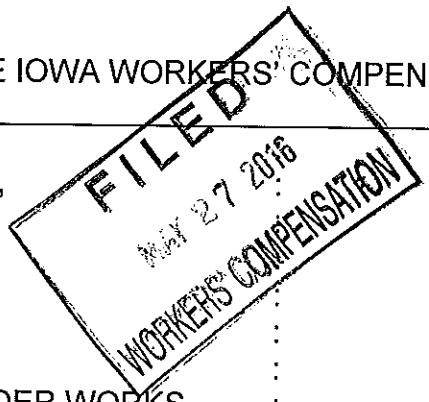
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



SNEJZANA K. NEDIC,	File No. 5052517
Claimant,	ARBITRATION
vs.	DECISION
JOHN DEERE CYLINDER WORKS,	
Employer, Self-Insured, Defendant.	Head Note No.: 1803

STATEMENT OF THE CASE

Snejzana K. Nedic, the claimant, seeks workers' compensation benefits from defendants, John Deere Cylinder Works, a self-insured employer for workers' compensation liability, as a result of an alleged injury on March 7, 2014. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on April 26, 2016, but the matter was not fully submitted until the receipt of both parties' briefs and argument on May 10, 2016. Oral testimony and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Claimant's exhibits were marked numerically. Defendants' exhibits were marked alphabetically. References in this decision to page numbers of an exhibit shall be made by citing the exhibit number or letter followed by a dash and then the page number(s). For example, a citation to claimant's exhibit 1, pages 2 through 4 will be cited as, "Ex 1-2:4."

The parties agreed to the following matters in a written hearing report submitted at hearing:

1. An employee-employer relationship existed between claimant and John Deere at the time of the alleged injury.

2. Claimant is seeking temporary total or healing period benefits May 29, 2014 through the present time and defendant agrees she has been off work since May 29, 2014.

3. If the injury is found to have caused permanent disability, the type of disability is an industrial disability to the body as a whole.

4. Claimant's weekly rate of compensation is $619.15.

5. Medical benefits are not in dispute.

6. Prior to hearing, defendant paid group disability benefits since May 29, 2014.

ISSUES

At hearing, the parties submitted the following issues for determination:

I. Whether claimant received an injury arising out of and in the course of employment; and,

II. The extent of claimant's entitlement to weekly temporary total or healing period benefits and permanent disability benefits.

During the hearing, defendant attempted to raise a new defense of lack of timely notice of a claimed back injury in that the only report of injury submitted to defendant (Ex. E-33) described only a left knee injury and desired to submit a new Exhibit J in which claimant states in an answer to an interrogatory that the written notice was given to defendant. They claimed to be surprised by her testimony of a back injury at hearing.

However, claimant's petition clearly asserts a cumulative back injury in addition to a left knee/extremity injury. The written notice to defendant (Ex. E-33) was always available to defendant during these proceedings, and there is nothing in the proposed Exhibit J that talks about the nature of the asserted injury. Claimant's testimony about a back injury at hearing should not have been a surprise to defendant. I disallowed the new defense at hearing as untimely raised, and that ruling is affirmed in this decision.

FINDINGS OF FACT

It should be noted that claimant was not represented by counsel at hearing. Her former counsel withdrew after a treating orthopedist refused to provide a medical opinion supportive of her claim of a new aggravation injury to her prior left knee condition. Four of claimant's exhibits were excluded from the evidence because claimant failed to provide these exhibits to defense counsel prior to hearing pursuant to our administrative rules and instructions contained in the hearing assignment order. However, the adverse impact of the excluded exhibits to claimant's case was minimal, as they contained reports from a Dr. Hussain, whose final opinion report was allowed because defendant had a copy of that report.

Claimant, age 43, was born and raised in Croatia, a country that was a part of the former country of Yugoslavia. She completed four years of high school in Croatia studying agricultural business. Claimant left Croatia due to war and came to Davenport, Iowa in 1998.

Upon her arrival in this country, claimant was immediately placed into a job for about 18 months involving material handling and data entry. She then worked for Walmart as a stocker for two years. Claimant subsequently began working for a printing company as a printing machine operator helper for about 18-24 months. She then obtained a job involving child care and counseling for three years. Thereafter, she then worked as a certified nurse's aide for six months and subsequently returned to the printing company for the next two years.

Claimant began working for John Deere in August 2008 as a robotic welding machine operator and material handler. Her work required her to load and push carts of parts about ten feet. The weights varied, but she would use a hoist to lift the heavier parts such as those weighing about 500 pounds. She claims her injury occurred while pushing the carts and the hoist.

Ms. Nedic's claim again asserts both a left knee and low back injury in March 2014 which developed over a period of time. She admits to a prior injury to her left knee when she fell during bombing in the war when she was 18 years of age. She had surgery at that time for a fractured patella. Infection developed after surgery and she required another surgery. Ms. Nedic received treatment for left knee pain after slipping on ice in December 2007 and January 2008. (Ex. A-2; Ex. B) Claimant testified she had no symptoms in her left knee or back before February 2014 when she began having left knee pain after her work at John Deere.

After reporting her left knee injury in March 2014, defendant apparently refused to treat her condition as work related due to her prior injury, but she was seen by William Candler, D.O. at Deere's health clinic. She began treating with Suleman Hussain, M.D., an orthopedist in October 2013. His initial assessment was post-traumatic arthritis. When initial conservative care failed to alleviate her symptoms, Dr. Hussain performed a surgical partial knee replacement. Following surgery, claimant continued to have symptoms and the doctor gave an injection. At the time of the visit with Dr. Hussain in June 2015, further injections were rejected, but she continued to have symptoms. (See generally Ex. C)

In response to an inquiry from Ms. Nedic's attorney as to whether her work at Deere aggravated her prior knee condition, the doctor stated as follows:

> I do think with the complex history of her knee, with the infection, and with the intervention that she had, it is very difficult to assign any type of current responsibility to the repetitive trauma that she may have exhibited during her work activities. With the information that I currently have, I cannot with a reasonable degree of medical certainty assess that to her work nature given her complex history of injury that she sustained and the nature of the care that she had to receive during her time overseas.

(Ex. C-28:29)

Claimant testified she suffered low back pain radiating into the right leg. Ms. Nedic was seen by an orthopedist at the same clinic as Dr. Hussain on May 7, 2014 for right-sided low back pain that developed over the last 2 ½ months from pushing and pulling heavy carts at Deere. (Ex. 5) It is unclear whether she was seen by Dr. Hussain or some other physician at that time from the only office note in evidence of that office visit. She was assessed with right-sided lumbar strain. There are no further records of any treatment at this clinic for low back pain until she saw Dr. Hussain on June 29, 2015 about two weeks after a fall which twisted her knee and caused back pain. The doctor states the back condition was an issue before, but possibly aggravated by the fall. At hearing, Ms. Nedic testified she fell on June 15, 2015 on a sidewalk in front of her home. Dr. Hussain's assessment was an injury to her elbow and back for which he ordered physical therapy. (Ex. C-30) At hearing, claimant testified that she was treated by a Dr. Dolphin, another orthopedist, for her back, who told her that it was due to old age and genetics. There are no records in evidence from a Dr. Dolphin.

Given the views of Dr. Hussain, I am unable to find that claimant suffered an aggravation injury to her left knee which led to Dr. Hussain's surgery and treatment.

I find that claimant did suffer a cumulative low back strain on or about May 7, 2014, given the office note of the orthopedist at that time. According to Dr. Hussain, there was a possible aggravation injury from her fall at home, and the prior back injury was an issue before this fall. Another doctor may have said her back issues are related to her age or genetic makeup, but just because age and genetics may pre-dispose one to injury, does not mean that a resulting injury in not compensable. Therefore, I find that the work injury of May 7, 2014 is a cause of a low back condition. However, no physician in this case has opined that her back condition contributes to her inability to work at Deere since May 29, 2014. It was her knee condition, not her back condition that took her off work.

Although I found a work injury to the back, I was unable to find that this injury is a cause of any temporary or permanent disability as a result of her back condition due to the lack of any supportive medical opinions.

Claimant was not seeking payment of any medical bills so further findings concerning medical benefits for the May 7, 2014 work injury are unnecessary.

CONCLUSIONS OF LAW

I. The claimant has the burden of proving by of 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.

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W. 2d 368 (Iowa 1985).

In this case, I was unable to find an injury to the right knee. However, I found that claimant carried the burden of proof and demonstrated by the greater weight of the evidence that she suffered a gradual or cumulative injury to her low back arising out of and in the course of employment with Deere. In cumulative trauma cases, injury dates are always a fluid issue and this agency is allowed to pick a different date of injury than one alleged. In this case, the date of injury found to be May 7, 2014 when she received her first treat with an orthopedic surgeon, presumably Dr. Hussain.

II. 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).

A treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404.408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2)(a-t), the disability is considered a scheduled member disability and measured functionally. If it is found that the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and measured industrially under Code subsection 85.34(2)(u). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. Delong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

Industrial disability was defined in Diederich v. Tri-City Ry. 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. However, consideration must also be given to the injured workers' medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured worker's qualifications intellectually, emotionally and physically; the worker's earnings before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted; Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616, (Iowa 1995); McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Serv. Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

In this case, I was unable to find that the work injury to the low back on May 7, 2014 was a cause of temporary or permanent disability. Therefore, weekly benefits for such disability must be denied.

ORDER

1. Claimant takes nothing from these proceedings.

2. Due to the findings of a work injury, defendant shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33.

Signed and filed this 27th day of May, 2016.

LARRY WALSHIRE
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.