BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| IRMA AQUILAR,<br><br>Claimant,<br><br>vs.<br><br>HEINZ<br><br>Employer,<br><br>and<br><br>LIBERTY MUTUAL INSURANCE COMPANY,<br><br>Insurance Carrier,<br>Defendants. | : | File No. 5003554<br><br>A R B I T R A T I O N<br><br>D E C I S I O N<br><br>Head Note No.: 1803 |

STATEMENT OF THE CASE

Irma Aquilar, claimant, has filed a petition in arbitration and seeks workers' compensation benefits from Heinz, employer and Liberty Mutual Insurance Company, insurance carrier, defendants.

This matter came on for hearing before deputy workers' compensation commissioner, Jon E. Heitland, on April 20, 2004 in Davenport, Iowa. The record in the case consists of claimant's exhibits 1 through 11; defense exhibits A through K; joint exhibits 1 through 11; as well as the testimony of the claimant, Barbara Laughlin, Dean Jensen, and Leota Rickey.

ISSUES

The parties presented the following issues for determination:

1. Whether the alleged injury is a cause of temporary disability.

2. Whether the alleged injury is a cause of permanent disability.

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

## FINDINGS OF FACT

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

At the time of the hearing the claimant was 55 years old. The claimant completed the 8th grade but did not complete her 9th grade year of school. She was born in Texas to a Spanish-speaking family, and today has some difficulty reading and writing the English language. However, an interpreter was not required for her to participate in the hearing.

Claimant has worked as a migrant farm worker, as a caretaker for nursing home outpatients who have suffered a stroke, as a crossing guard, and as a production line worker for Louis Rich and for the defendant-employer. Her work for Louis Rich and for Heinz involved repetitive tasks.

The claimant worked for Heinz beginning in 1977, until 1982, when she moved back to Del Rio, Texas, to care for her ailing father. She worked for the Tandy Company in Texas, testing computer motherboards. She described this as repetitive work also.

She moved back to Iowa in 1996 and worked at Heinz again beginning in January 1997. She worked there until August 2003 full-time plus overtime, earning $14.43 per hour.

Her duties at Heinz were to operate a labeling machine on the “soup line.” A DVD entered into evidence shows a similar labeling machine in operation, but the claimant testified, and a Heinz witness corroborated, that the machine shown is attaching gravy labels and operated at a slower pace than the soup labeling machine. Samples of the labels are also in evidence, with the gravy labels approximating the weight and size of the bundles of soup labels the claimant had to load into the machine. Heinz no longer operates the soup line and thus the same labels and a video of the same operation are not available.

The claimant’s job was to keep the labeling machine loaded with labels. This involved removing the bundles of labels, 1,000 per bundle, from a box on a pallet on the floor, and lifting them up to feed into the magazine of the machine. There would be 30 to 35 bundles in a box, and she would sometimes have to lift the box from the floor up to a rail on the machine. She estimated she would have to load a bundle into the machine about every one to two minutes.

The claimant bases her petition for benefits on both the repetitive and cumulative nature of this work, as well as a traumatic incident on June 13, 2000, where she hit her elbow on a part of the machine, resulting in immediate pain. She reported this injury to the plant nurse, who told her it would heal by itself.

The claimant has used June 26, 2000 as her date of injury, alleging a repetitive motion injury to her right shoulder, arm and hand. She also alleges the June 13, 2000 right elbow traumatic injury in this same petition. On June 26, 2000, the claimant was earning $13.79 per hour, 40 hours per week.

When a month later she still had pain, she was sent to see Camilla Frederick, M.D., on July 17, 2000. Dr. Frederick prescribed a wrist strap, exercises, and physical therapy and returned the claimant to full duty without restrictions. The claimant testified that the therapy, conducted in July and August of 2000, did not help.

On August 4, 2000, the claimant returned to Dr. Frederick with further complaints of pain. Dr. Frederick diagnosed right lateral epicondylitis. Dr. Frederick saw the claimant again on August 14, 2000, and again returned her to work without restrictions. (Joint Exhibit 2)

On October 17, 2001, the claimant saw Leo Kulick, M.D., for her right shoulder, arm and wrist complaints. (Ex. 8) Dr. Kulick ordered a nerve conduction study. (Ex. 8) The claimant underwent an EMG on May 2, 2002, which showed abnormal nerve conduction and carpal tunnel syndrome in both wrists. (Jt. Ex. 7)

On July 30, 2003, the claimant was seen by Richard Neiman, M.D. Dr. Neiman examined the claimant's right shoulder and found a 28 percent permanent partial impairment of the right upper extremity, which he converted to a 17 percent impairment of the body as a whole. He recommended an MRI and a right carpal tunnel decompression. (Ex. 1, Ex. 4) He also imposed restrictions against using the right arm above the shoulder, avoiding excessive flexion, extension, abduction, rotation or repetitive use of the right hand. (Ex. 1)

The claimant underwent a functional capacity evaluation (FCE) in Iowa City, Iowa on November 6-7, 2003, which concluded she was capable of doing work in the "light" category. (Ex. 5)

An MRI was conducted on March 1, 2004. Dr. Neiman found moderate tendinopathy of the supraspinous tendon and mild to moderate AC joint degenerative changes. (Ex. 2) The claimant also has diabetes, which she controls with injections and pills.

Since being laid off, the claimant was on unemployment benefits for a time. She has looked for work with a temporary employment agency, and with HON Industries, a maker of chairs and tables.

She states she has trouble sleeping due to her pain, and also has difficulty with routine tasks such as vacuuming, picking things up, and combing her daughter's hair.

On cross-examination, the claimant acknowledged that she only hit her elbow on the machine, she did not hit her shoulder or her neck. Neither did she fall, twist her shoulder, or miss any work as a result of her alleged injuries. She agreed no doctor had

diagnosed a repetitive injury to her neck or shoulder occurring on June 26, 2000. She also agreed that only Dr. Neiman has imposed any restrictions on her, and that she has not communicated those restrictions to Heinz.

The claimant also acknowledged that she had a prior injury at Heinz and she was aware of the procedures for reporting a work injury. She admitted she continued to work without restrictions at Heinz after her date of injury until she was laid off.

The claimant also stated that at one point she asked to be taken off the soup line because of the fast pace, but her request was denied due to her experience with the machine and because she had less seniority than other workers. She stated that the soup line was avoided by workers with more seniority because it was faster paced.

Leota Rickey testified also. She is a registered nurse with 35 years experience, 20 of which have been spent supervising other nurses. She has worked for Heinz since 1998, as a head nurse supervising the nursing staff, among other duties.

She testified that the nursing records show that the claimant did report an injury with her elbow on June 13, 2000, and that bruises were noted by Ms. Rickey herself. (Ex. 1) She stated that it was several days after the incident that the claimant complained of pain. At that time, Ms. Rickey measured the claimant's arms to see if one was swollen, but they were the same size. She issued the claimant a "tennis elbow" strap. Nurse Rickey stated that Heinz would have honored restrictions even from an unauthorized doctor such as Dr. Neiman, but no restrictions were ever communicated to them.

Dean Jensen also testified for the defendants. He is the safety and loss prevention manager for Heinz. He testified that he was familiar with the soup line that the claimant worked on, and her duties of maintaining the supply of labels and glue for the labeling machine. He estimated the claimant would have to handle an average of 750 labels per minute, or about one 1,000-count bundle every 1.5 minutes. She would have to handle about 30 bundles per hour, or 240 in an eight-hour shift. The bundles of soup labels would weigh about the same as the gravy labels in evidence or about two pounds per bundle.

He stated that the claimant was laid off along with 125 other employees. The claimant was laid off due to her lack of seniority and not due to her work injury.

The claimant is currently on a layoff status from Heinz. She was laid off in August 2003. She was then called back to work one or two days per week for a short time, but now has not been called back since January 2004.

The claimant earned $27,000 in 2000; $26,000 in 2001; $26,800 in 2002; but only $13,000 in 2003 and to date in 2004, she has no earnings.

Barbara Laughlin also testified. She is a vocational specialist, with a B.A. degree in sociology and psychology, and a graduate degree in vocational rehabilitation. She

has also worked for the State of Iowa as a vocational rehabilitation consultant. She has interviewed the claimant and authored a report on the claimant's employability. She examined the claimant's restrictions, her age, her lack of transferable skills, as well as other factors. The claimant's limited skills with reading and writing the English language were a factor she considered. She understood the restrictions imposed by Dr. Neiman to be no use of the right arm above shoulder level; avoidance of abduction and rotation of the arm and shoulder; avoidance of repetitive right hand movement, etc.

Ms. Laughlin thought the claimant had very little in the way of transferable skills, as about half of her work experience was in unskilled work. Her restrictions preclude her from many jobs that she formerly performed, because many of them were repetitive. Her age of 55 put her into the "older worker" category, which would also work against her. Ms. Laughlin concluded the claimant has lost access to between 60 and 75 percent of the job market.

Ms. Laughlin was also familiar with vocational reports from Steve Mootz, MA, CRC. She disagreed with the conclusions in that report, particularly the conclusion that the claimant could find other employment easily. She agreed with the report that the claimant would be wise to obtain her GED, as that is increasingly required by employers even for factory work.

Ms. Laughlin personally contacted some of the employers mentioned in the Mootz report as possible jobs for the claimant. She found many of them to involve repetitive work, which the claimant is restricted from doing, or requiring lifting beyond her restrictions. She stated that generally speaking, about 49 percent of all jobs are repetitive in nature.

In addition, many of the jobs identified were in locations other than the claimant's residence area, which is Muscatine, Iowa. Finally, even the jobs identified paid only in the range of $6.14 to $9.40, which was far less than the $14.43 the claimant earned when she was injured.

## CONCLUSIONS OF LAW

The first issue is whether the alleged injury is a cause of temporary or permanent disability.

The defendants make much of the fact that the claimant only reported a right elbow traumatic injury on June 13, 2000, and did not then, or later, report a cumulative injury to her right shoulder, arm or hand until her petition was filed. However, it is noted that a lack of notice under Iowa Code section 85.23 is not a disputed issue in this case.

The defendants dispute whether the claimant's condition actually extends beyond her arm and into the body as a whole. They also dispute whether any current shoulder or back condition is caused by a work injury.

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. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996)

Dr. Neiman has stated: "As far as permanency, I believe she has had injury to the right shoulder that is related to this injury and also repetitive trauma to the right hand producing the carpal tunnel." (Ex. 1, p. 2; Ex. 4, p. 6)

Michael Cullen, M.D., offered an opinion that the claimant's right carpal tunnel and right shoulder conditions were not caused by her work. He agreed her right elbow epicondylitis was related to her traumatic work injury.

Dr. Cullen did not feel the claimant had a work-related condition because he viewed a video of the machine in operation, and described it as having "no indication of repetition." However, Exhibit K, the DVD of a similar machine in operation, does show repetitive activity. He also based his opinion on the claimant having diabetes, which he indicated increases the chances of carpal tunnel syndrome. (Ex. I, p. 2)

The claimant described the job as repetitive. Her description of her duties was confirmed by Mr. Jensen and by the video. Although her job involved more standing and monitoring than it did using her hand and arm, nevertheless, over time she was required to repetitively lift, open, riffle and insert bundles numerous times per shift. It is found that the claimant's carpal tunnel syndrome, epicondylitis, and right shoulder problems are substantially caused by her work activity, and that her injury extends to the body as a whole.

The next issue is the extent of the 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, 593 258 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. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251

(1963); McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); 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.

The claimant was 55 years old at the time she was injured. This does put her at a disadvantage to other, younger workers when competing in the job market. Added to her age is her lack of formal education, which ended before completing the ninth grade. As Ms. Laughlin testified, employers do look at a worker's educational level when hiring, even for physical labor jobs. In addition, she has problems with reading and writing in both English and Spanish. However, there is no showing that her English skills affect her disability.

The claimant has permanent work restrictions that prevent her from working at many of the jobs she has performed in the past. She would technically be prohibited from returning to her old job at Heinz. She did, however, continue to work there at her old job even after her work injury. The restrictions by Dr. Neiman were not imposed until sometime later.

The claimant has few transferable skills. All of her work life has been in low-skilled positions. She has shown positive motivation to find substitute work, in that she has applied at various employers since being laid off.

The claimant has suffered a drastic decrease in her earnings, going from $26,000 per year to nothing. However, it must be noted that her present unemployment status is not due to her work injury, but to her lack of seniority. Dr. Neiman's restrictions were imposed in July 2003. She was laid off in August 2003. The fact remains that her present loss of earnings is most directly related to her layoff, not her injury. She was injured in 2000, yet her income for 2001 and 2002 stayed at her previous $26,000 level. It only dropped when she was laid off.

The Mootz vocational reports offer little insight to her true employability, primarily due to what appears to be a failure to take into account her restrictions against repetitive work. Many of the jobs identified as ones the claimant could do are repetitive and clearly outside her work restrictions.

The Laughlin report concludes that the claimant has lost 60 to 75 percent access to the labor market. Of course, the ultimate determination of industrial disability is for the undersigned to make and the undersigned is obligated to consider different factors, but her report does show a significant loss of job opportunities.

Ms. Laughlin testified that approximately 49 percent of all jobs are repetitive in nature, and the claimant is basically restricted from doing repetitive motions with her right arm and hand.

Based on these and all other appropriate factors of industrial disability, it is found that as a result of his work injury, the claimant has an industrial disability of 25 percent.

ORDER

Therefore it is ordered:

Defendants shall pay unto the claimant one hundred twenty-five (125) weeks of permanent partial disability benefits at the rate of three hundred fifty-eight and 42/100 dollars ($358.42) per week from June 27, 2000.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall be given credit for benefits previously paid.

Defendants shall pay the claimant's medical expenses. Defendants shall pay the future medical expenses of the claimant necessitated by the work injury, including any carpal tunnel release, rotator cuff repair or other procedures recommended by the claimant's physicians.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Costs are taxed to defendants.

Signed and filed this ___30th____ day of April, 2004.

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JON E. HEITLAND
DEPUTY WORKERS'
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