BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SHARON FREEMAN,		
Claimant,	FILED	File No. 5054755
vs.	FEB 17 2017	ARBITRATION
TYSON FOODS, INC.,	WORKERS COMPENSATION	DECISION
Employer, Self-Insured, Defendant.		Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Sharon Freeman, has filed a petition in arbitration and seeks workers' compensation benefits from Tyson Foods, Inc., employer, defendant. Deputy workers' compensation commissioner, Stan McElderry, heard this matter in Des Moines, Iowa.

ISSUES

The parties have submitted the following issues for determination:

1. Whether injury arising out of and in the course of employment on January 28, 2014 is limited to the right upper extremity (RUE) or is industrial;

2. The extent of permanent disability from the alleged injury, if any; and

3. Alternate medical care.

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.

FINDINGS OF FACT

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

The claimant was 31 years old at the time of hearing. She is originally from Liberia and her formal education ended with the 5th grade. She speaks heavily accented English, which she cannot read or write. Her sole employer since coming to

the United States has been Tyson. The claimant sustained a stipulated work injury on January 28, 2014. The primary issues are whether the injury is limited to the right upper extremity (RUE) or is industrial, and whether the injury is a cause of permanent impairment. The claimant also seeks alternate medical care.

The claimant had an injury to her right shoulder while working for Tyson in 2009. The diagnosis was subacromial bursitis and treatment was provided by Teri Formanek, M.D. (Exhibit 1, page 1) Dr. Formanek provided injections for the shoulder and discharged her from care on October 20, 2009 with no permanent restrictions. (Ex. 1, p. 8)

On January 28, 2014, the claimant reported an injury to her right arm and shoulder from repetitive pulling on pork products with her right side. She was seen by Timothy Vinyard, M.D., on February 4, 2014. (Ex. 2, p. 9) Dr. Vinyard performed an injection and ordered an MRI. The MRI results are not that remarkable according to Dr. Vinyard (Ex. 2, p. 15), but the actual MRI results state there was a subtle linear T1 and T2 signal intensity which might reflect a labral tear. (Ex. 5, p. 71) Although the claimant reported pain of 7 out of 10 in the shoulder on April 3, 2014, Dr. Vinyard placed her at maximum medical improvement (MMI) and released her from care. (Ex, p. 15)

The claimant also developed right carpal tunnel syndrome. An injection was provided on April 7, 2014. (Ex. 3, p. 26) On May 27, 2014, Benjamin Paulsen, M.D., performed carpal tunnel surgery. (Ex. 3, p. 36) The claimant was released to light duty until September 11, 2014. On September 11, 2014 the claimant was placed in a new position of "tagging." Tagging is marking an X on a hog butt and then the hanging of a tag on the upper part of a hog. It is a light regular bid job. Claimant testified that the job is painful for her right shoulder and she attempts to use her left side to perform the job. Claimant was placed at maximum medical improvement (MMI) for the carpal tunnel on January 19, 2015. A one percent RUE extremity impairment was opined. (Ex. C, p. 1)

Sunil Bansal, M.D., performed an independent medical evaluation (IME) of the claimant on May 15, 2015. (Ex. 8) Dr. Bansal opined right arm and shoulder injuries and tenderness to palpation in the right shoulder, grip strength in the right hand was substantially diminished from that on the left. He opined all were causally connected to work. He opined a 3 percent impairment to the right upper extremity for the right arm and hand, and a 3 percent upper extremity impairment for the right shoulder. This is a 4 percent body as a whole impairment. He also placed restrictions of no frequent lifting of over 5 pounds with the right arm, 10 pounds occasionally, and no more than 5 pounds with the right arm over shoulder level on an occasional basis. (Ex. 8, p. 87) He also opined no frequent overhead lifting with the right arm, no frequent pushing or pulling with the right arm, and no pushing or pulling greater than 20 pounds with the right arm. (Ex. 8, p. 87) Dr. Bansal recommended no further treatment "aside from maintenance is recommended." (Ex. 8, p. 87)

Dr. Vinyard was provided a copy of Dr. Bansal's IME. Dr. Vinyard disagrees that the claimant has a "significant tear of her labrum." (Ex. B, p. 1) He had not seen the claimant since 2014. The opinions of Dr. Bansal are accepted as more complete, more

accurately reflecting the reports of the claimant, claimant's ongoing pain, and based on a more recent examination of the claimant.

The restrictions of the claimant are very significant for a limited English speaker with a foreign 5th grade education who does not read or write. She is having problems in the job she currently has, and would be unable to return to most, if not all previous positions, she has held. Considering the claimant's medical impairments, training, permanent restrictions, as well as all other factors of industrial disability, the claimant has suffered a 65 percent loss of earning capacity.

On the date of injury the claimant had gross weekly earnings of $603.76, was single, and entitled to 1 exemption. As such, her weekly benefit rate is $375.35. The parties stipulated that the commencement date for permanent disability is June 10, 2014.

REASONING AND CONCLUSIONS OF LAW

The first issue then is the bilateral upper extremity claimed 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.

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.

The claimant has the burden of establishing an injury arising out of and in the course of employment. It was found above that she met that burden as to the right upper extremity and shoulder (BAW).

The next issue is the extent of 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. 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 65 percent loss of earning capacity, she has sustained a 65 percent permanent partial industrial disability entitling her to 325 weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(u).

ALTERNATE MEDICAL CARE

> [T]he 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.

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Iowa R. App. P. 14(f)(5); Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Id. The employer's obligation turns on the question of reasonable necessity, not desirability. Id.; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983). In Pirelli-Armstrong Tire Co., 562 N.W.2d at 433, the court approvingly quoted Bowles v. Los Lunas Schools, 109 N.M. 100, 781 P.2d 1178 (App. 1989):

> [T]he words "reasonable" and "adequate" appear to describe the same standard.
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> [The New Mexico rule] requires the employer to provide a certain standard of care and excuses the employer from any obligation to provide other services only if that standard is met. We construe the terms "reasonable" and "adequate" as describing care that is both appropriate to the injury and sufficient to bring the worker to maximum recovery.
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> The commissioner is justified in ordering alternate care when employer-authorized care has not been effective and evidence shows that such care is "inferior or less extensive" care than other available care requested by the employee. Long; 528 N.W.2d at 124; Pirelli-Armstrong Tire Co.; 562 N.W.2d at 437.

Claimant's own IME doctor is currently not recommending any particular care or treatment. On this record there is no alternate care to order at this time. A petition for alternate care may be filed if this changes. Alternate medical care is denied at this time.

ORDER

THEREFORE, IT IS ORDERED:

That the defendants pay claimant three hundred twenty five (325) weeks of permanent partial disability benefits commencing June 10, 2014, at the rate of three hundred seventy-five and 35/100 dollars ($375.35).

Costs are taxed to the defendant pursuant to rule 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 17th day of February, 2017.

STAN MCELDERRY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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SRM/srs

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.