BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SANTOS PEREZ ESPINOZA, Claimant, vs. TYSON FOODS, INC., Employer, Self-Insured, Defendant.	File No. 5059382 ARBITRATION DECISION
SANTOS PEREZ ESPINOZA, Claimant, vs. TYSON FOODS, INC., Employer, Self-Insured, Defendant.	File No. 5029333 REVIEW-REOPENING DECISION Head Notes: 1803, 2905

STATEMENT OF THE CASE

Santos Espinoza, claimant, filed a petition for review-reopening and a petition in arbitration seeking workers' compensation benefits from Tysons Foods, Inc. (Tyson). The review-reopening petition is based upon a February 4, 2008 work injury. The arbitration petition is based upon an injury he allegedly sustained on September 8, 2016 that allegedly arose out of and in the course of his employment. This case was heard in Council Bluffs, Iowa. The hearing was interpreted. The evidence in this case consists of the testimony of claimant, Barrie Black and Miguel Lopez. Claimant's Exhibits 1 and 3, Defendant's Exhibits A – E and Joint Exhibits 1 – 7 were admitted into the record.

ISSUES

FOR FILE NO. 5029333 (Review-Reopening d/o/i 02/04/2008)

1. Whether there has been a change in claimant's condition that would result in additional indemnity payments, and if so;

2. The extent of claimant's disability.

3. Assessment of costs.

FOR FILE NO. 5059382 (Arbitration Decision d/o/i 09/08/2016)

1. Whether claimant sustained an injury on September 8, 2016 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 disability.

4. Whether defendant is entitled to a credit under Iowa Code section 85.34(7)(2).

5. Assessment of costs.

STIPULATIONS

The parties filed hearing reports at the commencement of the arbitration and review-reopening hearing. On the hearing reports, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration and review-reopening 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 deputy workers' compensation commissioner having heard the testimony and considered the evidence in the record finds that:

Santos Espinoza, claimant, was 39 years old at the time of the hearing. He completed eighth grade in Honduras. He has no other education. Claimant moved to the United States when he was 19. (Transcript, page 14) Claimant started working for Tyson in July 2000 and has worked for Tyson for over 17 years. (Tr. p. 15)

In 2008 claimant injured his back while at work for Tyson. Claimant had back surgery in 2010 and was off work for about four months. (Tr. p. 16) Claimant said that his surgeon, Jonathan Fuller, M.D. provided permanent lifting restrictions of 20 pounds frequently and 50 pounds occasionally. (Tr. p. 17) Claimant said that when he was released by Dr. Fuller he had back pain, and he continues to have back pain. (Tr. p. 17) Claimant testified that his back was getting worse in 2015 and 2016 and he reported it to Tyson. (Tr. p. 18) Claimant would have ice packs at work and was referred back to Dr. Fuller. Dr. Fuller prescribed therapy, which claimant did not believe was helpful. (Tr. p. 19)

Claimant said that he had an injury at Tyson on September 8, 2016. Claimant was pushing a machine when he felt a severe pain in his back. Claimant said he

reported the injury and Tyson provided ice treatment for two weeks. (Tr. p. 20) Claimant said that the pain was not only in his back, but also all the way down his left leg. (Tr. p. 20) Claimant said that before this injury his pain was just in his back. Claimant saw Dr. Fuller who prescribed therapy. Claimant then went to his family physician at the Joshua Medical Center for treatment of his back and had an MRI performed. Claimant said that the MRI showed he had a disk injured and a screw from his surgery had moved. Claimant went back to Dr. Fuller and had additional physical therapy, which claimant said helped temporarily. (Tr. p. 23) Claimant was receiving pain medication from the Joshua Medical Center. (Tr. p. 23)

Claimant in late 2017 went to see Dr. Fuller to clarify his work restrictions, as claimant was bidding on a different job at Tyson. Claimant was applying to be a lead person in the inventory department. Claimant reviewed a video of this job and agreed that the video was an accurate representation of the job, on October 20, 2017. (Ex. C, p. 13) The video was sent to Dr. Fuller. Tyson identified claimant's restriction as the following in a letter to Dr. Fuller on November 3, 2017:

> When considering his prior permanent restrictions, we understand his full listing of permanent restrictions will be as follows:
>
> - No forklift driving [2009]
> - Occasional forward bend through end range of motion [2011]
> - Frequent bend through mid-range of motion [2011]
> - Avoid prolonged forward bend postures [2011]
> - Minimize prolonged standing postures [2011]
> - Lift/carry occasional 50 lbs., frequent 20 lbs. [2016]

(JEx. 3, p. 42) I find that these are claimant's restrictions.

Dr. Fuller medically approved his request to change jobs and did not change his restrictions. (Tr. pp. 24, 25; JEx. 3, p. 42)

Claimant did transfer to the inventory department. Part of his job as lead in this department required him to stack boxes. Claimant said it caused him more pain and he went to the Tyson health services and told them of his increased pain on this job. Claimant was able to work as lead in the inventory department for about two and one half weeks, but was reassigned. Claimant went back on the line making boxes, which resulted in a reduction of hours and pay. (Tr. p. 27)

Claimant said his pain in his back is getting worse and he still has symptoms down his left leg. He is taking medications for his pain. (Tr. pp. 28, 29)

Claimant has not had any additional surgery since the 2010 surgery on his back, has not had an increase in his impairment rating and has not been given any additional restrictions. (Tr. p. 31) Claimant has tried to bid into two other positions at Tyson as a sorter and multivac operator. (Tr. p. 36) Claimant occasionally has helped a friend to clean floors and paint. (Tr. pp. 37, 38; Ex. B, pp. 10, 11)

Testifying at the hearing was Barrie Black, R.N. and nurse case manager for Tyson. (Tr. p. 39) When claimant requested to bid into the inventory lead job Ms. Black asked Dr. Fuller to review the job to medically approve the job based upon claimant's restrictions. (Tr. p. 41) Dr. Fuller approved the job and claimant started working the lead inventory job. Ms. Black said that claimant went to her office and said his pain had intensified working the lead inventory job and asked to return to a prior job. (Tr. p. 42) As someone had bid into his prior job, he could not return to that position. (Tr. p. 45) Ms. Black said that claimant has not requested to go back to Dr. Fuller and has not requested medical care for his low back. (Tr. p. 43) Claimant was working as a box maker at the time of the hearing and had bid on a job on the multivac. (Tr. p.44)

Miguel Lopez, a supervisor at Tyson testified. Mr. Lopez said that claimant told him he wanted to transfer to the lead inventory position so he could be in a warmer environment. (Tr. p. 51) Mr. Lopez was aware that claimant was transferred from lead inventory due to difficulty in performing that job and transferred to the line making boxes with lower pay and less hours. (Tr. p. 55) In his deposition, claimant said that the cold increased his pain. (Ex. B, p. 9)

Claimant injured his lower back while working for Tyson on February 4, 2008. Claimant had surgery on June 18, 2010. The surgery consisted of:

PROCEDURE(S) PERFORMED:

1. Anterior posterior spinal fusion L5-S1 by the transforaminal lumbar interbody fusion technique with Gill laminectomy.

2. Pedicle screw instrumentation.

3. Stealth digital surgical navigation.

4. Local bone graft.

5. Injection of intrathecal morphine.

(Joint Exhibit 2, page 3) On January 2, 2011 Dr. Fuller provided a 20 percent whole body impairment rating for the claimant and had claimant at maximum medical improvement (MMI) as of December 30, 2010. (JEx. 3, p. 10) On December 5, 2013 claimant was provided restrictions. The restrictions were, "He is given work restrictions of lift 20 pounds frequently or 50 pounds occasionally on a permanent basis." (JEx. 3, p. 28)

The claimant and Tyson entered into an Agreement for Settlement, which was approved by the commissioner on March 3, 2014. (Ex. A, pp. 1, 2) The Agreement for Settlement provided for 17.715 weeks of healing period benefits and 175 weeks of permanent partial disability based upon a 35 percent loss of the whole body. (Ex. A, p. 1)

On September 24, 2015 claimant was seen by Jeffrey Hammer, PA, for complaints of chronic back pain with acute exacerbation. (Ex. 1, p. 2) On February 11 and February 26, 2016 claimant saw PA Hammer and described back pain. (Ex. 1, pp. 4, 7) On March 25, 2016 claimant was seen by David Kershner, PA for his annual physical. Claimant reported chronic lumbar pain and was prescribed Duexis for his lumbar pain. (Ex. 1, p. 12) On July 27, 2016 claimant reported to PA Kershner no change in his pain. (Ex. 1, p. 16)

On September 8, 2016 claimant reported to On-Site Health Services (OHS) at Tyson that he was having lower middle back pain from twisting his body while pushing a grissalli machine. (JEx. 4, pp. 44, 53)

On September 27, 2016 claimant was seen at Joshua Medical Center by PA Kershner for back pain. (Ex. 1, p. 19) He was diagnosed with "Low back pain – M54.5 chronic back pain with acute exarvation[1] [sic]". (Ex. 1, p. 20)

An MRI of October 17, 2016 showed the following;

> IMPRESSION: Postoperative changes L5-S1 with posterior decompression and fusion with most significant residual or new disease at the L4-5 level with facet arthropathy and left lateral recess narrowing. Perhaps this is a source of patient's left lower extremity pain. Consider left L5 transforaminal epidural block to confirm diagnosis and help with therapy if clinically indicated.

(JEx. 7, p. 72)

On October 13, 2016 claimant went to OHS to see if he could have an MRI of his spine. (JEx. 4, p. 46) On November 1, 2016 Dr. Fuller saw claimant for low back pain. Dr. Fuller reported that claimant believed this incident was related to his previous surgery and pushing a machine at work in September 2016. Dr. Fuller recommended therapy. (JEx. 3, p. 35) Dr. Fuller returned claimant to work on November 2, 2016 and kept his restrictions the same. (JEx. 3, p. 37) On December 13, 2016 Dr. Fuller noted claimant was doing better after therapy and was at MMI and could return to work with his same restrictions. (JEx. 3, p. 40)

[1] I read this word to be exacerbation, as exarvation does not appear in medical or regular dictionaries.

On December 29, 2016 Excel Physical Therapy noted claimant had completed 12 treatments and was discharged from therapy. (JEx. 5, p. 65)

On December 27, 2016 PA Kershner noted claimant's lumbar pain was better after therapy. (Ex. 1, p. 31) On April 9, 2017 PA Kershner saw claimant regarding his back pain. PA Kershner discussed with claimant that he should consider finding work that did not use his lumbar spine. (Ex. 1, p. 39)

Claimant has requested costs of $267.75, which includes two filing fees of $100.00 and a deposition charge of $67.75. (Ex. 3, p. 1)

I find that claimant's weekly worker's compensation rate for File No. 5029333, date of injury of February 4, 2008, is $407.00. I find that claimant's weekly worker's compensation rate for File No. 5059382, with alleged date of injury of September 8, 2016, is $451.46.

CONCLUSIONS OF LAW

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

Upon review-reopening, claimant has the burden to show a change in condition related to the original injury since the original award or settlement was made. The change may be either economic or physical. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959). A mere difference of opinion of experts as to the percentage of disability arising from an original injury is not sufficient to justify a different determination on a petition for review-reopening. A failure of a condition to improve to the extent anticipated originally may also constitute a change of condition. Meyers v. Holiday Inn of Cedar Falls, Iowa, 272 N.W.2d 24 (Iowa App. 1978).

Benefits shall commence as of the date claimant filed her petition for review-reopening. Verizon Business Network Services, Inc. v. McKenzie, 823 N.W.2d 418 (Iowa Ct. App. 2012) (Table).

Although a review-reopening award is not precluded simply because evidence was considered or anticipated at the time of the arbitration hearing, this agency is not charged with re-determining the condition of the claimant, which was adjudicated in the former arbitration proceeding. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391 (Iowa 2009). A "condition that has already been determined by an award or settlement should not be subject of a review-reopening petition." Id.

Claimant's formal restrictions are the same as they were when the agreement for settlement was approved in 2014. There is no medical opinion that there has been a substantial change in the claimant's physical or economic condition related to the February 4, 2008 work injury. Claimant has not met his burden of proof to show entitlement to review-reopening.

There is evidence that claimant did have a work injury on September 8, 2016. Claimant reported his injury to OHS and went to see PA Kershner. He was seen by Dr. Fuller and had physical therapy. The MRI of October 17, 2016 showed, "postoperative changes L5-S1 with posterior decompression and fusion with most significant residual or new disease at the L4-5 level with facet arthropathy and left lateral recess narrowing." (Ex. 7, p. 72)

Claimant credibly testified that he had dificulty working in cold environment, which Mr. Lopez confirmed claimant had told him. Claimant attempted to work as a lead person in the inventory department, but could not do so due to his pain. Claimant

has proven by a preponderence of the evidence that he suffered a permanent injury to his lower back on September 8, 2016 that arose out of and in the course of his employment at Tyson. This is an industrial disabilty.

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 assessing an unscheduled, whole body injury case, the claimant's loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

Claimant has a long work history at Tyson and was working at Tyson at the time of the hearing in a job making boxes. Claimant has bid on positions at Tyson and clearly wants to continue to work for Tyson. Claimant's education and vocational history are limiting factors for him to find work outside of meatpacking. Claimant's 2008 injury and fusion already limited claimant's earning capacity. I find that claimant's September 8, 2016 injury has further decreased claimant's earning capacity. He has more pain working in the "cold side" of meat packing. He had difficulty performing some work that is within his formal restrictions.

I find that claimant has a 45 percent loss of earning capacity. Upon consideration of the above and all other relevant factors of industrial disability, it is determined claimant sustained a 45 percent industrial disability as a result of the work-related injury of September 8, 2016.

Claimant was previously awarded indemnity benefits for his low back while working for Tyson. Tyson has requested a credit for the successive disability.

Iowa Code section 85.34(7) (2016) provides in part:

a. An employer is fully liable for compensating all of an employee's disability that arises out of and in the course of the employee's employment with the employer. An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment with a different employer or from causes unrelated to employment.

b. If an injured employee has a preexisting disability that was caused by a prior injury arising out of and in the course of employment with the same employer, and the preexisting disability was compensable under the same paragraph of section 85.34, subsection 2, as the employee's present injury, the employer is liable for the combined disability that is caused by the injuries, measured in relation to the employee's condition immediately prior to the first injury. In this instance, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer.

If, however, an employer is liable to an employee for a combined disability that is payable under section 85.34, subsection 2, paragraph "u," and the employee has a preexisting disability that causes the employee's earnings to be less at the time of the present injury than if the prior injury had not occurred, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer minus the percentage that the employee's earnings are less at the time of the present injury than if the prior injury had not occurred.

I find defendant is entitled to a credit for the 35 percent disability benefits, one hundred seventy-five (175) weeks, defendant paid claimant for File No. 5029333, the February 4, 2008 injury.

Defendant shall pay clamant an additional 10 percent industrial disability, fifty (50) weeks, for File No. 5059382, the September 8, 2016 injury.

I award claimant the cost of the filing fee and deposition cost for a total of $167.75 for File No. 5059382. No costs are awarded for File No. 5029333.

ORDER

FOR FILE NO. 502933 (Review-Reopening d/o/i 02/04/2008)

Claimant shall take nothing further.

Each party shall pay their own costs.

Defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

FOR FILE NO. 5059382 (Arbitration Decision d/o/i 09/08/2016)

Defendant shall pay claimant fifty (50) weeks of permanent partial disability benefits commencing December 13, 2016 at the weekly rate of four hundred fifty-one and 46/100 dollars ($451.46).

Defendant shall pay claimant costs of one hundred sixty-seven and 75/100 dollars ($167.75).

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. Apr. 24, 2018)

Defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 10th day of December, 2018.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFE/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.