BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARIA DEL CARMEN OSORIO,

Claimant,

vs.

TYSON FRESH MEATS,

Employer,
Self-Insured,
Defendant.

File No. 5052625

ARBITRATION

DECISION

Head Note No.: 1803, 2907

STATEMENT OF THE CASE

Maria Del Carmen Osorio, claimant, filed a petition for arbitration against Tyson Fresh Meats, as a self-insured employer. An in-person hearing occurred on May 27, 2016, in Des Moines, Iowa.

The evidentiary record includes claimant's exhibits 1 through 13. Defendants submitted a separate set of exhibits labeled as exhibits A through O. All exhibits were received without objection.

Claimant testified on her own behalf. Defendant called Tomas Macias and Ahmed Ibrahim to testify. The evidentiary record closed at the conclusion of the arbitration hearing. However, counsel for the parties requested the opportunity to file post-hearing briefs. The parties were given until June 27, 2016 to file and serve their post-hearing briefs, at which time the case was considered fully submitted to the undersigned.

STIPULATIONS

The parties submitted a hearing report at the commencement of the arbitration hearing. In the order section of the hearing report, the undersigned found the hearing report "to be a correct representation of disputed issues and stipulations and the report was approved and accepted into the record of this case." Those stipulations and the disputed issues were discussed by counsel and the undersigned at the commencement of hearing. However, for clarity sake, the parties have entered into the following stipulations:

1. The parties stipulate to "[t]he existence of an employer-employee relationship at the time of the alleged injury." (Hearing Report, page 1)

2. The parties stipulate that "Claimant sustained an injury on November 4, 2013 which arose out of and in the course of employment." (Hearing Report, p. 1)

3. With respect to the claim for permanent disability, the parties stipulate that "[i]f the injury is found to be a cause of permanent disability ... the disability is an industrial disability." (Hearing Report, p. 1)

4. With respect to the claim for permanent disability, the parties stipulate that "[t]he commencement date for permanent partial disability benefits, if any are awarded, is the 5th day of November, 2013." (Hearing Report, p. 1)

5. With respect to the rate of compensation, the parties stipulate that, "[a]t the time of the alleged injury, claimant's gross earnings were $542.58 per week." (Hearing Report, p. 1)

6. With respect to rate of compensation, the parties have stipulated, "[a]t the time of the alleged injury, ... claimant was single." (Hearing Report, p. 1)

7. With respect to the rate of compensation, the parties have stipulated, "[a]t the time of the alleged injury, ... claimant was entitled to 3 exemptions." (Hearing Report, p. 1)

8. The parties represent to the undersigned that they believe the applicable weekly rate, if benefits are awarded, is $360.78. (Hearing Report, p. 1)

9. With respect to the request for specific taxation of costs, the parties stipulate that "[t]he costs listed in the attachment have been paid." (Hearing Report, p. 2)

The parties' stipulations are accepted. The undersigned will not enter any findings of fact or conclusions of law pertaining to any of the parties' stipulations. The parties are expected to and ordered to comply with stipulations that have been accepted.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether the alleged injury is the cause of permanent disability and, if so, the extent of claimant's entitlement to permanent partial disability benefits.

2. Whether costs should be assessed against either party.

FINDINGS OF FACTS

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

Maria Osorio is a 46 year old woman, who was born in Guatemala. She speaks very little English and has only a third grade education. She has lived in the United States since 1995 and in Iowa since 1996. (Claimant's testimony)

Ms. Osorio does not know how to use a computer or know how to type. She has worked only manual labor, or unskilled jobs, such as babysitting, selling food as a street vendor in Los Angeles, California, and selling chickens at a street market in Guatemala. Ms. Osorio testified that she does not believe she could return to any of her prior employment because they all involve more lifting than is permitted by her independent medical evaluator, Sunil Bansal, M.D. (Claimant's testimony)

Claimant started working for Tyson Fresh Meats (hereinafter referred to as "Tyson") in Perry, Iowa in 2003. She submitted to a pre-employment physical and passed that physical without any permanent physical restrictions. Ms. Osorio had no prior neck or shoulder injuries or limitations before starting her employment with Tyson. (Claimant's testimony)

Ms. Osorio started her employment with Tyson packaging ribs. She performed this job for three or four years and testified that the job required her to lift boxes of ribs weighing 25-30 pounds if the conveyor was broken. Claimant does not believe she could return to that position at Tyson because of the lifting requirements. (Claimant's testimony)

Ms. Osorio transferred to a "packaging bellies" position approximately nine years before the hearing and continued to work in that position on the alleged date of injury and at the time of the arbitration hearing. On November 4, 2013, the Tyson facility experienced a malfunction of a hot water system. Claimant was transferred to a different area to continue her work duties. However, claimant's job duties became more strenuous and repetitive during the shift while in a different area. She developed neck and shoulder pain and tiredness. (Claimant's testimony)

Upon returning to her typical location and duties, she experienced what she described as a "pull" in her right shoulder and neck. Following the "pull," she experienced an increase in pain and reported the incident to her supervisor. Tyson sent claimant to the nurse's station and later directed her to a physician for medical care. Tyson has admitted this injury and provided relevant and necessary medical care for the condition.

Claimant has been provided conservative medical care. She has been evaluated by an occupational medicine physician, an orthopaedic surgeon, and a physiatrist. None of the physicians selected by Tyson have further treatment recommendations. Each of the physicians selected by Tyson has declared maximum medical improvement and each of these physicians has returned claimant to work without restrictions. (Exhibits 2, 5, 7; Transcript, page 63)

Tyson provided claimant some light duty, or modified work, for a period of time after her injury. However, pursuant to the releases from the authorized treating physicians, Ms. Osorio has returned to her pre-injury position with Tyson and has continued to work in that position without lost time since March 2014. (Tr., p. 111) In the packaging bellies area, there are three positions with distinct duties. The three workers assigned to the area rotate positions during the day. However, claimant is required to perform all three of the positions during some part of her work day. Claimant testified that she receives some assistance from her co-workers since her injury. Specifically, she testified that her co-workers will give her short breaks to rest and that her co-workers do the heavier lifting.

Defendant called claimant's supervisor, Ahmed Ibrahim, to testify. Mr. Ibrahim testified that claimant is a good employee and that she continues to perform up to necessary standards. However, Mr. Ibrahim concedes that co-workers could agree to trade job duties with Ms. Osorio or carry cardboard inserts to assist claimant. (Tr., pp. 95-96) Nevertheless, he testified that he observes claimant on a daily basis and that she continues to perform all three positions in the packaging bellies area satisfactorily. (Tr., p. 111)

Defendant also called one of claimant's co-workers, Tomas Macias, to testify. Mr. Macias confirmed that claimant continues to perform all three of the positions within the packaging bellies area. (Tr., p. 82) However, Mr. Macias testified that he carries the cardboard inserts for claimant and helps her as much as possible. (Tr., p. 75-76, 82) He also testified that he has observed claimant in pain and that it is obvious to him that she is hurting while working at Tyson. (Tr., p. 76) Mr. Macias' testimony corroborates claimant's testimony about her ongoing symptoms and some efforts by her co-workers to assist or accommodate her at work.

Claimant also obtained an independent medical evaluation, performed by Sunil Bansal, M.D., on March 18, 2015. Dr. Bansal opines that claimant sustained permanent injury and permanent impairment to both her right shoulder and neck as a result of her work duties at Tyson. Dr. Bansal specifically assigns a three percent permanent impairment for claimant's neck condition as well as an additional three percent permanent impairment of the whole person for claimant's right shoulder condition.

Dr. Bansal notes that claimant continues to work full duty in her position at Tyson, including lifting up to 15 pounds. However, Dr. Bansal notes that the continued work is painful for claimant. (Ex. 8, p. 92) Dr. Bansal recommended permanent physical restrictions that include no frequent reaching with either arm, no lifting greater than 15 pounds with either arm on more than an occasional basis, no lifting greater than 10 pounds with either arm on a frequent basis, and no pushing or pulling greater than 40 pounds occasionally or 25 pounds frequently. (Ex. 8, p. 97)

Having considered the opinions of the treating occupational medicine physician and the treating orthopaedic surgeon, I find it difficult to accept their full duty releases to mean that claimant has no permanent work restrictions or limitations. The physiatrist,

Kurt A. Smith, D.O., diagnosed claimant with chronic neck pain after this injury. (Ex. 7, p. 83) This seems appropriate given claimant's ongoing symptoms, as confirmed by Mr. Macias. Dr. Smith also released claimant to return to her job without limitations. This is appropriate for the job claimant held at the time of the injury and currently. Realistically, however, given her chronic pain with work activities, she is not likely capable of fully unrestricted work.

On the other hand, claimant had a prior foot injury and has permanent work restrictions that preclude lifting over 20 pounds on an occasional basis. Claimant remains capable of performing at about that same level at the present time, as demonstrated by her continued work in the packaging bellies area at Tyson. I find the full duty releases by the occupational medicine physician, the orthopaedic surgeon, and the pain specialist to mean that claimant can continue to work at her job at Tyson without accommodations, not that she would be capable of fully unrestricted work in the general labor industry.

However, Dr. Bansal's restrictions are likely also overly restrictive. If applied, his restrictions may preclude some of the job duties performed by Ms. Osorio at Tyson. For instance, Dr. Bansal would limit claimant to 10 pounds of lifting on a frequent basis. Claimant is required to lift up to 11 pounds on a frequent basis during portions of her work day. She is clearly capable of that, having continued to work in the packaging bellies area without lost time since March 2014. (Tr., pp. 71-72, 111)

I find that the orthopaedic surgeon's opinion that claimant sustained no permanent impairment is not consistent with a diagnosis by the physiatrist that she has chronic pain. I find that the orthopaedic surgeon's opinion that claimant sustained no permanent impairment is not consistent with the observations and testimony offered by Mr. Macias. Instead, I find that the permanent impairment ratings offered by Dr. Bansal are more consistent with and realistic of claimant's ultimate outcome and ongoing symptoms.

That being said, claimant is capable of continuing to work her position in the packaging bellies area at Tyson. She is not likely to desire or pursue other jobs within Tyson and has not explored any potential jobs outside of Tyson since the date of injury. Claimant has some minimal loss of future earning capacity as a result of her work injury. She has proven she sustained permanent disability in some amount as a result of the November 4, 2013 neck and right shoulder injuries.

Ms. Osorio earns more now than she did in any of her prior jobs. She asserts she could not return to some of her prior employment, though she was not likely to have done so regardless of this injury. Ms. Osorio's job possibilities were limited prior to this injury given her language barrier, educational limitations, and work history. Realistically, however, she remains capable of performing in the job she had prior to the date of injury and earning at essentially the same or higher rate than she did at the time of the injury. She does not desire a different job and has not sought a different job. The November 4, 2013 injury has had little practical effect on claimant's earning capacity moving forward.

Considering claimant's age, educational background, employment history, ability to return to work in a new position, ability to retrain or find alternate employment, permanent impairment, permanent work restrictions, motivation, as well as all other relevant industrial disability factors, I find that claimant has proven she sustained a 15 percent loss of future earning capacity as a result of the November 4, 2013 work injury.

CONCLUSIONS OF LAW

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).

Having found that claimant proved she sustained permanent disability as a result of the November 4, 2013 work injury, I must consider the extent of that permanent disability and claimant's entitlement to permanent partial disability benefits. The parties appropriately stipulated that this injury, if found to have caused permanent disability, should be compensated on an industrial disability basis pursuant to Iowa Code section 85.34(2)(u). (Hearing Report)

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.

Having found that claimant proved she sustained a 15 percent loss of future earning capacity as a result of the November 4, 2013 work injury, I conclude that claimant is entitled to a 15 percent industrial disability award, or 75 weeks of benefits. Iowa Code section 85.34(2)(u).

Finally, claimant seeks an assessment of her costs. Costs are assessed at the discretion of the agency. Iowa Code section 85.40. Exercising the agency's discretion and recognizing that claimant has prevailed on the majority of issues, I conclude that it is appropriate to assess claimant's costs.

At the commencement of hearing, the parties notified the undersigned that claimant's requested independent medical evaluation fee is no longer in dispute. I conclude that it is appropriate to assess claimant's filing fee of $100.00 pursuant to 876 IAC 4.33(7). It is also appropriate to assess claimant's service fees ($12.96) pursuant to 876 IAC 4.33(3). In total, defendants will be ordered to reimburse costs totaling $112.96.

ORDER

THEREFORE, IT IS ORDERED:

The parties are ordered to comply with all stipulations that have been accepted by this agency.

Defendant shall pay claimant seventy-five (75) weeks of permanent partial disability benefits commencing on November 5, 2013 at the rate of three hundred sixty and 78/100 dollars ($360.78) per week.

Defendant shall pay interest on all accrued benefits pursuant to Iowa Code section 85.30.

Defendant shall reimburse claimant's costs totaling one hundred twelve and 96/100 dollars ($112.96).

Defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 24th day of October, 2016.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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WHG/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.