BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



VICTOR SAINZ,

Claimant,

vs.

TYSON FRESH MEATS, INC.,

Employer,
Self-Insured,
Defendant.

File No. 5053964

ARBITRATION

DECISION

Head Note Nos.: 1402.30, 1803

## STATEMENT OF THE CASE

Victor Sainz, claimant, filed a petition in arbitration seeking workers' compensation benefits from Tyson Fresh Meats, the self-insured employer, the defendant in this case.

The evidentiary record includes: Joint Medical Exhibits JE1 through JE9, Claimant's Exhibits 1 through 8 and Defendant's Exhibits A through G. At hearing, claimant and William Sager, Human Resources Manager for the defendant employer, provided testimony.

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

The matter proceeded to hearing on November 20, 2017, with the assistance of an interpreter, Ms. Patricia Hillock. At the conclusion of the hearing, the record was held open until December 11, 2017, for the limited purpose of allowing defendant to submit an opinion concerning a permanent impairment rating from Yorell Manon-Matos, M.D. (Transcript, pages 84-85) The parties submitted post-hearing briefs on January 23, 2018 and the matter was fully-submitted on that date.

## ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury to his neck on or about August 4, 2015, that arose out of and in the course of employment;

2. Extent of permanent partial disability, if any.

3. Independent medical examination (IME) reimbursement, Iowa Code section 85.39. (Exhibit 7, p. 71)

4. Costs. (Ex. 7)

## FINDINGS OF FACT

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

Claimant was 43 years old at the time of the hearing. (Tr. p. 14) He graduated from high school and attended a university in Cuba for three years, but did not obtain a degree. Claimant testified that he understands very little English. (Tr. p. 15) He is right-handed. (Id.)

Given claimant's difficulty with the English language, he does not believe that he would be successful in a job that required him to speak English regularly. (Tr. p. 16)

### The Injury

The parties stipulated that claimant sustained injuries to his right hand/arm and bilateral shoulders on or about August 4, 2015. (Hearing Report, p. 1) Claimant also alleges an injury to his neck, which defendant denies. Defendant also denies that any injuries resulted in any permanent impairment.

On August 4, 2015, claimant was working for the defendant employer doing his job of de-fatting hams. He was working at about chest height, looking down, and repeatedly manipulating the hams with his hands and using a Whizard knife. He had pain that developed over time in his neck, bilateral shoulders, and right hand, with the worst pain in his neck, right shoulder and hand. (Tr. pp. 28-29) The pain continued as he continued to work. (Tr. p. 29) Claimant stated that the neck and shoulder pain have continued to the present time. (Tr. p. 30)

### Work History

Claimant's first job was in Cuba. He worked in construction laying bricks, which required lifting 25 to 30 pounds and working overhead. Claimant did not believe that he could physically do that job in his current condition.

Claimant came to the United States in 2011 and started working at Tyson Fresh Meats, the defendant employer, as his first job in the United States. He started on a job using a Whizard knife, and continued to do that job for over four years. (Tr. p. 21) He was doing this same job at the time of his injuries in this matter. (Id.)

At the time of the hearing, claimant continued to work for the defendant employer although he is now in a job that does not require the use of a Whizard knife. His job now requires him to separate bellies with his hands. He described it as a lighter-duty job than his prior job with the Whizard knife. (Tr. pp. 59-60) He earned from $15.10 to $16.75 per hour on the Whizard knife job. (Ex. 2, p. 45; Tr. p. 60) He now earns $16.00 per hour in the lighter-duty belly separation position. (Tr. p. 60)

I find that claimant is motivated to maintain employment.

**Post-Injury Medical Treatment**

After claimant developed pain on August 4, 2015, he reported the pain to his employer and he received treatment at the nurses' station. (Tr. p. 29) The nurse recorded claimant's complaints as: bilateral shoulder pain, arms, hand, and back pain. (Ex. JE1, p. 1) The back pain was also described as "upper back" pain. (Ex. JE1, p. 3) On August 18, 2015, claimant described his pain as "unbearable" at times. (Ex. JE1, p. 4) After a few weeks, claimant was sent to a doctor. (Tr. p. 30)

On August 31, 2015, claimant was seen by Joshua Hamann, M.D., with the aid of an interpreter. (Ex. JE2, p. 38; Tr. p. 31) Claimant was placed on light duty and moved to a lighter-duty job supervising the grease line. (Tr. pp. 31-32) Claimant was diagnosed with bilateral shoulder impingement and he treated with Dr. Hamann for about three months. (Ex. JE2, p. 40) Dr. Hamann prescribed physical therapy, provided bilateral shoulder injections and ordered an MRI for both shoulders. (Ex. JE2, pp. 40, 42) The MRI of the left shoulder was "[e]ssentially unremarkable." (Ex. JE5, p. 81) The MRI of the right shoulder was also "[e]ssentially [an] unremarkable exam except for tendinosis signal," which was described as "[m]ild tendinosis." (Ex. JE5, p. 82) There was also a "question of [a] very small partial articular side tear at the insertion site of the supraspinatus tendon." (Id.) However, Dr. Hamann found no significant tears or indications for surgical intervention in the MRIs. (Ex. JE2, p. 43)

On November 16, 2015, Dr. Hamann noted claimant reported "severe pain throughout this whole time" and that none of the treatments have helped. (Ex. JE2, p. 44) They discussed options and Dr. Hamann indicated that claimant decided "to return to work without restrictions so that he may obtain a second opinion." (Id.) Dr. Hamann also felt that "this patient's pain may be exaggerated." (Id.) Dr. Hamann returned claimant to work with no restrictions and placed him at maximum medical improvement (MMI). (Id.) Claimant was taken off his light-duty job and put back on the Whizard knife job. (Tr. p. 34)

On January 8, 2016, claimant was seen by Sunil Bansal, M.D., for the purpose of an independent medical evaluation (IME) at the request of claimant's counsel. (Ex. 1, p. 1) Dr. Bansal reviewed claimant's medical history and his current complaints and job duties with the defendant employer. He conducted a physical examination and diagnosed: right rotator cuff tendonitis and left shoulder strain. (Ex. 1, p. 7) He stated that "there is at least a component of the right shoulder and scapular area pain that is referred from a cervical discogenic source." (Id.) He assigned five percent permanent impairment to the right upper extremity, which he converted to three percent of the whole person, based on the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides), in reliance upon Figures 16-40 through 16-46. (Ex. 1, p. 10) This impairment is based on loss of range of motion in the right shoulder. Dr. Bansal found no ratable impairment applicable to the left shoulder. (Id.) He then assigned permanent lifting restrictions for the right arm of no more than ten pounds, no more than five pounds above chest level, and no frequent above chest level lifting. (Id.) He recommended a cervical MRI, intermittent injections, NSAIDs and a home exercise program. (Id.)

Claimant took Dr. Bansal's restrictions to his employer in February 2017, but stated that he was told they would not be honored. (Tr. pp. 36-37)

On February 15, 2016, claimant was seen by United Community Health, and stated that he was told by a specialist to follow-up with his primary care provider and get a cervical MRI. (Ex. JE4, p. 74) He complained of bilateral shoulder and neck pain, with some numbness in his right fingers. An MRI was ordered. (Ex. JE4, p. 75)

The MRI of the cervical spine obtained on February 24, 2016, showed a "[s]traightening of the natural cervical lordosis" a "[s]mall focal right posterolateral disc protrusion at C5-C6," and a "[v]ery small broad-based right posterolateral disc protrusion at C6-C7." (Ex. JE5, p. 85)

On April 11, 2016, claimant was seen by Wade Jensen, M.D., for the purpose of an independent medical evaluation (IME) at the request of defendant. (Ex. JE6, p. 93)

Dr. Jensen reviewed claimant's medical history and discussed the nature of the injury with claimant and conducted a physical examination. (Ex. JE6, pp. 93-94) Dr. Jensen found "no obvious impingement signs." (Ex. JE6, p. 94) He concluded that claimant had a C5-6 disc protrusion with no clear evidence of radiculopathy; a C6-7 disc bulge that was likely asymptomatic; bilateral shoulder strain that had resolved with full range of motion and no evidence of bursitis, tendinitis or rotator cuff tear. (Ex. JE6, p. 95) He diagnosed claimant with "likely" right carpal tunnel syndrome, with positive Tinel's and Phalen's test and possible trigger finger. (Id.) Dr. Jensen opined that it was "plausible that his carpal tunnel syndrome may be causally related to his employment," in conjunction with the repetitive nature of claimant's job. (Id.) He further stated that the trigger fingers "may also be somewhat causally related, especially at the 5th digit." (Id.) Concerning the neck complaints, he stated that the "cervical disk herniation is unknown whether this is causally related," but he believed that it was "not the major source of his problems." (Id.) Dr. Jensen discussed Dr. Bansal's assignment of permanent impairment and restrictions and stated that "[t]here is no clinical basis for physical restrictions for the above based diagnoses." (Id.) He also found that the reduced range of motion that formed the basis of the impairment rating assigned by Dr. Bansal had "resolved and is now normal." (Id.) Claimant testified that this was not the case, and he did not believe that his shoulder problems had resolved at that time. (Tr. p. 39) Dr. Jensen recommended EMG studies for both upper extremities, believing that carpal tunnel was the likely cause of his symptoms and consideration for an injection to address the trigger finger and stated that no treatment was recommended for the shoulders or cervical spine, unless there was "clear radiculopathy" from the EMG studies. (Ex. JE6, p. 95)

On April 21, 2016, Dr. Bansal authored a report stating that he reviewed the February 24, 2016 MRI and that the results thereof supported his contention that a least some contribution to claimant's right hand numbness, neck and right shoulder issues were related to a cervical disc problem. (Ex. 1, pp. 13-15) Based on a review of the medical records, he determined that claimant fit in the DRE Category II for impairment for radicular complaints and assigned 5 percent permanent impairment of the whole

person for the neck as a provisional rating because "adequate treatment has not yet been provided." (Ex. 1, p. 15) He did not re-evaluate claimant at that time.

On May 13, 2016, claimant underwent an EMG of the right upper extremity which showed "[d]istal right median neuropathy – consistent with right carpal tunnel syndrome, mild (or early)." (Ex. JE7, p. 133)

Claimant had additional medical care with Seth Harrer, M.D. (Ex. JE2, p. 48) He was assessed with intermittent triggering of the right small finger, with A1 pulley inflammation and right carpal tunnel syndrome. He was given a wrist brace and occupational therapy. (Id.) Claimant testified that he talked to Dr. Harrer about his neck and shoulders, but was told by the doctor that he was not authorized to examine his neck and shoulders. (Tr. p. 42)

Claimant underwent right carpal tunnel release on July 5, 2016 with Dr. Harrer. (Tr. p. 43; Ex. JE5, pp. 86-90) He continued to treat with Dr. Harrer and continued to complain of numbness and tingling in his fingers post-surgery. (Ex. JE2, pp. 52, 53) On September 21, 2016, Dr. Harrer stated that the symptoms mostly revolved around the small finger, but that claimant was having pain at the A1 pulley and wanted surgery on the finger, but there was no active popping. Dr. Harrer recommended a referral for a second opinion to a hand surgeon. (Ex. JE2, p. 53)

On November 15, 2016, claimant was seen by Dr. Manon-Matos. He did not demonstrate any triggering of his finger, but did complain of pain at the right small finger A1 pulley sight. (Ex. JE6, pp. 98, 99) On November 23, 2016, Dr. Manon-Matos recommended an injection and therapy. (Ex. JE6, p. 101) Claimant did not want an injection based on his reaction to a prior injection in his shoulder. Dr. Manon-Matos stated that if the patient declined the recommendations, then he would declare claimant to be at MMI. (Id.)

On November 30, 2016, in a letter to defense counsel, Dr. Jensen, after a review of medical records and EMG studies of the upper extremities, confirmed his opinion that claimant "does not have a cervical radiculopathy and that his neck and cervical complaints are not a result of cervical radiculopathy. The complaints that he has are not causally related to his employment based on EMG, MRI findings, and physical examination." (Ex. JE6, p. 104) He placed claimant at MMI and stated that claimant had no permanent impairment or permanent restrictions for his cervical complaints. (Id.) He did not re-examine claimant at that time.

On December 9, 2016, claimant returned to Dr. Manon-Matos and received injections in his right index, middle and ring fingers. (Ex. JE6, p. 106)

On December 16, 2016, claimant underwent another EMG test, which revealed "no abnormalities in the right upper extremity and related cervical paraspinals." (Ex. JE7, p. 136)

On January 6, 2017, claimant returned to Dr. Manon-Matos, who found recurrent right carpal tunnel syndrome and trigger fingers at the right index, middle, ring and small

fingers. (Ex. JE6, p. 10) Surgery was recommended for the middle and small fingers along with revision of the carpal tunnel release. (Ex. JE6, p. 110) The surgeries were performed in February 2017. (Ex. JE6, pp. 112-114; Ex. 1, p. 19)

On February 17, 2017, claimant was seen for a second time by Dr. Bansal for a follow-up IME at the request of claimant's counsel. (Ex. 1, p. 16) Dr. Bansal noted that claimant was scheduled for the carpal tunnel revision and trigger fingers surgeries on February 22, 2017. (Ex. 1, p. 19) Dr. Bansal concluded that claimant was not at MMI concerning the right hand, noting the upcoming surgery. (Ex. 1, p. 24) He discussed a possible double crush syndrome, in which the nerve is compressed at two distinct points, which may account for continuing symptoms following the carpal tunnel release. He assigned a new 5 percent permanent impairment to the right upper extremity, which he converted to 3 percent to the whole person, following the right carpal tunnel release surgery and based on loss of sensation. (Ex. 1, p. 24) He then reaffirmed his prior opinions of impairment applicable to the right shoulder and neck as stated above. (Id.) He added restrictions of avoiding repeated neck motion or holding his neck in a flexed position for greater than 15 minutes. (Ex. 1, p. 25) I note that in this report, Dr. Bansal re-examined claimant's right shoulder and stated that claimant's "current condition and examination are unchanged, to slightly worse" compared to his initial evaluation on January 8, 2016. (Ex. 1, p. 22)

On April 10, 2017, Dr. Jensen authored a letter to defense counsel stating that double crush syndrome is quite rare and that the diagnostic testing and physical exam did not support its existence in this case. (Ex. JE6, p. 116)

On July 14, 2017, claimant was seen again by Dr. Manon-Matos with some improvement, but with "worsening pain related to the right index finger." (Ex. JE6, p. 122) On August 23, 2017, claimant proceeded with surgery on the right index finger. (Ex. JE6, p. 122; Ex. JE8, p. 137)

On July 21, 2017, Dr. Bansal, without re-examining claimant, issued a report following an updated records review again discussing a double crush condition as a potential explanation of claimant's ongoing symptoms. (Ex. 1, pp. 27-29)

On October 15, 2017, claimant underwent an FCE with Daryl Short, DPT, at the request of claimant's counsel. (Ex. 8, p. 79) He was noted to have given a consistent effort and performance with all test items, and was determined to have provided a valid effort. (Ex. 8, pp. 79, 81) It was concluded that "Mr. Sainz's capabilities are in the sedentary to light category (up to 15 lbs. on an occasional basis to the waist level) of physical demand." (Ex. 8, p. 81)

On October 19, 2017, Dr. Bansal again reviewed additional medical records, but did not re-examine claimant, and concluded that he reached MMI on October 5, 2017, for the right hand. (Ex. 1, p. 30C) However, he declined to offer an opinion of permanent impairment on the right hand because he had not reevaluated claimant after claimant had additional treatment. (Ex. 1, p. 30C)

On October 26, 2017, claimant underwent an FCE with Neal Wachholtz, DPT, at Excel Physical Therapy, at the request of Dr. Manon-Matos. "Analysis of multiple validity criteria indicates that test results are a VALID representation of his current functional abilities." (Ex. JE9, p. 140) He was found to be "capable of performing work activities within the MEDIUM physical demand level." (Id.) This provides for a lifting and carrying restriction of 50 pounds occasionally and 25 pounds frequently. Claimant testified that he did not believe that he could lift 50 pounds occasionally over the course of a regular work day. (Tr. pp. 52-54)

On November 7, 2017, Dr. Manon-Matos responded to a letter from the nurse case manager and placed claimant at MMI and assigned restrictions per the FCE of October 26, 2017, of no lifting over 50 pounds occasionally and 20 pounds frequently and no prolonged or heavy grasping with the right hand. (Ex. JE8, p. 138)

After being assigned these restrictions from Dr. Manon-Matos, the employer took claimant off the Whizard knife job that he had been doing at the time of his injury and placed him on a job separating bellies, which claimant described as being a lighter duty job. (Tr. pp. 58-60) Claimant had been in that job for only a few weeks at the time of the hearing on November 20, 2017. (Tr. p. 60)

On November 10, 2017, Dr. Bansal issued another report after a review of additional records. He did not re-examine claimant. (Ex. 1, p. 30E) In this report, Dr. Bansal considered the October 26, 2017, FCE and the November 7, 2017, opinion of Dr. Manon-Matos. Dr. Bansal stood by his prior opinions. He noted that the two FCEs displayed a "considerable variance in functional abilities." (Ex. 1, p. 30F) Dr. Bansal stated that he believed that the October 15, 2017 FCE with Daryl Short, was more consistent with claimant's objective medical findings and pathology, which included claimant's neck, right shoulder and right hand. (Id.)

On November 13, 2017, Dr. Jensen authored a follow-up letter to defense counsel advising that after a review of medical records, the FCEs and the EMG studies that "he does not appear to have radicular complaints based on the records," and "would not warrant cervical surgery for his current symptoms," and that the same "would not significantly contribute to his overall work restrictions." (Ex. D, p. 12)

On November 21, 2017, Dr. Manon-Matos responded to a letter written by the claims examiner and stated that claimant reached MMI and sustained 5 percent impairment to the upper extremity. (Ex. JE6, p. 131A) He also wrote "16, 21-23/16, 5th." (Id.) Although, this is not terribly descriptive and Dr. Manon-Matos provided no discussion about how he arrived at the impairment that he assigned, it is understood by the undersigned that this is more likely than not a reference to chapter 16 of the AMA Guides, Fifth Edition, Figures 16-21 through 16-23, which relate to impairments due to loss of range of motion.

The physical therapists who performed the FCEs were recruited by counsel to write competing critiques of the others' report. (Ex. 8, pp. 104-106; Ex. C, pp. 9-11) Daryl Short, who performed the October 15, 2017, FCE at the request of claimant's counsel, wrote that Neal Wachholtz, who performed the October 26, 2017, FCE found

claimant was limited to 45 pound grip strength in his right hand, and yet assigned a functional limitation of lifting up to 50 pounds, which was more than his grip strength. He asserted that this is unsafe. (Ex. 8, p. 105) However, Mr. Wachholtz, in his rebuttal, points out that his evaluation also found that claimant demonstrated 95 pound grip strength in his left hand and that the 50 pound lifting limit is a bilateral lift, not right arm only, therefore, the occasional 50 pound lifting restriction is not unsafe. Mr. Wachholtz then criticizes Mr. Short's findings regarding the curious drop in strength that claimant had during testing with Mr. Short, who recorded only 15 pounds of grip strength on the right and 63.3 pounds for the left hand. (Ex. C, p. 10) This was substantially less than the strength claimant performed during his evaluation with Mr. Wachholtz just 11 days later. Even more curious is Mr. Short's finding that claimant had 17 pounds of pinch strength on the right hand, and yet only 15 pounds of grip strength. (Id.) In the end, both evaluators stand by their individual findings and conclusions.

The two FCEs are both deemed to be valid studies and were performed less than two weeks apart and yet, they result in quite different findings concerning claimant's ability to perform physical tasks during the testing and the resultant assignment of restrictions. It is unknown whether other factors contributed to this difference, such as altered sleep patterns, nutritional changes, illness, psychological factors, general fatigue, or other things that might help to explain this apparent difference in physical ability.

What is known about the FCEs is that the evaluation performed by Neal Wachholtz was specifically requested by the treating physician, Dr. Manon-Matos, and was then adopted by him as an appropriate statement of claimant's physical abilities and limitations. Although Dr. Bansal wrote many updates to his reports, he saw claimant on just two occasions. Dr. Manon-Matos had the opportunity to see claimant over multiple visits and was in a better position to evaluate claimant's symptoms and physical abilities. Dr. Manon-Matos accepted the October 26, 2017 FCE performed by Neal Wachholtz and I accept the same, finding that claimant is capable of performing work in the medium work category.

**Additional Findings**

The parties stipulated that claimant sustained injury to his bilateral shoulders on or about August 4, 2015. (Hearing Report, p. 1)

No physician has assigned any impairment to the left shoulder and I find that there is none.

Regarding claimant's right shoulder, Dr. Bansal assigned 5 percent to the right upper extremity, which he converted to 3 percent of the whole person on January 8, 2016, based on loss of range of motion. (Ex. 1, p. 7) However, Dr. Jensen on April 11, 2016, found that the claimant no longer had any loss of range of motion and there was no longer a basis to assign an impairment rating. (Ex. JE6, p. 95) However, on February 17, 2017, Dr. Bansal again found similar loss of range of motion as he did in his initial evaluation on January 8, 2016. (Ex. 1, p. 20) But, the FCE performed by Mr. Wachholtz on October 26, 2017, found that claimant had bilateral shoulder mobility

within normal limits, with full overhead reach and normal movement patterns and normal strength. (Ex. JE9, p. 141) These are significantly divergent findings. However, for the reasons stated above, I have accepted the FCE of Mr. Wachholtz. I also note that the FCE with Mr. Wachholtz was closer in time to the hearing. I now accept the opinion of Dr. Jensen that claimant sustained no permanent impairment to his right shoulder, which is supported by the Wachholtz FCE and represents the evaluation that is closest in time to the hearing in this case.

Concerning claimant's neck claim, defendant disputes a causal connection to the work injury.

On April 21, 2016, Dr. Bansal stated:

> In my original IME, I opined that at least a contribution of Mr. Sainz-Cruz's constellation of right hand numbness, neck, right shoulder, and shoulder blade symptomatology was related to a cervical discogenic problem. I specifically opined that the pathology, if that were the case, would be at the C5-C6 and/or C6-C7 levels. The above February 24, 2016 cervical MRI did indeed confirm those suspicions. In fact, he has a disc protrusion at both C5-C6 and C6-C7, with C5-C6 disc protrusion appearing more significant. More importantly, the C5-C6 disc protrusion is lateralized to the right, conforming with Mr. Sainz-Cruz's clinical presentation. In fact, he has right thumb numbness that follows the dermatomal pathway of the C6 nerve root. Per the AMA Guides, this would be considered verified radiculopathy (MRI of EMG findings) combined with corresponding clinical radicular symptoms.

(Ex. 1, p. 14) He also stated that claimant's "cumulative work duties that he performed at Tyson were a significant contributing factor, on a cumulative basis, for the development and aggravation of his cervical disc disease, especially at C5-C6." (Id.) Dr. Bansal then assigned five percent to the whole person based on DRE placement in category II due to radicular complaints, under the AMA Guides, on April 21, 2016. (Ex. 1, p. 15)

On April 11, 2016, Dr. Jensen concluded that claimant had a C5-6 disc protrusion with no clear evidence of radiculopathy and the C6-7 disc bulge that was likely asymptomatic. (Ex. JE6, p. 95) However, he also stated that the "cervical disk herniation is unknown whether this is causally related," but he believed that it was "not the major source of his symptoms." (Id.)

On November 13, 2017, without a re-examination of claimant and based on a records review, Dr. Jensen stated that claimant "does not appear to have radicular complaints based on the records," and "would not warrant cervical surgery for his current symptoms," and that the same "would not significantly contribute to his overall work restrictions." (Ex. D, p. 12) This opinion was based on the EMG, MRI, and his physical examination of claimant. He assigned no permanent impairment for his cervical complaints. (Ex. JE6, p. 104) However, I note that the MRI obtained on February 24, 2016, did show a right posterolateral disc protrusion at C5-C6, and a small

right posterolateral disc protrusion at C6-C7. (Ex. JE5, p. 85) I also note that Dr. Jensen's physical exam of claimant occurred over seven months before this November 30, 2016 opinion and his initial opinion was that the causal connection of the cervical spine was "unknown." (Ex. JE6, p. 95)

Claimant testified that before he went to work for Tyson in 2011, he had never had issues with his neck and had never had any previous medical treatment for his neck. He underwent a pre-employment physical with Tyson and passed. (Tr. p. 20)

On February 17, 2017, Dr. Bansal re-evaluated claimant and found specific deficits concerning claimant's cervical spine, and reasserted his previously assigned five percent impairment to the whole person. (Ex. 1, pp. 20, 24) This was the most recent physical examination of claimant concerning his neck complaints and I accept Dr. Bansal's opinions concerning causal connection of the neck to the work injury of August 4, 2015 and permanent impairment.

Concerning the right upper extremity claim, Dr. Bansal assigned five percent permanent impairment, based on the carpal tunnel and loss of sensation, which he converted to three percent of the whole person. (Ex. 1, p. 24) Dr. Manon-Matos on November 21, 2017, also stated that claimant sustained five percent impairment to his right upper extremity. (Ex. 6, p. 131A)

I accept the opinions of both Dr. Bansal and Dr. Manon-Matos of five percent permanent impairment to the upper extremity, which converts to three percent of the whole person.

The Combined Values Chart on page 604 of the AMA Guides provides that the five percent whole person impairment for the cervical spine combined with the three percent whole person impairment for the right upper extremity, equals eight percent to the whole person.

I find that claimant has sustained eight percent permanent impairment to the whole person as a result of the August 4, 2015 work injury.

Considering the extent of claimant's industrial disability, his continued employment at Tyson and earnings of only slightly less than he earned when he was injured, his post-high school education and intelligence, and his motivation to remain employed would tend to support a lower assessment of industrial disability.

However, claimant's age of 43 years old, his difficulty with the English language and his inability to perform work that would require English fluency, his limited work experience involving labor intensive positions of construction and working at Tyson, along with his impairment rating of eight percent to the whole person and his restrictions limiting him to the medium work category would tend to support a higher assessment of industrial disability.

Considering the above and all other appropriate factors for the assessment of industrial disability, I find that claimant sustained 25 percent industrial disability.

Concerning the IME invoice of Dr. Bansal, at Exhibit 7, page 71 of claimant's exhibits, Dr. Bansal has submitted an invoice stating a charge of $2,962.00. The IME that this bill relates to occurred on February 3, 2016. (Ex. 7, p. 71; Ex 1, pp. 1-12) Prior to the February 3, 2016, IME with Dr. Bansal, claimant had been seen by Dr. Hamann on November 16, 2015. (Ex. JE2, p. 44) Dr. Hamann stated that claimant was at MMI and he returned claimant to work with no restrictions. (Id.)

The parties have stipulated to a commencement date for permanent partial disability benefits of October 5, 2017 and an applicable rate of $389.18. (Hearing Report, p. 1)

## CONCLUSIONS OF LAW

1. Whether claimant sustained an injury to his neck on or about August 4, 2015, that arose out of and in the course of employment.

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).

When an expert opinion is based upon an incomplete history, the opinion is not necessarily binding upon the commissioner. The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence, together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire & Casualty Co., 526 N.W.2d 845 (Iowa 1995).

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.

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

The parties stipulated that claimant sustained cumulative injuries to his bilateral shoulders, right hand, and arm, which arose out of and in the course of employment and manifested on or about August 4, 2015. The defendant however denied causation of the claimed neck injury.

I noted above that claimant passed a pre-employment physical with the defendant employer before commencing his employment in 2011. Claimant testified that he had no injuries, medical treatment or permanent restrictions to his neck prior to working for the defendant employer. Claimant's upper back/neck complaints began after the date of the work injury. Dr. Bansal suggested a likelihood of a cervical issue contributing to claimant's symptoms at his first IME of claimant, which was supported by the findings of the cervical MRI. Claimant noted right hand numbness throughout the medical records, which correlates to the MRI findings according to Dr. Bansal. For these reasons and the reasons stated above, I accepted the opinion of Dr. Bansal finding that the cumulative work duties that claimant performed at Tyson were a significant contributing factor "for the development and aggravation of his cervical disc disease, especially at C5-C6." (Ex. 1, p. 14) I further accepted Dr. Bansal's assignment of 5 percent whole person impairment based on DRE placement in category II due to radicular complaints, under the AMA Guides, on April 21, 2016. (Ex. 1, p. 15)

2. Extent of Permanent Partial Disability, if any.

I have found above that claimant sustained permanent impairment to his right upper extremity of five percent, which converts to three percent of the whole person. In addition, I have found that claimant sustained five percent permanent impairment to the whole person as a result of the neck injury. I found that claimant did not sustain any permanent impairment concerning the bilateral shoulders.

The Iowa Supreme Court has ruled that when an employee sustains injuries involving a scheduled member and injuries to the unscheduled body as a whole, the resulting permanent disability is compensable as an industrial disability. Sherman v. Pella Corp., 576 N.W.2d 312 at 320 (Iowa 1998). Barton v. Nevada Poultry Co., 253 Iowa 285, 291 110 N.W.2d 660, 663 (1961).

In this case, I have found above that the combined functional impairment is eight percent to the whole person based on the Combined Values Chart of the AMA Guides for both the right upper extremity and the neck.

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 worker's 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).

In assessing an unscheduled, whole-body injury case, the claimant's loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009).

As stated above and for the reasons there given, I have determined that claimant has sustained 25 percent industrial disability.

3. Iowa Code Section 85.39 IME Reimbursement (Ex. 7, p. 71).

Claimant seeks reimbursement for the February 3, 2016 IME of Dr. Bansal in the amount of $2,962.00

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.

Defendant is 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 argues that an employer-retained physician did not evaluate claimant's permanent disability prior to Dr. Bansal's IME of February 3, 2016. In their post-hearing brief defendant argues that on November 16, 2015, Dr. Hamann merely placed claimant at MMI and released claimant to return to work with no restrictions with no specific statement concerning the issue of a permanent impairment rating and therefore, claimant should be precluded from reimbursement under Iowa Code section 85.39.

However, this agency has concluded in the past that when an employer-retained physician returns an employee to work full-duty with no restrictions and fails to expressly opine concerning impairment, an inference is produced that the employer-retained physician did not believe that claimant had any permanent impairment, which allows claimant to obtain an examination under Iowa Code section 85.39. Moffitt v. Estherville Food, Inc., Nos. 5029474, 5039475, 5029476, (App. Dec., Sept 21, 2011); Flynn v. John Deere Davenport Works, Nos. 5030928, 5030940, (App. Dec., Nov. 21, 2011); and Countryman v. Des Moines Metro Transit Authority, Nos. 5009718, 5013883 (App. Dec., Mar. 16, 2006).

Based on the above, I conclude that claimant is entitled to reimbursement of the February 3, 2016 IME with Dr. Bansal. In support thereof I further note that not only did Dr. Haman return claimant to work without restrictions, but he also placed claimant at MMI. By doing so, he reinforced the inference that he did not believe claimant sustained any permanent impairment by indicating that claimant was unlikely to get substantially better or worse, when he placed claimant at MMI, thereby identifying no zero percent permanent impairment.

4. Costs (Ex. 7).

The final issue is 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 generally successful in this claim and therefore exercise my discretion and assess costs against the defendant in this matter.

However, in reviewing Claimant's Exhibit 7 in which he sets forth his claimed costs, I note that claimant seeks $2,962.00 for Dr. Bansal's February 3, 2016 IME, which is dealt with above and is now specifically excluded as a cost. I also note that claimant seeks costs including $1,990.00 for Dr. Bansal's March 14, 2017 IME report. A review of the invoice shows that the services provided were an examination and a report. There is no distinction as to the amount attributable to the examination compared to the portion attributable to the preparation of the report. I conclude that a reasonable portion attributable to the preparation of the report is two-thirds of the amount charged, or $1,326.67. In addition, claimant seeks a cost of $900.00 for Mr. Short's FCE report. A review of Mr. Short's invoice shows $550.00 is for the evaluation and $350.00 is for the preparation of the report.

Under Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015) our Supreme Court has stated that the inclusion of the costs associated with the examination are not includable as costs, only the cost associated with the preparation of the report shall be allowed. Therefore, I find that claimant is entitled to costs as follows: (1) filing fee - $100.00; (2) service fee - $6.74; (3) Dr. Bansal's March 14, 2017 report - $1,326.67; and, (4) Mr. Short's FCE report - $350.00.

## ORDER

**IT IS THEREFORE ORDERED**

Defendant shall pay claimant industrial disability benefits of one hundred twenty-five (125) weeks, beginning on the stipulated commencement date of October 5, 2017, until all benefits are paid in full.

Defendant shall be entitled to credit for all weekly benefits paid to date, if any. The parties have stipulated in the Hearing Report that there is no applicable credit.

All weekly benefits shall be paid at the stipulated rate of three hundred eighty-nine and 18/100 dollars ($389.18) 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 for the February 3, 2016 IME with Dr. Bansal in the amount of two thousand nine hundred sixty-two and 00/100 dollars ($2,962.00).

Defendant shall pay costs as outlined 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.

Signed and filed this 10th day of April, 2018.

TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.