BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FATIMA BEGIC,	:	
Claimant,	:	File No. 5044085
vs.	:	APPEAL
TYSON FRESH MEATS, INC.,	:	DECISION
Employer, Self-Insured, Defendant.	:	Head Note Nos.: 1100;1801; 1803; 2500; 4000

Claimant Fatima Begic appeals from an arbitration decision filed September 9, 2014. The case was heard on July 1, 2014, and it was considered fully submitted on July 22, 2014, in front of the deputy workers' compensation commissioner.

The deputy commissioner determined that claimant failed to prove by a preponderance of the evidence that she sustained a work-related injury to her right shoulder on or about June 27, 2012, as alleged, and claimant was awarded nothing beyond reimbursement for an IME plus the cost of obtaining medical records.

Claimant asserts on appeal that the deputy commissioner erred in finding she failed to prove the occurrence of a work-related injury and in not awarding weekly benefits, medical benefits, penalty benefits, interest, mileage and costs. Defendant asserts that the findings of the deputy commissioner should be affirmed on appeal.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, I reach the same analysis, findings and conclusions as those reached by the deputy commissioner.

Pursuant to Iowa Code Sections 86.24 and 17A.5, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on September 9, 2014, that relate to issues properly raised on intra-agency appeal with the following additional analysis.

ISSUES ON APPEAL

1. Whether claimant sustained a right shoulder injury on or about July 27, 2012, which arose out of and in the course her employment.

2. Whether claimant is entitled to TTD/HP benefits from June 28, 2012, through July 8, 2012, and from April 3, 2013, through January 5, 2014.

3. Whether claimant is entitled to an award of permanent disability benefits commencing on July 9, 2012.

4. Whether claimant is an odd-lot injured worker.

5. Whether claimant is entitled to an award of medical benefits as set forth in claimant's Exhibit 14.

6. Whether claimant is entitled to penalty benefits.

7. Whether claimant is entitled to interest on the accrued portion of the award for weekly benefits.

8. Whether claimant is entitled to an award of mileage reimbursement as set forth in claimant's Exhibit 15.

9. Whether claimant is entitled to an award of costs as set forth in claimant's exhibit 13.

STIPULATIONS

1. Claimant was an employee on June 27, 2012.

2. Permanent benefits awarded, if any, shall begin on July 9, 2012, interrupted by two different healing periods.

3. The disability, if any, is industrial in nature.

4. Claimant's gross earnings at the time of her injury were $575.00 per week. She is married and entitled to three exemptions. Based on those factors, claimant's weekly benefit rate is $400.82.

5. Defendant agrees the medical bills claimed are appropriate for claimant's condition, but dispute those bills are for services related to a compensable injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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).

The first issue is whether claimant sustained a right shoulder injury on or about June 27, 2012, which arose out of and in the course of her employment with defendant.

Arnold E. Delbridge, M.D., orthopedic surgeon, who was selected by claimant after this claim was denied by defendant, opined that claimant's employment with defendant caused a cumulative work-related material and permanent aggravation of claimant's pre-existing right shoulder condition. (Exhibit 11, page 26; Ex. 23, pp. 12-13) Dr. Delbridge opined that claimant has permanent impairment of 12 percent of her right upper extremity, which converts to seven percent impairment of the whole person resulting from the injury. (Ex. 11, p. 25)

Four physicians disagreed with Dr. Delbridge's causation opinion: Robert Gordon, M.D., occupational medicine specialist, (Ex. 3, pp.29-30; Ex. L, p. 62) Thomas Gorsche, M.D., orthopedic surgeon, (Ex. 5, pp. 7-8) Brian Adams, M.D., orthopedic surgeon, (Ex. 10, pp. 6-7) and Richard Naylor, M.D., orthopedic surgeon.

(Ex. M, p. 103) Those four physicians felt that claimant's right shoulder condition was an age-related naturally occurring degenerative condition. Drs. Gordon, Gorsche and Adams were selected by defendant. Dr. Naylor examined claimant at her request.

Dr. Gordon is a problematic expert for defendant. He is an employee of the defendant who has the greatest financial interest of all of the experts in the outcome. However, Dr. Gordon did order multiple tests and he also referred claimant multiple times for examination by specialists. Dr. Gordon's opinions are credible because they are consistent with the opinions of Drs. Gorsche, Adams and Naylor.

Drs. Gorsche and Adams are both orthopedic surgeons who opined that claimant's shoulder condition is age-related. Their opinions are well-reasoned and are consistent with greater weight of the evidence in this case.

While I give greater weight to the opinions of Drs. Gorsche and Adams than I give to Dr. Delbridge, I find Dr. Naylor's causation opinion to be particularly convincing. Dr. Naylor evaluated claimant at her request. Dr. Naylor had absolutely nothing to gain by agreeing with Drs. Gordon, Gorsche and Adams, and by disagreeing with Dr. Delbridge. In his report dated April 4, 2014, Dr. Naylor stated the following in pertinent part:

> I reviewed approximately 2 inches of her previous notes. I reviewed notes by Dr. Gordon, Dr. Gorsche, Dr. Adams and Dr. Delbridge. I had seen the patient initially I think twice with clinic visits. Her last followup being on 1/23/2013 and her initial consultation being on 11/08/2012.
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> . . .
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> MRI showed partial thickness rotator cuff tear with impingement and AC joint arthrosis. EMGs were otherwise negative. At that time I offered her diagnostic arthroscopy. She asked me if it could be work related. I told her I would have to have more information. She subsequently ended up following with Dr. Delbridge who did a MRI arthrogram which then showed at least 50% tear, progression of tear although she had not been working during this time.
>
> I also watched a video with a lawyer that I saw yesterday which is her job description and it was consistent with a job where she takes meat that comes down a conveyor belt, drops into a bucket that she then can reach into the bucket, pull it out. The person who is doing that, I do not know exactly what her height was, but it was not any overhead work. It was at or mainly below shoulder height work. On the job description most weight [sic] less than that but they can weight [sic] up to 4 pounds. Otherwise I have to concur with Dr. Gordon, Dr. Gorsche and Dr. Adams that from watching the video and seeing her I can not put this together how it is work related. I also reviewed notes with Dr. Delbridge up to, I think, his

> last note that I had was on 11/2013. She underwent surgery in May and then had to have a subsequent manipulation I think in August but at this time I have to concur with the same conclusion as Dr. Gordon, Dr. Adams and Dr. Gorsche.

(Ex. M, p.103)

Dr. Naylor, a doctor chosen by claimant, noted that the MRI arthrogram ordered by Dr. Delbridge showed a progression of claimant's rotator cuff tear during a period of time when claimant was not working. This particular fact indicates claimant's condition was a non-work related degenerative condition rather than one caused by, or exacerbated by, work.

Also, claimant made two conflicting claims of injury. On the one hand, she reported to Drs. Gordon, Gorsche and Adams that her symptoms started when she was injured on or about June 27, 2012, when she reached into a bin. (Ex. 3, p. 1; Ex. 5, p. 1; Ex. 10, p. 1) On the other hand, she reported to Dr. Delbridge that her symptoms resulted from repetitive tasks over a period of several months. (Ex. 11, pp. 23 and 26) Therefore, Dr. Delbridge's causation opinion appears based on an incorrect history.

When an expert's opinion is based upon an incomplete history, the opinion is not necessarily binding upon the commissioner. Id. The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence, together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Id. (Citing Gwynne v. Vance, 258 Iowa 875, 879, 140 N.W.2d 917, 919 (1966)).

Another consideration which works against claimant in this case is her credibility. Claimant failed 17 out of 17 validity criteria during the functional capacity evaluation (FCE) which took place on January 21 and 22, 2013. The FCE report states the following on pages one and two:

> Evaluation Results:
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> The overall results of this evaluation represent an inconsistent effort and unreliable performance secondary to the submaximal performance demonstrated by Ms. Begic during her performance on a variety of functional tasks. (Consistency of effort is determined by evaluating a battery of objective tests.) The client demonstrates inconsistent reliability of pain. (Reliability of pain is generally based on the correlation between subjective complaints and functional performance; presence of exertion, postural changes, recruitment of muscles, and heart rate. Self-termination of tolerances or refusal to attempt tasks without clinical objective findings signifies inconsistent reliability of pain.) The overall results of this evaluation do not represent a true and accurate representation of Ms. Begic's overall physical capabilities and tolerances at this time.

> **Given the fact that the client failed 17 out of 17 objective consistency of effort criteria and demonstrated inconsistent reliability of pain, a physical demand level cannot be determined with a submaximal effort and inconsistent reliability of pain.** (emphasis not added)

(Ex. 4, pp. 6-7)

Also, claimant's description of her job varied from doctor to doctor as did her pain level and range of motion as noted by Dr. Delbridge in his report of January 17, 2014. (Ex. 11, pp. 22-27) To Dr. Adams, claimant described lifting items from floor to waist level and twisting and turning. (Ex. 10, p. 1) There was no job she performed that required her to lift items from floor to waist level and the ones that required twisting and turning were minimal. (Exhibits 19 and 20) While there were some jobs claimant performed where minor stress was placed on her shoulders, (Ex. 19, pp. 7, 18) claimant reported to the company nurse, to Dr. Gordon and to Dr. Gorsche that her injury resulted from bending over the combo to reach for meat. (Ex. D, p. 4; Ex. 3, p.1; Ex. 5, p. 1)

The deputy commissioner noted in the arbitration decision that during the arbitration hearing she found claimant to be lacking in credibility:

> . . . [claimant] appeared to over exaggerate her symptoms and what hurt claimant the most was her obvious understanding of English, but her adamant refusal to acknowledge that she understood it despite slipping up time and again. During cross-examination it was difficult to ascertain whether she truly did not understand or was being intentionally obfuscating . . .

(Arb. Dec., p. 8)

> . . . She claimed to speak and understand no English but was repeatedly caught answering questions before the interpreter had a chance to interpret. When confronted with this, claimant retreated behind a wall of feigned ignorance. She failed 17 out of 17 validity criteria. She claimed that one of her jobs was not fit for a healthy person let alone one in her condition . . .

(Arb. Dec., p. 11)

Some of the findings by the presiding deputy were based on the deputy's conclusion that claimant was lacking in credibility. While I performed a de novo review, I give considerable deference to findings of fact that are impacted by the credibility findings, expressly or impliedly, made by the deputy who presided at the hearing.

Having reviewed the entire record, including the videos which were introduced as Exhibit 20, as well as considering all of the expert testimony and medical records, I

affirm the deputy commissioner's finding that claimant failed to prove by a preponderance of the evidence that her right shoulder condition was caused by her employment with defendant. I affirm the deputy commissioner's finding that claimant's shoulder condition is the result of a degenerative disease rather than any work-related trauma.

Because of the finding of no causal relationship between claimant's employment and her right shoulder condition, all other issues raised by claimant are moot and are not addressed in this decision.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of September 9, 2014, is AFFIRMED in its entirety.

Claimant takes nothing.

Claimant shall pay the costs of the appeal, including the preparation of the hearing transcript.

Signed and filed this 9th day of October, 2015.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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