BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GIANJE RUE,

Claimant,

vs.

TYSON FOODS, INC.,

Employer,
Self-Insured,
Defendant.

File No. 5053587

ARBITRATION

DECISION

Head Note Nos.: 1108.50; 1402.40; 1801; 1803

STATEMENT OF THE CASE

Gianje Rue, claimant, filed a petition in arbitration seeking workers' compensation benefits from self-insured employer Tyson Foods, Inc., as defendant. Hearing was held on July 19, 2016. Presiding at the hearing was Deputy Workers' Compensation Commissioner Erin Q. Pals.

Gianje Rue and Brook Salgar were the only witnesses who testified live at trial. The evidentiary record also includes claimant's exhibits 1-11 and defendant's exhibits A-C. The parties submitted a hearing report at the commencement of the evidentiary hearing. On the hearing report, the parties entered into certain stipulations. Those stipulations are accepted and relied upon in this decision. No findings of fact or conclusions of law will be made with respect to the parties' stipulations.

The parties requested the opportunity for post-hearing briefs which were submitted on August 2, 2016.

ISSUES

The parties submitted the following issues for resolution:

1. What, if any, permanent partial disability did claimant sustain as a result of the September 12, 2014, work injury?
2. Whether claimant is entitled to temporary benefits from September 13, 2014 through January 22, 2015, as a result of the September 12, 2014, work injury?
3. The appropriate commencement date for any permanent partial disability benefits.

4. Whether sanctions should be assessed against claimant for two missed IME appointments?

FINDINGS OF FACT

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

The parties have stipulated that Ms. Rue sustained a work injury at Tyson Foods (hereinafter "Tyson") on September 12, 2014. On that date, Ms. Rue was taking trash to the dumpster when she slipped on a piece of meat and fell flat onto her back. (Testimony) Defendant disputes claimant's claim that she is entitled to permanent and/or temporary weekly disability benefits.

On September 12, 2014, Ms. Rue was seen at the Buchanan County Health Center emergency room. She complained of low back pain into her right buttock causing pain and increased back pain with movement of the right leg after a fall at work. She also reported numbness to her right leg. William R. Neff, M.D., examined Ms. Rue and noted that she had degenerative disc disease in the lumbar spine, osteoarthritic facet arthropathy in the lower lumbar spine with no evidence of fractures. The doctor recommended Flexeril, rest for her back, back care instruction, and a pillow behind her knees. (Exhibit 3)

Ms. Rue was seen at Concentra on October 6, 2014. She felt that her pattern of symptoms was worsening. She reported that she had not been working because she had resigned from her job. She had been taking her medications but had not had any relief. She rated her pain as a 10/10. The pain radiated into her left leg. It was felt she had lumbar radiculopathy and lumbar strain. Ms. Rue was restricted to no lifting over 10 pounds, no bending greater than zero times per hour, and no pushing and/or pulling over 15 pounds of force. The notes indicated that the anticipated maximum medical improvement date was October 20, 2014. (Ex. 5)

Ms. Rue testified that she moved to Georgia on September 28, 2014, to care for her ill father. She had planned to move before she sustained the work injury on September 12, 2014. Once she moved to Georgia she began treating with an authorized provider until she was placed at maximum medical improvement (MMI) on January 22, 2015. (Testimony)

The first treatment Ms. Rue received in Georgia was on October 13, 2014. She was seen for evaluation of back and left leg pain at Resurgens Orthopaedics in Atlanta, Georgia. She reported that she slipped and fell at work in Iowa. Ms. Rue told the doctor that she had been seen in the emergency room. She also had approximately five visits of rehabilitation which she felt made her pain worse. She rated the pain as a 9/10. The notes indicate that she ambulated with an antalgic gait. (Ex. 7, p. 1)

Ms. Rue returned to Resurgens on October 30, 2014. She was seen by Edward Middlebrooks, M.D. for MRI follow-up. She reported that she continued to have low back pain although she felt it was somewhat better since she had been taking her medications. The doctor's impression was mild lumbar strain and lumbar disk degeneration without radiculopathy and lumbar facet syndrome. Dr. Middlebrooks started her back in rehabilitation. He also noted she could go back to a sedentary position. He requested to see her back in six weeks; he anticipated MMI and full duty release at that time. (Ex. 7, p. 4)

On December 15, 2014, Ms. Rue returned to see Dr. Middlebrooks. She reported that the rehabilitation aggravated her back. Upon exam, she was diffusely tender in her lumbar spine. Dr. Middlebrooks recommended consideration for lumbar facet injections. Ms. Rue wanted to consider her options. He recommended follow-up in four weeks. (Ex. 7, p. 7)

Ms. Rue returned to see Dr. Middlebrooks on January 22, 2015. She reported continued low back pain without radicular symptoms. She decided not to have the injection. The doctor's impression was lumbar strain and lumbar facet arthritis. He placed her at MMI. He opined that her lumbar strain had resolved from her injury. He further noted that she had underlying facet arthropathy, which was aggravated by her injury but was not caused by her injury. He stated that by this time one would anticipate that it would be resolved as well and there was no additional intervention to be performed. He did not feel she would benefit from any additional physical therapy. She was released to regular duty. Dr. Middlebrooks assigned zero percent permanent functional impairment and discharged Ms. Rue from his care. (Ex. 7, pp. 10-11)

Ms. Rue testified at her deposition that she believes she moved back to Iowa around May of 2015. When she returned to Iowa she did not contact Tyson about possibly returning to work for them. Rather, she began putting in applications in different areas. (Ex. B, p. 19) The record is void of any evidence that Ms. Rue sought any additional treatment for her injury.

On August 18, 2015, at the request of her attorney, Ms. Rue underwent an independent medical examination (IME) with David H. Segal, M.D., in Waterloo, Iowa. Ms. Rue reported that she had constant, moderate-severe back pain that was worsening. She had lower back pain that radiated to her left buttock, left hip, and left leg and into her toes. She told the doctor that she was unable to perform daily activities and that the intractable pain was greatly affecting her life and her function. She rated her pain as an 8-9/10. She reported that her lowest level of pain was an 8 and her highest pain level was a 10. On examination, the doctor noted that she was exquisitely tender in her low back. He did not even perform a straight leg raise due to the patient's pain level. With regard to her gait, the doctor noted it was very limited due to pain, slow, guarded, limp, required contact guard assistance. The doctor's assessment was degeneration of lumbar or lumbosacral intervertebral disc, displacement of lumbar intervertebral disc without myelopathy, lumbosacral spondylosis without myelopathy. Dr. Segal reviewed the October 22, 2014, MRI from Resurgens. He noted that her pain

started with a work injury and that before the injury she had "absolutely no pain." (Ex. 1, p. 2) Based on that history, he stated that her pain was clearly related to the work injury. (Ex. 1, pp. 2, 6) The doctor noted that she could barely move and walk. Dr. Segal assigned her to be completely off work, no lifting, no sitting, no bending, no moving, he felt she was completely disabled from working. He also opined that she sustained permanent impairment of 13 percent of the body as a whole due to the work injury. (Ex. 1)

On September 4, 2015, just a few weeks after her IME with Dr. Segal, Ms. Rue completed a job application for Ravenwood. Ms. Rue signed the application and agreed that the application was true and complete. On her job application she failed to list Tyson as a prior employer. However, she did indicate that she did have additional prior employment but that employment was not CNA related. (Ex. A)

On September 28, 2015, Ms. Rue signed a physical assessment form. The form indicated that she had never had any serious, recurring back pain and that she had never been treated for back pain, back spasms, back strain, or back injury. (Ex. A, pp. 10-12) She also signed a medical history form which stated that she had no current injuries/conditions. The form also stated that she had no past injuries of conditions. (Ex. A, p. 14)

Ms. Rue was hired to work as a CNA by Ravenwood on October 6, 2015. At the time of hearing Ms. Rue was still working for Ravenwood. She was working without any restrictions. She worked 40 plus hours per week and earned $17.00 per hour. She testified that the job of a CNA is "not intense." There are machines to lift people and she does not have to work alone. For example, there are two workers to lift one patient. She said that in her condition she is always certain to ask for help. She felt going back to work was helpful for her because when she was not working she was straining herself with her kids. She takes over-the-counter Tylenol for pain every day. She has no problems getting through her work days at Ravenwood. (Testimony)

Ms. Rue testified that prior to the September 12, 2014, work injury she had no back problems. She did admit that she was in a motor vehicle accident in 2012 which caused a pulled muscle in her back. However, according to Ms. Rue, this was a short-term problem. She said she had no serious problems with her back prior to the work injury. She did admit that she received $2,000 from her insurance carrier as a result of the MVA. Additionally, under cross-examination, Ms. Rue admitted that she received treatment for her back in 2008 from Allen Hospital. Thus, Ms. Rue's statement to Dr. Segal that she had no back problems prior to the work injury was not completely accurate.

Ms. Rue's responses on her job application at Ravenwood indicating that she had no prior back conditions, sprains, or strains were not completely accurate either. (Ex. A, p. 9) At hearing, Ms. Rue admitted that she failed to reveal any prior injuries to her perspective employer. She said she did not tell them because she wanted the job. (Testimony)

It is noted that on her job application to Ravenwood, Ms. Rue indicated that she worked while she was in Georgia. However, at hearing she said she just put that down on her job application so she could get a job at Ravenwood. According to Ms. Rue's hearing testimony, she did not work in Georgia, she simply put false information on her job application because that is what she felt like she needed to say in order to get the outcome she wanted. She explained that it was her sister who actually worked at that Georgia employer. At the hearing Ms. Rue testified that she went to work with her sister every day because her sister did not want to leave Ms. Rue alone in her home. However, in her deposition Ms. Rue testified that she stayed with "the father" every day at the house because he could not be left alone; he was an elderly person. She testified that she was paid $9.00 per hour to watch him. (Ex. B, p. 20) At hearing, Ms. Rue testified that she was in pain while she was in Georgia so she did not even look for a job while she was there. (Testimony)

The first issue to be addressed is whether Ms. Rue has demonstrated by a preponderance of the evidence that she sustained a permanent injury as a result of the September 12, 2014 work injury. The treatment note from Ms. Rue's last appointment prior to moving to Georgia, states that she was anticipated to reach MMI by October 20, 2014. (Ex. 5, p. 1) She then moved to Georgia and treated with Dr. Middlebrooks on several occasions until he placed her at MMI on January 22, 2015. He opined that she did not sustain any permanent functional impairment as a result of the work injury. Additionally, he released her to regular duty. (Ex. 7)

The only other medical opinion in this matter regarding permanency comes from Dr. Segal who did not see Ms. Rue until August of 2015. (Ex. 1) I do not find the opinions of Dr. Segal to be persuasive. Unfortunately, Ms. Rue failed to reveal any prior back problems to Dr. Segal. Thus, Dr. Segal's opinions are based on an incomplete and inaccurate history. Furthermore, the report of Dr. Segal is not consistent with the record as a whole. For example, he would place her at full disability. He noted she could barely move or walk. He recommended that she be completely off work, with no lifting, no sitting, no bending, and no moving. Yet, mere weeks after this evaluation Ms. Rue completed a job application which indicated that she had no problems with her back. Ms. Rue was then hired by Ravenwood and began working as a CNS on October 6, 2015. She testified that she is able to do this job without any difficulty. She testified she is able to work as a CNA 40 plus hours per week. These facts do not support Dr. Segal's findings or opinions. Thus, I do not give the report of Dr. Segal any weight.

After consideration of the entire record I find that Ms. Rue has failed to carry her burden of proof to show that she sustained any permanent disability as a result of the September 12, 2014 work injury. Ms. Rue is not entitled to any permanent partial disability benefits as a result of the September 12, 2014, work injury.

The next issue to be addressed is Ms. Rue's claim for temporary benefits. Because she failed to show entitlement to permanency benefits her claim is for temporary total disability benefits. Specifically, Ms. Rue is seeking temporary benefits from September 13, 2014 through January 23, 2015; this is the time that she was in

Georgia. At hearing, Ms. Rue testified that prior to the work injury she had made plans to move to Georgia to care for her ill father. She further testified that she did not take care of her Dad, rather, she was just there to visit him so that he could see her. She said that she had restrictions at the time so she could not work. As previously noted, this hearing testimony conflicts her deposition testimony. Because of these obvious contradictions in Ms. Rue's testimony the undersigned simply cannot rely on her testimony.

Brooke Salgar from Tyson testified at hearing. She has worked at Tyson since June of 1994. She is currently the human resource manager and has been since 1996. She works at the same location that Ms. Rue worked. She testified that if Ms. Rue had not voluntarily resigned her position at Tyson to move to Georgia, Tyson would have been able to accommodate the restrictions from Dr. Middlebrooks. Tyson is always able to accommodate restrictions unless a claimant is completely restricted from work. (Testimony)

I find that Ms. Rue voluntarily left her employment at Tyson for reasons not related to the work injury. I further find that Tyson had suitable work available for Ms. Rue at the time that she chose to leave her employment at Tyson. Therefore, I find that when Ms. Rue left Tyson to move to Georgia this constituted a refusal to accept suitable work. Thus, Ms. Rue has failed to show entitlement to any temporary total disability benefits.

We now turn to defendant's request for sanctions. Specifically, defendant is seeking sanctions under rule 876 IAC 4.36, against claimant because she failed to show up for two IME 85.39 appointments that defendant scheduled. The defendant had to pay for both appointments and is seeking sanctions in the amount of those charges. The evidentiary record indicates that Ms. Rue was a no show for an IME with Chad Abernathey, M.D. on two separate occasions: December 21, 2015 and January 20, 2016. Defendant was charged a total of $3,240.00 for these two appointments. (Ex. C)

At hearing, Ms. Rue testified that at some point her attorney's secretary did call her to tell her about the IMEs with Dr. Abernathey. However, it was too late at that point. She also mentioned that they sometimes got other people's mail and their mail went to other people so they miss important papers sometimes. However, in her deposition on April 4, 2016, she testified that she received notice of the appointment and just forgot to attend the appointments. (Ex. B, p. 23)

Defendant seeks sanctions under 876 IAC 4.36. However, I find that this rule is not applicable in this present instance because the claimant has not failed to comply with the rules or any order of a deputy commissioner. It is unfortunate that claimant did not cooperate with either of defendant's attempts to have her undergo a physical examination but she did not violate any rules or orders. Thus, defendant has failed to show a basis for sanctions.

Furthermore, Iowa Code section 85.39 contains its own remedy for an injured worker failing to attend an IME. The statute clearly states that the refusal of a claimant to submit to an 85.39 examination shall result in the suspension of the claimant's right to any compensation for the period of the refusal. While it is unfortunate that the defendant incurred thousands of dollars in expenses because Ms. Rue failed to attend the appointments sanctions are not appropriate in this case.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6)(e).

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.

Based on the above findings of fact, I conclude that claimant has failed to carry her burden of proof to show by a preponderance of the evidence that she sustained any permanent injury as a result of the September 12, 2014 work injury.

Claimant is also seeking temporary total disability benefits. 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. If the employee refuses to accept the suitable work with the same employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of refusal. Section 85.33(1) & (3).

Based on the above findings of fact, I conclude that when Ms. Rue voluntarily left her employment at Tyson to move to Georgia this constituted a refusal of suitable work. Thus, Ms. Rue has failed to show entitlement to temporary total disability benefits.

Defendant is seeking sanctions for claimant's failure to attend two IME appointments. 876 IAC 4.36 states: "If any party to a contested case or an attorney representing such party shall fail to comply with these rules or any order of a deputy commissioner or the workers' compensation commissioner, the deputy commissioner or workers' compensation commissioner may impose sanctions . . ." Based on the above findings of fact I conclude that sanctions are not appropriate. Defendant's request for sanctions is denied.

ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing from these proceedings.

Defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1 (2) and 876 IAC 11.7.

Signed and filed this 14th day of October, 2016.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.