BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FAUSTINO MENDEZ,		
Claimant,	FILED	File Nos. 5052962, 5055351
vs.	NOV 13 2017	ARBITRATION
TYSON FRESH MEATS,	WORKERS COMPENSATION	DECISION
Employer, Self-Insured, Defendant.		Head Note Nos.: 1402.30, 1402.40 1803, 2209, 2502, 2907

STATEMENT OF THE CASE

Faustino Mendez, claimant, filed two petitions in arbitration and seeks workers' compensation benefits from defendant, Tyson Fresh Meats, as the self-insured employer. Hearing was held in Des Moines on March 28, 2017.

The parties filed hearing reports in each file at the commencement of the arbitration hearing. On the hearing reports, 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 evidentiary record includes Joint Exhibits 1 through 6, Claimant's Exhibits 1-16, and Defendants' Exhibits A as well as C through G. Defendants objected to Claimant's Exhibits 14 through 16 as untimely. Although the objections were overruled, defendants were given 30 days after the date of the hearing to file a rebuttal medical report. Defendants filed their desired rebuttal report as a Supplemental Arbitration Hearing Exhibit, marked as Exhibit F, page 17, on April 24, 2017. Exhibit F, page 17 is received and admitted into the evidentiary record.

Claimant testified on his own behalf. Defendants called Cody Smith, a nurse case manager employed by Tyson, to testify.

At the conclusion of the arbitration hearing, counsel for the parties requested the opportunity to file post-hearing briefs. Their request was granted and the parties filed their briefs simultaneously on June 2, 2017, at which time the case was considered fully submitted.

ISSUES

In File No. 5052962, the parties submitted the following disputed issues for resolution:

1. Whether claimant's January 27, 2014 injury caused temporary disability and, if so, the extent of claimant's entitlement to temporary disability, or healing period, benefits.

2. Whether the January 27, 2014 injury caused permanent disability to claimant's shoulders such that the injury should be compensated industrially instead of as a scheduled member injury to the arms.

3. The extent of claimant's entitlement to permanent disability benefits.

4. The proper commencement date for permanent disability benefits.

5. Whether claimant is entitled to reimbursement of an independent medical evaluation pursuant to Iowa Code section 85.39.

6. Whether claimant is entitled to alternate medical care, or future medical care, for his alleged shoulder injuries.

7. Whether costs should be assessed against either party.

Counsel agreed at the commencement of hearing, if claimant's injuries are limited to bilateral upper extremity injuries for the January 27, 2014 injury date, then the proper commencement date for permanent disability benefits is November 20, 2014. That agreement is accepted as a stipulation.

In File No. 5055351, the parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury that arose out of and in the course of his employment on May 7, 2015.

2. Whether the alleged injury caused temporary disability and, if so, the extent of claimant's entitlement to temporary disability, or healing period, benefits.

3. Whether the alleged injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits.

4. The proper commencement date, if any, for permanent disability benefits.

5. Whether claimant is entitled to reimbursement of an independent medical evaluation pursuant to Iowa Code section 85.39.

6. Whether claimant is entitled to alternate medical care, or future medical care, for his alleged bilateral shoulder injuries.

7. Whether costs should be assessed against either party.

FINDINGS OF FACT

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

1. Faustino Mendez is a 43-year-old gentleman with only a third or fourth grade education.

2. Mr. Mendez was born in El Salvador. He came to the United States in 1994. He is able to speak rudimentary English to communicate, but is not fluent in English. Mr. Mendez understandably required the services of an interpreter, Karen Deters, at the arbitration hearing.

3. Claimant sustained admitted cumulative bilateral arm injuries as a result of his work activities at Tyson with a manifestation date of January 27, 2014. (Hearing report; Transcript)

4. Claimant failed to prove by a preponderance of the evidence that he sustained bilateral shoulder injuries as a result of his work activities on or before January 27, 2014.

5. Claimant similarly failed to prove by a preponderance of the evidence that he sustained bilateral shoulder injuries on May 7, 2015.

6. I accept the medical causation opinions offered by the treating physiatrist, Kurt A. Smith, D.O. as stated in his April 24, 2017 report. (Exhibit F, page 17)

7. Specifically, I find that claimant's ongoing shoulder pain is the result of a degenerative process and is not a work-related condition. I further find that claimant did not prove that his work activities materially aggravated or exacerbated his degenerative shoulder condition. (Ex. F, p. 17)

8. I reject the medical causation opinion of claimant's independent medical evaluator, Jacqueline M. Stoken, D.O.

9. Dr. Stoken does not appear to have had a full and complete history or understanding of the work activities and alleged injuries. For instance, Dr. Stoken makes no reference to the alleged May 7, 2015 work injury. Dr. Stoken also causally relates alleged injuries to claimant's bilateral plantar fasciitis and bilateral knees that are not even alleged as injuries by the claimant.

10. In his deposition, claimant refers to the initial injury in January 2014 as involving only his bilateral hands, or bilateral carpal tunnel. (Ex. G, p. 26) He specifically alleges in his deposition that his bilateral shoulder injuries are the result of work activities in May 2015. (Ex. G, pp. 27-28) Dr. Stoken's history is not consistent with claimant's deposition testimony or theory of the case.

11. Claimant admits that he did not initially report either neck or shoulder issues after the January 27, 2014 injury date. (Ex. G, p. 26) In his initial statement of injury given to Tyson on January 27, 2014, Mr. Mendez noted bilateral hand or wrist pains. He did not mention elbow or shoulder symptoms. The physical diagram located on that injury report demonstrates only physical symptoms in the hands or wrists. (Ex. A, p. 1)

12. Claimant was evaluated by an orthopaedic surgeon, Ze Hui Han, M.D. on February 17, 2014. Dr. Han recorded no complaints of elbow or shoulder symptoms at his initial evaluation. (Joint Ex. 1, pp. 1-2) By contrast, on September 26, 2014, Dr. Han notes a report of elbow symptoms by claimant and specifically notes this is a "new condition." (Joint Ex. 1, p. 21) None of the treating medical providers have opined that claimant's elbow or shoulder conditions are causally related to or materially aggravated by his work activities at Tyson.

13. Dr. Stoken did not discuss any of these discrepancies in the medical records or claimant's deposition testimony. I am not convinced that Dr. Stoken had a good grasp or understanding of the claims being asserted in this case, nor the causal connection of the alleged injuries to claimant's work activities. Therefore, I accept Dr. Smith's causation opinion as most credible with respect to the alleged shoulder injuries.

14. Having concerns and lacking confidence in the accuracy of the history and opinions expressed by Dr. Stoken with respect to claimant's alleged shoulder injuries, I similarly reject her opinions pertaining to claimant's bilateral carpal tunnel syndrome.

15. Instead, I accept the medical opinions of the treating orthopaedic surgeon, Dr. Han, with respect to claimant's bilateral carpal tunnel syndromes. Dr. Han treated both wrists, providing an injection for the left wrist and surgical intervention for the right carpal tunnel syndrome.

16. Dr. Han opines that claimant has reached maximum medical improvement for both the left and right carpal tunnel syndrome conditions. (Joint Ex. 1, p. 25) This opinion is accepted as accurate.

17. Dr. Han opines that claimant sustained two percent permanent impairment of the right hand as a result of the carpal tunnel syndrome. (Joint Ex. 1, p. 27) With respect to the left carpal tunnel syndrome, Dr. Han opined that without

surgical intervention, "there is no need for the permanent impairment rating" and specifically indicated that without surgery the impairment rating would be zero percent. (Joint Ex. 1, p. 13)

18. Claimant did not desire surgical intervention on his left carpal tunnel. I find that Dr. Han's opinion is the most credible in this record and that claimant has failed to prove any permanent disability related to the left hand or arm.

19. Pursuant to Table 16-2 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, page 439, a two percent permanent impairment of the right hand converts to a two percent permanent impairment of the right upper extremity.

20. Considering the permanent impairment rating, as well as claimant's testimony about his loss of function, I find that claimant has proven by a preponderance of the evidence that he sustained a two percent permanent loss of function of the right arm as a result of his work activities manifesting as a cumulative injury on January 27, 2014.

CONCLUSIONS OF LAW

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.

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.

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).

In this case, I found that claimant did not prove his alleged bilateral shoulder injuries arose out of and in the course of his employment or that they were materially aggravated by his work activities for either alleged date of injury. I conclude that claimant failed to carry his burden of proof to establish compensable shoulder injuries under either date of injury.

Given that his May 7, 2015 injury claim is related solely to the alleged bilateral shoulder claims, I conclude that claimant failed to prove entitlement to any temporary disability, healing period, or permanent disability benefits in File No. 5055351. I further conclude that claimant failed to prove entitlement to any alternate medical care, or future medical care, related to his shoulder injury claims under either date of injury or file.

Similarly, I found that claimant failed to prove permanent disability to his left arm as a result of the left carpal tunnel syndrome. Instead, I relied upon Dr. Han's opinion and found that claimant failed to prove permanent disability related to the left arm. I conclude that claimant is not entitled to an award of permanent disability for the left arm injury sustained on January 27, 2014.

A wrist injury is an injury to the arm, not the hand. Holstein Elec. v. Breyfogle, 756 N.W.2d 812 (Iowa 2008). Therefore, with respect to claimant's right carpal tunnel syndrome, I conclude that claimant has established a permanent injury to his right arm. Having found that Mr. Mendez did prove he sustained a two percent permanent impairment of the right arm as a result of the January 27, 2014 injury date (File No. 5052962), I conclude that claimant is entitled to an award of permanent disability benefits for the January 27, 2014 right arm injury.

Under the Iowa Workers' Compensation Act permanent partial disability is categorized as either to a scheduled member or to the body as a whole. See section 85.34(2). Section 85.34(2)(a)-(t) sets forth specific scheduled injuries and compensation payable for those injuries. The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). Compensation for scheduled injuries is not related to earning capacity. The fact-finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

Having considered the competing impairment ratings, as well as claimant's testimony regarding his symptoms and the injuries, I found that claimant proved he sustained a two percent permanent impairment of the right upper extremity. I conclude that claimant is entitled to an award equivalent to two percent of the right arm as a result of the January 27, 2014 work injury.

I found that claimant sustained a two percent permanent loss of function in his right arm as a result of the January 27, 2014 work injury. The Iowa legislature has established a 250-week schedule for arm injuries. Iowa Code section 85.34(2)(m). Claimant is entitled to an award of permanent partial disability benefits equivalent to the proportional loss of his arm. Iowa Code section 85.34(2)(v). Two percent of 250 weeks equals 10 weeks. Claimant is, therefore, entitled to an award of 10 weeks of permanent partial disability benefits against the employer at the stipulated weekly rate of compensation. Iowa Code section 85.34(2)(m), (v); Blizek v. Eagle Signal Company, 164 N.W.2d 84 (Iowa 1969).

Claimant sought an award of temporary disability, or healing period benefits. However, the claim for temporary disability related to the bilateral shoulder claims and occurred after the date when the parties stipulated permanent disability benefits would

commence if the injury was limited to a scheduled member injury. (Hearing Report; Transcript) Therefore, I conclude that no healing period benefits should be awarded.

Mr. Mendez also seeks an award for reimbursement of his 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).

With respect to claimant's left and right carpal tunnel syndrome, defendants obtained permanent impairment ratings from the treating orthopaedic surgeon, Dr. Han, in 2014. (Joint Ex. 1, pp. 13, 27) Dr. Stoken performed her independent medical evaluation on May 23, 2016. Claimant clearly established the pre-requisites of Iowa Code section 85.39 to qualify for an independent medical evaluation.

However, defendants challenge whether the full cost of Dr. Stoken's evaluation should be awarded. Defendants accurately point out that they are only responsible for reimbursement of the reasonable fees associated with this evaluation.

Dr. Stoken's evaluation encompassed the bilateral arms, bilateral shoulders, bilateral plantar fasciitis, and bilateral knees. Of the eight body parts evaluated and considered by Dr. Stoken, only two were subject to evaluation pursuant to Iowa Code section 85.39.

Defendants suggest a reasonable reduction of Dr. Stoken's evaluation fees based upon her billing statement. Defendants accurately note that Dr. Stoken charges $300 "extra" for each additional body part evaluated. Claimant did not even make claims for injuries to his bilateral feet or bilateral knees. Defendants suggest a reduction of Dr. Stoken's fee totaling $1,200.00, reflecting the cost of evaluating these body parts. Defendants similarly suggest reducing Dr. Stoken's charges for the medical records review and report by half since four of the eight body parts evaluated were not even claimed as work injuries. I find defendants' argument convincing in this respect. I conclude that claimant is entitled to reimbursement for Dr. Stoken's independent medical evaluation in an amount totaling $2,900.00. This represents the standard examination fee ($800.00), plus $900.00 for evaluation of three additional body parts, and one-half of the medical record review ($600.00) and report preparation fees ($600.00).

Finally, Mr. Mendez requests assessment of his costs. Assessing costs is a discretionary function of the agency. Iowa Code section 86.40.

In this case, defendants have prevailed on the majority of the disputed issues. I conclude that the parties should bear their own costs in File No. 5055351, as claimant obtained no award of benefits in that file. In File No. 5052962, I conclude it is reasonable to assess claimant's filing fee ($100.00) and service fees ($6.73). All other requests for costs are denied.

ORDER

THEREFORE, IT IS ORDERED:

In File No. 5052962:

Defendants shall pay claimant ten (10) weeks of permanent partial disability benefits commencing on November 20, 2014 at the stipulated rate of four hundred twenty-four and 22/100 dollars ($424.22) per week.

Defendants shall pay interest pursuant to Iowa Code section 85.30 on all accrued weekly benefits.

Defendants shall be entitled to the credit stipulated to by the parties in the hearing report for all benefits paid to date.

Defendants shall reimburse claimant's independent medical evaluation fees in the amount of two thousand nine hundred and 00/100 dollars ($2,900.00).

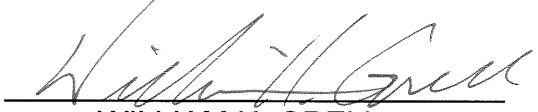
Defendants shall reimburse claimant's costs totaling one hundred six and 73/100 dollars ($106.73).

In File No. 5055351:

Claimant shall take nothing.

The parties shall bear their own costs related to this contested case proceeding.

Signed and filed this 13th day of November, 2017.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Mark A. King
Attorney at Law
1200 Valley West Dr., Ste. 208B
West Des Moines, IA 50266-2318
mark@iowalawking.com

Stephanie Marett
Attorney at Law
700 Walnut St., Ste. 1600
Des Moines, IA 50309-3800
slm@nyemaster.com

WHG/srs

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.