BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MAYOT K. AJANG, Claimant, vs. SMITHFIELD FOODS, INC., Employer, and SAFETY NATIONAL CASUALTY CORP., Insurance Carrier, Defendants.	:	File No. 5063546 ARBITRATION DECISION Head Note Nos.: 1402.30, 1803

FILED
JAN 31 2019
WORKERS COMPENSATION

STATEMENT OF THE CASE

Claimant, Mayot Ajang, filed a petition in arbitration seeking workers' compensation benefits from Smithfield Foods, Inc., (Smithfield), employer, and Safety National Casualty Corp., insurer, both as defendants. This matter was heard in Des Moines, Iowa, on October 23, 2018 with the final submission date of November 27, 2018.

The record in this case consists of Joint Exhibits 1 through 10, Claimant's Exhibit 1, Defendants' Exhibits A through G, and testimony of claimant. Serving as interpreter was Dhoal Larjin.

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 and 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.

ISSUES

1. Whether claimant sustained an injury to his right shoulder that arose out of and in the course of employment.

2. Whether the injury to the right shoulder is a cause of permanent disability.

3. The extent of claimant's entitlement to permanent partial disability benefits.

FINDINGS OF FACT

Claimant was 53 years old at the time of the hearing. Claimant was born in Sudan. Claimant and his family moved to Egypt in 2002 to escape the Civil War in Sudan. Claimant emigrated to the United States in 2005. Claimant started the 10th grade in Sudan, but did not graduate high school.

Claimant has taken ESL classes in Egypt and in the United States.

Claimant testified he speaks enough English to buy groceries and to ask simple directions. Claimant does not require an interpreter at work with Smithfield. Claimant did require an interpreter at hearing.

Claimant worked as a driver and as an administrative assistant in an office in Sudan. In 2008 to the time of hearing, claimant performed production line work at three different meat processing plants. At the time of hearing, claimant was still employed at Smithfield. (Exhibit F, page 36)

Claimant began with Smithfield in January 2014. (Ex. F, p. 36)

Claimant's prior medical history is relevant. In May 2008, claimant was evaluated for right shoulder pain. Claimant's right AC joint was found tender on exam. Claimant was given a cortisone injection in the right shoulder. (Jt. Ex. 1, p. 1)

In October 2008, claimant was seen for right shoulder pain. Claimant indicated he was unable to throw with the right arm. Claimant was given another cortisone injection in the right shoulder. (Jt. Ex. 1, p. 2)

On April 24, 2015, claimant treated for bilateral shoulder pain. (Jt. Ex. 3, pp. 11-13)

Claimant testified that at the time of injury, he was working a job sawing and cutting ribs on a production line at Smithfield. (Ex. G, p. 42, Deposition page 21, Tr. pp. 17, 20, 33)

On June 15, 2015, claimant was seen by the nurse at Smithfield with complaints of pain in the left armpit and rib area. Claimant's pain started when cutting ribs. Claimant had no pain on the right. Claimant was given Ibuprofen and told to use ice. (Jt. Ex. 4, p. 49)

On November 6, 2015, claimant was evaluated by Ryan Meis, M.D., at CNOS, for left shoulder pain. Claimant indicated he worked at a job requiring a lot of sawing. Claimant did not have any problems on the right side. An MRI showed a substantial superior labral tear on the left with mild degenerative AC joint changes. Claimant was

given a cortisone injection in the left and returned to work at full duty. (Jt. Ex. 7, pp. 75-77)

Claimant returned to CNOS on January 29, 2016. Claimant was evaluated by Nichole Friessen, PA. Claimant indicated the injection gave little relief of pain. Claimant complained of pain in the anterior aspect of the left shoulder. Claimant was assessed as having left shoulder pain due to impingement and impartial thickness rotator cuff tear. Claimant was given a cortisone injection in the left shoulder subacromial space. (Jt. Ex. 7, pp. 78-79)

Claimant returned to Dr. Meis on March 18, 2016. Claimant indicated the cortisone injection gave relief for three weeks. Claimant complained of pain in the anterior and lateral side. Claimant had no similar symptoms on the right side. Claimant was given a cortisone injection in the left shoulder and returned to work with restrictions limiting him to lifting 10 pounds frequently with an occasional pushing and pulling. (Jt. Ex. 7, pp. 80-81)

On or about April 1, 2016, claimant reported right shoulder problems. A nurse at Smithfield noted claimant had been separating and trimming hams for approximately two days. (Ex. E, Jt. Ex. 4, p. 54)

Claimant was evaluated by Todd Woollen, M.D., on May 24, 2016 for right shoulder pain. Claimant denied any prior shoulder injury. An MRI of the right shoulder suggested a prior right shoulder dislocation with findings of a moderate Hill-Sachs and a soft tissue Bankart injury. Claimant had advanced degenerative changes in the glenohumeral joint and mild to moderate degenerative changes in the AC joint of the right shoulder. Claimant was told he would eventually require right shoulder replacement. (Jt. Ex. 8, p. 86)

Claimant indicated his pain began a year ago but Dr. Woollen told him the degenerative changes were old. Claimant was told he needed to apply for a job that did not require heavy use of the right shoulder. (Jt. Ex. 8, pp. 86-87)

On June 9, 2016, claimant underwent a functional capacity evaluation (FCE). Claimant gave valid effort in testing. Claimant was found to be able to lift and carry 50 pounds occasionally and 30 pounds frequently at a waist level. Claimant was restricted to lifting 30 pounds occasionally and 15 pounds frequently at shoulder level. Overhead lifting was limited to 15 pounds occasionally. (Jt. Ex. 9)

In a June 24, 2016 note, Dr. Meis found claimant had a 4 percent permanent impairment to the left upper extremity, converting to a 2 percent permanent impairment to the body as a whole. Claimant's restrictions were as per the FCE. (Jt. Ex. 7, pp. 84-85)

In a December 20, 2017 report, Brian Crites, M.D., gave his opinions of claimant's condition following an independent medical evaluation (IME). Claimant had intermittent pain in the right shoulder. Claimant had occasional numbness, locking, and pain in the left shoulder. Claimant was still working at Smithfield, but with restrictions as per the FCE. Dr. Crites found that claimant had an 11 percent permanent impairment to the right upper extremity and a 10 percent permanent impairment to the left upper extremity. (Cl. Ex. 1, pp. 1-4)

Dr. Crites opined that claimant's work at Smithfield was a substantial cause or aggravating factor to his left shoulder condition and impairment. He noted that while claimant had an MRI showing a pre-existing dislocation and degenerative changes, this was exacerbated by his work at Smithfield. He opined that claimant's bilateral shoulder injuries and disabilities were caused by his work at Smithfield. He found claimant had reached maximum medical improvement (MMI) as of July 2016. He agreed with permanent restrictions as per claimant's FCE. (Cl. Ex. 1, pp. 4-5)

On August 23, 2018, claimant was evaluated by Hsueh-Yu Wesley Cheng, M.D., at the HealthWest Physicians Clinic of Iowa. Claimant's pain in the left shoulder began three years prior. Claimant's right shoulder pain began one year later. Claimant was assessed as having bilateral shoulder pain. Dr. Cheng recommended an MRI of the left shoulder. (Jt. Ex. 10, pp. 103-105)

Claimant was later evaluated by Joseph Dumba, M.D., with the HealthWest Physician's Clinic of Iowa, on September 10, 2018. Claimant was assessed as having bilateral shoulder pain. Claimant had a cortisone injection in both shoulders. An MRI of both shoulders was recommended. (Jt. Ex. 10, pp. 106-108)

At the time of hearing, claimant was still employed with Smithfield. Claimant had been moved to a Cryovac job, as it was within his work restrictions. Claimant said the job is lighter duty, but it hurts his right shoulder. Claimant testified the job requires him to put meat in a bag. Claimant testified the meat weighs approximately one to two pounds per piece. Claimant testified the job did not require much overhead work. At the date of injury, claimant earned $16.30 per hour. At the time of hearing, claimant said he earned $17.70 per hour.

Claimant testified he regularly works 50-60 hours per week. Records indicate, at the time of the hearing, claimant's gross weekly earnings were approximately $1,000.00 per week. (Ex. B, pp. 25-28)

CONCLUSIONS OF LAW

The first issue to be determined is whether claimant sustained an injury to the right shoulder that arose out of and in the course of employment. As detailed in the parties stipulations, prehearing report, arguments at hearing, and post hearing briefs, the parties agree that claimant sustained an injury to the left shoulder that arose out of

and in the course of employment. Defendants deny that claimant also sustained a right shoulder injury that arose out of and in the course of employment.

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 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).

Records indicate that when claimant first reported a June 15, 2015 injury, it was only to his left shoulder. (Jt. Ex. 4, p. 49) From the June 15, 2015 date of injury up until his March 18, 2016 appointment with Dr. Meis, claimant routinely indicated his pain was confined to his left shoulder only. (Jt. Ex. 7, pp. 75-77, 80-81)

On April 1, 2016, approximately ten months after the date of injury, claimant reported a right shoulder problem. At that time, claimant had been separating hams for approximately two days. (Ex. E) Claimant testified this job required lifting pieces of meat weighing between one to two pounds and pushing them into a bag. The records indicate this job does not require or involve much above the shoulder work. (Tr. pp. 34-35)

As detailed in the Findings of Facts, medical records indicate claimant had significant right shoulder problems prior to the June 2015 date of injury. In May 2016, claimant was evaluated by Dr. Woollen. An MRI showed that claimant had a Hills-Sachs deformity and a Bankart lesion, both of which are indicative of a prior right shoulder dislocation. Dr. Woollen told claimant that his degenerative changes in his right shoulder were old. (Jt. Ex. 8, pp. 86-87)

Dr. Crites also noted that claimant's MRI showed a right shoulder problem with a pre-existing dislocation. (Cl. Ex. 1, pp. 2, 4)

Claimant testified at hearing that he did not have any prior right shoulder problems. (Tr. p. 24)

Dr. Crites opined that claimant's right shoulder injury "... was exacerbated by his job duties at Farmland Foods." (Cl. Ex. 1, p. 4)

However, Dr. Crites opinion of causation is problematic. As noted, claimant reported a left shoulder injury on June 15, 2015. Claimant denied right shoulder problems until approximately ten months later, on April 1, 2016. At the time of the reporting of the right shoulder problems, claimant had been working on a job requiring him to move one to two pounds of meat with little overhead activity. Claimant had only been working this job for two days. Dr. Crites offers no explanation why claimant's right shoulder injury is related to work, given that claimant did not report the right shoulder problems until ten months after the alleged date of injury. Dr. Crites offers no explanation of how claimant's right shoulder injury was exacerbated by his work at Smithfield when the job that allegedly injured claimant only required lifting meat weighing one to two pounds with no overhead work. Given these discrepancies, Dr. Crites opinion regarding causation are found not convincing.

As noted, claimant has also denied, both at hearing and in his histories given to his physicians, that he had any prior right shoulder injuries before April 2016. This testimony is contrary to records from 2008. This testimony is also contrary to an MRI showing evidence of a prior dislocation on the right. This testimony is contrary to

opinions given by Dr. Crites and Dr. Woollen that claimant had a prior right shoulder dislocation. Given this record, claimant's testimony regarding his right shoulder injury is found not credible.

Claimant's right shoulder injury allegedly occurred approximately ten months after the date of injury. When claimant reported the alleged right shoulder injury, he had been working a position requiring minimal lifting and little overhead work. The opinions of Dr. Crites regarding causation are found not convincing. Claimant's testimony regarding the history of his right shoulder injury is also found not credible. Given this record, claimant has failed to carry his burden of proof he sustained a right shoulder injury on June 15, 2015, that arose out of and in the course of employment.

Claimant has failed to carry his burden of proof, he sustained an injury to his right shoulder on June 15, 2015, that arose out of and in the course of employment. All other issues concerning the right shoulder are moot.

The last issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

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.

Industrial disability can be equal to, less than, or greater than functional impairment. Taylor v. Hummel Insurance Agency, Inc., 2-2, Iowa Industrial Comm'r Dec. 736 (1985); Kroll v. Iowa Utilities, 1-4, Iowa Industrial Comm'r Dec. 937 (App. 1985); Birmingham v. Firestone Tire & Rubber Company, II, Iowa Industrial Comm'r Rep., 39, (App. 1981).

As noted, claimant has failed to carry his burden of proof his right shoulder injury arose out of and in the course of employment. As a result, any industrial disability claimant may have sustained concerns only the loss to his left shoulder.

Claimant was 53 years old at the time of the hearing. Claimant is a refugee from Sudan. He did not graduate from high school. All of claimant's work in the United States has been manual labor jobs in meat processing plants. Claimant does not require an interpreter at work. However, claimant did require an interpreter at hearing.

Two experts have opined regarding the functional disability of claimant's left shoulder. Dr. Meis treated claimant's shoulder condition and saw claimant on two separate occasions. Dr. Meis opined claimant had a 4 percent permanent impairment to the left upper extremity, converting to a 2 percent permanent impairment to the body as a whole. (Jt. Ex. 7, pp. 84-85)

Dr. Crites evaluated claimant on one occasion for an IME. Dr. Crites found that claimant had a 10 percent permanent impairment of the left upper extremity. According to the conversion tables in the Guides, page 439, a 10 percent permanent impairment to the upper extremity converts to a 6 percent permanent impairment to the body as a whole.

Dr. Crites opinions regarding functional impairment are more detailed than those offered by Dr. Meis. I am able to follow Dr. Crites analysis of claimant's permanent impairment using his exam of claimant and the tables found in the Guides. Based on this, it is found claimant has a 6 percent permanent impairment to the body as a whole regarding his injury to his left upper extremity.

Claimant has permanent restrictions limiting him to occasional lifting and carrying 50 pounds, occasionally lifting 30 pounds at shoulder level, and occasional lifting 15 pounds overhead. (Jt. Ex. 9) Smithfield has accommodated those restrictions.

Claimant's hourly wage of pay has increased, and at the time of hearing claimant was earning more per hour than he was at the date of injury.

As noted, claimant has permanent restrictions which limit his ability to lift, carry, and work overhead. Claimant's work history in the United States has been in manual labor jobs requiring repetitive use of his upper extremities. While it is true the claimant is earning more now than at the time of injury, it is also true that claimant's access to other jobs has been limited, to some capacity, due to his permanent restrictions.

When all factors are considered, it is found that claimant has a 20 percent industrial disability of loss of earning capacity.

ORDER

THEREFORE, IT IS ORDERED:

That defendants shall pay claimant one hundred (100) weeks of permanent partial disability benefits at the rate of five hundred sixty-seven and 74/100 dollars ($567.74) per week, commencing on June 13, 2016.

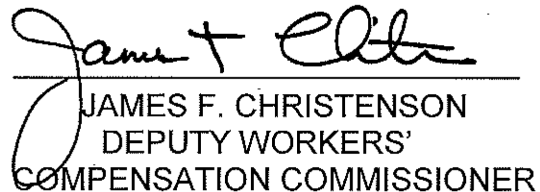
That defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. April 24, 2018).

That defendants shall pay costs.

That defendants shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

Signed and filed this 31st day of January, 2019.



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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.