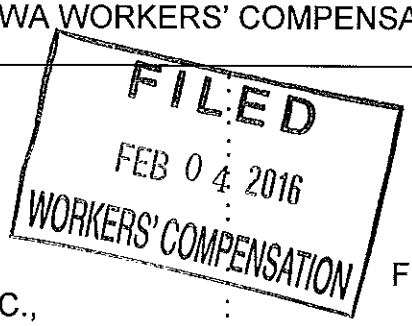
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



JULIET GALURA,

Claimant,

vs.

COMPETITIVE EDGE, INC.,

Employer,

and

SELECTIVE INSURANCE COMPANY OF THE SOUTHEAST,

Insurance Carrier,
Defendants.

File Nos. 5051017, 5051018

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Claimant has filed petitions in arbitration and seeks worker's compensation benefits from Competitive Edge, Inc., employer, and Selective Insurance Company of the Southeast, Insurance Carrier, defendants.

Deputy workers' compensation commissioner, Stan McElderry, heard this matter in Des Moines, Iowa.

ISSUES

The parties have submitted the following issues for determination:

For File No. 5051017:

1. Whether the claimant suffered an injury arising out of and in the course of employment on January 19, 2012;

2. Untimely claim under Iowa Code section 85.26;

3. Independent Medical Evaluation (IME) pursuant to Iowa Code section 85.39; and

4. Alternative Medical Care.

For File No. 5051018:

1. Whether the claimant suffered an injury arising out of and in the course of employment on May 14, 2013;

2. Independent Medical Evaluation (IME) pursuant to Iowa Code section 85.39; and

3. Alternative Medical Care.

FINDINGS OF FACT

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

The claimant was 57 years old at the time of hearing. She completed high school in the Philippines. She came to the United States from the Philippines in 2001. Her work experience includes about 7 years as a home health aide in Israel, 5 months as a housekeeper/dietician for Beaverdale Retirement Center in Des Moines, and then embroidering for the employer herein since 2001.

On January 19, 2012 the claimant was seen by Carlos Schroder, M.D. (Exhibit 2) Dr. Schroder noted left shoulder pain and left neck pain with swelling on the left side of the neck. (Ex. 2, p. 1) On January 24, 2013, Tiffany Ketcham, D.O., noted left shoulder pain radiating to the neck. (Ex. 2, p. 3) Claimant returned to Dr. Ketcham for a hypertension and diabetes checkup Dr. Ketcham noted left shoulder and neck pain. (Ex. 2, p. 7) No treatment was recommended. (Ex. 2, p. 10) On April 4, 2013, Dr. Ketcham again noted left shoulder and neck pain. (Ex. 2, p. 11) Again no treatment was recommended. (Ex. 2, p. 14) On May 14, 2013, Dr. Ketcham noted complaints of a gradual onset of intermittent episodes of left shoulder pain described as dull and aching. (Ex. 2, p. 16) The symptoms were noted to have started about three months previous and as getting worse. (Ex. 2, p. 16) Dr. Ketcham noted the condition as work related shoulder tendonitis. (Ex. 2, p. 18)

On October 17, 2013, Dr. Ketcham noted ongoing shoulder pain. (Ex. 2, p. 19) On January 21, 2014, Dr. Ketcham recommended physical therapy (PT) to be followed by an MRI if the claimant did not improve. (Ex. 2, p. 24) On February 18, 2014, Dr. Ketcham recommended an MRI which was performed on March 11, 2014. (Ex. 2, p. 26) The MRI showed a partial high grade bursal sided tearing of the anterior and central fibers of the supraspinatus, mild AC joint arthritis with bursitis, and moderate to advanced intracapsular biceps tendinosis. (Ex. 3, p. 1) Dr. Ketcham referred the claimant to Jason Sullivan, M.D. Dr. Sullivan had recommended surgery. The defendants then had William Boulden, M.D., perform an IME. Dr. Boulden also viewed a video (Ex. H) of the claimant's job duties being performed by someone else. Dr. Boulden opined that there was no correlation between the claimant's job duties and the pathology of claimant's shoulder. (Ex. C, p. 7) Defendants then denied the claim and the surgery recommended by Dr. Sullivan was cancelled. By a letter questionnaire

dated January 13, 2015 and signed off on by Dr. Sullivan on January 29, 2015. Dr. Sullivan agreed that he could not say if the work activities were related to the surgery he had recommended. (Ex. 4, pp. 6-7)

Sunil Bansil, M.D., performed an IME on May 1, 2015. (Ex. 1) Dr. Bansal opined that the claimant suffered an overuse injury to her left arm with a left rotator cuff tear relative to the plead May 14, 2013 injury date from her repetitive activities at work. (Ex. 1) Dr. Bansal further opined that the claimant had a 5 percent BAW permanent impairment. Regarding the plead January 19, 2012 injury, Dr. Bansal noted that the claimant had non-work related discogenic disease and did opine that work was a substantial or primary factor and thus did not offer an impairment rating for the 2012 conditions. The claimant has an objective finding of a rotator cuff tear which she credibly associates with work activities and Dr. Bansal agrees. It is so found. It is also found that the other conditions were not established as having been caused by or materially aggravated by work.

An injury of the shoulder is a body of the whole injury. So claimant's benefits will be looked at industrially. The claimant has a high school education in another country. She continues to work at Competitive Edge and she has suffered no actual rate of wage loss to present. Given her work history and education her industrial capacity is limited by this injury. Given the claimant's pain, claimant's medical impairment, training, permanent restrictions, as well as all other factors of industrial disability, the claimant has suffered a 20 percent loss of earnings capacity.

On the January 19, 2012 date of injury plead the claimant was married, entitled to two exemptions, and had gross earnings of $457.00 per week. The weekly benefit rate is therefore $320.74. The parties stipulated that the commencement date for any permanency benefits is January 20, 2012. For the May 14, 2013 plead injury date the claimant was married, entitled to two exemptions, and had gross earnings of $463.09. The weekly benefit rate therefore is $325.11. The parties stipulated that the commencement date for any permanency benefits would be May 15, 2015.

Claimant seeks alternative medical care via continued treatment with Jason Sullivan, M.D. Dr. Sullivan had recommended surgery before the claim was denied. Claimant also seeks payment of the Dr. Bansal IME in the amount of $2,975.00. (Ex. 1, p. 17)

REASONING AND CONCLUSIONS OF LAW

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).

It was found that the claimant's May 14, 2013 left shoulder (BAW) injury/disease arose out and in the course of her employment and caused permanent restrictions and impairment. It was also found that the claimant had not met her burden of proof on her 2012 claim. All other issues are therefore moot on that file.

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.2d 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.

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961). 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).

Based on the finding that the claimant has suffered a 20 percent loss of earning capacity, she has sustained a 20 percent permanent partial industrial disability entitling her to 100 weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(u).

Next is alternative medical care.

Under Iowa law, the employer is required to provide care to an injured employee and is permitted to choose the care. Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997).

> [T]he employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Iowa R. App. P. 14(f)(5); Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Id. The employer's obligation turns on the question of reasonable necessity, not desirability. Id.;

Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983). In Pirelli-Armstrong Tire Co., 562 N.W.2d at 433, the court approvingly quoted Bowles v. Los Lunas Schools, 109 N.M. 100, 781 P.2d 1178 (App. 1989):

> [T]he words "reasonable" and "adequate" appear to describe the same standard.
>
> [The New Mexico rule] requires the employer to provide a certain standard of care and excuses the employer from any obligation to provide other services only if that standard is met. We construe the terms "reasonable" and "adequate" as describing care that is both appropriate to the injury and sufficient to bring the worker to maximum recovery.

The commissioner is justified in ordering alternate care when employer-authorized care has not been effective and evidence shows that such care is "inferior or less extensive" care than other available care requested by the employee. Long, 528 N.W.2d at 124; Pirelli-Armstrong Tire Co., 562 N.W.2d at 437.

Claimant requires further treatment for her rotator cuff tear that defendants are not providing. The alternative medical care is granted.

IME

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Defendants' liability for claimant's injury need not ultimately be established before defendants are obligated to reimburse claimant for an independent medical examination

After the defendants got opinions of no permanent impairment or injury the claimant chose to get an evaluation/examination to establish whether the injuries arose out of and in the course of employment, and whether they caused permanent impairment or disability. The claimant got that exam from Dr. Bansal, who charged a reasonable fee of $2,695.00 for the ratings. Defendants are responsible for paying/reimbursing that fee.

ORDER

THEREFORE IT IS ORDERED:

That the claimant take nothing on File No. 5051017.

For File No. 5051018:

That defendant pay claimant one hundred (100) weeks of permanent partial disability commencing May 15, 2014, at the rate of three hundred twenty five and 11/100 dollars ($325.11).

Alternative medical care is granted as noted above.

That the defendants pay/reimburse the two thousand six hundred ninety-five and no/100 dollars ($2,695.00) IME fee of Dr. Bansal.

Costs are taxed to the defendant pursuant to 876 IAC 4.33.

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.

Signed and filed this 4th day of February, 2016.

STAN MCELDERRY
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.