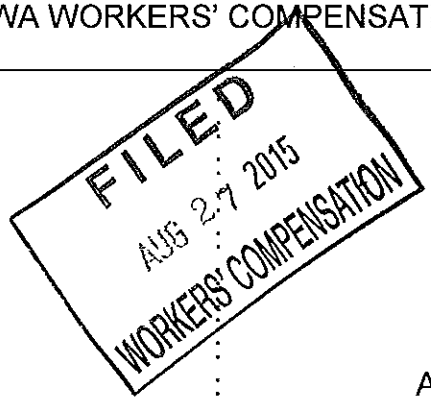
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



MARIA PICENO,

Claimant,

vs.

EMCO ENTERPRISES,

Employer,

and

OLD REPUBLIC INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5046687

A R B I T R A T I O N

D E C I S I O N

Head Note No.: 1803

STATEMENT OF THE CASE

The claimant, Maria Piceno has filed a petition in arbitration and seeks workers' compensation benefits from EMCO Enterprises, employer, and Old Republic Insurance Company, defendants.

This matter was heard by Deputy Workers' Compensation Commissioner Ron Pohlman in Des Moines, Iowa. The record in the case consists of claimant's exhibits 1-23; defendants' exhibits A through J, as well as the testimony of the claimant through interpreter, Ernest Niko-Muricia.

ISSUES

The parties submitted the following issues for determination:

1. The nature and extent of claimant's entitlement to permanent partial disability benefits; and

2. Whether the claimant is entitled to reimbursement for an independent medical evaluation pursuant to Iowa Code section 85.39.

FINDINGS OF FACT

The undersigned having considered the testimony and evidence finds:

The claimant at the time of the hearing was 48 years old and born in Mexico. She graduated high school in Mexico and attended law school in Mexico but did not graduate. Her legal training in Mexico is not transferrable to the United States. She can speak and understand some English but is not conversant in English. Prior to becoming employed at EMCO the claimant had no physical limitations or restrictions with respect to either of her arms or shoulders.

On May 16, 2011 the claimant was working at her job assembling doors for EMCO Enterprises. This job required repetitive use of her upper extremities assembling, maneuvering, and lifting door parts. She occasionally had to lift up to 50 pounds. It is stipulated that she sustained an injury on this date to her left elbow and arm when she accidentally struck her left elbow against the edge or corner of a metal table while in the process of working with and moving doors or door parts. She felt immediate pain in her left elbow area. The dispute here is whether the claimant developed sequela to her shoulder as a result of development of chronic pain syndrome.

The claimant eventually saw Patricia Kallemeier, M.D. at the direction of the defendants and was diagnosed with left epicondylitis as a result of the work injury. On June 27, 2012 Dr. Kallemeier performed a left lateral elbow extensor carpi radialis brevis origin debridement and noted postoperative diagnosis of left lateral elbow tendinopathy. On July 5, 2012 Dr. Kallemeier noted that after the surgery the claimant had numbness in her fingers and gave the claimant restrictions of no use of her left hand with recommendation of physical therapy and medication. The claimant testified that about two to three weeks after her left elbow surgery she began to develop pain extending up to her shoulder intermittently and down her arm to her hand. Her left arm became cooler in temperature than her right arm, and she had swelling in her left arm. Dr. Kallemeier referred the claimant to Steven Quam, D.O. for pain management.

On August 6, 2012 Dr. Quam diagnosed the claimant with left complex regional pain syndrome of the upper extremity with sympathetically maintained pain. See Exhibit 7, pages 97-100. On August 8, 2012 Dr. Quam performed a left stellate ganglion block injection, which the claimant felt did not provide her much relief.

On June 18, 2013 Dr. Kallemeier opined that the claimant had left upper extremity impairment of 62 percent, which converted to 37 percent of the whole person based on left lateral elbow tendinopathy with resultant complex regional pain syndrome. See Exhibit 3, page 59. The defendants sent the claimant to Scott Neff, D.O. for a medical evaluation. Dr. Neff indicated that the claimant exhibits symptom magnification and opined that the claimant needed permanent work restrictions for her elbow.

On September 20, 2013 Dr. Kallemeier indicated disagreement with an assertion from defense counsel that if the injection to the claimant's elbow provided 100 percent relief the claimant did not have complex regional pain syndrome. See Exhibit 3, page 62.

Dr. Quam indicated that he agreed to a letter authored by defense counsel that the claimant's permanent impairment would be limited to the left upper extremity since the claimant did not meet the specific criteria in the AMA Guides To The Evaluation of Permanent Impairment, Fifth Edition for complex regional pain syndrome. See Exhibit 7, pages 115-116.

Dr. Quam changed his opinion again in response to questions from claimant's counsel on December 12, 2013 to indicate that he agreed that the claimant did have complex regional pain syndrome. See Exhibit 7, pages 120-121.

The claimant had an independent medical evaluation with Sunil Bansal, M.D. in which Dr. Bansal concluded the claimant had complex regional pain syndrome and assigned a total impairment of 18 percent to the claimant's whole person along with permanent restrictions of no lifting more than five to ten pounds and no use of the left hand on a sustained basis, no frequent lifting, squeezing, pinching, grasping, pushing or pulling with the left hand as well as avoiding exposure of her left hand to extreme heat or cold. See Exhibit 11, pages 140-158.

Defendants had the claimant undergo surveillance, which is depicted in Exhibit H. Nothing in the video indicates the claimant was engaging in activities that are outside of her work restrictions. The claimant is currently employed with the defendant. Claimant is not aware of any other job that she could do besides her current job.

REASONING AND CONCLUSIONS OF LAW

The first issue in this case is the nature and extent of claimant's entitlement to permanent partial disability. The first part of this question is whether the work injury has resulted in an injury that extends beyond her left elbow and into the body as a whole.

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).

Essentially, the first question is a question of causation. Did the work injury cause an injury to the body as a whole? The claimant has proven based upon this record that she has sustained complex regional pain syndrome. Dr. Quam's opinion on the surface may appear to be inconsistent, but when asked specifically if he felt the claimant had developed complex regional pain syndrome as a result of the work injury irrespective of the specific criteria in the Guides he asserts that she has. This is consistent with his initial opinion and is consistent with the opinions and the objective testing in this record. In as much as the claimant has proven that she has sustained an injury to the body as a whole this must be evaluated industrially. It is also noted that the claimant has established that the work injury caused disability to her right shoulder as well as her left shoulder further indicating an injury to the 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.

The claimant has significant limitation in the use of her left shoulder as well as significant impairment and permanent restrictions. She remains employed, but her prospects for other employment have been significantly diminished since this work injury. Considering these and all factors of industrial disability it is concluded that the

claimant has sustained a 60 percent industrial disability entitling her to 300 weeks of permanent partial disability benefits pursuant to Iowa Code section 85.34(2)(u).

The next issue is whether the claimant is entitled to reimbursement for an independent medical evaluation pursuant to Iowa Code section 85.39.

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.

Defendants are 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).

The record indicates that the defendants obtained an evaluation which the claimant believed to be too low and thus the criteria are met.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay claimant three hundred (300) weeks of permanent partial disability benefits commencing August 9, 2012 at the weekly rate of four hundred fourteen and 22/100 dollars ($414.22).

Defendants shall receive credit for ten (10) weeks of permanent partial disability benefits paid at the weekly rate of four hundred ten and 86/100 dollars ($410.86).

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30 with subsequent reports of injury filed as directed by this agency.

Defendants shall reimburse the claimant for the independent medical evaluation with Dr. Bansal pursuant to Iowa Code section 85.39.

Costs of this action are taxed to the defendants pursuant to rule 876 IAC 4.33.

Signed and filed this 27th day of August, 2015.

RON POHLMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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RRP/sam

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.