BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BEE XIONG,		
Claimant,		File No. 5059996
vs.		ARBITRATION
TYSON FRESH MEATS, INC.		DECISION
Employer, Self-Insured, Defendant.		Head Note Nos.: 1100

STATEMENT OF THE CASE

Bee Xiong filed a petition for arbitration seeking workers' compensation benefits from, the employer, Tyson Fresh Meats, Inc., a self-insured employer.

The matter came on for hearing on November 2, 2018, before Deputy Workers' Compensation Commissioner Joseph L. Walsh at the Sioux City IowaWORKS office. The record in the case consists of joint exhibits 1 through 3; claimant's exhibits 1 through 7; defense exhibits A through G; as well the sworn testimony of claimant, Bee Xiong. Tammie Swanson, Nurse Manager of Health Services and Will Sager, Human Resources Manager, testified on behalf of the defendant. Carin Eckhoff served as the court reporter. The parties argued this case and the matter was fully submitted on December 14, 2018.

ISSUES AND STIPULATIONS

The stipulations contained in the hearing order have been approved and are deemed ordered with the consent of the parties.

The parties have stipulated that there was an employer-employee relationship at the time of the alleged injury. Claimant alleges he sustained an injury which arose out of and in the course of employment on January 11, 2017. The employer denies that an injury occurred on that date. The employer further denies that the alleged injury is a cause of any temporary or permanent disability.

The claimant seeks temporary disability benefits from the date of his injury through September 24, 2018. The employer concedes claimant has been off work during this period but denies liability for benefits during this period of time. The claimant

seeks permanency benefits commencing September 25, 2018. The employer denies legal responsibility for any permanency. The commencement date for benefits, if any are owed, is also disputed.

Regarding rate of compensation, the parties stipulated that claimant was married but could not agree on gross wages or entitlement to exemptions. Those matters are disputed and both parties have submitted exhibits supporting their respective positions.

Affirmative defenses have been waived with the exception of notice under Section 85.23. This is an affirmative defense asserted by the employer.

Claimant seeks medical expenses as set forth in claimant's exhibit 5. The employer disputes liability for these expenses on the basis of medical causation. No weekly benefits have been paid and there is no issue regarding credit. The parties have stipulated that some medical expenses were paid under the employer's group health insurance and the employer is entitled to a credit for those expenses paid.

The parties have requested a specific taxation of costs, including an independent medical report.

FINDINGS OF FACT

Bee Xiong is a 47-year-old man employed by Tyson Fresh Meats in Storm Lake. He testified live and under oath at the hearing on November 2, 2018. He was quite deliberate in his answers, sometimes pausing and thinking hard about his answers. Some of his testimony appeared hesitant or uncertain. His testimony did not always match the other evidence in the record in certain, significant ways. I find claimant's credibility to be equivocal at best.

Mr. Xiong was originally from California. He completed the 9th grade, but did not finish high school. He moved to Storm Lake, Iowa in 2011. Shortly after he moved to Storm Lake, he was hired by Tyson as a production worker and passed a pre-employment physical. He was allowed to work without any restrictions at that time. (Defendant's Exhibit A) He does not have any significant history of workers' compensation injuries. Mr. Xiong's spouse, Shee Xiong is also employed at Tyson. Mrs. Xiong was also present at hearing. She was not called to testify although she allegedly witnessed the incident and was present with her husband immediately after the alleged incident. Mr. Xiong testified that he has experienced low back difficulties from time to time in his life prior to this injury. In this record, it is somewhat unclear the precise nature of his pre-existing low back difficulties, however, Mr. Xiong acknowledged that he had symptoms from time to time and surgery was recommended by at least one physician several years ago.

Mr. Xiong testified that on January 11, 2017, he drove to work with his wife as normal. He was running a little bit late and he got out of the car to help direct her parking. "And once she parked the car, we - - we were late and we were in the back of the parking lot and it's a little distance getting to work. So we were late and I turn and twist and pick up my box real fast and then I felt - - I felt a pop in my back and I felt the pain and I told my wife about that and - -". (Transcript, page 14)

Mr. Xiong testified that he immediately reported the incident to his supervisor, Martin. Martin instructed him to go to the plant nurse. He testified that in the nurse's office, he was approached by the general manager and another supervisor who provided him with leave of absence paperwork. He was not directed to see a Tyson physician. (Tr., pp. 16-17)

The Tyson Medical Department note from January 11, 2017 documented the following.

> TM [Team Member] presents to OHS accompanied by supervisor Marvin Escalante reporting that he is having back pain that is not related to work. TM reports that he periodically has back pain. TM rates pain 6/10. TM is administered medication and sent back to work. TM later returns relating that he feels that he is not able to perform job FD today. TM is sent home per this nurse and advised to call in tomorrow and to see PCP if not better. TM relates that he is worried about his points. He is referred to Benefits to get a WH380 form. TM OOP at 1733. Supervisor Martin updated.

(Def. Ex. C, p. 1) This documentation is critical to the case. The entry was created by Tabitha Castaneda, RN. Claimant alleges the documentation is wrong at best. At worst, claimant alleges there is some type of fraud involved.

The Tyson Medical Department notes also contain documentation of the following encounter on July 21, 2016.

> TM presents to OHS with supervisor Israel with c/o lower back pain from bending down and lifting a box at home yesterday. TM reports to this RN that he was in the parking lot at work and he bent down to pick up his lunch box and as he bent down he felt a pinching pain. Supervisor called in room to clarity. TM then states that he bent down to pick up lunch box at home and felt a sudden pinching pain yesterday. TM states that he just wants to have a few weeks off to see if it gets better and he wants to claim disability. TM went to talk to personnel. TM returns to OHS stating that he wants to go home and come in tomorrow to see if he feels better.

(Def. Ex. C, p. 2)

When examined about this at hearing, claimant denied that he reported an incident on July 21, 2016, where he was picking up a lunch box in the parking lot. (Tr., p. 37) His memory was fuzzy as to exactly what he did report, but he was certain he did not report anything about picking up a lunch box in the parking lot. The Tyson Employee Attendance Calendar, however, did not note any absence on July 21, 2016. (Cl. Ex. 1, p. 3) Mr. Xiong testified that he could not recall whether he went home or not. (Tr., p. 37)

After the alleged incident, Mr. Xiong testified that his condition did not improve. He went to his own physician, Natalie Schaller, D.O., on January 19, 2017. Dr. Schaller does not document any work injury in her records. (Jt. Ex. 1, pp. 12-14) There is little documentation of any kind regarding how the back pain came about. In any event, Dr. Schaller and Mr. Xiong developed a treatment plan which included an MRI and eventually a referral to Grant Shumaker, M.D., a highly-qualified neurosurgeon.

The first time claimant saw Dr. Shumaker was March 21, 2017. At that visit, there is nothing documented about a work injury in the records. (Jt. Ex. 2, p. 25) In fact, Dr. Shumaker documented the following. "He denies specific recent inciting trauma but relates this may be a recurrence of an old injury." (Jt. Ex. 2, p. 25) Prior to hearing, Dr. Shumaker confirmed in writing that Mr. Xiong never mentioned any work injury during his course of treatment. (Def. Ex. D) Dr. Shumaker diagnosed Mr. Xiong with a disk herniation at L4-5 with mild facet arthropathy on the right L4-5. After attempting an injection, Dr. Shumaker performed a discectomy on January 3, 2018, and continued a normal course of follow-up care. (Jt. Ex. 2, p. 36)

Claimant sought an independent medical evaluation with Sunil Bansal, M.D., in September 2018. Dr. Bansal performed a thorough review of the records and examined the records in detail. (Cl. Ex. 3) He opined that Mr. Xiong "incurred L3-4 and L4-5 disc herniations from hurriedly twisting while bent forward on January 9, 2017, at the parking lot of Tyson." (Cl. Ex. 3, p. 18) He provided an expert opinion regarding impairment and restrictions as well.

Viewing all of the relevant evidence in this case record, the claimant has failed to meet his burden of proof that he sustained an injury which arose out of and in the course of his employment on July 11, 2017.

CONCLUSIONS OF LAW

The fighting issue in this case is whether the claimant met his burden of proof that he sustained an injury on January 11, 2017, which arose out of and in the course of his employment.

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.

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 Electric 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.

For the reasons set forth in the findings of fact, I find that the claimant has failed to meet his burden of proof that he sustained an injury on July 11, 2017. Viewing all of the evidence as a whole, I find that the claimant simply does not have the type of credible evidence to sustain his burden of proving his injury by a preponderance of evidence.

ORDER

THEREFORE IT IS ORDERED

Claimant shall take nothing.

Each party shall pay their own costs.

Signed and filed this 12th day of April, 2019.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.