BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KOLLEEN BERRY,

Claimant,

vs.

MATRIX SERVICES, INC.,

Employer,

and

ILLINOIS NATIONAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5062840

ARBITRATION

DECISION

Head Note Nos.: 1802; 1803

STATEMENT OF THE CASE

Kolleen Berry claimant, filed a petition in arbitration seeking workers' compensation benefits against Matrix Services, Inc., employer, and Illinois National Insurance Company, insurer, for an accepted work injury date of January 4, 2016.

This case was heard on November 28, 2017, in Des Moines, Iowa, and considered fully submitted on December 19, 2017, upon the simultaneous filing briefs.

The record consists of Joint Exhibits 1-3; claimant's exhibits 4-17; Defendants exhibits A-H, and the testimony of claimant and Mike Berry.

ISSUES

1. Whether the alleged injury is a cause of temporary disability and, if so, the extent;
2. Whether the alleged injury is a cause of permanent disability and, if so;
3. The appropriate commencement date of permanent disability benefits; and,
4. The extent of permanent partial disability.

STIPULATIONS

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.

The parties agree claimant's gross earnings were $882.69 per week at the time of her injury. At all times material hereto, claimant was married and entitled to two exemptions. Based on the foregoing, the weekly benefit rate is $567.62.

FINDINGS OF FACT

Claimant was a 58 year old person at the time of the hearing. Her past education includes high school and an electrical class wherein she learned to repair electrical cords on the tools.

Claimant began working at defendant employer's approximately November 2014. Her job was a tool room attendant. She was responsible for handing out tools, keeping track of them, inspecting the tools and the harnesses. Prior to being a tool attendant, she worked as a fire watch where she would stand by with a fire extinguisher in case a fire started during a welding job or some other open flame work. She also was a bottle watch and hole watch, observing the air supply for workers using air tanks and workers in a confined space. (See Ex. 12)

While working as a fire watch, claimant was required to wear fire resistant coveralls. She described them as itchy and hot. She also carried a fire extinguisher that weighed approximately 50 pounds—although she admitted she rarely had to lift due to the help of coworkers.

On January 4, 2016, she was burned when her safety vest caught on fire while standing near an open propane fueled flame. A co-worker bandaged claimant and she returned to work. When she arrived home, her husband had an opportunity to look at the burned area, after which he immediately took her to the emergency room.

She was diagnosed with a moderate chemical burn. (JE 1:1) She was treated and released with a work note excusing her from activity for three days. (JE 1: 4) She returned to work after the three days and placed back into her regular duties. She then followed up with Terry O'Neal-Cox, M.D., four days later reporting pain in the left back and left side. (JE 2:1) Claimant was cleansed, bullae drained, and more extensive wounds were debrided. Topical anointments were applied. After she was bandaged, she was instructed to keep the area dry and clean and avoid strenuous activities involving the left upper extremity. (JE 2:2) Her burns were treated again a day later. (JE 2:3) She continued to receive wound care from Dr. Cox until January 18, 2016, when she was discharged. (JE 2:11) She maintained pain complaints in the low back and left

side along with continued pain with the open wounds on her chest. (JE 2:10) Dr. Cox felt that her burns were healing satisfactorily and discharged her with home care instructions. (JE 2:11)

Claimant received additional care with Mary Sebas, NP, at United Hospital District beginning on March 15, 2016. (JE 3:1) At this time, claimant reported "prickly pain by her bra line on the left side." (JE 3:1) Ms. Sebas prescribed a Lidoderm patch, Ibuprofen, trazadone, codeine, and melatonin to help claimant sleep. (JE 3:3) Claimant continued to have pain and discomfort. She returned to Ms. Sebas in April 2016. (JE 3:5) Ms. Sebas modified claimant's prescription therapy discontinuing the Tylenol-Codeine and adding Ultram and gabapentin and Ambien for claimant's insomnia due to her pain. (JE 3:5)

Ten days later, on April 15, 2016, claimant returned to Ms. Sebas' office reporting claimant had no pain—only itching and dryness. (JE 3:7) Her prescription therapy was continued. On a followup visit with Ms. Sebas on June 3, 2016, claimant reported no pain or discomfort except under the left bra line where she had persistent pain and redness. (JE 3:10) She was sleeping through the night with no issues.

She was given one more month of prescription for Ambien and Ultram along with a Telfa protective covering to be applied under the left auxillary/trunk and instructions to keep the area dry with body powder. A prescription for a therapeutic bra was also written. (JE 3:11) During the July 25, 2016, visit, claimant described inability to wear a bra due to the pain but that the pain was controlled with tramadol and acetaminophen three times daily. (JE 3:13) Claimant's Ambien prescription was also continued. (JE 3:13)

Claimant was returned to work with some restrictions of no lifting more than 41 pounds and only occasionally lifting 21 to 40 pounds. (JE 3:16) She also had slight push/pull restrictions of no pushing and pulling over 75 pounds and only occasional pushing and pulling for anything over 51 pounds. (JE 3:16)

In her last visit with Ms. Sebas on September 13, 2016, claimant reported no pain. (JE 3:17) A new medication therapy plan was put in place to taper off the tramadol. Ultram and Ambien were continued. (JE 3:19)

Rick Garrels, M.D., performed an IME on March 27, 2017 at the request of the defendants. (Ex A; A-4) He agreed that claimant sustained a burn injury arising out of her work and found her to be at MMI as of October 26, 2016. However, he classified her as incurring a zero percent impairment because, despite the scar tissue, there was no limitations to her activities of daily living. (Ex. A1) He revisited his opinion after a letter from defendant's counsel on October 13, 2017, and confirmed that the zero percent impairment was appropriate. (Ex A:4)

> I would not be able to justify a change in rating for Ms. Berry without clinically assessing her motion. Based on 25 years of clinical practice in

> manageing [sic] acute burn care at the Emergency Department and the followup burn care in the Occupational Medicine clinic setting, my general impression based on the healed burn area, I would not expect there to be any impact on overall motion. The key to understanding Table 8-2 on page 178 of the AMA Guides, 5th Edition, is the fact to rate an impairment the patient must satisify [sic] all 3 criteria. There has to be an active condition, it must impact function and must require active treatment. With Ms. Berry, if she is able to do regular work, it negates any of the listed limitations in the Mediation Statement. In addition, there is nothing to clinically support she requires ongoing treatment of any type related to the burn. So, two of the criteria are not met, resulting in the Class 1 impairment and the assessment of 0% impairment.

(Ex. A:4)

David Archer, M.D., performed a medical record review and concluded that claimant fell into a Class 2 whole person impairment with skin disorder signs and symptoms and therefore would qualify for a 10 percent whole person impairment. (Ex 14:42)

At some point, she was taken out of the tool room and placed in the lunchroom. She was laid off on January 21, 2016, while on restricted duty. She was not released to full duty with no restrictions until July 25, 2016. She maintains that she was unable to obtain a job with open sores, burned and restricted duty primarily because working at an oil refinery requires wearing a harness and fire retardant clothes under the harness. The harness would chafe against her bra strap which required constant re-adjusting.

Currently, she has an uncomfortable tingling/prickling or stretching feeling when lifting, pulling or moving her arms. There is increased sensitivity to heat.

There was no testimony that claimant looked for work, from January 21 through July 25, but neither did defendant employer request for her to return. The job had finished by that time.

She obtained new employment as a pipe fitter with Wyatt Field Service Company in September 2016. For Wyatt, she worked approximately 27 days as an assistant pipe fitter. She testified that she was able to prepare pipe to be fit together, lift it, grind it, and work on a scaffold. She then did not find new employment until July 2017. The refinery industry has slow months in December, January and February. Her current position is as a fire watch. She is not required to wear a safety harness, but she does wear fire retardant protective gear. She still complains of irritation around her burn site. At times during the day, claimant will need to re-adjust her clothing to relieve some of the irritation. Claimant testified that this can be a burden as she works primarily in a male-dominated workforce.

There are no permanent work restrictions claimant is operating under. She will occasionally use Biofreeze, an over-the-counter ointment but otherwise does not treat with medications or topical creams.

CONCLUSIONS OF LAW

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).

Claimant seeks temporary and permanent disability benefits arising out of an accepted work injury of January 4, 2016.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, Iowa App 312 N.W.2d 60 (1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Claimant argues she was off work from January 21, 2016, until July 26, 2016, as a result of her work injury. Claimant was instructed to avoid strenuous activity and repetitive use of the left upper extremity. Claimant was taken off tool watch by defendant because the work did not meet her restrictions. It is not clear that the restrictions of Dr. Cox were removed. Instead, claimant was laid off.

She was discharged from Dr. Cox's care on January 18, 2016, but she still had open wounds. Claimant alleges that she could not find new employment due to the continued discomfort. It appeared from claimant's testimony that she and her husband took jobs together in the oil refinery business. There was no evidence that claimant looked for positions outside the refinery field.

She did not return to care until March 15, 2016, when she began treating with Nurse Practitioner Mary Sebas. Claimant treated with Ms. Sebas until September 13, 2016.

On April 15, 2016, claimant returned to Ms. Sebas' office reporting claimant had no pain—only itching and dryness. On a followup visit with Ms. Sebas on June 3, 2016, claimant reported no pain or discomfort except under the left bra line where she has persistent pain and redness. She was sleeping through the night with no issues. While there was little change in claimant's medical condition from April through September, Ms. Sebas had an expectation that there would be an improvement.

On July 26, 2016, claimant was returned to work by Ms. Sebas with new restrictions of no lifting more than 41 pounds and only occasionally lifting 21 to 40 pounds. She also had slight push/pull restrictions of no pushing and pulling over 75 pounds and only occasional pushing and pulling for anything over 51 pounds. The tool, fire, hole watch positions required her to do some heavy lifting.

Claimant did not work under any restrictions when she and her husband took a position in September 2016 as an assistant pipefitter.

Based on the treatment and records of Ms. Sebas, it is found that claimant did not meet the factors of Iowa Code section 85.34(1) ending entitlement to healing period benefits until July 26, 2016 when claimant was officially returned to work by Ms. Sebas. Therefore, claimant is entitled to temporary benefits from January 21, 2016, until July 26, 2016.

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.

July 27, 2016 would be the commencement date of permanent 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).

Dr. Garrels placed claimant in Class 1 under the Guides to the Evaluation of Permanent Impairment, published by the American Medical Association (AMA) and assessed a zero percent impairment whereas Dr. Archer placed claimant into Class 2 due to her skin disorder and symptomatology of discomfort, itchiness, and irritability. Dr Archer assessed a 10 percent whole person impairment.

Claimant has a high school education. Her past work history includes waiting tables. Recently, her work history has been in the oil refinery field. The fire watch, tool watch, hole watch positions did not require specific skills other than fixing cords. Claimant needed to be watchful, be able to track inventory, and interact with co-workers. These skills are transferable to other positions. Claimant's primary complaint is that the work she does now is more challenging because of chafing against her burn site. Claimant has not sought out other work. She has not sought out medical advice about treating the chafing or how to avoid irritation with her work harness. She has no permanent work restrictions and she only occasionally uses an over-the-counter ointment.

Based on the foregoing, it is determined claimant has sustained a 5 percent industrial loss as a result of the irritability, chafing, and heat sensitivity.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant twenty-five (25) weeks of permanent partial disability benefits at the rate of five hundred sixty-seven and 62/100 dollars ($567.62) per week from July 27, 2016.

That defendants are to pay unto claimant temporary benefits from January 21, 2016, until July 26, 2016 at the aforementioned stipulated rate.

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

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

That defendants are to be given credit for benefits previously paid.

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

That defendants shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

Signed and filed this 1st day of February, 2018.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.