BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ERICA TORRES, Claimant, vs. JOHN DEERE WATERLOO WORKS, Employer, Self-Insured, Defendant.	FILED MAR 24 2017 WORKERS COMPENSATION	File Nos. 5053687, 5053688 5053689, 5053690 ARBITRATION DECISION Head Note Nos.: 1100, 1803

STATEMENT OF THE CASE

Claimant, Erica Torres, has filed a petition in arbitration and seeks workers' compensation benefits from John Deere Waterloo Works, self-insured employer. Deputy workers' compensation commissioner, Stan McElderry, heard this matter in Waterloo, Iowa.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, 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.

ISSUES

The parties have submitted the following issues for determination:

Whether the claimant suffered a cumulative injury of arising out of and in the course of employment on November 1, 2013 (5053689); November 8, 2013 (5053687); December 9, 2013 (5053690); and/or July 25, 2014 (5053688); and for each file whether there is

1. Temporary disability
2. An industrial or scheduled member injury;
3. Permanent disability, and if so, the extent;
4. Commencement date; and
5. Timely notice.

FINDINGS OF FACT

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

The claimant was 32 years old on the date of hearing. She did not complete high school but did earn a GED in 2008. She has been working since she was 16 in various jobs such as hostess, housekeeper, waitress, prep cook, and cashier. Previous employment also includes line production at Tyson pulling chitlins. She also worked as a security guard at the Isle of Capri Casio. She testified that she left that employment because she did not like working the midnight (3rd) shift.

The claimant began her employment with John Deere Waterloo Works in August of 2011 as a core cell operator on D shift 6 p.m. to 6 a.m. Fridays, Saturdays and Sundays. That position was about 90 percent forklift driving and about 10 percent line work handling cores. The cores handled by hand varied in size from about 2 pounds up to 20 pounds. A device was used to move heavier cores.

The claimant claims to have sustained an injury arising out of and in the course of her employment on November 1, 2013; November 8, 2013; December 9, 2013; and/or July 25, 2014 from cumulative/repetitive trauma from her core cell operator position. She also claims depression related to the work injuries.

The claimant was first diagnosed with depression when she was about 11 and removed from her mother and put in foster care. She also suffered postpartum depression after the birth in her first daughter in 2005. Claimant would assert those are the only instances of depression she suffered before her employment at John Deere. However, the medical records show a very lengthy history of emotional and depression issues going back and continuing over 20 years. Much of the history is troubling and it would be best not to recount in too much detail in a public record. Suffice it to say that the records show treatment in 2000 following a miscarriage. Instances of rape, physical, and mental abuse are documented. The claimant also has a lengthy history of substance abuse which continued through at least some of her pregnancies. A significant observation of the undersigned was the claimant's emotional teariness on questioning regarding rape as opposed to her unemotional responses to questions regarding her injuries. If the current depression is causally connected to work some emotion on the issue would appear to have been displayed. The claimant was not and is not past the issues of depression and emotional issues predating her employment at John Deere as she would have one believe.

The claimant testified that she had no problems with her neck, shoulders, or either arm or hand before her work at John Deere. However numerous medical records predating the August 2011 employment with John Deere document problems going back to 2009. The claimant even told medical providers (and John Deere) until the spring of 2015 that her problems were due to the prior employment at Tyson. On the notice issue claimant asserted she did not know the difference between workers' compensation and WI (John Deere provided non-occupational short term disability

benefits). On the WI forms the claimant asserted that her complaints were not work related. Claimant had also been trained on how to report a work injury.

Only Dr. Manshadi, who performed an independent medical evaluation (IME) of the claimant, causally connects the work at John Deere to the claimant's alleged injuries. (Exhibit 1) His opinions are fatally flawed by descriptions of claimant's work that claimant contradicted (or disputed). All of the other relatively numerous medical providers (including Dr. Lawler, Dr. Karik, Dr. Olsen, Dr. Broghammer, Dr. Fields, University of Iowa Rheumatology) offer no opinion on causation or find no causation. There is not sufficient credible unflawed medical evidence to support causation. The claimant was not credible, some examples of why are detailed above. The claimant even quit a job as a school bus driver before starting the position after her work at John Deere ended. This evidences a lack of motivation or a realization that such employment could limit her workers' compensation recovery. Also her demeanor was poor. Her facial and body expressions were at times at odds with her testimony. She at times pivoted her testimony when confronted with contradictions or implausibilities. All was very consistent with a deliberate effort to exaggerate and conceal.

The claimant's weekly benefit rate for each alleged injury date was stipulated to in the hearing report and is accepted without a further recounting here. Claimant seeks payment/reimbursement of Dr. Manshadi's IME fee.

REASONING AND CONCLUSIONS OF LAW

The first issue is whether the claimant suffered a permanent disability or loss of earning capacity as alleged from an injury arising out of and in the course of employment.

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 14(f).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it arose out of and in the course of employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967). The words "arising out of" refer to the cause or source of the injury. The words "in the course of" refer to the time, place and circumstances of the injury. Sheerin v. Holin Co., 380 N.W.2d 415 (Iowa 1986); McClure v. Union et al., Counties, 188 N.W.2d 283 (Iowa 1971).

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. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296 (Iowa 1974).

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. The weight to be given to any expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts relied upon by the expert as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974); Anderson v. Oscar Mayer & Co., 217 N.W.2d 531 (Iowa 1974); Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

It has long been the law of Iowa that Iowa employers take an employee subject to any active or dormant health problems and must exercise care to avoid injury to both the weak and infirm and the strong and healthy. Hanson v. Dickinson, 188 Iowa 728, 176 N.W. 823 (1920). A material aggravation, worsening, lighting up, or acceleration of any prior condition has been viewed as a compensable event ever since initial enactment of our workers' compensation statutes. Ziegler v. U.S. Gypsum Co., 252 Iowa 613; 106 N.W.2d 591 (1961). While a claimant must show that the injury proximately caused the medical condition sought to be compensable, it is well established in Iowa that a cause is "proximate" when it is a substantial factor in bringing about that condition. It need not be the only causative factor, or even the primary or the most substantial cause to be compensable under the Iowa workers' compensation system. Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980)

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.

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).

The claimant did not meet her burden of establishing any temporary or permanent impairment or loss of earning capacity from a work injury as alleged on November 1, 2013; November 8, 2013; December 9, 2013; and/or July 25, 2014. As such, all other issues, other than an IME, are moot.

IME

In DART, the Iowa Supreme Court noted that:

> Our legislature established a statutory process to govern examinations of an injured worker in order to obtain a disability rating to determine the amount of benefits required to be paid by the employer. Neither courts, the commissioner, nor attorneys can alter that process by adopting contrary practices. If the injured worker wants to be reimbursed for the expenses associated with a disability evaluation by a physician selected by the worker, the process established by the legislature must be followed. This process permits the employer, who must pay the benefits, to make the initial arrangements for the evaluation and only allows the employee to obtain an independent evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Iowa Code § 85.39.
>
> Young argues the process is unfair to workers because the employer has too much control over the evaluation and can impose adverse consequences on the employee. She argues the process unfairly limits

> her to one reimbursable, independent evaluation and **could permit employers to sabotage the claim process by failing to initiate the evaluation process. Yet, these arguments have been impliedly rejected by the legislature in enacting section 85.39.** (Emphasis added).

Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 847 (Iowa 2015).

The decision in DART is clear that Iowa Code section 85.39 only requires an employer to pay for an IME when " . . . an evaluation of permanent disability has been made by a physician retained by the employer."

There was not an evaluation of permanent impairment made by an employer-retained physician before the IME of Dr. Manshadi for the claimant. For this reason, claimant's petition for an IME under Iowa Code section 85.39 is denied.

ORDER

THEREFORE IT IS ORDERED:

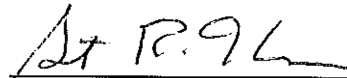
That the claimant take nothing.

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.

Defendants shall receive credit for all benefits previously paid.

That the parties bear their own costs pursuant to rule 876 IAC 4.33.

Signed and filed this 24th day of March, 2017.



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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.