

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RAUL LOZA MARTINEZ,

Claimant,

vs.

CURLY'S FOODS,

Employer,

and

SAFETY NATIONAL,

Insurance Carrier,  
Defendants.

**FILED**

AUG 06 2019

WORKERS COMPENSATION

File No. 5060170

ARBITRATION DECISION

Head Note Nos.: 1803

STATEMENT OF THE CASE

Raul Loza Martinez, claimant, filed a petition in arbitration seeking workers' compensation benefits against Curly Foods, employer, and Safety National, insurer, for an accepted work injury date of May 25, 2017

This case was heard on April 3, 2019, in Sioux City, Iowa. The case was considered fully submitted on the same.

The record consists of Joint Exhibits 1-5; Claimant's Exhibits 1-5, Defendants' Exhibits A-D, and testimony from the claimant and Brian Herbst.

ISSUE

Extent of claimant's disability.

STIPULATIONS

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The parties agree the claimant sustained an injury on May 25, 2017, which arose out of and in the course of his employment. Claimant also sustained a temporary disability during a period of recovery, entitlement to which is no longer in dispute.

At the time of his injury, the claimant's gross earnings were \$870.00 per week. He was married and entitled to 3 exemptions. Based on those foregoing numbers, the parties believe the weekly benefit rate to be \$570.84.

The parties agree that the claimant sustained a permanent disability, but disagree as to the extent. They agreed that the disability is industrial in nature and that the commencement date for permanent partial disability benefits is February 2, 2019.

Defendants waive any and all affirmative defenses and agreed to pay the 85.39 independent medical evaluation (IME) report of Dr. Stoken. Prior to the hearing, the claimant was paid 5.57 weeks of compensation at the rate of \$570.84. The defendants are entitled to a credit of that amount against any award.

#### FINDINGS OF FACT

Claimant was a 62-year-old male at the time of the hearing. His educational background includes completion of secondary school in Mexico which is equivalent to a high school education in the United States. He understands some English but is not fluent. He testified that he does not believe he could write a page in English. He does not read the newspaper or any books in English. He does have a driver's license.

He was born in Mexico and immigrated in 1986 to the United States when he was 29 or 30. After immigrating, he was first employed in California before moving to Iowa. In 1989 he began work at a meat packing plant that would become the defendant employer.

Prior to coming to the United States, he worked at his father's farm. His past work experience has been heavy duty labor.

His first job for defendant employer was deboning. He worked that position for 13 years. He moved to a machine operator job for 15 years. His work required him to assemble a robot, installing windows, rails, and filters. Some of his work required him to work at or above shoulder height as well as regular lifting heavy weights of 40 to 50 pounds.

Up through December of 2016, claimant's job duties included one machine. In January 2017, his duties changed and he was required to operate two machines at a time. Claimant testified that this increased work load was stressful. He complained to the human resources supervisor twice. During the meetings, the supervisor maintained he would be assisting claimant. However, claimant testified that the supervisor did not provide the help as promised.

Brian Herbst, the environmental health and safety manager, testified that the defendant employer is a value-added facility. They take raw meat and process it. No live animals are involved. They deal with portions of meat only such as chicken breasts, thighs, legs, pork shoulders, pork butts, pork ribs, turkey breasts and the like.

Claimant alleged, and defendants agreed, that this increased workload led to his work injury. He complained to the supervisor about managing both machines. He also complained about his pain but was not sent for treatment right away.

He was seen by Rodney Cassens, M.D., on August 3, 2017, for complaints of right shoulder rotator cuff pain, right knee sprain, and right elbow medial epicondylitis. (JE 1:1) He had received an injection in the right elbow three weeks ago and the pain "has improved significantly." (JE 1:1)

The notes indicate that his right knee pain was worsening and that he was developing pain in his left shoulder due to overcompensation of his left upper extremity due to restriction for the right upper extremity. (JE 1:1) Claimant was instructed to undergo an MRI for his right knee. Id. He was advised to continue with ibuprofen 800 mg t.i.d. for two weeks and physical therapy for two weeks. Id. The restrictions were increased to no pushing, pulling, manipulation, and reaching of more than ten pounds occasionally. Id.

Claimant underwent surgery to his right knee on September 21, 2017. (JE 2:4; 4:19) As time went on, his left shoulder pain worsened and an MRI revealed full-thickness tear of the anterior mid-supraspinatus with tendon retraction. (JE 2:5) There was also a circumferential tear along the chondral labral junction. (JE 2:1) He was continued on work restrictions of ten pounds. Id. On or around November 28, 2017, claimant presented with right knee pain. (JE3:12) Aaron Althaus, M.D., recommended claimant cut back on his activity, keep claimant in a light duty position, with a five pound lift in front of the body, no overhead lifting, minimize ambulation, and stay out of a cold environment. (JE 3:14) He underwent surgical repair of the left shoulder on May 24, 2018. (JE 5:21)

On or about October 31, 2018, claimant presented with right knee pain. (JE 3:9) He was examined by Dr. Althaus who recommended a variety of therapy and treatment options including total knee replacement. (JE 3:9) Claimant opted for conservative treatment of physical therapy (PT) and platelet-rich plasma (PRP) injections. (JE 3:10) At the visit, claimant was still suffering left shoulder pain. (JE 3:9)

During the January 9, 2019, checkup, claimant reported improvement with the shoulder and knee but that he still suffered from fatigue and weakness. (JE 3:14) Dr. Althaus wrote the following:

He is doing well, but he notes some fatigue. I think he has several degenerative conditions going on and I think it is possible he may not get

to his full strength following his rotator cuff repair. I think though we have given him sufficient time to achieve his maximal improvement, but at this point I would like him to undergo FCE for delineation of his work ability. We will be able to determine further recommendations after that.

(JE 3:17)

On February 6, 2019, claimant was seen again by Dr. Althaus for follow up of right knee and left shoulder pain. (Defendants' Exhibit A:2) He exhibited good range of motion of the left shoulder with some pain and weakness. Id. He had a slight flexion contracture to his knee and he wore a brace. Id.

(Insert paragraph of PLNA)

He has worked [*sic*] manual type job for his career and I think he has some limitations because of chronic repetitive use. I think Light-Medium type work certainly is reasonable. I think maintaining a position where he can at least have some rest through his elbow is reasonable to take some of the weight off his knee, although the work environment will dictated [*sic*] his duties, I do think Light-Medium work as a permanent restriction is reasonable. We will institute this. At this point I think we can declare him to have maximized his improvement and progress toward Maximum Medical Improvement. I do note that if in the future he has problems that are worsened or relatable back to his known left shoulder injury and right knee injury, he is a candidate for further diagnosis and/or treatment involving the possibility of future cortisone shots, or even future surgical treatments. He understands these options and we will see him back as needed.

Id.

His current job is a quality control position wherein he checks the chickens to ensure there are no bones in it. The chicken is dumped on a conveyor belt. It travels through a metal detector which alerts him to the presence of a bone. If the bone is found, he can either reject the meat or fix it. He does not weigh the chicken parts but rather moves them around to check for bones. This position was created after claimant's shoulder surgery and he is the first person assigned to it. However, it is a position that exists on both shifts and if claimant is not assigned to the position, someone else would be. There are no accommodations provided for him to do this job.

He cannot do any of his prior positions. His past light duty jobs included separating packages of meat, cleaning seals, placing stickers. At one time, he attempted to return to his previous job and operate a machine but after three to four days, he experienced too much pain. He admits that there is no doctor who has indicated that he cannot continue in his current position.

He does not know how long he will be assigned to the quality control position. Currently claimant is the number 2 person on the seniority list. There is only one person at the plant who has more seniority.

Since the surgery to the right knee, claimant has worn a brace. Uneven surfaces present challenges. If he walks on the yard and there is a dip, his knee will hurt and may give out. He has not been able to mow the lawn since every little dip bothers his leg.

His right elbow hurts and while he manages the pain, it does not go away completely. He has a loss of strength and has diminished lifting abilities. There is pain in his right shoulder and left shoulder. He is not able to change a light bulb because he cannot hold his arms over his head for any significant period of time.

He takes ibuprofen and Tylenol, Flomax and a prostate drug.

Mr. Herbst testified that most of the jobs at the plant fall into the light to medium duty work category and that about a quarter of positions (106/513) could be done by the claimant with his current restrictions. If he was not doing quality control, he could work in the kitchen, loading various products onto a cooking line. Most of those products weigh around 2.5 pounds. There are some products that weigh over 22 pounds such as a brisket.

On January 17, 2019, claimant underwent an examination with Jacqueline Stoken, D.O. (Ex. 1) At the time of the examination, claimant reported severe pain in the right knee, moderate to severe pain in the left shoulder, nagging and aching pain in the right shoulder. (Ex. 1:9) Claimant was assigned to sedentary work. Id.

During the examination, claimant exhibited reduced range of motion in the right shoulder, left shoulder and right knee. He had a positive Hawkins, Neer and supraspinatus test of the right and left shoulder. (Ex. 1:10) He walked with a normal gait but was tender on patellar compression.

Dr. Stoken's diagnosis included the following:

1. Status post work injury on or about May of 2017 with right shoulder strain, right knee meniscal tear, and left rotator cuff tear.
2. Status post diagnostic arthroscopy, partial medical meniscectomy, mechanical debridement with heat chondroplasty, all 3 components, mostly the patella and medial tibial plateau and a little bit of lateral tibial plateau on 9/21/17 done by Dr. Kevin Liudahl. Postoperative diagnosis is right knee medial meniscal tear, chondromalacia, with severe patella chondromalacia.
3. Status post left shoulder arthroscopy, rotator cuff repair, subacromial decompression, distal clavicle excision, biceps tenotomy on

5/24/18 done by Dr. Aaron Althaus. Postoperative diagnosis is left full thickness rotator cuff tear, labral tear and mild longhead biceps tendinosis.

4. Chronic pain of the right shoulder, left shoulder, and right knee.

(Ex. 1:11)

Based on the medical records since 2017, subjective reports from the claimant, and the current diagnosis, Dr. Stoken found that claimant had sustained a 10 percent impairment of the right upper extremity due to range of motion deficits, a 14 percent impairment to the whole body as a result of range of motion deficits and his distal clavicle excision in the left shoulder, and a 2 percent lower extremity impairment to the left knee. (Ex. 1:11-12) The cause of these deficits were attributed to repetitive trauma that caused or aggravated the claimant's injury to bilateral shoulders, right knee, and body as a whole. (Ex. 1:12)

While maintaining that claimant sustained a bilateral shoulder injury, Dr. Stoken assigned a percentage impairment only for the right upper extremity and not the right shoulder. (Ex. 1:11)

For work restrictions, she recommended the following:

Reasonable permanent work restrictions would be as per the FCE done on 1/18/19.

On 1/18/19, he underwent a functional capacity evaluation. It was felt to be a valid test as he gave maximum, consistent effort. He is able to function in the **Sedentary** category. His ability with material handling at waist level and below is within the **Medium** category. His limitations include –

Waist to floor lifting 20 pounds frequently, 30 pounds occasionally and 40 pounds rarely.

Waist to crown (handles) 5 pounds frequently, 10 pounds occasionally and 15 pounds rarely.

Waist to crown (preferred) 5 pounds frequently, 10 pounds occasionally and 20 pounds rarely.

Front carry 20 pounds frequently, 30 pounds occasionally and 40 pounds rarely.

Right carry 20 pounds frequently, 30 pounds occasionally and 40 pounds rarely.

Left carry 15 pounds frequently, 25 pounds occasionally and 35 pounds rarely.

He has no limitations with forward bending, standing, stairs, walking for 6 minutes and sitting.

He had some limitation and would be able to occasionally engage in elevated work, crouch, kneel/half-kneel and climb a ladder with 2 hands.

(Ex. 1:12)

On January 28, 2019, claimant underwent a functional capacity evaluation (FCE) at Workwell Systems, Inc. (Ex. 2:20) The therapist concluded that based on the consistent effort, the test was valid. (Ex. 2:21) Claimant could not kneel or squat. His walking ability was decreased. His right leg grows numb while driving for long periods. (Ex. 2:29)

The results of the FCE placed claimant in the sedentary category with the following restrictions:

1. These projections are for 8 hours per day and 40 hours per week at the levels indicated on the FCE Test Results and interpretation grid.
2. The client's capabilities are in the sedentary category (waist to crown lifting up to 10 pounds on an occasional basis and 20 pounds on a rare basis) of physical demand characteristics. Specific capabilities are noted with the FCE Test Results and interpretation grid.
3. His ability with right carrying, front carrying, and waist to floor lifting falls within the medium category, handling up to 30 pounds occasionally and 40 pounds rarely.
4. His ability with right carrying, front carrying, and waist to floor lifting falls within the medium category, handling up to 30 pounds occasionally and 40 pounds rarely.
5. Recommend periodic rest breaks with standing and walking activities.
6. Please review the FCE Test Results and interpretation grid for full details of this client's functional abilities.
7. Contact me for additional questions regarding this FCE report.

(Ex. 2:21, 22)

On February 4, 2019, claimant underwent an FCE with Witter Workforce Assessment. (Ex. B:4) Physical therapist Marcus M. Witter concluded claimant could work at a restricted light-medium physical demand position, however noted that the claimant's results were not consistent and deemed the FCE invalid. Id. "Due to the fact that a significant percentage of validity criteria were failed during this exam, Mr. Loza-Martinez's true functional capabilities must be left to professional conjecture," Mr. Witter wrote in his report. (Ex. B:4) The invalid results were based on what Mr. Witter perceived to be inconsistent, sub maximal effort and self-limited responses. (Ex. B:6, 8) In the Blankenship summary, the report identifies the squatting exercises as the areas of the most inconsistent pattern where the pain did not correlate with the movement pattern. (Ex. B:12) Other tests that were scored invalid involved the use of his shoulders while lifting. (Ex. B:25-26)

On February 18, 2019, Jeff Johnson, MLS, issues a vocational rehabilitation report. (Ex. 3:33) Mr. Johnson interviewed the claimant on December 17, 2018, and reviewed the two FCEs and the IME of Dr. Stoken. (Ex. 3:33) Mr. Johnson found claimant's transferable skills included operation of production machines. (Ex. 3:35) Pre-injury claimant performed at primarily heavy and medium work levels. (Ex. 3:36) Post-injury claimant's physical abilities most closely align with the light work category as defined by the Department of Transportation (DOT) according to Mr. Johnson. (Ex. 3:36) Thus, Mr. Johnson sets claimant's loss of employment at 62 percent and writes that claimant "retains 'fair' access to 52 occupations classified by the DOT." (Ex. 3:36) The 62 percent loss does not take into account of the claimant's inability to speak, read or write English or his age. (Ex. 3:38)

### CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

The claimant has the burden of proving by a preponderance of the evidence that the 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.

This case is limited to an examination of the extent of the claimant's accepted work injury. The parties agree claimant has sustained a permanent disability arising out of a work-related injury occurring on May 25, 2017, to his bilateral shoulders and right knee. The dispute arises over the extent of claimant's disability. Defendants proffered the FCE results of Mr. Witter who deemed the claimant to be in the light to medium work category with modifications or restrictions, however, those results were deemed invalid in Mr. Witter's opinion due to the claimant's inconsistent test results, pain behaviors and sub maximal effort. On the other hand, claimant proffered contrary FCE results which placed claimant in the sedentary work category based on valid test results.

Claimant has already undergone right knee surgery and left shoulder surgery. Dr. Althaus attributed some of claimant's ongoing conditions to be degenerative in nature, however, degenerative conditions can be exacerbated by work injuries. Dr. Stoken opined that based on the medical records, claimant's history and her examination of claimant that the physical state of the claimant at the time of the examination was due to the claimant's work condition.

Claimant has been working a modified light duty job that requires him to inspect chicken weighing no more than two to two and a half pounds each. He is able to do this position without restrictions or accommodations. The job is consistent with the FCE

conducted by Work Well and within the work conditions recommended by Jeff Johnson, the vocational rehabilitation consultant.

The opinions of the Work Well therapist and Dr. Stoken are more consistent with the claimant's work pattern as well as his injury, surgical treatment, as well as his contemporaneous complaints of pain and discomfort documented in the medical records. For that reason, Mr. Witter's FCE results are given lower weight.

In the defendants' own plant, only approximately a quarter of the positions fit claimant's current work restrictions. That number is in line with the 62 percent loss of disability assessed by the vocational rehabilitation consultant.

Based on claimant's age, his physical condition, his motivation to work, his educational background, his limited ability to speak, read, and write English, as well as his work experience, it is deemed that claimant has sustained a 75 percent industrial loss.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant three hundred seventy-five (375) weeks of permanent partial disability benefits at the rate of five hundred seventy and 84/100 dollars (\$570.84) per week from February 2, 2019.

That defendants shall pay accrued weekly benefits in a lump sum.

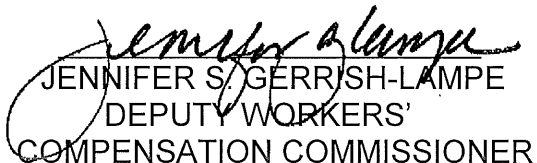
That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants are to be given credit for benefits previously paid.

That defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

That defendants shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

Signed and filed this 6<sup>th</sup> day of August, 2019.

  
JENNIFER S. GERRISH-LAMPE  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

Copies to:

Tom L. Drew  
Attorney at Law  
535 – 40<sup>th</sup> St.  
Des Moines, IA 50312-9403  
mailbox@drewlawfirm.com

Timothy A. Clausen  
Attorney at Law  
4280 Sergeant Rd., Ste. 290  
Sioux City, IA 51106-4647  
clausen@klasslaw.com

JGL/srs

**Right to Appeal:** This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876 4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.