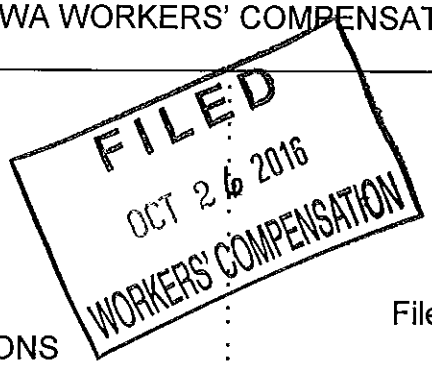
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



WILLARD MILLER,

Claimant,

vs.

CARGILL MEAT SOLUTIONS CORPORATION,

Employer,

and

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,

Insurance Carrier,
Defendants.

File No. 5049510, 5049511

ARBITRATION

DECISION

Head Note Nos.: 1803, 1108

STATEMENT OF THE CASE

Willard Miller filed two petitions for arbitration seeking workers' compensation benefits from Cargill Meat Solutions Corporation and The Insurance Company of the State of Pennsylvania.

The combined matter came on for hearing on November 3, 2015, before Deputy Workers' Compensation Commissioner Joseph L. Walsh in Ottumwa, Iowa. The record in the case consists of joint Exhibits 1 through 15; as well the sworn testimony of claimant, Willard Miller. Stacy Jo Gray was appointed court reporter. The parties argued this case and the matter was fully submitted on December 15, 2015. Both parties submitted post-hearing briefs.

ISSUES AND STIPULATIONS

File No. 5049510:

It is stipulated that claimant sustained an injury which arose out of and in the course of his employment on January 15, 2013. The defendants dispute that this injury resulted in any permanent disability in his left shoulder or bilateral wrists and hands. Thus, defendants contend they are not responsible for any permanent disability benefits. Claimant alleges entitlement to industrial disability benefits. The rate of

compensation is stipulated. Affirmative defenses have been waived and the defendants' credit for five weeks of compensation paid at the agreed rate is stipulated. Claimant seeks an independent medical evaluation as well. The stipulations described herein and set forth in the hearing report, are hereby accepted and deemed enforceable.

For File No. 5049511:

The parties agree that claimant sustained an injury which arose out of and in the course of his employment on November 19, 2009. It is stipulated that this injury resulted in both temporary and permanent disability, although there is no issue regarding temporary disability benefits. The primary dispute for this file is the extent of the claimant's industrial disability. The parties have stipulated to the elements which comprise the rate of compensation. Affirmative defenses are waived. It is stipulated that the defendants paid 50 weeks of benefits at the agreed rate and they are entitled to a credit for such payments. Claimant seeks payment for an independent medical evaluation.

Costs and IME reimbursement are disputed in both file numbers.

FINDINGS OF FACT

Willard Miller, hereinafter claimant, born October 1951 and age 64 at the time of hearing works, for employer as a general worker. Claimant attended but did not complete the ninth grade of high school. Claimant is not mechanically inclined. Claimant has a G.E.D. dating back to 1969. His past work experience includes construction, painting, factory work, forklift driver, superintendent, temporary labor and bar keep work. Claimant is not computer literate but is capable of casual use of a smart phone.

A Cargill general worker is tantamount to a utility worker who fills in for other workers while performing a designated job. Claimant spends more than half of the 50-hour workweek pushing 200-pound barrels on four-wheel carts. The lesser half of the week is pushing barrels about half full. He also packs and stacks 20-pound boxes of meat onto pallets. Overall, claimant works about half the time pushing barrels, 40 percent boxing and stacking meat with 10 percent dedicated to utility relief work. The claimant has 7 years of seniority, which makes his position as general worker somewhat fickle. If claimant's current assigned position is placed up for union bid he may not have sufficient seniority to keep the assignment. Claimant has been physically able to do the work assigned to him to date of hearing. The employer is allowing claimant to work this assignment indefinitely.

Claimant has abided by Dr. Galles' work restrictions both at work and home. Claimant has increased his rate of pay, both gross and hourly, since the first injury. Claimant has a strong work ethic and will continue to do well notwithstanding the physical impediments to his vocational success.

Claimant injured his right shoulder November 19, 2009. This fact is stipulated by the parties. Claimant was scooping with a shovel when injured. He was throwing a scoop full when the right shoulder hit a piece of steel that held metal conduit. The shoulder popped with pain preventing arm movement and weight bearing. Claimant sought treatment from Gregory Clem, M.D., in December 7, 2009. Medication and physical therapy was initially prescribed.

Eventually claimant was sent to Kary Schulte, M.D., an orthopedic surgeon who advised surgery. A second opinion was sought from Christopher Dupuis, M.D. with a cortisone injection in the right shoulder and another suggestion of surgery. Claimant initially rejected the surgery option for fear of getting worse. The shoulder became progressively worse as claimant continued his work activities. Claimant did succumb to the surgeons' recommendation with arthroscopic rotator cuff repair on the right, September 19, 2011. The surgery, followed by physical therapy and cortisone injections, gave little relief. The surgery result was a bad one considering claimant's inability to return to work without chronic pain. Claimant continued to treat for pain complaints. The cervical spine was ruled out as a cause after MRI examination. Nevertheless, claimant continued to visit the Cargill health station with little relief in his discomfort. The right shoulder pain became chronic causing sleep disturbance and reliance on over-the-counter medications.

Claimant asserts a subsequent injury to the left shoulder and bilateral hands/wrists. The injury date is stipulated at January 15, 2013. Claimant sustained injury to the hands by the repetitive motion work in pushing barrels and packing and palletizing boxes. The left shoulder complaints appear to stem from overuse as a sequelae of the right shoulder chronic pain and limitations. It is completely logical to find that the left shoulder is the result of overuse at work. The significant and protracted problems with the right shoulder caused claimant to overuse the left thereby causing injury. Claimant sought conservative treatment from the left shoulder from Robert Gordon, M.D., who diagnosed impingement features, bilateral hand pain near the thumb and positive grind tests bilaterally. Arthritis was suspected. Claimant then treated with Kyle Galles, M.D., for bilateral shoulder symptomology. He noted pain in right worse than left. A shoulder injection was placed into the right AC joint to no avail. Dr. Galles also did a cortisone injection into the left shoulder. Dr. Galles found maximum medical improvement on the right shoulder with suggestion to minimize repetitive work over shoulder height.

Dr. Galles also injected claimant's left shoulder which did result in symptom improvement. The shoulder symptoms did however progress into equally painful conditions. Dr. Galles reiterated previously imposed work restrictions, "No reaching above head with bilateral upper extremities no work at/above shoulder level with bilateral shoulders." (Citation)

Claimant also sought treatment for suspected bilateral carpal tunnel syndrome with moderate to severe symptoms. Michael Gainer, M.D., opined that claimant suffered from mild carpal tunnel syndrome on the left and possible neck problem on the

right. Investigation into the neck problems turned up nothing with a concluding diagnosis of mild carpal tunnel syndrome. Wrist splints were prescribed with a conclusion that the problem was not bad enough for surgery. Dr. Gainer opined that impairment would be no more than 5 percent per upper extremity for the carpal tunnel syndrome.

Robin Sassman, M.D. conducted an independent medical examination at claimant's request. Dr. Sassman reviewed 1,722 pages of medical records before issuing a report. Dr. Sassman opined that claimant sustained 11 percent body as a whole permanent partial impairment to the right shoulder. Dr. Sassman opined that claimant sustained 9 percent body as a whole permanent partial impairment to the left shoulder. For the bilateral carpal tunnel she opined that claimant sustained 10 percent impairment to each upper extremity or 6 percent body as a whole to each side. Combining all of the ratings Dr. Sassman found a total of 18 percent body as a whole permanent partial impairment causally connected to the January 15, 2013 injury. I find that Dr. Sassman confused the month of the 2013 injury. This inadvertent date error does not confound her opinion.

Dr. Sassman opined that claimant has work restrictions as a result of his work injuries. She indicated that claimant should limit lifting, pushing, pulling and carrying 30 pounds occasionally from floor to shoulder level. She also indicated that claimant should not lift, push, pull or carry above shoulder level. Claimant was also cautioned to avoid using vibratory power tools that would exacerbate his symptoms.

Dr. Dupuis, the treating surgeon for the right shoulder released claimant to full duty with an 8 percent whole body permanent impairment.

Dr. Galles opined that the right shoulder has a 4 percent body as a whole impairment with a restriction to minimize repetitive over-the-shoulder activities. Dr. Galles indicated that 10 to 15 repetitions per hour for the shoulder should be the limit.

I find that claimant sustained permanent partial impairment to the body as a whole as a result of the November 19, 2009 injury to the right shoulder. The situs of the impairment and the ratings of 4 percent to 8 percent of the body as a whole indicate that this is industrial disability. The work restrictions of avoiding repetitive movement over shoulder is entirely appropriate for the surgery and prolonged chronic pain for which claimant suffers on a daily basis.

As to the January 15, 2013 left shoulder injury, Dr. Galles opined 1 percent body as a whole impairment with a similar restriction to minimize repetitive use over shoulder level of 10 to 15 times an hour.

Dr. Gainer opined that the bilateral carpal tunnel syndrome was mild. This is in stark contrast to Dr. Sassman's opinion of 6 percent impairment to the body as a whole to each side for the carpal tunnel syndrome. It is found that 6 percent per side body as

a whole impairment for mild carpal tunnel syndrome is inconsistent with the medical evidence when viewed globally. The bilateral carpal tunnel is more akin to a 2 percent body as a whole impairment causally connected to the January 15, 2016 injury. It is clearly a case of nonsurgical carpal tunnel syndrome with chronic but mild symptoms.

The left shoulder injury has permanent impairment caused by the January 15, 2013 injury. The opinion of Dr. Sassman, while finding excessive impairment, is nevertheless consistent with the medical treatment and work restrictions. The high rating of impairment to the left shoulder is not accepted as correct, yet it is strong evidence that claimant sustained permanent partial impairment to the body as a whole stemming from the January 15, 2016 overuse left shoulder injury. Dr. Galles suggested that claimant return to work after a left shoulder injection. Dr. Galles also indicated that claimant sustained impairment at 1 percent body as a whole and that claimant should try to minimize repetitive work over the shoulder level and return for cortisone injections at a 4 to 6-month interval. The ongoing need for treatment and some improvement with the prior injection indicates a symptomatic shoulder that will not completely recover. It is found that the left shoulder has permanent partial impairment caused by the January 15, 2013 work injury. It is found that the impairment to the left shoulder is more akin to 5 percent of the body as a whole as opposed to the much higher rating issued by Dr. Sassman. The left shoulder injury is as stable as it will get. The treatment offered is maintenance in nature. This is an injury which has reached maximum medical improvement.

While there has been much discussion of a cervical spine injury, no such claim was made in the petitions. Further analysis is unnecessary.

CONCLUSIONS OF LAW

Having found the November 19, 2009 injury as a cause of permanent disability to the body as a whole it follows that his matter must be evaluated industrially.

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.

Furthermore, industrial disability is evaluated without respect to accommodations which are (or are not) made by an employer. The Iowa Supreme Court views "loss of earning capacity in terms of the injured worker's present ability to earn in the competitive job market without regard to the accommodation furnished by one's present employer." Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 617 (Iowa 1995).

The right shoulder injury with surgical involvement, moderate work restrictions and permanent impairment causes a loss of access to the job market. Claimant's objective job market is quite limited at his advanced age and with little formal education. He is also limited in computer skills having only the ability to manipulate a smart phone. Retraining is not in the cards for claimant at this point in his vocational timeline. Considering the age, experience, work restrictions and all other salient factors it is held that claimant sustained 25 percent industrial disability caused by the November 19, 2009, injury.

Of greatest concern in this matter is claimant's loss of access based on his limited work experience. When combined with the age factor, claimant is in a precarious situation should he lose his current employment. The lack of education, age and work restrictions severely restricts claimant's reemployment opportunity. On the other hand, the ongoing employment at substantially similar wage puts a cap on the industrial disability. He is able to perform his current job without significant accommodation. It is the current ability to maintain gainful employment at a comparable or higher rate of pay that prevents significantly higher industrial disability.

With respect to the January 15, 2013 injury, the defendants contend that claimant has failed to prove that his work injury is a cause of any permanent disability. I disagree.

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).

Based upon the medical opinion of Dr. Sassman, and other medical providers, and considering all of the other relevant evidence in the record, I find that the January 15, 2013, work injury is a cause of permanent disability.

Most of the factors are the same but for advanced age at the time of injury. The work restrictions are substantially similar. The impairment is certainly lower. However, claimant has maintained his ability to perform work in the occupation for which he has prior training and experience. Claimant does have multiple issues stemming from the 2013 injury. The left shoulder problem and mild bilateral carpal tunnel syndrome makes this a little more serious notwithstanding the ability to function vocationally at the current job. It is the combined impairment and work restrictions from 2013, combined with all that has happened with the 2009 injury that adds industrial disability. In total, the combined industrial disability stemming from the two injuries is 35 percent. The situs of three injuries, both shoulder and bilateral hands make this a more significant impediment to finding and holding work in the open job market. If claimant were not employed stably he could very well make a viable case for permanent total disability. In conclusion, the 2013 injury when apportioned adds 10 percent industrial disability to the 2009 injury. The defendants are entitled to a credit for the 2009 injury as set forth in Iowa Code section 85.34(7) (2015).

The final issue concerns an award of Iowa Code section 85.39 independent medical examination expenses.

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).

The defendants obtained ratings of impairment or opinions regarding permanency for both injuries. Claimant is entitled to a second opinion. The costs charged were fair and reasonable.

ORDER

THEREFORE IT IS ORDERED:

For File No. 5049511

Defendants shall pay the claimant one hundred twenty five (125) weeks of permanent partial disability benefits at the rate of four hundred twenty-seven and 26/100 dollars ($427.26) per week from the date healing period benefits ended. If no healing period benefits were paid, benefits shall commence on November 20, 2009.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall be given credit for the permanent partial disability previously paid.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

For File No. 5049510

Defendants shall pay the claimant fifty (50) weeks of permanent partial disability benefits at the rate of four hundred eighty-four and 60/100 dollars ($484.60) commencing on the date healing period benefits ended. If no healing period benefits were paid for this injury, benefits shall commence on January 16, 2013.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall be given credit for the permanent partial disability previously paid.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

For both files:

Defendants shall pay costs of these actions.

Defendants shall pay Iowa Code section 85.39 independent medical examination expenses.

Signed and filed this 26th day of October, 2016.

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.