BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

STEVE MEIER,	:	
	:	File No. 5005461
Claimant,	:	
	:	ARBITRATION
vs.	:	
	:	DECISION
ALCOA ALUMINUM COMPANY OF AMERICA,	:	
	:	
Employer,	:	HEAD NOTE NOS: 1106; 1108.30; 1108.50;
Self-Insured,	:	1401; 1402.40; 1803; 2205; 2902;
Defendant.	:	2601; 2601.10

INTRODUCTION

This is a proceeding in arbitration filed by Steve Meier, claimant, against ALCOA–Aluminum Company of America, employer, and self-insured defendant for benefits as a result of an injury that occurred on June 28, 2000. A hearing was held in Davenport, Iowa on January 22, 2004 at 3:00 p.m., which is the time, date and place previously set by the order of the workers' compensation commissioner.

Claimant was represented by Allan Hartsock. Defendant was represented by Cameron A. Davidson.

The record consists of the testimony of Steven Meier, claimant; Patrick Timothy Tray, claimant's supervisor; Forrest W. Smith, M.D., employer's in-house medical doctor; and joint exhibits A through V consisting of 45 pages.

Also present in the courtroom at the time of the hearing was Candy Teel, R.N., employer's plant nurse.

The case was fully submitted at the close of the hearing.

STIPULATIONS

The parties stipulated to the following matters at the time of the hearing:

1. That an employer-employee relationship existed between employer and claimant at the time of the injury;

2. That claimant did, in fact, sustain an injury on June 28, 2000 which arose out of and in the course of employment with employer;

3. That the injury was the cause of temporary disability during a period of recovery, however, at the time of the hearing, temporary disability benefits were no longer in dispute;

4. That the type of permanent disability in the event of an award of permanent disability is industrial disability for an injury to the body as a whole;

5. That at the time of the injury claimant's gross earnings were $815.50 per week, that claimant was single and entitled to three exemptions, and that the parties believe the weekly rate of workers' compensation to be $487.42 per week.

6. That defendant was not asserting any affirmative defenses;

7. That medical benefits were no longer in dispute;

ISSUES

The parties submitted the following issues for determination at the time of the hearing:

1. Whether the injury was the cause of permanent disability;

2. Whether claimant is entitled to permanent disability benefits, and if so, how much;

3. What is the commencement date for permanent partial disability benefits in the event of an award of those benefits.

FINDINGS OF FACT

Claimant, Steven Edward Meier, testified that on June 28, 2000 he was working with a co-employee who was another technician on a job at the chlorine mixing station.

Claimant described the occurrence of the injury as follows:

> I went out on the job. He instructed me he wanted four unions placed with pipe Ts. He instructed me that the system was purged and safe to work on. I proceeded to work on the system. I believe it was the final, the forth [sic] union. When I broke that open, I was immediately sprayed in the face with chlorine gas, pure chlorine gas.

(Transcript, pages 16 and 17)

Claimant continued: "[I] Immediately lost my breath, my eyes and face starting [sic] burning. I basically kind of ducked down to get away from it and tried to reach up and close it to seal it." (Tr., p. 17)

Claimant estimated that he was hit in the face for approximately 20 seconds which rendered him disabled.

Claimant further testified: "I had difficulty breathing, my vision got blurred, my face was burning, I was coughing." (Tr., p. 17)

Claimant testified it was probably 20 minutes before anybody came to his assistance and took him to the medical department of the company.

He was given no medical treatment at that time but he did receive oxygen in the ambulance on the way to Genesis Hospital.

Claimant related that they put him on an IV to help the loss of moisture in his system and they also put him on oxygen with moisture to help relieve the chlorine in his lungs. Claimant said he was in the hospital the rest of that day and the following day.

Scott C. Ludwig, M.D., in the emergency room on June 28, 2000, reported:

> This 49-year-old male arrives by Medic ambulance having been squirted in the face with a highly concentrated amount of chlorine gas which they use to mix with the aluminum to create alloys. He did have safety goggles on, but he did inhale the gas. He immediately had developed some respiratory distress which he believes is getting worse by the minute. This occurred approximately an hour and a half ago. He has no history of previous lung disease.

(Ex. U, p. 43)

Dr. Ludwig reported that claimant did not smoke, he is a single parent, he takes no regular medications and denies any allergies. His past medical history is entirely unremarkable. Dr. Ludwig further reported that claimant was intermittently coughing and had a raspy voice. His chest had scattered expiratory wheezes and a few basilar rales.

The doctor reported that a chest x-ray showed early pulmonary congestion. Dr. Ludwig's diagnosis was: "Chlorine gas exposure with early pulmonary congestion and bronchospasm." (Ex. U, p. 43)

Akshay K. Mahadevia, M.D., a pulmonary doctor, was contacted and instructed the emergency personnel that claimant should be kept in the hospital overnight.

A history and physical was performed on June 28, 2000 which recorded:

> HISTORY: The patient is a 49-year-old pleasant white male who has been in good health until today when he was working on a chlorine line at ALCOA to repair it, and he had a sudden exposure to chlorine gas because of the leakage in the line. He immediately became extremely dyspneic. He started having headache, nausea, dizziness, cough, wheezing, and developed respiratory distress. He was brought to Genesis Medical Center East Campus, emergency room where he was evaluated and was found to have significant bronchospasm. His oximetry was 98% on room air, and he is being admitted. He complains of chest tightness.

(Ex. U, p. 44)

The doctor recorded that there was no family history for any pulmonary distress. The doctor's impression was: "Acute chlorine gas exposure." (Ex. U, p. 44) The doctor reported his plan as follows:

> PLAN: Oxygen, nebulizer treatments, steroids, observation, repeat complete blood count and chest x-ray. Watch for pulmonary edema. Will also obtain a baseline spirogram. Further plan will depend on patient's course.

(Ex. U, p. 44)

On June 29, 2000, a pulmonary function test by Akshay Mahadevia, M.D reported a diagnosis of "Inhalation." His interpretation was: "The spirogram demonstrates a mild restrictive ventilatory defect." (Ex. V, p. 45)

At the hearing claimant testified that he came under the care of Humphrey Wong, M.D., of Pulmonary Associates who is a pulmonary specialist in Davenport, Iowa.

On August 2, 2000, Dr. Wong reported to Forrest W. Smith, M.D., that claimant was hospitalized for two days and placed on Prednisone and nebulizers. Dr. Wong said that claimant felt the Albuterol caused quite a few palpitations and he had some problems with atrial fibrillation. (Ex. L, p. 27)

Dr. Wong continued that since that time he has noticed problems breathing. He does not feel the shortness of breath has improved. His cough has improved. He continued to have soreness in his throat. He was unable to do his ADL's [activities of daily living], climb one flight of stairs, and carry up to 20 pounds without problems. He said claimant reported intermittent chest pain as well. Claimant said he feels that his breath was not back to normal. He was not as physically active as he once was.

Dr. Wong also wrote that there is a work restriction that claimant is not to be exposed to fumes or vapors. Likewise, Dr. Wong said that once his Prednisone was stopped, his breathing got worse and he received a shot of steroids at work. Likewise, he had some soreness in his mouth.

Dr. Wong made this assessment:

> ASSESSMENT:
>
> 1. This is a 49-year-old male, nonsmoker, who presents with shortness of breath, cough, mild lung restriction after chlorine gas exposure. Most likely, the patient has had inhalational lung injury from the chlorine with some residual dyspnea. One would assume some irritant bronchitic symptoms which should slowly improve. However, he may be left with some more chronic sensitivity to fumes.
>
> 2. He also has oral thrush most likely due to Prednisone.
>
> 3. He has history of underlying atrial fibrillation.

(Ex. L, p. 28)

On September 20, 2000, Dr. Wong wrote to Dr. Smith that claimant discontinued the Flovent, 220 mcg which Dr. Wong had prescribed because claimant did not notice any significant improvement. Dr. Wong wrote that the patient feels short of breath both at work and with working out at the gym. He has chronic cough productive of white phlegm. (Ex. M, p. 30)

Dr. Wong's assessment on September 30, 2000 was:

> ASSESSMENT:
>
> 1. Mr. Meier has irritant bronchitis most likely related to his chlorine exposure. He continues to be symptomatic. His pulmonary function testing reveals some mild restrictive component.

(Ex. M, p. 31)

Dr. Wong then stated:

1. Obviously, he should refrain from work environment where there are fumes, gases or smoke.

2. He was placed on Flovent 220 mcg 2 puffs bid, Serevent 2 puffs bid.

3. He was informed that this may be chronic in nature and may take many months to resolve or improve.

(Ex. M, p. 31)

Dr. Wong wrote to Dr. Smith again on December 13, 2000. Dr. Wong wrote:

> I had the opportunity to see your patient, Steven Meier, follow-up evaluation of his irritant bronchitis after chlorine exposure. He was last seen in September. Since that time he has not had significant improvement. He continues to cough with clear phlegm. He continues to have shortness of breath. He remains at Alcoa. His job description has changed but there continues to be fume exposure in the ambient air. He has trouble sleeping at night due to continued cough.

(Ex. N, p. 32)

On March 17, 2001, Robert Knudson, M.D., of the Bettendorf Medical Center, while seeing claimant on a different medical matter just coincidentally commented that claimant recently finished taking inhalers secondary to a inhalation accident at ALCOA where he works.

(Ex. F, p. 17)

Dr. Wong reported to Dr. Smith again on April 4, 2001. Dr. Wong's assessment was:

> ASSESSMENT:
>
> 1. Mr. Meier has continued pulmonary problems after exposure to chlorine. He continues to have a decreased FVC but is somewhat worse after stopping his inhalers.

(Ex. O, p. 34)

Dr. Wong recommended to Dr. Smith that claimant should have some work restrictions where he is not exposed to chlorine or other fumes or chemicals or dust. He should have good ventilation. (Ex. O, p. 35)

Dr. Wong wrote to Cathy Smith, Willis Administrative Services, on May 24, 2001 that claimant had not reached maximum medical improvement in regards to his chlorine exposure on June 28, 2000. Dr. Wong said claimant continues to have cough, shortness of breath, clear sputum production, and restrictive lung capacity when he exercises.

Dr. Wong said claimant was still symptomatic and it may take at least 12 to 18 months before maximum medical improvement may be reached. (Ex. P, p. 36)

On October 10, 2001, Dr. Wong wrote to Warne Ramsey, M.D., at the Bettendorf Medical Center, that claimant continued to have symptoms of shortness of breath, decreased endurance climbing ladders or bending over to tie his shoes. He said claimant continued to have significant sensitivity to fumes and that he does have an air pack that he wears at work. Dr. Wong's assessment on October 10, 2001 was:

> ASSESSMENT:
>
> 1. Mr. Meier has had chlorine gas inhalation. It has been 15 months since the event. He has not noticed significant improvement between his last visit six months ago. He may be approaching maximal medical benefit at this point.

(Ex. Q, p. 37)

The plan recommended by Dr. Wong at that point was as follows:

> PLAN:
>
> 1. I would like to obtain a full formal PFT to compare to his last exam one year ago.
> 2. Continue Flovent and Serevent at this point.
> 3. Continue Proventil as needed.
> 4. Continue respiratory protection.

(Ex. Q, p. 38)

On October 30, 2001, Dr. Wong wrote a To Whom It May Concern letter:

> Mr. Meier was exposed to a chlorine gas at work back in 6/00. Since that time, he has had respiratory difficulties starting with shortness of breath and cough especially when exposed to irritant chemicals and fumes. He has continued to have symptoms despite over one year's time of recovery and treatment. Given the fact that he is still quite sensitive to irritant chemicals and fumes, it would help his respiratory condition if his work environment was in an area such that the air was clean and temperature controlled.

(Ex. R, p. 39)

Dr. Smith, the in-house plant physician, an independent contractor with ALCOA, testified that on July 14, he liberalized claimant's restrictions because claimant wanted to return to unrestricted overtime. Therefore, he put him back in

the production area with restrictions that he should avoid mist, dust, vapors, fumes, smoke, and solvents and to wear appropriate respiratory protection. He should be fit and tested for a positive pressure respirator.

Dr. Smith testified that the consulting service of the American College of Occupational and Environmental Medical Group made him aware of Terrence C. Moisan, M.D., F.A.C.P. and F.C.C.P., a specialist in Respiratory and Occupational Medicine. (Ex. A)

Dr. Moisan is board certified in three areas: (1) internal medicine, (2) pulmonary diseases, and (3) preventive medicine (occupational medicine). (Ex. K)

Dr. Moisan is located at the Midwest Center for Environmental Medicine in Palos Heights, Illinois. (Ex. A, p. 1; Ex. B, p. 5)

Dr. Moisan was an independent medical evaluator for ALCOA and he reported on November 20, 2001.

Dr. Moisan said claimant was a nonsmoker who had no family history of significant respiratory disease. (Ex. A, p. 1)

Dr. Moisan reviewed multiple previous medical records. Dr. Moisan determined that multiple spirometries and pulmonary functions demonstrated an overall pattern of inconsistency related to the effort made by the patient. Dr. Moisan concluded that claimant did not have a major restrictive problem.

Dr. Moisan refined his opinion by stating: "I cannot conclude completely that he does not have a restrictive process however it could not be based on these measurements given their inconsistencies." (Ex. A, p. 3)

Dr. Moisan concluded:

> There has been <u>no evidence</u> on his spirometric testing or findings that he has developed asthma or RADS. . . .
>
> In summary, based on the totality of these records, his examination, the radiographic studies, I suspect that he had a transient tracheobronchitis and oropharyngitis/conjunctivitis from the chlorine exposure.

(Ex. A, p. 3)

Dr. Moisan continued: "Regarding his work status, I see no contraindication at this time to usual work duties although he should wear respiratory protection around irritants." (Ex. A, p. 3) "There has been no

evidence to suggest that claimant has developed asthma or reactive airway dysfunction syndrome based on these records." (Ex. A, p. 4)

On November 29, 2001, Dr. Moisan wrote to Dr. Smith that some ground glass opacity in earlier tests were not related to this chlorine exposure. (Ex. B, p. 5)

On April 24, 2002, Dr. Wong wrote to Dr. Knudson that claimant was last seen in December of 2001. Since that time, he states his cough is somewhat better. It is less during the day. It occurs when he overexerts himself and when he is exposed to chemicals and fumes. He continues to work at the plant, however, he is not on the hot line. He continues to have sensitivity to cleaners and fumes. He is not having nighttime symptoms. He feels he has some restriction in his chest when he takes a deep breath. (Ex. D, p. 8) Also on April 24, 2002, Dr. Wong dictated this plan into the record:

> PLAN:
>
> 1. He was placed on some Advair 250/50 1 puff bid.
>
> 2. I do recommend that he continue with his current work restrictions as outlined previously and what he is following at this time.
>
> 3. I think his medical condition overall has improved, though I suspect he still will be left with sensitivity to chemicals and fumes which may be long lasting but hopefully, his sensitivity may slowly abate with time.

(Ex. D, p. 9)

On June 24, 2002, claimant saw Kazi Majeed, M.D. of Genesis Medical Center for an unrelated medical problem not associated with this injury. (Ex. H, pp. 19 and 20)

At the hearing, claimant further testified that Dr. Wong "put me on a gel for my nose, because my nostrils were dry; and my eye sockets were dry, so he put me on an eye drop solution." (Tr., p. 21)

Claimant said he is still using these medications because it was explained to him that chlorine could burn the mucous membranes in your eye and nose sockets and cause damage. (Tr., p. 21)

Dr. Smith opined that in the twelve years he had been at ALCOA he had not experienced any residual with a short-term chlorine exposure of approximately 20 seconds. (Tr., p. 61)

Dr. Smith also had claimant evaluated by Thomas J. Hughes, M.D., an occupational medicine doctor, on July 30, 2001 who wrote a 15-page report at that time.

In the first paragraph of his report, Dr. Hughes stated: "Unfortunately, the records are by no means complete and I will attempt to make reference to those notable gaps in his medical documentation." (Ex. E, p. 10)

Dr. Hughes recorded that: "On July 14, 2000 it was reported that his chest was clear and you had liberalized his restrictions; but he was to continue to avoid dust, mist, vapors, fumes, smoke, solvents, and to wear respiratory protection. (Ex. E, p. 10)

Dr. Hughes reported that the pulmonary functional tests that he examined were essentially normal. He added that Dr. Wong indicated claimant had irritant bronchitis, but he had a normal spirogram. (Ex. E, pp. 11 and 12) Dr. Hughes said examination of claimant's chest was normal and the spirometry testing was clearly normal. Dr. Hughes concluded:

> It would be my basic conclusion, based on the patient's pulmonary function testing at this point in time, that he does not have any evidence of lung damage and certainly does no have evidence of any obstructive pulmonary disease. It is certainly possible, if not likely, that Mr. Meier has irritant-induced asthma, which is also called reactive airway dysfunction syndrome (RADS), and this certainly does occur with a single high level exposure to an irritating gas, fume, mist, or vapor. Confirmation of that diagnosis would require [additional testing].

(Ex. E, p. 13)

Dr. Hughes continued: "I did brief Mr. Meier that his current pulmonary function testing was normal and he basically treated this assessment with disbelief." (Ex. E, pp. 13 and 14)

In order to conclude his evaluation, Dr. Hughes wanted a Methacholine Challenge Test and when it was accomplished, he would try to write an impairment rating. (Ex. E, pp. 13 and 14) Dr. Hughes ended by saying that he would like the opportunity to finish or conclude his evaluation. (Ex. E, p. 14) But this was never done. (Ex. E, pp. 14 and 15)

A pulmonary function test conducted by Dr. Hughes on July 30, 2002 shows an interpretation of normal spirometry and bears a handwritten note at the bottom that states: "Standing [with] good effort nonsmoker." (Ex. E, p. 16)

Dr. Smith acknowledged that the consultation by Dr. Moisan and Dr. Hughes were for evaluation and not for treatment. (Tr., p. 69)

Dr. Smith agreed with defendant's counsel that Dr. Wong stated on April 4, 2001 that claimant continued to have decreased FVC but was somewhat worse after stopping his inhalers. (Ex. O, p. 34; Tr., p. 73)

Patrick Tray testified that he is a 27-year employee of employer and was currently a unit supervisor in utility maintenance supervising mechanics and electricians and that he currently supervises claimant. Mr. Tray testified that claimant was transferred to his unit after the inhalation exposure in June of 2000 in the ingot plant. (Tr., p. 43)

Mr. Tray testified that claimant worked under restrictions. Initially, he was restricted to an air-conditioned area. Mr. Tray acknowledged that he has seen claimant use an inhaler before and he has witnessed claimant cough. The witness also acknowledged that claimant has talked about his DJ and karaoke business.

The witness could not recall the last time when he saw claimant have any problems relative to the chlorine gas exposure.

Mr. Tray described claimant's restrictions as follows:

> His restrictions are, he's limited to between 20 and 90 degree, he's restricted from the ingot plant, and he's not supposed to work in the hot line when the mill is running, there's fumes, and, generally, we are not supposed to put him in areas that are dusty.

(Tr., p. 47)

Mr. Tray testified that it is possible for claimant to work overtime hours within his restrictions and he recalls when claimant told him that he no longer needed to use a respirator. (Tr., pp. 48 and 49)

Claimant testified that he started to work for ALCOA in 1995 and before the injury, he worked throughout the plant doing any maintenance jobs that it takes to get the plant running and keep it running. (Tr., p. 25)

Claimant testified that he was off work for five days for this injury and he was paid for that time.

When he returned to work, he was restricted from being in the plant and they put into a utility crew. The first two weeks he was placed in an air-conditioned room doing paperwork.

Claimant testified: "I never returned to the ingot plant. They restricted me from the ingot plant. They kept me in the utility crew." (Tr., p. 26)

The ingot plant was where the original accident took place. Claimant testified: "That's where they melt and form ingots. It's melted aluminum. They form ingots." (Tr., p. 27) Claimant testified that before the injury that he could work anyplace in the plant but now states: "I'm limited. I'm not allowed to work in the ingot plant or the hot line." (Tr., p. 27) Claimant testified that the hot line is "[w]here the rolling is done, complete rolling of the ingots . . . [b]ecause it's a very smoky area. It's got an oil mist in the area constantly." (Tr., pp. 27 and 28)

Claimant further testified with respect to his restrictions: "I'm not allowed to be in an area that's smoky, mist, chemical-induced areas, temperatures below 20 degrees or temperatures above 90 degrees. (Tr., p. 28)

Claimant said these restrictions originated with Dr. Wong.

Furthermore, when he first went back to work, he was required to wear a positive pressure mask and he still uses it when necessary. (Tr., pp. 19 and 20) Claimant added that he needs the positive pressure mask in smoky areas but the company has refrained sending him to work in smoky areas because of visibility problems with the mask. Claimant said he does not wear the mask frequently but he keeps it nearby incase he has to wear it. Claimant explained that a positive pressure mask filters the dust so you don't have to breathe it. It completely covers your face. (Tr., p. 30)

Claimant denied any breathing problems prior to this injury, the use of an inhaler, dryness in his eyes or nose or the use of eye drops and gel for his nose.

Claimant further testified he cannot go swimming in swimming pools any more because the chlorine irritates his eyes and his lungs. He cannot go to smoky areas like dance halls. He said he could no longer use his hot tub because of the chlorine. He avoids grilling on his desk because of the smoke. He sold his motorcycle because his eyes became dry and his nostrils would get so dry he didn't think it was worth it.

Claimant said he used to work out five days a week and now he's down to two days a week at most because his breathing is affected, especially on the treadmill-type work. (Tr., p. 32) Claimant said he could no longer mop the floor with ammonia or bleach-type materials because of the vapors which cause him to immediately plug up and he has difficulty breathing and his eyes and nose start burning.

To relieve this, he has to go outside and get fresh air.

Claimant recalled his visit to see Dr. Moisan in Chicago. Claimant testified that his examination by Dr. Moisan lasted "seven minutes." (Tr., p. 33)

Claimant related:

> He came in, I had a folder of X rays, I believe, two MRI and X rays of my lungs when I got hired. He basically sat down, looked through them through the light and had me take a breathing test. I went out and took the test which lasted about maybe at the most three minutes, and I came back to the room. He came in and talked to me for a brief period of time.

(Tr., pp. 33 and 34)

Claimant related his conversation with Dr. Moisan as follows:

Q. What did he tell you?

A. He told me he didn't believe that the chlorine incident was the problem that I was having.

Q. You said he did not believe it?

A. Yes. I made the statement, "Well, my X rays show that there is scarring in my lungs," and his reply was: "X rays aren't conclusive. You can't trust them." and I basically asked him how he made his determination because all he did was look at an X ray.

Q. Is that the end of the conversation?

A. Yes. That was the end of the conversation.

(Tr., p. 34)

Claimant said he continued to treat with Dr. Wong and that he considered Dr. Wong to be his treating physician. (Tr., pp. 34 and 35)

Claimant further testified that he took various breathing tests and that all of them were performed in an air-conditioned office and that he gave a full effort on these tests. Claimant testified no doctor told him that he was not giving full effort. (Tr., p. 35)

Claimant was asked if his condition, worse or about the same. And claimant replied:

> The last 12 months, my eyes, no. It's always been the same. My lungs, I would say have improved since the accident. I don't have the deep coughing that I used to have, but I still have problems when I get around the chemicals or the smoky areas, but I don't have that deep coughing that I had when I first was exposed to chlorine.

(Tr., p. 36)

Claimant testified that his condition with respect to his breathing, his nose and his eyes has remained about the same. (Tr., p. 36)

Claimant testified that he still continues to use inhalers and that Dr. Knudson's statement that he discontinued inhalers was not correct at the time of the hearing. (Tr., p. 37) However, he does not use them very often at all. (Tr., p. 38)

Claimant acknowledged that he was a DJ and that he was an ELVIS impersonator and that smoky areas such as bars now have to be avoided. He still uses eye drops and the nose gel as well as inhalers occasionally. (Tr., p. 39)

Claimant acknowledged that no doctors ever told him not to go into bars or night clubs but he was told to stay away from areas that were smoky environment type areas. (Tr., . 40)

On October 14, 2002, Dr. Wong wrote to Dr. Knudson that overall claimant was doing better outside of work but at work when he is exposed to the smoke and on the hot line, he had increased shortness of breath. He complains of dry eyes and dry sinuses when he is exposed to extreme cold and humidity. He has extreme shortness of breath.

Dr. Wong's assessment on October 14, 2002 was as follows:

> ASSESSMENT:
>
> 1. Mr. Meier has underlying chemically induced reactive airways disease. Since exposure two years ago, he is slowly improving. He continues to improve since his last visit. He continues to have sensitivities which may be long lasting though hopefully the threshold for treatment will be higher.

(Ex. S, p. 40)

On the same date, October 14, 2002, Dr. Wong wrote a letter to Dr. Smith which is Exhibit T that claimant had requested to work at temperatures as low as 20 degrees Fahrenheit and he approved him to do so and see how he does. (Ex. T, p. 42)

Unrelated to this injury, claimant had diagnostic cervical facet blocks and when he was offered additional surgery, he declined because he is an Elvis impersonator and is worried about damage to his voice. (Ex. G, p. 18)

At the hearing, claimant testified that he last saw Dr. Wong in April of 2003 and that he planned to see him again in April of 2004. He testified that he was seeing Dr. Wong on a one-time-a-year basis. (Tr., p. 24)

CONCLUSIONS OF LAW

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. of App. P. 6.14(6).

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).

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 Ry. Co., 219 Iowa 587, 258 N.W.2d 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 Serv. 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.

Evidence in administrative proceedings is governed by section 17A.14.

17A.14 Rules of evidence — official notice.

In contested cases:

1. Irrelevant, immaterial, or unduly repetitious evidence should be excluded. A finding shall be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs, and may be based upon such evidence even if it would be inadmissible in a jury trial. . . .

. . . .

5. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.

Claimant testified that the technican that he was working with instructed him that the system was purged and safe to work on. He further stated when he broke open the fourth union he was immediately sprayed in the face with chlorine gas, pure chlorine gas.

It was a sudden and unexpected and a serious and traumatic injury. Claimant testified that he immediately lost his breath, his eyes and face started burning, he had difficulty breathing, his vision got blurred, and he was coughing.

The episode lasted about 20 seconds but there was about 20 minutes before he received assistance.

Eventually, after five days, claimant was returned to work with restrictions which were still in place almost four years later at the time of the hearing.

Initially, he only worked in air-conditioned rooms and also initially he was forced to wear a positive pressure respirator and still keeps it handy for if and when it might be needed.

He has been administered several prescription medications including Cortisone, Prednisone, Albuterol, Keflex, DepoMedrol, Flovent, Serevent, Advol, Plavix, Amiodarone and Proventil as needed.

He was hospitalized for two days and missed five days of work.

The Albuterol caused his heart to flutter, speed up, and had an adverse effect on his heart.

Previous to this injury, claimant worked in maintenance and could work anywhere in the entire plant. After the injury, he was restricted to working only on the utility crew and was prohibited from working in the ingot plant and on the hot line.

These restrictions were still in effect at the time of the hearing on January 22, 2004. Claimant was prescribed inhalers and was still using inhalers at the time of the hearing. His eyes are still dry and require drops. His nose is still dry and requires medication gel.

Claimant's supervisor, Patrick Tray, testified that these restrictions were still in effect.

Supervisor Tray described the restrictions as working in temperatures between 20 and 90 degrees, he's restricted from the ingot plant, he's not supposed to work on the hot line when the mill is running, no fumes, and generally he was not supposed to be put in areas that are dusty. (Tr., p. 47)

Dr. Smith, the plant doctor, testified that he "liberalized" his restrictions because claimant wanted to return to unrestricted overtime. The "liberlized" restrictions were that he should avoid mist, dust, vapors, fumes, smoke, and solvents and to wear appropriate respiratory protection and be fitted for a positive pressure respirator. (Tr., p. 55)

Claimant testified his eyes had not improved. His lungs have improved since the accident. He does not have the deep coughing that he used to have, but he still has problems when he gets around chemicals or smoky areas. He has been prescribed eye drops for his eyes and medication gel for his nose.

Claimant also described numerous limitations that he encountered performing his usual and normal activities of dialy living that he did prior to the injury.

Dr. Moisan stated that claimant's efforts at testing were inconsistent suggesting he did not have a major restrictive problem. At the same time Dr. Moisan stated:

> I cannot conclude completely that he does not have a restrictive process however it could not be based on these measurements given their inconsistencies.

(Ex. A, p. 3)

Dr. Moisan concluded that there was no evidence to suggest asthma or RADS or reactive airway dysfunction syndrome based on the records he examined. Thus, Dr. Moisan's report is inconclusive.

Dr. Moisan was an independent medical examiner for defendants and the primary purpose of the one time when he was examined by Dr. Moisan was not for treatment but for an evaluation to provide evidence for litigation.

Claimant testified that Dr. Moisan spent a total of seven minutes with him. He said Dr. Moisan examined the folder with x-rays and MRI's of his lungs when he was hired.

Claimant then testified that he was administered a test which lasted at the most, three minutes. Claimant then related that Dr. Moisan came back in the room and told him that he did not believe the chlorine incident was the problem that he was having.

Claimant said he inquired about the scarring [broken glass opacity] and claimant states that he was told: "X rays aren't conclusive, you can't trust them." Claimant testified that was the end of the conversation with Dr. Moisan.

Claimant was also examined by Dr. Hughes with an independent medical examination for the benefit of defendant-employer. Dr. Hughes commented in his first paragraph that unfortunately the records are by no means complete.

Dr. Hughes concluded his examination report by stating that he would like to see a Methacholine Challenge Test so that he could try to make an impairment rating because he would like the opportunity to finish or conclude this evaluation. (Ex. E, pp. 1 and 14)

There was no evidence in the record that the Methacholine Challenge Test was ever performed.

Again, Dr. Hughes was a one-time examiner who was employed to evaluate claimant and had no responsibilities toward his treatment. Typically these one-time independent evaluations are for he purpose of providing evidence for litigation rather than treating the injury.

Dr. Smith, the in-house company physician opined relying on Dr. Moisan, Dr. Hughes, and himself, that claimant did not have a permanent condition relative to the chlorine gas exposure based on their tests which were normal. (Tr., p. 77)

On August 2, 2000, Dr. Wong examined claimant who is a 49-year-old male patient of Dr. Akshay Mahadevia, M.D. On that date, Dr. Wong's assessment was: "This is a 49-year-old male, nonsmoker, who presents with shortness of breath, cough, mild lung restriction after chlorine gas exposure.

Most likely, the patient has had inhalational lung injury from the chlorine with some residual dyspnea. One would assume some irritant bronchitis symptoms which should slowly improve. However, he may be left with some more chronic sensitivity to fumes. (Emphasis added.) (Ex. L, p. 28)

Dr. Wong added claimant had oral thrush most likely due to Prednisone and an underlying atrial fibrilliation. (Ex. L, p. 28)

Dr. Wong also suggested that a Methacholine Challenge Test may be ordered down the road. (Ex. L., p. 29) Dr. Wong's assessment on that date, September 20, 2000 was:

> ASSESSMENT:
>
> 2. Mr. Meier has irritant bronchitis most likely related to his chlorine exposure. He continues to be symptomatic. His pulmonary function testing reveals some mild restrictive component.

(Ex. M, p. 31)

The doctor said claimant should refrain from a work environment where there are fumes, gasses or smoke. Dr. Wong added that this may be chronic in nature and may take many months to resolve or improve. (Ex. M, p. 31)

On December 13, 2000, claimant still had irritant cough from chlorine exposure. He continued to have quite a bit of irritation still. (Ex. N, p. 32)

On April 4, 2001, Dr. Wong found claimant continued to have cough, shortness or breath and clear sputum production. He said claimant feels restricted in his lung capacity when he exercises. His assessment was continued pulmonary problems after exposure to chlorine.

Dr. Wong said claimant continues to have decreased FVC but is somewhat worse after stopping his inhalers.

The doctor cautioned that claimant should have some work restrictions where he is not exposed to chlorine or other fumes or chemicals or dust. He said he should have good ventilation. (Ex. O, pp. 34 and 35)

On May 24, 2001, Dr. Wong wrote to Kathy Smith, Claim Adjuster, that he did not believe claimant had reached maximum medical improvement in regards to his chlorine exposure on June 28, 2000. He continued to have cough, shortness of breath, clear sputum and restricted lung capacity when he exercises. Dr. Wong said it may take at least 12 to 18 months before maximum medical improvement may be reached.

On October 10, 2001, Dr. Wong wrote to Warne Ramsey, M.D. Dr. Wong's assessment was:

> ASSESSMENT:
>
> 2. Mr. Meier has had chlorine gas inhalation. It has been 15 months since the event. He has not noticed significant improvement between his last visit six months ago. He may be approaching maximal medical benefit at this point.

(Ex. Q, p. 37)

On October 30, 2001, Dr. Wong wrote a letter To Whom It May Concern stating that claimant was exposed to a chlorine gas at work in June 2000 and since that time he has had respiratory difficulties starting with shortness of breath and cough especially when exposed to irritant chemicals and fumes. He has continued to have symptoms despite over one year's time of recovery and treatment. Given the fact he is still quite sensitive to irritant chemicals and fumes, it would help his respiratory condition if his work environment was in an area such that the air was clean and temperature-controlled. (Ex. R, p. 39)

The authorized treating physician in this case was Humphrey Wong, M.D., a board-certified pulmonary doctor who saw claimant on December 5, 2001 and numerous other times.

Dr. Wong was the authorized treating physician in the opinion of this deputy who was responsible for claimant's treatment or failure to recover. Dr. Wong's initial diagnosis was irritant bronchitis from chlorine gas exposure. (Ex. C)

On October 14, 2002, Dr. Wong wrote to Dr. Knudson. His assessment on that date was:

> 2. Mr. Meier has underlying chemically induced reactive airways disease. Since exposure two years ago, he is slowly improving. He continues to improve since his last visit. He continues to have sensitivities which may be long lasting though hopefully the threshold for treatment will be higher.

(Ex. S, p. 40)

On October 14, 2002, Dr. Wong wrote to Dr. Smith stating that claimant was seen for chlorine-induced reactive airway disease and was overall showing slow but continued improvement. He has some sensitivities to cold and to fumes. (Emphasis added.) However, he is interested in trying to work at temperatures as low as 20 degrees Fahrenheit. Given the fact he has improved,

I certainly will approve him to try to work in that environment and see how he does. (Ex. T, p. 42)

Following diagnostic cervical facet blocks at the median branches of C3, C4, and C5 under fluoroscopy for degenerative disc disease, Kevin P. Wilson, D.O., wrote that claimant declined further diskectomy and fusion because he is an Elvis impersonator and is worried about damage to his voice. (Ex. G, p. 18)

No physician has given a permanent impairment rating.

> The functional impairment rating comes from a physician and usually is a specific percentage. However, an exact percentage is unnecessary in that functional impairment is only one consideration. . . .
>
> The employee's physical condition and emotional condition are evaluated both before and after the injury and at the time industrial disability is being assessed.

Lawyer and Higgs, Iowa Workers' Compensation Law and Practice, Third Edition, section 13-5, page 146

> The operative phrase is loss of earning capacity, not loss of actual earnings.

Lawyer and Higgs, Iowa Workers' Compensation Law and Practice, Third Edition, section 13-5, page 147

As quoted above from Iowa Code section 17A.14, paragraph one, a deputy's finding may be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs and may be based upon such evidence even if it would be inadmissible in a jury trial.

Likewise, paragraph five states that the agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.

In this case it is determined based upon the assessments of Dr. Wong, that claimant has sustained a permanent injury as a result of the accident that occurred on June 28, 2000, and based upon Dr. Wong's repeated prognostication and fear that claimant either is or will be sensitized to various vapors and fumes in the future. Lawyer and Higgs, Iowa Workers' Compensation Law and Practice, Third Edition, section 22-5, page 272.

Dr. Wong is the treating physician and has consistently imposed several work restrictions over a long period of time..

These restrictions have been imposed for over three and one-half years and there was no indication that they would not be in effect for the indefinite future.

Therefore, it is determined that claimant has sustained a permanent injury of sensitization to chemicals as a result of the injury that occurred on June 28, 2000.

This deputy has decided a number of chemical exposure cases and it is common for the injured employee to be sensitized to various chemicals for the rest of their life.

In addition, once sensitized, the frequency of recurrences and the intensity of recurrences commonly increase.

Wherefore, applying agency expertise to the facts of this case, it is determined that the injury of June 28, 2000 was the cause of permanent disability.

The next issue is claimant's entitlement to permanent disability, if any, and the commencement date for permanent disability benefits, if any are awarded.

Claimant was in his late 40's at the time of the injury and his early 50's at the time of the hearing. Thus, he should be at the peak of his earnings capacity. Claimant is a long-term employee of employer starting with ALCOA in 1995.

Claimant has suffered through a long and impaired period of recovery.

It is true that the employer has accommodated claimant's disability and provided his medical treatment for this injury. However, this generous accommodation on the part of ALCOA is not transferable to the competitive labor market. Thilges v. Snap-On Tools, 531 N.W.2d 644 (Iowa 1995)

As the deputy reviewed the evidence, he determined that Dr. Wong's experience as a board certified pulmonologist coincided with the deputy's experience in the determination of benefits in chemical exposure cases, which is that chemical exposures result in chemical sensitivity.

Claimant's testimony at the hearing confirms this determination because some three and one-half years plus after this injury claimant was still experiencing a number of chemical sensitivity problems.

In turn, claimant was foreclosed from performing the work that he was performing at the time of the injury which permitted him to work anywhere in the plant on any kind of a maintenance problem; whereas, now, claimant is confined to utility maintenance

and prohibited from the ingot foundry and the hot line, and any environment that is contaminated with vapors, fumes, smoke, dust, dirt, or strong smells.

These same restrictions would foreclose claimant from a number of jobs in the competitive labor market if he were forced to find new employment at his current age and education and work experience.

This case is similar to previous appeal decisions of this agency in the cases of Wright v. Walter Kidde Co., 33 Biennial Rep., Iowa Indus. Comm'r 237, 239 (appeal dec. 1977); and Nunemann v. Tone Bros., Inc., I-1 Iowa Indus. Comm'r Dec. 177 (appeal dec. 1984) (no medical evidence of a functional impairment, but lifting restriction which caused transfer of claimant to other employment). Lawyer and Higgs, Iowa Workers' Compensation Law and Practice, Third Edition, section 13-5, page 151

"An expert's opinion based on an incomplete history is not necessarily binding on the commissioner but must be weighed with other facts and circumstances." Moore v. Firestone Tire & Rubber Co., 3 Iowa Indus. Comm'r Rep. 192 (appeal dec. 1982)

In this case, the one time evaluations of Dr. Moisan and Dr. Hughes did not coincide with the actual treatment notes of the authorized treating physician who saw claimant frequently.

Both Dr. Moisan and Dr. Hughes mentioned that their records were not complete. The evaluations of Dr. Moisan and Dr. Hughes were not corroborated by the authorized treating physician.

Treating doctors are frequently given a preference over evaluating doctors. Lawyer and Higgs, Iowa Workers' Compensation Law and Practice, Third Edition, section 21-16, pages 249 and 352 which itemizes the cases that support this contention.

Wherefore, it is determined claimant is entitled to a 15 percent industrial disability to the body as a whole for the sensitization to a variety of chemicals and the inability to work where there are fumes, vapors, dust, smoke, and other air impurities, or to work in extremely cold or hot environments.

Claimant is entitled to 75 weeks of permanent partial disability benefits as industrial disability for an injury to the body as a whole at the stipulated rate of $487.42 per week in the total amount of $36,556.50 commencing on October 24, 2003.

Dr. Wong stated on March 24, 2001 that it may take at least 12 to 18 months for maximum medical improvement to be reached and 18 months from May 24, 2001 is October 24, 2003.

Permanent partial disability benefits commence at the end of healing period which in this case is estimated to be October 24, 2003.

ORDER

THEREFORE, IT IS ORDERED:

That defendant pay to claimant thirty-six thousand, five hundred fifty-six and 50/100 dollars ($36,556.50) in permanent partial disability benefits commencing on October 24, 2003.

That interest will accrue pursuant to Iowa Code section 85.30.

That all accrued benefits are to be paid in a lump sum.

That the cost of this action including the cost of the attendance of the court reporter at hearing and the transcript of hearing are charged to defendant pursuant to Iowa Code section 86.19, Iowa Code section 86.40, and rule 876 IAC 4.33.

That defendant file subsequent reports as requested by this agency pursuant to rule 876 IAC 3.1(2).

Signed and filed this ____30th_____ day of April, 2004.

_____
WALTER R. MCMANUS, JR.
DEPUTY WORKERS' COMPENSATION
COMMISSIONER

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