BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DARINKA MITRIC,	FILED	
Claimant,	DEC 09 2015	File Nos. 5043968; 5048334; 5048335
vs.	WORKERS COMPENSATION	ARBITRATION
TYSON FRESH MEATS, INC.,		DECISION
Employer, Self-Insured, Defendant.		Head Note Nos.: 1402; 1602; 1802; 1803; 2501; 2907

STATEMENT OF THE CASE

Darinka Mitric, claimant, filed three petitions in arbitration and seeks workers' compensation benefits from Tyson Fresh Meats, Inc., as the self-insured employer. Hearing was held on October 6, 2015.

Claimant testified on her own behalf with the assistance of a Spanish to English interpreter, Karmela Lofthus. No other witnesses testified live at the time of hearing. The evidentiary record also includes claimant's exhibits 1 through 17 and defendant's exhibits A through Q.

The parties also submitted a hearing report, which contains numerous stipulations. The parties' stipulations are accepted. No factual findings or conclusions of law will be made in this decision regarding the parties' stipulations.

ISSUES

In File No. 5043968, the parties submitted the following disputed issues for determination:

1. Whether claimant sustained injuries to her bilateral shoulders that arose out of and in the course of her employment on September 27, 2012.

2. Whether claimant is entitled to temporary total disability, or healing period, benefits for the claimed period from September 16, 2013 through September 12, 2014.

3. Whether the alleged injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits.

4. The proper commencement date for permanent disability benefits, if any are awarded.

5. Whether claimant is entitled to an award of past medical expenses.

6. Whether claimant is entitled to an award of past medical mileage reimbursement.

7. Whether defendant is entitled to a credit pursuant to Iowa Code section 85.38(2) for disability benefits paid to claimant.

8. Whether costs should be assessed against either party.

In File No. 5048334, the parties submitted the following disputed issues for determination:

1. Whether the November 20, 2012 right leg injury caused temporary disability and, if so, whether claimant is entitled to an award for the claimed healing period from September 16, 2013 through September 12, 2014.

2. Whether the November 20, 2012 right leg injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent partial disability benefits.

3. The proper commencement date for any permanent partial disability benefits awarded.

4. Whether claimant is entitled to an award of past medical expenses.

5. Whether claimant is entitled to an award for reimbursement of past medical mileage expenses.

6. Whether defendant is entitled to a credit pursuant to Iowa Code section 85.38(2) for disability benefits paid to claimant.

In File No. 5048335, the parties submitted the following disputed issues for determination:

1. Whether claimant sustained a left wrist injury that arose out of and in the course of her employment on February 25, 2013.

2. Whether claimant is barred from recovery pursuant to Iowa Code section 85.16(1) as a result of an intentional injury to herself.

3. Whether the alleged injury caused a permanent disability and, if so, the extent of claimant's entitlement to permanent partial disability benefits.

4. The proper commencement date for permanent partial disability benefits, if any are awarded.

5. Whether defendant is entitled to a credit pursuant to Iowa Code section 85.38(2) for disability benefits paid to claimant.

FINDINGS OF FACT

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

Darinka Mitric has worked at Tyson since she moved to Waterloo, Iowa in 1998. Claimant has worked two positions at Tyson. The first required her to build cardboard boxes by hand. She was required to perform repetitive motion and to lift, pull, or manipulate pallets. She performed this job for approximately ten years.

After Tyson installed a box-making machine, Ms. Mitric operated that box-making machine. As a machine operator, claimant was required to stack and move stacks of cardboard boxes. She was also required to load stacks of cardboard into the box-making machine, which required her to lift seven to nine pounds of materials above shoulder height on an occasional basis.

Claimant's job duties while operating the box machine are generally depicted in a video introduced into evidence as Exhibit Q. Review of that video reveals that claimant would stack boxes above shoulder height and that she would have to load cardboard into the box-making machine above shoulder height. The job duties were consistent, but not of an exceptionally fast pace. Exhibit Q demonstrates that the job duties performed by Ms. Mitric were consistent, but not terribly repetitive. The job duties were primarily performed below shoulder height and did not involve extensive or heavy lifting.

Claimant's official job title at the time of her alleged injuries was "Operate Trayformer # 6." A formal Job Analysis Summary is contained at Exhibit 8, page 61. The job analysis summary reveals that each box weighs less than one pound and that claimant would have lifted up to ten pounds while performing this job. The Job Analysis Summary is generally consistent with the work duties depicted on the video submitted as Exhibit Q.

Ms. Mitric asserts she sustained four separate injuries as a result of her work activities at Tyson. Her first injury claim involved a neck injury for which she submitted to surgery in 2006. That injury is not the subject of any of the current injury claims.

Claimant's second alleged work injury is a bilateral shoulder injury claim with an injury date of September 27, 2012. Ms. Mitric testified that her most difficult job duty was throwing cardboard above her head. Ms. Mitric is a relatively short statured female. She testified that as she threw boxes onto the machine on September 27, 2012, she experienced piercing pain in her shoulders and then fatigue and weakness in both arms.

Claimant's third work injury claim is a right knee injury occurring after a 50 pound box fell onto her right leg on November 20, 2012. Ms. Mitric's final claimed work injury is a left arm fracture occurring on February 25, 2013. Ms. Mitric testified that she tripped on a cord and fell onto her left arm. This decision will address each injury claim separately to avoid confusion of the issues.

Bilateral Shoulder Claim:

Ms. Mitric developed bilateral shoulder symptoms in approximately August 2012 and completed an incident report with Tyson on September 27, 2012. (Exhibit 8, pages 46-47) In that incident report, claimant reported that she suffered injuries to her bilateral shoulders because she worked "too long on the job doing the same motions." (Ex. 8, p. 46)

In her deposition and at trial, claimant testified that her most difficult and bothersome job task was throwing cardboard boxes overhead onto the box-making machine she operated. (Claimant's testimony; Ex. 7, pp. 23, 25) The stack of cardboard boxes claimant testified she "threw" onto the box-making machine weighed less than ten pounds. (Ex. 8, p. 61; Claimant's testimony)

Claimant asserts she sustained a cumulative trauma injury to her bilateral shoulders as a result of her work duties at Tyson. Ms. Mitric argues that her job duties required "constant movement of her arms and shoulders with a lot of overhead reaching." (Claimant's Post-Hearing Brief, p. 2) A video of claimant's job duties is in evidence as Exhibit Q. Review of the video does not demonstrate constant movement of the arms and shoulders. Some overhead lifting and reaching could be anticipated given claimant's stature. The formal job analysis of claimant's position confirms that the work she performed was relatively light. (Ex. 8, p. 61)

Several physicians were asked to comment on claimant's work duties and whether those work duties were a cause or a substantially aggravating factor of claimant's bilateral shoulder complaints. After the initial work injury report, Tyson referred claimant to Robert L. Gordon, M.D. for treatment. Dr. Gordon evaluated claimant initially on October 24, 2012 and apparently initiated some physical therapy for claimant's shoulder complaints. (Ex. E, p. 1) Dr. Gordon also went to the plant floor and evaluated claimant performing her job duties on October 24, 2012. (Ex. E, p. 4)

Dr. Gordon re-evaluated claimant on November 7, 2012. At that time, he noted significant decreases in claimant's shoulder range of motion since his October 24, 2012 evaluation. (Ex. E, p. 1) During his November 27, 2012 evaluation, Dr. Gordon noted inconsistent physical examination findings when claimant was distracted. Specifically, her shoulder range of motion was significantly better when she was not directly examined but was distracted. (Ex. E, p. 2) Nevertheless, Dr. Gordon recommended orthopaedic evaluation of claimant's bilateral shoulder condition. (Ex. E, p. 3)

Defendant sent claimant to Thomas S. Gorsche, M.D. for orthopaedic evaluation on December 4, 2012. Dr. Gorsche also found inconsistencies in claimant's physical examination with distraction. Dr. Gorsche recommended no additional treatment for the bilateral shoulders and referred claimant back to Dr. Gordon. (Ex. 10, pp. 67-68)

Dr. Gordon reevaluated Ms. Mitric on December 11, 2012. At that time, he specifically discussed with claimant how she believed her shoulders were injured. He again noted inconsistent findings with distraction. Dr. Gordon also reviewed claimant's shoulder MRI findings, noting:

> The findings on MRI are most consistent with changes of maturation. Her SLAP tears would not have been caused or aggravated by her performing her job as a tray former, as there were no necessary high-force/velocity acceleration/deceleration movements necessary about the bilateral shoulders. In addition, she did not have any traumatic injuries or falls that would have precipitated SLAP tears.

(Ex. E, p. 5)

Dr. Gordon recommended reevaluation by an orthopaedic surgeon after receipt of the MRI findings. (Ex. E, p. 5) Therefore, Dr. Gorsche reevaluated claimant on December 18, 2012. Following his physical examination, Dr. Gorsche again noted inconsistencies and opined, "There is nothing to suggest on examination that her symptoms are coming from the glenohumeral joint." (Ex. 10, p. 70) Dr. Gorsche imposed no restrictions and recommended no further treatment for claimant's shoulders. He opined that "the MRI findings . . . have no bearing on the complaints that she has at this time." (Ex. 10, p. 70)

Claimant sought medical attention with an orthopaedic surgeon of her own choosing, Arnold E. Delbridge, M.D. Dr. Delbridge evaluated claimant initially on April 15, 2013. He noted limited range of motion in both of claimant's shoulders, constant pain, and described his impression that she "has definite anatomic lesions visible on MRI," including rotator cuff tendinopathy, partial-thickness intrasubstance tear of the infraspinatus tendon and a SLAP tear of the labrum and mild acromioclavicular (AC) joint degenerative changes with acromial subdeltoid bursitis and intraarticular biceps tendinopathy on the right. (Ex. 15, p. 84) Dr. Delbridge also diagnosed claimant with left shoulder rotator cuff tendinopathy, a SLAP tear and bursitis and an infraspinatus tear. (Ex. 15, p. 84)

On October 9, 2013, Dr. Delbridge performed an arthroscopic surgical repair of claimant's superior labrum as well as an open rotator cuff repair with acromioplasty. (Ex. 15, p. 90) The operative note describes a SLAP tear and a partial rotator cuff tear. (Ex. 15, p. 90)

On January 24, 2014, Dr. Delbridge took claimant to surgery for her right shoulder. His postoperative diagnosis was a superior labrum tear, rotator cuff tear and impingement syndrome of the right shoulder. (Ex. 15, p. 96) Claimant's shoulder symptoms improved to some degree after these operative procedures.

Dr. Delbridge authored a November 25, 2014 report, which offered causation and impairment opinions pertaining to claimant's shoulders. Dr. Delbridge concedes that claimant's job at Tyson "was a relatively light job." However, he noted that claimant "had to put the boxes up above her shoulders which could have precipitated her issues." (Ex. 15, p. 115) Ultimately, Dr. Delbridge opined:

> It is my conclusion, even taking into account other physician's reluctance to state it is a work-related injury, because she has had many jobs at Tyson over the years which resulted in repetitive motion injuries of her upper extremities that this is work related. Admittedly, her last job was not very difficult but she had years and years of other jobs, one of which was pulling heavy pallets and occasionally even falling down if the pallet slipped.

(Ex. 15, p. 118)

During his deposition, Dr. Delbridge reiterated his understanding that claimant had "a lot of different jobs that very well could have caused this problem." (Ex. 15, p. 125) (Deposition Transcript, p. 16) In reality, claimant held only two different positions at Tyson. She initially built boxes by hand and later ran the box machine.

At his deposition, Dr. Delbridge acknowledged that claimant's box machine job at the time of the alleged shoulder injuries was not very difficult. (Ex. 15, p. 126) (Depo. Tr., pp. 19-20) During that deposition, it became apparent that Dr. Delbridge was not aware of claimant's actual job duties at Tyson and did not possess evidence or information to justify his November 25, 2014 opinion that claimant "had years and years of other jobs" or that she "had many jobs at Tyson over the years." (Ex. 15, pp. 127, 129) I am not confident in Dr. Delbridge's opinions because he appears to have had an incomplete history and appears to have made certain assumptions that were not necessarily accurate to reach his causation opinions and conclusions.

By contrast, defendant obtained an independent medical evaluation performed by Robert L. Broghammer, M.D. on December 29, 2014. Dr. Broghammer provides a work history and appears to have accurately grasped claimant's prior positions at Tyson. (Ex. 17, p. 166) During his physical examination of claimant's shoulders, Dr. Broghammer noted signs of symptom magnification and pain behaviors.

Ultimately, Dr. Broghammer opined, "it does not appear that there is any diagnosis to correspond with the claimant's alleged injury to her bilateral shoulders. In other words there is no diagnosis with regard to an injury, as there is no evidence of

injury." (Ex. 17, p. 168) Instead, Dr. Broghammer declared claimant's bilateral shoulder conditions to be a "non-work-related condition." (Ex. 17, p. 168) Specifically, Dr. Broghammer opined:

> [T]he worker's job duties at Tyson were not a substantial or material factor in causing her above shoulder conditions . . . . [T]he worker had no evidence of actual event or injury to correspond with the onset of her symptoms. Her symptoms began insidiously over a period of time. This is more likely than not due to the worker's chronic condition without evidence of causation or material aggravation of her preexisting condition from a work-related standpoint as it pertains to the alleged injury of 09/27/2012. Thus, in answer to the second part of this question, it is my medical opinion with a reasonable degree of medical certainty that the worker's shoulder surgeries performed by Dr. Delbridge were not related to an industrial injury sustained while working at Tyson, but rather due to personal chronic conditions.

(Ex. 17, p. 170)

Having weighed the respective advantages, perspectives, explanations, and credibility of the physicians that offered opinions pertaining to claimant's shoulders, I find the opinions and explanation offered by Dr. Broghammer to be most convincing. Those opinions are supported by the opinions offered by Dr. Gorsche and Dr. Gordon. Dr. Broghammer's history and understanding of claimant's work history appears accurate and his explanation of his rationale is reasonable and convincing.

By contrast, I do not find the opinion of Dr. Delbridge to be convincing in this situation. He appears to have rendered a causation opinion based upon a flawed factual history. Although he attempted to clarify, correct, and still support his opinion later in his deposition and afterward, I find his initial recitation of causation to be less credible given the erroneous history.

Having made these credibility determinations, I find that claimant's alleged bilateral shoulder injuries did not arise out of and in the course of her employment with Tyson and that the work performed at Tyson was not a substantial or materially aggravating factor regarding claimant's shoulder conditions. I find that claimant has not proven a causal connection between her shoulder medical treatment and her work activities Tyson.

Right Knee Claim:

It is stipulated that an injury occurred to claimant's right knee and leg on November 20, 2012. There does not appear to be any dispute that a 50 pound box fell onto claimant's right leg and knee. Following the accident, claimant had significant

bruising on her right leg. Defendant accepted the injury claim and referred claimant to Dr. Gordon for medical treatment.

Dr. Gordon evaluated claimant on November 27, 2012, noting tenderness in claimant's right lower extremity, but full range of motion. By December 12, 2012, Dr. Gordon found no swelling or bruising. He declared maximum medical improvement of claimant's right knee injury as of December 12, 2012 and released claimant from care for that injury as of that date.

Claimant reported her right leg symptoms to Dr. Gorsche and was examined for those complaints on February 19, 2013. Dr. Gorsche obtained x-rays of claimant's right leg. He noted no swelling, no bruising, inconsistent pain complaints, full range of motion and no instability of claimant's right knee. Dr. Gorsche recommended no surgical intervention, imposed no restrictions, and referred claimant back to Dr. Gordon. (Ex. 17, pp. 5-6)

Dr. Gordon re-evaluated claimant on March 7, 2013. He noted development of new symptoms in claimant's low back since he last evaluated her right leg. He opined those symptoms were not causally related to the November 20, 2012 right leg injury. Dr. Gordon again found no joint effusion and no right knee instability. Dr. Gordon recommended no further treatment for the right knee or right leg. He confirmed that claimant did not require medical restrictions for the right leg injury and opined that claimant did not incur any permanent impairment due to the box incident on November 20, 2012. (Ex. E, pp. 6-7)

Claimant was not satisfied with the answers she received from Dr. Gorsche or Dr. Gordon so she sought medical care on her own with Dr. Delbridge. However, claimant obtained no medical evaluations or treatment for her right knee between March 7, 2013 and September 16, 2013, when Dr. Delbridge first evaluated claimant's right knee. In his September 16, 2013 clinical note, Dr. Delbridge noted:

> She has negative x-rays but massive swelling. We will get an MRI of her knee in the near future. Her knee was struck by a falling box. She had x-rays and her knee examined but she has continued swelling. She had massive swelling for awhile [*sic*]. Now she continues to have pain in her knee and it feels like something is catching, so I think an MRI would be appropriate.

(Ex. 15, p. 86)

The MRI demonstrated no ligament or meniscal tears. It did demonstrate a Baker's cyst and some chondromalacia at the medial femoral condyle. (Ex. 15, p. 88) Upon evaluating the MRI results, Dr. Delbridge concluded that claimant "probably has some debris or loose bodies of cartilaginous type in her knee and she has some

degenerative areas." (Ex. 15, p. 89) He recommended a diagnostic arthroscopy of claimant's right knee.

Ms. Mitric was undergoing treatment for her shoulders thereafter and any treatment of claimant's right knee was delayed until May 2014, at which time Dr. Delbridge initiated some injections into claimant's right knee. Unfortunately, those injections were not helpful over the long-term.

By September 2014, Dr. Delbridge was documenting worsening of symptoms, including a sensation of claimant's knee giving away. (Ex. 15, p. 107) Claimant did not work between September 2013 and September 2014. Nevertheless, Dr. Delbridge pondered the possibility that there was a tear or loose body in claimant's right knee. He again recommended arthroscopic inspection.

On October 13, 2014, Dr. Delbridge took claimant to the operating room and performed an arthroscopic surgery. His operative note provides postoperative diagnoses of right knee degenerative changes of the medial femoral condyle and chondromalacia of the lateral tibial plateau and patella. He found no loose bodies or tears of any ligaments or meniscus. (Ex. 15, p. 108)

In a November 25, 2014 report, Dr. Delbridge opined:

> Undoubtedly at 62, even though her x-rays of her knee were negative in Dr. Gorsche's office, she has some evidence of degenerative changes. The acute injury from workman's [*sic*] compensation resulted in her right knee becoming symptomatic when it had not been very symptomatic before. Her injury at Tyson Fresh Meats was a substantial factor in bringing about her current condition.
>
> My conclusion is that as a result of her acute injury superimposed on her previous somewhat degenerative knee, she has a minimum impairment of 5% of her right lower extremity. Since she has not had an arthroscopy performed which I have recommended, that could change to some extent. It is more likely to change to a higher impairment than a lower impairment considering the circumstances. I have noted repeated effusions in her right knee which have responded poorly to Depo-Medrol injections in her knee.
>
> As a result of her knee injury she should not be asked to climb stairs repetitively nor do squatting while at work. Prolonged standing will also cause her to have some knee pain and effusion but it may be manageable, especially if she avails herself of an arthroscopy and debridement in the future.

(Ex. 15, p. 114)

Dr. Delbridge is the physician that performed surgery on claimant and had a chance to inspect her knee. Oftentimes, this will give the surgical physician greater credibility on causation issues. In this instance, however, Dr. Delbridge appears to be unaware that he performed surgery. His surgical note is dated October 13, 2014. (Ex. 15, p. 108) Yet, in his November 25, 2014 causation report, Dr. Delbridge records that claimant has not yet had an arthroscopic knee surgery performed. (Ex. 15, p. 114)

Dr. Delbridge's failure to recall or notice in his own medical records that he took Ms. Mitric to surgery only 43 days before issuing his causation opinion leaves me with a serious question about the accuracy of Dr. Delbridge's opinions or his recollection of claimant's actual knee condition at the time of surgery. Dr. Delbridge also provides no explanation why claimant's knee had no swelling within a month of the injury and then developed massive swelling in September 2013. Dr. Delbridge provides no explanation why claimant's right knee condition continued to deteriorate after she quit working for the employer.

By contrast, defendant had claimant evaluated by Dr. Broghammer on December 29, 2014. (Ex. 17) Dr. Broghammer provided an accurate recitation of claimant's right knee treatment in his report, including the surgical note from Dr. Delbridge. Dr. Broghammer opined:

> In my medical opinion with a reasonable degree of medical certainty, given the worker's essentially negative workup with demonstration only of chronic findings and no evidence of acute injury other than a contusion, which has resolved, the worker would not have any permanent partial impairment for her right knee. She does not require any permanent restrictions on the auspices of the worker's [*sic*] compensation system.

(Ex. 17, p. 171)

When comparing the competing medical opinions, I find the opinions of Dr. Gordon, Dr. Gorsche and Dr. Broghammer to be more convincing than the opinions offered by Dr. Delbridge. The opinions of Dr. Gordon, Dr. Gorsche and Dr. Broghammer appear to be consistent. The opinions offered by Dr. Broghammer specifically consider the surgical findings recorded by Dr. Delbridge.

Dr. Delbridge, on the other hand, had the chance to inspect claimant's knee joint surgically. He predicted that he would find loose bodies, ligament tears, or meniscus tears intraoperatively. He found none of the conditions he predicted during surgery. He found only degenerative changes during his arthroscopic inspection of claimant's right knee. Worse yet, when offering his opinions pertaining to causation, impairment, and restrictions, he erroneously thought that claimant had not undergone arthroscopy. Clearly, Dr. Delbridge did not even recall his own operative procedure on claimant, which is very damaging to his own credibility on this issue.

Therefore, having found the opinions of Dr. Gorsche, Dr. Gordon and Dr. Broghammer to be more convincing than those offered by Dr. Delbridge, I also find that claimant failed to prove a causal connection between her current right knee condition and the November 20, 2012 work incident. I find that claimant failed to prove the medical expenses she submitted for her right knee are causally related to the November 20, 2012 incident. I find that claimant failed to prove she sustained any permanent impairment as a result of the November 20, 2012 incident.

Having determined that there is not a causal connection between the treatment rendered by Dr. Delbridge and the November 20, 2012 incident, also find that claimant failed to prove she was off work or in a healing period for her right knee between September 16, 2013 and September 12, 2014.

Left Arm Fracture Claim:

On February 25, 2013, claimant was diagnosed with a fractured left arm. The primary fighting issue in this case is whether the left arm fracture occurred as a result of a fall at work.

Claimant testified that she fell onto her left arm and sustained injury. Specifically, claimant testified that she was throwing boxes in a chute. She explained that a metal wire was attached to a "poker." That wire was the same color as the floor and apparently fell onto the floor. As claimant was attempting to remove garbage from a trash can, she tripped over the wire and fell onto her left arm and wrist. She testified that she fell backward onto the concrete, injured her wrist, and reported the injury immediately to the company's on-site nurse.

Ms. Mitric testified that the company's nurse wrapped her arm. However, her symptoms continued and she was referred to Dr. Gorsche the day after the fall. Dr. Gorsche took x-rays of her left arm, which confirmed the fractures in her left wrist. Ms. Mitric testified that Dr. Gorsche casted her left arm for the next three weeks. Ms. Mitric also testified that she had never had any prior medical treatment for her left wrist before the February 25, 2013 injury.

Defendant offers unsworn written statements from three witnesses that suggest claimant was injured before her purported fall and that she staged the fall. Marguriette Irvin offered an unsigned statement, which states claimant told her before the alleged accident that her arm was hurting. Ms. Irvin also reported that claimant acted differently than normal, including taking extra breaks on the morning of the fall and grabbing her wrist before the alleged fall. (Ex. K, pp. 1-2)

Jennifer Koepke offered a signed statement, noting that claimant stated she tripped on a cord when she fell. Ms. Koepke stated that she went over to the area where claimant fell to inspect the area. She found the cable claimant allegedly tripped over was attached to a pole and was not on the floor. (Ex. K, p. 3)

Lakeithia Rowser offered a signed statement in which she states she saw claimant fall on purpose. She states she had seen claimant holding her arm during the morning before the fall and had been complaining about her arm prior to the alleged fall. She also states that she "watched her walk to the trash[,] lay the bag down[,] and fell to the floor." Ms. Rowser also refutes the claimant's assertion that she tripped over a cord on the floor. (Ex. K, p. 4)

Dr. Gorsche's treatment note from February 26, 2013, confirms that claimant reported a fall at work the prior day. It notes her x-rays and diagnosis of wrist fractures. That medical record also reports swelling and bruising around claimant's left wrist. (Ex. 10, p. 73)

The three witness statements are troubling and cause some doubt in the undersigned's mind about whether the alleged accident and injury occurred in the manner alleged by claimant. On the other hand, one of the statements produced by defendant is unsigned. All three of the statements are unsworn. None of the witnesses were called to testify at the time of trial or via deposition. None of the three witnesses were subjected to cross-examination or available to view their demeanor and credibility. None of the witness statements mention swelling or bruising being present in or around claimant's left wrist before the alleged fall on February 25, 2013.

While the three witnesses' written statements create doubt about the accuracy of claimant's testimony, I ultimately am not willing to find unsworn statements from unavailable witnesses to be more credible than sworn testimony offered by claimant. Claimant has produced the better evidence by offering sworn testimony and being subjected to cross-examination. Therefore, I find that claimant has proven she sustained a fall at work on February 25, 2013. I further find that defendant failed to prove the fall at work was a willful intent or attempt by Ms. Mitric to injure herself.

Two physicians have offered opinions as to permanent impairment caused by claimant's left wrist injury. Dr. Broghammer opined that the alleged fall on February 25, 2013 was consistent with claimant's reported injury and medical findings. He performed a thorough evaluation of claimant's left wrist and arm, documenting certain reduced ranges of motion. Based upon his physical examination, Dr. Broghammer opined that claimant sustained two percent (2%) permanent impairment of the left upper extremity as a result of the alleged fall on February 25, 2013. (Ex. 17, p. 172)

The second physician that offered opinions as to claimant's left wrist was Dr. Delbridge, who opined that the mechanism of injury was consistent with claimant's injuries. However, Dr. Delbridge opined that claimant has no residual impairment as a result of the February 25, 2013 injury. (Ex. 15, p. 113)

Having found reasons to doubt Dr. Delbridge's opinions on the shoulder and knee claims, I again find his opinion on this issue to be less credible than the opinion offered by Dr. Broghammer. Therefore, I find Dr. Broghammer's opinion to be

convincing and find that claimant sustained two percent (2%) permanent impairment and a corresponding two percent (2%) permanent disability of the left upper extremity as a result of the February 25, 2013 work accident.

Defendant seeks a credit for short term disability benefits paid to claimant from March 2013 through November 2013. Defendant includes exhibit P in its evidentiary offering, which provides a table of benefits purportedly paid to claimant. Defendant did not offer evidence to establish that the benefits paid to claimant came from a group plan. Defendant did not offer evidence to establish that the benefits would not have been payable to claimant if claimant was simultaneously entitled to permanent partial disability benefits under Iowa's workers' compensation laws. Defendant offered no evidence that it contributed to the group plan that purportedly paid short term benefits to claimant. Other than offering a table, defendant did not offer evidence that claimant was actually paid the benefits identified in Exhibit P.

CONCLUSIONS OF LAW

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

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

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an

expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

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

With respect to the September 27, 2012 bilateral shoulder claim (File No. 5043968), I found the medical opinions of Dr. Broghammer to be the most convincing. Having made that finding, I also found that claimant did not prove her bilateral shoulder injuries arose out of and in the course of her employment. Therefore, I conclude that claimant failed to carry her burden of proof to establish that her claimed bilateral shoulder injuries arose out of and in the course of her employment.

Having concluded that claimant failed to carry her burden of proof in the bilateral shoulder claim, I similarly find that claimant failed to prove entitlement to medical mileage, medical expenses, temporary disability, or permanent partial disability benefits.

When considering the November 20, 2012 right knee injury claim (File No. 5048334), I note that the parties stipulated that an injury occurred. However, I found that claimant failed to prove the injury caused temporary or permanent disability. Similarly, I found that claimant failed to prove a causal connection between her medical treatment for the right knee and the November 20, 2012 injury. Therefore, I conclude that claimant failed to carry her burden of proof and is not entitled to temporary disability benefits, permanent partial disability benefits, medical expenses, or medical mileage.

In the final injury claim for the alleged left wrist injury of February 25, 2013, defendant raised an affirmative defense pursuant to Iowa Code section 85.16(1). Specifically, defendant argues that claimant's injury was self-inflected or the result of an intentional act by claimant to injure herself.

Iowa Code section 85.16(1) provides, "No compensation under this chapter shall be allowed for an injury caused: (1) By the employee's willful intent to injure the employee's self or to willfully injure another." The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6). Therefore, the employer has the burden of proof to establish this affirmative defense. Nelson v. Cities Service Oil Co., 259 Iowa 1209, 1214; 146 N.W.2d 261 (1967).

Defendant introduced some evidence to establish its affirmative defense. That evidence raised some questions about the legitimacy of the claimant's February 25, 2013 claim. However, defendant did not offer sworn testimony from any of the three witnesses from whom they solicited written statements. None of the defense witnesses were subjected to cross-examination. I found that the defendant's evidence was not as convincing as the sworn testimony offered by claimant at trial. Therefore, I conclude that defendant failed to establish its affirmative defense pursuant to Iowa Code section 85.16(1).

Although the affirmative defense failed, claimant still bears the burden of proof to establish that the alleged injury arose out of and in the course of her employment. Claimant presented testimony that the injury occurred during her work duties and presented convincing medical evidence to establish a medical causation. Therefore, I found claimant proved she sustained a left wrist injury that arose out of and in the course of her employment with Tyson on February 25, 2013.

Having concluded that claimant proved a compensable left wrist injury on February 25, 2013, I turn to claimant's request for permanent disability. Claimant offered the medical opinion of Dr. Delbridge, opining that she has not sustained any permanent disability as a result of the left wrist injury. However, I did not find Dr. Delbridge's opinions convincing in any of the three alleged injury claims. Instead, I found the opinion of Dr. Broghammer most convincing. Dr. Broghammer opined that claimant sustained a two percent (2%) permanent impairment of the left upper extremity as a result of the February 25, 2013 left wrist injury.

Under the Iowa Workers' Compensation Act permanent partial disability is categorized as either to a scheduled member or to the body as a whole. See section 85.34(2). Section 85.34(2)(a)-(t) sets forth specific scheduled injuries and compensation payable for those injuries. The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993);

Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). Compensation for scheduled injuries is not related to earning capacity. The fact-finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

In this instance, I found that claimant sustained a two percent (2%) permanent impairment of the left upper extremity as a result of the February 25, 2013 work injury. The Iowa legislature has established a 250 week schedule for arm injuries. Iowa Code section 85.34(2)(m). Claimant is entitled to an award of permanent partial disability benefits equivalent to the proportional loss of her leg. Iowa Code section 85.34(2)(v). Two percent (2%) of 250 weeks equals 10 weeks. Claimant is, therefore, entitled to an award of 10 weeks of permanent partial disability benefits against the employer. Iowa Code section 85.34(2)(m), (v).

Permanent partial disability benefits commence at the termination of healing period. Iowa Code section 85.34(2). In this instance, no claim for healing period was asserted. Therefore, claimant's entitlement to permanent partial disability benefits commenced on February 26, 2013.

The next issue to be determined is whether defendant established the elements required to show entitlement to credit under Iowa Code section 85.38(2).

In order to prove entitlement to a credit, defendant must prove the following:

1) That benefits were received under a group plan;

2) Contribution to that plan was made by the employer;

3) The benefits should not have been paid if workers' compensation benefits were received; and

4) The amounts to be credited or deducted from the payments made or owed under chapter 85. Greenlee v. Cedar Falls Community Schools, File No. 934910 (App., December 27, 1993); McKernan v. Morningside College, File No. 955069 (App., February 22, 1993).

Defendant's burden to prove entitlement to a credit under section 85.38(2) was affirmed in SKW Biosystems/DeGussa Health and Nutrition v. Wolf, 723 N.W.2d 448 (Iowa App. 2006) (Table of Unpublished Decisions). In that case, the court held that SKW did not present the short or long-term disability policies and failed to present sufficient evidence to show that it was entitled to a credit. See also Albertsen v. Benco Manufacturing, File No. 5010764 (Appeal, July 27, 2007); Damiano v. Universal Gym, File No. 1071309 (Appeal, January 17, 2008); Miller v. Maintainer Corporation of Iowa, Inc., File No. 5020192 (Appeal, December 2009).

In this case, defendant seeks a credit totaling $7,176.00 for payment of short term disability income pursuant to Iowa Code section 85.38(2). However, having found that defendant did not carry its burden to establish that the benefits were actually paid to claimant, that the benefits were paid pursuant to a group disability plan, that defendant failed to prove the benefits would not be owed if claimant received the benefits awarded herein, and that defendant failed to prove that the employer actually contributed to the plan under which the short term disability benefits were purportedly paid, I conclude that defendant failed to carry its burden to establish a credit pursuant to Iowa Code section 85.38(2).

Finally, claimant seeks assessment of her costs in each of the three contested case proceedings. Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40. Having failed to carry her burden of proof in File Nos. 5043968 and 5048334, I exercise the agency's discretion and conclude that claimant's request for costs in those files should be denied.

Claimant has prevailed in File No. 5048335. She seeks award of two filing fees for this contested case. I find that one filing fee is permissible and reasonable. Therefore, I assess $100.00 for claimant's filing fee pursuant to rule 876 IAC 4.33(7).

Claimant seeks the cost of her deposition. That request is reasonable and I assess $122.05 pursuant to rule 876 IAC 4.33(2).

Claimant seeks the cost of Dr. Delbridge's report, which is $1,375.00 and the cost of medical records from Dr. Bogdanic totaling $47.50. I conclude the cost of Dr. Bogdanic's medical records is reasonable and assess the same pursuant to rule 876 IAC 4.33(6). With respect to Dr. Delbridge's report, he addressed each of the alleged injuries in that report. Equitably, defendant should not be required to pay the entirety of that fee given that it prevailed in two of the three files. I find it reasonable to assess defendant $500.00 for the cost of Dr. Delbridge's report as a cost in File No. 5048335 pursuant to rule 876 IAC 4.33(6). All other requests for costs are denied.

Therefore, exercising the agency discretion, I conclude that costs should be assessed against defendant in File No. 5048335 totaling $769.55.

ORDER

THEREFORE, IT IS ORDERED:

In File No. 5043968:

Claimant shall take nothing.

The parties shall bear their own costs.

In File No. 5048334:

Claimant shall take nothing.

The parties shall bear their own costs.

In File No. 5048335:

Defendant shall pay to claimant ten (10) weeks of permanent partial disability benefits at the rate of three hundred sixty and 93/100 dollars ($360.93) per week commencing on February 26, 2013.

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

Defendant shall reimburse claimant's costs in the amount of seven hundred sixty-nine and 55/100 dollars ($769.55).

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 9th day of December, 2015.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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WHG/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.