BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARTIN PEREZ, Claimant, vs. TYSON FRESH MEATS, INC., Self-Insured Employer, Defendant.	File No. 5046768 A R B I T R A T I O N D E C I S I O N Head Note No: 1108.50, 1402.20

STATEMENT OF THE CASE

Martin Perez, claimant, filed a petition in arbitration seeking workers' compensation benefits from Tyson Fresh Meats, Inc., self-insured employer, as defendant. Deputy Workers' Compensation Commissioner Erin Pals presided at the hearing which was held on April 6, 2015, in Des Moines, Iowa.

Claimant, Martin Perez, and Alfredo Robles both testified live at trial. Mr. Perez testified via interpreter, Aleimarie Griffieon. The evidentiary record also includes claimant's exhibits 1-11 and defendant's exhibits A-I. The parties submitted a hearing report at the commencement of the evidentiary hearing. On the hearing report, the parties entered into certain stipulations. Those stipulations are accepted and relied upon in this decision. No findings of fact or conclusions of law will be made with respect to the parties' stipulations.

The parties request the opportunity for post-hearing briefs which were received by the agency on May 8, 2015.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant sustained permanent injury as a result of the May 29, 2013, work injury. If so, the extent of claimant's entitlement to permanent partial disability benefits.

2. Whether defendant is entitled to a credit pursuant to 85.34(7).

3. Assessment of costs.

FINDINGS OF FACT

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

The central dispute in this case is whether Mr. Perez's May 29, 2013, injury to his back resulted in any permanent injury. I find that Mr. Perez has failed to carry his burden to show that he sustained a permanent work injury on May 29, 2013.

Mr. Perez is 52 years of age. He began working at Tyson Fresh Meats, Inc. (hereinafter "Tyson") in June of 2009. His first job involved cutting pork bone from the meat. He performed this job for three or four months. He testified that this did not involve much heavy lifting because the bone was small. He then moved to the scribe saw position. While working in this position he injured his neck and left shoulder in May of 2011. As a result of that 2011 injury this agency awarded 60 percent industrial disability. In that agency decision the restrictions of Sunil Bansal, M.D. were adopted. Those permanent restrictions were no lifting over 20 pounds occasionally, no lifting over shoulder level or away from the body, and no frequent lifting, pushing, pulling, or tasks that require frequent vibration. (Transcript, p. 48)

In October of 2011, Mr. Perez moved to his current position of riblet/mark backrib. In this position his job was to remove rib meat and throw the bone. This position was within the restrictions previously assigned by Dr. Bansal as a result of the 2011 injury. In this position the meat came to him on a line that was at the height of his belly button. Mr. Perez stood the whole time during this job. He testified that each piece of meat weighed approximately five pounds. He grabbed the meat with his left hand and then used a knife in his right hand to remove the bone from the meat. He had to reach forward to cut and pull back towards his body; he testified this required some force. This task was more difficult to perform during the first hour of each day because the meat was still frozen. He used the force from the right side of his body to cut frozen meat. This is the position he was working on the date of the injury in question; he was earning $13.95 per hour. At the time of the hearing he was still working in this position and was earning $14.45 per hour. While working in the remove riblet/mark backrib job he has also rotated into the remove blade bone job on the loin. (Testimony)

It is important to note that Mr. Perez had sustained another workers' compensation injury in 2005 while he was living in California. Mr. Perez sustained a repetitive injury to his back while working cutting celery. As a result of this injury he received medication, physical therapy, and underwent an MRI. Mr. Perez is unable to recall the medical providers that treated him for this injury in California. Defendant was unable to locate the previous treatment records or the prior MRI. As a result of the 2005 injury Mr. Perez was off work for two years and received a workers' compensation settlement in California. (Testimony)

Mr. Perez has alleged a cumulative repetitive work injury to his back on May 29, 2013, due to his remove riblet/mark backrib job. He testified that on May 29, 2013, he began to experience pain in his mid to low back and down his right leg. He continued to work and his pain worsened. (Testimony) On May 30, Mr. Perez reported to Tyson that on the previous afternoon he felt a "sudden pain in the middle of my upper back while I was cutting product that was stiff with my knife." He reported that initially the pain was little but it was now worse. The pain went all the way to his right foot. (Exhibit A, p. 1) He was seen in Tyson Health Services that same day with complaints of pain in his bilateral shoulders, neck, right back, leg, and foot. (Ex. A, p. 1) He was noted to have full range of motion of all extremities and no signs of distress. (id.)

On June 6, 2013, Mr. Perez reported no improvement in his symptoms. He also said that his pain was worse after he got home from work because he does not move around as much. He rated his pain as an 8 out of 10. According to the notes, Mr. Perez overmagnified groaned and grasped his right lower back. The note also indicates that he did not limp if he felt he was not being observed, "otherwise exaggerated limping favoring the RLE." Mr. Perez reported that he was taking prescription Meloxicam. The notes indicate that the prescription bottle had a fill date of May 22, 2013. (Ex. A, p. 1) He was seen again at John Deere Health Services on June 11, 2013. He reported that yesterday at home he could not stand for more than 5 minutes. He said he had numbness in his right leg up to his right buttock. He also reported that his whole right side hurt and that the pain was now radiating to his left side. Tyson scheduled an appointment for him to see Michael D. Jackson, M.D. (Ex. A, p. 2) On that same day, June 11, 2013, Mr. Perez was offered but declined light duty; instead he opted to stay off work. (Ex. E, p. 40)

Mr. Perez saw Dr. Jackson on June 18, 2013. His chief complaint was that the right side of his body hurt. Mr. Perez reported, "pain starts in my leg and radiates down foot and up neck." (Ex. 2, p. 16) Mr. Perez felt the pain was due to repetitive movements at his job. Dr. Jackson's impression was right ankle osteoarthritis exacerbated by prolonged standing and right thoracic myofascial strain. He placed him on restricted duty, prescribed him medications, and recommended two weeks of physical therapy. (Ex. 2) Mr. Perez returned to Dr. Jackson on July 3, 2013, with "very vague" symptoms. Dr. Jackson noted that there were some degenerative changes noted on his lumbar spine x-ray; he ordered an MRI. (Ex. 2, pp. 20-21) The MRI took place on July 24, 2013. Dr. Jackson reviewed the results with Mr. Perez at his July 29, 2013, appointment. The MRI revealed degenerative disc disease with right S1 nerve root impingement. According to Dr. Jackson, Mr. Perez's symptoms were consistent with the MRI but the symptoms were only present when he was sitting for longer periods of time. At that time, Mr. Perez was tolerating light duty without difficulty and he was benefiting from therapy. Mr. Perez was to follow-up after his vacation in August. (Ex. 2, pp. 22)

Mr. Perez took vacation from August 4-18, 2013. (Ex. A, p. 4) According to the July 29, 2013, note, claimant drove to California and then onto Mexico. (Ex. A, p. 5)

During his arbitration testimony he denied traveling to California. (Tr. p. 44) Mr. Perez did testify that he walked and biked while on vacation but he did not perform the other home exercises he had been given. (Tr. pp. 44-45)

Dr. Jackson saw Mr. Perez again on August 21, 2013. He was doing well and continued to improve. Mr. Perez continued to follow-up with Dr. Jackson. By September 12, his radicular symptoms seemed to have resolved so Dr. Jackson did not think a surgical consult was necessary. He continued with conservative treatment. Dr. Jackson felt he would likely be at maximum medical improvement (MMI) at the end of September. (Ex. 2, pp. 24-27)

On September 16, 2013, Tate Van Houten, DPT, conducted a job site evaluation of Mr. Perez's job. The physical therapist noted that there was no heavy lifting, bending or stooping noted with the job demands. After reviewing the job description and observing Mr. Perez perform all facets of his job requirements she found that the job requirements were safe for Mr. Perez to perform. (Ex. 3, p. 68)

Mr. Perez returned to Dr. Jackson on September 30, 2013. He reported mild pain in his foot that radiated up towards the calf on the right. At that time he was working 2 hours per day, full duty. Dr. Jackson's impression was thoracolumbar degenerative disk disease and right knee osteoarthritis. It was decided that the patient would resume his progressive return to full duty. He was also to continue his Mobic and Flexeril. Dr. Jackson anticipated he would be fully discharged in two weeks. (Ex. 2, p. 28)

At the October 11, 2013, visit Dr. Jackson noted Mr. Perez was working full duty. He still complained of some mild pain in the mid-back, right side, at the end of his work day. Mr. Perez denied any radicular symptoms. Dr. Jackson's impression was thoracolumbar degenerative disk disease, improved and right knee osteoarthritis, stable. He was released to return to full duty work and placed at MMI. Mr. Perez was to discontinue the Flexeril and taper off Mobic. He was also instructed to continue the home exercise program. (Ex. 2, p. 29)

On October 17, 2013, Dr. Jackson indicated that it was his opinion that patient had reached MMI on October 11, 2013, and had not sustained any permanent partial impairment from the injury. (Ex. 1, p. 12)

On December 20, 2013, at the request of his attorney, Mr. Perez underwent an IME with Sunil Bansal, M.D. (Ex. 6) Dr. Bansal diagnosed Mr. Perez with L5-S1 disc herniation with right S1 nerve root impingement. He recommended a surgical consult but if surgery was not pursued then he agreed with Dr. Jackson's MMI date of October 11, 2013. It is Dr. Bansal's opinion that Mr. Perez's job duties would place considerable stress on his lower back. He opined that Mr. Perez's impairment could be classified as having elements fitting into DRE Lumbar category III. Dr. Bansal noted consistent dermatomal radiculopathy with loss of relevant reflexes and strength. Dr. Bansal felt Mr. Perez sustained 10 percent whole person impairment. He restricted him to no lifting greater than 25 to 30 pounds occasionally, 7 pounds frequently; no bending, squatting,

climbing, twisting, pushing or pulling. He could stand/walk as tolerated. However, he should avoid standing for more than 4 hours, and avoid walking for more than 60 minutes at a time. Dr. Bansal felt that if his pain worsened he could benefit from a referral to a pain management specialist and perhaps an evaluation with a spine surgeon. (Ex. 6, pp. 80-90)

On January 27, 2015, Mr. Perez was involved in a single car accident which totaled his truck. During the accident Mr. Perez's truck flipped over and landed on its hood. (Tr. p. 48) He was seen at the emergency room of Greene County Medical Center. He reported injury to his left chest wall region. The notes state "negative for back pain and neck pain." (Ex. B, p. 12) Under the physical exam portion of the note, normal range of motion, no edema and no tenderness. (id.) During Mr. Perez's testimony he denied that the medical providers examined his back. (Tr. pp. 49-50) As a result of the motor vehicle accident he missed approximately two weeks of work. (Tr. pp. 37-38)

On February 20, 2015, at his attorney's request, Mr. Perez saw Dr. Bansal for a second IME. Dr. Bansal issued a report standing by all of his opinions in his prior report. (Ex. 6, pp. 91A-91D)

At the request of the defendant Mr. Perez underwent an IME at Iowa Ortho with Todd Harbach, M.D. on February 23, 2015. Dr. Harbach was provided with a video of Mr. Perez performing his remove riblet/mark backrib job; this is the same video admitted into evidence as exhibit I. Dr. Harbach opined that Mr. Perez's job did not contain lumbar stressors that would cause a disk herniation. (Ex. C, p. 30) He further opined that Mr. Perez's work caused a temporary aggravation rather than a permanent material aggravation of his pre-existing back condition. (Id.) He felt that the little bit of stooping he performed could cause a temporary aggravation of his chronic low back symptoms, but not a permanent or material aggravation. (id.) He did not feel Mr. Perez had sustained any permanent impairment nor required any permanent restrictions as a result of the May 29, 2013, injury. (Ex. C, p. 31) Dr. Harbach reviewed Dr. Bansal's 2013 report and did not agree with his opinions. When Dr. Harbach examined Mr. Perez he noted a little bit of tingling or pain around his hip but no symptoms below the hip. Mr. Perez reported some radiation into his leg on rare occasion. Therefore, Dr. Harbach did not agree with Dr. Bansal's IME findings and final rating. (Ex. C, pp. 27-31)

In response to Dr. Harbach's opinions, Dr. Bansal issued a third report; this was issued on March 9, 2015. Dr. Bansal also watched the video of Mr. Perez performing his job duties. After reviewing the additional information Dr. Bansal stated that his opinions remained unchanged. Dr. Bansal also stated that he disagreed with Dr. Harbach's assessment of Mr. Perez having a temporary aggravation. Dr. Bansal also disagreed with Dr. Harbach's assessment that Mr. Perez had chronic low back pain from the early 2000s. Dr. Bansal said that while he did have prior back pain in the 2000s, his pain had resolved. Dr. Bansal felt this was evidenced by the lack of treatment and complaints leading up to the work injury. He also pointed out that Mr. Perez passed Tyson's pre-employment physical exam testing. Additionally, Dr. Bansal pointed out that Mr. Perez had performed this job for several years without back

complaints. Dr. Bansal stated, "[a] temporary exacerbation vs. a permanent aggravation presupposes a return to the pre-injury baseline after a reasonable treatment period. It has been over a year with no improvement in Mr. Perez's back symptomatology. His baseline was characterized by having no radicular back pain." (Ex. 6, pp. 91F-91G)

At hearing Mr. Perez testified that he continues to have daily back pain. He also continues to have right leg pain that comes and goes. He takes ibuprofen twice per day and that helps to calm the pain. (Tr. pp. 34-36) According to Mr. Perez, the activities that tend to bother his back and leg the most is too much bending forward or standing. (Tr. p. 39)

Mr. Alfredo Robles also testified at hearing. Mr. Robles is claimant's supervisor and is able to observe him working for approximately three hours per day. Mr. Robles has not observed Mr. Perez having any difficulty performing his job. He also testified that Mr. Perez performs his job in a satisfactory manner. According to Mr. Robles, Mr. Perez has not reported any pain or problems with respect to performing his job for the past year and five months. (Tr. p. 66)

The first issue to be addressed is whether claimant sustained a permanent work injury to his back on May 29, 2013. I find that the preponderance of the evidence does not support Mr. Perez's claim that he sustained permanent injury to his back. There are several medical providers that have provided their opinions on this matter.

Dr. Jackson treated Mr. Perez over a period of several months and saw him on several occasions. Dr. Jackson did not place any restrictions or assign any permanency to Mr. Perez as a result of the May 29, 2013, work injury.

Dr. Bansal also issued his opinions in this matter. Dr. Bansal is board certified in occupational medicine. He opined that Mr. Perez's job duties would place considerable stress on his lower back. He also pointed out that Mr. Perez did not have any chronic back pain before the May 29, 2013, work injury. Dr. Bansal noted that his prior back pain had resolved and this was evidenced by the lack of treatment or complaints after the 2007 time period. He also pointed out that Mr. Perez was able to pass Tyson's pre-employment post-offer physical exam testing. Dr. Bansal also stated that Mr. Perez worked at his job for several years without complaints. Thus, a "postulation of chronic back pain" was medically illogical. (Ex. 6, p. 91G) Dr. Bansal assigned permanent restrictions on Mr. Perez's activities; however, I note those restrictions allow Mr. Perez to lift more weight than the prior permanent restrictions he placed on Mr. Perez as a result of the 2011 injury.

Dr. Harbach has also rendered opinions in this matter. Dr. Harbach is an orthopedic surgeon with Iowa Ortho. He is certified by the American Board of Orthopedic Surgeons. Dr. Harbach opined that the stooping that he performs while performing his job at Tyson could cause a temporary aggravation of his chronic low back symptoms but he did not feel the aggravation was permanent or material. (Ex. C, p. 30) He did not feel Mr. Perez sustained any permanent impairment as a result of the

work injury. Dr. Harbach further opined that Mr. Perez's conditions were long term and degenerative and more likely related to his prior work injury in California. He noted that the rating he received from Dr. Bansal was based on the leg issues and his herniated disk. However, he does not believe that Mr. Perez's job could cause a herniated disk. (Ex. C, p. 31) Dr. Harbach felt that the restrictions Mr. Perez had for his prior California injury were appropriate. He noted that he does not believe the need for these or any other restrictions are related to the May 29, 2013, work injury.

Also, physical therapist, Tate Van Houten visited the job site and observed Mr. Perez performing his job. It was the physical therapist's opinion that the job duties were safe for Mr. Perez to perform. (Ex. 3, p. 68)

After consideration of these opinions and the other evidence in the record I find Mr. Perez has failed to show by a preponderance of the evidence that he sustained a permanent work injury on May 29, 2013. The opinions of Dr. Jackson, Dr. Harbach, and physical therapist Van Houten are consistent with one another and with the evidence as a whole. Therefore, I find their opinions carry greater weight than the opinion of Dr. Bansal. Mr. Perez has not sought any treatment for his back since October of 2013. Additionally, he has performed his pre-injury job for approximately one year and five months without reporting any difficulty to his employer. His supervisor is able to see Mr. Perez perform his duties for several hours each day and has never observed Mr. Perez having any difficulty performing his duties. Even the restrictions placed on Mr. Perez by the IME doctor of his choosing do not support a claim for permanent injury. The lifting restrictions Dr. Bansal assigned in 2013 as a result of the injury in question are less restrictive than the lifting restrictions Dr. Bansal assigned due to the 2009 left shoulder/neck injury. The record as a whole supports defendants' contention that Mr. Perez has returned to baseline. Therefore, I find that claimant has failed to prove he sustained a permanent injury.

Because Mr. Perez failed to show that he sustained a permanent injury as a result of the work injury the remaining issues are moot.

CONCLUSIONS OF LAW

In the present case the parties have stipulated that Mr. Perez sustained an injury on May 29, 2013, which arose out of and in the course of his employment with Tyson. The central dispute is whether that injury was the cause of any permanent disability.

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 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.

For the reasons set forth above, I found that claimant failed to prove by a preponderance of the evidence that he sustained permanent disability as a result of the May 29, 2013, work injury. Having found that claimant failed to prove any permanent disability that is causally related to the work injury on May 29, 2013, I conclude that claimant failed to carry his burden of proof. Therefore, claimant failed to carry his burden of proof to establish that he is entitled to any permanent disability award and the issue of extent of entitlement to permanent partial disability benefits and credit are moot.

The final remaining issue is assessment of costs. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. Having found claimant failed to prove by a preponderance of the evidence that he sustained any permanent injury, I conclude it is not appropriate to assess costs in this matter.

ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing further from these proceedings.

Each party shall bear their own costs.

Defendants 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 23rd day of July, 2015.

ERIN Q. PALS
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 below, 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.