BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
SEP 12 2017
WORKERS COMPENSATION

MARIA MARTINEZ,	:	
Claimant,	:	File No. 5039651
vs.	:	REVIEW-REOPENING
TYSON FRESH MEATS, INC.,	:	DECISION
Employer, Self-Insured, Defendant.	:	Head Note Nos.: 1803, 2905, 2907

STATEMENT OF THE CASE

Maria Martinez, claimant, filed a petition for review - reopening seeking additional workers' compensation benefits from Tyson Fresh Meats, Inc., self-insured. The original injury occurred on November 19, 2010. The parties reached an agreement for settlement on July 11, 2014.

This case was heard in Sioux City, Iowa and fully submitted on February 27, 2017. The evidence in this case consists of the testimony of claimant, William Sager, II, Claimant's Exhibits 1 – 13 and Defendant's Exhibits A – C. Both parties submitted briefs.

The hearing was interpreted. For the purpose of this decision I will refer to Maria Martinez as claimant or Maria and Tyson Fresh Meats, Inc. as defendant or Tyson.

STIPULATIONS

The parties filed a hearing report at the commencement of the review-reopening hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this review-reopening 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 agreed that claimant's left upper extremity injuries were a sequelae to her November 19, 2010 injuries. The claimant stipulated in her brief that the commencement date of any benefits under this review – reopening petition would commence on December 21, 2015. (Claimant's brief, page 15)

ISSUES

Whether claimant warrants an increase in workers' compensation benefits; and if so;

The extent of claimant's disability.

Whether the claimant is entitled to payment of an independent medical examination (IME).

Assessment of costs.

FINDINGS OF FACT

The deputy workers' compensation commissioner, having heard the testimony and considered the evidence in the record, finds that:

Maria was 52 years old at the time of the hearing. Maria's education consists of attending the sixth grade in Mexico. She has no additional education. Maria's primary language is Spanish. She can understand some English, but cannot read or write English. (Transcript, p. 18) She does not know how to type or use a computer. (Tr. p. 18)

Maria did not work in Mexico. She started working in Minnesota gutting chickens in 1987. Maria started her work with Tyson in Storm Lake, Iowa in 1991.

From my observation of her demeanor at hearing including body movements, vocal characteristics, eye contact and facial mannerisms while testifying in addition to consideration of the other evidence, I found Maria credible.

On July 7, 2014, Maria and Tyson's Agreement for Settlement (AGFS) was approved by the Iowa Commissioner of Workers' Compensation. The AGFS provided for a 25 percent industrial disability for the right arm and shoulder injury. (Exhibit 1, p. 1) The parties agreed claimant had the restrictions listed by Joyce Stoken, D.O. The restrictions were,

> Reasonable permanent work restrictions for Ms. Martinez's right shoulder, include avoid working at or above the shoulder level, avoid repetitive pushing or pulling at or above shoulder level. She should avoid lifting more than 10 lbs. on a frequent basis and 20 lbs. on an occasional basis with her right upper extremity.

(Ex. 1, p. 13)

Maria testified that she developed pain in her left shoulder after the AGFS was approved in March 2015. (Tr. p. 32) Maria said that Dr. Stoken and Phillip Deffer, M.D., have provided her restrictions for her left upper extremity. (Tr. pp. 20, 21)

Maria was working the Cryovac job when she developed problems with her left upper extremity. (Tr. p. 32) Maria reported her injury to her left upper extremity to the Tyson nurses. She received treatment of ice on her shoulder and hand and naproxen. (Tr. pp. 34, 35) Maria was referred to Joshua Hamann, M.D., who began treating her left hand for locked/trigger fingers. (Tr. p. 35) At that time, Tyson provided light duty work for Maria. (Tr. p. 36) Dr. Hamann provided treatment to Maria's left shoulder from June through August 2015. (Tr. p. 38) Maria returned to full duty in September 2015; however, her hands started swelling and pain returned. (Tr. p. 42)

Dr. Deffer also provided treatment to Maria's hand. Dr. Deffer performed surgery on her left hand in February 2016. (Tr. p. 43) Dr. Deffer returned Maria to the Cryovac job in April 2016 but she was not able to perform that work and she was returned to light work. Maria attempted the Cryovac job in July until she saw Dr. Deffer in October. At that time, Dr. Deffer recommended claimant bid into another position. (Tr. p. 45) Maria attempted a job of bagging tendons, but was not able to perform the job. (Tr. p. 47) Maria testified that in January 2017, Dr. Deffer gave her permanent restrictions of not working above shoulder level, not to lift more than ten pounds and not to grip repeatedly with her hands. (Tr. p. 48)

Maria returned to light work. Shortly before the hearing she bid on a trim inspector job at Tyson. Maria had worked that job for one day when she was on light duty. (Tr. p. 58)

Maria testified that her right shoulder was in about the same condition when the AGFS was signed. She said her right hand was worse. (Tr. p. 52) Maria said she currently had difficulty in lifting anything with her right hand. Maria said that she currently has problems in using her arms above her shoulder. Her left wrist and hand are better now since she was doing light duty. (Tr. p. 54)

Maria did not believe, with the restrictions Dr. Deffer had given her, that she could perform any of her past work. (Tr. p. 55) She stated that she had been placed on the label job when she was on light duty and could do that job. (Tr. p. 61)

William Sager, II, Complex Human Resources Manager for the Tyson Storm Lake facility testified. He stated that claimant was disqualified for the bag tenderloins job she had bid on due to the restrictions Dr. Deffer provided in January 2017. (Tr. 63) Mr. Sager said that he just discovered the morning of the hearing that the claimant should have been awarded the inspector job on the ham line and the Tyson had made an error in not awarding the inspector job to Maria. He informed Maria at the hearing that the job was available for her. (Tr. p. 66) Mr. Sager also said the inspector position was a grade higher that Maria's prior work at Tyson, which means it was at a higher pay rate. (Tr. p. 68) Mr. Sager said that in addition to the inspect ham line, the inspect trim line, Exhibit C job would be within Maria's restrictions. (Tr. p. 74) Mr. Sager said that the inspect jobs were recently changed from temporary light duty jobs to permanent positions. (Tr. p. 78)

On March 11, 2015, Maria reported symptoms in her left finger/hand, wrist forearm, upper arm shoulder and back to Tyson. (Ex. 2, p. 40) She was placed on restricted duty. (Ex. 2, p. 41) The last Tyson Occupational Health record of January 5, 2017, noted claimant had permanent restrictions of light sedentary and no repetition and was discharged from further treatment. (Ex. 2, p. 119A)

Dr. Hamann was authorized by Tyson to provide care. On June 3, 2014, Dr. Hamann's assessment of claimant was, "1. Left wrist de Quervain tenosynovitis. 2. Left shoulder impingement." (Ex. 3, p. 123) He referred Maria to a hand surgeon. On June 24, 2015, Dr. Hamann examined Maria's left shoulder. He wrote, "Certainly, this is shaping up just like her right shoulder is, and I really do not think this should be dragged on for 3 years. I do not think any surgery is indicated." (Ex. 3, p. 124) Dr. Hamann provided an injection at that visit.

On August 8, 2015, Dr. Hamann issued a permanent impairment rating. His assessment was left shoulder parascapular bursitis. He found her at maximum medical improvement (MMI) and provided a zero percent impairment and returned her to full duty. (Ex. 3, p. 126)

Maria saw Dr. Deffer on August 13, 2015, for her left hand and thumb pain. (Ex. 3, p. 127) On February 25, 2016, Dr. Deffer performed surgery on Maria's left hand. His postoperative diagnoses were, "1. Left trigger thumb. 2. Left small finger trigger digit." (Ex. 2, p. 134) On May 26, 2016, Dr. Deffer discussed with Maria that he was considering giving her permanent restrictions of no repetitive activities. (Ex. 3, p. 140) On December 19, 2016, Dr. Deffer agreed with the following two statements written by Maria's attorney,

> 1. It is correct that your diagnosis of Ms. Martinez's 3/11/15 work injury to her left hand is underlying arthritis, primarily in her left thumb, which has been aggravated by her repetitive upper extremity work for Tyson coming forward to her referral to you in June of 2015, which (left hand) condition is now chronic?
>
> 2. It is correct to state that it is your opinion that long term restrictions are warranted for Ms. Martinez's left hand injury, including no use of a wizard [*sic*] knife, no use of a regular knife, and no use of a hook with her left hand?

(Ex. 3, p. 143C)

On January 5, 2017, Dr. Deffer provided permanent restriction for Maria. Dr. Deffer wrote,

> In regards to her permanent restrictions, I read Dr. Jacqueline Stokens [*sic*] evaluation from December 2016, and I think she was quite accurate. We have a minor discrepancy in the range of motion of the shoulder. I think it is reasonable that the patient is given a permanent restriction of no

> repetitive gripping, pinching, or pushing, and no use above shoulder level of either shoulder. I would give her a weight restriction of no more than 10 pounds. Using the occupational standards, this would make her only eligible for light sedentary type activity. I think she could do some activities that do not involve highly repetitive activities. Clearly, she has shown a propensity to being sensitive to repetitive activities. At this time, in regards to the diagnosis of her left shoulder, I think she does have a history of a subacromial bursitis, though right now it is asymptomatic. I think her left upper extremity is directly related to her employment at Tysons [*sic*]. I would place her at maximum medical improvement as of 01/05/2017. Permanent restrictions were placed as above.

(Ex. 3, p. 143E)

Dr. Deffer provided a three percent left upper extremity rating and a three percent hand impairment rating. (Ex. 3, p. 143E)

On November 19, 2015, Joyce Stoken, D.O., performed an IME. Dr. Stoken's diagnoses for Maria's left shoulder were left shoulder bursitis and left scapulothoracic syndrome and she provided a five percent whole person impairment rating. (Ex. 7, p. 159) Dr. Stoken recommended restrictions for the left shoulder injury of avoiding work at or above shoulder level, avoid repetitive pushing and pulling at or above the shoulder level. Maria should avoid lifting more than 10 pounds on a frequent basis and 20 pounds on an occasional basis with her left upper extremity. (Ex. 7, p. 159) Dr. Stoken noted that claimant's right shoulder was unchanged since she saw her in April 2014. (Ex. 7, p. 160) Dr. Stoken charged claimant $2,500.00 for the IME. (Ex. 7, p. 171)

On December 12, 2016, Dr. Stoken performed another IME, which concentrated on the left hand and left arm. Dr. Stoken's impression was,

> 1. Status post work injury on 11/19/10 and/or 3/11/15 with left shoulder bursitis.
>
> 2. Left hand small finger and thumb triggering.
>
> 3. Status post left thumb A1 pulley release. Left small finger A1 pulley release on 2/25/16 done by Dr. Phillip Deffer. Postoperative diagnosis is left trigger thumb. Left small finger trigger digit.
>
> 4. Chronic pain of the left upper extremity.

(Ex. 7, p. 171E) She provided a ten percent whole body impairment rating for the left upper extremity injury. (Ex. 7, p. 173E) Dr. Stoken recommended permanent restrictions of avoiding repetitive keying, gripping and pinching. She said claimant was best suited to observational/sedentary type of work. (Ex. 7, p. 171F)

Maria has significant new restrictions since her AGFS with her left shoulder and hand and is now restricted from performing repetitive work with her hands. The labor market for claimant is very narrow. She has limited education, limited English abilities and significant restrictions. I find Maria has a 90 percent loss of earning capacity.

Claimant has requested IME and filing fee and service costs in the total amount of $2,726.96. (Ex. 13, p. 208)

CONCLUSIONS OF LAW

Under Iowa Code section 86.14(2), the workers' compensation commissioner is authorized to "reopen an award for payments or agreement for settlement . . . [to inquire] into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded or agreed upon."

Upon review-reopening, claimant has the burden to show a change in condition related to the original injury since the original award or settlement was made. The change may be either economic or physical. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959). A mere difference of opinion of experts as to the percentage of disability arising from an original injury is not sufficient to justify a different determination on a petition for review-reopening. A failure of a condition to improve to the extent anticipated originally may also constitute a change of condition. Meyers v. Holiday Inn of Cedar Falls, Iowa, 272 N.W.2d 24 (Iowa App. 1978).

> Under Iowa Code section 86.14(2), the workers' compensation commissioner is authorized to "reopen an award for payments or agreement for settlement . . . [to inquire] into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded or agreed upon." When an employee seeks an increase in compensation, the employee bears the burden of establishing by a preponderance of the evidence that his or her current condition was "proximately caused by the original injury." Simonson v. Snap-On Tools Corp., 588 N.W.2d 430, 434 (Iowa 1999) (quoting Collentine, 525 N.W.2d at 829). The commissioner must then evaluate "the condition of the employee, which is found to exist subsequent to the date of the award being reviewed." Stice v. Consol. Ind. Coal Co., 228 Iowa 1031, 1038, 291 N.W. 452, 456 (1940). The commissioner is not supposed to "re-determine the condition of the employee which was adjudicated by the former award." Id.

Kohlhaas v. Hog Slat, Inc., 777 NW 2d 387, 391 (Iowa 2009).

Interest accrues on awards of permanent disability in review-reopening proceedings upon the commencement date of the additional benefits awarded in a review-reopening.

Maria has overwhelmingly shown that her condition is worse from the AGFS. While her right shoulder is about the same, her left hand and left shoulder are significantly worse. She has difficulty with both hands. She has been given significant lifting restrictions for her left extremity and now has to avoid all repetitive work with her hands. Tyson informed Maria at the hearing it had been wrong not to accept her bid for the inspector on the ham line and was going to obtain final approval immediately after the hearing. While claimant testified she thought she could return to the label job, it is not a job that Tyson identified she could do. It would require repetitive use of the hands.

Maria has proven that she is entitled to have her case reopened.

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.

In assessing an unscheduled, whole-body injury case, the claimant's loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

Maria has worked for Tyson for around 25 years. It is clear she is motivated to work. It is also clear that her work at Tyson has had a dramatic impact on her ability to work. It is her injuries after the AGFS that have had the most negative impact on her ability to work. Tyson has found two inspector positions that she would qualify for given her restrictions. Maria has a very limited education and no vocational relevant English skills. Her age is not a positive factor. She has a strong work ethic and has worked for Tyson many years. I previously found she had a 90 percent loss of earning capacity.

Outside of the limited trim inspector jobs at Tyson, Maria's industrial capacity is very limited. Considering all of the factors of industrial disability I find Maria has a 90 percent industrial disability. This finding assumes that Maria is employed at Tyson.

Maria has requested payment of the IME costs.

Iowa Code section 85.39 provides in part,

> 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. The physician chosen by the employee has the right to confer with and obtain from the employer-retained physician sufficient history of the injury to make a proper examination.

Tyson argues that Maria is not entitled to Dr. Stoken's IME costs of $2,500.00. Tyson argues that there was no qualifying rating by a physician retained by Tyson.

Dr. Hamann provided a permanent rating of zero rating on August 8, 2015. Dr. Hamann was retained by Tyson. Dr. Stoken's IME was on November 9, 2015. Maria has shown she is entitled to reimbursement of the $2,500.00 fee for the November IME. I find the IME costs to be reasonable.

Maria has requested the filing fees and service costs for two files.

Iowa Code section 86.40 states:

> **Costs.** All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states in part:

> **Costs.** Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be . . . (3) costs of service of the original notice and subpoenas, . . . (7) filing fees when appropriate . . . .

Filing fees and service costs are an appropriate reimbursable cost. However as there is only one case file that I am ruling on today, File No. 5039651, and the other file, File 5055511 was dismissed with prejudice, I am only awarding the filing and service costs in File No. 5039651 in the amount of $113.48.

ORDER

Defendant shall pay claimant four hundred fifty (450) weeks of permanent partial disability benefits commencing December 21, 2015 at the weekly rate of four hundred thirty-five and 34/100 dollars ($435.34).

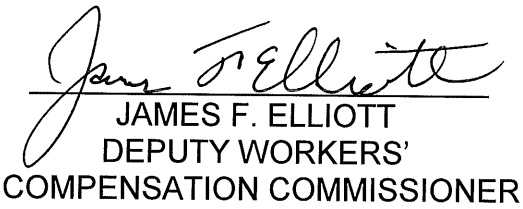
Defendant shall pay claimant two thousand five hundred and 00/100 dollars ($2,500.00) for the IME costs.

Defendant shall pay claimant costs in the amount of one hundred thirteen and 48/100 dollars ($113.48).

All past due amounts shall be paid with interest and in a lump sum.

Defendant shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Signed and filed this 12th day of September, 2017.



JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

James C. Byrne
Attorney at Law
1441 – 29th St., Ste. 111
West Des Moines, IA 50266-1309
jbyrne@nbolawfirm.com

Timothy A. Clausen
Attorney at Law
4280 Sergeant Rd., Ste. 290
Sioux City, IA 51106-4647
cclausen@marshallnet.com

JFE/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.