BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LORENA SERRATO,

Claimant,

vs.

FARMLAND FOODS, INC.,

Employer,

and

SAFETY NATIONAL,

Insurance Carrier,
Defendants.

File Nos. 5046691, 5046692

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Lorena Serrato, has filed petitions in arbitration and seeks workers' compensation benefits from Farmland Foods, employer, and Safety National, insurance carrier, defendants.

Deputy workers' compensation commissioner, Stan McElderry heard this matter in Sioux City, Iowa.

ISSUES

For File No. 5046692:

1. Whether the claimant suffered an injury that arose out of and in the course of her employment on February 29, 2012 was scheduled or industrial;

2. The extent of disability; and

3. Medical Benefits.

For File No. 5046691:

1. Whether the injury arising out of and in the course of claimant's employment on September 14, 2012 caused permanent disability, and if so, the extent; and

2. Medical Benefits.

FINDINGS OF FACT

The claimant was 29 years of age on the date of hearing. She is a high school graduate, and is generally fluent in Spanish and English (has trouble with some medical and legal terms). She received a degree in cosmetology at some point.

The claimant began her work with Farmland Foods in 2009. On February 29, 2012, the claimant was working on the repack machine placing more plastic into the machine when her co-worker turned the machine on. As a result, the machine pulled the claimant's right arm into the machine up to her wrist and part of the forearm. As the arm was pulled in metal rollers on the machine twisted and crushed her hand. Her attempts to free herself were unsuccessful and merely resulted in injury to the right shoulder. When supervisors finally arrived at the scene they would not allow the metal rollers to be broken so the claimant's arm remained trapped until the machine could be disassembled. When the claimant's arm was released she could not feel her hand which was swollen and numb, and she had pain from her elbow to her shoulder. The fighting issue is whether the injury is scheduled or industrial.

The claimant was taken to Crawford County Memorial Hospital (CCMH) (Exhibit 2, page 63) A cock-up splint was applied (Ex. 2, p. 66) and the claimant was then transported by ambulance to Alegant Health-Lakeside Hospital in Omaha, Nebraska. (Ex. 3)

At Alegant, David Inda, M.D., noted sensory changes involving the median nerve, and diminished sensation in the thumb, index finger and long finger that extended up the dorsum of the wrist. (Ex. 3, p. 74) In the hospital discharge summary on March 1, 2012, John McCarthy, M.D., diagnosed post crush injury of the right hand with possible ligamentous injury, and acute right carpal tunnel. (Ex. 3, p. 75) On March 8, 2012, Dr. McCarthy noted some limitations in claimant's right shoulder range of motion with some impingement signs. He diagnosed right acute median nerve compromise associated with crush injury, tenosynovitis right hand, and bursitis right shoulder. (Ex. 4, p. 89) By June 13, 2012 Dr. McCarthy was noting "functional range of motion to the shoulder and elbow." (Ex. 4, p. 104) On August 20, 2012, Dr. McCarthy noted, "intact functional range of motion to the shoulder. She is tender over her pronator." (Ex. 4, p. 112) Dr. McCarthy released the claimant to Dr. Anderson for physiatrist care.

The only doctor herein to provide a rating for the right shoulder was Sunil Bansal, M.D. The claimant saw Dr. Bansal for an independent medical evaluation (IME) on October 24, 2013. (Ex. 19) Dr. Bansal opined that the right shoulder concerns were due to the September 14, 2012 fall injury. (Ex. 19) The February 29, 2012 injury is limited to the right upper extremity (arm) and does not extend into the body as a whole, beyond some temporary shoulder concerns that resulted in no permanency. Dr. Anderson opined a 4 percent right upper extremity (RUE) for the February 29, 2012 injury. (Ex. 15, p. 244) However his rating is from the AMA Guides 6th edition which this agency has specifically not adopted. This agency utilizes the AMA Guides 5th

edition, unless lay testimony establishes that a deviation from the AMA Guides is necessary or appropriate. Dr. Bansal provides a rating of 22 percent for combined injuries to the RUE. Only 9 percent of which appears to be for the February 29, 2012 injury (10 percent shoulder and 5 percent elbow injuries were attributed by Dr. Bansal to the September 14, 2012 fall). Dr. Anderson permanently limited the claimant to one arm (left) work. (Ex. 15, p. 243) Although scheduled members are rated for functional and not industrial loss, a restriction of no industrial use argues strongly for a greater functional loss than either rating. However the no work use of the right upper extremity restriction appears to come from the fall injury. (Ex. 15, p. 243) Therefore for the right arm the 9 percent rating of Dr. Bansal will be accepted.

On September 14, 2012, the claimant suffered a stipulated work injury when she slipped on a wet spot on some stairs and fell. She felt immediate pain to her back, neck, and head. She was transported by ambulance to the CCMH and Steven Lapke, M.D., diagnosed head, neck, back, and right elbow contusion. (Ex. 10, p. 175) Although the claimant has made some claims that she lost consciousness, the ambulance and ER records do not support this conclusion. Todd Woolen, M.D., had concerns about the "possibility of secondary gain issues" regarding the claimant's head and dizziness complaints. The first report of back pain is July 12, 2013 when the claimant again saw Dr. Anderson. (Ex. 15, p. 240)

Eventually, the claimant was sent to physical therapy. On her last visit the therapist noted ongoing significant deficits in range of motion (ROM) and strength in the claimant's right shoulder, wrist, and hand. (Ex. 14, p. 228) Dr. Anderson on July 12, 2013 imposed restrictions of no gripping, pinching, pushing/pulling, or reaching above shoulder with her right upper extremity. (Ex. 15, p. 243) And stated "she may do one arm work only with l(eft)." (Ex. 15, p. 243) He also imposed restrictions of occasional bend, twist, squat, and kneel for the back injury. (Ex. 243) Thus Dr. Anderson is attributing the right shoulder and back to the September 2012 fall injury. Although he imposed no rating for the back, he provided permanent restrictions for it and the shoulder/arm.

Dr. Bansal provided a 5 percent permanent body as a whole impairment rating for the back. (Ex. 19) He opined restrictions of occasional only bend, twist, squat, and kneel for the back. (Ex. 19) For the RUE he opined no grip/pinch, push/pull, or reaching above right shoulder; and no use of right arm. (Ex. 19) He also initially imposed a rating for the head injury, but when the claimant's concussive syndrome and vertigo resolved he pulled that rating. (Ex. 36, pp. 507-509) In the middle of September 2013 the employer informed the claimant that it could find no jobs for her within her restrictions and removed the claimant from work. In February of 2014 the employer returned the claimant to the work of sorting meat pieces with her left arm only. However the job violated the bending restrictions and twisting in place for the back injury. (Ex. A, the employers job description, claimant's testimony). The claimant only lasted about a week in that position and she has not worked since.

The claimant has suffered a substantial loss of earnings capacity as a result of her September 14, 2012 injury. Both Dr. Bansal and Dr. Anderson imposed severe restrictions for the RUE when one understands that both attribute the claimant's right shoulder restrictions and limitations as existing from the September 2012 injury, and not the February 2012 crush injury. Dr. Anderson opined no industrial use of the right arm for a right arm dominant individual with only a high school education who is not 100 percent fluent in English. This is before considering restrictions she has to her back. She can return to no previous employment. No vocational training has been offered. Considering the claimant's medical impairments, training, age, permanent restrictions and limitations, as well as all other factors of industrial disability, the claimant has suffered a 100 percent loss of earnings capacity from the September 14, 2012 injury.

On February 29, 2012, the claimant was married, entitled to two exemptions, and had gross average week wages of $804.42. Her weekly benefit rate for that injury date is $531.46. On September 14, 2012, the claimant was married, entitled to two exemptions, and had gross average week wages of $721.61. Her weekly benefit rate for that injury date is $484.35. The parties stipulated to a July 12, 2013 commencement date for permanent benefits for both injuries. However the commencement date for an injury resulting in permanent total disability is the date of injury and continuing for all periods of disability.

Claimant seeks payment of medical expenses. The expenses are detailed in exhibit 34. Those expenses were reasonable and necessary for the treatment of the claimant's work injuries herein.

REASONING AND CONCLUSIONS OF LAW);

The first issue is the whether the work injury of February 29, 2012 was scheduled or industrial, and the extent of the claimant's entitlement to permanent partial disability.

Where an injury is limited to scheduled member the loss is measured functionally, not industrially. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983).

The courts have repeatedly stated that for those injuries limited to the schedules in Iowa Code section 85.34(2)(a-t), this agency must only consider the functional loss of the particular scheduled member involved and not the other factors which constitute an "industrial disability." Iowa Supreme Court decisions over the years have repeatedly cited favorably the following language in the 79-year-old case of Soukup v. Shores Co., 222 Iowa 272, 277; 268 N.W. 598, 601 (1936):

> The legislature has definitely fixed the amount of compensation that shall be paid for specific injuries . . . and that, regardless of the education or qualifications or nature of the particular individual, or of his inability . . . to engage in employment . . . the compensation payable . . . is limited to the amount therein fixed.

Our court has even specifically upheld the constitutionality of the scheduled member compensation scheme. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404 (Iowa 1994). Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Graves, 331 N.W.2d 116; Simbro v. DeLong's Sportswear 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C. M. Co., 194 Iowa 819, 184 N.W. 746 (1921). Pursuant to Iowa Code section 85.34(2)(u) the workers' compensation commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Co., 164 N.W.2d 84 (Iowa 1969).

Evidence considered in assessing the loss of use of a particular scheduled member may entail more than a medical rating pursuant to standardized guides for evaluating permanent impairment. A claimant's testimony and demonstration of difficulties incurred in using the injured member and medical evidence regarding general loss of use may be considered in determining the actual loss of use compensable. Soukup, 222 Iowa 272, 268 N.W. 598. Consideration is not given to what effect the scheduled loss has on claimant's earning capacity. The scheduled loss system created by the legislature is presumed to include compensation for reduced capacity to labor and to earn. Schell v. Central Engineering Co., 232 Iowa 421, 4 N.W.2d 339 (1942).

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by statute. Soukup, 222 Iowa 272, 268 N.W. 598.

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.

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).

I found that the claimant suffered a 10 percent permanent loss of use of her right upper extremity due to the February 29, 2012 injury. Based on such a finding, the claimant is entitled to 22.5 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(m), which is 9 percent of 250 weeks, the maximum allowable weeks of disability for an injury to the arm in that subsection.

Next is the permanent disability for the September 14, 2012 injury.

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. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 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. Cedar Rapids Community School v. Pease, 807 N.W.2d 839, 845 (Iowa 2011). 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 finder of fact, must determine the credibility of the witnesses, weigh the evidence, and decide the facts at issue in a case. See Arndt v. City of LeClair, 728 N.W.2d 389, 394-95 (Iowa 2007). One factor the commissioner considers is whether an expert's opinion is based upon an incomplete medical history. Dunlavey v. Economy Fire & Cas. Co., 526 N.W.2d 845, 853 (Iowa 1995).

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 and inability to engage in employment for which the employee is fitted. 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).

A finding of impairment to the body as a whole found by a medical evaluator does not equate to industrial disability. Impairment and disability are not synonymous. The degree of industrial disability can be much different than the degree of impairment because industrial disability references to loss of earning capacity and impairment references to anatomical or functional abnormality or loss. Although loss of function is to be considered and disability can rarely be found without it, it is not so that a degree of industrial disability is proportionally related to a degree of impairment of bodily function.

Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity, and the length of the healing period; the work experience of the employee prior to the injury and after the injury and the potential for rehabilitation; the employee's qualifications intellectually, emotionally, and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. Likewise, an employer's refusal to give any sort of work to an impaired employee may justify an award of disability. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980). These are matters which the finder of fact considers collectively in arriving at the determination of the degree of industrial disability.

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3

Industrial Commissioner Decisions 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions 654 (App. February 28, 1985).

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 29, 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 19, 1982).

Due to the finding of a 100 percent loss of earnings capacity the claimant is entitled as a matter of law to permanent total industrial disability pursuant to Iowa Code section 85.34(3). This entitles the claimant to weekly benefits for life absent a change of condition

MEDICAL

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).

The claimant has medical expenses that were reasonable and necessary for the treatment of the work injuries that are detailed in Exhibit 34. Those expenses are the responsibility of the defendants. The defendants shall pay/reimburse the medical bills as appropriate.

ORDER

THEREFORE IT IS ORDERED:

That for File No. 5046692 the defendants shall pay claimant twenty-two point five (22.5) weeks of permanent partial disability at the weekly rate of five hundred thirty-one and 46/100 dollars ($531.46) commencing July 12, 2013.

That for File No. 5046691 the defendants pay claimant permanent total disability benefits commencing September 14, 2012 at the rate of four hundred eighty-four and 35/100 dollars ($484.35), and continuing for all periods of disability .

Defendants shall pay/reimburse medical expenses as detailed above.

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.

Defendants shall receive credit for benefits previously paid.

Signed and filed this 30th day of October, 2015.

STAN MCELDERRY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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SRM/kjw

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.