BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FELIPA ACOSTA,

Claimant,

vs.

CAPITAL CITY FRUIT CO., INC.,

Employer,

and

SFM INSURANCE,

Insurance Carrier,
Defendants.

File No. 5065520

ARBITRATION

DECISION

Head Note No.: 1100; 1108; 1800, 1803

STATEMENT OF THE CASE

Claimant, Felipa Acosta, filed a petition in arbitration seeking workers' compensation benefits against Capital City Fruit Co. Inc., defendant, and SFM Insurance, insurer, both as defendants for an accepted work injury dated July 1, 2015. This case was heard on December 12, 2018, and considered fully submitted on January 7, 2019.

The record consists of joint exhibits 1-7, claimant's exhibits 1-6, and defendants exhibits A-B, D, along with the testimony of claimant, via Interpreter Ana Rodriguez, and James Barth, a witness for the defendants.

ISSUES

1. Whether claimant sustained an injury to the left shoulder, which arose out of and in the course of employment;

2. Whether the alleged injury is a cause of permanent disability and, if so;

3. The extent of claimant's industrial disability; and

4. The assessment of costs.

STIPULATIONS

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.

The parties stipulate the claimant sustained an injury on July 1, 2015, which arose out of and in the course of her employment. The parties further agree the injury was the cause of some temporary disability during the period of recovery, and settlement which is no longer in dispute.

The parties agree the claimant sustained an industrial disability and that the commencement date for permanent partial disability benefits, if any are awarded, is July 18, 2016.

FINDINGS OF FACT

At the time of the injury, the claimant's gross earnings were $479.83 per week. She was married and entitled to two exemptions. Based on those foregoing numbers, the weekly benefit rate is $329.37.

Prior to the hearing, the claimant was paid 25 weeks of compensation with the benefit at the rate of $315.10. Defendants have agreed to issue a check for the underpayment.

At the time of the hearing, claimant was a 53-year-old person. At all times material hereto she was married with adult children. Her educational background consists of six years of schooling in Mexico. While the claimant does have some familiarity with the English language, she does not speak functional and/or conversational English and she cannot read or write English. Prior to her immigration to the U.S., she was a stay at home mother.

Her pre-employment medical history is unremarkable. She had no physical limitations or restrictions imposed for either shoulder prior to the work injury. Her current permanent restrictions include no lifting more than 10-15 pounds and no lifting over her shoulders.

Before working for defendant employer, she was employed at a bakery packaging bread, followed by another temporary staffing position that also involved packaging. (Ex. 2:25) No lifting was required in either position. Claimant believes she could return to those positions if they were available.

On February 9, 2009, she began working for defendant employer as a produce packer. (Ex. 4:34) Her work duties included packaging, grading, sorting and labeling produce. She was also required to weigh cartons, place cartons on a pallet, and record used product. Id. These cartons weighed 25-30 pounds.

Approximately a year later, she was promoted to Senior Packer which included all of the aforementioned tasks along with operating hand jacks and forklifts, maintaining machines, directing employees, staging customer orders, and running a production day. (Ex 4:34)

Since her injury, she has received four pay increases and is working the same job as the one she had at the time of the injury. (Ex 4:36) Claimant testified that she currently has a co-worker to lift the tomato (25 pounds) and cucumber (30 pounds) crates. Prior to the injury, she was able to do all the essential tasks of her position without assistance.

On or about July 1, 2015, claimant was working around tomatoes and water. Someone had covered the wet floor with plastic and she slipped on the plastic and fell directly on her right shoulder. She felt immediate pain in her right shoulder and upper right arm. She was seen at Unity Pointy Clinic Family Medicine on the following day. (Joint Exhibit 1:1) She complained of the inability to lift her arm due to pain in the shoulder. Examination of the left shoulder was normal but the right shoulder revealed decreased range of motion and tenderness in the anterior shoulder on the right. (JE 1:2) Callie Waller D.O., ordered a trial of NSAIDs in home exercises to increase claimant's range of motion. Work restrictions were imposed of no repetitive lifting motions on the right arm and no lifting above the chest level. Id.

Claimant continued to experience pain and on July 16, 2015, a diagnostic injection was administered. (JE 1:6) Claimant's condition continued without improvement. On August 13, 2015, an MRI was ordered. (JE 1:9) The MRI revealed a large full thickness rotator cuff tear involving the supraspinatus and extending posteriorly to the cranial portion of the infraspinatus. There was also mild early atrophy of the infraspinatus and mild acromioclavicular joint degenerative changes. (JE 2:12) After the MRI, claimant was referred to Iowa Ortho where she was seen by Timothy R. Vinyard, M.D. (JE 3:14) Dr. Vinyard recommended surgical repair and placed claimant on a 2 pound lifting restriction. (JE 3:16) Claimant underwent surgery on October 9, 2015. (JE 5:80)

In the intervening time, claimant was seen at Des Moines Latin-American Medical Clinic where she reported right shoulder pain. During a visit on September 30, 2015, it was noted that a review of the symptoms was completely negative other than the right shoulder pain with movement. (JE 4:66) This diagnosis was again reaffirmed on May 7, 2016, when the review of symptoms is documented as negative other than the right shoulder issues. (JE 4:70)

Following surgery, claimant underwent a course of physical therapy. However, she continued to have pain and lack of range of motion. (JE 3:23) Because of her continued pain, stiffness, and lack of range of motion, claimant underwent a right shoulder injection on March 28, 2016. (JE 3:37) Claimant continued to report limited range of motion even after the cortisone injection. (JE 3:41) On April 26, 2016, she was seen by Dr. Vinyard who wrote the claimant had limited active range of motion but significantly improved passive range of motion. (JE 3:42) Restrictions were lifted to 20 pounds. (JE 4:44)

During the examination of May 23, 2016, Dr. Vinyard noticed claimant's inconsistent results between her active range of motion and passive range of motion. (JE 3:45) Dr. Vinyard suggested that claimant undergo a subsequent MRI to which claimant agreed. The May 27, 2016, MRI revealed mild signal changes in the supra and infraspinatus tendons consistent with a combination of postoperative change and tendinopathy. (JE 2:13)

After the unremarkable MRI, Dr. Vinyard noted in his medical records that her pain, strength, and range of motion had all improved and that claimant was ready to return to work without restrictions. (JE 3:49) Dr. Vinyard placed claimant at MMI and removed all restrictions. (JE 3:51)

Claimant returned to Dr. Vinyard on July 18, 2016, and during this visit, she reported mild pain especially with overhead motion. She also explained that she had not achieved full range of motion or strength. (Exhibit 3:53) Her presentation during this July 18, 2016 visit appeared to be at odds with the June 13, 2016 visit when Dr. Vinyard released her without restrictions. (C.f. Joint Exhibit 3:51 and JE 3:54) Dr. Vinyard and his physician's assistant could not explain claimant's continued symptoms and noted that on examination, both shoulders were comparable. (JE 3:54) Claimant was encouraged to push through the pain and continue her home exercises and strengthening regimen. Id.

On August 2, 2016, Dr. Vinyard issued a causation and extent letter agreeing that the treatment he provided arose out of her work, that he had no "great explanation for her continued mild to moderate symptoms", and that claimant was currently at MMI. He assigned a 2 percent upper impairment rating and a 1 percent whole person impairment rating as a result of her reduced range of motion. (Exhibit 3:56)

On August 31, 2016, claimant returned to Des Moines Latin-American Medical Clinic for follow-up of her hypertension, hypothyroidism, and right rotator cuff tear. (JE 4:76) At this visit, claimant reported good general health but for her right shoulder pain. On examination, the right shoulder showed abduction to 70°, and posterior elevation at 5° or less. (JE 4:76) It was felt that she was developing frozen shoulder on the right. Id.

On November 3, 2016, claimant underwent an independent medical examination with Dr. Jacqueline M. Stoken, D.O. (Ex. 1:1) Based on a review of the medical records, claimant's history, and Dr. Stoken's own examination, Dr. Stoken concluded claimant sustained a massive rotator cuff tear on the right along with mild to moderate shoulder bursitis on the left due to overuse and compensation for the right shoulder. (Ex 1:6) Dr. Stoken's diagnosis of shoulder bursitis on the left was based on her own examination of the claimant. (Ex 1:6) Claimant did not report left shoulder pain in her self-assessment. (Ex. 1:12-13) Dr. Stoken assessed a 15 percent impairment for the right shoulder injury as a result of the distal clavicle excision and range of motion deficits. (Ex 1:7) For the left shoulder, Dr. Stoken assessed a 4 percent whole person impairment for left shoulder range of motion deficits. (Ex. 1:7)

Dr. Stoken recommended permanent work restrictions of avoiding work at or above the shoulder level, avoiding lifting more than 10 pounds on a frequent basis, 15 pounds on an occasional basis, and 20 pounds on a rare basis. (Exhibit 1:7) Dr. Stoken placed claimant in the light duty work category. Id.

On March 29, 2017, claimant underwent a complete physical at Des Moines Latin-American Medical Clinic. (JE 4:79E) She reported to be in good health but did return on June 14, 2017, for complaints of pain in her feet and legs. (JE 4:79F)

On April 3, 2018, in response to an inquiry from the defendants, Dr. Vinyard denied treating claimant for left shoulder or arm pain or documenting any complaints of the same. (JE 3:60) He had no diagnosis of any left shoulder injury and therefore declined to make any causation between a left shoulder injury and claimant's original work injury. Id. He also responded to the impairment rating of Dr. Stoken and maintained his own impairment rating of 1 percent of the whole person and no restrictions. (JE 3:61)

At hearing, claimant testified that she believes her right shoulder is worse today than prior to her surgery. She has sought no treatment for her left shoulder. She testified that when she takes a pain pill for the right shoulder, there is a side benefit of alleviating pain in the left shoulder as well. Currently, she takes Tylenol three times per day.

She believes that her employer is aware of the restrictions that are imposed by Dr. Stoken. At times while she is working, the general supervisor has told her to slow down because of her shoulder. She does her current job with assistance. For instance, a line feeder will come and help to place heavy boxes on the line. She acknowledges that line feeders have been available during her employment with the defendant employer and is not a new position added to accommodate her shoulder issues. However, prior to her injury, she did not need the aid of a line feeder.

She is unable to lift her right arm above her head or hold things with her right arm.

James Barth, claimant's supervisor, testified that claimant reported no pain problems and requested no accommodations. According to Mr. Barth, most lines have two line feeders to lift the boxes of produce which weigh approximately 20-30 pounds each. He did acknowledge that at least two to three times per day, claimant would be required to lift an empty box onto a pallet and stack those boxes above shoulder level. He also said that this could be accomplished with the assistance of others. He was not aware of any current restrictions and believed she could do all the necessary functions of the Senior Packer.

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 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 Electric 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.

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.

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

The Iowa court has adopted the full-responsibility rule. Under that rule, where there are successive work-related injuries, the employer liable for the current injury also is liable for the preexisting disability caused by any earlier work-related injury if the former disability when combined with the disability caused by the later injury produces a greater overall industrial disability. Venegas v. IBP, Inc., 638 N.W.2d 699 (Iowa 2002); Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 265 (Iowa 1995); Celotex Corp. v. Auten, 541 N.W.2d 252, 254 (Iowa 1995). The full-responsibility rule does not apply

in cases of successive, scheduled member injuries, however. Floyd v. Quaker Oats, 646 N.W.2d 105 (Iowa 2002).

Defendants argue that claimant did not properly plead a left shoulder injury. It should be noted that in the hearing report and during the recitation of issues, this lack of notice defense was not raised. The petition identified claimant's right shoulder and whole body as injured body parts. The left shoulder is part of the body as a whole. Dr. Stoken's report was issued on November 3, 2016, and defendants obtained a rebuttal report from Dr. Vinyard on April 3, 2018, well in advance of the December 2018 hearing. Thus, defendants complaints of surprise and prejudice are not supported by the facts.

It is determined that the claimant properly pled her claim and the left shoulder injury can be considered as part of the issues presented to the undersigned.

During 2015 and most of 2016, claimant made no complaints of left shoulder injury either to the doctors at UnityPoint, to Dr. Vinyard, or even her own family practice doctor at Des Moines Latin-American Medical Clinic where her hypertension and hypothyroidism is monitored. In fact, during an examination on August 31, 2016, by her own personal physician rather than the workers' compensation chosen surgeon, claimant's left shoulder range of motion was deemed to be full. In a subsequent March 29, 2017, appointment where she underwent a complete physical there were no mentions of any left shoulder pain. In the pain reports completed by the claimant for Dr. Stoken, claimant identified only the right shoulder in her pain drawings and written assessment. Thus, Dr. Stoken's findings are based on solely her own examination conducted a year and a half after the original injury date.

Based on the foregoing, it is determined claimant failed to carry her burden that she sustained a left shoulder injury arising out of and in the course of her employment on July 1, 2015.

The next issue is the extent of claimant's right shoulder impairment.

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 released by Dr. Vinyard without restrictions; however, but for the June 13, 2016, visit to Dr. Vinyard, she consistently complained of right shoulder pain and decreased range of motion. Examination by her personal physician at Des Moines Latin-American Medical Clinic also revealed ongoing right shoulder problems even after Dr. Vinyard had released claimant to return to work without restrictions. She testified credibly that she utilized line feeders to lift boxes that weighed more than 20 pounds. This was corroborated by her supervisor, Mr. Barth, who testified that claimant's current position did not require any significant lifting. Claimant's previous jobs also did not require strenuous lifting and claimant testified that she could return to those jobs.

Essentially, claimant's current position falls within the work restrictions that Dr. Stoken set forth. Dr. Vinyard's records show claimant having inconsistencies between her passive and active range of motion; however, during each visit but for the June 13, 2016, one, claimant reported pain and discomfort with use of her right shoulder. Dr. Vinyard's return of claimant to work without restrictions despite claimant reporting pain and dysfunction in the visits before and after her release was jarring. Further, he acknowledged in the July 18, 2016, visit that claimant had not achieved full range of motion or strength.

The greater weight of the evidence supports a finding that claimant's right shoulder continues to pain her with use. She is able to perform her pre-injury position but with the assistance of line feeders that she did not use prior to her injury.

Dr. Stoken found claimant to have sustained a 15 percent impairment to the whole person as a result of the right shoulder injury. This impairment is more consistent with claimant's contemporaneous medical reports, as well as the findings of her personal physician at Des Moines Latin-American Medical Clinic.

Claimant has no high school diploma. She understands some English, but is not fluent. She could not perform a job that required the speaking or reading of English. She has limitations in lifting and use of her right shoulder. Based on the foregoing, it is determined claimant has sustained a 30 percent industrial disability.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant one hundred fifty (150) weeks of permanent partial disability benefits at the rate of three hundred twenty-nine and 37/100 dollars ($329.37) per week from July 18, 2016.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants are to be given credit for benefits previously paid.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. April 24, 2018).

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

That defendant shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

Signed and filed this 25th day of February, 2019.

JENNIFER S. GERRISH-LAMPE
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.