BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| ANTONIO GARCIA,<br><br>Claimant,<br><br>vs.<br><br>CARGILL MEAT SOLUTIONS CORP. (n/k/a JBS USA),<br><br>Employer,<br><br>and<br><br>OLD REPUBLIC INSURANCE COMPANY,<br><br>Insurance Carrier,<br>Defendants. | : | File No. 5056121<br><br>ARBITRATION DECISION<br><br>Head Note Nos.: 1108.50, 1402.40, 1403.30, 1801, 1803.1 |

FILED
MAY 23 2017
WORKERS COMPENSATION

## STATEMENT OF THE CASE

Antonio Garcia, claimant, filed a petition in arbitration seeking workers' compensation benefits from Cargill Meat Solutions Corporation n/k/a JBS USA, employer and Old Republic Insurance Company, insurance carrier, both as defendants. Hearing was held on February 14, 2017 in Des Moines, Iowa.

Antonio Garcia testified live at trial via a translator. The translator for the proceedings was Alina Salvat. The evidentiary record also includes Claimant's Exhibits 1-16 and Defendants' Exhibits A-P.

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.

It should also be noted that at the hearing the defendants stated that they would be responsible for the independent medical evaluation (IME) bill and therefore, that was no longer an issue that the undersigned needed to determine.

The parties submitted post-hearing briefs on March 13, 2017.

## ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant sustained an injury on or about June 5, 2014, which arose out of and in the course of employment?

2. Whether the alleged injury was the cause of permanent disability? If so, the extent of industrial disability claimant is entitled to receive.

3. Whether claimant is entitled to payment of temporary disability benefits?

4. Assessment of costs.

## FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Antonio has worked for Cargill Meat Solutions n/k/a JBS USA (hereinafter referred to as "JBS") on and off since 2006 or 2007. He was initially hired in 2000, terminated on more than one occasion and then re-hired. He alleges injury to his right elbow and right shoulder as the result of a work injury in early June of 2014. Defendants admit that claimant sustained an injury to his right elbow but deny any work-related injury to his right shoulder. I find that claimant's injury is limited to his right upper extremity.

On the date of the injury Antonio was pulling lard from carcasses when he felt pain in his right elbow. He reported the pain to his supervisor who took him to the nurses' station. (Testimony)

According to the JBS nurse daily visit log dated June 5, 2014, Antonio reported he was pulling lard when he felt a pull in his right elbow. No swelling was noted and he had full range of motion. He did have tenderness to his lateral elbow. He was provided with Tylenol, ice for 15 minutes, and then returned to regular work with elbow support. (Exhibit 1, page 1) Antonio continued to follow-up with the nurse at JBS for his right elbow. (Ex. 1, pp. 2-4)

An employee statement of injury was completed on June 6, 2014. The report indicates Antonio was pulling on lard and felt a pull in his right elbow. He had pain at that time, but the pain was a little more now. (Ex. A, p. 1)

On July 9, 2014, Antonio was seen by Jeffrey A. Lee, M.D. at MOHA on-Site Physician Services. He presented with complaints of right elbow pain. He reported he was initially injured in 2001 when he was inadvertently lacerated by a co-worker. Since that time he has had problems with his right elbow with pain radiating down to his hand. On July 9, 2014, he rated his pain as 4-5/10. A pain diagram was completed. The

doctor's assessment was right elbow pain. He recommended over-the-counter Aleve for pain. The doctor did not recommend physical therapy or work restrictions. Antonio was told to follow-up in two weeks or sooner if the pain increased. If he did not improve the doctor would consider physical therapy. (Ex. 2, pp. 10-14)

Antonio returned to Dr. Lee's office on July 30, 2014. He reported no change in symptoms. He was taking Aleve, one time per day. Antonio had been performing floor janitor work which has helped. He had not been pulling lard; the job that seemed to aggravate his elbow. The clinical note indicates that Antonio had been advised to bid to a different job but he was not willing to do that because of a potential change in pay grade. The notes indicate that there was a translator present and communication was excellent. The supervisor was also present when discussing job assignment and job duties. The doctor's assessment was right lateral epicondylar region pain that was unlikely related to a laceration incident 13 years ago. The plan included continuing to work at regular status, with his supervisor coordinating his assignment. (Ex. 2, pp. 15-19)

Antonio was seen again in Dr. Lee's office on August 18, 2014 for right elbow pain. He had been working with exercises on an intermittent basis. His supervisor planned to have the trainer meet with Antonio daily for stretches and range of motion exercises. Antonio was still on regular job status and his supervisor has been rotating him to different duties. Antonio was fitted for a Bandit strap and told to continue on Naproxen. (Ex. 2, pp. 20-24)

Antonio's employment was terminated on September 4, 2014. Claimant testified that he was terminated because he was injured. He also testified that he was told he was terminated because he went to eat without first cleaning a work area well enough. Once Antonio was terminated, he thought that meant he could no longer receive any medical treatment from the nurse's station at work. He testified that he was told he could not return to the workplace. (Testimony) The personnel information in evidence indicates that Antonio had been suspended in February of 2014. At that time, he was placed on last chance for all rules, excluding attendance, for one year. On September 4, 2014, he was terminated for failure to carry out company instructions as directed. (Ex. G)

On November 18, 2014, Antonio went to a doctor of his choosing; he saw Alejandro S. Curiel, M.D. at Monroe County Hospital and Clinics. Antonio reported that he was at work about one month ago and was carrying a big tub. When he lifted the tub he felt a ripping pain through his right elbow. He went to the nurse's station and reported what happened, but nothing was done. Antonio reported to the doctor that subsequently he was let go secondary to his weakness in his right hand. The doctor's impression was right elbow pain. A note was given to Antonio indicating he would need physical therapy, MRI, and an orthopedic consultation. (Ex. 3, pp. 25-33) Although it is not reflected in the doctor's notes, Antonio testified that Dr. Curiel gave him a sling to wear on his right arm. Antonio testified that he continued to wear this sling until he saw Scott M. Shumway, M.D. in March of 2015.

On March 25, 2015, Antonio was seen by Dr. Shumway at Iowa Ortho. Antonio reported an onset of right elbow pain approximately 9 months ago. He described the pain as constant and getting worse. He also reported tingling in the arms and weakness. Back in June of 2014, he was pulling fat and felt a pop and some pain along the lateral aspect of the right elbow. Dr. Shumway noted that in November of 2014, Antonio was given a sling to wear and had been wearing the sling for the past four months. Antonio testified that Dr. Shumway instructed him to stop wearing the sling. The notes indicate that he did have some shoulder stiffness from being in a sling for the past four months. Antonio had also been taking anti-inflammatories. Dr. Shumway's assessment was right lateral epicondylitis and right shoulder stiffness. He performed a Kenalog injection in the right lateral epicondyle. He also provided Antonio with a tennis elbow strap to wear while he was awake. Antonio was provided restrictions and told to follow-up in four weeks; if the pain subsided then the doctor would order occupational therapy. (Ex. 4, pp. 39-49)

On April 15, 2016, Dr. Curiel signed a letter authored by defendants' attorney. Dr. Curiel indicated that at the November 18, 2014, medical appointment Antonio only reported problems with his right elbow; he did not indicate any problems with his right shoulder. The doctor further indicated that the right elbow x-ray for Antonio was negative for any fractures. He also stated that he restricted Antonio from any work with his right arm until after physical therapy, MRI, and/or an orthopedic consultation; the right arm was the only body part he restricted. Antonio has not reported back to Dr. Curiel's office since the November 18, 2014 appointment. Dr. Curiel handwrote that, while it was possible for someone from his office to have given Antonio a sling, his office notes and documentation did not reflect that anyone from his office ever issued or prescribed Antonio a sling in November of 2014. Dr. Garcia noted that it was possible that Antonio could have asked his nurse to give him a sling and the doctor just did not know about the sling. (Ex, 3, pp. 35-38)

Antonio returned to Iowa Ortho on April 22, 2015, and reported that the injection did not provide him with much relief. He was prescribed occupational therapy and restrictions. He was to follow-up in four weeks. (Ex. 4, pp. 50-53)

On April 29, 2015, Dr. Shumway authored a missive regarding his examination and treatment of Antonio. Dr. Shumway opined that Antonio's right lateral epicondylitis was consistent with and correlated with both his description of the injury and the objective clinical findings. Dr. Shumway believed that Antonio's treatment, testing, and medications were reasonable, necessary, and related to the work injury of June 4, 2014. (Ex. 4, pp. 54-55)

Antonio continued to treat with Iowa Ortho for his lateral epicondylitis. Dr. Shumway also noted pain in the biceps and brachialis muscle bellies. Dr. Shumway recommended an MRI to evaluate the tendinous origin along the lateral epicondyle and biceps for possible injury or tear. (Ex. 4, pp. 56-58)

The MRI was performed on May 30, 2015. The study revealed normal biceps brachia and brachialis and mild to moderate tendinopathy at the common extensor origin with no partial thickness tearing. (Ex. 6, pp. 87-88; Ex. C, pp. 20-21)

By early June of 2015, Antonio reported to Dr. Shumway that his right elbow pain radiated to his shoulder. Antonio described the pain as piercing, sharp, and throbbing. Dr. Shumway performed a second Kenalog injection. (Ex. 4, pp. 60-63)

When Antonio returned to Iowa Ortho in early July he reported that his shoulder pain was the worst of his pains. Dr. Shumway's assessment included lateral epicondylitis, upper extremity pain, and overweight. He stated, "[a]t this point he continues to complain of severe pain involving the RIGHT upper extremity that is out of proportion and difficult for me to associate with his lateral epicondylitis." There was not much more Dr. Shumway could do for Antonio so he suggested he see a pain specialist for his upper extremity pain. Dr. Shumway felt that the pain was not related to his lateral epicondylitis. Antonio was to follow-up with Dr. Shumway on an as-needed basis. (Ex. 4, pp. 64-66)

Antonio saw Kurt Smith, D.O. at Iowa Ortho on August 3, 2015. He reported aching and throbbing pain in his right elbow. Dr. Smith's assessment included lateral epicondylitis. He noted Antonio's treatment history. He also noted that Antonio had not worked since September of 2014. Dr. Smith felt Antonio was at maximum medical improvement (MMI) and recommended a functional capacity evaluation (FCE) to determine permanent restrictions. Dr. Smith noted that if the FCE was not valid then Antonio would be considered released to full duty. (Ex. 4, pp. 67-70)

On August 19, 2015, claimant underwent an FCE at E3 Work Therapy Services. The overall classification of Antonio's efforts was considered to be invalid; thus, his functional capabilities could not be determined. The therapist also noted extreme overt pain behaviors, including grimacing and groaning during the test. (Ex. 7)

Antonio returned to see Dr. Smith on September 1, 2015. Dr. Smith noted that his examination was not consistent with the patient's described symptoms. The doctor noted that with attempts to range the right shoulder the patient was pushing in the opposite direction despite instruction through the interpreter to not do that. Dr. Smith also noted that the FCE was invalid. Dr. Smith reiterated that Antonio was at MMI. He released Antonio to full duty, no restrictions. (Ex. 4, pp. 71-74)

On October 13, 2015, Dr. Smith opined that further treatment was not medically necessary. He assigned zero percent permanent partial disability pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Ex. 4, p. 75)

At his attorney's request, claimant underwent an IME with Sunil Bansal, M.D. on November 20, 2015. After examining Antonio and reviewing the medical records provided to him, Dr. Bansal issued his IME report on December 16, 2015. Dr. Bansal diagnosed Antonio with right lateral epicondylitis and right adhesive capsulitis. Dr. Bansal agreed that Antonio had reached MMI for his right elbow on September 1,

2015. With regard to Antonio's right shoulder, Dr. Bansal recommended an MRI. However, in the absence of further treatment, Dr. Bansal agreed that he was at MMI on September 1, 2015. Dr. Bansal opined that Antonio's right lateral epicondylitis was caused from an acute on chronic scenario and related this condition to work. With regard to the right shoulder, Dr. Bansal opined that Antonio developed a frozen shoulder from disuse of his arm secondary to his right elbow pathology due to four months in the sling. Dr. Bansal noted four months was an extreme amount of time for the shoulder to be immobilized. Dr. Bansal assigned three percent right upper extremity impairment for the right elbow and five percent upper extremity impairment for the right shoulder. Dr. Bansal felt the following permanent restrictions were appropriate: no lifting greater than ten pounds occasionally, along with no lifting over shoulder level, because he simply cannot reach above shoulder level. (Ex. 8, pp. 101-112)

At the request of his attorney, Antonio underwent an FCE at WorkWell on December 17, 2016. The report states that Antonio gave consistent effort and performance. The FCE placed Antonio's capabilities in the lower medium work category. He was considered to have slight or no limitations for lifting waist to/from floor up to 20 pounds and lifting waist to/from crown up to 10 pounds. It was recommended that he limit his frequent work activities to not over 50 percent of his workday. It was also recommended that due to decreased right hand grip and pinch strength that he limit his grasping and/or twisting with his right hand to an occasional basis. (Ex. 9)

On December 21, 2016, Dr. Bansal authored a report stating he had reviewed the December 17, 2016 WorkWell FCE. Dr. Bansal agreed with those recommendations. (Ex. 8, pp. 114-15)

Antonio was seen at River Hills Community Health Center on January 11, 2017, for elevated blood pressure. (Ex. F) The notes state that he had no pain at that time. The notes further state, "can get on, get off, lay [*sic*] and sit up on the exam table without help." (Ex. F, p. 58) Antonio testified that he did not mention his shoulder at this appointment because he did not know if it would be covered. (Testimony)

On January 11, 2017, defense counsel sent a series of questions to Dr. Smith who answered the questions by checking yes or no. Dr. Smith indicated that he had reviewed Dr. Bansal's reports and the August 2015 FCE. Dr. Smith noted that during Antonio's September 1, 2015 examination, the subjective reports of pain were not consistent with his objective findings. He also noted that Antonio prevented testing of the range of motion of his right shoulder. Dr. Smith indicated that Antonio did have normal strength of his right upper extremity and normal range of motion. Dr. Smith opined that Antonio did not sustain any permanent impairment to his right elbow or his right shoulder as a result of the work injury. The doctor did not feel any permanent restrictions were necessary for Antonio as a result of the work injury. Dr. Smith did not agree with Dr. Bansal's opinions that Antonio developed a permanent injury to his right shoulder from disuse of his right arm secondary to the use of a sling for four months. Dr. Smith noted that Antonio's measurements throughout all of his evaluations had been inconsistent. (Ex. B, pp. 5-7)

On January 13, 2017, Dr. Shumway responded to a check yes or no letter from defense counsel. Dr. Shumway was aware of Antonio's claim that his shoulder symptoms were caused by the work injury; however, Dr. Shumway opined that Antonio only suffered from right elbow lateral epicondylitis as a result of his June 2014 work injury. He noted that Antonio had full range of motion of his elbow when he saw him in 2015. Dr. Shumway only issued temporary work restrictions for his lateral epicondylitis as a result of the work injury. Dr. Shumway stated that Antonio never wore the sling in Dr. Shumway's presence after his first evaluation in March of 2015. Dr. Shumway again indicated that Antonio's severe right arm pain was out of proportion and difficult to relate to his right lateral epicondylitis. Dr. Shumway deferred to Dr. Smith regarding any impairment and restrictions for the June 2014 injury. (Ex. B, pp. 8-11)

On January 13, 2017, Dr. Bansal issued another report; this report was issued after he reviewed Dr. Smith's opinions of January 11, 2017. Dr. Bansal stated he was confused how Dr. Smith could challenge his range of motion testing when Dr. Smith's notes did not indicate any range of motion testing for the shoulder. (Ex. 8, pp. 115A-115B)

On January 19, 2017, Dr. Smith stated that he had reviewed Dr. Bansal's January 13, 2017 IME report. Dr. Smith reaffirmed that in September of 2015, Antonio actively prevented the doctor from testing his right shoulder range of motion. Dr. Smith also indicated that the right shoulder range of motion findings in the August 2015 FCE, the November 2015 IME, and the December 2016 FCE were very inconsistent and unreliable. (Ex. B, pp. 12-13)

On January 23, 2017, Dr. Bansal issued yet another report. He stated that Dr. Smith's January 19, 2017 report did not change any of Dr. Bansal's opinions. He noted that there are several documents that demonstrate range of motion (ROM) deficits for Antonio's shoulder. (Ex. 8, pp. 114F-115F)

At hearing, Antonio testified that he still experiences pain in his right elbow and right shoulder. He takes aspirin for his pain three times per day. Antonio also testified that his right elbow and shoulder prevent him from performing his prior jobs. (Testimony)

Defendants have admitted that Antonio sustained a work-related injury to his right elbow. However, defendants deny any work-related injury to the right shoulder. In this case, the claimant has undergone treatment and testing with Dr. Shumway, an orthopaedic specialist. Antonio also treated with Dr. Smith, a physical medicine and rehabilitation specialist. Neither of these specialists related Antonio's shoulder problems to his work injury. Rather, the physicians concluded that the June 4, 2014, work injury was limited to Antonio's right arm. The doctors further opined that Antonio did not sustain any ratable permanent impairment to his right arm as a result of the work injury. The only physician to causally connect the shoulder to the injury is Dr. Bansal. However, Dr. Bansal's report does not effectively address the inconsistent findings upon examination throughout Antonio's treatment. Dr. Bansal also fails to explain why Antonio's grip strength improved from August to November of 2015. I find the opinions

of Dr. Shumway and Dr. Smith to be more persuasive than those of Dr. Bansal. Thus, I conclude that claimant has failed to carry his burden of proof to show by a preponderance of the evidence that his shoulder complaints are related to the work injury.

We now turn to the issue of permanent partial disability for Antonio's right upper extremity work-injury. Dr. Smith assigned zero percent permanent partial disability pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Ex. 4, p. 75) Dr. Smith released Antonio to full duty, no restrictions. (Ex. 4, pp. 71-74) Dr. Shumway deferred to Dr. Smith regarding any impairment and restrictions for the June 2014 injury. (Ex. B, pp. 8-11) Dr. Bansal assigned three percent right upper extremity impairment for the right elbow. Dr. Bansal felt the following permanent restrictions were appropriate: no lifting greater than ten pounds occasionally, along with no lifting over shoulder level, because he simply cannot reach above shoulder level. (Ex. 8, pp. 101-112) Dr. Shumway only issued temporary work restrictions for his lateral epicondylitis as a result of the work injury. Once again, I find the opinions of Dr. Smith and Dr. Shumway to be more persuasive than those of Dr. Bansal. The defendants correctly point out that the Fifth Edition of the AMA Guides to the Evaluation of Permanent Impairment state that conditions such as epicondylitis are not to be given an impairment rating unless there is some other factor to consider; which was not the case in the present situation. Dr. Bansal assigned functional impairment based on manual muscle testing. However, the Guides state that the results of the strength testing should be reproducible on different occasions or by two or more trained doctors. Additionally, the manual muscle testing is subject to the individual's conscious or unconscious control. (Guides, pp. 507-510) I do not find the rating method used by Dr. Bansal to be persuasive. I find claimant has a functional rating of zero percent impairment to his right upper extremity as a result of the work injury. Based on the opinions of Dr. Smith and Dr. Shumway, I further find that claimant does not have any permanent restrictions as a result of the work injury. I conclude that claimant has failed to carry his burden of proof to demonstrate by a preponderance of the evidence that he sustained any permanent impairment as a result of the work injury.

Claimant is also seeking temporary benefits from September 5, 2014 (the day after his termination) through September 1, 2015 (the date he reached MMI). The parties stipulated that Antonio was off of work during this time period. (Hearing Report) Because claimant failed to prove entitlement to permanent partial disability benefits any temporary benefits he would receive would be temporary total disability benefits, not healing period benefits. At the time of Antonio's termination he did not have any restrictions placed on his activities by a medical provider. The first time Antonio had any restrictions placed on his activities following the work injury was when he saw Dr. Curiel on November 18, 2014. Claimant argues that because doctors later assigned Antonio restrictions, this substantiates their argument that he should have been on restrictions related back to the time of his termination. The evidence in the case shows that claimant was working regular duty at the time of his termination and there were no actual medical restrictions placed on Antonio at that time. Thus, there is no medical opinion to support claimant's claim that he was temporarily disabled during this

timeframe. I find Antonio was not temporarily disabled during this timeframe. I find claimant has failed to show entitlement to temporary total disability benefits from September 5, 2014 to November 17, 2014.

Claimant is also seeking temporary benefits from November 18, 2014 through September 1, 2015. Claimant did have restrictions placed on his activities as of November 18, 2014. Defendants contend that claimant is not entitled to temporary benefits from November 18, 2014 through September 1, 2015, because his actions which led to termination were tantamount to a refusal of suitable work. In Antonio's case, he was terminated from his employment for violation of a written last chance agreement. Prior to the work injury, Antonio had been disciplined and in lieu of termination a last chance agreement was reached between JBS and Antonio. The agreement stated that Antonio was placed on last chance for all rules – excluding attendance, for one-year. (Ex. G, p. 94) Antonio testified that he knew failure to carry out company instructions as directed would result in termination. Despite this agreement, Antonio failed to clean up his area when he was initially instructed to do so. (Testimony) While ordinarily this may not be the type of conduct that would cause any employer to terminate an employee, this case is unique due to the written last chance agreement. I find that any employer who entered into such a written last chance agreement would have terminated the employee for such conduct. Therefore, I find that Antonio's failure to clean his work area when initially asked, while in a written last chance agreement, is tantamount to a refusal of suitable work. I find defendants have carried their burden to show Antonio refused suitable work. Thus, claimant is not entitled to temporary total disability benefits.

Finally, claimant is seeking an assessment of costs. Costs are to be assessed at the discretion of the deputy workers' compensation commissioner hearing the case. I find that claimant was not successful in his claims. I exercise my discretion and do not assess costs against the defendants. Each party shall bear their own costs.

## 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 Rule of Appellate Procedure 6.14(6)(e).

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 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.

Based on the above findings of fact, I conclude that claimant's work injury is confined to his right upper extremity. Claimant failed to carry his burden of proof to show by a preponderance of the evidence that he sustained an injury to his right shoulder as a result of the work injury.

Claimant did sustain a work-related injury to his right upper extremity. The next issue is whether he sustained permanent disability as a result of that injury. Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

Where an injury is limited to scheduled member the loss is measured functionally, not industrially. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983).

Because Antonio's injury is contained to his right upper extremity, he is to be compensated based on Iowa Code section 85.34(2)(m). The courts have repeatedly stated that for those injuries limited to the schedules in Iowa Code section 85.34(2)(a-t), this agency must only consider the functional loss of the particular scheduled member involved and not the other factors which constitute an "industrial disability." Iowa Supreme Court decisions over the years have repeatedly cited favorably the following language in the 66-year-old case of Soukup v. Shores Co., 222 Iowa 272, 277; 268 N.W. 598, 601 (1936):

> The legislature has definitely fixed the amount of compensation that shall be paid for specific injuries . . . and that, regardless of the education or qualifications or nature of the particular individual, or of his inability . . . to engage in employment . . . the compensation payable . . . is limited to the amount therein fixed.

Our court has even specifically upheld the constitutionality of the scheduled member compensation scheme. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404 (Iowa 1994). Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Graves, 331 N.W.2d 116; Simbro v. DeLong's Sportswear 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

Evidence considered in assessing the loss of use of a particular scheduled member may entail more than a medical rating pursuant to standardized guides for evaluating permanent impairment. A claimant's testimony and demonstration of difficulties incurred in using the injured member and medical evidence regarding general loss of use may be considered in determining the actual loss of use compensable. Soukup, 222 Iowa 272, 268 N.W. 598. Consideration is not given to what effect the scheduled loss has on claimant's earning capacity. The scheduled loss system created

by the legislature is presumed to include compensation for reduced capacity to labor and to earn. Schell v. Central Engineering Co., 232 Iowa 421, 4 N.W.2d 339 (1942).

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by statute. Soukup, 222 Iowa 272, 268 N.W. 598.

In the present case, I found the opinions of Dr. Smith and Dr. Shumway carried greater weight than that of Dr. Bansal. I concluded that claimant failed to demonstrate by a preponderance of the evidence that he sustained any permanent partial disability as a result of the work injury in question. Thus, claimant is not entitled to payment of any weekly permanent partial disability benefits.

Claimant is seeking payment of temporary weekly disability benefits. 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).

Iowa Code section 85.33(3) provides in pertinent part:

> If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employee refuses to accept the suitable work with the same employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal.

Iowa Code section 85.33(3).

The Iowa Supreme Court held there is a two-part test to determine eligibility under section 85.33(3): "(1) whether the employee was offered suitable work, (2) which the employee refused. If so, benefits cannot be awarded, as provided in section 85.33(3)." Schutjer v. Algona Manor Care Center, 780 N.W.2d 549, 559 (Iowa 2010). "If the employer fails to offer suitable work, the employee will not be disqualified from receiving benefits regardless of the employee's motive for refusing the unsuitable work." Neal v. Annett Holdings, Inc., 814 N.W.2d 512 (Iowa 2012). However, an injured worker will not be considered to have refused suitable work where the employee was unable to work based upon disciplinary action such as a suspension or termination based upon misconduct or a violation of a work rule. Alonzo v. IBP, Inc., File No. 5009878 (App. October 31, 2006); Franco v. IBP, Inc., File No. 5004766 (App.

February 28, 2005); Woods v. Siemens-Furnace Controls, File No. 1303082, 1273249, (App. July 2, 2002). The burden of proof to show a refusal of suitable work is on the employer. Koehler v. American Color Graphics, File No. 1248489, (App. February 25, 2005).

Defendants' assertion that claimant is not entitled to weekly temporary total disability or healing period benefits due to a refusal to accept suitable work pursuant to Iowa Code section 85.33(3) is an affirmative defense. The employer must show by the preponderance of the evidence that the work was offered; that the work was suitable, that is, having a physical or mental demand level that does not exceed claimant's capacities; and, that the refusal was an intentional act. Brodigan v. Nutri-Ject Systems, Inc., File No. 5001106 (App. April 13, 2004). Woods v. Siemens-Furnas Controls, File Nos. 1303082, 1273249 (Arb. July 22, 2002) (Final Agency Action). Disciplinary action such as a suspension or termination based upon misconduct or a violation of an employer's work rules is not a refusal to perform suitable work. In Franco v. IBP, File No. 5004766 (App. February 28, 2005) Commissioner Trier held:

> The concept that a termination for misconduct constitutes an intentional refusal to perform work was adopted by this agency in Himes v. MSP Resources, Inc., No's. 1055997 & 1055996 (App. April 10, 1996). . . . [T]hat policy has been expressly reversed to the extent that an employer's personnel policies will not govern entitlement to indemnity benefits. The employer must prove that the employee refused work that was both offered and suitable. The act of refusal must be an intentional act. Woods v. Seimens-Furnas Controls, No's. 1303082 & 1273249 (App. July 22, 2003). For misconduct to disqualify a person from compensation, the misconduct must be tantamount to refusal to perform the offered work. The misconduct must be serious and the type of conduct that would cause any employer to terminate any employee. The misconduct must have a serious adverse impact on the employer. Brodigan v. Nutri-Ject Systems, Inc., No. 5001106 (App. April 13, 2004). An employee working with restrictions is not entitled to act with impunity toward the employer and the employer's interests. Nevertheless, not every act of misconduct justifies disqualifying an employee from workers' compensation benefits even though the employer may be justified in taking disciplinary action.

Franco v. IBP, File No. 5004766, p. 6 (App. February 28, 2005).

Based on the above findings of fact, I concluded that the employer met its burden of proof to show by a preponderance of the evidence that the claimant's actions were tantamount to a refusal of suitable work. Antonio testified that he knew if he violated the last chance agreement he would be terminated. Despite this knowledge, Antonio failed to carry out company instructions as he was directed. Because claimant refused the suitable work offered to him, temporary total disability benefits cannot be awarded.

Costs are to be assessed at the discretion of the deputy workers' compensation commissioner hearing the case. I find that claimant was not successful in his claims. I

exercise my discretion and do not assess costs against the defendants. Each party shall bear their own costs.

ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing further from these proceedings.

Each party shall bear their own costs.

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 23rd day of May, 2017.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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EQP/srs

**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.