BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARIA TORRES DE LOPEZ,		File No. 5043779
Claimant,		A R B I T R A T I O N
vs.		D E C I S I O N
TYSON FOODS, INC.,		
Employer, Self-Insured, Defendant.		Head Note Nos.: 1800, 1803 2502, 2601

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Maria Torres De Lopez, filed her original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on January 30, 2014. Claimant alleged she sustained a work-related injury on November 25, 2011. (Original notice and petition)

Tyson Foods, Inc. is self-insured for purposes of workers' compensation. Defendant filed its answer on February I7, 2014. The company admitted the occurrence of the work injury. A first report of injury was filed on May 24, 2013.

The hearing administrator scheduled the case for hearing on August 25, 2015 at 1:00 p.m. The hearing took place in Des Moines, Iowa at the Iowa Department of Workforce Development. The undersigned appointed Ms. Gale Sweeney Christensen as the certified shorthand reporter. She is the official custodian of the records and notes. Mr. Rafael Geronimo was sworn in as the Spanish interpreter.

Prior to the commencement of the hearing, Mr. William J. Bribriesco, attorney for claimant, filed a Motion to Recuse Hearing Deputy. The Motion was filed on August 21, 2015. Among other matters, Mr. Bribriesco alleged at paragraph 5 of his motion:

> 5. To begin with, Claimant's Counsel submits that Deputy McGovern has demonstrated a personal bias or prejudice against Claimant's Counsel and/or has a personal bias in favor of Defendant Tyson Foods. Because of this bias/prejudice, Deputy McGovern cannot render a fair and impartial Arbitration Decision in this case.

On August 25, 2015, defendant filed a resistance to claimant's motion to recuse Deputy McGovern. In the resistance, defendant stated among other matters:

> 2. First, the motion in question should be denied because Claimant's counsel failed to comply with the recusal rule. Iowa Admin. Code section 876-4.38(4) states
>
> If a party asserts disqualification on any appropriate ground, including those listed in subrule 4.38(1), the party shall file a motion supported by an affidavit pursuant to Iowa Code section 17A.17(7). The motion must be filed as soon as practicable after the reason alleged in the motion becomes known to the party.
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> 3. The rule affirmatively required Claimant's counsel to file an affidavit, as soon as practicable, in support of his motion. Certainly, such an affidavit could have been filed with the motion to arguably comply with the rule, but was not. The arbitration hearing in this matter is scheduled for Tuesday, August 25, 2015, one day from now. Even if such an affidavit was filed on August 24, 2015, it would be late. The eve of trial is not synonymous with "as soon as practicable" under these facts...

A hearing was held on the motion and the resistance. Each attorney had the opportunity to argue his or her position. After all arguments had been heard, the undersigned declined to recuse herself.

Claimant testified on her own behalf. Defendant elected to call no witnesses.

The parties offered exhibits. Claimant offered exhibits marked 1 through 7. Defendant offered one exhibit marked AA. The parties offered joint exhibits marked A through J. All proffered exhibits were admitted as evidence in the case. Post-hearing briefs were due on September 30, 2015. However, counsel for claimant, requested an extension due to an illness. The filing of the briefs was extended to October 12, 2015. The case was deemed fully submitted on October 12, 2015.

STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

1. There was the existence of an employer-employee relationship at the time of the alleged injury.
2. Claimant sustained an injury on November 25, 2011, which arose out of and in the course of her employment;
3. The alleged injury is a cause of both temporary and permanent disability;

4. Temporary benefits are no longer at issue;

5. The commencement date for the payment of any permanent disability is September 22, 2014;

6. The weekly benefit rate for which benefits should be paid is $332.70 per week; and

7. Defendant has waived any affirmative defenses it may have had available;

ISSUES

The issues presented are:

1. What is the extent of permanent disability benefits to which claimant is entitled?

2. Whether claimant is entitled to the payment of the first independent medical examination claimant had; and

3. To whom the costs of the litigation should be assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This deputy, after listening to the testimony of claimant at hearing, after judging the credibility of claimant, and after reading the evidence, and the post-hearing briefs, makes the following findings of fact and conclusions of law:

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

Claimant is a very pleasant 52-year-old married mother of three children. Currently, she resides in Davenport, Iowa. She attended school through the third grade in Mexico. Claimant speaks Spanish, but she understands very little English. She does not drive a motor vehicle. She is right-hand dominant.

Claimant commenced her employment with Tyson in 2002. She works at the plant, located in Joslin, Illinois. She rides to work with her spouse who also works at the same facility.

Initially, claimant presented to Edward A. Connolly, M.D., with right shoulder pain on December 16, 2011. (Joint Exhibit A, page 1) Claimant followed up with Dr. Connolly on January 13, 2012. Claimant complained of right upper extremity pain of one month duration. (Jt. Ex. A-2) Dr. Connolly diagnosed claimant with:

IMPRESSION:

1. Right upper extremity pain, rule out cervical radiculopathy.

2. Right shoulder pain.

3. Impingement syndrome.

4. Status post right wrist first dorsal compartment release, October 12, 2011.

(Jt. Ex. A, p.3)

On January 27, 2012, claimant returned to Dr. Connolly with complaints of pain in her right shoulder, right arm and right wrist. (Jt. Ex. A, p. 4) Dr. Connolly diagnosed claimant with "Probable rotator cuff tendinopathy of the right shoulder." (Jt. Ex. A, p. 4) Because of her right wrist issues and right shoulder pain, Dr. Connolly recommended claimant be transferred to a work position that was less strenuous than the one that she had been holding. (Jt. Ex. A, pp.5-6) Dr. Connolly also advised claimant to avoid repetitive use of the right shoulder and wrist. (Jt. Ex. A, p. 6) Claimant was transferred to the position of pick lean.

On October 5, 2012, Dr. Connolly performed a right shoulder arthroscopy with biceps tenotomy, debridement of partial-thickness rotator cuff tear and subacromial decompression. (Jt. Ex. D, p. 3) Claimant tolerated the procedure well. There were no known complications. (Jt. Ex. D, p. 4)

The orthopedic surgeon opined claimant was at maximum medical improvement on April 9, 2013. Dr. Connolly assessed permanent work restrictions for the right arm of no frequent lifting greater than five pounds; no occasional lifting greater than ten pounds, no frequent gripping, pinching, only occasional pushing and pulling and no reaching above the shoulder with the right arm. (Jt. Ex. A, p. 14) Dr. Connolly did recommend a second opinion. (Jt. Ex. A, p. 13)

On November 18, 2013, defendants sent claimant to Tuvi Mendel, M.D., for an independent medical examination. (Jt. Ex. G, p. 1) Dr. Mendel did not find claimant to be at full MMI. The orthopedic surgeon recommended additional medical treatment for claimant's right shoulder. (Jt. Ex. G, p.4)

Claimant's counsel referred claimant to Richard L. Kreiter, M.D. Dr. Kreiter examined claimant on November 19, 2013. Dr. Kreiter diagnosed claimant with:

A) Mild adhesive capsulitis, post right shoulder arthroscopy with acromioplasty, subacromial bursectomy, and biceps tenotomy.

B) Symptomatic degenerative arthritis of the right acromioclavicular joint.

C) Right scapular pain with myositis, tendonitis, secondary to deconditioned upper back.

D) Possible carpal tunnel.

E) Diabetes.

(Ex. 3, p. 5)

Dr. Kreiter opined claimant was not at maximum medical improvement. Nevertheless, Dr. Kreiter provided the following permanent impairment rating:

> Maria has permanent impairment as a result of her limited motion of her shoulder and the AC joint pathology. We will reference the AMA Guides, 5th Edition, Guide to Permanent Impairment, page 476, figure 16-40. Flexion of 160 equals a 1% upper extremity impairment. Page 477, figure 16-43, abduction of 110 degrees equals a 3% upper extremity impairment. Page 479, figure 16-46, external rotation of 45 degrees equals a 1% upper extremity impairment. Page 499, table 16-18, impairment due to specific joint abnormalities under acromioclavicular joint, equals at least a 10% upper extremity impairment. Therefore, a 15% upper extremity impairment would be a 9% whole person impairment from page 439, table 16-3.

(Ex. 3, p. 5) Dr. Kreiter agreed with Dr. Connolly as to the proper work restrictions. (Ex. 3, p. 5)

Defendant referred claimant to Dr. Mendel for treatment following the initial examination that occurred on November 18, 2013. Dr. Mendel prescribed conservative treatment modalities. However, on March 13, 2014, Dr. Mendel performed the following surgical procedures:

1. Right shoulder arthroscopic glenohumeral joint labral debridement and synovectomy.

2. Right shoulder arthroscopic rotator cuff repair.

3. Right shoulder arthroscopic redo subacromial decompression.

4. Right shoulder arthroscopic redo acromioclavicular joint resection.

(Jt. Ex. G, p. 8) Claimant was taken to the recovery room in good condition. (Jt. Ex. G, p. 9)

Effective September 5, 2014, Dr. Mendel opined claimant had reached maximum medical improvement. The surgeon released claimant to full duty work. (Ex. G, p. 24)

On March 11, 2015, Dr. Mendel rated claimant as having a permanent impairment in the amount of 11 percent. The surgeon did not provide permanent restrictions for the right shoulder injury. He did acknowledge claimant was working in a light duty position and was performing reasonably well. (Jt. Ex. G, p. 26)

Claimant returned to Dr. Kreiter on April 14, 2015. (Ex. 6, p. 12) Dr. Kreiter opined claimant's permanent impairment rating remained at 9 percent to the body as a whole. (Ex. 6, p. 12) Dr. Kreiter also maintained the same work restrictions as he had imposed in November 2013. The evaluating physician did not believe additional treatment for the right shoulder was necessary. (Ex. 6, p. 12)

During her hearing, claimant testified credibly. She stated she is working in the "picnic area" and she is keeping within the restrictions imposed by Dr. Connolly. However, claimant does not believe the work is really light work. She testified she moves her hands all day long in a repetitive manner. She stated she does not work over her right shoulder.

In order to alleviate pain, claimant takes two over-the-counter Ibuprofen. She testified she is in constant pain and the pain never leaves her. She stated she must sleep on her back. She is unable to sleep on either side.

Claimant testified she earns $14.10 per hour as a Grade 1 worker. She does not earn overtime but she works from 32 to 37 hours per week, depending on the amount of work available at the plant. Claimant stated she is motivated to work. She does not want to leave her present position. Claimant enjoys working at Tyson. She has not sought outside employment.

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.

In arbitration proceedings, interest accrues on unpaid permanent disability benefits from the onset of permanent disability. Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979); Benson v. Good Samaritan Ctr., File No. 765734 (Ruling on Rehearing, October 18, 1989).

Claimant is an older worker. She does not read or write English. She understands some English but is very deficient in her command of the spoken word. Should claimant lose her job at Tyson, she would be unemployable. She attended school in Mexico through the third grade. Retraining is highly unlikely for claimant.

It is fortunate claimant enjoys her present job and is motivated to continue working at Tyson. She has some work restrictions but is able to perform all of her duties within the confines of those restrictions. Defendant is able to accommodate claimant. Claimant earns more money per hour now than she earned at the time of the work injury. She is precluded from working overtime hours. Claimant has no desire to seek other employment.

In reviewing all of the factors involving industrial disability, it is the determination of the undersigned deputy workers' compensation commissioner; claimant has an industrial disability in the amount of 30 percent. Defendants shall pay unto claimant 150 weeks of permanent partial disability benefits at the stipulated weekly benefit amount of $332.70 per week and commencing from the stipulated date of September 22, 2014.

Defendant shall take credit for all benefits previously paid to claimant.

The next issue for resolution is the payment of Dr. Kreiter's first independent medical examination pursuant to Iowa Code section 85.39 in the amount of $600.00. At the commencement of the hearing, defendant agreed to pay the second, more expensive independent medical examination. It was also performed by Dr. Kreiter. The cost was in the amount of $700.00.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

In Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015), the Iowa Court of Appeals found Iowa Code section 85.39 allows for an independent medical examination to be assessed against the defendant-employer.

However, the assessment can be charged only after the employer retained doctor has provided an impairment rating first.

Such is not the case here. Dr. Kreiter's initial IME was given prior to defendant-employer having obtained any impairment rating.

Claimant is entitled to one independent medical examination pursuant to Iowa Code section 85.39. Claimant cites no legal authority for the granting of multiple exams to be paid by defendant. Defendant is not liable for the payment of the first exam by Dr. Kreiter.

It is the determination of the undersigned; defendant shall pay unto claimant the following costs:

Filing fee $100.00

Service fee $5.54

Total $105.54

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay unto claimant one hundred fifty (150) weeks of permanent partial disability benefits commencing from September 22, 2014 and payable at the stipulated weekly benefit rate of three hundred thirty-two and 70/100 dollars ($332.70) per week.

Accrued benefits shall be paid in a lump sum with interest as provided by law.

Defendant shall take credit for all benefits paid prior to the filing of this decision.

Costs in the amount of one hundred five and 54/100 dollars ($105.54) are assessed to defendant.

Defendant shall file all reports as required by this division.

Signed and filed this 13th day of November, 2015.

Michelle A. McGovern

MICHELLE A. MCGOVERN
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.