BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JUAN ARROYO, Claimant, vs. SMITHFIELD FOODS, INC., Employer, and SAFETY NATIONAL CASUALTY CORP., Insurance Carrier, Defendants.	File No. 5066288 A R B I T R A T I O N D E C I S I O N Headnotes: 1803, 1803.1, 2502, 2907

STATEMENT OF THE CASE

Juan Arroyo, claimant, filed a petition for arbitration against Smithfield Foods, Inc., as the employer and Safety National Casualty Corporation as the insurance carrier. This case came before the undersigned for an arbitration hearing on October 8, 2019.

The parties filed a hearing report at the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted by the hearing deputy and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

Claimant was the only witness that testified at hearing. The parties offered Joint Exhibits 1 through 8. Claimant offered Exhibits 1 through 9. Defendants offered Exhibits A through L. All offered exhibits were admitted as evidence without objection.

Counsel for the parties requested the opportunity to file post-hearing briefs. Their request was granted. All parties filed post-hearing briefs on November 4, 2019. The case was deemed fully submitted to the undersigned on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether the January 11, 2018 work injury caused permanent disability.

2. Whether the work injury caused a permanent injury limited to a scheduled member injury, bilateral scheduled member injury, or whether the injury extends beyond the scheduled member and should be compensated as an industrial disability.

3. If claimant sustained an injury that extends beyond the scheduled member, whether claimant is currently entitled to industrial disability benefits or is limited to payment of a functional impairment rating at this time.

4. If claimant sustained permanent disability, the extent of claimant's entitlement to permanent partial disability benefits.

5. The applicable commencement date for permanent partial disability benefits, if any are awarded.

6. Whether claimant is entitled to reimbursement of an independent medical evaluation fee pursuant to Iowa Code section 85.39.

7. Whether costs should be assessed against either party and, if so, the extent of any such assessment.

FINDINGS OF FACT

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

Juan Arroyo is a 51-year-old gentleman, who was born in Mexico. He immigrated to the United States in 1985. Mr. Arroyo has no formal education. He cannot read or write in English. He speaks only a few words in English. Mr. Arroyo speaks Spanish in his work place or has the ability to use an interpreter. He is capable of reading and writing in Spanish only to write or recognize his own name.

While still residing in Mexico, Mr. Arroyo worked on a family farm, planting corn. This work was physical in nature. It required him to lift sacks of corn to load them onto animals and was required to lift these sacks above shoulder level.

Since moving to the United States, claimant has worked in the agricultural field, performing manual labor in grapefruit and mandarin fields in Florida. He testified that he was required to lift more than 50 pounds while performing this work and required to work above head level.

Mr. Arroyo subsequently moved to Nebraska and worked in a meat packing plant in Grand Island, Nebraska. He described his job as deboning a part of the cow around the shoulder area. Claimant testified he was required to lift more than 50 pounds in this job and that he worked over shoulder level on occasion.

In 2002, claimant moved to Denison, Iowa. He began working for Farmland (which later became and is hereinafter referred to as Smithfield Foods) in April 2002. At this same time, he also opened and operated a bar in Denison, Iowa with a friend. He testified that he did not perform any of the administrative paperwork, such as accounting, for the bar. He owned and operated the bar for approximately two years and concedes that he performed some of the day-to-day work such as bartending duties. As the bar owner, Mr. Arroyo waited on customers and carried boxes of beer weighing 20-30 pounds.

When he started at Smithfield Foods, Mr. Arroyo had no problems, symptoms, or limitations with his hands, shoulders, or neck. In his first position with Smithfield Foods, claimant emptied drums of fat. In this position, he was required to lift boxes from floor level. It required him to lift between 20 and 50 pounds and work at approximately face level. Claimant performed this job for approximately two years.

Claimant moved positions within Smithfield Foods. His second position was a ham deboning position. He worked at this job for approximately three years. As a ham de-boner, claimant was required to lift 20-30 pounds, including some infrequent lifting over shoulder level.

Mr. Arroyo's third position with Smithfield Foods was as a membrane skinner. He performed this job for approximately 11 years. This is the position claimant was performing on the date of injury.

As a membrane skinner, Mr. Arroyo removed a part of the hog's leg using a skinner, which consisted of a blade to which claimant pressed the leg to remove the membrane. Claimant testified that the job required him to lift 10 pounds or less. He stood to perform the work, looked down repeatedly, and lifted from waist level to the skinner. He then had to lift the piece of meat to a higher conveyor positioned at approximately face level. He described the position as repetitive in nature, processing a piece of meat approximately every 10-15 seconds for the duration of an 8-hour shift. He estimated that he worked approximately 48 hours per week.

Mr. Arroyo testified that when he initially bid to this job, the company changed the blades on the skinner frequently making the work much easier. However, closer to 2018, he testified that the blade would get dull and that his immediate supervisor did not always acknowledge or act upon his request to change the blade. Mr. Arroyo testified that the skinner position was much more difficult and required much greater force when the blade was dull. Claimant testified that in 2017, he bid to a new job because his shoulder felt tired or fatigued.

Claimant bid to a job emptying drums and bellies. He thought it was going to be an easier job, but testified it was not. He described emptying drums and large piles. He described having to use a hook and to pull bellies onto his line. He described a requirement to pull the bellies from above shoulder height. He also testified that the bellies would often be frozen and he was required to use significant force to pull the

frozen parts apart. He also described this position as more repetitive than the skinner position.

Mr. Arroyo testified that he developed symptoms within three days of transferring to the bellies job. Specifically, he testified that he developed symptoms in his neck and into his right arm down to his right hand. Claimant remained on his new job for only nine days.

After developing symptoms in the bellies job, claimant returned to his skinner position. He attempted to use his left hand and arm more when he returned to this position. However, he then developed symptoms into his left hand and forearm. Fortunately, he testified that the left hand and arm symptoms resolved within weeks of their development. Nevertheless, Mr. Arroyo believes the combination of the job duties he performed in the skinner position and the bellies position is what caused his injuries resulting in this contested case proceeding.

Claimant alleges a January 11, 2018 injury date. He first talked with the company nurse about his condition and symptoms this day. He concedes that he did not sustain any traumatic injury on that date. Instead, he alleges the repetitive work and processes caused him cumulative injuries.

After Mr. Arroyo reported the injury to the employer, it directed him for medical care. Specifically, defendants sent claimant for evaluation by Todd A. Woollen, M.D. on February 1, 2018. Dr. Woollen documented complaints of right shoulder and hand pain. Dr. Woollen makes no mention of neck symptoms on February 1, 2018. (Joint Exhibit 3, pages 68-69) When asked about this fact at trial, claimant asserted that he told the physician about his neck complaints through an interpreter, but he was not sure it was a professional interpreter that was present.

Claimant's symptoms continued after his initial evaluation by Dr. Woollen. Dr. Woollen referred him for an EMG and nerve conduction studies on his right upper extremity. That EMG occurred on March 19, 2018. It demonstrated findings consistent with right carpal tunnel syndrome. However, the EMG demonstrated no evidence of radiculopathy, which might suggest a neck injury. (Joint Ex. 6)

After the EMG, Dr. Woollen referred Mr. Arroyo to an orthopaedic surgeon, Benjamin Paulson, M.D. Dr. Paulson evaluated claimant on May 10, 2018. Dr. Paulson noted right carpal tunnel syndrome by history and confirmed by EMG. However, Dr. Paulson documented that claimant reported the condition as asymptomatic on May 10, 2018. He recommended continued use of a wrist brace and opined that claimant required no work restrictions as a result of the right carpal tunnel syndrome. (Joint Ex. 7, pp. 106-109)

Defendants inquired of Dr. Paulson as to the cause of claimant's right carpal tunnel syndrome. In a May 25, 2018 report, Dr. Paulson opined that the right carpal tunnel syndrome was not causally related to claimant's work activities. Instead, Dr.

Paulson opined, "I believe his carpal tunnel syndrome is idiopathic in nature and he would have developed carpal tunnel syndrome to the same degree now whether he worked for Smithfield Foods or not." (Joint Ex. 7, p. 115)

Mr. Arroyo returned to Dr. Paulson on June 6, 2018. Again, Dr. Paulson noted that claimant was asymptomatic at that evaluation. He declared claimant to have achieved maximum medical improvement for the right carpal tunnel syndrome. Dr. Paulson opined that claimant required no work restrictions and released him from further care for the carpal tunnel condition. (Joint Ex. 7, p. 110)

Dr. Woollen also acted upon claimant's right shoulder complaints by ordering an MRI of the right shoulder. (Joint Ex. 2, p. 66) Dr. Woollen then referred claimant to an orthopaedic surgeon, Bradley A. Lister, M.D., for his right shoulder complaints. Dr. Lister evaluated Mr. Arroyo on May 23, 2018.

Dr. Lister documented right shoulder pain, accurately noted that there was no specific injury and that claimant's right shoulder pain started in January 2018. Dr. Lister interpreted the MRI to demonstrate tendinopathy of the right shoulder supraspinatus and infraspinatus tendons. He noted partial articular surface tearing of these tendons as well as a partial interstitial tear of the long head of the biceps tendon. (Joint Ex. 3, p. 80) Ultimately, Dr. Lister's impression was tendinopathy of the right rotator cuff.

On May 23, 2018, Dr. Lister performed a right shoulder injection and instructed claimant on daily shoulder stretching exercises to perform. Follow-up was recommended in June 2018 but claimant was on vacation so follow-up was scheduled for July 25, 2018. (Joint Ex. 3, p. 82)

On July 25, 2018, Dr. Lister again examined claimant's right shoulder. Once again, he diagnosed claimant with tendinopathy of the right rotator cuff. He added the prior diagnosis of right carpal tunnel syndrome as well. However, Dr. Lister recommended against any surgical intervention on the right shoulder and recommended a 15-pound lifting restriction. He discharged claimant from further treatment with a recommendation to continue daily shoulder stretching exercises. (Joint Ex. 3, p. 83)

Defendants returned claimant to Dr. Lister for further evaluation on September 26, 2018. Dr. Lister confirmed at that appointment that claimant achieved maximum medical improvement for the right shoulder. Dr. Lister also confirmed his prior lifting restriction of 15 pounds with the right shoulder. He added that claimant should avoid repetitive pushing and pulling with the right shoulder and avoid overhead activities with the right shoulder. (Joint Ex. 3, p. 85)

After being released by his treating orthopaedic surgeons for both the right shoulder and right carpal tunnel syndrome, Mr. Arroyo sought an independent medical evaluation performed by Sunil Bansal, M.D. on August 14, 2018. Dr. Bansal opined that claimant sustained injuries to the neck, right shoulder, right arm, and right hand as a result of repetitive work activities at Smithfield Foods. Dr. Bansal opined that claimant

sustained myofascial pain syndrome in his neck, a right rotator cuff tear, a SLAP tear, and a partial tear of the right biceps tendon as a result of his work activities at Smithfield Foods. (Claimant's Ex. 1, p. 9)

Dr. Bansal opined that claimant also sustained a left shoulder strain, but did not declare that condition to be permanent in nature. With respect to the right carpal tunnel syndrome, Dr. Bansal concurred with Dr. Paulson that claimant achieved maximum medical improvement on June 6, 2018. Dr. Bansal assigned no permanent impairment related to the right carpal tunnel syndrome. (Claimant's Ex. 1, p. 14)

With respect to the right shoulder injury, Dr. Bansal opined that claimant sustained a four percent (4%) permanent impairment of the whole person. (Claimant's Ex. 1, p. 14) However, Dr. Bansal also opined that claimant requires further orthopaedic treatment for the right shoulder. Specifically, Dr. Bansal opines that claimant needs further orthopaedic treatment for his right rotator cuff tear and right shoulder SLAP tear. (Claimant's Ex. 1, p. 9) Dr. Bansal opines that, if no further treatment is sought or provided, claimant's right shoulder achieved maximum medical improvement on August 14, 2018. (Claimant's Ex. 1, pp. 9-10)

With respect to his neck injury, Dr. Bansal opines that claimant has not achieved maximum medical improvement. Instead, Dr. Bansal recommends an MRI of the neck. Depending on the results of the MRI, Dr. Bansal opines that claimant may require epidural injections or neck surgery. If no further neck treatment is desired or provided, Dr. Bansal opines that claimant achieved maximum medical improvement on August 14, 2018. (Claimant's Ex. 1, p. 9) Although he opines claimant has not yet achieved maximum medical improvement, Dr. Bansal opines that claimant sustained a five percent permanent impairment of the whole person as a result of the neck injury. (Claimant's Ex. 1, p. 13) Dr. Bansal opined that claimant should not lift more than 10 pounds with his right arm, should not push or pull greater than 20 pounds on an occasional basis with the right arm, should only forward reach occasionally and should not lift above shoulder. (Claimant's Ex. 1, p. 14)

Following Dr. Bansal's evaluation, defendants scheduled claimant for an independent medical evaluation of claimant's shoulders, which was performed by Dean K. Wampler, M.D. on October 30, 2018. Dr. Wampler documented normal range of motion in the left shoulder without crepitus or clicking. Claimant reported no pain during left shoulder movements or tenderness during palpation. Dr. Wampler concluded that claimant's left shoulder examination was "completely normal." (Joint Ex. 8, p. 136)

Dr. Wampler recorded complaints of diffuse soreness about the right shoulder upon palpitation of the shoulder and biceps tendon. Claimant demonstrated reduced range of motion both actively and passively during Dr. Wampler's evaluation of the right shoulder. However, Dr. Wampler documented that claimant resisted some ranges of motion due to fear of pain. (Joint Ex. 8, p. 127)

Dr. Wampler identified diminished sensibility in the right index and middle finger. Dr. Wampler also documented normal and painless active cervical range of motion. (Joint Ex. 8, p. 138)

Dr. Wampler concurred with Dr. Lister's assignment of permanent restrictions for the right shoulder. He recommended right shoulder actions be limited to below chest height and within 18 inches of the body, but opined that these were consistent with Dr. Lister's restrictions. (Joint Ex. 8, p. 138) Dr. Wampler opined that claimant "does not have any cervical spine or neck related problem connected with his work duties at Smithfield Foods." (Joint Ex. 8, p. 139) However, Dr. Wampler did note that claimant has "Myofascial pain with an ill-defined trigger point in his right trapezius muscle that accounts for his symptoms in the top of his shoulder with some radiation to his neck and right outer arm." (Joint Ex. 8, p. 139) Dr. Wampler also noted that claimant has tendinopathy in his right shoulder. (Joint Ex. 8, p. 139)

Defendants subsequently scheduled claimant for an independent medical evaluation of his shoulders performed by Steven A. Aviles, M.D. on February 4, 2019. Dr. Aviles' diagnoses included, "Vague right shoulder pain" and "Normal left shoulder." (Joint Ex. 7, p. 126) Dr. Aviles documented inconsistencies in claimant's right shoulder evaluation and indicated that claimant "showed 6/9 signs of inappropriate behavior" during Dr. Aviles' evaluation. Ultimately, Dr. Aviles identified no objective evidence to define or diagnose a specific right shoulder injury arising out of work. Therefore, Dr. Aviles opined that claimant did not sustain a right shoulder injury as a result of his work activities at Smithfield Foods. (Joint Ex. 7, p. 127)

Dr. Aviles declared maximum medical improvement because he concluded that claimant had not sustained a work injury. Similarly, without a definable work injury, Dr. Aviles opined that claimant sustained no permanent impairment to the right shoulder as a result of work activities at Smithfield Foods. (Joint Ex. 7, p. 127)

With respect to the left shoulder, Dr. Aviles opined that claimant "has normal shoulder exam findings. I do not believe that there was an injury to his left shoulder." (Joint Ex. 7, p. 128) As a result, Dr. Aviles declared the left shoulder at maximum medical improvement and assigned no permanent impairment related to work activities at Smithfield Foods. (Joint Ex. 7, p. 128) He assigned no permanent work restrictions for the left or right shoulders that would relate to work activities or injuries at Smithfield Foods. (Joint Ex. 7, p. 128)

Given Dr. Bansal's diagnosis of a neck injury, defendants also scheduled claimant for an independent medical evaluation by a spine surgeon, Todd J. Harbach, M.D., performed on February 28, 2019. Dr. Harbach noted the prior EMG findings ruled out radiculopathy from the neck. Dr. Harbach noted that plain x-ray films demonstrated claimant "has facet joint arthrosis which was not caused by work but could be aggravated by it." (Joint Ex. 7, p. 131) Dr. Harbach rendered a diagnosis of "cervical spondylosis without myeloradiculopathy." He opined that claimant does not qualify for a permanent impairment rating related to the neck. Dr. Harbach assigned no work

restrictions related to claimant's neck. (Joint Ex. 7, p. 131) Specifically, Dr. Harbach opined, "His cervical pathology is only mild facet joint arthrosis which is not a surgical problem nor is it a problem that is caused by work." (Joint Ex. 7, p. 131)

Mr. Arroyo testified that he did not have any neck or shoulder symptoms prior to January 2018. He acknowledged some prior right hand symptoms, but testified they resolved. I accept both statements as accurate, as there is no evidence that claimant had ongoing symptoms or treatment of the neck, right shoulder, right arm, or right hand prior to January 2018.

Claimant also obtained a medical report from his personal physician Michael Luft, D.O. Dr. Luft issued a report dated February 28, 2019 in which he concluded claimant has cervical and/or right trapezius myofascial pain syndrome, right rotator cuff tendinitis with partial surface tearing, and right carpal tunnel syndrome. Dr. Luft asserted claimant likely has permanent impairment and permanent restrictions as a result of the conditions. He causally related claimant's injuries to his repetitive work at Smithfield Foods. (Joint Ex. 1, pp. 30-31)

Considering all of the medical evidence in the record, I find the opinions of Dr. Harbach to be convincing with respect to claimant's neck condition. Dr. Harbach is an orthopaedic spine surgeon. He opines that claimant's neck condition was not causally related to his work activities at Smithfield Foods. I accept this opinion as accurate.

Dr. Harbach, however, also opines that claimant has facet joint arthrosis in his neck, which could be aggravated by his work activities. (Joint Ex. 7, p. 131) This probability is not enough to sway me that there was more likely than not a work related injury to claimant's neck.

Dr. Bansal speculates that claimant may have other discogenic pathology. Yet, claimant did not obtain a full workup of the neck to prove or disprove Dr. Bansal's speculations about his neck. In his rebuttal report, Dr. Bansal attempts to rectify his opinions with those of Dr. Wampler and Dr. Harbach. However, Dr. Bansal's initial opinions suggest or hypothesize that claimant's condition is the result of discogenic pathology. No other physician agrees with that conclusion, and radiculopathy was ruled out via the EMG. I do not find Dr. Bansal's opinions convincing without some objective evidence to support them. Dr. Harbach, the neck surgeon, refuted Dr. Bansal's opinions and opined that there likely was not a surgical intervention for claimant's neck.

Dr. Luft is not a specialist. He did have the advantage of evaluating claimant multiple times and of knowing claimant better than the one-time evaluators. However, he cannot provide a definitive diagnosis whether the injury is to the neck or the trapezius. I am not convinced that Dr. Luft's opinions and diagnoses should be given greater weight than a spine specialist, Dr. Harbach. Although I find the neck/trapezius issue to be a close evidentiary call and I found Mr. Arroyo credible when he testified that he did not have neck symptoms prior to January 2018, I ultimately find that claimant

failed to carry his burden to prove a permanent injury to his neck as a result of work activities at Smithfield Foods.

With respect to the left shoulder, Dr. Bansal diagnosed a left shoulder strain. Dr. Wampler identified a normal left shoulder examination. Dr. Aviles similarly documented a normal left shoulder evaluation. I find it is possible that claimant experienced some symptoms in his left shoulder. However, no physician has assigned a permanent impairment rating or permanent restrictions as a result of some left shoulder diagnosis. I find that claimant failed to prove a permanent injury to his left shoulder.

Turning to the right shoulder, I find the opinions of Dr. Lister to be most convincing. Dr. Lister was the treating orthopaedic surgeon. He noted findings on the right shoulder MRI detailing potential issues with the biceps tendon. Yet, Dr. Lister's final diagnosis of claimant's right shoulder was tendinopathy of the right rotator cuff. (Joint Ex. 3, p. 82) He opined that claimant achieved maximum medical improvement on September 26, 2018. I accept his diagnosis and date of maximum medical improvement as convincing.

Dr. Lister imposed lifting restrictions that precluded lifting over 15 pounds with the right arm, avoidance of repetitive pushing and pulling and avoidance of work over shoulder height with the right arm. (Joint Ex. 3, p. 85) I find these restrictions to be reasonable, consistent with the diagnosis, and medically necessary for claimant's right shoulder condition. Dr. Lister documents that defendants referred claimant to him for a work-related injury. However, he does not specifically address the mechanism of injury or definitely causally relate claimant's right shoulder condition to his work activities at Smithfield Foods.

Defendants obtained the opinions of Dr. Aviles, which challenge causal connection between the right shoulder condition and claimant's work at Smithfield Foods. Claimant relies upon the opinions of Dr. Bansal to specifically causally relate the right shoulder to claimant's work. Defendants did not ask Dr. Wampler to specifically address causation of the right shoulder. However, review of his report suggests that he, like Dr. Lister, assumed the right shoulder was causally related to work. The hearing report indicates that defendants accepted the right shoulder injury as a compensable claim. (Hearing Report, page 2, "Additional Issues" section)

In this case, I find the opinions of Dr. Bansal to be supported by the opinions of Dr. Lister and Dr. Wampler with respect to the right shoulder. I accept Dr. Bansal's causation opinion as most convincing on the issue of the right shoulder. I find that claimant proved by a preponderance of the evidence that he sustained a right shoulder injury as a result of his work activities at Smithfield Foods. I accept Dr. Lister's restrictions and Dr. Bansal's permanent impairment rating as most convincing with respect to the right shoulder. Therefore, I find that claimant proved he sustained a six percent (6%) impairment of the right upper extremity as a result of the right shoulder injury, the equivalent of four percent (4%) of the whole person. (Claimant's Ex. 1, pp. 13-14)

With respect to the right carpal tunnel condition, I do not find Dr. Aviles' opinions to be convincing. I find it highly improbable that claimant's right carpal tunnel condition was idiopathic and would have developed to the same degree without performing work activities at Smithfield Foods. However, it appears that all physicians agree that claimant sustained no permanent impairment rating related to the right carpal tunnel condition. Claimant's work restrictions are related to the right shoulder. I find that claimant proved he sustained right carpal tunnel syndrome as a result of his work activities at Smithfield Foods. However, he did not prove by a preponderance of the evidence that he sustained a permanent impairment or permanent injury as a result of the right carpal tunnel syndrome.

Ultimately, I find that claimant has proven a permanent injury to his right shoulder that resulted in permanent work restrictions. The right shoulder injury resulted in a six percent permanent impairment of the right upper extremity, or right arm. Claimant has proven entitlement to permanent disability for the right shoulder. He has also proven he achieved maximum medical improvement for the right shoulder on September 26, 2018.

CONCLUSIONS OF LAW

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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.

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

In this case, I found that claimant proved a permanent injury to his right shoulder. I found that he sustained permanent impairment and permanent disability as a result of the right shoulder injury. Therefore, I conclude claimant is entitled to an award of permanent partial disability benefits for his right shoulder injury on January 11, 2018.

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)-(u) (2019) or for a loss of earning capacity under section 85.34(2)(v) (2019). 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).

An injury to a scheduled member may, because of after effects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating of industrial disability. It is the anatomical situs of the permanent injury or impairment which determines whether the schedules in section 85.34(2)(a) - (t) are applied. Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943). Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

However, I found that claimant failed to prove by a preponderance of the evidence that he sustained a permanent neck injury, a permanent left shoulder injury, or a permanent right hand or arm injury as a result of carpal tunnel syndrome. Ultimately, I conclude that claimant failed to carry his burden of proof to establish he sustained a permanent injury to any body part other than his right shoulder. Instead, I conclude that claimant's injury should be compensated as a scheduled member injury to the right shoulder. Iowa Code section 85.34(2)(n) (2018).

When determining the functional loss of a scheduled member injury:

> [T]he extent of loss of percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American Medical Association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment.

Iowa Code section 85.34(2)(x) (2018).

The Iowa legislature enacted significant amendments to the Iowa workers' compensation laws, which took effect in July 2017. As part of those amendments, the legislature specified that injuries to the shoulder should be compensated as scheduled member injury on a 400-week schedule. Iowa Code section 85.34(2)(n) (2018). It has long been understood that an injury must be compensated as a scheduled injury if the legislature saw fit to list the injured body part in Iowa Code section 85.34(2)(a)-(u). Williams v. Larson Construction Co., 255 Iowa 1149, 125 N.W. 248 (1963). Having found that claimant did not prove his January 11, 2018, injury extended beyond the right shoulder, I conclude that the injury should be compensated as a scheduled member injury pursuant to Iowa Code section 85.34(2)(n) (2018).

I found that claimant sustained a six percent loss of function in his right shoulder as a result of the January 11, 2018, work injury. The Iowa legislature has established a 400-week schedule for shoulder injuries. Iowa Code section 85.34(2)(n). Claimant is

entitled to an award of permanent partial disability benefits equivalent to the proportional loss of his shoulder. Iowa Code section 85.34(2)(w); Blizek v. Eagle Signal Company, 164 N.W.2d 84 (Iowa 1969). Six (6) percent of 400 weeks equals 24 weeks. Claimant is, therefore, entitled to an award of 24 weeks of permanent partial disability benefits against the employer as a result of the January 11, 2018 right shoulder injury. Iowa Code section 85.34(2)(n), (w).

Mr. Arroyo also seeks an award of the cost of his independent medical evaluation performed by Dr. Bansal. 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).

However, Iowa Code section 85.39 established prerequisites that claimant must meet before reimbursement of an independent medical evaluation is required of the defendants. First and foremost, an evaluation of permanent disability must be made by a physician chosen by the defendants before claimant obtains his independent medical evaluation.

In this case, Dr. Paulson released claimant from further treatment of his right carpal tunnel syndrome and opined that the condition was not work related. Dr. Paulson also offered an opinion about permanent restrictions related to the right carpal tunnel syndrome prior to Dr. Bansal's evaluation. However, this record does not disclose that Dr. Paulson offered an opinion about permanent impairment prior to Dr. Bansal's evaluation in August 2018.

Similarly, Dr. Lister offered opinions about claimant's right shoulder diagnosis, declared maximum medical improvement and opined about permanent work restrictions. However, Dr. Lister did not offer an opinion about permanent impairment prior to Dr. Bansal's evaluation occurring. I did not identify any other physician's opinions pertaining to permanent impairment occurring or being rendered prior to Dr. Bansal's independent medical evaluation. Therefore, I conclude that claimant failed to establish the initial prerequisite of Iowa Code section 85.39 to obtain reimbursement of Dr. Bansal's fees under that statute. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 843-844 (Iowa 2015).

The final disputed issue is whether costs should be assessed against either party. Costs are assessed at the discretion of the agency. Iowa Code section 86.40.

Claimant prevailed and obtained an award of permanent disability benefits. The hearing report indicates that no voluntary permanent disability benefits were paid to claimant prior to hearing. Therefore, it was necessary for claimant to pursue this contested case proceeding to obtain the permanent disability benefits to which he was entitled. I conclude it is appropriate to assess claimant's costs in some amount.

Claimant's request for costs is itemized and documented in Claimant's Exhibit 7. Mr. Arroyo seeks reimbursement of his filing fee, or $100.00. This is a reasonable request and is assessed pursuant to 876 IAC 4.33(7). Mr. Arroyo also seeks his services costs upon each of the named defendants (combined service fees totaling $13.44). Again, this is a reasonable request for costs and these costs are taxed pursuant to 876 IAC 4.33(3).

Finally, claimant seeks assessment of claimant's independent medical evaluation report fee with Dr. Bansal. Claimant lists this cost as $2,774.00 in his itemization of costs. However, review of Dr. Bansal's itemized statement discloses that he charged $568.00 for his evaluation of claimant and $2,206.00 for his report. Having relied upon portions of Dr. Bansal's report, I conclude it is appropriate and reasonable to assess his report fee. I conclude that defendants should be assessed $2,206.00 for Dr. Bansal's report fee pursuant to 876 IAC 4.33(6). See Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 845-847 (Iowa 2015).

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant twenty-four (24) weeks of permanent partial disability benefits commencing on September 26, 2018.

All weekly benefits shall be paid at the stipulated weekly rate of six hundred nineteen and 19/100 dollars ($619.19).

Defendant shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

Defendants shall reimburse claimant's taxable costs totaling two thousand three hundred nineteen and 44/100 dollars ($2,319.44).

Defendant shall timely file all reports as required by 876 IAC 11.7.

Signed and filed this 6th day of February, 2020.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Michael Miller (via WCES)
James Byrne (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.