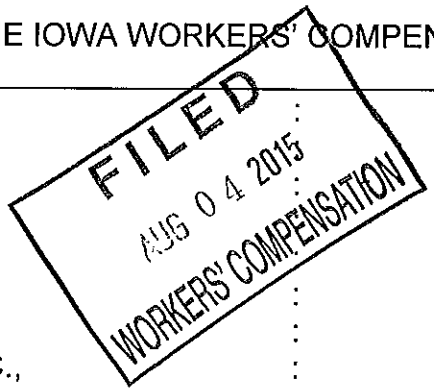
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



JULLIE WILLIAMS, Claimant, vs. TYSON FOODS, INC., Employer, Self-Insured, Defendant.	:	File No. 5043463 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1402.40, 1803, 2701

STATEMENT OF THE CASE

Claimant, Jullie Williams, filed a petition in arbitration seeking workers' compensation benefits from Tyson Foods, Inc., self-insured employer, as defendant. This case was heard in Des Moines, Iowa on April 8, 2015 with a final submission date of May 18, 2015.

At hearing, claimant objected to Exhibit B, pages 16-19 as being untimely served under rule 876 IAC 4.19(3)(d). Exhibit B, pages 16-19 are reports from Robert Gordon, M.D. The records indicate Dr. Gordon was a treating physician authorized by defendant. As such, the motion to exclude Exhibit B, pages 16-19 was denied. Schoenfeld v. FDL Foods, Inc., 560 N.W.2d 595 (Iowa 1997). Claimant was allowed to submit rebuttal after the taking of evidence, to offset any prejudice caused by the late submission of Exhibit B, pages 16-19. Claimant submitted that rebuttal as Exhibit 1, pages 6-9.

The record in this case consists of claimant's Exhibits 1-6, defendant's Exhibits A through N, and the testimony of claimant.

ISSUES

1. Whether the injury is a cause of permanent disability; and if so
2. The extent of claimant's entitlement to permanent partial disability benefits.
3. Whether claimant is entitled to alternate medical care under Iowa Code section 85.27.

FINDINGS OF FACT

Claimant was 36 years old at the time of hearing. Claimant was raised in Liberia. Claimant graduated from high school in Liberia. Claimant speaks both French and English. Claimant moved to the United States in 2004.

Claimant initially worked for Tyson for three years beginning in 2004. In 2007 she quit and began employment with The Homestead. With The Homestead claimant worked with autistic children. In 2008 claimant returned to employment with Tyson.

Claimant testified she worked at a job called "Round Heads." Claimant said she held a knife in her right hand and made cuts with the knife in hog heads. Claimant said her job was highly repetitive. She said while working "Round Heads" in approximately January of 2013 she began having pain and burning in her right shoulder.

On January 30, 2013 Jeffrey Lee, M.D. indicated he evaluated claimant for a recurrence of a ganglion cyst in the left wrist and the onset of right shoulder pain. Claimant was undergoing physical therapy and work restrictions. (Exhibit E)

On April 1, 2013 claimant was evaluated by Todd Johnston, M.D. for right shoulder pain. Claimant had full range of motion on the right shoulder. Claimant was assessed as having trapezius strain that was improving. (Ex. 3, p. 4)

Claimant returned to Dr. Johnston. Claimant had full range of motion. She was assessed as having mild scapular winging and trapezius strain. (Ex. 3, p. 5)

On June 24, 2013 claimant returned in followup with Dr. Johnston. Claimant indicated her shoulder was 75 percent better. She was assessed as having resolving trapezius strain. Dr. Johnston found claimant at maximum medical improvement (MMI). Dr. Johnston indicated he would not give restrictions to claimant until he was able to do a video review of claimant's new job. (Ex. 3, p. 7)

Claimant returned to Dr. Johnston on August 26, 2013. Claimant indicated increased pain at night following increased work. Claimant was assessed as having chronic trapezius and neck strain. Dr. Johnson opined claimant would have some chronic strain in the trapezius area. He opined claimant had no permanent impairment from her June 24, 2013 injury. (Ex. 3, p. 10; Ex. F)

Claimant was evaluated by Robert Gordon, M.D. on September 4, 2013 with complaints in the right trapezius area. Dr. Gordon did not believe claimant was at MMI. He recommended an MRI for the right trapezius area. (Ex. 4, pp. 4-5; Ex. B, pp. 1-2)

An MRI of the right shoulder showed a moderate AC arthropathy, mild glenohumeral (GH) capsulitis and mild rotator cuff periotendinitis. Claimant was returned to work at full duty. She was discharged from care with no permanent restrictions or permanent impairment. (Ex. 4, pp. 6-7; Ex. D)

Claimant returned to Dr. Gordon on December 23, 2013 complaining of right shoulder pain and lower back pain. Claimant was recommended to undergo physical therapy and avoid cross body work on the right. Claimant was assessed as having AC joint arthropathy. (Ex. 4, pp. 8-9)

Claimant returned in followup with Dr. Gordon on January 14, 2014. Claimant continued to complain of right shoulder pain. Claimant had an AC joint injection. Claimant was limited to lifting up to two pounds on the right and was to not perform any work above shoulder height. She was prescribed physical therapy. Claimant was assessed as having AC joint arthropathy. (Ex. 4, pp. 10-11)

On January 30, 2014 claimant saw Dr. Gordon in followup. Claimant indicated improvement with the right shoulder following an injection. Claimant was released from care. She was given home exercises. She returned to work with no restrictions. (Ex. 4, p. 12)

In a January 12, 2015 report Farid Manshadi, M.D., gave his opinions of claimant's condition following an independent medical evaluation (IME). Claimant continued to have right shoulder pain. Claimant had been off work beginning in November of 2014 due to child birth. Dr. Manshadi opined claimant had a 10 percent permanent impairment to the right shoulder based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, pages 475-479. He found claimant at maximum medical improvement on December 9, 2014. He recommended claimant avoid repetitive activity. He limited claimant to lifting from 20-30 pounds on the right. (Ex. 1, pp. 1-5)

In an April 3, 2015 report Dr. Gordon opined the restrictions by Dr. Manshadi were arbitrary. He opined he did not agree with the range of motion findings given in Dr. Manshadi's reports. He opined range of motion is not an objective physical way to test a patient. He disagreed claimant had a 10 percent permanent impairment. This was because when Dr. Gordon evaluated claimant, he found she had full range of motion in the right shoulder. He opined claimant had no permanent impairment to the right shoulder. (Ex. B, pp. 16-19)

In an April 16, 2015 letter, Dr. Manshadi indicated he had reviewed Dr. Gordon's April 3, 2015 report. Dr. Manshadi indicated claimant's MRI showed rotator cuff periotendinitis, AC arthropathy and evidence of GH capsulitis. This was why claimant showed evidence of reduced range of motion. He opined the restrictions he gave claimant were objectively and medically necessary. He indicated the reason Dr. Gordon found claimant had full range of motion was he had just given claimant an injection in January of 2014. Dr. Manshadi opined the restrictions he gave claimant were objectively and medically necessary. He noted claimant had both positive MRI findings and clinical evidence of an impingement syndrome. (Ex. 1, pp. 6-9)

Claimant testified she was off work approximately in November of 2014 to have a baby. She said she returned to work in February of 2015.

At the time of hearing claimant was working a whizzard knife taking cheeks from pig heads. Claimant said she can do the job easier than she can do the "Round Heads" job. Claimant said she still has pain and burning in her shoulder from the "Cheek Heads" job. She said she took the "Cheek Heads" job because it causes less pain to her shoulder, even though she earns approximately $1.00 less per hour. Claimant said given the conditions in her shoulder, she does not believe she could return to work in the "Round Heads" job. Claimant says she continues to work even though she has right shoulder pain, as she needs to support her family.

Claimant testified that during the period of time she was off for three months, her right shoulder continued to hurt.

Claimant testified she was unhappy with the care given by Dr. Gordon. She testified she has no confidence in him as a physician and requested defendant authorize a different orthopedic specialist for her shoulder.

CONCLUSIONS OF LAW

The first issue to be determined is if claimant's injury resulted in a permanent disability.

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 R. App. P. 6.14(6).

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).

Claimant's unrebutted testimony is that prior to her return to Tyson in 2008, she had no shoulder problems. Claimant's job in the "Round Heads" position was highly repetitive. Claimant treated with physicians for ongoing shoulder pains for approximately two years. An MRI of claimant's shoulder performed in September of 2013 showed degeneration of the cartilage cushioning the AC joint, inflammation of the tendon sheath and the rotator cuff, and inflammation of the connective tissues in the GH area. (Ex. D)

Two experts have opined whether claimant has a permanent impairment of her right shoulder. Dr. Gordon treated claimant for an extended period of time. He opined claimant had no permanent impairment to the right shoulder. (Ex. 4, p. 12; Ex. B, pp. 16-19)

Dr. Manshadi opined claimant does have the permanent impairment to the right shoulder. (Ex. 1) Dr. Manshadi's opinions are based, in part, on records showing claimant had ongoing right shoulder pain for approximately two years. His opinion is also based on MRI findings that claimant had degeneration of the cartilage cushioning the AC joint, inflammation of the tendon sheath in the rotator cuff, and inflammation of the connective tissues in the GH area.

Based on this record, it is found Dr. Manshadi's opinions regarding permanent impairment are more convincing than those of Dr. Gordon.

Claimant's unrebutted testimony is she had no right shoulder problems before her return to work at Tyson in 2008. Records indicate claimant has treated with authorized physicians for approximately two years for ongoing right shoulder pain. Diagnostic testing, including a September of 2013 MRI, show claimant has had inflammation and degeneration of the cartilage cushioning the AC joint, inflammation of the tendon sheath in the rotator cuff, and inflammation of connective tissue in the GH area. Based on this record, claimant has carried her burden of proof she sustained a permanent impairment caused by the January of 2013 injury.

The next issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

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.

Claimant was 36 years old at the time of hearing. She was raised in Liberia. Claimant graduated from high school in Liberia. She speaks French and English. Claimant worked for Tyson beginning in 2004. In 2007 she left Tyson to work with autistic children. In 2008 claimant returned to work at Tyson.

Dr. Manshadi opined claimant has a 10 percent permanent impairment to the body as a whole. As noted above, Dr. Manshadi's opinions regarding permanent impairment are found to be more convincing than the opinions of Dr. Gordon. Based on this it is found claimant has a 10 percent permanent impairment to the body as a whole from her January of 2013 injury.

Dr. Manshadi restricted claimant from repetitive activity on the right. He also limited claimant to lifting 20-30 pounds on the right. (Ex. 1, pp. 1-5)

Claimant's unrebutted testimony is that she took a $1.00 per hour pay cut to work in a position that was less physically demanding for her right shoulder.

Claimant has a 10 percent permanent impairment to the body as a whole. She has restrictions that limit her in her repetitive use of the shoulder and lifting with the right shoulder. Claimant has taken a job that pays less in order to protect her right shoulder. When all relevant factors are considered, it is found claimant has a 20 percent industrial disability or loss of earning capacity.

The final issue to be determined is if claimant is entitled to alternate medical care under Iowa Code section 85.27.

Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such

alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

The employer's obligation to provide medical care under the statute turns on the question of reasonable necessity, not desirability. The employee must prove the care being offered by the employer is unreasonable to treat the work injury, not that another treatment plan is reasonable. Lynch Livestock v. Bursell, No. 14-1133, Filed May 20, 2015 (Iowa Ct. App.)

Defendant has provided claimant with diagnostic testing, including an MRI. They have provided claimant with treatment with at least two physicians, including an orthopedic specialist. Claimant has received medication and an injection for her right shoulder. Defendant has authorized approximately seven months of physical therapy for claimant. Given this record, it cannot be said that the authorized care has been unreasonable.

I appreciate claimant's concerns regarding treatment with Dr. Gordon. As noted above, I find the opinions of Dr. Manshadi regarding permanent impairment with permanent restrictions are more convincing than that of Dr. Gordon. However, given the authorized treatment, as detailed above, the record does not indicate the authorized care provided by defendant was unreasonable. Claimant has failed to carry her burden of proof she is entitled to alternate medical care.

ORDER

THEREFORE IT IS ORDERED:

That defendant shall pay claimant one hundred (100) weeks of permanent partial disability benefits at the rate of four hundred forty-nine and 20/100 dollars ($449.20) per week commencing on January 2, 2013.

That defendant shall pay accrued benefits in lump sum.

That defendant shall pay interest on unpaid weekly benefits as ordered above and as set forth in Iowa Code section 85.30.

That defendant shall pay the costs of this matter.

That defendant shall file subsequent reports of injury as required under rule 876 IAC 3.1(2).

Signed and filed this 4th day of August, 2015.

JAMES F. CHRISTENSON
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.