BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

NORIE SMITH, Claimant, vs. TPI IOWA, LLC, Employer, and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, Insurance Carrier, Defendants.	:	File No. 5068018 ARBITRATION DECISION Head Note Nos.: 1803, 1806, 2501, 2700, 1802

STATEMENT OF THE CASE

Claimant, Norie Smith, has filed a petition for arbitration seeking workers' compensation benefits against TPI Iowa, LLC, employer, and Insurance Company of the State of Pennsylvania, insurer, for file No. 5067018, both as defendants.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner in the matter of Coronavirus/COVID-19 Impact on Hearings, the hearing was held on September 16, 2021 via CourtCall. The case was considered fully submitted on October 25, 2021, upon the simultaneous filing of briefs.

The record consists of Joint Exhibits 1-6, Claimant's Exhibits 1-7, Defendants' Exhibits A-G, and the testimony of claimant.

ISSUES

1. Whether the accepted work injury was the cause of a permanent disability, and if so, the extent;

2. The commencement date of benefits;

3. Whether claimant is entitled to alternate medical care under Iowa Code section 85.27;

4. Apportionment;

5. Costs.

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 stipulate the claimant sustained an injury arising out of and in the course of her employment on November 21, 2017. While they dispute claimant sustained a permanent disability arising from that injury, they agree that if a disability is found to be compensable, it is industrial in nature.

They further agreed that at the time of the accepted work injury, and all relevant times hereto, claimant was single and entitled to one exemption. At the time of her accepted injury, the claimant's gross earnings were $830.50 per week. Based on the foregoing, the weekly benefit rate would be $506.17.

The defendants waive all affirmative defenses. There are no credits in dispute.

FINDINGS OF FACT

At the time of the hearing claimant was a 69-year-old person with a high school education. Claimant is currently employed at Newton School District working in the cafeteria fifteen hours per week at $14.00 per hour.

She began working for defendant employer on August 25, 2008, and worked there until December 2017. TPI produces windmills. Her work duties for defendant employer included carrying fiberglass into a mold that would help smooth a turbine blade. The physical demands of the job included lifting from 15 to 80 pounds all day long.

Prior to her employment with defendant employer, claimant worked the dryer assembly line at Maytag. While working for Maytag, claimant injured her right shoulder.

She then sustained an injury on December 15, 2015, which she attributed to her work with defendant employer. (DE D:1) Jacqueline Stoken, D.O., opined claimant had sustained a 21 percent whole person impairment due to this injury and that claimant was best suited for sedentary work given her physical condition. (DE D:7-9) The record also indicates claimant had a previous 14 percent permanent functional impairment relating to the right shoulder according to Dr. Formanek on August 8, 2007. (DE F)

On September 2, 2016, claimant was seen at Newton Clinic by Orville Bunker, M.D., for left-sided pain radiating into the left thigh. (JE 2:7) The history notes that she had pain on the left side for approximately one year. Id.

On May 7, 2018, Dr. Sullivan responded to an inquiry from defendants regarding claimant's left rotator cuff repair. (JE 4:3) He wrote that he received no information from the patient or any other credible source that would qualify claimant's injury as a work injury. Id. After significant physical therapy, he released her to full-duty work without restrictions and placed her at MMI as of April 5, 2017. Id. Based on her range of motion deficits of approximately 10 percent and mild weakness, he would place her impairment between 5-10 percent of the upper extremity. Id.

These injuries preceded the injury date in question. On or about November 21, 2017, claimant fell on water in the break room. She struck her bottom and felt pain in her right leg up to her back. She was taken to the ER and x-rays showed no signs of acute injury. (JE 2:4)

She returned to work the following day and informed the defendant employer's nurse she would need to go to physical therapy as she had pain in her low back and restricted range of motion in her neck.

On November 30, 2017, claimant began physical therapy. (JE 3:1) She complained of pain from her neck to her low back and into her left shoulder. (JE 3:1) Her pain was five on a ten scale but sometimes reached eight. Id. Claimant continued therapy through April 2018. (JE 3:40-41)

On December 15, 2017, approximately three weeks after her injury, she retired. Claimant testified at hearing that her children encouraged her to retire after her fall and her left shoulder surgery. She also identified her shoulder as the reason for her retirement in her deposition taken on February 2018. (CE 6)

On December 20, 2017, claimant was seen at the Newton Clinic by Orville Bunker, M.D. for a painful neck and back. (JE 2:2) She exhibited full range of motion of her neck with tenderness over the paraspinal muscles on the right side of the neck going over towards the shoulder on the right. (JE 2:2) She had some tenderness over the paraspinal muscles of the lumbar spine with full range of motion of the hips. (JE 2:3) Dr. Bunker believed she would improve given that she was not working but instructed her to follow up if she was not seeing improvement in a month. Id.

On February 8, 2018, claimant was seen by Daniel C. Miller, D.O., for follow up of her neck and low back pain. (JE 1:2) She had tenderness to palpation of the lumbar muscles on the right side above the iliac crest. (JE 1:3) She complained that the pain extended down to the sacroiliac joint which was tender to palpation into the sacral notch. Id. She had tenderness in the thoracic muscle on the right side as well. Id. Dr. Miller diagnosed claimant with unspecified dorsalgia and ordered an MRI. Id. He released claimant to return to full-duty work. Id.

On February 19, 2018, the MRI was conducted. (JE 1:4) The MRI of the cervical spine showed multilevel degenerative disc changes of the discs without evidence of focal disc herniation. Id. Findings were most significant at the level of C4/C5. Id. Neuroforaminal narrowing was seen at multiple levels throughout the cervical spine. Id. In the lumbar region, the MRI revealed multilevel degenerative disc bulging, most

significant at the levels of L4-S1. (JE 1:6) Left neuroforaminal narrowing with contact of exiting nerve root was suggested secondary to eccentric disc bulging. Id.

Claimant returned to Dr. Miller on February 22, 2018, to discuss the MRI results. (JE 1: 9) It was noted that claimant had recently retired. Id. She reported that the neck pain waxed and waned but the back pain was more frequent, radiating into the right leg down to the knee. Id. Dr. Miller explained that the MRI results suggested left-sided pathology but claimant's symptoms were right-sided. (JE 1:10) He opined that she was suffering myofascial back and hip pain and recommended an injection of Depo-Medrol which she refused. Id. He advised her to continue taking Tylenol and referred her to physical therapy. Id. He believed she suffered an acute, temporary exacerbation of her back and neck condition. Id.

On March 12, 2018, she was seen by Dr. Bunker for a yearly health check. At that time she reported some abdominal discomfort and diarrhea but a good appetite. (JE 2:5) He noted that she returned to work three months ago after being off work for six months due to the shoulder surgery. Id. She was contemplating retirement at the end of the year. Id. There was no mention of the back, hip, or neck complaints.

On March 15, 2018, claimant returned to Dr. Miller with complaints of increased hip and low back pain. (JE 1:11) Her neck pain was intermittent but improving. Id. She had tenderness to palpation of the lumbar muscles on the right side above the iliac crest. (JE 1:12) She complained that the pain traveled down to the sacroiliac joint which was tender into the sacral notch. Id. She had tenderness in the thoracic muscle on the right side with no tightness. Id. He continued her on physical therapy and her extra-strength Tylenol prescription. Id.

During her follow-up appointment of April 12, 2018, she stated she was doing a lot better, "not as bad but sometimes it will hit me in my neck and back." (JE 1:16) She continued to have right hip pain associated with prolonged walking. Id. Dr. Miller discharged claimant to full duty with no restrictions and assigned no impairment rating. (JE 1:18)

On July 20, 2021, Jacqueline Stoken, M.D., examined claimant for an IME. (CE 2:6) At that time, claimant complained of pain in her back that she described as aching, throbbing, intermittent, sharp, tender, exhausting, tiring, continuous, numb, and unbearable. (Id. at 10) She rated her pain at 8 to 9 on a 10 scale, averaging 8. Id. Physical therapy, Tylenol and alternating heat and ice made her condition better but walking, standing, and sitting for long periods of time aggravated her pain. Id.

Her functional ranges of motion were as follows:

> Cervical flexion is 40 degrees, extension is 30 degrees, side bending to the right is 30 degrees and to the left is 30 degrees, rotation to the right is 30 degrees and to the left is 50 degrees. She has negative Spurling's test bilaterally. She does have muscle spasming in the cervical paraspinals predominantly on the right.

> Lumbar flexion is 60 degrees, extension is 10 degrees, side bending to the right is 20 degrees and to the left is 10 degrees. She does have muscle spasming in the lumbar paraspinals. She has a negative straight leg raise bilaterally. She is able to heel and toe walk. She ambulates with a normal gait.

(CE 2:11)

Dr. Stoken diagnosed claimant with acute cervical and lumbar strain/contusions following the work injury of November 21, 2017, and chronic pain of the cervical and lumbar region. Id. Dr. Stoken opined that as a result of the work injury, claimant sustained permanent impairment to the low back, neck and body as a whole. (CE 2:12) Dr. Stoken assigned a 5 percent impairment of the whole person for the neck due to asymmetric range of motion and muscle spasms and 8 percent for the back due to chronic pain for a total of 13 percent. Id. Dr. Stoken identified May 1, 2018, as the MMI date. Id.

For restrictions, Dr. Stoken recommended claimant engage in employment in the light category of work with no lifting greater than 10 pounds on a frequent basis, 15 pounds on an occasional basis, and 20 pounds on a rare basis. (CE 2:13) Claimant should avoid repetitive bending, lifting and twisting. Id.

Claimant was examined by Dr. Neff on August 4, 2021. (DE E). Dr. Neff found no permanent impairment relating to the work incident in November of 2017 and assigned no work restrictions associated with the back. (DE E:7*)* He identified claimant as an older worker who had a previous rotator cuff repair in the left shoulder and likely degenerative rotator cuff pathology in the right. (DE E:7) He recommended sedentary or office type work while acknowledging she was working as a server in a school cafeteria which may be within her restrictions. (DE E:7) He believed claimant might benefit from nonsteroidal anti-inflammatory medication but that these medications made claimant feel sick to her stomach. Id. However, these conditions were unrelated to her fall in 2017.

At the time of her injury, claimant was making $20.39 per hour with overtime. She worked approximately 12 hours a day, 6 days a week.

In June 2018, claimant obtained new employment at Atlas Hydraulics, a company that makes hoses for John Deere. She worked there for approximately three weeks but left because of her back pain. She then began working at Newton Village serving food. She testified that her job duties included lifting and walking. She left that employment due to the physical requirements and in September obtained a new position with Newton Community School District. The position is part time, working approximately three to five hours per day.

Today, her primary source of pain is in her lower back to her neck. She testified that due to her back pain she is no longer able to run or sit for long periods of time. She does not take any prescription medications but instead treats with Tylenol.

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. 6.904(3).

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" refer 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 Elec. 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).

The parties agree claimant sustained a temporary low back injury on November 21, 2017. However, claimant argues that the low back and cervical pains that she currently suffers arise from the work injury. Dr. Miller and Dr. Neff both opined claimant sustained only a temporary injury to her back. Dr. Miller served as the treating physician and Dr. Neff is an orthopedist. Dr. Stoken, a one-time examiner, diagnosed claimant with a strain and opined claimant has sustained a permanent disability as a result.

Claimant did sustain a fall and she did go on to receive physical therapy for her back and neck pains. Dr. Neff attributes this pain primarily to claimant's underlying degenerative condition. Dr. Stoken's opinions are somewhat contradictory to her previous opinion. Dr. Stoken placed claimant in the sedentary work category following claimant's left shoulder injury and rotator cuff repair. However, for the fall, Dr. Stoken found claimant to be capable of light duty work which suggests that claimant's condition was better in 2021 than it was in 2018 when Dr. Stoken examined claimant for the shoulder injury. Further, there was no mention of neck and back pain in the August 6, 2018, examination of claimant which Dr. Stoken conducted for the purposes of evaluating the left shoulder. (see DE D) Under the current status section of the report, claimant made no mention of the fall in November 2017 or any lingering problems related to the fall of November 2017.

The picture painted in Dr. Stoken's report is of an employee who sustained a serious debilitating injury to the left shoulder and left arm with no problems related to the back and neck which is consistent with the argument advanced by the defendants and their experts that claimant sustained only a temporary exacerbation of a pre-existing condition.

Based on the report of Dr. Stoken in August 2018 along with the opinions of Dr. Miller and Dr. Neff, it is found that claimant sustained a temporary exacerbation of a pre-existing degenerative condition that was resolved in mid-2018. The claimant has not carried her burden of proof as it relates to the issue of permanency.

The remainder of the issues are moot.

ORDER

THEREFORE, it is ordered:

Claimant shall take nothing.

The parties shall bear their own costs, and the cost of the hearing transcript initially born by the defendants shall be shared equally by the defendants and claimant with one-half being owed by each side.

Signed and filed this 7th day of February, 2022.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Erik Luthens (via WCES)

Timothy Wegman (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.