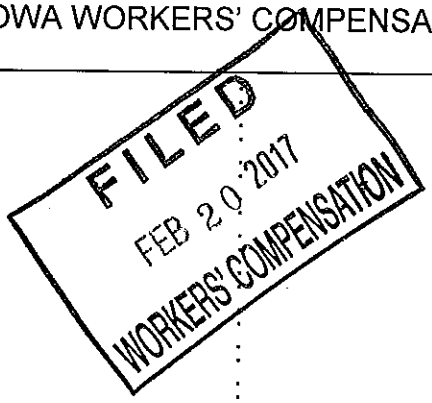
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



LESVIA RIVAS,

Claimant,

vs.

FARMLAND FOODS,

Employer,

and

SAFETY NATIONAL,

Insurance Carrier,
Defendants.

File No. 5052859

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Lesvia Rivas, has filed a petition in arbitration and seeks worker's compensation benefits from Farmland Foods, employer, and Safety National, insurer, defendants. Deputy Workers' Compensation Commissioner, Stan McElderry, heard this matter in Sioux City, Iowa.

ISSUES

The parties have submitted the following issues for determination:

1. Whether injury arising out of and in the course of employment on or about July 11, 2014 (or May 12, 2014) is limited to the right upper extremity (RUE) or is industrial;

2. The extent of permanent disability from the alleged injury;

3. Temporary benefits; and

4. Independent Medical Evaluation (IME).

The parties filed a hearing report at the commencement of the hearing. On the hearing report, the parties entered into various stipulations. Those stipulations were accepted and are hereby incorporated into this 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.

FINDINGS OF FACT

The undersigned having considered all of the evidence and testimony in the record finds:

The claimant was 36 years old at the time of hearing. She is originally from Guatemala and her formal education ended with the 6th grade. She speaks little English and cannot read or write in English. She does not type and has no computer skills. She began her employment with Farmland in January of 2014 as a laborer in various positions. She was placed in the "Pack Off" job in February of 2014.

The pack off job required the claimant to stand next to a conveyor belt with 20-30-pound boxes of meat coming at her from the right. She would then lift the boxes (120-180 per hour) from the conveyor belt to a pallet where she would stack the boxes one by one until a height of approximately up to 57-1/2 inches was achieved. She performed this job 3-4 days per week 8-10 hours per day. On days when she was not working the pack off position she put hams in boxes, put labels on boxes, or made boxes.

The claimant sustained a cumulative work injury to her right arm, shoulder and her neck from the repetitive work of the pack off position. She reported the injury on July 11, 2014 to her supervisor and stated that she had been hurting for 2-3 months. The employer uses May 12, 2014 as the date of injury. Since July 11, 2014 is when the claimant believed the injury was serious enough to report; it will be utilized as the manifestation date of injury. She saw the company nurse that date who noted that the claimant said the right shoulder was "swollen." (Exhibit 1, page 3) The claimant then came down with bronchitis and missed 2 weeks of work. Although fired for "points" (too many absences) she was allowed to return, and worked July 30 and 31, 2014 before being discharged again on July 31, 2014. (Ex. F, p. 1) Interestingly, the claimant complained of right shoulder, arm, and neck pain to the company nurse on both days she had been allowed to return to work. (Ex. 1)

The claimant saw Todd Woollen, M.D., on August 1, 2014. (Ex. 2, p. 1) He injected the claimant's right elbow. (Ex. 2, pp. 12-13) On August 8, 2016 Dr. Woollen made an orthopedic referral with John A. McCarthy, M.D. Dr. McCarthy first saw the claimant on August 20, 2014. He noted soreness over the right shoulder. (Ex. 3, p. 18) On September 10, 2014 the claimant again saw Dr. McCarthy who ordered an EMG and mentioned getting an MRI. The EMG was performed on September 29, 2014 and was consistent with right carpal tunnel syndrome. (Ex. 4, pp. 57-58) On October 7, 2014 the claimant reported improvement to Dr. McCarthy and was scheduled to start physical therapy (PT). On November 4, 2014 the claimant reported that her right upper extremity (RUE) was better, but she thought PT was making things worse. She also had to stop PT to take care of her ill son.

An MRI of the right shoulder on November 19, 2014 did show some damage to the right shoulder including a small non-displaced posterior superior labral tear and some degenerative changes in the AC. (Ex. 3) On December 11, 2014 the claimant reported to Dr. McCarthy that she was having significant and persistent pain over her right shoulder down to her elbow. Dr. McCarthy recommended a lateral epicondyle release.

On December 30, 2014 Dr. McCarthy noted that the claimant did not have a classic history to cause a SLAP tear, and that he found it difficult to associate the tear with work activities. (Ex. 3) The recommended right lateral epicondylar release was performed on January 2, 2015. (Ex. 6)

Robin Sassman, M.D., performed an independent medical evaluation (IME) of the claimant on May 18, 2015. (Ex. 8) Dr. Sassman opined a 4 percent upper extremity impairment for the right shoulder, 1 percent body as whole (BAW) for the right elbow, and 15 percent BAW for the cervical neck. The combined rating was 19 percent BAW. Restrictions included no lifting of more than 5 pounds with the right hand and no use of the right hand above shoulder height. Grasping and gripping limited to on a rare basis. (Ex. 8) Dr. Sassman charged a reasonable $2,140.00 for her IME.

On September 25, 2015 Dr. McCarthy placed the claimant at maximum medical improvement (MMI), released claimant to full duty work, and gave a 7 percent RUE rating. (Ex. 3) The claimant was seen by Mark Goebel, M.D., on January 13, 2016 with ongoing right arm and neck pain. Dr. Goebel referred her to RoseMary Mason, M.D., who first saw the claimant on March 14, 2016. (Ex. 7) Dr. Mason noted that treatment was complicated in that the claimant was now 6 plus months pregnant. He instructed claimant to return after she had given birth. (Ex. 9) On July 18, 2016 the claimant returned to Dr. Goebel who ordered a right shoulder MRI. The MRI showed some right shoulder concerns. (Ex. (9)

The claimant had a defense IME with Dr. Jensen on August 15, 2016. Dr. Jensen noted full range of motion in the right shoulder and no clear evidence of right shoulder pathology. (Ex. B) He concluded that the claimant has mild carpal tunnel on the right and there were not sufficient findings to confirm a cervical spine concern. He imposed a 50 pound lifting restriction and a 7 percent upper extremity impairment. He further concluded that any right shoulder complaints were not work related and no impairment or restrictions were necessary for the right shoulder. (Ex. B)

On September 2, 2016 Dr. Goebel opined that the claimant's right shoulder complaints, including, rotator cuff tendinopathy, were at least in part related to work. (Ex. 9) He did disagree with Dr. Sassman's 5 pound lifting restriction and felt that the claimant was capable of more.

The claimant's work injuries extend beyond the arm to the right shoulder. The claimant had a SLAP tear in the shoulder which was objectively found. Testimony from the employer is that the claimant has lost access to at least 50 percent of the jobs in

their plant. The restrictions of the claimant are limiting. Considering the claimant's medical impairments, training, permanent restrictions, as well as all other factors of industrial disability, the claimant has suffered a 50 percent loss of earnings capacity.

On the date of injury the claimant had gross weekly earnings of $599.41, was married, and entitled to 8 exemptions. As such, her weekly benefit rate is $426.82. The parties stipulated that the commencement date for permanent disability is September 25, 2015. Claimant seeks payment of the IMEs of Dr. Sassman; one of June 25, 2015 for $2,140.00, and one for August 29, 2016 for $1,215.00. No rating of impairment was issued by a defense-selected doctor prior to June 25, 2015 (May 18, 2015 examination date) IME report of Dr. Sassman. There was an evaluation of impairment from a defense doctor prior to the August 29, 2016 IME report of Dr. Sassman.

REASONING AND CONCLUSIONS OF LAW

The first issue then is the bilateral upper extremity claimed injury.

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).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

The claimant has the burden of establishing an injury arising out of and in the course of employment. It was found above that she met that burden as to the right upper extremity and shoulder (BAW).

The next issue is extent of permanent disability for the injury.

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 Rule of Appellate Procedure 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 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.

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.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, 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.

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961). Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

Based on the finding that the claimant has suffered a 50 percent loss of earning capacity, she has sustained a 50 percent permanent partial industrial disability entitling

her to 250 weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(u).

The next issue is healing period.

An employee is entitled to appropriate temporary partial disability benefits during those periods in which the employee is temporarily, partially disabled. An employee is temporarily, partially disabled when the employee is not capable medically of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability. Temporary partial benefits are not payable upon termination of temporary disability, healing period, or permanent partial disability simply because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury. Section 85.33(2).

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1).

The claimant's injury caused permanent disability and impairment. Thus, the temporary benefits herein are healing period benefits. The claimant was off work from August 1, 2014 through September 24, 2015 until released to maximum medical improvement effective September 25, 2015 when she could have returned to work. The defendants are responsible for paying healing period benefits for this period to the extent they have not already done so.

IME

Iowa Code section 85.39 provides, in relevant part, as follows:

> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the 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).

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.

Dr. Sassman provided an IME after the defendants got a rating from a defense-selected doctor which claimant believed was too low. The defendants shall pay/reimburse the $2,140.00 IME fee of Dr. Sassman.

ORDER

Therefore it is ordered:

That the defendants pay claimant healing period benefits from August 1, 2014 through September 24, 2015 at the weekly rate of four hundred twenty six and 82/100 dollars ($426.82).

That the defendants pay claimant two hundred fifty (250) weeks of permanent partial disability benefits commencing September 25, 2015, at the rate of four hundred twenty six and 82/100 dollars ($426.82).

Defendants shall pay/reimburse as appropriate the two thousand one hundred forty and 00/100 dollars ($2,140.00) IME fee of Dr. Sassman.

Costs are taxed to the defendant pursuant to 876 IAC 4.33.

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30 with subsequent reports of injury pursuant to rule 876 IAC 3.1.

Signed and filed this 20th day of February, 2017.

STAN MCELDERRY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

James C. Byrne
Attorney at Law
1441 – 29th St., Ste. 111
West Des Moines, IA 50266
jbyrne@nbolawfirm.com

Deena A. Townley
Attorney at Law
4280 Sergeant Rd., Ste. 290
Sioux City, IA 51106
Townley@klasslaw.com

SRM/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.