

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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SCOTT FRERICK,

Claimant,

vs.

ARCHER DANIELS MIDLAND  
CO. INC.,

Employer,  
Self-Insured,  
Defendant.

**FILED**  
MAY 07 2019  
WORKERS' COMPENSATION

File No. 5059421

ARBITRATION

DECISION

: Head Notes: 1108, 1402, 1700, 1803, 3800

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STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Scott Frerick, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on August 17, 2017. Claimant alleged he sustained a work-related injury on April 14, 2015. (Original notice and petition)

For purposes of workers' compensation, Archer Daniels Midland Co. Inc., (ADM), is self-insured. Defendant filed its answer on August 28, 2017. The defendant admitted the occurrence of the work injury on April 14, 2015.

The hearing administrator scheduled the case for hearing on September 6, 2018. The hearing took place at 150 Des Moines Street in Des Moines, Iowa. The undersigned appointed Ms. Erin Hines, as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on his own behalf. Defendant did not call any witnesses to testify at the hearing. Joint Exhibits 1 through 4 were offered. Claimant offered exhibits 1 through 3. Defendant offered exhibit A. All proffered exhibits were admitted as evidence. The original transcript was filed on September 19, 2018. The parties also submitted post-hearing briefs on October 8, 2018. The case was deemed fully submitted on that date.

### 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 April 14, 2015, which arose out of and in the course of his employment with respect to the abdomen/oblique and back;
3. The alleged injury is a cause of temporary disability;
4. The injury is a cause of permanent disability;
5. Temporary benefits are no longer at issue;
6. If permanency is found the parties agree the method of calculation is by the industrial manner;
7. The commencement date for any permanent partial disability benefits is August 3, 2015;
8. The weekly benefit rate is \$692.49;
9. Defendant waives any affirmative defenses it may have had available to the employer;
10. Medical benefits are no longer in dispute;
11. Defendant is entitled to a credit for the payment of permanency benefits for 57 weeks and 4 days at the rate of \$692.49 per week. This covers the time period from August 31, 2015 through September 8, 2016;
12. The parties stipulate to an underpayment of weekly benefits in the amount of \$131.78 per week; and
13. The parties agree claimant has paid the costs listed.

### ISSUE

There is the issue of the extent of claimant's permanent partial disability.

### FINDINGS OF FACT

This deputy, after listening to the testimony of claimant and after judging the credibility of claimant, plus 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 Rule of Appellate Procedure 6.14(6).

Claimant is presently 53 years old and married. He graduated from Kennedy High School in Cedar Rapids, Iowa in 1983. In the summer of 1986, claimant obtained his commercial drivers' license (CDL). Claimant detailed his truck driving jobs in claimant's exhibit 1, page 1. From 1986 through 1998 claimant worked at Dale Lee Distributing in Cedar Rapids. He was a beer distributor for Budweiser products. From 1998 through 2009, claimant worked for Fleck Sales out of Cedar Rapids. Fleck Sales is a distributor for Miller beer products.

In August of 2009, claimant commenced his employment with Archer Daniels Midland Co., Inc. as a slip seat driver. Primarily, claimant hauled corn germ from Cedar Rapids, Iowa to Clinton, Iowa. There was no lifting involved. However, occasionally claimant would be assigned to haul corn syrup to Chicago, Illinois. Then claimant would have to lift long hoses that weighed from 40 to 80 pounds. He would hook the hoses together for the dissemination of the syrup.

During his direct examination, claimant explained he works as a "preloader". Claimant testified:

A. A preloader is the one that goes into the plant. You got to check in at the system there. Then you turn in your - - get a ticket that gets you into the plant. And then you get the load. You take it. You stage it in the yard. And the driver runs that load, be it syrup, germ. Quite a few things we haul out of that plant.

Q. So you're just getting the load ready, so that the driver can take the load somewhere else?

A. Right. I stage it, I load it, and then I go get another one.

Q. And is that all done on the ADM property then?

A. I would say about 90 percent of it is on ADM property, yeah.

Q. So you're within what kind of a distance, from what part of the - - you know, one part of the plant to the other?

A. If I did a round robin from our lot, get checked in to -- about 2 miles, the driving per load, maybe more than that. It could be a little light.

Q. First of all, what kind of truck or equipment are you driving in this preload job?

A. Full-size semi.

Q. Tractor trailer?

A. Tractor trailer, yes.

(Transcript pages 25-26)

Claimant continued during direct examination to explain his job duties. He testified:

A. We have our own dedicated lot, which is close to ADM, which is about a mile from the plant.

Q. And then what do you do once you pick up the tractor trailer? What do you do?

A. I got to go onto a scale, and I check in with dispatch.

Q. And so you drive what, a mile or 2 to get there?

A. Yeah. Probably a mile, half mile, yeah.

Q. And so then you put the truck on top of a scale?

A. Right. They check me in.

Q. And what happens then?

A. Then they give me a ticket and then a certificate of verification. That gets me into the plant. So I proceed from there to drive to the plant through the gates to another scale, where they load me from above like a spout. And then I get loaded. I get -- the paperwork is received there. I take the paperwork back to dispatch, and I get another empty. It's just -- it's like a big circle

Q. You just leave the truck there, and then the driver picks it up and drives it off?

A. Right. They get the paperwork, and somebody will take that load, yeah.

(Tr., pp. 26-27)

During direct examination, claimant described how he had sustained his work injury on April 14, 2015 at approximately 4:00 a.m. Claimant was reaching for a heavy cordless drill. He stepped into a pothole he did not see. He was thrown off balance and fell against an empty metal hopper. Claimant testified the back of his neck made contact with the hopper. (Tr. pp. 31-33)

Mr. Currie, claimant's counsel, asked claimant how he felt immediately following the work injury. Claimant testified:

A. My left arm instantly went numb from top - - to bottom. And I remember dropping the drill. And I - - it just was numb as numb could be.

Q. Did you fall to the ground?

A. No. I never hit the ground.

Q. What did you do then?

A. I tried to shake it off with my kind of - - you know when your arm falls asleep?

Q. And you're kind of demonstrating.

What are you talking about here?

A. I was talking like - -

Q. Shaking your left hand and arm?

A. Like what the heck did I do? And I was worried about the drill. Did I break the drill? I never once dreamed that I did anything to my neck. I just thought it was - - my arm was completely just gone, yeah.

Q. And were you able to continue with your work that day then?

A. I did.

(Tr., pp. 33-34)

Claimant was directed to St. Luke's Hospitals and Clinics for medical care. (Joint Exhibit 4, page 1) On April 15, 2015, Cynthia R. Lewis-Younger, M.D., treated claimant

for his work injury. The physician conducted a physical examination. Dr. Lewis-Younger diagnosed claimant with:

IMPRESSION: This is an acute trapezius and thoracic back strain. My plan is to limit his work day to about 6 hours for a week. He has been prescribed Ibuprofen 800 mg and hydrocodone and cyclobenzaprine to take when at home. He is to use warm soaks and to return to clinic on 04/20/2015.

(Jt. Ex. 4, p. 1)

Claimant returned to Dr. Lewis-Younger on April 20, 2015. The physician diagnosed claimant with acute trapezius and cervical strain. (Jt. Ex. 4, p. 2) Claimant was prescribed a sling to elevate his left arm. Physical therapy two to three times per week with the sling was ordered. The physician renewed claimant's prescriptions. (Jt. Ex. 4, p. 2)

On April 28, 2015, Shirley Pospisil, M.D., ordered x-rays of the cervical spine. (Jt. Ex. 4, p. 3) The results were read by Keith F. Lacey, M.D. The radiologist opined:

1. Changes of degenerative disc disease at C5 6.
2. Left C3 4 facet arthropathy.
3. T1 is not seen on the lateral view.

(Jt. Ex. 4, p. 3)

On May 1, 2015, claimant underwent Magnetic Resonance Imaging (MRI). Theodore S. Donta, M.D., interpreted the results. Dr. Donta opined:

At C3-C4, there is mild bulging of the disc annulus and posterior disc osteophyte spurs bilaterally. There is mild facet arthropathy on each side. The AP diameter of the spinal canal centrally measured 14 mm. There is moderate left and mild right foraminal stenosis.

At C4-C5, there is mild disc space narrowing a disc bulge, and endplate disc osteophyte spurs. The AP diameter of the spinal canal centrally measured 13 mm. There is moderate left and mild right foraminal stenosis.

At C7, there is mild disc space narrowing a mild disc bulge, and a left-sided disc osteophyte complex. Is moderate left foraminal stenosis. The AP diameter of the spinal canal measured 13 mm.

The C7 through the T2 levels are normal.

**Impression:** Multilevel degenerative disc disease as described above, with mild spinal canal stenosis and foraminal stenosis at several levels. Please see the report for level by level details.

(Jt. Ex. 4, pp. 4-5)

Claimant returned to see Dr. Pospisil on May 4, 2015. The physician explained the results of the MRI. Dr. Pospisil explained to a representative from ADM and to the nurse case manager, claimant was in need of work restrictions. The physician imposed no use of the left hand, claimant was permitted to perform clerical work, claimant must alternate walking, standing and sitting as tolerated for comfort. Claimant was prohibited from performing any driving under DOT regulations, secondary to the medications he was prescribed. (Jt. Ex. 4, p. 6) On May 4, 2015, Dr. Pospisil referred claimant to Chad D. Abernathey, M.D., a neurosurgeon, at Cedar Valley Orthopedics. (Jt. Ex. 4, p. 7)

Dr. Abernathey examined claimant on May 18, 2015. The neurosurgeon performed an examination and provided a neurosurgical opinion. (Jt. Ex. 1, p. 1) Dr. Abernathey reviewed the MRI. He also conducted a physical examination of claimant. Dr. Abernathey determined:

**IMPRESSION/RECOMMENDATIONS:** Mr. Scott Frerick clinically presents with a significant left C7 radiculopathy secondary to left C6-7 disc extrusion with osteophyte formation and stenosis and incidental adjacent C5-6 degenerative changes with stenosis. The patient demonstrates -3, 4 weakness of the left triceps and wrist and finger extensors with sensory impairment extending into the 2<sup>nd</sup> and 3<sup>rd</sup> digits with an absent triceps reflex. I discussed the risks, goals, and alternatives of conservative management vs. surgical intervention, with the patient in detail. I emphasized the risks of carotid, tracheal, esophageal, and cranial nerve injuries, non-fusion, collapse of fusion graft, dislocation of fusion, fusion complications, instability, CSF leak, spinal cord injury, vertebral artery injury, stroke, heart attack, death, infection, paralysis, sensorimotor deficits, bladder or bowel dysfunction, autonomic complications, persistent pain, allergic and adverse drug reactions, anesthetic complications, hemorrhage, phlebitis, DVT, PE, recurrence, possibility of persistent symptoms, instrumentation vs. non-instrumentation, allograft vs. autograft, and so on. He states he fully understands the breadth of our conversation and wishes to proceed with C5-6 and C6-7 ACDF with instrument allograft in the coming days.

(Jt. Ex. 1, pp. 1-2)

On June 3, 2015, Dr. Abernathey performed a "C5-C6 and C6-C7 anterior cervical discectomy, osteophyctomy, instrumented allograft fusion, microscope." (Jt.

Ex. 1, p. 5) The patient was subsequently taken to the recovery room in satisfactory condition. (Jt. Ex. 1, p. 5)

Claimant had a follow up visit with Dr. Abernathey on June 17, 2015. Claimant's neurologic function was intact. He demonstrated excellent relief of his pre-operative symptomatology. (Jt. Ex. 1, p. 2) Dr. Abernathey ordered physical therapy and claimant was allowed to return to light-duty work. Claimant was instructed to work four hours per day, to limit lifting to 20 pounds, and to avoid repetitive bending, lifting, or twisting. (Jt. Ex. 1, p. 2)

On July 29, 2015, Dr. Abernathey returned claimant to full duty work. (Jt. Ex. 1, p. 2) Claimant returned to Dr. Abernathey on November 23, 2015, to discuss his overall status with the neurosurgeon. (Jt. Ex. 1, p. 6) Dr. Abernathey indicated in his clinical note for the same date:

...He has actually made an excellent recovery. He has only minimal residual left C7 weakness in the triceps at a -1 level. He has been working full duty without significant difficulty. I advised the patient to contact me should he develop any new neurologic symptoms or signs in the future and I would be happy to see him in additional consultation. . .

(Jt. Ex. 1, p. 6)

Claimant did participate in aggressive physical therapy as recommended by Dr. Abernathey. (Jt. Ex. 2) Claimant was released from therapy on August 7, 2015 because he had reached all of his physical therapy goals. (Jt. Ex. 2, p. 7)

Dr. Abernathey provided a permanent impairment rating for claimant due to a significant left C7 radiculopathy secondary to left C6-7 disc extrusion with osteophyte formation and stenosis incidental to adjacent C5-6 degenerative changes with stenosis and residual left C7 weakness. Dr. Abernathey determined claimant had an 11 percent impairment to the body as a whole. (Jt. Ex. 1, p. 7)

Claimant testified when he returned to light duty work, he performed clerical duties. Claimant returned to his regular preload job in August of 2015. This was approximately 8 to 10 weeks post-surgery. At the time of his hearing, claimant testified, he was performing his regular preload job. (Tr., pp. 40-41) He was working without any restrictions. (Tr., p. 46)

Claimant testified his numbness is absent with the exception of an occasional "flare-up", every month. Claimant testified he had pain in his neck. It was better than prior to the surgery but the pain still existed. (Tr., p. 41-42)

Mr. Currie asked claimant if he was able to perform his job as a preloader. Claimant replied:



- A. Yeah, to a point. The thing that I noticed I do differently a lot of times is the way I back up. Because every now and then the plant will have us come in from a different gate, which means I have to back in. And to back in, you got to do like a semicircle S and - - from the left. And I can't turn my head like I used to, so I find myself backing up a lot differently if it's around a bend.

I'm not one to use my mirrors in that case because I prefer to see what I'm doing when I'm backing up. I can't do that now to my left. I have adjusted and I back up differently. It might look kind of goofy to the average person, but I get it done.

Q. Any other problems performing your job that you've noticed since your return?

A. Just that one, yeah. And I - - well, sometimes I have pain driving around.

Q. What do you mean?

A. With the potholes. Driving around the side streets.

Q. What problems does that give you?

A. The bouncing.

Q. And what sensations do you feel?

A. Feeling pain in the neck, yeah.

Q. Have you had to miss any time from work since going back to work after your surgery?

A. I wouldn't say I've missed time. I may have cut days short, but I haven't missed any time.

Q. What do you mean cut days short?

A. Leave early.

Q. And why do you leave early?

A. My neck hurts, I guess, is the way to put it.

Claimant testified he can no longer enjoy boating. The bouncing up and down over the water aggravates his neck. He also stated he needs to bring a pillow with him when he travels by plane or train. (Tr., p. 45)

Claimant is very happy working at ADM as a truck driver. He really enjoys the work. He has no plans to seek other employment. At the time of his hearing, claimant was making more money per hour than prior to his work injury. (Tr., p. 49)

### **RATIONALE AND CONCLUSIONS OF LAW**

When an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522, 133 N.W.2d 867 (1965).

The weight to be given an expert opinion may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. St. Luke's Hospital v. Gray, 604 N.W.2d 646 (Iowa 2000).

The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavy v. Economy Fire and Casualty Co., 526 N.W.2d 845 (Iowa 1995).

The parties stipulated claimant had a permanent partial disability to the back. His disability is to be calculated by the industrial method. Prior to the hearing, defendant paid claimant, 57 weeks and 4 days of permanent partial disability benefits at the rate of \$692.49. The period represented was from August 3, 2015 through September 8, 2016. Additionally, the parties stipulated there was an underpayment of weekly benefits in the amount of \$131.78. The parties agree defendant shall take credit for all permanency benefits paid prior to the hearing.

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 a credible witness for himself. He was consistent in the manner with which he reported his work injury to all his medical providers. His testimony at hearing was consistent as well. From all the medical records reviewed, claimant provided a truthful assessment of his condition following his work injury, following his surgery, and after his return to work. Claimant was very motivated to rehabilitate his condition through physical therapy. He met all of his goals the physical therapist had set for him.

Claimant is working his regular job. However, he explained how he has changed the manner with which he backs up his trucks at the plant. Claimant also testified there are days when he leaves his shift early due to neck pain. Since he is paid by the hour, he loses some hourly wages when he does not work his entire assigned shift.

Claimant is 53 years old. If he is unable to drive a truck in the future, it will be difficult for claimant to secure other employment, given his surgical cervical injury.

As a result of the work injury, Dr. Abernathey performed a cervical discectomy and fusion. (Jt. Ex. 1, pp. 5-6) The neurosurgeon rated claimant as having an 11 percent permanent impairment to the body as a whole. (Jt. Ex. 1, p. 7) Generally, Dr. Abernathey provides zero impairment ratings or very low ratings. His rating is rather high, considering past ratings Dr. Abernathey has given in many other cases.

After considering all of the factors involving industrial disability; it is the determination of the undersigned; claimant has a permanent partial disability in the amount of twenty-five (25) percent. Defendant shall pay unto claimant one hundred twenty-five weeks of permanent partial disability benefits at the stipulated weekly benefit rate of \$692.49 per week and commencing from August 3, 2015. As indicated, defendant shall take credit for 57 weeks and 4 days of permanent partial disability benefits previously paid to claimant. Also, the underpayment of \$131.78 shall also be paid to claimant.

Defendant 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).

The final issue is the matter of costs.

Iowa Code section 86.40 states:

Costs. All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

Costs. Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010) The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

Claimant is requesting certain costs as detailed on page two of the hearing report.

The following cost is taxed to defendant:

Filing fee: \$100.00

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay unto claimant one hundred twenty-five (125) weeks of permanent partial disability benefits commencing from August 3, 2015 and payable at the stipulated rate of six hundred ninety-two and 49/100 dollars (\$692.49).

All past due benefits shall be paid in a lump sum together with interest as allowed by law and as discussed in the body of the decision.

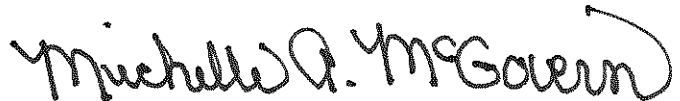
Defendant shall take credit for all benefits paid to date and as discussed in the body of the decision.

Defendant shall pay unto claimant, an underpayment of one hundred thirty-one and 78/100 dollars (\$131.78).

Defendant shall pay costs as detailed in the body of the decision.

Defendant shall file all reports as required by law.

Signed and filed this 7<sup>th</sup> day of May, 2019.



MICHELLE A. MCGOVERN  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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MAM/sam

**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.