

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

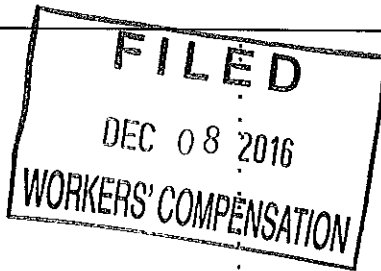
DANETTE GLASS,

Claimant,

vs.

JOHN DEERE WATERLOO WORKS,

Employer,  
Self-Insured,  
Defendants.



File No. 5051091

ARBITRATION

DECISION

Head Note Nos.: 1402.30; 2907

STATEMENT OF THE CASE

Danette Glass, claimant, filed a petition for arbitration against John Deere Waterloo Works (hereinafter referred to as "John Deere"), as the self-insured employer. An in-person hearing occurred on May 26, 2016, in Des Moines, Iowa.

The evidentiary record includes claimant's exhibits 1 and 3 through 11 as well as defendants' exhibits A through W. Claimant's exhibit 2 was excluded from the evidentiary record pursuant to an objection as to its timeliness. Claimant testified on her own behalf, including rebuttal testimony. Defendants called Erik Fuessel to testify.

Due to receipt of untimely produced evidence, the evidentiary record was suspended at the end of the live hearing. Additionally, claimant requested a deposition of the treating vascular surgeon, Alan R. Koslow, M.D., prior to the date of the arbitration hearing. Pursuant to Iowa Code 86.18(2), the undersigned ordered the evidentiary record left open to permit claimant to take the deposition of Dr. Koslow. The evidentiary record closed upon the receipt of defendants' supplemental medical report from Michael L. Cullen, M.D., and receipt of Dr. Koslow's deposition transcript.

Counsel for the parties requested the opportunity to file post-hearing briefs. Their request was granted. The parties filed their post-hearing brief on August 31, 2016, at which time the case was considered fully submitted to the undersigned.

On September 26, 2016, defendant filed a motion to strike a portion of claimant's post-hearing brief. Specifically, defendant moved to strike claimant's brief starting at line 6 on page 3 through line 19 on page 4 of claimant's brief. Defendant contends this portion of claimant's post-hearing brief quotes from evidence not contained within the evidentiary record.

Claimant resists the motion to strike. Claimant asserts that defendant cross-examined claimant on the contents of the quoted letter and that the defendant placed the issue into dispute. Therefore, claimant contends that the content of the letter should be permitted pursuant to a professional statement of counsel to avoid any speculation on the issue.

Review of the evidentiary record demonstrates that the content quoted in claimant's post-hearing brief as noted above is not contained within the evidentiary record. No evidence is received after the close of the evidentiary record. 876 IAC 4.31. Claimant's quotation and discussion of evidence not contained within the evidentiary record is not appropriate. Claimant's attempt to include the content of evidence not offered at the time of hearing or received into the evidentiary record is not permitted. Claimant's brief, as described above, is stricken.

Defendant also seeks to strike the last paragraph on page 16 of claimant's post-hearing brief because it references internet research. In response, claimant contends "the brief and the paragraph speak for itself." None of the content referenced in this paragraph of claimant's post-hearing brief is contained within the evidentiary record. This portion of claimant's post-hearing brief is stricken.

The parties filed a hearing report at the commencement of hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed in this decision. The parties are now bound by their stipulations.

### ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury on September 4, 2013 which arose out of and in the course of employment.
2. Whether claimant is barred from recovering any worker's compensation benefits for his alleged failure to give timely notice of his injury pursuant to Iowa Code section 85.23.
3. Whether claimant's claim is barred by the statute of limitations pursuant to Iowa Code section 85.26.
4. Whether the September 4, 2013 injury caused temporary disability during a period of record and, if so, whether claimant is entitled to healing period benefits between September 5, 2013 through March 1, 2015.
5. Whether the September 4, 2013 injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent partial disability benefits.
6. Whether claimant is an odd-lot employee.

7. If the September 4, 2013 injury caused permanent disability, the proper commencement date for permanent disability benefits.
8. Whether defendant is obligated for payment of past medical expenses.
9. Whether defendant is entitled to a credit towards any permanent partial disability benefits awarded in this case for a disability payment in the amount of \$13,182.14 for a period of time between July 30, 2012 and April 21, 2013.
10. Whether costs should be assessed against either party.

#### FINDINGS OF FACTS

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

Danette Glass is a 47 year old woman, who asserts that she sustained thoracic outlet syndrome as a result of her work activities at John Deere in its Waterloo plant. Ms. Glass started working in a manufacturing job for John Deere in November 2010. (Claimant's testimony)

Prior to commencing her employment with John Deere, Ms. Glass had significant and relevant medical care. In 2005, Ms. Glass sustained a neck injury while working at Tyson on its production line. Claimant required surgery on her neck as a result of her work injury at Tyson. (Claimant's testimony) Specifically, claimant submitted to a C5-6 fusion, performed by Chad Abernathey, M.D., on January 5, 2006. (Exhibit H, page 5) Ms. Glass testified she had a good recovery following this surgery. She returned to work without restrictions at Tyson approximately four months after her surgery. Claimant was able to advance into a supervisory position at Tyson but ultimately separated from her employment with Tyson in 2009.

John Deere required claimant to submit to a pre-employment physical with a physician of its choosing before claimant commenced employment. Claimant submitted to that requested evaluation and passed the physical without permanent restrictions. Additionally, John Deere required a full clearance by claimant's treating neurosurgeon, Dr. Abernathey, with respect to her prior neck injury before she commenced employment. Dr. Abernathey provided a full-duty release for claimant's condition. (Claimant's testimony)

Ms. Glass worked in production with John Deere from November 2010 through September 2011. In September 2011, claimant began developing new symptoms in her neck. She was ultimately referred back to Dr. Abernathey, who recommended and performed a second neck surgery on claimant. (Claimant's testimony) The second surgery included a C6-7 fusion of claimant's cervical spine. (Ex. H, p. 12)

Claimant remained off work from July 30, 2012 through April 12, 2013. She made no claim that her neck pain and surgery were related to her work activities at John Deere. (Claimant's testimony)

Once again, John Deere required a full duty release by Dr. Abernathey before claimant was allowed to return to work. Dr. Abernathey again released claimant without medical restrictions and she returned to full-duty work at John Deere. (Ex. H, p. 16) Ms. Glass testified that she felt pretty good and that her symptoms resolved after the second neck surgery. (Claimant's testimony)

Upon returning to work, claimant was able to bid into a job she desired. She was able to observe various job options and ultimately was able to select her position in "Split 69" in which she performed assembly duties on a tractor assembly line. (Claimant's testimony)

Ms. Glass described her job duties after she returned to work. She explained that she had to raise her arms above her head to perform her assembly duties. She described installing and tightening various bolts and zip tying items into place. (Claimant's testimony)

In approximately July 2013, Ms. Glass began experiencing pain in her neck again. She developed her symptoms when lifting her arms above her head. She experienced a short break in work and some improvement in symptoms. However, her symptoms continued to develop until she eventually had pain from her shoulder up into her neck and down her left arm. (Claimant's testimony)

Claimant testified that she notified her supervisor of her symptoms and her belief that it was work related on September 5, 2013. She went to urgent care. At that point in time, claimant believed her symptoms were related to her neck again. Given that belief, claimant's personal physician again referred her to Dr. Abernathey. (Claimant's testimony)

Dr. Abernathey re-evaluated claimant on September 16, 2013. Dr. Abernathey obtained a repeat MRI of claimant's neck. Ultimately, Dr. Abernathey opined that claimant's neck MRI demonstrated good decompression and he recommended against surgical intervention. (Claimant's testimony; Ex. H, p. 16)

Claimant testified that her husband spoke with her attorney and obtained a recommendation to be evaluated by a vascular surgeon, Alan R. Koslow, M.D. Claimant identified Dr. Koslow via the internet and obtained a referral from her personal physical to be evaluated by Dr. Koslow. (Claimant's testimony)

Dr. Koslow evaluated claimant on February 26, 2014. He ordered a scalene block as a diagnostic tool to determine if claimant had thoracic outlet syndrome. (Ex. 3, p. 3) The scalene block was performed and Dr. Koslow re-evaluated claimant on March

19, 2014. He concluded that claimant had thoracic outlet syndrome and recommended surgical intervention. (Ex. 3, pp. 4-5)

Claimant submitted to surgery on April 3, 2014. Dr. Koslow performed surgery on the anterior scalene and resected her first rib as treatment for her thoracic outlet syndrome. (Ex. 3, p. 7) Unfortunately, claimant did not receive significant benefit from Dr. Koslow's surgery. Although claimant testified she received relief of the symptoms of thoracic outlet syndrome as a result of the surgery, she developed fluid in her lung and phrenic nerve damage that permanently paralyzed a portion of her diaphragm, affecting her breathing. (Ex. 3, p. 19; Ex. 7, p. 2; Claimant's testimony)

As a result of this phrenic nerve damage, claimant testified that physical exertion is now impossible. She attempted work hardening and a gradual return to work at John Deere. However, she was never able to walk stairs, push or pull forcefully or achieve a physical level of functioning sufficient to return to work at John Deere on a full-time basis. (Claimant's testimony)

Ms. Glass also developed a blood clot or occlusion of her left subclavian artery. (Ex. 3, pp. 34-35, 43) Dr. Koslow evaluated and took claimant back to surgery for this condition on July 7, 2015. (Ex. E, p. 43) Dr. Koslow's attempts to stent the artery failed and he attempted to bypass the artery. Ultimately, Dr. Koslow left the practice of medicine and referred claimant to the University of Iowa Hospitals and Clinics for any further treatment. (Claimant's testimony) Dr. Koslow testified that he had retired from the practice of medicine in his deposition. (Ex. 3, p. 58) However, in November 2015, Dr. Koslow entered into a settlement agreement with the Iowa Board of Medicine over charges of professional incompetency in the practice of surgery. In that settlement agreement, Dr. Koslow agreed to a citation for demonstrated professional incompetency in his practice of surgery and agreed to professional monitoring of his future practice of medicine for a period of time. (Ex. W)

A vascular surgeon, Timothy F. Kresowik, M.D., at the University of Iowa evaluated claimant on September 29, 2015. Dr. Kresowik opined that claimant's condition did not warrant further intervention at that time because she did not have symptoms that caused concern about the loss of her left arm and the risks for further intervention outweighed any potential benefits. (Ex. T)

The initial and primary factual dispute in this case is whether claimant's thoracic outlet syndrome is causally related to or materially aggravated by claimant's work activities at John Deere. Claimant offers the causation opinion of the treating surgeon, Dr. Koslow, in support of her claim. Dr. Koslow opines that claimant's work at John Deere caused or materially aggravated her condition leading to his diagnosis of thoracic outlet syndrome. Dr. Koslow further opines that it was medically necessary to perform surgery to treat claimant's thoracic outlet syndrome. (Ex. 3, p. 56) Dr. Koslow confirmed his causation opinion in his deposition. (Ex. 3, p. 68)

Claimant also obtained an independent medical evaluation performed by a neurosurgeon, Richard Kreiter, M.D. Dr. Kreiter evaluated claimant on April 21, 2016. Although he offered a permanent impairment rating, Dr. Kreiter opined that he "cannot comment definitely on causation" with respect to the development of thoracic outlet syndrome and its relationship to claimant's work activities at John Deere. (Ex. 1, p. 2)

Defendants asked an occupational medicine physician, Dr. Olson, to observe claimant's job at John Deere and offer an analysis of whether the job duties claimant performed caused or materially aggravated her thoracic outlet syndrome. Dr. Olson evaluated the job duties in late January or early February 2015. He provided a relatively detailed description of the job duties. Following his jobsite viewing and analysis, Dr. Olson opined, "Ms. Glass' work activities at John Deere did not cause or significantly contribute to nor materially aggravate any of her alleged neck complaints/conditions nor her alleged thoracic outlet syndrome. Ms. Glass' symptoms are not attributable to the job duties that she was performing in Dept. 641." (Ex. O, p. 14)

Defendants also obtained an independent medical evaluation performed by a board certified neurologist, Michael L. Cullen, M.D. Dr. Cullen evaluated claimant on March 28, 2016 and authored a report dated April 4, 2016. (Ex. J) Dr. Cullen opined:

It is my opinion within a medical degree of probability that the work activities at John Deere Waterloo Works (specifically 2013) did not contribute to or aggravate the purported condition of thoracic outlet syndrome. The rationale for this conclusion specifically does not satisfy the Bradford Hill criteria for medical causation or aggravation. The literature outside of anatomic explanations is weak to non-existent regarding activity provocation. Furthermore, Ms. Glass' alleged exposure to any offending activities was relatively brief, she failed to failed to [sic] respond to cessation of purported work activities and subsequently failed to respond to surgical treatment.

(Ex. J, p. 10)

Ultimately, this case comes down to a factual dispute that turns on the opinions of competing medical experts. Both parties critique the medical histories and causation opinions of the competing medical experts.

Claimant contends that the treating surgeon, Dr. Koslow, is the most qualified medical expert in this case and that Dr. Koslow's opinion should be accepted as the most credible causation opinion in this evidentiary record. Defendants challenge Dr. Koslow's credibility by noting his disciplinary charges and settlement.

Defendant urges that the opinions of Dr. Olson and Dr. Cullen be accepted as most credible in this case. Defendant urges that Dr. Olson had the best opportunity to observe claimant's job duties and make an informed opinion about the causal

connection between claimant's job duties and her diagnosis of thoracic outlet syndrome. Claimant challenges Dr. Olson's opinions because he performed only a site viewing and a records review but did not evaluate or examine claimant.

Defendant also urges acceptance of the opinion of Dr. Cullen. Defendant urges that Dr. Cullen is board certified as a neurologist, that he personally evaluated claimant, and provided convincing response and rebuttal to the opinions of Dr. Koslow. Claimant challenges the opinions of Dr. Cullen because he is a one-time evaluator and because he is not a vascular surgeon.

Claimant also challenges the credibility of both Dr. Olson and Dr. Cullen's opinions by challenging the accuracy and completeness of the job duties observed and described by Dr. Olson. Claimant testified that the job duties were in excess of those described by Dr. Olson in his report. Defendant's witness, Erik Fuessel, was not able to confirm the accuracy of Dr. Olson's job description or refute claimant's testimony about her job duties. Therefore, claimant's critique and challenge of the accuracy of Dr. Olson and Dr. Cullen's opinions has some validity.

On the other hand, claimant's challenge, if considered in relation to Dr. Koslow, is also just as damaging to Dr. Koslow's credibility. While Dr. Olson observed at least some of the actual job duties performed by claimant at the John Deere plant, Dr. Koslow literally had no recollection of claimant's job duties as discussed during his treatment. He conceded at his deposition that he had very little information about claimant's job duties prior to receipt of evidence in this case approximately six weeks before his deposition. (Ex. 3, p. 64) Dr. Koslow's deposition occurred on July 1, 2016. Therefore, Dr. Koslow did not possess an accurate or complete history of claimant's work activities (and certainly had less information available than Dr. Olson) at the time he authored his initial causation opinion in June 2015.

When considering the competing medical opinions, I find that the opinions of Dr. Olson and Dr. Cullen carry greater weight in this case than the causation opinions offered by Dr. Koslow. Having made this finding, I similarly find that claimant has failed to prove by a preponderance of the evidence that her work activities at John Deere caused or materially aggravated her thoracic outlet syndrome or that her work activities caused the need for her thoracic outlet syndrome or subsequent complications and symptoms.

#### CONCLUSIONS OF LAW

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.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.



Having found the opinions of Dr. Olson and Dr. Cullen to be most convincing on the issue of the cause of claimant's thoracic outlet syndrome, I conclude that claimant failed to prove by a preponderance of the evidence that her condition is causally related to, arose out of, or was materially aggravated by her work activities at John Deere. Therefore, I conclude that claimant failed to prove she sustained a compensable work injury on September 4, 2013.

Having concluded that claimant failed to prove a compensable injury, there is no need to further address her claims for temporary disability, healing period, permanent disability, or medical benefits. She is not entitled to any of those claimed benefits. Similarly, it is not necessary to address defendants' asserted affirmative defenses of lack of timely notice or statute of limitations because claimant failed to establish an otherwise compensable work injury.

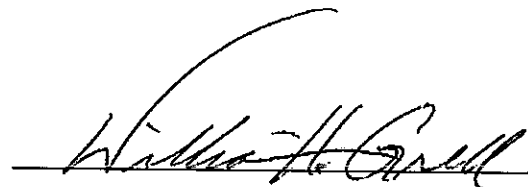
Finally, claimant seeks an assessment of her costs. Costs are assessed at the discretion of the agency. Iowa Code section 85.40. Exercising the agency's discretion and recognizing that claimant failed to establish she sustained a compensable work injury, I conclude that none of claimant's asserted costs should be assessed against defendants in this case.

ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing.

Signed and filed this 8<sup>th</sup> day of December, 2016.



WILLIAM H. GRELL  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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WHG/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.