

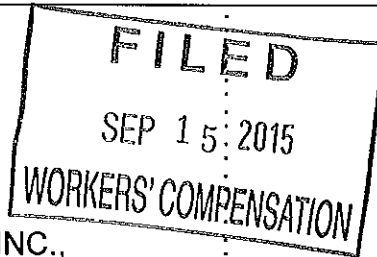
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SEMRA DEVIC,
Claimant,

vs.

TYSON FRESH MEATS, INC.,

Employer,
Self-Insured,
Defendant.



File No. 5047228

ARBITRATION
DECISION

Head Note Nos.: 1800; 1803; 1700;
2502

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Semra Devic, filed her original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on March 6, 2014. Claimant alleged she sustained a work-related injury on March 6, 2013. (Original notice and petition.)

Tyson Fresh Meats, Inc., filed its answer on April 21, 2014. The Company admitted the occurrence of the work injury. A first report of injury was filed on May 10, 2013.

The hearing administrator scheduled the cases for hearing on April 6, 2015 at 1:00 p.m. The hearing took place in Waterloo, Iowa at the Iowa Department of Workforce Development. The undersigned appointed Ms. Kira M. Stover, as the certified shorthand reporter. She is the official custodian of the records and notes. Ms. Karmela Loftus, acted as the Bosnian interpreter.

Claimant testified on her own behalf. Ms. Sandy Brustkern testified for defendant. The parties offered exhibits. Claimant offered exhibits marked 1 through 16. Defendant offered exhibits marked A through K with the exception of exhibit B, page 6 which was filed in an untimely manner. All other proffered exhibits were admitted as evidence in the case. The case was deemed fully submitted on May 9, 2015.

Claimant was originally making a request for a permanent mental component to her claim. However, she withdrew her claim for any permanency benefits. Claimant is requesting alternate medical care, but defendant has denied liability for any psychological or psychiatric claim. As a consequence, the issue of alternate medical care cannot be addressed at this time since defendant is denying there is a causal connection between claimant's alleged condition and the work injury on March 6, 2013.

STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

1. There was the existence of an employer-employee relationship at the time of the alleged injury.
2. Claimant sustained an injury on March 6, 2013 which arose out of and in the course of her employment;
3. The work injury is a cause of both temporary and permanent disability;
4. If permanency is awarded, claimant is entitled to industrial disability benefits;
5. The weekly benefit rate for which benefits should be paid is \$384.40 per week;
6. Defendant has waived any affirmative defenses it may have had available;
7. The parties are able to agree defendant is entitled to a credit for benefits paid prior to the hearing; the parties admitted they would be able to work out the amounts themselves, including weekly workers' compensation benefits paid, the net short-term disability benefits paid; and medical and hospitalization expenses paid pursuant to Iowa Code section 85.38 (2); and
8. The parties are able to stipulate to the costs allowed by law.

ISSUES

The issues presented are:

1. The extent of permanent disability benefits to which claimant is entitled;
2. Whether claimant is entitled to certain medical expenses pursuant to Iowa Code section 85.27;
3. Whether claimant is entitled to the payment of an independent medical examination pursuant to Iowa Code section 85.39; and
4. Whether claimant is entitled to alternate medical care pursuant to Iowa Code section 85.27.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This deputy, after listening to the testimony of claimant at hearing, as well as to the testimony of Sandy Brustkern, and after judging the people's credibility, and after

reading the evidence, the undersigned makes the following findings of fact and conclusions of law:

The party who would suffer loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6)

Claimant is a 51 year-old married mother of seven children with four of the children living at home with her. Currently she resides in Waterloo, Iowa. Her spouse is not currently employed. Claimant testified he was terminated from Tyson in 2009 because he had a "bad back" and could not return to work. One of claimant's adult daughters resides with her parents. She does not work outside of the home. A minor child also lives in the home.

Currently, claimant is receiving \$912.00 in disability benefits from the Social Security Administration as well as \$50.00 in long-term disability benefits. Claimant is also receiving medical benefits through Title 19.

Claimant immigrated to the United States from Bosnia on February 28, 1998. She had never been employed in Bosnia. She did work in the United States shortly after she arrived in this country. Claimant commenced her employment with Tyson Fresh Meats, Inc., on August 31, 2005. She passed the pre-employment physical required by personnel at Tyson.

Claimant is a chronic abuser of tobacco products. She smokes approximately one pack per day. Claimant presented to the hearing leaning on a cane.

Claimant was placed on the taco and pizza line for the duration of her employment. The work duties included lifting tubs up to 40 pounds above the shoulders, opening bags, and pouring the contents of the bags into containers. Claimant had to carry the containers up three steps too. The parties stipulated claimant sustained her work injury on March 6, 2013.

Claimant presented to Allen Occupational Health Services on March 8, 2013. She complained of back pain, and pain down her left leg and into her foot. (Exhibit 5, page 18) X-rays were taken. (Ex. 5, p. 21) Kenneth McMains, M.D., ordered MRI testing of the lumbar spine on March 29, 2013. The results showed:

IMPRESSION: Two level disc herniations at L3-L4 with definite extruded/sequestered disc fragment on the left with compression of the left L4 nerve root measuring 7mm in the AP diameter. At L4-L5 there is disc bulge with central disc protrusion and small sequestered disc fragment below the disc level with compression of the ventral thecal sac. Mild spinal stenosis.

(Ex. 5, p. 24)

Personnel at Tyson referred claimant to Chad Abernathey, M.D., a neurosurgeon, in Cedar Rapids, Iowa. Dr. Abernathey examined claimant on April 24, 2013. (Ex. 7, p. 28) Dr. Abernathey found:

NEURODIAGNOSTIC INVESTIGATIONS: MRI of the lumbosacral spine demonstrates left L3-4 disc extrusion.

IMPRESSION/RECOMMENDATIONS: Ms. Semra Devic clinically presents with left L4 radiculopathy secondary to left L3-4 disc extrusion. I discussed the risks, goals and alternatives of conservative management vs. surgical intervention with the patient in detail. I emphasized the risks of stroke, heart attack, death, infection, paralysis, sensorimotor deficits, bladder or bowel dysfunction, persistent pain, instability, allergic and adverse drug reactions, anesthetic complications, vascular injury, hemorrhage, CSF leak, phlebitis, DVT, PE, recurrence, persistent symptoms, impotence, and so on. She states she fully understands the breadth of our conversation and wishes to proceed with surgical intervention in the coming days.

(Ex. 7, p. 28)

On May 14, 2013, Dr. Abernathey performed a left L3-4 partial hemilaminectomy and discectomy using a scope. Subsequent to the surgery, claimant was taken to the recovery room in a satisfactory condition. (Ex. 8, p. 33)

Claimant engaged in follow-up care with Dr. Abernathey. She requested pain medications for chronic pain. (Ex. 7, p. 30) On July 29, 2013, Dr. Abernathey opined claimant could return to work without restrictions effective August 5, 2013. (Ex. 7, p. 30) Claimant did not return to work. She engaged in physical therapy.

On November 22, 2013, Dr. Abernathey examined claimant for the purpose of rendering a permanent impairment rating. The neurosurgeon opined in relevant portion:

Ms. Devic returns today for an impairment rating at the request of her insurance carrier. She continues to demonstrate excellent relief of her pre-operative symptomatology with only modest residual low back pain and lower extremity paresthesia. Her neurologic function remains intact. Based upon the AMA Guidelines for chronic pain, decreased range of motion of the lumbosacral spine, previous disc extrusion and subsequent surgery; I would consider the patient to have a 7% whole body impairment rating.

(Ex. 7, p. 30)

On March 10, 2014, claimant had another MRI. Stephen J. Pomeranz, M.D., interpreted the results as:

IMPRESSION:

1. Postoperative changes at the L3-4 level with a prior left-sided laminectomy with a recurrent left far lateral disc herniation projecting into the left L3-4 neural foramen.
2. Small central subligamentous L4-5 disc herniation indenting the anterior aspect of the thecal sac.

(Ex. 11, p. 61)

On the succeeding day, Ivo Bekavac, M.D., Ph.D., a neurologist, examined claimant for a follow up appointment. Dr. Bekavac conducted EMG testing. The results were normal. (Ex. 11, pp. 62-63) The physician diagnosed claimant with:

IMPRESSION: Intermittent lumbosacral sensory radiculopathy as well as herniated disc at the level L3-L4. No evidence of lumbosacral motor radiculopathy.

(Ex. 11, p. 62) Dr. Bekavac recommended a referral to Dr. Abernathey. (Ex. 11, p. 62)

Because claimant did not improve, she underwent a second surgery on March 27, 2014. Dr. Abernathey performed a left L3-L4 partial hemilaminectomy, discectomy, using a scope to perform the surgery. (Ex. 8, p. 34) Claimant was taken to the recovery room in satisfactory condition. (Ex. 8, p. 34)

There was a period in time when claimant returned to work in a light duty capacity. Claimant testified she primarily sat in the cafeteria because of her severe pain. She worked in a light duty capacity for approximately two weeks. Claimant testified she could not sit or stand.

On January 23, 2015, claimant sought an independent medical examination from Marc Hines, M.D. The examination was sought pursuant to Iowa Code section 85.39. Dr. Hines provided permanent impairment ratings, but he rated conditions other than claimant's back and left leg pain. Dr. Hines rated right leg pain, bursitis, depression, anxiety, and suicidal ideation. The examining physician did not establish a causal relationship between all of the rated conditions and claimant's work injury.

Dr. Hines opined:

IMPAIRMENT RATING: I have used the Fifth Edition Guides to the Evaluation of Permanent Medical Impairment to give this patient an impairment rating. I have first used page 546, table 17-33, for ischial

bursitis requiring frequent waiting and limited sitting time for 3% to the whole person for her left sacroillitis. The patient also has 3% for trochanteric bursitis on each side using the same table. Using table 14-1, page 363, I have given an impairment rating for the mild impairment for anxiety and the moderate impairment for depression. The patient's situation certainly will require psychiatric evaluation, and this needs to be done sooner rather than later. The patient was given, therefore, as a numeric value, in order to assist in looking at these values within the presence of other values, a 15% whole person impairment.

In regard to her lumbar spine injury, this patient would fall in a lumbar category 3, table 15-3, page 384. I understand this is different than what Dr. Abernathy has given the patient previously, but the patient clearly had repeated evidence and difficulties with L4 radiculopathy secondary to free disk fragment. The patient would therefore be felt to have had signs of significant consequence, I have given her a 13% impairment of the whole person, as this is a repeated and longstanding difficulty with two episodes that require surgery. I feel that this is easily the consideration at this time based on the examination, history, multiple surgeries and MRI findings in the past that document the difficulties which she has experienced.

Using combined values tables, page 604, 15% combined with 13% is 26%, 26% combined with 3% is 28% combined with 3% is 30%, 30% combined with 3% is 32%. The total whole person impairment given the relevant findings on this examination is 32% whole person. Please see future medical treatment, as some of these difficulties may be at least partially remedial.

(Ex. 2, pp. 8-9)

Dr. Hines imposed permanent work restrictions based upon the examination he conducted on January 23, 2015. (Ex. 2, pp. 9-10) The restrictions were:

RESTRICTIONS: The patient at this time would not be able on the basis of examination today to repeatedly flex or extend at the waist. She has very limited extension and almost none with flexion almost only 20 degrees of significant pain. She is able to side bend relatively well, but has significant pain. She was not able to isolate thoracic rotation for me and is not able to estimate this, but it appears using the entire body she is able to rotate relatively well. The patient however, has significant gait difficulties and would not be able to climb stairs, except for personal needs on a rare occasion. The patient would not be able to repeatedly bend, twist, pivot, crawl, on her hands. She would not be able to take fixed positions for long periods. For instance, sitting for than 30 minutes at a time, standing for more than 30 minutes at a time or walking for more

than 20 minutes at a time. These, in fact, are actually probably too liberal, but in general for giving a permanency as to these, I will state these restrictions at the present time. She would not be able to lift anything heavy. She could carry 10 pound weights and certainly work with 20 pound weights on a table if seated. The patient would not be able to be exposed to extremes of vibration and temperature, and she would not be able to climb to heights reliably. She would not be able to work clutched vehicles well with difficulty that she has and particularly heavy machinery.

(Ex. 2, p. 9)

Subsequent to the receipt of the independent medical report from Dr. Hines, defendant sought an independent medical examination and report from Charles Mooney, M.D. Dr. Mooney examined claimant on March 26, 2015 in Ames, Iowa. According to Dr. Mooney's records, claimant voiced the following complaints:

Currently Ms. Devic complains of pain in her low back radiating into her right side. She actually points to the area of the right flank where she has the most discomfort. She complains of pain occasionally radiating into the left calf toward the knee and complaining of sensory loss in the small toes of both feet and a decreased sensation like her leg is asleep in the calf in a stocking-like distribution on the left. She reports pain to be predominantly between a 7 and an 8, aggravating up to a 9 with activities such as walking greater than 15 to 20 minutes. She notes that the weather affects her back pain, noticing that when it is colder she has more pain. She does not complain of pain with sitting. She does not complain of pain with sleep but does state that the gabapentin that she is currently taking does help with her night symptoms. She does not report any other relieving activities. She reports she is not taking any pain medications at this time. She does take several other medications for her hypertension which she did not provide.

(Ex. A, p. 4)

Dr. Mooney diagnosed claimant with the following conditions:

1. Evidence of herniated disc at L3-L4 requiring lumbar laminectomy and discectomy times 2 (same level). There does appear to be some persistent radicular complaints, although not classically dermatomal.
2. Abnormal EMGs during the course of her treatment noted by Dr. Brian Sires on 09/12/13, which have now normalized based on the EMG evaluation performed by Dr. Bekavac on 3/11/14.
3. Non physiologic findings and psychological overlay, which may be partially explained by cultural differences.

4. Obesity and deconditioning.
5. History of depression and cerebral vascular disease noted in records predating injury (Dr. Bogdanic 12/17/12 Depression) and (Dr. Bekavac 11/11/11 Stroke and TIA).

(Ex. A, p. 6)

Dr. Mooney opined claimant reached maximum medical improvement on September 27, 2014. (Ex. A, p. 6) The evaluating physician also opined claimant had a 12 percent permanent impairment rating according to the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition. (Ex. A, p. 6)

Dr. Mooney also imposed permanent work restrictions. (Ex. A, p. 7) The permanent restrictions included:

1. Maximum rare lift, 20 pounds.
2. Maximum frequent lift, 10 pounds.
3. No repetitive bending or lifting from floor to waist.
4. No repetitive twisting. It is my opinion that no additional restrictions are indicated.

(Ex. A, p. 7)

Dr. Mooney opined claimant did not sustain any permanent injuries to her bilateral lower extremities. (Ex. A, p. 7) The physician stated no permanent restrictions were necessary for the lower extremities. (Ex. A, p. 7)

The parties have stipulated claimant has sustained a permanent injury to her body as a whole. 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.

Three physicians have provided permanent impairment ratings for claimant. The ratings are 7 percent, 12 percent, and 32 percent. The rating by Dr. Hines is rejected because he rated conditions for which there is no causal relationship between the condition and the work injury. Claimant did undergo two surgeries and it seems the 12 percent impairment rating would be more consistent with someone who had undergone multiple surgical procedures.

Additionally, the restrictions imposed by Dr. Mooney seem reasonable, given the nature of claimant's injury. The restrictions will place a hardship on claimant. She has very limited experiences in the working world. She worked at Tyson, she was a housekeeper and a day care worker. Her transferable skills are minimal, at best. Claimant is unable to speak the English language, even though she has been in the United States since 1998. It is doubtful she will ever be functionally literate in the English language.

Claimant is 51 years old. She is not especially motivated to seek work either within the packing plant or at some other employer. She does not want to lose her long-term disability benefits, her Social Security disability benefits or the benefits she receives under Title 19. If claimant does not work, she is able to stay at home with her spouse and other family members who do not have outside employment.

After considering all of the factors affecting industrial disability, it is the determination of the undersigned; claimant is entitled to a permanent partial disability in the amount of seventy-five (75) percent. Defendant shall pay unto claimant 375 weeks of permanent partial disability benefits at the stipulated weekly benefit rate of \$384.40 per week and commencing from September 27, 2014, the date, Dr. Mooney opined claimant had reached maximum medical improvement.

In arbitration proceedings, interest accrues on unpaid permanent disability benefits from the onset of permanent disability. Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979); Benson v. Good Samaritan Ctr., File No. 765734 (Ruling on Rehearing, October 18, 1989).

The next issue for resolution is the matter of medical benefits pursuant to Iowa Code section 85.27. The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Defendant is liable for all causally connected medical expenses. Claimant did not detail which medical bills were disputed by defendant. The undersigned is assuming defendant is paying all medical bills for authorized treating physicians and medical providers authorized to treat claimant's spine and left leg. Defendant is not liable for any expenses to treat claimant's psychological or psychiatric conditions. Defendant has denied liability for any alleged mental condition.

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.

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).

Claimant obtained an independent medical examination and report from Dr. Marc Hines on January 23, 2015. The total cost equaled \$1,725.00. Defendant is liable for the same.

The final issue centers on claimant's costs. It is the determination of the undersigned; defendants shall pay unto claimant the following costs:

| | |
|-----------------------------------|----------|
| Filing fee | \$100.00 |
| Deposition transcript of claimant | \$88.90 |
| Total | \$188.90 |

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay unto claimant three hundred seventy-five (375) weeks of permanent partial disability benefits commencing from September 27, 2014 and payable at the stipulated weekly benefit rate of three hundred eighty-four and 40/100 dollars (\$384.40) per week.

Accrued benefits shall be paid in a lump sum with interest as provided by law.

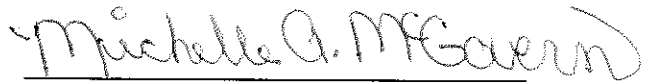
Defendant shall take credit for all benefits paid prior to the filing of this decision, including the net amount of any long-term disability benefits.

Pursuant to Iowa Code section 85.39, defendant shall pay the cost of the independent medical examination in the amount of one thousand seven hundred twenty-five and no/100 dollars (\$1,725.00).

Costs in the amount of one hundred eighty-eight and 90/100 dollars (\$188.90) are assessed to defendant.

Defendant shall file all reports as required by this division.

Signed and filed this 15th day of September, 2015.



MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

J. Richard Johnson
Attorney at Law
1636 42nd St. NE
Cedar Rapids, IA 52402
rjohnson@jllawplc.com

Chris J. Scheldrup
Attorney at Law
PO Box 36
Cedar Rapids, IA 52406-0036
cscheldrup@scheldruplaw.com

MAM/kjw

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.