BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARIA J. GARCIA, Claimant, vs. TYSON FRESH MEATS, INC., Employer, Self-Insured, Defendant.	FILED MAR 22 2018 WORKERS COMPENSATION	File Nos. 5062176, 5062177 5062178, 5062179 ARBITRATION DECISION Head Note Nos.: 1100; 1402.40; 1803

STATEMENT OF THE CASE

Maria J. Garcia, claimant, filed four separate petitions in arbitration seeking workers' compensation benefits from Tyson Fresh Meats, the self-insured employer.

On July 24, 2017, prior to the arbitration hearing, defendant filed a motion to compel claimant to attend a functional capacity evaluation. Claimant resisted the motion. On August 1, 2017, the undersigned denied the motion to compel. On the same date, defendant filed a notice of appeal of the denial of the motion to compel. The four petitions proceeded to a combined arbitration hearing on August 15, 2017. On September 26, 2017, the parties filed their post-hearing briefs following the arbitration hearing. On December 7, 2017, the commissioner issued an order finding insufficient grounds to grant the appeal and therefore, denied the application for interlocutory appeal and dismissed the notice of appeal.

The evidentiary record includes: Joint Medical Exhibits JE1 through JE7, Claimant's Exhibits 1 through 10 and Defendant's Exhibits A through C.

At hearing, claimant provided testimony through an interpreter, Mr. Frank Gonzalez.

The parties filed four separate hearing reports at the commencement of the arbitration hearing. On the hearing reports, 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.

ISSUES

The parties submitted the following disputed issues for resolution:

File No. 5062176 (Accepted Cumulative Injury, Right Shoulder, January 12, 2015):

1. Extent of industrial disability.
2. Iowa Code section 85.39 IME, partial reimbursement (Exhibit C).
3. Costs.

File No. 5062177 (Alleged Acute Injury, Right Shoulder, January 14, 2015)

4. Whether claimant sustained an injury that arose out of and in the course of employment on January 14, 2015.
5. Causation of industrial disability and extent, if any.
6. Apportionment/credit if any award of industrial disability in File No. 5062176.
7. Costs.

File No. 5062178 (Accepted Acute Injury, Left Leg, April 29, 2015)

8. Causation of permanent partial disability of the left leg/knee and extent, if any.
9. Costs.

File No. 5062179 (Alleged Acute Injury, Left Leg, May 19, 2015)

10. Whether claimant sustained an injury that arose out of and in the course of employment on May 19, 2015 involving his left leg/knee.
11. Causation of permanent partial disability and extent, if any.
12. Apportionment/credit if any award of permanent partial disability in File No. 5062176.
13. Costs.

FINDINGS OF FACT

After a review of the evidence presented, I find as follows:

Claimant was 57 years old at the time of the hearing. (Transcript page 13) She is right-hand dominant. (Tr. p. 20)

Claimant was born in Mexico and attended school there through the eighth grade. In 2004, she moved to the United States. Her first language is Spanish and she has learned to read, write and speak some words in English, but not a lot. Since the Tyson Foods plant closed in August 2015, claimant has been taking beginner English classes at Western Iowa Tech in Denison, Iowa. At the time of the hearing, she was continuing to take such courses. (Ex. 2, p. 25)

Work History

While claimant lived in Mexico, she worked at home raising her six children. (Tr. pp. 13, 17) She stated that she does not know how to type or use a computer. (Tr. pp. 15-16)

After coming to the United States in 2004, claimant continued to work at home for the first year and then she began working at Tyson Foods on November 18, 2005. (Tr. pp. 17-18; Ex. 7, p. 48) Her first job was cutting contamination off of cows and bulls, which included trimming the inside of the carcass. (Tr. p. 19) She did that job for about 7 to 8 years. (Id.) The cows came to her work area via an overhead rail system, hanging by their rear feet. Claimant used a knife, a hook and a sharpening stick to do her job. (Tr. p. 19) She used the knife with her right hand and the hook with her left hand to grab the chest of the cow. (Tr. pp. 19-20) This job included frequent overhead work to trim contamination from the cow's hind legs. (Tr. p. 20) Claimant does not believe that she could do this job any longer due to her present shoulder condition. (Id.) Claimant's next job at Tyson Foods was operating a vacuum to clean the chest cavity of the cows and remove contamination. She did this job for about a year. (Tr. pp. 20-21) The cows she worked on were on the overhead rail as described above. The vacuum tool was very hot in order to kill bacteria. This job required claimant to frequently move the tool up and down, including above shoulder height. (Tr. p. 21) She estimated that she worked on well over 1,000 cows per day and up to as many as 1,800 to 2,000 on some days. (Tr. pp. 21, 22) She did not believe that she could do this vacuuming job any longer due to her present shoulder condition. (Tr. pp. 22, 23)

In 2015, while working for the defendant employer, claimant was performing a job using electric scissors that weighed about 4 to 8 pounds and were about 2 feet long. Her job was to use the scissors to repetitively reach out and cut the hooves off the cows. (Tr. p. 25) She estimated that this job required her to work on about 1,700 to 1,800 cows per day. Claimant did not believe that she could return to this scissor job any longer due to her present shoulder condition. (Tr. p. 27)

Claimant advised that she earned about $13.65 per hour while working for the defendant employer. (Ex. 2, p. 26)

Claimant testified that she did not believe that she could return to any of the regular jobs that she previously did for the defendant employer. (Tr. p. 47) She did believe that she could return to the light duty jobs that she had been assigned, but agreed that the light duty jobs were not regular bid jobs and were only available to injured people on a temporary basis. (Id.)

Claimant lost her job with the defendant employer when the plant closed on August 14, 2015. (Tr. pp. 14-15) Thereafter, claimant received unemployment benefits for several months. (Tr. p. 45)

Current Employment

At the time of the hearing, claimant was unemployed. She testified that she applied for just one job in the two year period between the date the Tyson plant closed and the date of the arbitration hearing. (Tr. p. 46) She applied at Farmland in Denison, Iowa and advised the potential employer of her shoulder injury. She was not offered employment. (Id.)

I find that claimant is not motivated to return to work, in view of the fact that she has applied for only one job in the previous two years.

Prior Medical Condition

Before claimant began working at Tyson Foods in 2005, she completed and passed a pre-employment physical. (Tr. pp. 18, 19)

In 2010, claimant was trimming cows at work and had some pain in her right shoulder. The employer sent her for medical treatment. (Tr. p. 23) She received physical therapy and took ibuprofen and her shoulder pain got better. (Tr. p. 24)

In 2013, claimant was doing repetitive work when she developed pain in her right shoulder again. (Id.) At that time, the defendant employer sent her for medical treatment and claimant received an injection in her shoulder, which was helpful. (Ex. JE2, p. 40) She was released back to work without restrictions in 2013. (Tr. p. 24)

I find that claimant did not have any permanent restrictions and was working full-duty without any restrictions at the time of the initial injury alleged herein.

The Injuries

On January 12, 2015, (File No. 5062176) claimant sustained a stipulated work injury while cutting hooves off of cows. (Hearing Report, File No. 5062176, p. 1; Tr. p. 25) She stated that the scissors were dull and she had to use more force to do the cutting. (Tr. p. 28) The pain in her right shoulder and elbow came on gradually during her shift that day. She reported the injury and was taken to the nurses' station where she was treated with ice and ibuprofen. (Ex. JE1, p. 1) She reported her pain to the

nurse as a level 8. (Id.) She was placed on a lighter duty job of placing plastic on the cow hides to reduce contamination. (Id.)

On January 14, 2015 (File No. 5062177), claimant testified that she was doing the light duty work of placing plastic on the cow hides, when a metal tube/pipe fell and hit her in the right shoulder and back. (Tr. p. 29) She stated that the pain in her right shoulder increased. (Tr. p. 30) However, I note that she reported her pain level to the nurse as a 6, which was less than what she reported to the nurse two days earlier on January 12, 2015, and she had no redness, bruising or swelling. (Ex. JE1, p. 1) She was given the same treatment as before of ice and ibuprofen. (Id.) She was placed on a different light duty job, which involved counting the holes in the cow hides and recording the number in a notebook. (Tr. p. 30)

On April 29, 2015, (File No. 5062178) claimant sustained a stipulated work injury while she was walking down the stairs at work and injured her left leg. (Hearing Report, File No. 5062178, p. 1; Tr. pp. 34-35) Claimant described the injury as twisting her left ankle and knee. (Tr. pp. 34-35) She reported the incident to her employer and she was sent for medical treatment. (Tr. p. 35)

On May 19, 2015, (File No. 5062179) claimant was leaving the nurses' station, and while stepping down, she slipped and fell and landed on her left leg twisting her left knee causing pain from the left knee down her leg. (Tr. pp. 36-37) She could not stand up immediately and someone helped her to her feet. (Tr. p. 37) She reported the incident to her supervisor and she was sent for medical treatment to Dr. Woollen. (Tr. pp. 37-38)

Post-Injury Medical Treatment

After the January 12, 2015, injury, and after some initial treatment with the company nurse, claimant was sent to Todd Woollen, M.D. at CCMH Medical Center in Denison, Iowa. (Tr. p. 30; Ex. JE1 pp. 1-3; Ex. JE2, p. 40) An interpreter was provided for her visits with Dr. Woollen. (Tr. pp. 30-31) Claimant advised Dr. Woollen on January 23, 2015, that her "equipment wasn't sharp enough," and that she was using her own strength to do her job rather than relying on the tool. (Ex. JE2, p. 40) She also advised him of the incident with the metal tube/pipe falling on her. (Id.) An injection was recommended. (Id.)

On January 27, 2015, Dr. Woollen noted improvement from the injection and recommended physical therapy "for the pain that remains." (Ex. JE2, p. 42) He stated the "true shoulder pain" had "resolved," but that claimant continued to have some pain in her chest and neck. (Id.)

On February 10, 2015, Dr. Woollen found that claimant's right shoulder pain was mild and that her right elbow was doing much better and that her thoracic and back pain was slowly healing. (Ex. JE2, p. 44) However, by February 25, 2015, the pain in her

right posterior shoulder and back was getting worse. A referral to Nebraska Spine and Pain Center was recommended. (Ex. JE2, p. 46)

On March 11, 2015, claimant was seen by J.B. Gill, M.D. at the Nebraska Spine and Pain Center concerning right arm and parascapular pain. (Ex. JE4, p. 80) He opined that her symptoms were coming from the right shoulder and were not related to any cervical radiculopathy, and that "[i]t sounds as if her injury was an overuse injury." (Ex. JE4, p. 83) Claimant was maintained on restrictions until she could be seen by a shoulder specialist.

On March 18, 2015, claimant was seen by Daniel J. Larose, M.D. at Miller Orthopedic Specialists. (Ex. JE5, p. 85) She was seen with the assistance of an interpreter. (Ex. 5, p. 86) Dr. Larose reported that the prior shoulder injection provided no significant help and that physical therapy was not very helpful and it was stopped. His impression was that claimant had rotator cuff syndrome with a possible tear. (Id.) An MRI was recommended.

On March 25, 2016, Dr. Larose recommended surgery, including: examination of claimant's right shoulder under anesthesia, arthroscopy, subacromial decompression, inspection of the biceps for possible biceps tenodesis, and rotator cuff repair. (Ex. JE5, p. 86) Claimant wanted to proceed with the surgery as recommended. (Id.)

Claimant testified that on April 29, 2015, she hurt her leg walking down the stairs at work. She twisted her ankle and her knee. (Tr. pp. 34-35) She reported this incident to her employer and was sent for medical treatment. (Tr. p. 35) This is the stipulated work injury identified in File No. 5062178. Following this injury, the shoulder surgery was postponed. (Tr. p. 34)

Claimant was seen on April 30, 2015, by Dr. Woollen and reported pain in both legs, worse in the left leg. (Ex. JE2, p. 47) Claimant testified that she received injections in both her ankle and knee. (Tr. p. 36; Ex. JE2, p. 48) Dr. Woollen stated that "her morbid obesity is likely contributing more to her ankle and knee pain than anything else." (Ex. JE2, p. 48)

On May 14, 2015, claimant reported improvement in her knee pain following the injection. (Ex. JE2, p. 51)

Claimant testified that on May 19, 2015, she was leaving the nurses' station, which requires her to step down and she fell, landing on her left leg and twisting her left knee. (Tr. pp. 36-37) This is the injury claimed in File No. 5062179. On the same day, claimant was also seen by Dr. Woollen and reported feeling "a lot worse," with the worst of the pain in the left lateral ankle. (Ex. JE2, p. 53) She was placed on crutches and put in a CAM boot, with a work restriction of no prolonged standing and avoid weight bearing on the left leg. (Ex. JE2, pp. 53-54)

On May 28, 2015, claimant saw Dr. Larose and it was noted that she was supposed to have shoulder surgery about one week earlier, but she had inverted her left ankle and upon examination her balance did not seem to be good and "it would have been difficult to do a shoulder surgery and then have her on crutches for the ankle sprain." (Ex. JE5, p. 88) Therapy was prescribed for the left ankle and right shoulder. (Id.)

On June 17, 2015, she followed-up with Dr. Woollen regarding her left ankle injury and reported improvement with walking and she was having "a little knee pain again." (Ex. JE2, p. 58) Physical therapy was recommended for both the left knee and ankle. (Id.)

Also on June 17, 2015, claimant was seen by Dr. Larose and noted that her right shoulder was still painful, although her motion was improved. (Ex. JE5, p. 89) The right shoulder surgery was rescheduled. She was encouraged to cease using the boot for her left ankle. (Id.)

On July 8, 2015, claimant reported improvement in her left ankle, but she still had pain in her knee. Her right shoulder and elbow were still hurting. (Ex. JE2, p. 60)

As stated above, the employer closed the plant where claimant worked on August 14, 2015. (Tr. pp. 14-15)

On November 2, 2015, claimant underwent right shoulder surgery with Dr. Larose. (Ex. JE7, p. 100) The procedure included partial tenotomy of the biceps tendon with the arthroscope, subacromial decompression with coplaning of the clavicle, and mini open rotator cuff repair and biceps tenodesis of the right shoulder. (Id.)

On November 18, 2015, claimant reported to Dr. Larose that her pain was well controlled and it was noted that she had good healing following surgery. (Ex. JE5, p. 90)

Claimant saw Dr. Larose monthly from December 2015 through April 2016. (Ex. JE5, pp. 92-97)

On April 13, 2016, claimant was noted by Dr. Larose to have "[g]ood strength on testing [of her] rotator cuff." (Ex. JE5, p. 97)

On April 28, 2016, claimant complained of left ankle, knee and leg pain. Dr. Woollen stated that "[g]iven her pain for 1 year in her left knee and left ankle, I think proceeding with an MRI of the left knee and ankle would be reasonable. I think this may be necessary to close her claim given her ongoing complaints." (Ex. JE2, p. 67) He again stated that claimant's "morbid obesity is likely contributing to both her left knee and left ankle pain." (Id.)

On May 28, 2016, Dr. Woollen wrote a letter and referred to the MRI, which was obtained on May 11, 2016. (Ex. JE3, pp. 77-79) Dr. Woollen stated that the MRI showed "diffuse osteoarthritis in the left ankle and moderate tricompartmental degenerative changes with complex tearing of the medial meniscus in the left knee." (Ex. JE2, p. 69) He also described the degenerative changes and opined that the changes were chronic in nature, and that claimant "needs to probably have a knee replacement based on these findings if her pain is to resolve," which, "will need to be done through her regular insurance as we would not expect workman's [*sic*] compensation to cover knee replacement from osteoarthritic changes." (Id.) He then placed claimant at maximum medical improvement (MMI).

Current Condition

Claimant testified that she continues to have constant pain in her right shoulder and right shoulder blade. (Tr. p. 44) She described the pain from the shoulder to the elbow on her right side with the majority of her pain in her right shoulder. (Tr. p. 45) She described difficulty with repetitive activity with her right arm. (Tr. p. 17)

Permanent Partial Disability

On April 13, 2016, claimant was still having some discomfort in her right shoulder. She had been on a 5 pound restriction for her right arm prior to this date and testified that she had no change in her condition over the past month. (Tr. pp. 41-42) Nevertheless, on April 13, 2016, Dr. Larose said that claimant "can be at full work." (Ex. JE5, p. 97) He placed claimant at MMI and opined that "[a]ccording to the Fifth AMA Guide Book . . . she has a 10% impairment of the right upper extremity." (Id.)

On July 11, 2016, Sunil Bansal, M.D., issued a report following an independent medical examination (IME) that occurred on June 1, 2016. (Ex. 1, pp. 1-15) Dr. Bansal reviewed claimant's medical history and had a discussion with her through an interpreter concerning the injuries, her treatment, her current condition, and job duties. He conducted a physical examination and noted her range of motion of her right shoulder and described her left shoulder range of motion as "full," but without noting any measurements for comparison to the right. (Ex. 1, pp. 10-11) Dr. Bansal opined concerning the shoulder injury that claimant had strained rotator cuff tendons on January 12, 2015 from her work and had "further injury on January 14, 2015 when metal tubing hit the back of her shoulder area." (Ex. 1, p. 12) Dr. Bansal does not provide any discussion to support his conclusion that claimant sustained "further injury" on January 14, 2015. (Id.) He then assigned ten percent permanent impairment to the right upper extremity, which is six percent of the whole person, and referred only to the "January 12, 2015 injury," while discussing permanent impairment. (Ex. 1, pp. 13-14) This impairment rating is based on reduced range of motion and Table 16-40 through 16-46 of the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides). (Ex. 1, p. 13) Dr. Bansal assigned restrictions of no lifting over ten pounds occasionally or five pounds frequently with the right arm.

No lifting over five pounds occasionally over shoulder height and no frequent overhead lifting with the right arm. (Ex. 1, p. 14) He stated that claimant may need intermittent cortisone injections, NSAIDS and home exercise going forward. (Id.)

Concerning the left knee, Dr. Bansal described the incidents from April 29 and May 19, 2015. He stated that on April 29, 2015 claimant likely sustained a sprain of her left knee and ankle and on May 19, 2015, "she most likely tore her medial meniscus" in her left knee. (Ex. 1, p. 13) He concluded that "her left knee and ankle condition is related to her April 29 and May 19, 2015 injuries at Tyson." (Id.) Dr. Bansal assigned 2 percent permanent impairment to the lower extremity for the knee and no impairment for the ankle. The rating was based on a meniscal tear and a need for a meniscectomy under Table 17-33 of the AMA Guides. (Ex. 1, p. 14) Dr. Bansal then assigned restrictions of avoiding multiple stairs and steps and walking or standing more than 30 minutes. (Id.) Dr. Bansal recommended a left knee medial meniscectomy. (Ex. 1, p. 15)

On June 1, 2017, Dr. Larose, in a letter prepared by defense counsel, signed his agreement to his summarized opinions. (Ex. JE5, pp. 97A, 97B) The letter indicates that Dr. Larose agreed with Dr. Bansal's rating of ten percent to the upper extremity, which converts to six percent to the body as a whole and after reviewing the restrictions as assigned by Dr. Bansal, he continued to believe that she could be released to full work, and "if not she should seek medical treatment." (Ex. JE5, p. 97B) He did not provide any discussion or rationale for his lack of restrictions, despite the defendant's request that he state his "written opinion regarding the basis for not giving [claimant] permanent work restrictions." (Id.)

On July 7, 2017, claimant underwent an IME with Ryan Meis, M.D., an orthopedic surgeon at the CNOS Dunes Clinic at the request of defense counsel. (Ex. A) The examination occurred with the assistance of an interpreter. Dr. Meis reviewed claimant's medical records, including Dr. Bansal's IME and obtained current x-rays of claimant's left knee and ankle. (Ex. A, pp. 1, 4) Claimant testified that this exam only involved her left leg and did not address her shoulder injury. (Tr. p. 44) Dr. Meis reviewed the May 11, 2016 MRI of claimant's left knee and concluded that "[t]here is mild chondromalacia of the medial compartment and the patellofemoral joint," but he stated "I do not see an obvious discrete tear of her meniscus, although, there is slight signal in the posterior horn of the meniscus on the medial side." (Ex. A, p. 2) His conclusion was that claimant sustained a knee sprain and an ankle inversion sprain from April and May 2015. (Ex. A, p. 2) Dr. Meis further stated that the:

> diagnoses are due to her slipping while on the stairs and her knee giving away. Her overall health conditions including morbid obesity make her more at risk for these injuries and when she has an injury of this nature, it makes the injury worse because of the amount of weight applied to the extremity when it is in an awkward position.

(Ex. A, p. 3) Dr. Meis opined that claimant had reached MMI and "I do not feel that she sustained any permanent impairment of her knee or her ankle." (Id.) He recommended that claimant wear an ankle brace and that physical therapy to strengthen her ankle may be helpful or home exercises. Dr. Meis specifically rejected the opinion to proceed with surgery recommended by Dr. Bansal concerning claimant's knee based on a lack of definitive evidence of a meniscal tear. He therefore also stated that the impairment rating assigned by Dr. Bansal is not appropriate because without the surgery, there would be no loss of meniscal tissue from a meniscectomy. He agreed with Dr. Woollen that surgery was not significantly likely to improve her symptoms. Finally, Dr. Meis opined that claimant required no permanent restrictions. (Id.)

On July 8, 2017, claimant underwent a functional capacity evaluation (FCE) at the request of claimant's counsel. (Ex. 9) Claimant testified that the evaluation was conducted with the aid of an interpreter. (Tr. p. 48) Claimant was described as having given a consistent effort through the testing and her effort was described as "valid." (Ex. 9, p. 63) She was found to be able to function in the sedentary work category, lifting up to ten pounds occasionally. (Id.) It was also recommended that claimant "limit reaching and elevated work above chest level to an occasional basis." (Id.)

Right Shoulder Rating and Restrictions

January 12, 2015, File No. 5062176

Concerning the January 12, 2015 accepted cumulative injury to claimant's right shoulder, Dr. Larose, the authorized treating physician, assigned a ten percent permanent partial impairment of the right upper extremity, which converted to six percent of the whole person. (Ex. JE5, p. 97B) Dr. Bansal, claimant's IME physician, noting only the January 12, 2015 date of injury when discussing a permanent impairment rating, assigned the same permanent impairment rating. (Ex. 1, p. 14)

I find, based on the opinions of both Dr. Larose and Dr. Bansal, that claimant sustained six percent whole person impairment as a result of the January 12, 2015 work injury.

Regarding permanent restrictions, Dr. Larose assigned no restrictions and returned claimant to work full-duty on April 13, 2016. However, the employer's plant had already closed in August 2015 and claimant never returned to work. Dr. Bansal assigned restrictions of: no lifting over ten pounds occasionally or five pounds frequently with the right arm; no lifting over five pounds occasionally over shoulder height; and no frequent overhead lifting with the right arm. (Ex. 1, p. 14) The FCE found that claimant could function in the sedentary work category, lifting up to ten pounds occasionally. (Ex. 9, p. 63) I find that the restrictions assigned by Dr. Bansal are supported by the FCE results. I also find that Dr. Larose did not provide significant detail or justification for his lack of restrictions despite the defendant's request that he do so. (Ex. JE5, p. 97B)

I generally accept the restrictions assigned by Dr. Bansal, and I find that the restrictions will make it very unlikely that claimant will be able to return to the type of work that she previously performed at Tyson Foods, which is the only job that claimant has ever had. However, I also note that claimant has made virtually no effort to find employment and therefore, she has not tested the work restrictions in a work setting. I also note that claimant has not sought any medical treatment for her shoulder since April 2016.

January 14, 2015, File No. 5062177

Concerning claimant's alleged acute injury of January 14, 2015, I find that the greater weight of the evidence supports a conclusion that the January 14, 2015 incident was a temporary aggravation, and was not an incident that led to additional permanent impairment. This finding is based on claimant's report of pain of 8/10 following the January 12, 2015 incident compared to 6/10 following the January 14, 2015 incident. (Ex. JE1, p. 1) In other words, although claimant testified that she had increased pain, it was obviously temporary because her reported pain was actually less than after the initial January 12, 2015 incident. Also, it is significant that no physician has identified any permanent impairment specifically attributable to the January 14, 2015 incident. Further, Dr. Bansal, who discussed both the January 12 and January 14, 2015 incidents in his IME report, only referenced the January 12, 2015 work injury when he assigned an impairment rating.

I find that although the incident of being struck by a metal tube/pipe clearly arose out of and in the course of her employment on January 14, 2015, that claimant failed to carry her burden of proof that the incident led to any permanent impairment.

Right Shoulder Industrial Disability

Considering claimant's industrial disability, under File No. 5062176, I note that her age, limited education, limited work experience and her impairment rating and restrictions would tend to support a higher industrial disability. However, claimant's lack of motivation to seek employment would tend to support a lower industrial disability.

Considering the above and all other appropriate factors related to industrial disability, I find that claimant has sustained 50 percent industrial disability.

Left Leg

April 29, 2015, File No. 5062178

Concerning the accepted April 29, 2015 left leg injury, Dr. Bansal opined that on that date claimant likely sustained a sprain of her left knee and ankle and on May 19, 2015, "she most likely tore her medial meniscus" in her left knee. (Ex. 1, p. 13) He then assigned a two percent permanent impairment to her left lower extremity based on Table 17-33 of the AMA Guides, which assumes a partial meniscectomy as a result of

the May 19, 2015 incident, not the April 29, 2015 incident. He assigned no impairment for the ankle.

Dr. Meis considered the April 29, 2015 and May 19, 2015 injuries and concluded that the May 11, 2016 MRI of claimant's left knee showed no "obvious discrete tear of her meniscus." (Ex. A, p. 2) He concluded that both the April 29, 2015 and May 19, 2015 incident resulted in a sprain and claimant did not sustain any permanent impairment from either incident. (Ex. A, p. 3) He further contested the impairment rating assigned by Dr. Bansal, because absent a surgery, which has not occurred in this case, there would be no loss of meniscal tissue from a meniscectomy, and therefore no ratable loss.

I find that claimant failed to carry her burden of proof that she sustained permanent partial disability from the April 29, 2015 work injury. This is supported by the fact that neither Dr. Bansal nor Dr. Meis assigned any permanent impairment for the April 29, 2015 left leg injury.

May 19, 2015, File No. 5062179

As stated above, Dr. Bansal opined that on May 19, 2015, claimant "most likely tore her medial meniscus" in her left knee and he assigned two percent permanent impairment to her left lower extremity based on Table 17-33 of the AMA Guides, which assumes a partial meniscectomy based on his diagnosis of a meniscal tear. (Ex. 1, p. 13) However, the rating only applies if the surgery is done, according to Dr. Meis. In this case, the surgery has not been done and therefore, I disregard Dr. Bansal's opinion on this particular issue.

Also as stated above, Dr. Meis found no meniscal tear and concluded that claimant sustained a sprain and he assigned no impairment rating. I accept Dr. Meis's opinion that claimant did not sustain any permanent impairment as a result of the May 19, 2015 work injury.

Although the evidence supports the finding that claimant sustained an injury that arose out of and in the course of her employment on May 19, 2015, when she was leaving the nurses' station and fell, the evidence also supports the finding that the injury claimant sustained did not lead to any permanent partial disability.

Additional Findings

Concerning claimant's IME with Dr. Bansal, the cost was $2,945.00. (Ex. 1, p. 16; Ex. C, p. 31) Defendant paid $1,200.00 of the bill prior to hearing, arguing that the charged fee was unreasonable. (Ex. C. pp. 30-31) Defendant does not argue that any portion is not appropriately payable for any other reason.

Claimant was paid 70 weeks of permanent partial disability benefits for her January 12, 2015 shoulder injury prior to the hearing. (Hearing Report, File No. 5062176, p. 2)

CONCLUSIONS OF LAW

File No. 5062176 (Accepted Cumulative Injury, Right Shoulder, Jan. 12, 2015):

Extent of Industrial Disability

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, 593; 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. However, consideration must also be given to the injured worker's medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured workers' qualifications intellectually, emotionally and physically; the worker's earning before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted. Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616 (Iowa 1995); 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).

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

Assessments of industrial disability involve a viewing of loss of earning capacity in terms of the injured workers' present ability to earn in the competitive labor market without regard to any accommodation furnished by one's present employer. Quaker

Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996); Thilges v. Snap-On Tools Corp., 528 N.W.2d 614 (Iowa 1995).

I have found above that claimant has sustained 50 percent industrial disability for the reasons there stated.

In further support of this conclusion I note that claimant's shoulder injury involved persistent pain and difficulty that required surgical intervention. The surgery was significant and included: a partial tenotomy of the biceps tendon; subacromial decompression with coplaning of the clavicle; mini open rotator cuff repair; and biceps tenodesis. Claimant's authorized surgeon did not provide any particular reasoning for his decision to not assign permanent restrictions, despite being asked to do so by defendant. (Ex. JE5, p. 97B) Claimant testified that she continued to have constant pain in her right shoulder and down her arm and she has difficulty with repetitive activity with her right arm. (Tr. pp. 17, 44, 45)

Claimant did not have any medical care for her shoulder for some time prior to the hearing. She has made virtually no effort to seek additional employment beyond the benefit of taking English courses. Nevertheless, the undersigned cannot ignore the significance of the restrictions assigned by Dr. Bansal, which were supported by the valid FCE.

In addition, claimant's difficulty with the English language, her age, her limited education and her limited work experience all will be significant barriers to her reentry into the workforce.

Iowa Code Section 85.39 IME reimbursement

Prior to the hearing, defendant paid $1,200.00 of the cost of the IME with Dr. Bansal. The total amount charged was $2,945.00. This left an unreimbursed balance of $1,745.00. Claimant seeks reimbursement of this balance.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

> Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under

section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Defendant's argument appears to be that the fee is unreasonable because the report includes a lengthy medical history review and offers opinions on causation when the January 12, 2015 work injury was admitted and causation was not an issue. The undersigned is not persuaded by this argument. The fact that claimant's IME physician conducted a thorough medical record review is reasonable for the assessment of permanent impairment. Had this not occurred, it is likely that defendant would argue that the physician's opinions are based on an incomplete medical history and a misguided understanding of the claimant's relevant prior medical condition and treatment and that the opinion should therefore be disregarded. In addition, the fact that Dr. Bansal offered a causation opinion, which I note is an exceedingly minor portion of the overall report, does not justify withholding about 60 percent of the billed amount. Defendant is obligated to reimburse the full amount of the cost of Dr. Bansal's IME.

Costs

Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I conclude that claimant was successful in this claim and therefore exercise my discretion and assess costs against the defendant in this matter as set forth in Claimant's Exhibit 8, page 52, less the amount of Dr. Bansal's IME, which is addressed above. Therefore, the total amount of costs assessed against defendant is $1,013.86.

File No. 5062177 (Alleged Acute Injury, Right Shoulder, January 14, 2015)

Arising out of and in the Course of Employment

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 Elec. 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.

I have found above that claimant sustained an injury that arose out of and in the course of her employment on January 14, 2015.

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.

A metal tube or pipe fell and struck claimant in the back/shoulder area. There is no credible evidence that the event did not occur. Claimant testified that she had at least an initial increase in pain when the event occurred. Therefore, I conclude that claimant did sustain an injury that arose out of and in the course of her employment on January 15, 2015.

Causation of Industrial Disability and Extent, if any.

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).

I have found above for the reasons there stated that claimant has failed to carry her burden of proof that the January 14, 2015 injury caused any permanent partial disability. This is supported by the lack of any medical opinion in evidence concluding that the January 14, 2015 incident led to permanent impairment. Further, Dr. Bansal only referenced the January 12, 2015 work injury when he assigned an impairment rating to claimant's shoulder.

The remaining issues in this file are moot.

File No. 5062178 (Accepted Acute Injury, Left Leg, April 29, 2015)

Extent of permanent partial disability, if any.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

Where an injury is limited to a scheduled member the loss is measured functionally, not industrially. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983).

I have found above that Dr. Bansal opined that on April 29, 2015 claimant likely sustained only a sprain of her left knee and ankle. (Ex. 1, p. 14) Also, Dr. Meis likewise concluded that the April 29, 2015 incident resulted in only a sprain. He then stated that claimant did not sustain any permanent impairment from the incident. (Ex. A, p. 3) In short, neither physician assigned any impairment rating for this date of injury.

I conclude that claimant failed to carry her burden of proof that she sustained permanent partial disability from the April 29, 2015 work injury.

7File No. 5062179 (Alleged Acute Injury, Left Leg, May 19, 2015)

Arising out of and in the Course of Employment

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 Elec. 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.

I have found above that claimant sustained an injury that arose out of and in the course of her employment on May 19, 2015.

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.

Claimant fell and required assistance to stand back up, she complained of pain in her left leg from the fall. There is no credible evidence that the event did not occur. Claimant testified that the event occurred and resulted in pain to her left leg. Therefore, I conclude that claimant did sustain an injury that arose out of and in the course of her employment on January 15, 2015.

Causation of Industrial Disability and Extent, if any.

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).

I have found above for the reasons there stated that claimant has failed to carry her burden of proof that the May 19, 2015 injury caused any permanent partial disability.

In support of this conclusion, I note that Dr. Bansal's assignment of a two percent permanent impairment rating relies on a partial meniscectomy surgery that has not occurred in this case. Dr. Meis found no meniscal tear and concluded that claimant sustained a sprain and he assigned no impairment rating. I accepted Dr. Meis's opinion that claimant did not sustain any permanent impairment as a result of the May 19, 2015 work injury.

Although the evidence supports the conclusion that claimant sustained an injury that arose out of and in the course of her employment on May 19, 2015, when she was leaving the nurses' station and fell, the evidence also supports the conclusion that claimant did not sustain any permanent partial disability from the incident.

Remaining issues in this file are moot.

ORDER

IT IS THEREFORE ORDERED

File No. 5062176, Right Shoulder, January 12, 2015

Defendant shall pay claimant industrial disability benefits of two hundred fifty (250) weeks, beginning on the stipulated commencement date of April 13, 2016, until all benefits are paid in full.

Defendant shall be entitled to credit for all weekly benefits paid to date. The parties have stipulated that defendant is entitled to a credit of seventy (70) weeks.

All weekly benefits shall be paid at the stipulated rate of three hundred eighty-one and 91/100 dollars ($381.91) per week.

All accrued benefits shall be paid in a lump sum.

Defendant shall pay interest on any accrued weekly benefits pursuant to Iowa Code section 85.30

Defendant shall reimburse claimant the remaining cost of Dr. Bansal's independent medical exam in the amount of one thousand seven hundred forty-five and 00/100 dollars ($1,745.00).

Defendant shall pay costs in the amount of one thousand thirteen and 86/100 dollars ($1,013.86) as set forth in Claimant's Exhibit 8 (less the amount of Dr. Bansal's IME addressed above).

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.

File No. 5062177, Right Shoulder, January 14, 2015

Claimant shall take nothing.

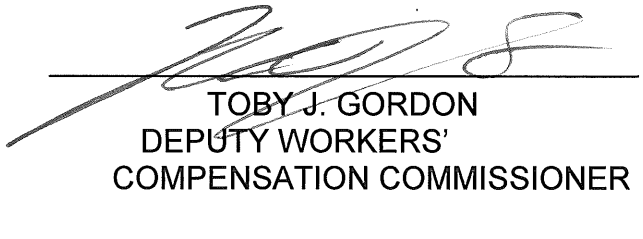
File No. 5062178, Left Leg, April 29, 2015

Claimant shall take nothing.

File No. 5062179, Left Leg, May 19, 2015

Claimant shall take nothing.

Signed and filed this 22nd day of March, 2018.



TOBY J. GORDON
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TJG/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.