BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOSE PALACIOS,	:	File Nos. 20700124.01
	:	5066703
Claimant,	:	5066704
	:	5066705
vs.	:	5066706
	:	
TYSON FOODS, INC.,	:	ARBITRATION DECISION
	:	
Employer,	:	
Self-Insured	:	Head Notes: 1402.30, 1801, 2401,
Defendant.	:	2402, 2501, 2502

STATEMENT OF THE CASE

Claimant, Jose Palacios, filed petitions in arbitration seeking workers' compensation benefits from Tyson Foods, Inc. (Tyson), self-insured employer. This matter was heard on June 3, 2021, with a final submission date of August 2, 2021.

The record in this case consists of Joint Exhibits 1-9, Claimant's Exhibits 1-4, Defendant's Exhibits A-N, and the testimony of claimant. Serving as interpreters for this hearing were Ernest Nino-Murcia and Patricia Hillock.

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

ISSUES

File No. 5066703 (DOI 11/25/2016):

1. Whether claimant sustained an injury that arose out of and in the course of employment.

2. Whether there is a causal connection between the injury and the claimed medical expenses.

3. Whether claimant is entitled to reimbursement for an independent medical evaluation (IME).

4. Credit.

5. Costs.

File No. 5066704 (DOI 12/07/2016):

1. Whether claimant sustained an injury that arose out of and in the course of employment.

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

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

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

5. Whether there is a causal connection between the injury and the claimed medical expenses.

6. Whether claimant is due reimbursement for an IME.

7. Credit.

8. Costs.

File No. 5066705 (DOI 02/14/2017):

1. Whether claimant sustained an injury that arose out of and in the course of employment.

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

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

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

5. Whether there is a causal connection between the injury and the claimed medical expenses.

6. Whether claimant is due reimbursement for an IME.

7. Credit.

8. Costs.

File No. 20700124.01 (DOI 04/24/2018)

1. Whether claimant sustained an injury that arose out of and in the course of employment.

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

3. Whether claimant's claim for benefits is barred by application of Iowa Code section 85.23.

4. Whether claimant's claim for benefits is barred by application of Iowa Code section 85.26.

5. Whether the injury is a cause of temporary disability.

6. Whether there is a causal connection between the injury and claimed medical expenses.

7. Whether claimant is due reimbursement for an IME.

8. Credit.

9. Costs.

File No. 5066706 (DOI 05/31/2018)

1. Whether claimant sustained an injury that arose out of and in the course of employment.

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

3. Whether there is a causal connection between the injury and the claimed medical expenses.

4. Whether claimant is due reimbursement for an IME.

5. Credit.

6. Costs.

FINDINGS OF FACT

Claimant was 64 years old at the time of hearing. Claimant was born in El Salvador. He went up to the 5th grade in school in El Salvador. (Testimony pp. 21-23)

Claimant has farmed and bought and sold livestock. Claimant has worked in fast food restaurants and in a sewing factory. (TR pp. 23-25)

Claimant began working for Tyson, formerly known as IBP, in 1995. (TR p. 27) For the entire time he worked at Tyson, claimant operated a Whizard Knife. Claimant said he trimmed hams on a conveyor line and cut off fat. (TR pp. 29-31) Claimant testified he speaks little English, but always had an interpreter to use at Tyson. (TR p. 44)

Claimant's prior medical history is relevant. Claimant testified that in 2002 he fell at work. This matter was resolved in 2004. Claimant had little recollection of the details of the settlement regarding the work injury. Records from this agency indicate claimant settled this case on an Agreement for Settlement (AGFS) for 12 percent of the body as a whole or 60 weeks for $19,887.60, plus $1,112.40 for medical expenses. (Ex. A, Claimant's Post-Hearing Brief)

On October 7, 2016, claimant was evaluated by Benjamin Pohl, PA-C, for neck and upper back pain that had been bothering him for a few months. Claimant was assessed as having cervical muscular pain and upper back pain. Claimant was treated with medication. (Joint Exhibit 1, pp. 1-3)

Claimant's first petition alleges claimant fell at work on November 25, 2016, and injured his back and bilateral lower extremities. Claimant testified in deposition and at hearing that he did not fall on November 25, 2016. He said he reported pain in his right arm on November 25, 2016, but did not fall. Claimant testified in deposition he also had shoulder, neck and pain in the back of his head at approximately this time caused by doing repetitive work over the years. (Defendant's Exhibit A, depo pp. 11-12; TR pp. 55-56)

Claimant's second petition alleges he fell on December 7, 2016, and injured his back and bilateral lower extremities. In deposition, claimant testified he slipped on some lard at work on December 7, 2016. He landed on his left buttock. Claimant continued to work and did not miss any work due to the incident. Claimant testified the fall caused pain in his left leg to his foot. (Ex. A, depo p. 13; TR pp. 37-39) Claimant testified he believed he was on light duty after this fall.

Claimant was evaluated on December 29, 2016, by Physician's Assistant Pohl for follow-up of chronic neck and right upper extremity pain. Claimant indicated that in July, without injury or trauma at work, he began to have neck and bilateral upper extremity pain. Claimant was prescribed medication and told to follow-up with the company physician. (JE 1, pp. 4-5)

Claimant's third petition alleges he fell on February 14, 2017, and injured his back and bilateral lower extremities.

On March 30, 2017, claimant was seen by Physician's Assistant Pohl for follow-up for his chronic neck and right upper extremity pain. Claimant indicated he had a corticosteroid injection in the left shoulder that improved his left upper extremity pain. Claimant also indicated he had physical therapy, massage, electrical stimulation and other treatments for neck and right upper extremity pain without improvement. Claimant was assessed as having chronic radicular cervical pain and chronic pain in both shoulders. An MRI was recommended. (JE 1, pp. 6-7)

On April 5, 2017, claimant underwent a cervical MRI. It showed mild to moderate degenerative disc and degenerative facet disease and posterior osteophytes. (JE 2, pp. 54-55)

Claimant's fourth petition alleges a repetitive trauma to his bilateral upper extremities occurring on April 24, 2018.

On April 27, 2018, claimant was evaluated by Colette Hostetler, M.D., with arm and knee pain. Claimant had generalized weakness in both arms. Claimant had arm pain radiating from his hands to his shoulder, neck and back of his head. Claimant was prescribed medication and excused from work until May 7, 2018. (JE 1, pp. 9-11)

Claimant returned to Dr. Hostetler on May 3, 2018, for a recheck of arm pain. Claimant also complained of left lower extremity pain radiating up to his buttocks and lower back. Claimant was assessed as having a repetitive motion injury and pain in both upper extremities and left-sided sciatica. Claimant was prescribed medication and physical therapy. Claimant was taken off work for another two weeks. (JE 1, pp. 12-15)

Claimant returned to Dr. Hostetler on May 17, 2018. Claimant had a lumbar spinal x-ray and was assessed as having facet degenerative disease. He was assessed as having piriformis syndrome on the left and neck pain on the right. Claimant was told to do piriformis exercises and physical therapy. He was taken off work until June 11, 2018. (JE 1, pp. 16-19)

Claimant's fifth petition alleges a May 31, 2018 injury when claimant fell and injured his back and bilateral legs.

Claimant testified in deposition the May 31, 2018 injury relates to his right hand flaring up from a prior injury. He said the flare-up to his right hand was due to using an electric knife. (Ex. A, depo pp. 18-19)

Claimant was evaluated by Patrick Hartley, M.D., on June 12, 2018, with Tyson's onsite clinic. Claimant had pain in the upper back, shoulder and neck. Dr. Hartley ordered hip x-rays. (JE 4, pp. 61-64) X-rays of the left hip were normal. (JE 4, p. 68)

Claimant returned to Dr. Hartley on August 2, 2018, with continued complaints of pain in the left buttock, hip and thigh. Claimant was referred to physical therapy. (JE 4, pp. 70-71)

Claimant returned to Dr. Hartley on October 18, 2018, with complaints of pain in his left lumbar spine, buttocks and lower extremity. Claimant said walking relieved his pain. Claimant was referred for an MRI. (JE 4, pp. 74-75)

On October 11, 2018, claimant was seen by Dr. Hostetler. Claimant indicated pain in his neck, upper back and shoulders had improved with physical therapy. An MRI of the lumbar spine was recommended. (JE 1, pp. 23-25)

Claimant had a lumbar MRI on October 18, 2018. It showed disc space narrowing and desiccation throughout the lumbar spine and mild multi-level degenerative disc disease and a prior left L4 laminectomy. (JE 6)

Claimant was referred to a spine specialist on November 7, 2018. Claimant was evaluated by Benjamin MacLennan, M.D. Claimant's lumbar spine had a fairly well-maintained range of motion. Dr. MacLennan recommended against further surgery. Claimant was returned to work at 75 percent. (JE 7, pp. 89-92)

Claimant returned to Dr. Hartley on November 8, 2018. Claimant was found to be at maximum medical improvement (MMI) for his upper back, neck and shoulder pain. Claimant was returned to his regular duties regarding his upper back and shoulder pain. (JE 4, pp. 79-81)

On November 9, 2018, claimant underwent an epidural steroid injection (ESI) in his lumbar spine. The injection was performed by Fred Dery, M.D. Claimant was returned to work with no restrictions. (JE 7, pp. 94-95)

In a November 15, 2018 note, Dr. Hartley indicated that it was uncertain to what extent claimant's complaint of thigh, hip and lower back pain could be attributed to work at Tyson as there was an inconsistent timeline related to the alleged December 7, 2016 fall. (Ex. D)

Claimant was seen at the QMU Pain Clinic on November 21, 2018, on referral from Dr. Hostetler for management of left lumbosacral pain. Claimant indicated his back pain began six months prior without any injury. Claimant did recall falling in late 2016 and early 2017, but did not associate these falls with the onset of current pain. Claimant was recommended to return to the clinic for an L4 ESI. (JE 8, pp. 103-110)

Claimant was evaluated on November 24, 2018, by Trevor Gulbrandsen, M.D., for lower back pain. Claimant was returned to work without restrictions. (JE 9, pp. 143-144)

Claimant returned to Dr. Dery on December 12, 2018. Claimant indicated the injection from November 2018 worsened his symptoms. Claimant indicated that " . . . out of the blue . . . about seven months ago maybe he developed severe pain in the back and down the leg. . ." (JE 7, p. 96) Claimant was assessed as having left-sided L5-S1 facet arthritis. Claimant was also assessed as having multi-level mild to moderate bilateral facet arthritis in the lumbar spine. Claimant was treated with medications. (JE 7, pp. 96-98) At this time, Dr. Dery noted, "We discussed his pathology and the timeline and I suggested that his case manager try to figure out exactly what happened since a fall 2 years ago with an intervening period of no pain, and then an acute onset of pain without other trauma doesn't really make sense to me." (JE 7, p. 98)

Claimant was returned to QMU Pain Clinic on December 18, 2018. Claimant was given an ESI at the L4-5 level. (JE 8, pp. 114-116)

Claimant returned to Dr. Dery on January 9, 2019, for follow-up of his left lower extremity pain. Dr. Dery changed claimant's pain medication. Dr. Dery noted he did not see any proximate injury to explain current symptoms. (JE 7, pp. 100-101)

In a January 4, 2019 letter, defendant asked Dr. Dery questions regarding claimant's condition. In an undated response, Dr. Dery indicated he did not see any information suggesting claimant's current pain complaints were related to a work injury or prior back surgery. Based on this, Dr. Dery opined that claimant's low back and lower extremity condition was a personal health issue. (Ex. B)

In a January 15, 2019 letter, Dr. Hostetler opined claimant could return to work on March 11, 2019. (Claimant Exhibit 1, p. 7)

Claimant retired from Tyson on January 17, 2019. At the time of his retirement, he was working at 75 percent of pace. (Ex. A, depo pp. 27-28; Ex. E; TR p. 48)

In a March 13, 2019 letter, Dr. Hostetler assessed claimant as having foraminal stenosis of the lumbar region, facet arthritis of lumbosacral region, lumbar degenerative disc disease, lower back pain radiating to the left lower extremity, and piriformis syndrome on the left side. Dr. Hostetler opined that claimant's back pain was a combination of pre-existing conditions as well as exacerbation of the symptoms by falls at work. (Ex. 1, pp. 8-9)

In a May 27, 2020 report, Lana Sellner, MS, CRC, gave her opinions of claimant's vocational opportunities. She opined claimant was capable of working at a light to medium demand level. She opined this would have no vocational impact on claimant. (Ex. G)

In a June 25, 2020 report, Charles Mooney, M.D., gave his opinions of claimant's condition following an IME. Claimant indicated he had constant neck pain, bilateral shoulder pain, pain in the right upper extremity, pain in the left buttock radiating to the legs and bilateral knee pain. (Ex. J, pp. 4-5)

Dr. Mooney assessed claimant as having degenerative facet and disc disease of the cervical spine. He found that claimant had degenerative disc disease in the area of the previous L4-5 laminectomy. (Ex. J, p. 9)

Dr. Mooney opined that claimant's condition in the neck, bilateral shoulders and upper extremities, lower back and left lower extremity were personal to claimant as there was no evidence of a specific injury occurring to these areas. He also opined claimant's work duties would not result in injury to his upper extremities. He found claimant at MMI as of November 8, 2018. (Ex J, pp. 9-11)

In a September 22, 2020 report, Richard Kreiter, M.D., gave his opinions of claimant's condition following an IME. Claimant indicated waking up at night with numbness and tingling in his arms. Claimant had left buttock pain radiating to the left leg. Claimant had difficulty standing for over a half hour. (Ex. 2, p. 13)

Dr. Kreiter assessed claimant as having bilateral carpal tunnel syndrome greater on the right, right shoulder pain and chronic lower back pain with sciatica, with numbness in the left leg and foot. He opined all the conditions he assessed were

caused by claimant's 23 years of working at IBP/Tyson with a Whizard Knife and falls on slick concrete. (Ex. 2, p. 10)

Dr. Kreiter recommended EMG/NCS studies for the bilateral upper extremities. He recommended medication and an exercise program for the lower back. Dr. Kreiter found that claimant had between 5 to 8 percent permanent impairment to the body as a whole for the lower back condition based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Regarding claimant's upper extremities, if surgery was performed and claimant's symptoms relieved, there would be no permanent impairment. Regarding the shoulder, he opined no permanent impairment could be done until proper diagnosis and treatment was performed. (Ex. 2, pp. 10-11)

In a June 21, 2021 letter, Dr. Mooney indicated he had reviewed the IME from Dr. Kreiter. Dr. Mooney noted that an MRI showed evidence of the lumbar laminectomy causing degenerative changes affecting the L5 nerve root. He opined claimant's lower back and lower extremity symptoms were related to his 2002 surgery. He found that claimant had no additional permanent impairment related to an alleged December 7, 2016 slip and fall at work. He opined there was no evidence of cumulative trauma to the claimant's upper extremities and that claimant's shoulder condition was related to a degenerative condition. He again opined that claimant's symptoms were personal in nature. (Ex. N)

Claimant testified in deposition that he has not looked for work since leaving Tyson as he does not believe he can work anymore. (Ex. A, depo p. 29) Claimant testified he still has pain in his right hand. (TR p. 51) He also said he has difficulty sleeping due to his neck and shoulders. (TR p. 54)

CONCLUSIONS OF LAW

The first issue to be determined is whether claimant sustained an injury that arose out of and in the course of employment.

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. 6.904(3).

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" refer 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.

Regarding file number 5066703 (DOI 11/25/2016), claimant's petition alleges claimant fell at work and injured his back and lower extremities. In deposition claimant testified this date of injury does not correlate to a fall at work or any other traumatic injury. Claimant said that approximately at this time he was having shoulder and neck pain. (Ex. A, depo pp. 11-12) At hearing, he testified this date of injury was a "mistake." (TR pp. 50-56) Given this record, claimant has failed to carry his burden of proof he

sustained an injury arising out of and in the course of employment regarding file number 5066703.

As claimant failed to carry his burden of proof he sustained a fall at work on November 25, 2016, that arose out of and in the course of employment, all other issues, except for reimbursement of the IME, are moot.

Regarding file number 5066704 (DOI 12/07/2016), claimant again pled that he fell at work on this date and injured his back and lower extremities. In deposition, claimant said he fell at work after slipping and landed on his wallet. (Ex. A, depo p. 13) Claimant did not miss any work for this injury and continued to work.

Claimant was evaluated by medical providers on December 29, 2016, March 30, 2017, and April 5, 2017. There is no indication in any of these visits that claimant had a fall at work and injured his low back and lower extremities. It was not until his visit on April 27, 2017, at his appointment with Dr. Hostetler for arm and knee pain, that he indicates a fall at work. Dr. Hostetler noted in records from that visit, "He had two falls, his last fall was in February of last year."

In brief, claimant went for nearly five months before reporting a fall at work.

On November 21, 2018, claimant was evaluated at QMU Pain Management. Claimant related back pain for approximately six months, or approximately beginning in May of 2018. Claimant indicated he fell in late 2016 or early 2017, but did not associate this fall with his current symptoms. (JE 8, pp. 103-104)

Five experts have opined regarding causation of claimant's condition. Dr. Dery is a physiatrist specializing in pain management and physical medicine and rehabilitation who treated claimant on several occasions. Dr. Dery could not find a causal link between claimant's job and his back and leg symptoms. This was based on a record that claimant had alleged falls at work, and did not have any symptoms until years later. (Ex. B; JE 7, pp. 96-98, 100-101)

Dr. Hartley saw claimant on eight occasions. Dr. Hartley indicated it was uncertain that claimant's symptoms were related to work due to an inconsistent timeline. (Ex. D)

Dr. Mooney saw claimant once for an IME. He opined claimant's back and leg symptoms were due to degenerative conditions and to claimant's prior back surgery. (Ex. J, pp. 10-11)

Dr. Hostetler is claimant's family doctor. Dr. Hostetler opined claimant's back and leg symptoms were a combination of claimant's pre-existing condition as well as exacerbation from falls at work. (Ex. 1, pp. 8-9)

Dr. Kreiter evaluated claimant on one occasion for an IME. He opined, in part, that claimant's back condition was caused by falls on slick floors at work. (Ex. 2, p. 10)

Drs. Hostetler and Kreiter's opinions regarding causation are problematic. As noted above, claimant alleges a fall in December 2016. Claimant saw healthcare providers in December 2016, March 2017, and early April 2017. There is no indication in any of these records of a back or leg condition related to a fall at work. It is not until late April of 2017, in any medical record, that claimant relates a back condition caused by work. Records from a pain clinic indicate claimant told providers his back condition was not related to falls at work. The timeline regarding claimant's alleged December 2017 injury and the onset of symptoms is inconsistent. Neither Drs. Kreiter or Hostetler addresses, explains or even references these inconsistencies in causation. Given this omission regarding factual inconsistencies, it is found the opinions of Dr. Kreiter and Dr. Hostetler regarding causation are not convincing regarding the lower back and lower extremity condition.

Claimant alleges a fall at work on December 7, 2016 causing problems to his back and lower extremities. Claimant saw providers on three occasions after the alleged fall. There is no reference in any of these records regarding a fall at work or a back or leg injury. The first reference in medical records to an alleged December 2016 fall occurs in a medical record generated five months after the fall. The time between claimant's fall and his alleged onset of symptoms is inconsistent. Drs. Dery, Hartley and Mooney all opine that claimant's back condition cannot be related to work at Tyson. The opinions of Drs. Hostetler and Kreiter regarding causation of the low back and lower extremity conditions are found not convincing. Given this record, claimant has failed to carry his burden of proof he sustained an injury on December 7, 2016, to his back or lower extremities that arose out of and in the course of employment.

As claimant failed to carry his burden of proof he sustained an injury on December 7, 2016, that arose out of and in the course of his employment, all other issues are moot, except for reimbursement of the IME.

Regarding file number 5066705 (DOI 02/14/2017), claimant alleges he fell at work and injured his lower back and legs on this date.

As detailed above, claimant alleges a fall at work on February 14, 2017. He saw providers on two occasions after that alleged fall. There is no reference in either record to a February 14, 2017 fall at work concerning low back or leg conditions. The first reference to an alleged fall at work occurs approximately 2-1/2 months later when claimant was evaluated by Dr. Hostetler.

For the same reasons as detailed above regarding file number 5066704, claimant has failed to carry his burden of proof he sustained an injury on February 14, 2017, to his back and lower extremities that arose out of and in the course of employment.

As claimant failed to carry his burden of proof he sustained an injury on February 14, 2017, that arose out of and in the course of employment, all other issues, except for reimbursement of the IME, are moot.

Regarding file number 5066706 (DOI 05/31/2018), claimant's petition alleges a fall at work on May 31, 2018, injuring his lower back and lower extremities.

There is no evidence in the record that claimant had a fall at work on May 31, 2018, that injured his lower back and lower extremities. Claimant gave no testimony regarding a May 31, 2018 fall at work. Claimant's testimony in deposition seems to suggest that the May 31, 2018 date of injury relates to a flare-up he had with his right hand while using a Whizard Knife. (Ex. A, pp. 18-19) Based on this record, it is found claimant failed to carry his burden of proof he sustained an injury on May 31, 2018, that arose out of and in the course of employment affecting his low back and lower extremities caused by a fall at work.

As claimant failed to carry his burden of proof he sustained an injury on May 31, 2018, arising out of and in the course of employment, all other issues regarding this file are moot except for reimbursement of the IME.

Regarding file number 20700124.01 (DOI 04/24/2018), claimant alleges in his petition that he sustained an injury to his bilateral upper extremities caused by a cumulative trauma.

The record indicates that beginning in July 1995 claimant worked the same job during his entire tenure at Tyson using a Whizard Knife. Claimant worked this job for 23 years. Claimant testified the knife vibrated and caused claimant's arm to shake. Claimant also would grab hams off a conveyor line with his left hand. (TR pp. 29-32; Ex. L) Claimant testified the job caused his fingers to lock because of repetitive cutting movement over years on the job. (TR p. 50) Claimant testified he still has pain and locking in his right hand. (TR pp. 51-52)

In April 2018 claimant was evaluated by Dr. Hostetler for pain and weakness in both upper extremities. (JE p. 9) Claimant was assessed by Dr. Hostetler on numerous occasions as having a repetitive motion injury to his upper extremities. (JE 1, pp. 14, 18, 22, 42)

Dr. Hostetler gave claimant work restrictions on June 1, 2018, relative to his upper extremity problem. (Ex. 1, p. 1)

Dr. Kreiter opined that claimant's symptoms in his bilateral upper extremities were due to his work for 23 years with a Whizard Knife. Dr. Kreiter assessed claimant as having a potential bilateral carpal tunnel syndrome. He opined claimant's symptoms in his bilateral upper extremities were due to 23 years of working on a production line with a Whizard Knife. (Ex. 2, p. 10) Dr. Kreiter's opinion regarding causation are consistent with claimant's medical history. Given this record, Dr. Kreiter's opinions regarding causation to claimant's upper extremities are found convincing.

Dr. Mooney opined that claimant's work duties would not result in an injury to his upper extremities. (Ex. J, pp. 9-10)

Dr. Mooney's opinion regarding causation to the upper extremities is problematic. Claimant worked a job on a production line using a vibrating knife in his right hand and repetitively grabbing large hams with his left. Claimant did this job for over 23 years. Dr. Mooney offers no rationale why claimant, who worked for 23 years in a job requiring repetitive motion and vibrating knives, did not have a work-related upper extremity injury. Given this record, Dr. Mooney's opinion regarding causation of claimant's upper extremity condition is found not convincing.

Claimant worked a job requiring repetitive motion and vibrating knives for 23 years. He has been assessed on numerous occasions as having a repetitive motion injury to his upper extremities. Claimant was given work restrictions for a repetitive motion injury. Dr. Kreiter's opinions regarding causation are found convincing regarding the upper extremity injury. Dr. Mooney's opinions regarding causation of the upper extremity condition are found not convincing. Given this record, claimant has carried his burden of proof he sustained a bilateral upper extremity injury occurring on April 24, 2018.

The next issue to be determined is if claimant's claim for benefits is barred for failure to give timely notice under Iowa Code section 85.23, or is barred as an untimely claim under Iowa Code section 85.26.

An original proceeding for benefits must be commenced within two years from the date of the occurrence of the injury for which benefits are claimed or within three years from the date of the last payment of weekly compensation benefits if weekly compensation benefits have been paid under Iowa Code section 86.13. Iowa Code section 85.26(1). A proceeding in review-reopening must be commenced within three years from the date of the last payment of weekly benefits under either an award for payments or an agreement for settlement. Iowa Code section 85.26(2). The "discovery rule" may extend the time for filing a claim where weekly benefits have not yet been paid. The rule does not extend the time for filing a claim where benefits have been paid. Orr v. Lewis Cent. School Dist., 298 N.W.2d 256 (Iowa 1980). Under the rule, the time during which a proceeding may be commenced does not begin to run until the claimant, as a reasonable person, should recognize the nature, seriousness and probable compensable character of the condition. The reasonableness of claimant's conduct is to be judged in light of the claimant's education and intelligence. Claimant must know enough about the condition to realize that it is both serious and work connected. Orr, 298 N.W.2d at 261; Robinson v. Dep't of Transp., 296 N.W.2d 809 (Iowa 1980).

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim

through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Dep't of Transp., 296 N.W.2d 809 (Iowa 1980).

The 90-day limit for notice does not begin running until the employee, acting reasonably, should know his injuries are both serious and work connected. Robinson v. Dep't of Transp., 296 N.W.2d 809, 812 (1980). The statute of limitations also does not begin to run until the employee knows that the physical condition is serious enough to have a permanent adverse impact on his employment or employability. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001).

Disability is found to have manifested when an employee has knowledge of a permanent impairment of the injury, and the causal impact the injury would have upon a job. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 152 (Iowa 1997).

Failure to timely give notice or commence an action under the limitations statute is an affirmative defense which defendants must prove by a preponderance of the evidence. DeLong v. Iowa State Highway Comm'n, 229 Iowa 700, 295 N.W. 91 (1940).

Iowa Code section 85.26(1) requires claimant, in this case, to file a claim for benefits within two years from the date of the occurrence. Claimant pled a date of injury of April 24, 2018. Claimant's petition, in this case, was filed February 7, 2020. Claimant's claim for benefits is not barred by application of Iowa Code section 85.26

Claimant alleges a cumulative injury to his left shoulder and upper extremities bilaterally of April 24, 2018. Claimant testified at hearing that whenever he was hurt or if something hurt, he reported his injury to the nurse's office. (Tr. pp. 56-57) On June 1, 2018, claimant was evaluated by Dr. Hostetler. At that visit claimant indicated he spoke with supervisors about injuries to his right upper extremity caused by using a Whizard Knife. (Jt. Ex. 1, p. 20) There is no evidence in the record claimant failed to give timely notice of his work injury as required by Iowa Code section 85.23. Given this record, defendant has failed to carry its burden of proof claimant's claim for benefits is barred by application of Iowa Code section 85.23 or 85.26.

The next issue to be determined is whether the injury resulted in a temporary disability.

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1).

Dr. Hostetler saw claimant on April 27, 2018, in part, for arm pain. Claimant was taken off work until May 7, 2018. (JE 1, pp. 9-11)

Claimant returned to Dr. Hostetler on May 3, 2018, with complaints of arm pain. Claimant was assessed as having a repetitive motion injury. Claimant was taken off work for another two weeks. (JE 1, pp. 12-15)

Claimant returned to Dr. Hostetler, in part, for arm pain. Claimant was assessed as having a repetitive motion injury. Claimant was not returned to work until June 11, 2018. Given this chronology as described above, claimant is due temporary total disability benefits from April 25, 2018 through June 10, 2018.

The next issue to be determined is whether there is a causal connection between the work injury and the claimed medical expenses.

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

As noted, it is found that claimant sustained a work-related injury to his bilateral upper extremities. There is no evidence in the record that the treatment given to claimant for his upper extremity condition was not reasonable and necessary. There is no evidence in the record that the charges for the services were not fair and reasonable. Given this record, defendant is liable for payment of the claimant's medical expenses only as they relate to his injury to his upper extremities.

The next issue to be determined is whether claimant is entitled to reimbursement for an IME.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Regarding the IME, the Iowa Supreme Court provided a literal interpretation of the plain-language of Iowa Code section 85.39, stating that section 85.39 only allows the employee to obtain an independent medical evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 847 (Iowa 2015).

Under the Young decision, an employee can only obtain an IME at the employer's expense if an evaluation of permanent disability has been made by an employer-retained physician.

Iowa Code section 85.39 limits an injured worker to one IME. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842 (Iowa 2009).

The Supreme Court in Young noted that in cases where Iowa Code section 85.39 is not triggered to allow for reimbursement of an independent medical examination (IME), a claimant can still be reimbursed at hearing the costs associated with the preparation of the written report as a cost under rule 876 IAC 4.33. Young at 846-847.

In Kern v. Fenchel, Doster & Buck, No 20-1206, filed September 1, 2021 (Iowa Ct. App.) unpublished as of October 25, 2021, the Iowa Court of Appeals held a defendants' expert opinion of no causation was tantamount to a zero impairment rating, thus entitling reimbursement for a claimant's IME.

In an IME report, dated June 25, 2020, Dr. Mooney opined that none of claimant's alleged injuries were causally connected to his work at Tyson. (Ex. J, pp. 9-11) In a September 22, 2020, IME report Dr. Kreiter found claimant had a permanent impairment regarding his work-related injuries. (Ex. 2, pp. 10-11) Given the chronology of the IME reports, and recent case law in Kern, claimant is due reimbursement for all expenses associated with the IME with Dr. Kreiter.

The next issue to be determined is credit. Defendant contends they are due credit under Iowa Code section 85.34(7) (Defendant's Post-Hearing Brief, pp. 18-19)

Iowa Code section 85.34(7) (a) provides that "An employer is fully liable for compensating all of an employee's disability that arises out of and in the course of the employee's employment with the employer."

However, Iowa Code section 85.34(7)(b)(2) states:

> If … an employer is liable to an employee for a combined disability that is payable under subsection 2, paragraph "u," and the employee has a preexisting disability that causes the employee's earnings to be less at the time of the present injury than if the prior injury had not occurred, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for

> which the employee was previously compensated by the employer minus the percentage that the employee's earnings are less at the time of the present injury than if the prior injury had not occurred.

The legislative history relevant to the above statutory provision indicates, "The general assembly intends that an employer shall fully compensate all of an injured employee's disability that is caused by work-related injuries with the employer without compensating the same disability more than once." 15 Iowa Practice, Workers' Compensation, § 13.6, page 164 (2014-2015) (citation omitted).

Apportionment, under Iowa Code section 85.34(7), only applies when there has been a finding of permanent disability. As there has not yet been a finding of any permanent impairment regarding claimant's April 24, 2018 injury, apportionment under Iowa Code section 85.34(7) would not yet apply to this date of injury.

ORDER

THEREFORE IT IS ORDERED:

For file number 5066703 (DOI 11/25/2016):

Claimant shall take nothing in the way of benefits.

For file number 5066704 (DOI 12/07/2016):

Claimant shall take nothing in the way of benefits.

For file number 5066705 (DOI 02/14/2017):

Claimant shall take nothing in the way of benefits.

For file number 5066706 (DOI 05/31/2018):

Claimant shall take nothing in the way of benefits.

For file number 20700124.01 (DOI 04/24/2018):

Defendant shall pay claimant temporary total disability benefits at the rate of four hundred sixty-four and 70/100 dollars ($464.70) per week from April 25, 2018 through June 10, 2018.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

That defendant shall pay claimant's medical expenses as detailed above.

That defendant shall pay costs.

That defendant shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

For file numbers 5066703, 5066704, 5066705 and 5066706:

That both parties shall pay their own costs.

For file numbers 5066703, 5066704, 5066705, 5066706 and 20700124.01:

Defendant shall reimburse claimant for costs associated with Dr. Kreiter's IME.

Signed and filed this 25th day of October, 2021.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Michelle Schneiderheinze (via WCES)

Jason Wiltfang (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.