BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JAMES M. WONTEN, Claimant, vs. TYSON FOODS, INC., Employer, Self-Insured, Defendant.	FILED FEB 22 2019 WORKERS' COMPENSATION	File Nos. 5053408, 5058593 ARBITRATION DECISION Head Notes: 1108, 1803

STATEMENT OF THE CASE

The claimant, James Wonten, filed two petitions for arbitration and seeks workers' compensation benefits from Tyson Foods, Inc. The claimant was represented by Matthew Leddin. The defendant was represented by Jean Dickson. Following the hearing, an appearance was filed by Jason Wiltfang, June 21, 2018.

The matter came on for hearing on February 21, 2018, before Deputy Workers' Compensation Commissioner Joe Walsh in Davenport, Iowa. The record in the case consists of Joint Exhibits 1 through 11; Claimant's Exhibits 1 through 5 and Defense Exhibits A through N (Defendant's Exhibit K was withdrawn). The claimant testified under oath at hearing. The record was held open after hearing and claimant introduced additional Exhibits 6 and 7. Amy Pederson was appointed the official reporter and custodian of the notes of the proceeding. The matter was fully submitted on April 9, 2018, after helpful briefing by the parties.

ISSUES AND STIPULATIONS

The parties submitted the following issues for determination and stipulations for File No. 5053408:

ISSUES

1. Whether the stipulated work injury resulted in any permanency.

2. Whether the claimant is entitled to permanent partial disability benefits.

3. The number of exemptions to which claimant is entitled is disputed.

4. Defendant seeks a credit under Iowa Code section 85.34(7) for an agreement for settlement.

STIPULATIONS

1. The parties had an employer-employee relationship.

2. Claimant sustained an injury which arose out of and in the course of employment on May 13, 2014.

3. Temporary disability/healing period and medical benefits are no longer in dispute.

4. Any permanent disability is industrial.

5. The commencement date for any permanent disability benefits is June 23, 2015.

6. Affirmative defenses have been waived.

7. Medical expenses are not in dispute.

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1. The parties had an employer-employee relationship.

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4. Any permanent disability is industrial.

5. The commencement date for any permanent disability benefits is June 23, 2015.

6. Affirmative defenses have been waived.

7. Medical expenses are not in dispute.

FINDINGS OF FACT

Claimant, James Wonten, was 52 years old as of the date of hearing. He was born in Liberia and completed high school there. In Liberia, Mr. Wonten was a teacher. He came to the United States in 2006. He has no formal education in the United States. He initially moved to Minnesota where he worked as a dietary aide in a hospital, delivering food to patients. He is able to read and write in English. After living there for about six months, he moved to Muscatine, Iowa, and began working at Tyson Foods, Inc. (hereafter, Tyson) in March 2008. Mr. Wonten has four children. He testified at hearing that he claimed two of his children, Nathan Wonten (born, March 1997) and Prince Wonten (born, October 2007), on his income tax returns. He testified that he pays child support on these children in the amount of $160.00 per week.

Mr. Wonten testified live and under oath at hearing. His native language is Dahm. He testified in English with a thick accent, however, he was easy to understand. Mr. Wonten was a credible witness and a reasonably good historian. His testimony generally aligns with the other records in the case. There was nothing about his demeanor which caused the undersigned concern for his truthfulness.

Mr. Wonten suffered a hernia injury while working on the belly line for Tyson in October 2010. Mr. Wonten underwent medical treatment for this injury. The parties settled this claim on a full commutation in January 2014. In the end, claimant was compensated for an 18.26 percent industrial disability. (Defendant's Exhibit C, page 1) The total value of the settlement was $29,828.63. After recuperating from this injury, Mr. Wonten changed jobs. While he was still on the production line, he bid into a job entitled "Whiz Skin Patches" where he uses a knife. He trims meat products for a twelve-hour shift. At the time of hearing, he still performed this work. He testified that he still has symptoms from the hernia surgery, even after leaving the job lifting bellies. (Def. Ex. B, Wonten Depo 1, p. 11)

The parties have stipulated that Mr. Wonten suffered an injury which arose out of and in the course of his employment on May 13, 2014. On that date he was twisting from the right to the left and he felt a burning pain in his low back. (Def. Ex. B, Wonten Depo 1, pp. 11-12) After the work injury, Mr. Wonten continued to work and underwent a course of conservative medical care, first treating with Gregory Clem, M.D. (Jt. Ex. 2, pp. 1-15) Dr. Clem treated him with medications, restrictions and physical therapy. He received physical therapy at Columbus Junction Physical Therapy. (Jt. Ex. 4, pp. 1-7)

He was eventually referred to Michael Dolphin, D.O., at Orthopedic Specialists. (Jt. Ex. 6, pp. 1-3) In September 2014, Dr. Dolphin diagnosed a lumbar strain. (Jt. Ex. 6, p. 2) He reviewed the diagnostic studies, including an MRI, and recommended Mr. Wonten continue with the conservative treatment. (Jt. Ex. 6, p. 2) On September 30, 2014, Mr. Wonten returned to Dr. Clem. He continued Mr. Wonten on work hardening and provided him with an abdominal/back brace of some type. (Jt. Ex. 2, p. 8) At that time, he placed Mr. Wonten at maximum medical improvement (MMI) and released him from care.

Mr. Wonten continued to follow up with Dr. Clem from time to time thereafter. The working diagnosis was low back pain with some right sciatica or mechanical low back pain. (Jt. Ex. 2, pp. 9-15) Claimant testified credibly that his back pain never resolved, and this is consistent with the medical records in evidence. (See also Jt. Ex. 3, pp. 2-22) Bending, twisting and lifting in particular cause him pain. Claimant underwent an independent medical evaluation by Richard Kreiter, M.D., in December 2014. (Cl. Ex. 2, pp. 19-20) He diagnosed lower lumbar back pain, probable dysfunction of the right sacroiliac joint. (Cl. Ex. 2, p. 20) He assessed claimant's impairment in the range of 5 to 8 percent and recommended reasonable lifting restrictions. (Cl. Ex. 2, p. 21)

In October 2016, Patrick Hartley, M.D., reviewed records and evaluated Mr. Wonten on behalf of Tyson. He diagnosed chronic lumbar myofascial pain with associated right lower extremity radicular symptoms. (Jt. Ex. 11, p. 1) The following is then documented. "Before I had complete [sic] my evaluation, the nurse (following review of records) indicated that Mr. Wonten had previously been placed at MMI, and in the absence of a new reported injury, did not need to be evaluated today." (Jt. Ex. 11, p. 1)

The greater weight of evidence supports a finding that the claimant suffered some permanent disability to his low back as a result of his stipulated May 2014, work injury.

The parties have stipulated that claimant suffered an injury to his left upper extremity on November 24, 2015, which arose out of and in the course of his employment. He was sent to Dr. Clem, who documented his complaints in December 2015, diagnosing "right hand neuralgia with right lateral epicondylitis and some right shoulder pain and trapezius pain." (Jt. Ex. 2, p. 11) Conservative medical care was provided for the next several months. (Jt. Ex. 2, pp. 11-14; Jt. Ex. 10) Based upon the Tyson Medical records which are in evidence, it appears claimant was consistently complaining of right elbow, upper arm and shoulder pain since at least December 2015. (Jt. Ex. 3, pp. 21-22)

By April 2016, Mr. Wonten was referred to Steindler Orthopedics where he was evaluated by Brian Wills, M.D. (Jt. Ex. 8) Dr. Wills documented the course of events, performed a thorough examination and diagnosed carpal tunnel syndrome and right lateral epicondylitis. (Jt. Ex. 8, p. 3) He offered surgery on the carpal tunnel and

recommended home exercise for the lateral epicondylitis. (Jt. Ex. 8, p. 4) Surgery was performed on May 6, 2016. (Jt. Ex. 8, p. 6) The surgical result was good. Dr. Wills followed up with claimant and released him to full work activities on June 21, 2016. (Jt. Ex. 8, p. 13) Claimant followed up with Dr. Wills again in October 2016, confirming the results of the carpal tunnel surgery was good. (Jt. Ex. 8, p. 17) At that time, Dr. Wills opined claimant suffered no ratable impairment from the carpal tunnel. (Jt. Ex. 8, p. 20) It appears that the shoulder complaints were never addressed or even evaluated by Tyson's physicians. (Cl. Ex. 2, p. 28)

In January 2017, Dr. Kreiter evaluated claimant's right shoulder. He diagnosed joint synovitis with possible impingement and bursitis. (Cl. Ex. 2, p. 24) He attributed this condition to claimant's work activities and provided a 25 percent whole person impairment rating for this condition. (Cl. Ex. 2, pp. 24-25) He equivocated on maximum medical improvement, stating that the condition had plateaued, however, Mr. Wonten would benefit from additional treatment.

Dr. Hartley evaluated Mr. Wonten's right shoulder in August 2017. (Jt. Ex. 11, p. 9) He noted there "is not consistent evidence in the medical record of continuing shoulder symptoms dating back to his injury in November 2015 when he alleges he injured his shoulder." (Jt. Ex. 11, p. 10) Dr. Hartley then began treating the right shoulder in August 2017. (Jt. Ex. 11, p. 12) Dr. Hartley diagnosed a sprain of the right acromioclavicular joint and provided a pain injection. (Jt. Ex. 11, p. 13) In September 2017, claimant followed up and Dr. Hartley noted that the condition was degenerative and not work-related. (Jt. Ex. 11, p. 17) In October 2017, Dr. Hartley opined claimant was at MMI with no impairment from a work injury. (Jt. Ex. 11, p. 19)

Dr. Kreiter prepared a report for claimant's counsel in December 2017, wherein he disagreed with Dr. Hartley, noting that claimant had suffered an "aggravation and acceleration of a pre-existing condition caused by multiple mini traumas to the right shoulder and not a single wipe-out injury." (Claimant's Ex. 2, pp. 28-29)

Dr. Hartley prepared a final report in February 2018, wherein he comprehensively opined that Mr. Wonten does not suffer from any permanent disability in his right arm or shoulder. (Def. Ex. N)

The greater weight of the evidence supports a finding that claimant has suffered a permanent disability in his right shoulder as a result of the stipulated work injury.

CONCLUSIONS OF LAW

There are numerous issues presented in these two files. For both files, Tyson contends Mr. Wonten has not suffered any permanent disability resulting from the stipulated work injuries.

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).

File No. 5053408, Low Back

The parties have stipulated claimant suffered an injury to his low back on May 13, 2014, while he was bending and twisting at work. The question is whether this admitted injury is a cause of any industrial disability. The claimant alleges it is. The defendant claims it is not, contending there is no objective evidence of permanent impairment. By a preponderance of evidence, I find the claimant has suffered an industrial disability as a result of his May 2014, work injury.

While it is not required that an injured worker have a permanent impairment to have a permanent industrial disability, I find the medical opinion of Dr. Kreiter to be the most compelling medical opinion regarding claimant's low back condition. It is the most consistent opinion with the other medical documentation in the record, as well as the highly credible testimony of Mr. Wonten, who, through the date of hearing, continues to have some ongoing symptoms. Specifically, Mr. Wonten's ongoing complaints of symptoms are documented in the Tyson Medical records, Dr. Clem's records, as well as Dr. Hartley's report.

File No. 5058593 Right Shoulder, Right Upper Extremity

The dispute regarding claimant's right shoulder mirrors the back issue. Claimant alleges he has suffered permanent impairment while the defendant contends that there is no objective basis for a finding of impairment. With regard to the shoulder, defendant has further contended that any disability which does exist results from an underlying degenerative condition rather than any work injury. Again, by a preponderance of evidence, I find the greater weight of evidence supports the claimant's position. While I

do find that Dr. Kreiter's 25 percent whole person impairment rating is overstated, I agree that there is some functional disability present in the right shoulder. I specifically agree with Dr. Kreiter's finding that claimant aggravated or accelerated the underlying degenerative condition in his right shoulder. (Cl. Ex. 2, pp. 28-29) Dr. Kreiter's opinion is bolstered by the Tyson Medical records, which demonstrate claimant began complaining of the right shoulder symptoms the same time he developed numbness in his hand and arm. The complaints are also documented in Dr. Clem's records. I agree with the defendant that his complaints are not documented in the ongoing treatment notes of Dr. Wills. I find that this is more a reflection of Dr. Wills' focus rather than the claimant's focus.

The next issue is the extent of claimant's industrial disability. The claimant has alleged he has suffered independent industrial disability from each of these injuries while the defendant contends the total disability is minimal, and, in fact, subsumed in his previous hernia disability. Tyson specifically claims it is entitled to a credit for all of the disability benefits paid to claimant for a February 2014, full commutation settlement which equated to an 18.26 percent industrial disability. Because all of claimant's disabilities are industrial and the credit issue has been raised, the totality of claimant's industrial disability is analyzed herein.

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 is a 52-year-old immigrant from Liberia where he was educated. He is able to read and write in English, however, he has a thick accent. He worked as a teacher in Liberia. I suspect he is quite bright. Since coming to the United States in 2006, he has mostly worked as a production worker at Tyson Foods.

He has three separate disabilities from his work at Tyson. He suffered a hernia

injury which, he testified at hearing, still causes symptoms and pain in his abdomen, particularly when performing manual labor. He and Tyson agreed that his industrial disability from this injury was 18.26 percent. (Def. Ex. 2)

Claimant now has two distinct disabilities which further impact his employability in the competitive job market to at least a minor degree. He suffered a May 2014, work injury which has caused a minor permanent impairment in his low back. This condition causes claimant pain on a regular basis, particularly when lifting heavy items, bending and twisting. In November 2015, he suffered a cumulative trauma injury which aggravated or accelerated a degenerative condition in his right shoulder. This also resulted in some permanent impairment of his right shoulder and interferes with his ability to reach and lift. Mr. Wonten works long days on a fast-paced line using a large knife. He has no formal medical restrictions. He has been able to continue working in spite of his ongoing pain and symptoms associated with all of his disabilities. Due to raises in the plant, he is actually earning more money than he did at the time of his various injuries. I find that Mr. Wonten is highly-motivated to work and earn wages.

Pursuant to Iowa Code section 85.34(7) (2017), the employer is entitled to a credit for permanent partial disability paid as a result of a previous injury to its employee against any subsequent award.

Section 85.34(7) states:

> 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. (1) 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 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.

The purpose of this section is to assure that an employee is fully compensated for all disability caused by the work-related injuries without compensating the same disability more than once. Workers' Compensation, Iowa Practice 15, (2014-2015), Section 13.6. The agency has interpreted this provision in Steffen v. Hawkeye Truck & Trailer, File No. 5022821 (App. September 9, 2009).

In my reading of Section 85.34(7), the agency is required to assess the

claimant's full loss of earning capacity for all injuries for which he was compensated industrially and provide a credit for benefits previously paid. Having reviewed all of the evidence in the record, I find claimant has suffered a total disability, from all three injuries, of 38.26 percent. I attribute 18.26 percent of the disability to the October 1, 2010, hernia injury. The parties settled this dispute as a full commutation and agreed upon all benefits owed to the claimant for the injury. (Def. Ex. C) Claimant argues that this is a closed file settlement and likens it to an 85.35 compromise settlement. I disagree. The fact that the settlement closes out claimant's right to future medical treatment for this condition does not change the fact that the parties agreed upon the benefits which were owed to the claimant for the injury. I conclude that the defendant is entitled to a credit for all industrial disability benefits paid for the October 2010, hernia injury. Tyson, however, agreed that the claimant had suffered an 18.26 percent industrial disability before he had ever suffered injuries to his back or shoulder. I am not free to reassess or readjudicate that agreement. In essence, the 18.26 percent disability memorialized in the 2014 full commutation, serves as a floor for his full disability.

Having reviewed all of the evidence in the record and further having considered all of the appropriate factors of industrial disability, I find claimant has suffered an additional 10 percent industrial disability resulting from his May 2014, low back injury, and an additional 10 percent industrial disability from his November 2015, right shoulder injury. Both injuries resulted in a minor degree of permanent impairment which do impact his ability to earn wages in the competitive labor market. Nevertheless, claimant has remained employed at Tyson and is earning higher wages than he was before his injuries. Therefore, claimant's full disability, resulting from all three injuries is 38.26 percent.

The next issue is the claimant's rate of compensation. There is no dispute regarding the claimant's gross wages or marital status. The dispute revolves exclusively around his entitlement to exemptions.

In calculating the rate of compensation, the injured worker's marital status and number of dependents entitled to be claimed are necessary. "The weekly benefit amount payable to any employee for any one week shall be upon the basis of eighty percent of the employee's weekly spendable earnings, . . ." Iowa Code section 85.37 (2017) Weekly spendable earnings is defined as the amount remaining after payroll taxes are deducted from gross weekly earnings. Iowa Code section 85.61(9) (2017).

The agency "has long held that actual exemptions claimed on the income tax return controls. . . . A claimant is typically limited to those exemptions claimed on his tax returns." Kayser v. Farmers Cooperative Society, File No. 5034699 (Arb. Dec. March 13, 2012) *citing* Deraad v. Fred's Plumbing & Heating, File No. 1134532 (App. Jan. 16, 2002) *and* Webber v. West Side Transport, File No. 1278549 (App. Dec. 20, 2002). In essence, the agency recognizes a presumption that the claimant is entitled to

the number of exemptions which were actually claimed on their tax returns. The party seeking to overcome that presumption must present sufficient evidence at hearing to rebut the presumption.

In this case, the claimant's income taxes for 2014 and 2015 are not in evidence. The claimant testified that he claimed two of his children as dependents on his taxes. I find the claimant is credible and I believe his testimony. This testimony is unrebutted by the defendant. The claimant's rate shall be calculated utilizing his two dependents.

ORDER

THEREFORE, IT IS ORDERED:

File No. 5053408 (Low Back)

Defendant shall pay the claimant fifty (50) weeks of permanent partial disability benefits at the rate of four hundred three and 31/100 dollars ($403.31) per week from June 23, 2015.

Defendant shall pay accrued weekly benefits in a lump sum.

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

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

File No. 5058593 (Right Shoulder)

Defendant shall pay the claimant fifty (50) weeks of permanent partial disability benefits at the rate of four hundred eleven and 80/100 dollars ($411.80) commencing on October 5, 2017.

Defendant shall pay accrued weekly benefits in a lump sum.

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

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

For both files, reasonable costs are taxed to the defendant.

Signed and filed this 22nd day of February, 2019.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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