BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PABLO RODRIGUEZ, Claimant, vs. TYSON FRESH MEATS, INC., Employer, Self-Insured, Defendant.	File No. 5019814 APPEAL DECISION Head Note Nos. 1100; 1402.30; 1402.40 1701; 1802; 1803; 1803.1; 1808; 2501; 2701; 2907; 3701; 4000.2	FILED JUL 13 2009 WORKERS' COMPENSATION

Pursuant to Iowa Code sections 86.24 and 17A.15, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision of September 15, 2008 filed in this matter that relate to issues properly raised on intra-agency appeal, except for the analysis and findings concerning the extent of claimant's permanent disability.

In addition to the case law on industrial disability cited by the presiding deputy commissioner, the following additional authority is relevant to the industrial analysis in this case. First, an injury to the shoulder that may only limit the use of the arms is not a scheduled injury, but an injury to the body as a whole. It is the situs of the injury, not the situs of the impact of that injury that governs whether this injury is scheduled or industrial. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995); Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986).

Additionally, a showing that claimant had no loss of his job or actual earnings does not preclude a finding of industrial disability. Loss of access to the labor market is often of paramount importance in determining loss of earning capacity, although income from continued employment should not be overlooked in assessing overall disability. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991); Collier v. Sioux City Comm. Sch. Dist., File No. 953453 (App. February 25, 1994); Michael v. Harrison County, Thirty-fourth Biennial Rep. of the Industrial Comm'r, 218, 220 (App. January 30, 1979).

After a de novo review of the record it is concluded that the injury in this case is not limited to the hands and arms, but extends into both of claimant's shoulders. Consequently, this is a body as a whole injury and must be compensated industrially. This finding is based on the views of Dr. Manshadi expressed in his report of April 14, 2008. Dr. Manshadi found that not only does claimant have pain in the arms, but in the trapezius muscles and diagnosed a shoulder strain. (Exhibit 3, page 13) I cannot affirm

the presiding deputy's finding that Dr. Manshadi failed to identify a permanent injury to the shoulder as the doctor specifically stated as follows:

> DISCUSSION: Mr. Rodriguez has worked for Tyson for a number of years. A lot of his job required a lot of gripping and grasping of knifes performing various job activities at Tyson. It appears that he has suffered from bilateral lateral epicondylitis as well as strain of the bilateral upper trapezius muscles as well as arthralgias in the hands. I believe all the above symptoms and diagnoses are related to his work activities while employed at Tyson. Dr. Palma could not find any underlying inflammatory condition. Mr. Rodriguez denies any previous problem with his arms, shoulders or hands prior to his employment at Tyson and I do not find any records to indicate such. As such, he does have partial permanent impairment in regard to his upper extremities and shoulders and hands.

(Ex. 3, p. 14)(Emphasis added.)

This opinion of Dr. Manshadi is far more convincing than the views of Dr. Palma who did not expressly address claimant's shoulder pain complaints in his reports. This is likely due to the fact that, as a rheumatologist, his primary focus was on joint, not muscle pathology. Dr. Manshadi identified shoulder muscle pain on each time he examined claimant. Claimant and his wife at hearing testified that this pain is not limited to the hands and arms, but includes the shoulder. (Transcript, pages 22, 38, and 43) Pain into his shoulder has been a consistent complaint during the entire course of his treatment. Consequently, the impairment rating based on chronic pain, is appropriate and specifically includes chronic shoulder pain.

It is therefore concluded that the work injury of December 16, 2009, is a substantial cause of a three percent permanent partial impairment rating to the body as a whole and restrictions against repetitive use of the hands, elbows and arms as suggested by both Drs. Manshadi and Palma. Consequently, the extent of claimant's industrial disability or loss of earning capacity must be considered pursuant to Iowa Code section 85.34(2)(u).

Claimant's assertion that my analysis in Jefferson v. Eagle Ottawa, File No. 5013791 (App. February 28, 2007) is applicable to this case and is largely correct. Where claimant's pre-injury occupation involved repetitive use his extremities and this work injury has restricted repetitive use of these extremities, claimant's ability to compete for jobs in the labor market for which he is bested-suited has been significantly reduced. Although claimant has returned to all aspects of his job with defendant-employer, he has done so contrary to the recommendations of his treating doctor. Claimant testified to ongoing pain in his elbows, shoulders, neck and hands and wrists. (Tr., p. 43) He testified that he asked Dr. Manshadi to remove restrictions so that defendant-employer would allow him to return to work as he "needed to have money to

cover the expenses on my house and to eat" despite having ongoing problems with his hands, elbows, and shoulders. (Tr., p. 38) The employer here has presented claimant with a Hobson-like choice of either a return to full duty, or the loss of his job placing his family at peril. Claimant testified that he works with his chronic pain because he needs to support his family. That admirable decision does not preclude compensation for his disability. Claimant's lack of English communication skills only aggravates this disability, because his is limited to unskilled manual labor and his past work involves only unskilled manual labor. Claimant is commended for continuing his English education. At the present time claimant is continuing to work in a full-duty position of driving hogs and earns approximately $12.45 for 40 hours per week. (Tr., p. 51)

After consideration of all of the proper industrial disability factors it is concluded that the work injury of December 16, 2005 is a cause of a 20 percent loss of claimant's earning capacity. The finding is significantly impacted by claimant's ongoing ability to perform the driving hogs position in a full duty capacity for a competitive wage. The employer has admirably worked with claimant to ensure his continued employment. Such a finding entitles claimant to 100 weeks of permanent partial disability benefits as a matter of law under Iowa Code section 85.34(2)(u), which is 20 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection.

ORDER

IT IS THEREFORE ORDERED THAT the arbitration decision is MODIFIED by striking the third un-numbered paragraph in the Order portion and inserting the following in lieu thereof:

Defendant shall pay to claimant one hundred (100) weeks of permanent partial disability benefits at the rate of three hundred fifty and 15/100 dollars ($350.15) per week commencing August 16, 2006.

The balance of the Order remains unchanged.

The costs of this appeal are assessed to defendant.

Signed and filed this 13th day of July, 2009.

CHRISTOPHER J. GODFREY
WORKERS' COMPENSATION
COMMISSIONER

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