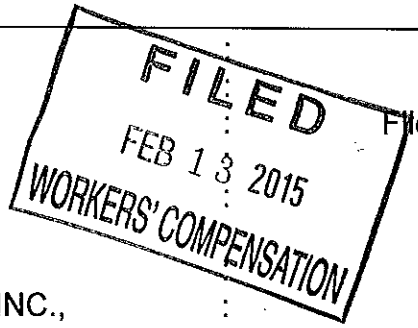
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



MEHMED AHMETOVIC,	:	File Nos. 5045319, 5045320
Claimant,	:	
vs.	:	ARBITRATION
TYSON FRESH MEATS, INC.,	:	DECISION
Employer, Self-Insured, Defendants.	:	Head Note No.: 1803

STATEMENT OF THE CASE

Mehmud Ahmetovic, claimant, has filed petitions in arbitration and seeks workers' compensation from Tyson Fresh Meats, Inc., self-insured employer, defendant.

This matter came on for hearing before deputy workers' compensation commissioner, Jon E. Heitland, on October 7, 2014 in Des Moines, Iowa. The record in the case consists of claimant's exhibits 1 through 7; defense exhibits A through D; as well as the testimony of the claimant.

ISSUES

The parties presented the following issues for determination in File No. 5045319, date of injury June 20, 2013:

1. Whether the claimant sustained an injury arising out of and in the course of employment on June 20, 2013.

2. Whether the alleged injury is a cause of temporary disability.

3. Whether the alleged injury is a cause of permanent disability.

4. The extent of the claimant's entitlement to permanent partial disability benefits.

5. Whether the claimant is entitled to payment of medical expenses pursuant to Iowa Code section 85.27.

The parties presented the following issues for determination in File No. 5045320, date of injury October 17, 2011:

1. Whether the alleged injury is a cause of temporary disability.

2. Whether the alleged injury is a cause of permanent disability.

3. Whether the claimant is entitled to temporary total disability or healing period benefits during a period of recovery.

4. The extent of the claimant's entitlement to permanent partial disability benefits.

5. Whether the claimant is entitled to payment of medical expenses pursuant to Iowa Code section 85.27.

FINDINGS OF FACT

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

Claimant, Mehmud Ahmatovic, testified he was born in 1963 in Bosnia. He left Bosnia to live in the United States in 2001. He is married. He has one child, aged 18 now. He was living with claimant in 2011 and 2013 at the time of the alleged dates of injury.

Claimant's education consists of attending school in Bosnia, completing high school there, where he was trained as a medical technician. He worked in that capacity for about eight years up to and during the war in Bosnia.

Once he moved to the United States, he tried to learn English but it did not go well. Today he is only able to say a few things in English, but for most things he needs an interpreter. When working for the employer at Tyson, he does not need an interpreter as he knows how to do his job. He has done the same job the last seven years. If he were to change jobs, he would need an interpreter to explain to him how to do the new job. He cannot read newspapers or magazines in English. He has not considered attending school in the U.S. to be a medical technician due to his language situation.

His first job in Iowa was in Independence, where he worked with hams at a meat processing plant. He worked there about three years, as a machine operator. He would lift hams into a machine or onto a rack or tray. He would only have to carry the hams a couple of steps. He would have to lift hams above shoulder level at times. He stopped working there when the company shut down.

His next job was at Janesville, Iowa, where he worked as a janitor for a few months. That was dusty work so he went to work for IBP, also known as Tyson, defendant employer herein, beginning September 12, 2006. Prior to working there he underwent a physical examination. (Exhibit B) His first job was to separate intestines, which he did for six months. He developed an allergy in his arm at this job, so he was switched to scraping lard, which he still does today. He has done that job for more than seven years.

In his job, as the hog comes toward him, he opens the hog with his left hand, then cuts downward with a Whizard knife with his right hand, three or four times. The cut begins at about the height of his eyes. Exhibit seven, page 1, shows claimant at work, wearing a hard hat and with hog halves hanging behind him. Claimant stated he would help process 9700 hogs, or about 19,400 halves, per shift. Claimant was one of four people doing his job for that many halves, so he would do about 4500 per shift. Claimant explained he actually started with his knife higher than his eyes, and then scraped the lard out, which required three or four cuts. The photo shows a worker pulling the lard out, but that is a different job than claimant performed.

On the date of injury, a co-worker failed to do something and when claimant reached with his left hand and leaned forward, the half fell off its hook, and fell onto him, hitting the back of his neck and the back of his head. It struck him on his upper back between the shoulder blades, and on his right shoulder.

Claimant reported the injury to his supervisor. He reported pain between his shoulder blades, in his low back, and throughout his upper body. He was given medical care by Tyson, who had him seen by doctors who regularly came to the Tyson plant, first by Gregory Clem, M.D., then primarily by Robert Gordon, M.D. Claimant was put on light duty for a month and a half before being returned to scraping lard, with restrictions for four or five days. Dr. Gordon then found him to be at maximum medical improvement, and assigned no restrictions or ratings of impairment. (Exhibit B)

However, after he returned to his job, some of his pain symptoms remained, and his condition did not improve 100 percent. He still had pain between his shoulder blades and in his shoulder, although he had significant improvement in other areas of his upper back.

Claimant sought a second opinion from his personal doctor, Vinko Bogdanic, M.D. Dr. Bogdanic told Tyson he agreed with Dr. Gordon's findings. (Ex. B)

Claimant asserts a second date of injury of June 20, 2013. This is based on experiencing pain the day before that date, which included tingling in his right arm and down into his right leg. He was no longer able to hold a knife. He was taken off work that day and night by a supervisor. The next day he went to see the nurse and reported the pain. When he felt these symptoms, he was doing his regular job, scraping lard. The symptoms increased while he was at work, not while doing things at home. Every

day after the long break and for the last three hours of his shift, his symptoms became worse, so he would take pain medication before beginning his work shift.

After June 20, 2013, claimant was seen by Tyson doctors for this pain. He was seen about once a week for about five weeks. He was also put on light duty, for about two months. Unlike his first injury, he did not experience as much improvement after this injury. He still today feels a lot of pressure in his shoulder, and sharp pain between his shoulders. Dr. Gordon again found claimant to be at maximum medical improvement and assigned no restrictions. Claimant asked for a second opinion on a Tyson medical form. He wanted to see Richard Naylor, M.D., because claimant was still having pain. However, that request was denied by Tyson on December 18, 2013, with a notation "treatment offered promptly, treatment suited to injury, and no inconvience [sic]". (Ex. 3, p. 5)

Claimant then saw Arnold Delbridge, M.D., for an independent medical examination (IME) on July 28, 2014. Dr. Delbridge recommended permanent restrictions of not reaching or lifting above shoulder level repetitively with his right upper extremity with over five pounds weight, or from lifting at arm's length with more than five pounds on a repetitive basis. He also restricted him from lifting above shoulder level with the right hand. He also assigned a rating of permanent partial disability of three percent for upper extremity/shoulder impairment, or two percent body as a whole, for the 2011 injury. He did not assign a rating of impairment for the 2013 injury. (Ex. 1)

Claimant stated his symptoms prevented him from sleeping on his side, and he was comfortable only on his back. Now he cannot sleep on his left side, even though his medical records say he cannot sleep on his right side. That was an error by an interpreter. The pain is on his right side, but for some reason it prevents him from sleeping on his left side. When he sleeps on his right side, he has immediate pain. When he sleeps on his left side, the pain gradually gets worse.

He lives in an apartment. Before his alleged injuries, he used to enjoy fishing, but now he is not able to because he is afraid he would hurt his arm. He only knows how to fish with his right arm. He has unpaid medical bills from Dr. Delbridge for $175.00. (Ex. 5, p. 1) He enjoys working at Tyson and would like to continue to do so.

On cross examination, he agreed the numbers of hog halves he butchers did not come from any official source. He based that on conversations with co-workers rather than on a document. He also agreed the photo in Exhibit 7 showed hog halves, and it was a hog half that fell on him.

Claimant saw Dr. Delbridge only one time. The bill in exhibit 5, page 1, is dated May 9, 2014, which was the same day he underwent an Independent Medical Examination. No one has explained to him what the $175.00 bill is for. The one and only time he saw Dr. Delbridge was for his IME.

He agreed he has not missed any work due to either injury. Only Dr. Delbridge has recommended permanent restrictions.

Claimant would like to continue working at Tyson. He has looked into another job that would be easier, but it would pay less. He has not been told he has to bid into another job other than the initial Tyson doctor who recommended claimant look for a different job. Claimant would have to bid into another position. He hopes he gets the other, easier job.

On re-direct examination, claimant stated Dr. Bogdanic is his primary care doctor. He is not a specialist. The appointment with Dr. Delbridge had to be rescheduled because the interpreter did not show up. Claimant later saw Dr. Delbridge with the interpreter present. On re-cross examination, claimant agreed Dr. Delbridge has not recommended he see a specialist.

CONCLUSIONS OF LAW

The parties presented the following issues for determination in File No. 5045320, date of injury October 17, 2011:

The first issue is whether the alleged injury is a cause of temporary or permanent disability.

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).

For the October 17, 2011, date of injury, claimant alleges an injury to his head, shoulder and upper/middle back from a hog half falling on him. Defendants admit an injury to the head, right shoulder and upper back.

The parties stipulated claimant suffered a traumatic work injury on October 17, 2011. Claimant recovered well from this incident, but claims he continues to suffer pain and flare-ups when he works above shoulder level at his job.

Dr. Gordon states claimant has not suffered any impairment, temporary or permanent, as a result of his work injury. Dr. Delbridge finds permanent impairment from the hog half hitting claimant. Dr. Gordon bases his conclusion on the lack of "objective" evidence. In other words, the only evidence of impairment is claimant's subjective reports of ongoing pain. However, Dr. Delbridge recognizes that subjective pain can be impairment. Claimant's testimony about his pain was credible. Greater weight will be given to the opinion of Dr. Delbridge. It is found claimant has carried his burden of proof to show by a preponderance of the evidence that his traumatic work injury on October 17, 2011, has resulted in temporary and permanent disability.

The next issue is the extent of the claimant's entitlement to permanent partial disability benefits.

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 was 51 years old at the time of the hearing. He was educated in his native Bosnia as a nurse technician. He does not use that skill here in the United States.

He has worked as a janitor in the past, and at another meat packing facility. He does not feel he could return to either job now due to his work restrictions and the pain from his injury when using his shoulder. If he were to be thrust into the labor market in the future, he would be limited to manual labor jobs in light of his education level and his restrictions.

Dr. Delbridge recommended permanent restrictions of not reaching or lifting above shoulder level repetitively with his right upper extremity with over five pounds weight, or from lifting at arm's length with more than five pounds on a repetitive basis, and no lifting above shoulder level with the right hand. However, he also stated those restrictions do not directly reflect claimant's current job. Dr. Delbridge rated the 2011 injury as causing a permanent partial disability of three percent for upper extremity/shoulder impairment, or two percent body as a whole.

Claimant continues to work for Tyson at his same job. His symptoms of pain continue. At work he has an increase in pain after the lunch break in the afternoon. When he stands a long time he gets stiff, and his upper back and neck become painful. Lifting his right arm above shoulder level also causes pain. (Ex. 4, p. 5)

Based on these and all other appropriate factors of industrial disability, it is found claimant has, as a result of his October 17, 2011, work injury, an industrial disability of 25 percent.

The next issue is whether the claimant is entitled to payment of medical expenses pursuant to Iowa Code section 85.27.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Defendants object to a submitted medical bill from Dr. Delbridge for $175.00 as being duplicative of the fee already paid for the IME. In addition, it is not clear what the fee is based upon. Claimant did see Dr. Delbridge for an independent medical examination but it cannot be assumed this is part of that fee. Claimant bears the burden of proof to show entitlement to reimbursement for this medical bill, but has provided no evidence as to what it is based upon. It would have been a simple matter to obtain from Dr. Delbridge's office an explanation of the fee. Defendants will not be ordered to pay the $175.00 fee.

The parties presented the following issues for determination in File No. 5045319:

Whether the claimant sustained an injury arising out of and in the course of employment on June 20, 2013.

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 R. App. P. 6.14(6).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

Claimant has alleged two separate injuries. After his October 17, 2011, traumatic injury, claimant continued to work at his job, which required repetitive work. He would handle thousands of hog halves every shift. He uses his right hand to use a scraping knife while stabilizing the hog half with his left hand. He begins at eye level, then scrapes downward, an average of three times per hog half. He estimated he does this scraping movement over 10,000 times every shift he works. There is no contrary evidence in the record.

Claimant alleges a cumulative injury based on returning to work following the first injury, then suffering an aggravation of the earlier injury by continuing with repetitive work activities. For the date of injury of June 20, 2013, claimant alleges he has re-injured or aggravated his upper and middle back injury by overuse and repetitive work when he returned to work for the employer.

However, claimant has offered little proof to substantiate this theory. It is true he has established he does repetitive work. But there is no evidence his work constituted a cumulative injury which manifested on the date alleged. Rather, the greater weight of the evidence shows claimant's later pain is part of his ongoing pain from his traumatic injury. Continuing to work in a repetitious job appears to aggravate his injury to his shoulder, and may in fact have spread his symptoms to other parts of his body. But this is part of his original injury, not a new injury process. Even if it were to be considered a new event, it would be a sequela of his original injury, and therefore compensated as

part of that injury, not as a separate injury. No physician's opinion that claimant suffered a separate and distinct cumulative injury appears in the record. Dr. Delbridge also considered this one injury and provided only one impairment rating.

The award above for the October 17, 2011, traumatic injury contemplates all disability from that injury, including the ongoing effects and pain from that injury and the symptoms on which claimant based his petition for a June 20, 2013 injury. There is only one injury indicated in this record, the traumatic injury of October 17, 2011.

It is concluded claimant has not carried his burden of proof to show he suffered a cumulative injury on June 20, 2013. The record shows by a preponderance of the evidence any later symptoms were part of the October 17, 2011, injury.

All other issues for File No. 5045319 are therefore moot.

ORDER

THEREFORE IT IS ORDERED:

In File No. 5045320:

Defendant shall pay unto the claimant one hundred twenty-five (125) weeks of permanent partial disability benefits at the rate of four hundred twenty and 91/100 dollars ($420.91) per week from September 11, 2013.

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 be given credit for benefits previously paid.

Defendant shall pay the claimant's prior medical expenses but only as set forth in the decision above.

Defendant shall pay the future medical expenses of the claimant necessitated by the work injury.

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

Costs are taxed to defendant.

In File No. 5045319:

Claimant shall take nothing from this file.

Signed and filed this 13th day of February, 2015.

JON E. HEITLAND
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JEH/kjw

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.