BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ALFRED SARMU, Claimant, vs. GREEN PLAINS INDUSTRIAL CLEANING SERVICES, Employer, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	File No. 5053809 APPEAL DECISION Head Notes: 1108.50, 1402.40, 1803, 2907	FILED MAY - 9 2019 WORKERS' COMPENSATION

STATEMENT OF THE CASE

On April 25, 2019, Joseph S. Cortese II, Iowa Workers' Compensation Commissioner, delegated authority to the undersigned to issue the final agency decision on the intra-agency appeal and cross appeal currently pending before this agency.

Defendants, Green Plains Industrial Cleaning Services, employer, and its insurer, Liberty Mutual Insurance Company, appeal from an arbitration decision filed on January 9, 2018. The case was heard on August 1, 2017, and it was considered fully submitted on September 1, 2017, in front of the deputy workers' compensation commissioner.

The deputy commissioner found that claimant carried his burden of proof that the work injury of August 23, 2015 caused permanent disability. The deputy commissioner awarded claimant 50 weeks of permanent partial disability benefits. The deputy commissioner also awarded claimant costs in the amount of $350.00, plus an unknown service fee.

Defendants assert on appeal that the deputy commissioner erred in finding that claimant carried his burden of proof that he sustained any permanent disability as a result of the stipulated work injury. Defendants also assert that the deputy commissioner erred in awarding a service fee in an unknown amount.

Claimant did not cross-appeal.

In the claimant's post-hearing brief, claimant stated his employment status had changed since the time of the arbitration hearing. Because this information was not introduced at the time of the hearing and claimant did not move to include additional evidence after the hearing, this information is not given any consideration by the undersigned. Iowa Code section 17A.12(8)

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, I reach the same conclusions as those reached by the deputy commissioner with the below substituted findings of fact and conclusions of law with regard to the award or permanency benefits. However, I modify the deputy's decision on the issue of costs.

FINDINGS OF FACT

Claimant, Alfred Sarmu was 27 years old at the time of the hearing. He was single with two minor children. He is right hand dominant. Mr. Sarmu was born in Liberia Africa. He graduated from high school in Liberia, where he learned to read and write in English. He moved to Rhode Island in 2010 and lived there until 2014. During his time in Rhode Island he pursued his machinist certificate at the New England Technical College; however, he did not complete the program. While in Rhode Island Mr. Sarmu worked at AMTROL inspecting welding and testing propane tanks and hot water heater tanks. This work required him to lift tanks overhead approximately every 45 minutes. He performed this work 8 to 12 hours per day and was paid $11.00 per hour. (Transcript pages 8-15)

Mr. Sarmu's employment history also includes working at Capstan Atlantic, a car part manufacturer, for approximately three years. He performed production work. His duties involved lifting totes filled with car parts onto a table. He estimates that the totes weighed anywhere from 50-75 pounds. He had to lift a tote from the floor to the table approximately every thirty minutes. His duties also required him to stack empty totes to eye-level. He worked 8-10 hours per day and was paid $13.00 per hour. (Tr. pp. 16-35)

In 2014, Mr. Sarmu moved to the Des Moines area and began working for Green Plains Industrial Cleaning Services (hereinafter "Green Plains"). He worked as a field technician cleaning industrial plants. The physical demands of the position are set forth in the written job description. He is required to work indoors and outdoors in all weather conditions. The position also requires regular exposure to industrial environments involving equipment, elevated work areas, confined spaces, noise, dust, hazardous materials, and odors. Additionally, his duties required regularly traversing multiple flights of stairs, carrying equipment, lifting and moving up to 50-100 pounds occasionally, 25-50 pounds frequently, and 10-20 pounds. The duties also require frequently climbing, crawling, kneeling, crouching, pushing, pulling, lifting, carrying, and gripping. Additionally, Mr. Sarmu's job duties included climbing a ladder with 50 feet of

water hose which he would use to "hydro-blast" tanks which were caked with corn syrup. The hoses were high pressure and weighed approximately 25 pounds each. The hoses could spray anywhere from 10,000 pressure per square inch (PSI) to 40,000 PSI. His job required extensive travel. (Tr. pp. 19-30; Claimant's Exhibit 1, pp. 1-2))

At the time of the August 23, 2015 work injury, Mr. Sarmu was inside of a large tank, using a pressure hose to "hydro-blast" dried corn syrup off of the tank. The injury occurred when the equipment he was using malfunctioned causing Mr. Sarmu's back to be sprayed by the pressurized water. He estimates the water was at approximately 25,000 PSI at the time he was sprayed. His employer took him to the emergency room for treatment. At the time of the injury, he was working in Tennessee. (Testimony)

Mr. Sarmu was seen at Baptist Memorial Hospital emergency department. The diagnosis was laceration 7 cm from high power hose. The wound was cleaned and dressed. He was instructed to keep the wound clean, dry, and covered. (Joint Exhibit 1)

Mr. Sarmu returned to Iowa. He was seen at the Iowa Clinic on August 26, 2015. He presented with fevers, chills, and green drainage from his back wounds. Mr. Sarmu was noted to have upper back tissue injury with complex curvilinear wounds and possibly 2 deeper pockets of abscess. The assessment included superficial injury of trunk with infection and cellulitis. The notes indicate Mr. Sarmu had a serious infection. Michael Mohan, M.D., a general surgeon, performed a debridement and incision and drainage of back wound on August 27, 2015. Mr. Sarmu was taken off work until September 9, 2015. (JE2, pp. 1-10; JE3)

Mr. Sarmu did not return to work on September 9, 2015, due to a slow healing process. Dr. Mohan saw Mr. Sarmu for follow-up on September 16, 2015. Mr. Sarmu complained of pain in his posterior right shoulder. He was taking hydrocodone. The doctor noted that Mr. Sarmu was making slow progress, but the wound was beginning to clean up. He was kept off of work for another week. (JE2, pp. 11-13)

On September 23, 2015, Dr. Mohan released Mr. Sarmu to return to work on September 28, 2015. However, he was restricted to work in a dry environment for two weeks. (JE2, p. 13)

On October 12, 2015, Dr. Mohan released Mr. Sarmu to return to full duty work without any restrictions. (JE2, p. 14)

Mr. Sarmu returned to see Dr. Mohan on October 21, 2015 for a wound check. He denied any ongoing drainage. Mr. Sarmu did still have some discomfort and stiffness. He was back to full duty at work. Dr. Mohan noted that he was recovering nicely from surgery and was slowly resuming all normal activities. Mr. Sarmu was to return on an as needed basis. (JE2, p. 15)

Mr. Sarmu returned to see Dr. Mohan on June 13, 2016. He reported pain and tightness on his back in the area of the injury. He had a large keloid scar in his right upper back which was tender to touch. The doctor noted the keloid scar was very tight and causing him range of motion issues with pain. Dr. Mohan discussed the situation with Konstantinos Lekkas, M.D., a plastic surgeon. Dr. Lekkas recommended excision and serial injections with steroid. (JE2, pp. 20-23)

Mr. Sarmu saw Dr. Lekkas on August 31, 2016. Mr. Sarmu reported that the area of his injury on his right/mid back was itchy and painful. He also felt he had limited range of motion with his right extremity. Dr. Lekkas noted a thick widened centralized round scar that was approximately 4 cm in diameter. He also noted a few other smaller ones and some tiny scars in the lower area. Dr. Lekkas felt that approximately 1.5 cm of area should be reinjected and re-excised. (JE2, pp. 24-25)

Dr. Lekkas performed the scar revision operation on February 20, 2017. Mr. Sarmu was kept off of work until March 20, 2017 when he was released to full duty. On March 20, 2017, the doctor noted that the scars looked good and were healing well. There is no indication in the clinical note that Dr. Lekkas performed any type of testing for range of motion. Based on the notes, it is not clear if any type of examination, other than looking at the scars, was performed. (JE2, pp. 31-33; JE4) According to Mr. Sarmu, Dr. Lekkas only spent five to ten minutes with him at this visit. He did testify that the doctor felt his wound, but did not take any measurements or use any pins or other tools to gauge his pain or measure sensitivity. Mr. Sarmu said he was asked to extend his arm away from his body to shoulder height. However, he was never asked to lift his arm above shoulder level. (Tr. pp. 52-53)

The first issue that must be addressed is whether Mr. Sarmu sustained any permanent impairment as the result of the work injury. Dr. Mohan, who provided treatment to Mr. Sarmu, stated that he does not perform impairment rating testing. (JE2, p. 17) He offered no opinion with regard to permanent impairment. There are two other doctors who did offer their opinions regarding impairment.

On June 19, 2017, Dr. Lekkas issued a to Whom It May Concern letter. The letter stated that he last saw Mr. Sarmu on March 20, 2017. The letter also stated:

> He is healing very nicely. He has no limits in his range of motion. The pain is significantly improved. They are not itchy. He essentially is healed. I expect no further treatment necessary, and no further surgery. He is at maximum medical improvement. He has no disability from this and no pain. He has full range of motion. I would give him a permanent partial disability rating of zero.
>
> (JE 2, p. 34)

At the request of his attorney, Mr. Sarmu saw Sunil Bansal, M.D. for an IME on July 26, 2017. Dr. Bansal spent approximately one and a half hours with Mr. Sarmu. In his report Dr. Bansal stated:

> High pressure burn to the right scapular and upper back region, with cellulitis.
>
> Status post debridement of right upper back wound, incision and drainage of subcutaneous abscesses.
>
> Keloid scar of the skin.
>
> Status post 15 cm scar revision to the back.
>
> With reference to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, specifically Table 8-2, Mr. Sarmu meets the criteria of a Class I Impairment. His burn is sensitive to the physical agents of temperature, and he does need to apply moisturizers. Secondary to the extensive body surface area burning, **I would assign a 5% impairment of the body as a whole.**
>
> In addition:
>
> With reference to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, specifically Figure 16-40 through 16-46 and comparing to the left shoulder, we find that Mr. Sarmu is assigned:

	RANGE OF MOTION	**% UE Impairment**
Flexion:	173, 173, and 170 degrees	1
Abduction:	162, 164, and 164 degrees	1
Adduction:	25, 28 and 30 degrees	1
External Rotation:	89, 88, and 86 degrees	0
Extension:	42, 40, and 41 degrees	1
Internal Rotation:	71, 70 and 70 degrees	1

> **This equals a 5% upper extremity impairment, which is equal to a 3% impairment to the body as a whole.**

(Ex. 7, pp. 7-8)

Regarding the issue of permanent functional impairment, I find the opinions of Dr. Bansal to carry greater weight than those of Dr. Lekkas. It is not clear from the records if Dr. Lekkas performed any type of range of motion testing prior to issuing his

impairment opinion. Additionally, it is not known if Dr. Lekkas is familiar with the AMA Guides to the Evaluation of Permanent Impairment or if he utilized them in any way when assigning zero impairment. Dr. Lekkas certainly did not make any reference to the AMA Guides in his records. Dr. Bansal's report demonstrates that he did conduct range of motion testing. Additionally, Dr. Bansal cited to specific portions of the AMA Guides to the Evaluation of Permanent Impairment 5th edition, to support his opinion regarding Mr. Sarmu's permanent impairment. I find claimant sustained permanent impairment to his whole person as the result of the work injury.

We now turn to the issue of restrictions. Dr. Mohan released Mr. Sarmu to return to work without any restrictions. Dr. Lekkas also released Mr. Sarmu to full duty. (JE2) Dr. Bansal imposed work restrictions as follows:

> Avoid prolonged exposure to sunlight. Avoid extreme temperature exposures, either hot or cold. Wear proper work gear to prevent exposure to environmental or chemical exposure. No lifting greater than 10 pounds over shoulder level with the right arm. No frequent reaching with the right arm, or over shoulder work.
>
> (Ex. 7, p. 9)

Dr. Bansal's testing and report reveal that Mr. Sarmu does continue to have difficulty because of his work injury. He has stiffness and tightness which Mr. Sarmu testified causes him increased pain when performing tasks such as reaching overhead. Given Mr. Sarmu's physical injuries and his testimony regarding his own abilities and pain, I find Dr. Bansal's restrictions to be more persuasive than those of Dr. Mohan or Dr. Lekkas. The restrictions assigned by Dr. Bansal prohibit Mr. Sarmu from returning to some of his prior employment.

Once Mr. Sarmu was released to full duty work at Great Plains Industrial Cleaning Services, he worked there for approximately five to six more months. He was able to perform the work during this time, but did experience pain, especially when he used his right arm. His job duties included lifting and moving fifty to one hundred pounds occasionally and twenty-five to fifty pounds frequently. During his continued employment Mr. Sarmu still had pain and tightness in the areas of the scarring. Overhead lifting, spraying, and pulling weights such as the hoses created more pulling on the areas of the injury and increased his pain. He took over-the-counter Tylenol two to three times per day in order to perform his job. However, by the end of the day, the Tylenol was not helping. Mr. Sarmu left the job because he felt the physical demands were not good for him. Mr. Sarmu voluntarily terminated his employment on March 25, 2016. (Defendant's Exhibit B, p. 5, Tr. p. 24 - 29; Tr. p. 63)

He went to work at TPI, a manufacturer of wind turbine components. Mr. Sarmu worked at TPI from April of 2016 through August of 2016. His job involved fiberglass lamination. To perform his job, he would spread resin over fiberglass with a roller. He

worked 8 hours per day and was paid $16 per hour. He was physically able to perform his duties at TPI. (Tr. pp. 72-75)

At the time of the hearing, Mr. Sarmu was working for Sky Climber. He performed software upgrades for windmill towers. He traveled to the location of the windmill tower, hooked up his laptop to the system and upgraded the software. His job does not involve any climbing. He did not have any problems physically performing his job duties. He had worked for Sky Climbers for approximately one year. However, the job involved extensive travel. Mr. Sarmu was sometimes away from home for three months at a time and he does not like this aspect of the job. He is paid $20 per hour. He averages 65 hours per week and is paid overtime. (Tr. pp. 66-72)

At the time of hearing, Mr. Sarmu continued to have difficulties due to his work injury. He continued to have a pulling sensation in his shoulder when he reached out in front of him. He also has pain and tightness when he reaches overhead. Mr. Sarmu admits that he is able to reach out in front of him and reach overhead, but it does cause considerable pain. He has pain and sensitivity over the right scapular and shoulder regions. Mr. Sarmu experiences hypersensitivity of his scar tissue; he is sensitive to heat and sunlight. He uses lotion on a daily basis. (Tr. pp. 48-49; 56-57; Cl. Ex. 7, p. 6)

Due to his work injury, Mr. Sarmu does not believe he could perform the type of work he performed at AMTROL any longer. He could not lift propane and water tanks overhead and hook the tanks onto a conveyor rack as he did before. He also does not think he would be capable of lifting the 50-75 totes, or stack totes to eye level. (Tr. pp. 8-21) Because of the physical requirements of the Capstan Atlantic job, Mr. Sarmu does not believe he would be capable of performing this type of work. Specifically, he believes the overhead lifting would cause pain due to the pulling on the scars on his back. (Tr. pp. 16-35) Mr. Sarmu does not believe he could perform these job duties any longer. (Tr. pp. 19-30) Mr. Sarmu also testified that the reason he left Green Plains was because he felt the physical demands were not good for him.

Considering Mr. Sarmu's age, educational background, employment history, ability to retrain, motivation to remain in the workforce, length of healing period, permanent impairment, and permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that Mr. Sarmu has sustained a 10 percent loss of future earning capacity as a result of his work injury.

Defendants also appeal an issue related to the assessment of costs. In the arbitration decision, the defendants were assessed certain costs, including a service fee in an "unknown" amount. (Arbitation Decision p. 11) Specifically, defendants contend because there is no evidence in the record regarding the amount of the service fee, the service fee cannot be awarded as a cost. Claimant points out that he is not seeking the service fee as an assessed cost. Assessment of costs is discretionary. Because the claimant was generally successful in his claim I find that an award of costs is appropriate. However, I exercise my discretion and find that a service fee in an unknown amount is not an appropriate cost. Therefore, I modify the deputy's

assessment of costs. Defendants are assessed costs in the amount of $100 for the filing fee and $250.00 for the report of Dr. Lekkas. IAC 876 4.33(6) & (7). Thus, defendants are assessed costs totaling $350.00.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6)(e).

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

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v.

Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Based on the above findings of fact, Mr. Sarmu sustained permanent impairment to his whole person as the result of the work injury. I further conclude Mr. Sarmu has sustained a 10 percent loss of future earning capacity as a result of his work injury. As such, he is entitled to 50 weeks of permanent partial disability benefits at the stipulated rate of four hundred seventy-seven and 12/100 dollars ($477.12). Pursuant to the parties' stipulation these benefits shall commence on March 21, 2017. (Hearing Report, p. 1)

Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. 876 IAC 4.33. Based on the above findings of fact, I conclude that an assessment of three hundred fifty and no/100 dollars ($350.00) is appropriate.

ORDER

THEREFORE, IT IS ORDERED:

That the arbitration decision filed on January 9, 2018 is affirmed in part and modified in part.

All weekly benefits shall be paid at the stipulated rate of four hundred seventy-seven and 12/100 dollars ($477.12).

Defendants shall pay 50 weeks of permanent partial disability benefits commencing on the stipulated commencement date of March 21, 2017.

Defendants shall be entitled to credit for all weekly benefits paid to date.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable 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. See Deciga Sanchez v. Tyson Fresh Meats, Inc., File No. 5052008 (App. Apr. 23, 2018) (Ruling on Defendants' Motion to Enlarge, Reconsider or Amend Appeal Decision re: Interest Rate Issue).

Defendants shall reimburse claimant costs as set forth above.

Defendants 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 May, 2019.

ERIN Q. PALS
DEPUTY WORKERS
COMPENSATION COMMISSIONER

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