BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MIRZA CUFUROVIC, Claimant, vs. TYSON FOODS, INC., Self-Insured, Employer, Defendant.	FILED APR 16 2018 WORKERS' COMPENSATION	File No. 5063063 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1402.30, 2907

STATEMENT OF THE CASE

Mirza Cufurovic, claimant, filed a petition in arbitration and seeks workers' compensation benefits from defendant, Tyson Foods, Inc., as the self-insured employer. Hearing occurred before the undersigned on January 9, 2018, in Waterloo.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision. No factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 11, Claimant's Exhibits 1 through 5, and Defendant's Exhibits A through H. All exhibits were received without objection.

Claimant testified on her own behalf and called her son, Anis Cufurovic, to testify. Defendant called Enes Kajtezociv and Mary Jones to testify. The evidentiary record closed at the conclusion of the January 9, 2018 hearing.

Counsel for the parties requested the opportunity to file post-hearing briefs. Their request was granted. The parties filed post-hearing briefs on February 12, 2018, at which time the case was considered fully submitted to the undersigned.

ISSUES

1. Whether claimant sustained an injury that arose out of and in the course of her employment with Tyson on or about August 25, 2016.

2. Whether claimant is barred from any recovery as a result of an alleged failure to give timely notice of her injury pursuant to Iowa Code section 85.23.

3. Whether claimant is entitled to an award of healing period benefits from May 9, 2016 through the date of the arbitration hearing.

4. Whether claimant is entitled to interest on any accrued weekly benefits.

5. Whether claimant is entitled to an award of past medical expenses contained at Claimant's Exhibit 3.

6. Whether claimant is entitled to reimbursement for medical mileage through the date of the arbitration hearing.

7. Whether claimant is entitled to alternate medical care for ongoing and future medical treatment.

8. Whether costs should be assessed against either party.

FINDINGS OF FACT

Having considered all of the evidence and testimony in the record, recognizing that there may be competing or contradictory facts within this evidentiary record, I find the following facts:

Mirza Cufurovic is a 39-year-old woman, who began working at Tyson Foods, Inc. in 2000. (Claimant's testimony) Prior to commencing her employment with Tyson, Ms. Cufurovic submitted to an evaluation and demonstrated that she had no physical limitations or restrictions. She was cleared to work without restrictions. (Joint Exhibit 1, page 1) Initially, upon starting with Tyson, she was a skinner on the Ham Line. She worked that position for approximately one year and then transferred for a few years to the Boneless Loin Line performing knife work trimming meat. Claimant next worked as a "Golden Helmet" in which she prepared supplies, provided breaks for other workers in various positions, and filled in for sick or otherwise absent line workers. (Claimant's testimony)

Ms. Cufurovic then transferred to become a lead person in which she would be able to perform all jobs on a line, assist the supervisor, and fill-in for the supervisor when the supervisor was absent. For the last five to six years before her alleged injury date, Ms. Cufurovic worked in a Food Safety and Quality Assurance (FSQA) position with Tyson. (Claimant's testimony)

In her FSQA position, claimant was responsible for inspecting meat and production conditions, including checking temperatures of processing areas and meat being processed. She worked primarily in the Cold Chain area as an FSQA worker. However, if other FSQA workers were absent, she was required to fill-in for those

absent workers in other lines and areas. She testified that she was required to fill-in for other lines during the last couple months of her employment. (Claimant's testimony)

Claimant testified that the Cold Chain area did not have lots of lifting for her to perform and she lifted approximately 5-10 pounds at a time. However, when she filled-in for other lines and areas, she would lift much more weight. She testified when she covered as an FSQA worker in the Bone-In Department, she would lift boxes ranging from 40 to 110 pounds.

Ms. Cufurovic testified that she would lift between 70-100 boxes during an 8-hour shift. This means she lifted approximately 9 to 12 ½ boxes per hour during her shift. Assuming the accuracy of claimant's estimates of her lifting duties, she lifted a box as an FSQA worker about every 4.8 minutes to every 6.8 minutes.

In April 2016, Ms. Cufurovic began experiencing low back pain. She testified that she reported this to her supervisor, Eric. However, she admitted on cross-examination that she did not tell her supervisor that she thought her back pain was related to her employment duties.

Claimant testified that she went to the nurse's station at Tyson within a short period of time, after reporting the back pain to her supervisor. She testified that the nurses gave her over-the-counter medications and sent her back to work. Mary Jones, Tyson's Nurse Manager, testified that any time an employee reported to the nurse's station for evaluation or treatment, a treatment record would be generated. Tyson possesses no nurse notes for purported visits Ms. Cufurovic made to the nurse's station in April or May 2016. (Mary Jones' Testimony)

In her deposition, Ms. Cufurovic conceded that she first reported the alleged back injury to the employer after her health insurance lapsed approximately four and a half months after the onset of symptoms, or in approximately September 2016. (Defendant's Ex. A, pp. 27-28) Joint Exhibit 1, page 7 is an accident report that corroborates claimant reported the injury to Tyson in September 2016.

At the end of April or beginning of May 2016, claimant stopped working at Tyson because of her low back and leg symptoms. (Claimant's testimony) She testified that her symptoms have continued to worsen since April 2016, despite not working.

On May 12, 2016, Ms. Cufurovic was transported via ambulance to the emergency room from her family physician's office after experiencing a syncopal episode with loss of consciousness. Interestingly, the emergency room physician on May 12, 2016 recorded that claimant had a negative history for any back pain. (Joint Ex. 10, p. 2) Claimant denies the accuracy of this medical record at least with respect to her low back pain. (Claimant's testimony)

In her deposition and again at trial, claimant denied that she had ever experienced back troubles before April 2016. (Claimant's testimony; Defendant's Ex. A,

p. 22) Yet, in a medical report dated May 23, 2016, claimant gave a history to a neurologist that she had "lower back pain being present for several years but getting worse recently." (Joint Ex. 2, p. 1) Claimant has seen and is aware of this medical record, but denies the accuracy of the history as recorded.

On May 31, 2016, claimant had an MRI of her lumbar spine performed. The radiology report records a history from claimant that includes an assertion of a work-related fall approximately two months prior. (Joint Ex. 5, p. 7) Claimant denies the accuracy of this record as well. In fact, claimant asserts she did not know this was a work-related condition at the time she submitted to this MRI. (Claimant's testimony)

On June 15, 2016, claimant was evaluated by Nagarathnamma Nadipuram, M.D. The June 15, 2016 medical report documents that claimant reported lower back pain radiating down to her right foot and that she "has had it for past year and has gotten worse over past 2 months." (Joint Ex. 6, p. 2) Claimant denies the accuracy of this medical history as well. (Claimant's testimony)

On August 25, 2016, Ms. Cufurovic was evaluated by Frank E. Hawkins, M.D. Dr. Hawkins recommended that claimant report her low back injuries to Tyson to facilitate discussion of return to work issues. However, Dr. Hawkins noted this should be done "[e]ven though she is not complaining of this as a Workers' Compensation injury." (Joint Ex. 10, p. 12)

At trial, claimant testified initially that she could not recall whether her health insurance lapsed shortly after she reported the injury to Tyson. (Claimant's testimony) Yet, in her deposition, claimant acknowledged that her health insurance through Tyson lapsed "right after" reporting her back condition as a work injury. (Defendant's Ex. A, pp. 27-28) On September 16, 2016, claimant reported her low back as a work injury to Tyson. (Joint Ex. 1, p. 7; Claimant's testimony) Claimant's testimony is at odds with her prior deposition testimony and inconsistent with the medical records in many respects. Some of the discrepancies potentially could be understood and explained by her language barriers. However, with the number of discrepancies, I have a hard time accepting the testimony of Ms. Cufurovic as credible in many respects.

In an effort to investigate the claim, defendant scheduled claimant to be evaluated by Robert L. Gordon, M.D. on November 1, 2016. (Joint Ex. 11) Dr. Gordon took a history from claimant and performed an examination. He noted that claimant lifted periodically throughout her shift as an FSQA worker at Tyson. However, he noted that claimant did not identify or recall any specific lifting incident that caused her low back injury. Dr. Gordon inquired why claimant thought her back troubles were related to her employment and recorded that she responded, "looking back in retrospect that maybe work could have had something to do with her symptoms." (Joint Ex. 11, p. 4) Dr. Gordon opined that the history provided by claimant, as well as his review of the prior medical records, does not support a conclusion that claimant's low back condition is work related. (Joint Ex. 11, p. 4)

Dr. Gordon candidly stated that he was not sure of the cause of claimant's low back condition given the findings of the MRI performed shortly before his evaluation. However, he recommended a second surgical opinion before claimant submitted to surgical intervention. (Joint Ex. 11, p. 4)

In the meantime, claimant continued to seek medical attention and was referred to orthopaedic surgeon, Arnold E. Delbridge, M.D. Dr. Delbridge evaluated claimant on October 13, 2016 and recommended an MRI myelogram. (Joint Ex. 8, p. 3) Dr. Delbridge evaluated claimant again after the MRI on October 31, 2016. He recommended surgical intervention. (Joint Ex. 8, p. 4) Claimant did not seek a second surgical opinion, as recommended by Dr. Gordon. Instead, on January 4, 2017, claimant submitted to an L5-S1 laminotomy and partial disc excision at L5. (Joint Ex. 10, p. 17)

Unfortunately, the initial low back surgery did not resolve all of claimant's problems. Dr. Delbridge took claimant back to surgery on September 11, 2017 and performed a repeat laminotomy and partial disc excision on the right at L5-S1 as well as a neurolysis at L5-S1 and foraminotomy at the L5 nerve. (Joint Ex. 10, p. 19) Ms. Cufurovic was not yet at maximum medical improvement at the time of trial and testified that she has ongoing symptoms.

Claimant's counsel asked the treating surgeon to analyze whether claimant's low back condition was related to her work at Tyson. Dr. Delbridge opined:

> It was apparent she had to lift repetitively weight up to 100-110 lbs, and depending on the day, had to do it multiple times, especially if the line broke down. Over time, she developed degenerative disc disease and also had some foraminal impingement at various times when MRIs were taken....
>
> Even though her history is a little unusual in terms of back problems, she did not do any outside activities which were at all comparable to what she did at work. She worked for many years and did it very well and then had an onset of low back pain and convincing radiculopathy which did not allow her to continue. It is my conclusion that her work at Tyson was a substantial contributing factor to her current difficulties and her current treatment.

(Joint Ex. 8, p. 29)

In a supplemental report dated October 19, 2017, Dr. Delbridge reiterates, "it is my conclusion that Mirza Cufurovic lifted quite heavy objects on a repetitive basis day after day. My conclusion is that her spine issues are as a result of cumulative trauma from heavy lifting over a period of time." (Joint Ex. 8, p. 32)

Defendant scheduled an evaluation with a different orthopaedic surgeon, Trevor R. Schmitz, M.D. Dr. Schmitz evaluated claimant on October 2, 2017 and authored a report dated November 2, 2017. (Defendant's Ex. B) Dr. Schmitz noted that claimant reported no specific incident causing her injury. He noted that the surgeries performed did not provide significant improvement of symptoms, and he noted that claimant had lumbar disc degeneration with protrusions. (Defendant's Ex. B, pp. 1, 3)

Ultimately, Dr. Schmitz acknowledged that certain movements can cause acute disc herniations. However, he noted that claimant had no recollection of a specific incident that injured her low back. Accordingly, Dr. Schmitz opined:

> I would state that the claimant's work activities at Tyson Foods Inc. did not permanently or materially aggravate, accelerate, or light up the claimant's back condition. It is well established that lumbar issues are primarily related to age and genetic factors. The vast majority of lumbar disc herniations occur without any specific inciting event. Ms. Cufurovic cannot point to any inciting event that caused her low back or right leg radicular pain. Given the fact that she cannot point to any specific incident in question that caused her pain and that she was seeking treatment for this several months prior to reporting it to Tyson Foods, I cannot in any way state that the work activities at Tyson Foods permanently or materially aggravated, accelerated, or lit up the claimant's back condition.

(Defendant's Ex. B, p. 4)

Ultimately, the determination of whether claimant sustained an injury to her low back as a result of her work duties at Tyson becomes a medical causation issue. Defendant produced the opinions of Dr. Gordon and Dr. Schmitz in defense of this claim.

Dr. Gordon is not a back surgeon. He candidly admitted in his report that he was not sure of the cause of claimant's low back condition, though he did not believe it to be work related. Dr. Gordon appears to have provided sage advice, however, in recommending a second surgical opinion. Claimant's initial surgery did not provide the desired relief, and perhaps Dr. Gordon's advice for a second opinion would have been beneficial in claimant's treatment regimen. Ultimately, I have difficulty in fully accepting or finding Dr. Gordon's opinions entirely convincing given that he is not a back surgeon and admits he cannot identify the specific cause of claimant's condition.

Certainly, I do not ascribe to or accept Dr. Schmitz's asserted notion that most low back injuries are caused by age and genetic factors. As an agency, we see numerous low back injuries caused by lifting and work activities.

On the other hand, Dr. Schmitz had a chance to review the video of claimant's job duties introduced as Defendant's Exhibit F. My review of the video demonstrates that an FSQA worker must bend and twist, move larger pieces of meat, and lift and

transfer boxes full of meat. The duties depicted on the video contained at Exhibit F do not demonstrate repetitive or repeated lifting, and it appears that there are other job duties involved as an FSQA employee that do not require lifting, including significant walking. I suspect that there are duties performed by an FSQA worker that are not fully depicted on the job video at Exhibit F.

Nevertheless, this video gave Dr. Schmitz some idea of the actual job conditions and duties performed by claimant. Dr. Schmitz opined that he could not identify any lumbar stressors depicted on the job video. (Defendant's Ex. B, p. 6) I observed a scene in which the worker was bent over, reaching into a bin, moving large hog leg pieces that likely would put some stress on the lumbar spine given the awkward positioning. As noted, I suspect that there are other job duties such as performing as an FSQA in the Bone-In Department that are not viewed or described by Dr. Schmitz. Nevertheless, Dr. Schmitz's review of this video gave him a better understanding of the FSQA job duties than Dr. Delbridge possessed when formulating his causation opinion.

Although I have some concerns about the opinions of Dr. Gordon and Dr. Schmitz, I also have significant concerns about the history as understood by Dr. Delbridge. As noted above, claimant lifted approximately 9 to 12 ½ boxes per hour as an FSQA worker. Dr. Delbridge at least twice notes in his reports that claimant was lifting heavy weights on a repeated or repetitive basis. This is simply not an accurate description of claimant's work activities, even as testified to by claimant. Dr. Delbridge appears to be under the erroneous assumption that claimant was lifting heavy weights repeatedly, when she actually was not lifting on a terribly repetitive basis, and much of her work involved lifting well below the weight requirements spelled out in Dr. Delbridge's report.

I find it difficult to ascribe significant weight or credibility to Dr. Delbridge's causation opinion given that his understanding of claimant's job duties appears to be inaccurate, and he overestimates the frequency and weights lifted in her duties at Tyson. Having difficulties with each of the physician's medical opinions, I ultimately accept the opinions of Dr. Schmitz as the most convincing in this case. Although Dr. Delbridge had the advantage of seeing claimant's spine intra-operatively and having evaluated her more times over a period of time, Dr. Schmitz had a more accurate understanding of claimant's job duties having reviewed the job video. Dr. Gordon also acknowledged that claimant lifted periodically at her work at Tyson. To the extent that Dr. Gordon's opinions support or bolster Dr. Schmitz's opinions, his opinions are also found to be most credible in this evidentiary record.

Dr. Schmitz and Dr. Gordon's opinions appear to rely upon the most accurate work history. Though I do not find any of the opinions entirely convincing, I find those of Dr. Schmitz and Dr. Gordon to be most consistent with the facts surrounding claimant's job duties, as I have found them. Therefore, I find that claimant has not proven her work at Tyson was a substantial contributing factor in causing or in materially aggravating her low back condition.

CONCLUSIONS OF LAW

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).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

In this case, I found that Ms. Cufurovic did not prove by a preponderance of the evidence that her work activities at Tyson were a substantial contributing factor of her low back injury. With an inaccurate job history being relied upon by the physician that provided her a beneficial causation opinion, I found that report to carry less weight. Other, contrary evidence in the record, suggested that claimant's injury was not causally related to or materially aggravated by her work activities. Having reached this factual finding, I conclude that Ms. Cufurovic failed to carry her burden of proof to establish that her low back injury arose out of and in the course of her employment with Tyson.

Having concluded that Ms. Cufurovic failed to prove her injury arose out of and in the course of her employment, I conclude that all other disputed issues are moot. I conclude that Ms. Cufurovic's claim should be dismissed without an award of weekly or medical benefits.

Claimant also seeks assessment of her costs. Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40. Claimant failed to prove she sustained a compensable work injury. Therefore, I conclude it is not appropriate to assess her costs associated with this action. Defendant did not introduce a statement of costs. Therefore, I conclude that each party should bear their own costs associated with this case.

ORDER

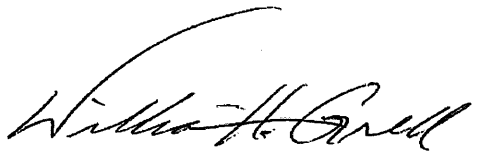
THEREFORE, IT IS ORDERED:

Claimant shall take nothing.

Claimant's original notice and petition is dismissed with prejudice.

All parties shall bear their own costs.

Signed and filed this 16th day of April, 2018.



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WHG/sam

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.