BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARIA LOPEZ VELASCO, Claimant, vs. TYSON FRESH MEATS, INC., Employer, Self-Insured, Defendant.	:	File No. 5047953 ARBITRATION DECISION Head Note Nos.: 1802, 1803, 2500, 2800

STATEMENT OF THE CASE

Maria Lopez Velasco, claimant, filed a petition in arbitration seeking workers' compensation benefits from Tyson Fresh Meats, Inc., self-insured employer, as a result of an alleged injury she sustained on March 13, 2014 that allegedly arose out of and in the course of her employment. This case was heard on July 25, 2015 in Sioux City, Iowa, and fully submitted on September 2, 2015. The evidence in this case consists of the testimony of claimant, Will Sager and Renea Kestrel, claimant's exhibits 1 through 13 and defendants' exhibits A through M. Both parties submitted briefs. Claimant withdrew her request for reimbursement of the independent medical examination (IME). (Claimant's brief, page 10) The claimant will be referred to as Maria and the defendant will be referred to as Tyson in the body of this decision. The hearing was interpreted.

ISSUES

1. Whether an employer-employee relationship existed at the time of the alleged injury;
2. Whether claimant sustained an injury on March 13, 2014 which arose out of and in the course of employment;
3. Whether claimant provided timely notice to the defendant of a work injury;
4. Whether the alleged injury is a cause of temporary disability and, if so, the extent;
5. Whether the alleged injury is a cause of permanent disability and, if so;
6. The extent of claimant's disability.

7. Whether claimant is entitled to payment of medical expenses.

The stipulations contained in the Hearing Report are accepted and incorporated into this decision as fully set forth.

PRIOR CLAIM HISTORY

Maria had a claim against Tyson for a right shoulder injury with a date of injury of July 6, 2012. This claim was on File No. 5041862. This claim resulted in an arbitration decision of December 19, 2013. This decision awarded benefits for Maria's right shoulder and bilateral feet injuries. The case was appealed to the commissioner, and before a decision was issued by the commissioner, the parties reached a Compromise Settlement on January 31, 2014. (Exhibit 11, pages 1 – 8)

FINDINGS OF FACT

The deputy workers' compensation commissioner, having heard the testimony and considered the evidence in the record, finds that:

Maria was 55 years old at the time of the hearing. She attended grade school in Mexico. Maria had no significant work experience in Mexico. She lived in Los Angeles for about a year and was employed in a plastic factory that made packaging materials and a fabric warehouse. (Exhibit I, page 47) In 2002 she responded to a recruitment advertisement and moved to Storm Lake, Iowa to work at Tyson (f/n/a IBP). (Transcript p. 12; Ex. I, p. 47) As noted above, Maria claimed work related injuries for the right shoulder and bilateral feet. Maria testified that she took a leave of absence for over a year from Tyson to have her bilateral foot injury treated in Mexico. (Tr. p. 18) As part of Maria's settlement with Tyson, Maria resigned from Tyson and agreed not to apply for any positions with Tyson in the future. (Ex. C, p. 20)

Maria did not work for about a year, from March 21, 2014 through March 4, 2014. (Tr. pp. 18, 42) Despite the terms of the release and due to miscommunication, Maria requested employment from Tyson, and Tyson rehired her. Maria started working for Tyson on March 5, 2014. Her work ended 9 days later, March 13, 2014 when the hiring mistake was discovered. This also is the day that Maria said she was told to go home. Maria did not work again for Tyson.

When Maria returned to work on March 5, 2014, she bid on a position, packing pigs feet. She actually performed three different functions in her job. The three positions were pack front feet, pack hind feet and make box. (Tr. p. 24) A video of these jobs was shown at the hearing and was submitted as Exhibit M. Initially Maria said she did not have problems performing the job; however, she said that on March 13, 2014 she experienced pain when she was pulling boxes coming down the line when she felt pain. (Tr. pp. 21, 22) Maria said the job was difficult when boxes became jammed up, and she had to push a 30-pound box down the line. (Tr. p. 25)

Maria sad that on March 13, 2014 her shoulder hurt very much, and she informed her supervisor, Luis Espana. (Tr. p. 29) Maria said she was told by Mr. Espana that Tyson had nothing they could do and sent her home. (Tr. p. 30) I find that Maria notified Tyson about a work injury on March 13, 2014. On March 14, 2014 Maria was seen at United Community Health by Kylie Hildreth, ARNP. ARNP Hildreth noted,

> MARIA LOPEZ is a 53 year old female. Source of patient information was patient. Patient states she started working at Tyson on 3/5/2014. States she has been off work for over 1 year prior to this. States she is packing boxes that are up in the air. States she has had to reach with her right arm above her head repeatidly [sic] all day. States now she is unable to move her right arm above her head. States she did hurt this shoulder a year and a half ago and had the same symptoms. States at that time she went to physical therapy. States having to use the right arm so much since she started on 3/5/14 has made the pain return. Rates pain today 8/10 with moving arm above her head. If her arm is to her side she is not having pain. Has been taking naproxen without any improvement.

(Ex. 1, p. 7) On March 19, 2014 Marlon Gasner, P.T. recommended physical therapy. He noted the mechanism of injury was gradual and insidious. (Ex. 6, p. 1) Maria attended seven physical therapy sessions and self-discharged. (Ex. 6, p. 13)

Maria was seen by Joshua Hamann, M. D. on March 26, 2014. Dr. Hamann wrote, "The patient has been having pain in her right shoulder over the last year and a half. It has been worse over the last month or so. She recently started work at Tyson doing boxes and working overhead." (Ex. 7, p. 1) On April 9, 2014 Dr. Hamann determined that Maria had a right shoulder rotator cuff tear and recommended surgery. (Ex. 7, p. 5) On April 22, 2014 Dr. Hamann performed surgery on Maria's right shoulder. His postoperative diagnoses were,

1. Right shoulder rotator cuff tear.
2. Right shoulder biceps tendon tear.
3. Right shoulder distal clavicle arthritis.
4. Right shoulder impingement.

(Ex. 8, p.1) Dr. Hamann returned Maria to work with a five-pound lifting restriction and no work above shoulder level on July 18, 2014. (Ex. 7, p. 12) On October 10, 2014 Dr. Hamann released Maria to return to work with no restrictions. (Ex. 7, p. 15)

As of the date of the hearing Maria was not working. She did work for about three months caring for a person with Alzheimer's. (Tr. p. 35) Maria stated that she planned to apply to work in food service at a local university but had not submitted her application. (Tr. p. 36)

Maria testified that after the surgery the pain got better, but she still cannot raise her right arm and she has lost strength. (Tr. pp. 32, 33) Maria said that she does not have 100 percent use of her arm. When she lifts above her shoulder it causes pain. (Ex. I, p. 58)

Upon cross-examination Maria admitted that in a workers' compensation hearing on September 5, 2013 she testified that she could not lift her [right] arm and that it would lock up. (Tr. p. 38) Maria said that she stacked boxes as high as her shoulder would let her. She would stack three to four boxes. (Tr. p. 51) During cross-examination Maria said she felt a sharp pain while lifting a box. (Tr. p. 47) She said that her injury was caused when pulling a box that was stuck from the pressure of other boxes, not from lining and stacking boxes. (Tr. p. 51) Maria was working at chest height when she said she was injured. (Tr. p. 51) Maria testified that when she would grab a box it was generally at shoulder level and not overhead. (Tr. p. 53) While the video showed some aspects of the job could be performed above shoulder level, such as stacking boxes, Maria testified she worked at below shoulder level. The video showed most of the work at the packing pigs feet job was performed below shoulder level.

William Sager is the complex human resource manager for the Tyson Storm Lake facility. He testified that Maria was allowed to bid on the boxing feet job. After Maria bid on the job an industrial engineer and a nurse reviewed the job and allowed Maria to work at that job. (Tr. p. 65) Mr. Sager said that there was miscommunication between the workers' compensation people at Tyson and his department that led to Maria being hired after she settled her workers' compensation claim. (Tr. p. 65) Mr. Sager said that when Maria told Tyson on March 13, 2014 she could not do her job she was allowed to bid on another job. Mr. Sager first learned that Maria had agreed not to work for Tyson on April 17, 2014. (Tr. p. 66)

Renea Kestel, Complex Nurse Manager testified. Ms. Kestel said that her contact with Maria occurred when Maria returned to work after winning a bid for a job after being out for a year for a non-work related reason. (Tr. p. 76) Ms. Kestel then had contact with Maria when Maria came in and told her she could not physically perform her job of packing pigs feet. According to Ms. Kestel, Maria said that she had injured her shoulder a year ago. (Tr.p.76)

As set forth above Maria claimed a work injury for her right shoulder due to an alleged injury of July 6, 2012. In that claim, Maria had an independent medical examination (IME) performed by Sunil Bansal, M.D. on March 13, 2013. (Ex. 4, pp. 1 – 3) Dr. Bansal submitted a supplemental report on September 4, 2013. (Ex. 4, pp. 14 – 18) In the March 13, 2013[1] report, Dr. Bansal found upon examination,

[1] Dr. Bansal lists the date of injury as June 26, 2013. It appears the parties agreed that the date of this injury was July 6, 2012

> Ms. Lopez continues to have right shoulder pain, as well as bilateral foot pain. She is not able to raise her right arm above shoulder level. When she raises it too high, it will actually lock and is very painful. She also has a lot of popping and cracking in her shoulder. Her right shoulder pain is not constant, but with certain positions or movements she will have sharp, stabbing pain.
>
> On a scale from 0 to 10, with 0 being no pain and 10 being the highest level of pain, she rates her average right shoulder pain at 6/10.

(Ex. 4, pp. 5, 6) He recommended right arm restriction of,

> I would place a restriction of no lifting greater than 10 pounds with her right arm along with no lifting more than 5 pounds above shoulder level with the right arm. She simply cannot do more, it causes her pain, and would place additional stress to the right shoulder.
>
> No frequent reaching, pushing, or pulling with the right arm to avoid further damage to the right shoulder and to keep pain levels in check.
>
> No pushing, pulling greater than 20 pounds with the right arm.

(Ex. 4, pp.10, 11) He also recommended an MRI of Maria's shoulder.

On March 2, 2015 Dr. Bansal performed an independent medical examination for Maria's March 13, 2014 right shoulder injury. (Ex. 4, pp. 19 – 28) Dr. Bansal wrote that, "...she [Maria] had to stack boxes up to 30 pounds onto a pallet to shoulder height. Her shoulder pain increased tremendously." (Ex. 4, p. 24) Dr. Bansal's opinion concerning causation was,

> In my medical opinion, Ms. Lopez-Velasco aggravated her right shoulder from returning to work at Tyson, performing the box stacking job to overhead levels on or above March 13, 2014. This most likely led to the full thickness tear with the need for subsequent surgery.

(Ex. 4, p. 26) On July 14, 2015 Dr. Bansal provided an additional report (addendum) stating,

> This addendum serves as a clarification of Ms. Lopez-Velasco's job duties, as there appears to have been a miscommunication at the March 2, 2015 IME visit. Of note, the interpretation for that IME was performed by her son.
>
> I have reviewed the provided video footage of the work being performed in the positions Ms. Velasco worked in at Tyson.

(Ex. 4, p. 30) Dr. Bansal commented that his prior report was incorrect in reporting that Maria lifted 30-pound boxes; rather she pushed 30-pound boxes. Dr. Bansal stated that a third of her job (making boxes) was performed almost exclusively involved overhead reaching. (Ex. 4, p. 31) Dr. Bansal concluded that the overhead reaching was the cause of Maria's right torn rotator cuff. (Ex. 4, p. 31)

Douglas Martin, M.D. performed an IME on July 24, 2013. He concluded that Maria had right shoulder impingement syndrome. (Ex. 5, p. 6) Dr. Archer did not believe that her shoulder impingement was work related at the time of his IME. He recommended a temporary restriction that Maria not work above shoulder level. (Ex. 5, pp. 6, 7)

On June 16, 2015 Michael Nguyen, M.D. provided opinions concerning Maria's condition by reviewing medical records. (Ex. A, pp. 7 – 9) Dr. Nguyen wrote,

> The right shoulder impingement diagnosed and surgically treated by Dr. Hamann would not be determined as a cause from her work period of 03/05/2014 to 03/13/2014, for a 9-day period of 53.54 hours, as a direct result, specifically noting that on her MRI in the supraspinatus there is evidence of fat atrophy of the supraspinatus, which would denote presence of a chronic condition and disuse.

(Ex. A, p. 9) Dr. Nguyen stated that the work Maria performed between March 5 and March 13, 2014 did cause some aggravation to an underlying condition, but did not cause any permanent aggravation. (Ex. A, p. 9)

On June 11, 2015 Dr. Hamann responded to Tyson's request for an opinion as to the causation of Maria's rotator cuff tear. Dr. Hamann's opinion was,

> Therefore, in review of these records and of my own records following her surgery, I would make these opinions on Ms. Lopez Valesco's [sic] right shoulder: I do not believe with a degree of medical certainty that the activities in Tyson of March 2014, led to a rotator cuff tear. I also do not believe that after reviewing the work descriptions and videos, that these would have aggravated her presumed rotator cuff tear. Certainly, after her case settlement in 2013 and at rehire, she may have done any number of activities, which would have injured her shoulder.

(Ex. B, p. 18)

CONCLUSIONS OF LAW

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

Maria reported to her supervisor, Mr. Espana, on March 13, 2014 that her work was causing her pain in her shoulder. Her employer sent her home from work. Tyson received timely notice of Maria's claim of a work-related injury.

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).

"When an expert opinion is based upon an incomplete history, the opinion is not necessarily binding upon the commissioner. 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." Dunlavey v. Economy Fire & Casualty Co., 526 N.W.2d 845 (Iowa 1995).

In this claim Dr. Bansal was the only physician to opine that Maria's work caused permanent injury to her right shoulder in March 2014. He provided an addendum to his opinion after he discovered that he was incorrect about the amount of lifting she was required to perform. In the addendum Dr. Bansal still incorrectly described Maria's work as requiring substantial work over head. Maria testified that she did not work overhead due to her shoulder. The video shows some overhead work when reaching for empty boxes, but it was not a significant part of her work. Maria testified her shoulder pain started on March 13, 2014 when she was pulling a box that was very tight. (Tr. p. 21)

I find that Maria has failed to prove by a preponderance of the evidence that she permanently injured her right shoulder while working for Tyson in March 2014. The medical evidence and her testimony are not convincing that she had a temporary or permanent injury that arose out of and in the course of her employment in March 2014. The opinions of Dr. Hamann and Dr. Nguyen are more convincing than those of Dr. Bansal.

Iowa Code section 85.39 provides in part,

> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination. The physician chosen by the employee has the right to confer with and obtain from the employer-retained physician sufficient history of the injury to make a proper examination.

In this case Dr. Bansal performed his IME for the March 2014 injury on March 2, 2015. Dr. Nguyen provided his opinion as to the extent of impairment on June 16, 2015. Dr. Hamann provided his opinion on June 11, 2015. Maria has not shown the condition precedent for reimbursement for the IME; the employer (Tyson) retained a

physician who provided an evaluation that was too low before Maria obtained the opinion of Dr. Bansal. Reimbursement of Dr. Bansal's costs is not available under 85.39 for Maria.

As Maria did not prevail in this claim I also decline to award her any costs under 876 AC 4.33.

ORDER

The claimant, Maria Lopez Velasco shall take nothing in this claim.

Signed and filed this 23rd day of February, 2016.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFE/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.