and rotator cuff tendinitis. The neck pain was believed to be related to muscle inflammation. Claimant had an MRI of the shoulder and neck in October 2012. The MRI demonstrated a rotator cuff tendon tear with a mild long head biceps tendinopathy. The MRI also revealed a mild degeneration of the mid to lower cervical spine. Claimant also had nerve conduction studies that confirmed moderate to severe carpal tunnel syndrome on the left with denervation.

Dr. Adams, the treating doctor, placed claimant at MMI with a 7 percent whole body impairment rating of the left shoulder, on December 11, 2013. Dr. Adams opined that claimant may return to work with no work restrictions to the right hand. The work restrictions for the left include allowing frequent lifting of zero to ten pounds, occasional lifting from zero to thirty five pounds, occasional climbing, no crawling, frequent gripping and pinching, occasional pushing and pulling and no reaching above the shoulder. Dr. Adams also suggested to avoid full power grasping with the left hand but could do moderate grasping on the left. Gregory E. Clem, M.D., incorporated these restrictions. (Def. Ex. B, pp. 25-26)

Claimant sought out an IME from Richard Kreiter, M.D., pursuant to Iowa Code section 85.39. Dr. Kreiter opined that claimant's left shoulder and bilateral carpal tunnel syndromes are causally related to the repetitive trauma claimant sustained while working for Tyson. Dr. Kreiter also causally connected 11 percent whole body impairment to the work performed for Tyson and the related injury of February 10, 2012.

Claimant was offered to bid a number of jobs upon her return to work. Tyson has an interactive process which in some way attempts to accommodate injured workers with permanent work restrictions. Tyson offered claimant the jobs of "de-fat ham/straight knife", "cryovac wrapper butts", "trim ham cushion and membrane skinner" and "belly feed skinner". Claimant was encouraged to attempt the feed belly skinner job. Claimant felt that the work was in violation of Dr. Adams' work restrictions. Tyson's

Dr. Clem approved each of the jobs. Claimant worked the feed belly skinner job for an hour, two days in a row and refused to work further. Claimant indicated she was not interested in the feed job. Claimant felt that the whole offer of work was a set up to get her to quit her job. Claimant wanted to go back to other jobs that she knew she could handle like the cutting bags job. Tyson did not offer claimant the other light duty jobs. Tyson also offered claimant "trim inspection" which required lifting of 40 pounds. Tyson offered to accommodate by having someone else perform the heavy lifting aspect of "trim inspection". Claimant felt it all beyond her work restrictions and did not try any other jobs.

Claimant went on leave of absence February 19, 2014.

After the right carpal tunnel surgery, Tyson again attempted to accommodate claimant's work restrictions by offering the jobs of "align hind foot", "first and second pluck" and "trim liver". Claimant did not return to access Tyson's interactive bidding process until February 2016.

I find that claimant was not motivated to return to work. She attempted one job for two hours over a period of two days. This simply does not demonstrate high motivation. I believe claimant that she truly believed she could not perform this work. I further find that claimant has real and significant, permanent functional impairment. Claimant has suffered multiple surgeries due to the work injuries. The employer has made diligent attempts to accommodate the restrictions imposed by treating doctors.

CONCLUSIONS OF LAW

The first question is whether the admitted February 10, 2012 injury is a cause of permanent disability, and if so, the extent of such disability.

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).

The parties stipulated that the February 12, 2010, injury is a proximate cause of disability in the claimant's left shoulder, upper extremity and cervical spine.

The expert opinions as to the medical impairment in this case are not necessarily conflicting. Both treating and independent examining doctors agree that claimant suffered impairment and has causally connected work restrictions.

The fighting issue in this case is the extent of claimant's industrial disability.

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).

Although claimant is close to a normal retirement age, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund of Iowa v. Nelson, 544 N.W. 2d 258 (Iowa 1995). However, this agency does consider voluntary retirement or withdrawal from the work force unrelated to the injury. Copeland v. Boones Book and Bible Store, File No. 1059319, Appeal Decision (November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

Having reviewed all of the evidence in the case file, I find that the claimant has suffered a 60 percent loss of earning capacity as a result of the February 10, 2012, work injury. Claimant, age 59 years at the date of hearing, was born in Mexico with primary language as Spanish. She obviously has limited English proficiency. She graduated from the 6th grade in Mexico. Her work history is mostly repetitive manual labor in the meat packing industry. Claimant has been a hard worker for her entire life. She is probably correct that working in a fast-paced industrial setting is not her best option at this time.

While the claimant has been a hard worker her entire life, she has not gone to great lengths to return to work for this employer. Claimant essentially refused to attempt jobs offered by employer. She was not highly motivated to return to work at Tyson. While I believe that the claimant did not believe she could perform the work at Tyson, her refusal to attempt to work in positions she was released to try by the physicians makes a finding of permanent total disability impossible.

While claimant has an undisputed functional impairment stemming from the injuries combined with significant work restrictions, this does not equate to a permanent total disability case. It is also noted claimant has not made a significant work search since leaving Tyson.

On the other hand, the claimant has significant work restrictions both from the treating doctor and independent evaluator. She is restricted from frequent lifting of zero to ten pounds, occasional lifting from zero to thirty five pounds, occasional climbing, no crawling, frequent gripping and pinching, occasional pushing and pulling and no reaching above the shoulder. Dr. Adams also suggests to avoid full power grasping with the left hand but could do moderate grasping on the left. Dr. Clem incorporated these restrictions. (Def. Ex. B, pp. 25-26) Objectively, these are severe restrictions which significantly impair the claimant's ability to secure employment in the competitive job market.

With claimant's lack of English language skills, her manual labor work experience and age, she will have difficulty securing employment. These factors weigh toward a higher industrial disability notwithstanding diligent efforts to reemploy by the employer.

Having considered all the salient industrial disability factors it is held that claimant has a 60 percent industrial disability as a result of the February 10, 2012, work injury.

ORDER

THEREFORE IT IS ORDERED:

Defendant shall pay the claimant three hundred (300) weeks of permanent partial disability benefits at the rate of four hundred twenty-nine and 65/100 ($429.65) per week commencing August 29, 2013.

Defendant shall pay accrued weekly benefits in a lump sum.

Defendant shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendant shall be given credit for the benefits previously paid.

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

Costs are taxed to defendant.

Signed and filed this 10th day of May 2017.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.