BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

WALEED IBRAHIM, Claimant, vs. TYSON FOODS, INC., Employer, Self-Insured, Defendant.	:	File Nos. 5055825, 5062041 ARBITRATION DECISION Head Note No.: 2403

FILED
JUN 27 2017
WORKERS' COMPENSATION

STATEMENT OF THE CASE

The claimant filed a review-reopening petition from a settlement approved January 19, 2016, which saw the claimant receive an 11.5 percent industrial payment. The claimant also filed a petition in arbitration alleging a new injury on March 24, 2015.

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

ISSUES

For File No. 5062041:

1. Whether the claimant has established a change in condition such as to merit an additional award of disability.

For File No. 5055835:

1. The extent of disability, if any, from the injury arising out of and in the course of employment on March 24, 2015; and

2. Reimbursement/payment of Independent Medical Evaluation (IME) pursuant to Iowa Code section 85.39.

FINDINGS OF FACT

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

The claimant was 26 years old at the time of hearing. He was born in Iraq and is fluent in Arabic. He has limited English skills. He is a high school graduate, and attended a university in Iraq to become a teacher. The record is not totally clear, but it

appears that the claimant has a bachelor's degree and some master degree level courses post-degree. He provided security services to American VIP officials in Iraq and came to the U.S. as a refugee. His only employment in the U.S. has been at Tyson Foods.

Claimant seeks to approve a settlement approved January 19, 2016 of 11.5 percent industrial for a September 29, 2014 injury. That injury was the result of an incident which occurred while pushing four hogs on a trolley in a cooler. The claimant received about 6 epidural shots from Kurt Smith, D.O., as a result of this injury. (Joint Exhibit 4) Dr. Smith placed the claimant at maximum medical improvement (MMI), and released the claimant to full-duty work without restrictions March 16, 2015. (Jt. Ex. 4, p. 8)

The claimant sustained a second injury at Tyson on March 24, 2015 while pushing carts. An MRI was ordered and showed a disc herniation at L5-S1. Claimant saw Todd Harbach, M.D., on April 30, 2015. Dr. Harbach thought surgery was a high risk option for the claimant and started with an epidural instead. (Jt. Ex. 9, p. 2) The claimant returned to Dr. Smith on June 1, 2015 for neck and back pain.

The claimant saw Sunil Bansal, M.D., for an independent medical evaluation. Dr. Bansal opined a 5 percent body as a whole (BAW) for the cervical injury. (Jt. Ex. 10, p. 9)

The claimant underwent surgery on his low back on August 4, 2015. The microdiscectomy did not seem to improve the low back. (Jt. Ex. 9, p. 4) Dr. Smith opined MMI for the neck injury on December 9, 2015. (Jt. Ex. 4, p. 14) On January 7, 2015, the claimant signed a settlement for his neck injury and it was approved on January 22, 2016. (Ex. E) The record does not reflect any change in condition in the neck condition since the settlement. The last impairment rating also shows no increase. (Ex. 1) It was conceded at hearing that most of claimant's current issues stem from the second pled injury date.

The claimant was seen by Irving Wolfe, D.O., for an IME on November 29, 2016. (Ex. 1) Dr. Wolfe opined a body as a whole (BAW) rating of 23 percent (combined both injuries). It appears that 16 percent is related for the lumbar injury. (Ex. 1, p. 12) He opined restrictions of frequent lift up to 10 pounds, 20 pounds occasionally, carry frequently of 15 and occasionally of 20, push/pull 150 pounds, sit/stand for 45 minutes. (Ex. 1) Claimant testified that he can sit/stand for 25-30 minutes.

The claimant underwent two functional capacity evaluations herein. Both were considered invalid. The claimant is not currently working at Tyson as he was sent home at some point. He has not been offered work although Tyson states the claimant is welcome to look at open positions and bid.

He has limitations and restrictions from his IME doctor. He has industrial loss. Given his educational achievement in Iraq he is obviously intelligent and has the ability to retrain into less physical employment. The large employer herein is also not offering

him work based on their perception of his disability. Considering the claimant's medical impairments, training, permanent restrictions, as well as all other factors of industrial disability, the claimant has suffered a 50 percent loss of earnings capacity.

The claimant's weekly benefit rate was previously established as $334.33 per week for the review reopening. For the arbitration case the claimant was single, entitled to one exemption, and has a weekly rate of $361.92. Claimant also seeks reimbursement/payment of the $2,450.00 IME fee of Dr. Wolfe.

REASONING AND CONCLUSIONS OF LAW

The first issue is whether claimant is entitled to additional permanent disability benefits via a claim for review-reopening.

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 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).

In a proceeding to reopen an award for payments or agreement for settlement as provided by section 86.13, inquiry shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded or agreed upon. Iowa Code section 86.14(2).

The Iowa Supreme Court has held that a claimant does not need to prove that the change in the condition was not contemplated at the time of the original decision(s). Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009).

The claimant did not meet his burden of establishing a worsening in condition or impairment, or additional industrial loss and the review-reopening must be denied.

The March 24, 2015 injury.

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. of 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. Cedar Rapids Community Schools v. Pease, 807 N.W.2d 839, 845 (Iowa 2011). 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 finder of fact, must determine the credibility of the witnesses, weigh the evidence, and decide the facts at issue in a case. See Arndt v.

City of LeClair, 728 N.W.2d 389, 394-95 (Iowa 2007). One factor the commissioner considers is whether an expert's opinion is based upon an incomplete medical history. Dunlavey v. Economy Fire & Cas. Co., 526 N.W.2d 845, 853 (Iowa 1995).

It was found that the claimant met his burden of establishing that his injury of March 24, 2015 caused permanent disability.

The next issue is extent of permanent disability for the injury.

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 Rule of Appellate Procedure 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 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 143.

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 and inability to engage in employment for which the employee is fitted. 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 50 percent loss of earning capacity, he has sustained a 50 percent permanent partial industrial disability entitling him to 250 weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(u).

Independent Medical Evaluation.

Iowa Code section 85.39 provides, in relevant part, as follows:

> 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.

Defendant is 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). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

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.

The issues on the IME are whether the IME fee of Dr. Wolfe is reimbursable. The IME followed the defendant's own doctors, Dr. Hitchon, opining that the injury caused no restrictions or impairment. So payment/reimbursement of an IME is appropriate. But the $2,450.00 IME fee is for the 2014 and 2015 injuries. The claimant already had an IME on the 2014 injury and only one is allowable. The defendant shall pay/reimburse as appropriate $1,225.00 (one half of the total fee) of the IME fee of Dr. Wolfe.

ORDER

THEREFORE IT IS ORDERED:

That the claimant take nothing further on File No. 5062041.

For File No. 5055835:

That defendant pay claimant two hundred fifty (250) weeks of permanent partial disability at the weekly rate of three hundred sixty one and 92/100 dollars ($361.92) commencing May 12, 2015

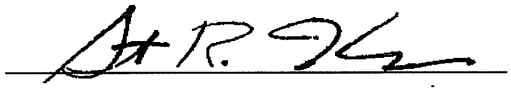
That the defendant pay/reimburse as appropriate one thousand two hundred twenty-five and no/100 dollars ($1,225.00) of the Dr. Wolfe IME.

Defendant shall pay the costs of this action pursuant to 876 IAC 4.33.

Defendant shall receive credit for benefits previously paid.

Defendant shall file subsequent reports of injury as required by the agency.

Signed and filed this 27th day of June, 2017.



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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.