BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

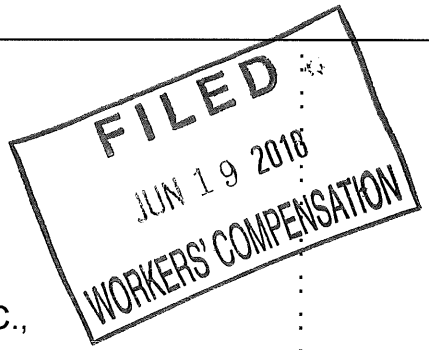
JOHN ARNZEN,

Claimant,

vs.

TYSON FOODS, INC.,

Employer,
Self-Insured,
Defendant.



File No. 5062268

ARBITRATION

DECISION

Head Notes: 1100, 1801, 1803, 3000

STATEMENT OF THE CASE

John Arnzen, claimant, filed a petition in arbitration seeking workers' compensation benefits from Tyson Foods, Inc., the self-insured employer.

The matter proceeded to hearing on January 25, 2018.

The evidentiary record includes: Joint Exhibits JE1 through JE5; Defendant's Exhibits A through G; and, Claimant's Exhibits 1 through 6. At hearing, claimant and Allen Wiegert, Continuous Improvement Supervisor at Tyson both provided testimony.

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.

The parties submitted post-hearing briefs on March 12, 2018 and the matter was considered fully submitted on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant's injury arose out of and in the course of his employment with defendant employer.

2. Whether the alleged injury was the cause of temporary disability from the period of June 22, 2016 through January 19, 2017.

3. Whether the alleged injury was the cause of permanent disability, and the extent thereof.

4. Rate.

FINDINGS OF FACT

After a review of the evidence presented, I find as follows:

Claimant was single and 52 years old at the time of the hearing. He completed the 9th grade and received a G.E.D. in 1983. He later received a high school diploma from Kirkwood Community College in 1985. (Tr. p. 66; Ex. B, 3) He received a certificate of completion for management training from Pizza Hut. (Tr. p. 13) Claimant is right-handed. (Tr. p. 20)

1) WORK HISTORY

Before working at Tyson, claimant worked for several years in fast food, pizza restaurants and in other food preparation jobs as a cook. He worked for employers including McDonalds, Little Caesars, a sub shop, Lormar College, the Tri-State Blind Society, and Pizza Hut, among others, all in the area of food preparation. (Ex. 4, p. 38) He also worked in telemarketing and as a clerk at gas stations. There is a gap in claimant's work history beginning in 2002 due to a conviction of sexual abuse, and placement in prison, and subsequent transition to the civil commitment unit for sex offenders in 2009. (Tr. p. 15) Claimant continued to reside in the civil commitment facility at the time of the hearing, with no scheduled release date, although, he has annual reviews during which his potential release is considered. (Tr. p. 68) Upon entering the transitional release phase of the program, claimant was allowed to seek employment. He entered that phase on August 19, 2015. (Tr. p. 16)

On April 25, 2016, claimant began working for the defendant employer, Tyson, which was previously known as Hillshire. (Tr. p. 16; Ex. 1, p. 6) The employer is a turkey processing facility. Claimant's job was in production. This involved 4 different jobs, which employees rotated through during their shift. (Tr. p. 23) The jobs included: (1) grabbing the dead birds, which claimant believed weighed up to 50 to 55 pounds, and placing them on a hanging conveyor line; (2) inserting your hand into the open rear end of the turkey, grabbing, twisting and pulling out the heart and internal organs; (3) pushing a suction device into the bird to clean out the remainder of the guts;

and, (4) spraying the birds to clean off any blood or contaminants. Allan Wiegert, a manager for Tyson stated that he believed the turkeys weighed between 45 to 50 pounds. (Tr. p. 81)

Claimant stated that pushing his hand into the turkeys and pulling out the internal organs was particularly difficult for him. (Tr. p. 26) Claimant described forcing his hand through the anus of the bird in order to pull out the guts. (Tr. p. 25) After reviewing a video that showed workers (not claimant) doing the gut pulling job, I note that the hole

was apparently opened up by other workers before it arrived to the gut pulling area. The hole had been enlarged to roughly the diameter of a baseball. Workers appeared to use predominantly one hand, but clearly were shown using both hands to reach, grip twist and pull the guts. Claimant stated that he would use primarily his left hand to pull the guts. (Tr. pp. 28, 29) Claimant stated that the job of gut pulling was often about 90 minutes of his total shift, but on one occasion he did this job for over four hours. (Tr. p. 30) Claimant guessed that on a typical shift he would perform the gut pulling function well over 100 times and perhaps as much as 600 or 800 times. (Tr. p. 31)

Claimant was fired from his job at Tyson on or about June 21, 2016. The employer cited job abandonment as the basis for the termination. (Tr. p. 51; Ex. 1, p. 7) The employer's documents showed that June 21, 2016 was the date of a 75 day evaluation for claimant and that "[h]is review was poor." (Ex. 1, p. 11) It was noted that claimant's work lacked quality and quantity and his supervisor did not recommend that claimant's employment be continued. (Id.) I find that the 75 day evaluation occurred on the 57th day of claimant's employment. (Ex. 1, p. 6)

At the time of claimant's termination, he was not under any work restrictions and was working full-time.

Claimant was not employed at the time of the hearing and had not been employed since his termination from Tyson.

2) PRIOR MEDICAL CONDITION

Claimant testified that he had no prior problems with his hands before working at Tyson. (Tr. p. 18) He passed a pre-employment physical for Tyson. (Tr. pp. 20-22)

3) THE INJURY

Claimant stated that after about one week of working production, and particularly the job of reaching into the bird, grabbing, twisting and pulling out the internal organs, that claimant developed swelling and pain in his hands. (Ex. B, p. 5) Claimant alleges a date of injury of May 12, 2016. On that date, claimant reported swelling and pain in his hands to Norma Sanchez, RN, the on-site nurse at Tyson Foods, after working at 80 percent of full production and two weeks of ramping-in to the job. (Ex. JE1, p. 4) She noted swelling to the top of claimant's bilateral hands over the knuckles and fingers. (Id.)

Claimant testified that the employer's training regimen allowed for 60 to 90 days for an employee to work up to full production. (Tr. p. 32) Claimant presented an "Evis Ramp-in Guideline," which shows a 20 day schedule for building up to 100 percent proficiency, and also provides that if at "any time an employee has report of pain, they will fall back to the last change in ramp-in guidelines," thereby reducing their level of productivity, presumably to reduce the risk of additional pain or injury." (Ex. 1, p. 1)

4) POST-INJURY MEDICAL TREATMENT

After claimant saw the on-site nurse, Ms. Sanchez, on May 12, 2016, he continued to see her on multiple occasions in May and June, 2016. (Ex. JE1, pp. 1-4) Claimant generally continued to complain of pain and swelling in his hands and the right middle finger and knuckle. (Ex. JE1, pp. 1-4)

However, on May 13, 2016, Nurse Sanchez found that claimant had "minimal swelling." (Ex. JE1, p. 4) On May 15, 2016, she stated that claimant had redness on the top of the right middle finger with minimal swelling to the right hand and no swelling on the left. (Ex. JE1, p. 3) On May 17, 2016, Ms. Sanchez found that claimant had "no swelling" in his hands. (Id.) On May 19, 2016, and again on May 30, 2016, Nurse Sanchez found no swelling or redness in his hands. (Ex. JE1, p. 2)

Claimant also received medical treatment at the civil commitment unit for sex offenders (CCUSO) for general medical concerns. On May 23, 2016, claimant was seen by Mary Benson, ARNP at the CCUSO and reported starting a new job a few weeks ago and that the swelling in his hands had resolved and "the nurse at his place of employment is working with him and it's much better." (Ex. JE2, p. 5) The swelling was down and "[t]here is no pain." (Id.) On June 7, 2016, Ms. Benson recorded that claimant was "working quite hard at his job and it is very physically demanding," but that "[h]e realizes that I cannot take care of his hands because of the Workman Comp [sic] issues but that he will keep me apprised." (Ex. JE2, p. 6) He also reported that although his hands were originally "quite swollen and very painful," that "things are going better," and although his hands are still puffy, they feel better. (Ex. JE2, p. 6) He also advised that he has been "using Biofreeze and over the counter analgesics," and that he wanted to stop the Naproxen which had been previously prescribed for inflammation. (Ex. JE2, p. 6)

On June 15, 2016, the employer's on-site nurse, Ms. Sanchez, noted that claimant had swelling on the top of his hands. (Ex. JE1, p. 1) However, claimant last saw the on-site nurse on June 20, 2016 and at that time, he reported that he had no swelling and he denied any pain. (Ex. JE1, p. 1) He was cleared to continue with the ramp-in schedule at that time, and increase his productivity. (Id.)

Claimant was fired from his job on or about June 21, 2016.

On June 22, 2016, claimant was seen by Ms. Benson at CCUSO and reported that he lost his job last night and that his hands had been swollen and painful. At that time, she noted that his "[h]ands are swollen, fingers look like sausages, and they are painful for him to use and manipulate to make a fist, but he does have full range of motion." (Ex. JE2, p. 7)

On July 11, 2016, claimant was seen by Rick Wilkerson, D.O. of NWIA Bone Joint & Sports Surgeons. (Ex. JE3, p. 12) Dr. Wilkerson found claimant had "swelling and [a] bit of flexion deformity at the thumb metacarpophalangeal joint bilaterally, left worse than right." (Id.) In addition he found that claimant had positive Tinel's on the left and marginal Phalen's on the left. Both were negative on the right. (Id.) He

suspected bilateral carpal tunnel, worse on the left. An EMG/NCV was recommended along with splints. Claimant was told to avoid repetitive gripping, squeezing, pushing and pulling bilaterally. (Id.)

On July 12, 2016, Dr. Wilkerson stated that based on the "patient history, which is all I was provided . . . his symptoms are consistent with his new job," and claimant "does also have persisting thumb MCP," which "could also have worsened symptomatically due to his work." (Ex. JE3, p. 15) He again recommended EMG/NCV testing to evaluate for carpal tunnel along with splints. (Id.)

On July 13, 2016, claimant was seen again by Ms. Benson at CCUSO and reported that he was seen by Dr. Wilkerson and returned with a prescription for Naproxen, but stated that "he feels his hands are getting better." (Ex. JE2, p. 7)

On August 22, 2016, claimant returned to Dr. Wilkerson after having the EMG/NCV tests completed. Dr. Wilkerson stated that the studies showed "significant carpal tunnel syndrome on the left and not as severe on the right," which he found to be "quite consistent with his examination." (Ex. JE3, p. 9) Dr. Wilkerson recommended surgery on the left and a cortisone injection on the right. (Id.) He also gave him carpal tunnel splints. (Ex. JE3, p. 12)

On October 24, 2016, claimant was seen by Douglas Martin, M.D., for the purpose of an independent medical examination (IME) at the direction of the employer. (Ex. C, p. 1) Claimant reported that "he did not have any improvement" in his condition. (Ex. C, p. 2) Dr. Martin stated that claimant's current symptoms were "numbness in the thumb, index and middle finger bilaterally," with nighttime waking, "positive flick symptomology, and difficulty with fine manipulation of objects," and that claimant believed his grip strength had decreased. (Ex. C, p. 3) Dr. Martin found negative Tinel's and Phalen's tests bilaterally and normal bilateral wrist range of motion, but positive Durkan's compression tests bilaterally. (Ex. C, p. 4) He found claimant's grip strength testing did not result in a bell-shaped curve and therefore concluded that it was invalid. (Id.)

Dr. Martin opined that "I do not believe that this gentleman's carpal tunnel syndrome can be related to his work activities." (Ex. C, p. 5) Dr. Martin stated that his causation opinion was "based upon review of the medical documentation as presented, as well as review of the job description, job video and its application to the current evidence based medicine literature on the subject." (Id.) Dr. Martin referred to the American Medical Association Guides to the Evaluation of Permanent Impairment, Second Edition, in his discussion. However, this agency has most recently adopted the Fifth Edition of the AMA Guides. Dr. Martin discussed various risk factors associated with occupational activities that include high force and unusual postures, along with very forceful work as being "very strong evidence" of causation and that highly repetitive work in combination with other factors also represented "very strong evidence" for a causal connection. (Ex. C, p. 6) I note that claimant described the work that he performed as both forceful and repetitive. Dr. Martin questioned why claimant would

have problems with the left hand greater than the right when the job video showed a worker (not claimant) primarily using his right hand to pull guts from turkeys. However, claimant stated that he primarily used his left hand to pull the guts out of the turkeys. (Tr. p. 28) I note that the job video actually showed workers using both hands and applying force when gripping, twisting and pulling the guts from the bird. (Ex. JE5) I also counted the primary worker in the video pulling guts from 10 turkeys during the 60 second video, or about one every 6 seconds. (Id.) The work is clearly repetitive and the video shows that force is required with gripping, twisting and pulling in order to accomplish the task.

Dr. Martin stated that factors other than working at Tyson are more likely to blame for claimant's complaints, but he admits that he does "not know much about his health history prior to his employment time at Tyson." (Ex. C, p. 6) Dr. Martin stated that because claimant was in prison, "it is probably better to state that there are other outside work activities that have a better explanation and relationship to the development of carpal tunnel syndrome or it is certainly also possible that a combination of genetics and anthropomorphic factors have a better explanation for why this occurred." (Id.) The undersigned is uncertain as to what Dr. Martin may be referring to when he states there may be "anthropomorphic factors" involved. The undersigned understands anthropomorphism to be "[t]he ascribing of human motivation, characteristics, or behavior to inanimate objects, animals, or natural phenomena." Webster's II New Collegiate Dictionary, Third Edition, 2005. Further, Dr. Martin gives no particular suggestions nor does he refer to any specific evidence of what other factors may be the contributing factors that he envisioned, outside of his employment.

Dr. Martin declined to give an opinion concerning maximum medical improvement (MMI). (Ex. C, p. 7)

The undersigned puts very little weight on the causation opinion of Dr. Martin, which is based on speculation of an admittedly unknown prior medical history and assumptions about claimant's prison work activity and appears to ignore the lack of symptoms immediately prior to claimant's work at Tyson and development of symptoms following the beginning of his work at Tyson.

Dr. Martin agreed that concerning future medical treatment, "carpal tunnel injection therapy" would be appropriate, and if that failed then carpal tunnel release surgery may be needed. (Ex. C, p. 5)

On November 7, 2016, Dr. Martin appears to confirm his prior opinion after reviewing records from Dr. Wilkerson. (Ex. C, p. 11)

On May 3, 2017, Sunil Bansal, M.D. authored a report following an IME that occurred on January 20, 2017. (Ex. 3, pp. 29-36) Dr. Bansal indicated that he reviewed medical records from the Tyson nurse, but he made no comments about those notes. He also reviewed the CCUSO records, and the EMG/NCV studies. He indicated that he reviewed records of Dr. Martin's IME, but again makes no comments about

those records. (Ex. 3, pp. 29-31) Claimant advised Dr. Bansal that he continued to have constant pain in his bilateral hands, left greater than right, but the swelling was not as bad as it had been. (Ex. 3, p. 32) He also described tingling and numbness in his hands with pain extending into his left shoulder and difficulty lifting above his left shoulder. Dr. Bansal conducted a physical examination and found positive Tinel's and Phalen's bilaterally, but full range of motion in both wrists. (Ex. 3, pp. 33-34) He diagnosed bilateral carpal tunnel syndrome. Dr. Bansal found that January 20, 2017, the date of his examination was the appropriate date of MMI. (Ex. 3, p. 34) Dr. Bansal discussed claimant's job duties, including the process of pulling the heart and organs from the turkey and stated that the "job tasks would place significant pressure on the wrists based on repetition and the angle in which he would position his wrists while he reached out to twist and yank the hearts from the birds." (Ex. 3, pp. 34-35) Claimant also advised Dr. Bansal that he used his left hand a significant amount of the time when he was pulling guts, which Dr. Bansal believed explained the increased symptoms on the left side. (Ex. 3, pp. 34-35) Dr. Bansal found that the job duties "of repetition, posture, and force for the yanking of the hearts," are the sort of variables that "clearly qualify as having a strong potential to cause carpal tunnel syndrome." (Ex. 3, p. 35) He also noted that claimant denied a history of carpal tunnel issues before working for the defendant employer. (Ex. 3, p. 35) He concluded that "Mr. Arnzen developed bilateral carpal tunnel syndrome from his cumulative work at Tyson/Hillshire." (Ex. 3, p. 34)

Dr. Bansal assigned a 4 percent upper extremity rating on the right, which he converted to 2 percent of the whole person. He assigned 5 percent upper extremity impairment on the left, which he converted to 3 percent of the whole person. (Ex. 3, pp. 35-36)

Considering the impairment ratings assigned by Dr. Bansal, I find that the 2 percent whole person for the right and the 3 percent whole person for the left, equals 5 percent of the whole person pursuant to the Combined Values Chart, page 604 of the AMA Guides, Fifth Edition. Dr. Bansal recommended a surgical consultation for further medical care and permanent restrictions of no lifting greater than 10 pounds occasionally or 5 pounds frequently.

Considering the causation and permanent impairment opinions of Dr. Martin and Dr. Bansal, I find Dr. Bansal's opinion to be more persuasive. Dr. Bansal considers claimant's medical history including his lack of any symptoms prior to commencing work at Tyson and the onset of symptoms after starting his job, as well as the repetitive nature of his job. The potential for injury from the job of pulling guts is supported by the "Evis Ramp-in Guideline," which anticipates the potential for some level of pain during the process of slowly progressing an employee to full work capacity and expects that an employee may need to slow down and move backward on the scale, presumably to avoid further pain or injury. (Ex. 1, p. 1) I accept the causation opinion and the 5 percent whole person functional rating assigned by Dr. Bansal. However, I do not accept Dr. Bansal's opinion concerning permanent restrictions, which are far more restrictive than claimant's demonstrated ability and are discussed further below.

On July 16, 2017, Phil Davis, M.S., provided a vocational opinion stating that claimant had been unable to find employment since his termination and considering the temporary restrictions assigned by Dr. Wilkerson and the permanent restrictions of Dr. Bansal that claimant would be in the sedentary physical demand level. (Ex. 4, p. 40) He concluded that considering all factors, including claimant's criminal history, that his ability to obtain or maintain employment has "now been eliminated." (Ex. 4, p. 41)

On July 24, 2017, defense counsel obtained an opinion from Ze-Hui Han, M.D., of Iowa Ortho, following a records review. It does not appear that Dr. Han ever examined claimant. (Ex. E, p. 4) Dr. Han found no causal connection between claimant's bilateral carpal tunnel symptoms and his work at Tysons. This was based on claimant having worked for the defendant employer for 36 days, noting that for the majority of the time, his work performance was around 25 percent to 60 percent, 4 days at 80 percent and 3 days at 100 percent. (Ex. E, p. 5) Dr. Han agreed that the work required repetitive wrist twisting and bending, but stated that because it was for a "short period of time . . . there is not enough evidence that these work activities could be the main reason for his bilateral carpal tunnel syndrome." (Id.) Dr. Han also stated that "Tyson did not contribute or materially aggravate his bilateral carpal tunnel syndrome." (Id.)

On November 9 and 10, 2017, the defendant inquired with Dr. Han concerning a response to Dr. Bansal's IME report. (Ex. E, p. 1) On November 10, 2017, Dr. Han, authored a letter to defense counsel and stated that because claimant only worked at Tyson for a short time and he only worked at "about 50-60% of the work load," that he "cannot contribute his bilateral carpal tunnel syndrome to the work activities in Tyson." (Ex. E, p. 2) Dr. Han did not suggest any other alternative cause nor discuss the possible relevance of the lack of symptoms prior to commencing work at Tyson and the onset of symptoms shortly after claimant began the job. (Id.) However, Dr. Han stated that based on the EMG and nerve conduction testing the appropriate treatment would be surgical release, which would be "the number one choice." (Id.) As a records review only, I am less persuaded by Dr. Han's opinion, particularly when Dr. Han does not offer any other explanation for the undisputed diagnoses of bilateral carpal tunnel. Nor is there any evidence presented that would give a reasonable alternative cause. The weight of the evidence supports a finding of causation as stated by Dr. Bansal, which I have accepted above.

On December 22, 2017, claimant was seen by Neal Wachholtz of Excel Physical Therapy for the purpose of a functional capacity evaluation (FCE) at the request of defendants. Mr. Wachholtz found the testing to be invalid based on results reflecting a submaximal effort. (Ex. F, p. 1) However, claimant did demonstrate the ability to lift and carry 40 pounds occasionally and 30 pounds frequently, although these were described as "self-limiting." (Id.) He also demonstrated grip strength of 80 pounds on the left and 100 pounds on the right. (Id.) At the time of the exam, claimant reported continued "sharp pains in both wrists with any level of activity," and "intermittent numbness in his right anterior and lateral forearm," and "tingling in the tips of the middle and ring fingers of his left hand" and "occasional swelling in both hands." (Ex. F, p. 3)

Mr. Wachholtz noted claimant's diagnosis of bilateral carpal tunnel syndrome, and stated that "[i]t would be appropriate to restrict him from high repetitions with high forces and awkward postures during grasping activities." (Id.)

I find that claimant was able to perform, at a minimum, at the levels observed and recorded by Mr. Wachholtz, which clearly exceed the restrictions assigned by Dr. Bansal. I also note that the abilities observed by Mr. Wachholtz are more consistent with the work that claimant was actually performing while working at 100 percent capacity in the weeks prior to his termination. Claimant described his work as requiring the ability to lift 50 pound turkeys, reaching, and forceful gripping, twisting and pulling. I accept Mr. Wachholtz's opinion concerning claimant's ability to work and I am not dissuaded by the fact that the report was deemed invalid, because the invalidity related to a perceived lack of effort, which if true, would only push the work abilities higher. Therefore, the invalidity does not negate the actual ability that claimant showed during testing, which was recorded by Mr. Wachholtz as the ability to lift and carry 40 pounds occasionally and 30 pounds frequently and grip strength of 80 pounds on the left and 100 pounds on the right. (Ex. F, p. 1)

I also note that Allan Wiegert, a Continuous Improvement Manager testified that even with the restrictions assigned by Dr. Bansal, which I have not accepted, that about 80 percent of the jobs in the plant would fit within those restrictions. (Tr. p. 80)

5) ADDITIONAL FINDINGS

Defendant contends claimant's proper rate in this case is based on an average weekly wage of $311.98, with a stipulated exemption status of S-1, for a calculated rate of $207.91. Defendant's rate calculation is contained in claimant's exhibits at Exhibit 5, page 42. Claimant is critical of defendant's calculation noting that although claimant only worked at Tyson for 9 weeks, as reflected in the exhibit, the total wages for that 9-week period was divided by 13 weeks, artificially deflating the average weekly wage. (Ex. 5, p. 43) I find that if one divides the total wages in Exhibit 5 of $4,055.71 by the 9 weeks actually worked, the average weekly wage is $450.63, not $311.98, as proposed by defendant. However, more importantly, I find that the weeks relied upon by defendant include weeks through June 25, 2016, which clearly go beyond the date of injury of May 12, 2016. (Ex. 5, 42)

Although claimant's exhibits also contain paystubs prior to April 30, 2016, these are from his work with the prior employer, Hillshire. (Ex. 5, pp. 44-50)

Claimant argues that the correct average weekly wage is $461.88, but he also relies on weeks that go beyond the date of injury. (Claimant's Brief, p. 17)

CONCLUSIONS OF LAW

1. The first issue is whether claimant's injury arose out of and in the course of his employment with defendant employer.

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).

When an expert opinion is based upon an incomplete history, the opinion is not necessarily binding upon the commissioner. The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence, together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire & Casualty Co., 526 N.W.2d 845 (Iowa 1995).

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.

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then

becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

I have accepted the opinion of Dr. Bansal above concerning causation for the reasons there stated. I conclude that claimant sustained bilateral carpal tunnel syndrome that arose out of and in the course of his employment and I conclude that the manifestation date of the injury was on May 12, 2016, when claimant was first seen for medical care for his injuries.

2. The second issue is whether the alleged injury caused temporary disability from the period of June 22, 2016 through January 19, 2017.

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).

I have concluded that the correct manifestation date of the injury is May 12, 2016. On that date, claimant was seen by the on-site nurse, who noted that he had been working at 80 percent capacity on the ramp-in schedule for his job. The nurse reduced his work rate to 40 percent, but did not take him off work. (Ex. JE1, p. 4) As claimant continued to work, his work capacity rose and by June 6, 2016, he returned to the prior 80 percent level of work. He continued to improve in proficiency and he reached 100 percent by June 13, 2016. (Ex. 1, pp. 4-5)

Claimant was not taken off work by any medical provider as a result of the work injury.

Claimant seeks healing period benefits from June 22, 2016 through January 19, 2017, from his termination through the time that Dr. Bansal placed him at MMI. The entirety of claimant's argument for entitlement to temporary benefits is based on the stipulations contained in the Hearing Report that claimant was off work during the above period of time and that defendant agrees that the commencement of permanency benefits, is the date of Dr. Bansal's placement of claimant at MMI. However, these stipulations alone do not fulfill the statutory requirements for temporary benefits.

Defendant argues that claimant was terminated for reasons unrelated to any alleged work injury, specifically for poor job performance. I note that claimant was "behind in his training and development," and because of his slow development, he was

not recommended for continued employment, as his probationary period was concluding. (Ex. 1, p. 9)

It is significant that claimant was never taken off work by any physician in this case, and I conclude that claimant has not shown by a preponderance of the evidence that his time off work from June 22, 2016 through January 19, 2017 was related to or caused by an inability to work and that temporary benefits are therefore not triggered solely due to his termination from employment by Iowa Code section 85.33(1). Although the termination may reflect unreasonable behavior on the part of the employer, the fact remains that the statutory trigger for temporary benefits did not occur.

Claimant is therefore, not entitled to temporary benefits.

3. The third issue is whether the alleged injury caused permanent disability, and the extent thereof. I have not been asked to determine the appropriate conversion date, which the parties have stipulated is January 20, 2017. (Hearing Report, p. 1)

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).

In this case, I have concluded above that claimant sustained bilateral carpal tunnel injuries as a result of his May 12, 2016 work injury. I have also accepted as a statement of minimum physical ability, the findings of physical therapist, Neal Wachholtz.

Claimant argues that he is permanently and totally disabled based on the vocational report of Phil Davis. I note that Phil Davis, based his conclusion on the restrictions assigned by Dr. Bansal, which I have rejected. Clearly, claimant was working far in excess of the restrictions assigned by Dr. Bansal at the time of his termination. I therefore, reject the conclusion of Mr. Davis, that claimant's ability to obtain and maintain employment, even in view of his criminal record, has been eliminated. I conclude that claimant is not permanently and totally disabled. Therefore, having accepted the functional impairment of Dr. Bansal above, I find that claimant has sustained 5 percent permanent impairment as a result of his May 12, 2016 work injury. Five percent is 25 weeks. Iowa Code section 85.34(2)(s).

4. The final issue is the correct rate.

The parties have stipulated that the appropriate exemption status is single with one dependent. (Hearing Report, p. 1) The issue for the determination of rate is the correct average weekly wage.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Iowa Code section 85.36(6).

When an injured worker has been employed less than 13 weeks prior to the date of the injury, the average weekly wage is to be calculated using:

> the amount the employee would have earned had the employee been so employed by the employer the full thirteen weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation. If the earnings of other employees cannot be determined, the employee's weekly earnings shall be the average computed for the number of weeks the employee has been in the employ of the employer.

Iowa Code section 85.36(7).

Defendant contends claimant's proper rate in this case is based on an average weekly wage of $311.98, with an exemption status of S-1, for a calculated rate of $207.91. Defendant's rate calculation is contained in claimant's exhibits at Exhibit 5, page 42. As stated above, defendant uses weeks in their calculation that go beyond the injury date. I therefore reject defendant's calculation. Claimant argues the missing weeks must be filled in using the customary earnings of similarly situated employees, rather than the available limited wage information for claimant. However, as I have found above, claimant also relies on weeks that go beyond the date of injury, and I must therefore also reject claimant's rate calculation. The weeks to be used in calculating rate are those preceding the date of injury, not after. Iowa Code section 85.36(7). Both defendant and claimant improperly rely on weeks post-injury in their calculations.

In this case, claimant was hired by the defendant employer on April 25, 2016 and the manifestation of the injury occurred on May 12, 2016. This is little more than 2 weeks, and reliance on these weeks alone risks skewing the resultant average weekly wage based on the very small data sample.

I accept the testimony of claimant that other similarly situated employees worked on average, 40 hours per week. Using this 40 hours per week, the evidence establishes that claimant was earning $12.90 per hour plus a shift differential of $0.50 per hour for a total hourly wage of $13.40. This amount multiplied by 40 hours equals $536.00 per week. Therefore, using the actual weeks that claimant worked prior to the date of injury, which include the weeks ending on May 7, 2016 ($502.04) and the week ending April 30, 2016 ($577.64) plus the amount of $536.00 for the prior eleven weeks, I

calculate the total gross wages for the 13 weeks prior to the date of the injury to be $6,975.68. This amount divided by 13 weeks equals an average weekly wage of $536.59. Applying this amount and the stipulated dependency exemption status of single and one (S-1), I arrive at an applicable workers' compensation rate of $336.95, from the appropriate rate book for this date of injury.

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay claimant permanent partial disability benefits of twenty five (25) weeks, beginning on the stipulated commencement date of January 20, 2017, until all benefits are paid in full.

All weekly benefits shall be paid at the above identified rate of three hundred thirty six and 95/100 dollars ($336.95) per week.

All accrued benefits shall be paid in a lump sum.

Defendant shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten (10) 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 (2) percent, see Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018)

Defendant 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 19th day of June, 2018.

TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Matthew M Sahag
Attorney at Law
301 E. Walnut St., Ste. 1
Des Moines, IA 50309
matthew@dickeycampbell.com

James L. Drury II
Attorney at Law
800 Stevens Port Dr., Ste. 713
Dakota Dunes, SD 57049-5005
Jamey.drury@tyson.com

TJG/sam

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.