BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

IDA MORENO,

Claimant,

vs.

SMITHFIELD FOODS, INC., d/b/a CURLY'S FOODS,

Employer,

and

INDEMNITY INSURANCE CO. OF AMERICA,

Insurance Carrier,
Defendants.

File No. 5055408

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Ida Moreno, has filed petitions in arbitration and seeks worker's compensation benefits from, Curly's Foods, employer, and Indemnity Insurance Company of America, insurance carrier, defendants.

Deputy workers' compensation commissioner, Stan McElderry, heard this matter in Sioux City, Iowa.

ISSUES

1. Whether the injury on August 16, 2013 which arose out of and in the course of employment is scheduled or industrial; and

2. Extent of permanent disability.

FINDINGS OF FACT

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

The claimant was 56 years old at the time of hearing. She was born in Mexico and only has 2 years of formal school. She speaks a little English. She cannot read English. Before coming to the U.S. in 2001 her work experience was raising 5 children

and milking cows. Her first job in the United States was production placing meat and candy on a line, then about 7 months at Tyson trimming pork butts, and then she took a job cleaning offices. She began at Curly's in 2007 cutting meat and removing fat with a traditional knife and a whizard knife.

The parties stipulated that the claimant had an injury arising out of and in the course of employment which manifested August 16, 2013. The claimant testified that the injury was due to cumulative or repetitive work activities, and that she first experienced pain when using a whizard knife. The claimant also testified that she experienced bilateral arm pain when stacking hams weighing from 3-30 pounds. She stated that some of the stacking was above shoulder height. However, Curly's does not produce or handle hams.

After the injury, the claimant was placed in a job of placing a tray inside a liner. Due to hand pain, she was switched to wiping sauce of the seals of little tubs. When she complained of continuing pain she was moved to a job in the weighing department where she weighs meat of up to 16 ounces. As of the date of the hearing she continued in that position.

The claimant was first seen by Douglas Martin, M.D., on August 20, 2013. (Exhibit 1, page 1) She complained of bilateral shoulder pain of 3 years in duration, and bilateral hand numbness and tingling. (Ex. 1, p. 1) Physical therapy was ordered and commenced on August 23, 2013. She then went to Mexico for a month. (Ex. 1, p. 4) She was seen again by Dr. Martin on September 30, 2013 and was to begin physical therapy. (Ex. 1, p. 5) She returned to Dr. Martin on October 14, 2013. An injection in the right shoulder, right carpal tunnel, and right thumb was performed on October 28, 2013. (Ex. 1, p. 10-11) She initially reported some improvement from the injections. Dr. Martin discussed a CTS release with the claimant on November 22, 2013. (Ex. 1, p. 16)

Dr. Martin referred the claimant to Raymond Sherman, M.D. The claimant reported bilateral arm pain of 4-5 years duration to Dr. Sherman. (Ex. 3, p. 4) On December 31, 2013, Dr. Sherman performed a right endoscopic carpal tunnel and trigger thumb release. (Ex. 4) She saw Dr. Sherman again on January 9, 2014 and kept off work. She saw Dr. Sherman again on February 10, 2014 complaining of significant right thumb pain and was released to one-hand work. (Ex. 3, p. 9) By February 5, 2014, the claimant was showing some improvement in her grip, grasp, and pinch strengths. On February 10, 2014, the claimant complained to Dr. Sherman of significant right thumb pain. (Ex. 3, p. 9)

On April 3, 2014 the claimant complained to Reed B. McGill, P.A., of pain throughout her right hand. (Ex. 3, p. 11) The claimant returned to Dr. Martin on June 5, 2014 for an impairment rating. He placed her at maximum medical improvement (MMI) and imposed a restriction of occasional gripping bilaterally. He opined a 10 percent upper left extremity and a 10 percent right upper extremity rating which he converted into a 12 percent of the body as a whole (BAW). (Ex. 1, p. 21) On August 11, 2014, Dr.

Martin confirmed that he still believed the restrictions he imposed were appropriate and did not need to be increased or modified. (Ex. 1, p. 28)

The claimant saw Sunil Bansil, M.D., for an independent medical evaluation (IME) on November 23, 2015. (Ex. 5) Dr. Bansal opined a 11 percent right upper extremity (RUE) impairment for the right wrist and hand, 1 percent RUE for the right thumb, 11 percent LUE impairment for the left wrist and hand, and 3 percent RUE for the right shoulder. (Ex. 5, pgs. 12-13) He opined no ratable impairment for the left shoulder. (Ex. 5, p. 13) He also opined restrictions of 10 pounds occasional lift and 5 pounds frequently for either arm, and no more than 5 pounds lifting overhead on an occasional basis only.

Although only Dr. Bansal provided an impairment rating beyond the bilateral extremities the injury is to the body as a whole. Dr. Martin provided an injection to the right shoulder which Dr. Sherman noted had improved the shoulder. (Ex. 3, p. 3) The operative word being improved not cured. The claimant continued to make complaints regarding her right shoulder which Dr. Martin downplayed. The claimant's restrictions are severe. Although the employer has positions which met the claimant's restrictions, those restrictions are very limiting industrially. Considering the claimant's medical impairments, training, permanent restrictions, as well as all other factors of industrial disability, the claimant has suffered a 40 percent loss of earnings capacity.

On date of injury the claimant was married, entitled to 2 exemptions, and had average weekly wages of $695.40. As such her weekly benefit rate is $458.55. The parties stipulated to an August 16, 2013 commencement date.

REASONING AND CONCLUSIONS OF LAW

The first issue is whether the injury is scheduled to the bilateral upper extremities or is to the body as a whole.

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).

Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 593; 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."

In this case I found that the claimant's injury extended into the right shoulder, an unscheduled loss. Therefore the loss is to the body as a whole and analyzed industrially.

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 40 percent loss of earning capacity, she has sustained a 40 percent permanent partial industrial disability entitling her to 200 weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(u).

ORDER

THEREFORE IT IS ORDERED:

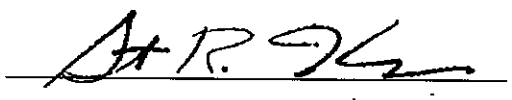
That the defendants shall pay the claimant two hundred (200) weeks of permanent partial disability commencing August 16, 2013 at the weekly rate of four hundred fifty eight and 55/100 dollars ($458.55).

Defendants shall receive credit for all benefits previously paid.

Costs are taxed to the defendants 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 3rd day of February, 2017.



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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.