BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JULIO VARGAS,

Claimant,

vs.

TYSON FOODS,

Employer,
Self-Insured,
Defendant.

File Nos. 5041117, 5041115

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Julio Vargas, claimant, filed petitions in arbitration seeking workers' compensation benefits from Tyson Foods (Tyson), self-insured employer, defendant, as a result of an injury he allegedly sustained on July 7, 2010 and April 1, 2010 that allegedly arose out of and in the course of his employment. This case was heard in Des Moines Iowa, and fully submitted on September 2, 2014. The evidence in this case consists of the testimony of claimant, David Duncan, joint exhibits A through S, and claimant's exhibits 1 through 6.

ISSUES

For File No. 5041117 (Date of Injury: April 1, 2010):

1. The extent of temporary disability.
2. Whether the alleged injury is a cause of permanent disability and, if so;
3. Whether the alleged disability is a scheduled member disability or an unscheduled disability.
4. The extent of claimant's disability.
5. Whether claimant is entitled to payment of medical expenses.
6. Assessment of costs.

The parties stipulated claimant had an injury on April 1, 2010 that arose out of and in the course of employment that caused a temporary disability. The parties stipulated for this file that claimant's weekly rate is $427.74, and that defendant is

entitled to a credit of 16.286 weeks of benefits at $427.74 per week and for a payment of $900.69[1]

For File No. 5041115 (Date of Injury: July 7, 2010):

1. Whether claimant sustained a cumulative injury on July 7, 2010, which arose out of and in the course of employment;

2. Whether the alleged injury is a cause of temporary disability and, if so, the extent;

3. Whether the alleged injury is a cause of permanent disability and, if so;

4. Whether the alleged disability is a scheduled member disability or an unscheduled disability, and;

5. The extent of claimant's disability.

6. The commencement date of any permanent benefits.

7. Whether claimant provided timely notice to defendant.

8. Whether claimant is entitled to payment of medical expenses.

The parties stipulated for this file that claimant's weekly rate is $427.74 and that defendant is entitled to a credit of 16.286 weeks of benefits at $427.74 per week and for a payment of $900.69.

RULING ON APPLICATION TO REOPEN THE RECORD.

Defendant on February 5, 2015 filed a motion to reopen the record and submit additional evidence after the record was closed. Claimant filed a resistance. Rule 876 Iowa Administrative Code 4.31 provides:

> Completion of contested case record. No evidence shall be taken after the hearing.
> This rule is intended to implement Iowa Code section 86.18.

The record was closed after the hearing. I have no authority to allow evidence to be submitted after the hearing and after the record was closed. Defendant's motion to reopen the record and submit additional evidence is denied. Had the evidence been admitted it would not have made a material difference in and findings or conclusion in this opinion.

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[1] Defendant claims a credit of 16.286 weeks and the $900.69 payment in either case, not in both cases. They have paid 16.286 weeks of benefits total and one $900.69 payment. (Transcript, pages 13, 14)

FINDINGS OF FACT

The deputy workers' compensation commissioner having heard the testimony and considered the evidence in the record finds that:

Julio Vargas, claimant, was 45 years old at the time of the hearing. Mr. Vargas' primary language is Spanish. He went to the 8th grade in the Dominican Republic and has no additional education. (Exhibit R, page 2) He cannot read or write English. Prior to work at Tyson, Mr. Vargas said worked in greenhouses and grocery stores in New York. In his Social Security application his work history was listed as a cashier in a grocery store for a number of years and he spent four years in a chicken factory. (Ex. Q, p. 3) Mr. Vargas said he could not return to cashier and grocery work due to his back. (Ex. R, p. 2) Mr. Vargas was denied for his application for Social Security Disability. (Ex. Q, pp. 19 – 39)

Mr. Vargas started work at Tyson in October 2006. Mr. Vargas worked a number of different jobs on the various production lines. Claimant was terminated after his FMLA and Leave of Absence expired on June 7, 2012. (Ex. O, p. 5) He was not working at the time of the hearing. (Tr. p. 49) He has not applied for any work. (Ex. R, p. 3) Mr. Vargas described that whenever he used his arms overhead they would hurt and pop. He testified that he does little around the home due to his pains in his shoulder, back, and chest.

The first record of claimant complaining of right shoulder pain was a Tyson nurse's note of July 31, 2009. (Transcript, page 31; Ex. 1. p. 28) Mr. Vargas said that on Thursday April 1, 2010 he was removing a belly from a combo when the hook he was using to lift the bellies moved and he fell and hit the edge of a container; the combo. (Tr. pp. 32, 33; Ex. 4, pp. 144, 145) Mr. Vargas continued to work that day and the next. On Monday, he went to the company nurse complaining of right chest wall pain. (Ex. 1, p. 28) Mr. Vargas was referred to Mercy Occupational Health. Claimant was assessed as having, "Right anterior chest wall contusion and intercostal strain from apparent work-related blunt trauma, on April 01, 2010, superimposed on preexisting anterior mediastinal cyst." (Ex. A, p. 9) Mr. Vargas was returned to work with restrictions. On April 19, 2010, claimant was referred to physical therapy. The physical therapist assessed claimant with a pretty deep contusion of the right chest wall and felt his rehab potential was excellent. (Ex. D, p. 1) On June 6, 2010, Michael Staker, M.D., examined Mr. Vargas. Mr. Vargas was concerned he had a fractured rib and he was assured he did not. Dr. Staker's assessment was, "Right anterior chest wall pain, resolving." (Ex. A, p. 13) On June 7, 2010, Mr. Vargas retuned to Dr. Staker complaining of increased chest pain. Dr. Staker was uncertain of the etiology of his chest pain. (Ex. A, p. 15) On July 13, 2010, Timothy Maves, M.D., examined Mr. Vargas. His diagnosis was, "Probable costochondritis involving the 5th and 6th ribs on the right side." (Ex. G, p. 1) Dr. Maves provided injections on that date. On August 11, 2010, Dr. Maves noted that Mr. Vargas, "He has had right-sided chest wall pain that radiated out toward the shoulder and into the upper back and neck area since that time." (Ex. G, p. 3) Dr. Maves wrote:

> Possible myofascial pain involving the upper trapezius on the right side as well as costochondritis involving the sixth rib on the right. He responded partially to costochondral injections back about a month ago, and I think it is reasonable to repeat the sixth costochondral injection as well as add a trigger point in the right upper trapezius and see if we can get him some more complete relief. Julie states that he is probably going to be seen what sounds like by an orthopedist as a shoulder specialist for evaluation of his shoulder, and I think this is probably a good idea as well.

(Ex. G, p. 4) Mr. Vargas received another injection at that examination.

Thomas Dean, PA-C, examined Mr. Vargas. He stated that he had run out of therapeutic and diagnostic modalities for relief of Mr. Vargas' symptoms. PA-C Dean wrote, "States it is noticeable when he tries to reach his shoulder up and away and reaching out and way [sic] from his body." (Ex. A, p. 21) PA-C Dean noted Mr. Vargas had been complaining of shoulder pain. (Ex. A, p. 21) On September 21, 2010, PA-C Dean wrote that he had nothing further to offer Mr. Vargas. He wrote that, "Patient was not injured in the RT shoulder." (Ex. A, p. 24)

On April 21, 2010, Mr. Vargas saw his primary care physician, David Bedell, M.D., for chest pain. (Ex. E, p. 1) On May 14, 2010, Dr. Bedell wrote, "April 1st 2010 he was pulled into the top of a barrel with an elevated border, had immediate pain, but not too bad. The next day it was much worse, he has SOB [shortness of breath] and couldn't twist or bend." (Ex. E, p. 4) Dr. Bedell noted claimant had fallen about three years ago and hurt his left wrist and coccyx. His assessment was rib contusion, rib fracture, and left wrist pain. (Ex. E, p. 5) On June 15, 2010, Dr. Bedell reviewed x-rays and noted that no factures or dislocations were found. (Ex. A, p. 7) On July 9, 2010, Mr. Vargas complained of shoulder pain. Dr. Bedell's note states, "Multiple month h/o bilateral L > R shoulder pain. No history of trauma. Worse when he tries to scratch the back of his head. No arm symptoms. Slightly worse with torsion of his neck." (Ex. E, p. 8) Dr. Bedell noted right shoulder tenderness over the proximal deltoid muscle and popping in the AC area with full abduction on November 2, 2012 and assessed Mr. Vargas with bilateral shoulder pain. (Ex. 2, p. 31) Mr. Vargas went to the emergency room on November 12, 2010 complaining of shoulder pain, his chest and right ear external pain. The note of that visit states that claimant had been experiencing shoulder pain for two years. (Ex. 2, p. 33) Mr. Vargas was examined by Tammy Madsen, PA-C. The records of that visit state, "With regards to the patient's shoulder pain. Unfortunately this is likely due to osteoarthritis from years of manual labor." (Ex. 2, p. 35) Mr. Vargas asked Dr. Bedell to correct his medical records about his shoulders. (Ex. E, p. 27) Dr. Bedell wrote a note dated January 13, 2012 stating that his records did not show claimant as having shoulder issues before his accident on April 1, 2012. (Ex. E, p. 39) On January 11, 2011, Dr. Bedell noted Mr. Vargas, "[P]resents with both sides shoulder pain and multiple other somatic complaints." (Ex. E, p. 16) On June 17, 2012, Dr. Bedell assessment of the claimant was in part.

> Mr. Vargas has multiple somatic complaints and depressed mood. I am hopeful that once his depression improves, his symptoms will also improve. A large degree of his depression symptoms are related to this shoulder pain and lack of working as a consequence.

(Ex. E, p. 30)

On August 25, 2011, Mr. Vargas was seen for low back pain radiating down into his right leg by Dr. Bedell. (Ex. 2, p. 49) On November 30, 2011, Dr. Bedell wrote a "To Whom It May Concern Letter on behalf of Mr. Vargas. In this letter he stated,

> He has been seen multiple times for his shoulder pain and over time has developed right shoulder adhesive capsulitis and a right shoulder superior labrum from anterior to posterior tear (SLAP). This injury could very well stem from his April 2010 accident since it was at that point that he started to complain of shoulder pain.
>
> . . . .
>
> I do not have access to his clinical notes around the time of his two accidents to address the issue of whether there is a temporal correlation between either of his accidents and the back pain.

(Ex. E, p. 36)

Dr. Bedell wrote another "To Whom It May Concern" letter in April 2012. In this letter he commented that he did not believe Mr. Vargas could return to the same level of physical activity that he performed in his previous jobs. (Ex. E, p. 50) On February 7, 2013, Dr. Bedell wrote another "To Whom It May Concern" letter. This letter summarized a number of Mr. Vargas' medical conditions. As to the claimant's shoulders, he noted it was difficult to really pinpoint one specific problem that could be addressed with an injection or procedure. He believed the best thing for claimant was to become reconditioned with physical therapy. Dr. Bedell also noted Mr. Vargas continues to have right chest wall pain. (Ex. E, p. 69) On December 10, 2013, Dr. Bedell wrote his last, "To Whom It May Concern" letter. He noted Mr. Vargas' chest wall pain was stable and no further treatment was indicated. He noted Mr. Vargas' was limited in overhead work due to shoulder pain and recommended physical therapy. (Ex. E, pp. 84, 85) On June 11, 2014, Dr. Bedell said that Mr. Vargas was at maximum medical improvement (MMI) and advised him that he did not think surgery was advisable for his sacpulocostal syndrome/popping in his back. (Ex. E, p. 92)

Dr. Bedell was deposed on April 30, 2014. Dr. Bedell said that Mr. Vargas did not complain about his shoulders during his initial visits. On July 9, 2010, was the first visit where Mr. Vargas complained of shoulder pain. (Ex. S. p. 4) Dr. Bedell referred Mr. Vargas to the orthopedic department due to his complaints of shoulder pain. (Ex. S, p. 5) Dr. Bedell stated that it was not until February 24, 2011 that Mr. Vargas wanted

his back pain addressed, although he had mentioned multiple pain complaints previously. (Ex. S, p. 6) Dr. Bedell agrees with the diagnosis that Dr. Bedell provided in Exhibit I, pages 40, 41, although he was not certain that Mr. Vargas provided a complete information to the providers at Mercy Occupational Health at that time. (Ex. S, p. 11) While Dr. Bedell answers a question before it is completely asked, it appears he agrees that Mr. Vargas' chronic pain from his chest wall injury was causally treated to his work injury.

> Q. The issue of causation of what his current complaints are related to that accident, is there anything that you can relate specifically to the chronic pain syndrome issues with his chest wall? Do you feel within a reasonable degree of medical certainty that that may be related to - -
>
> A. Correct

(Ex. S, p. 13) At the time of the deposition he was uncertain if the injury of April 1, 2010 caused Mr. Vargas' shoulder problems. (Ex. S, p. 13) On June 16, 2014, Dr. Bedell was shown a picture of a combo that was larger than the one he had viewed at his deposition. Dr. Bedell wrote:

> After reviewing the photos of a "combo" and noting that they are much larger than the containers that were in the DVD that we viewed, the nature of Mr. Vargas' accident from April 1, 2010 is much easier to understand. I now find Mr. Vargas' explanation of his accident/injury completely plausible. I now can visualize him leaning over at the edge of the combo attempting to hook the pork bellies (or whatever part of the pig he was dealing with) and if the hook didn't catch or tore through the meat while he was pulling with sufficient force, he could easily sustain a significant shoulder injury as well as the chest wall injury that he complained of. Whether the accident in April of 2010 caused his right shoulder problems or was one of many small repetitive use injuries to his shoulder leading to a tear in his superior labrum is difficult to determine with certainty, however there is no doubt in my mind that the work that Mr. Vargas did at Tyson is the principal cause of his shoulder problems. I can say this with a reasonable degree of medical certainty.

(Ex. 6, p. 148)

Mr. Vargas worked up to July 7, 2010. On that day, Mr. Vargas said he was having pain in his chest, shoulders, back, neck, and had problems breathing. (Tr. p. 39) Claimant stopped working on that date and received payments from Tyson until November 1, 2010. (Tr. pp. 41, 42) Mr. Vargas believed he received weekly sick pay benefits for a time thereafter. (Tr. p. 42)

Dr. Bedell referred claimant to Mathew Bollier, M.D., for his shoulder pain and was seen on January 7, 2011. (Ex. I, p. 1) Mr. Vargas reported pain in both shoulders

with his right worse than his left. On March 9, 2011, a right shoulder MRI was performed. The MRI showed a partial thickness bursal sided tear involving the distal supraspinatus tendon and subacrominal subdeltoid bursitis. (Ex. 2, p. 40) An MRI of the cervical spine on March 3, 2011 found mild degenerative changes of the cervical spine at C4-C5 and C5-C6. (Ex. 2, p. 42) On August 29, 2011, Dr. Bollier recommended arthroscopy of the shoulder. (Ex. I, p. 14) Dr. Bollier performed shoulder surgery on October 12, 2011. The post-operative diagnosis was SLAP lesion, type II, disorder of the tendon of biceps and bursitis of shoulder. (Ex. I, p. 22) On April 9, 2012, Dr. Bollier noted, relatively new onset of posterior scapular pain and recommended physical therapy. (Ex. I, pp. 35, 39) On March 7, 2013, Dr. Bollier signed off on a letter prepared by defendant's counsel. Dr. Bollier agreed to:

> 2. Having reviewed the report of Mercy Occupational Health dated April 5, 2010, I do not agree that the incident as reported was a likely cause of Mr. Vargas' shoulder problems (including but not limited to the SLAP lesion which was subsequently diagnosed and on which I performed surgery.)

(Ex. I, p. 40)

Claimant identified Exhibit 4 as pictures of combos and testified that it was similar to the one he injured himself on April 1, 2010. I find his testimony credible that this was the type of combo he injured himself on April 1, 2010. Defendant objected due to lack of foundation, that the pictures were not authorized by Tyson, and the unauthorized pictures violated company policy. The objection was overruled. Claimant sufficiently identified the pictures to provide foundation. Claimant testified that he did not take the picture himself, but they were sent to his cell phone. Mr. Vargas testified he did not know who sent him the pictures. (Tr. pp. 56 – 60) His testimony about that fact was not believable. It was clear Mr. Vargas did not want to name a Tyson employee who could have been disciplined for sending him the pictures.

Mr. Vargas testified that his left wrist pain was from his fall in 2007. (Tr. p. 64) He acknowledged that the physicians that Tyson had determined on November 1, 2010 told him he was at maximum medical improvement and they had no further treatment to offer him. (Tr. p. 66: Ex. A, pp. 29, 30)

On November 1, 2010, Theodore Koerner, M.D., answered a series of questions concerning claimant's conditions that were asked by Tyson. Dr. Koerner stated his diagnosis of Mr. Vargas was "Mild R anterior CW [chest wall] contusion & intercostal strain, objectively recorded many months ago." (Ex. A, p. 26) Dr. Koerner did not believe Mr. Vargas' shoulder complaints were related to his accident of April 1, 2010. Dr. Koerner noted Mr. Vargas' blunt trauma caused an aggravation, but it was now completely resolved. (Ex, A, p. 26) He wrote that Mr. Vargas needed no additional treatment, was at maximum medical improvement (MMI) and had no permanent impairment. (Ex. A, pp. 27, 30) Dr. Koerner's impression was:

IMPRESSION:

1. Right anterior chest wall contusion and intercostal strain from apparent work-related blunt trauma on 04/01/10, superimposed on pre-existing anterior medial cyst, completely resolved to baseline. The patient's physical examination demonstrates no objective dysfunction or tenderness. There only remains mild subjective pain.

2. Bilateral, completely normal shoulder examination. Only subjective pain remains.

(Ex. A, p. 30)

David Duncan human resources manager for the Columbus Junction plant testified. He testified that the line claimant was working on used cardboard combos and one plastic combo. Mr. Duncan testified that Mr. Vargas was terminated after he had been off work and had exhausted Tyson's leave policy.

Mr. Vargas was notified by letter, written in English, that as of November 5, 2010 Tyson would not pay for his bilateral shoulder medical treatment, but would continue to pay for treatment for his right chest condition that were authorized. (Ex. P. p. 1)

Mr. Vargas injured his left wrist in a work accident in March 2007. He was evaluated by Brian Adams, M.D. Dr. Adams wrote,

1. My diagnosis is posttraumatic arthritis secondary to malunion of a left distal radius fracture sustained at a remote previous time.

2. I believe the work related injury as I understand it on 1/31/07 caused somewhat increased symptoms in the left wrist but I do not believe the history is consistent with a major aggravation which substantially changed the underlying disorder.

3. I do not believe the work related injury on 1/31/07 permanently altered the underlying condition described in number 1 above, nor did it cause permanent change in to the condition.

(Ex. H, p. 11)

While claimant has put in evidence about hearing loss and tinnitus, the evidence does not support a compensable claim. Hearing testing was normal. (Ex. K, p. 3; Ex. N. p. 3) There is no convincing causation opinion that his tinnitus was induced by work.

In July 2009 Mr. Vargas was complaining of right shoulder pain that had caused discomfort for over eight months. (Ex. 1, p. 27)

On October 30, 2012, Robert Milas, M.D., examined claimant and provided a report. His impression was "derangement of both shoulders." (Ex. L, p. 2) He provided a 36 percent whole body rating and stated that Mr. Vargas should have his left shoulder evaluated by an orthopedic surgeon. He recommended light duty for Mr. Vargas and no over the shoulder work. (Ex. L, p. 2)

Mr. Vargas has requested reimbursement of certain medical expenses. He is requesting the balance after a group insurance paid on his bills of $2,308.54 for hospital bills and $3,746.95 for physician bills. The bills are itemized as to date, but not what service and what medical treatment was provided.

Mr. Vargas cannot return to heavy or medium manual labor at this time due to his right shoulder, chest pain, and depression. While Mr. Vargas testified he is very limited in any of his abilities, none of the medical providers have indicated Mr. Vargas is as limited as he thinks he is. I find Mr. Vargas has a 30 percent loss of earning capacity due to his right shoulder, chronic chest pain, and depression.

REASONING AND CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

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).

In these claims, Mr. Vargas has requested that a finding be made that he has multiple injuries that arose out of and in the course of his employment at Tyson and occurred as a result of his accident on April 1, 2010 or was the result of cumulative trauma with a July 7, 2010 date of injury.

Claimant's testimony that he did not know who took pictures of the combo was not convincing. The employer has a policy of not permitting pictures within the plant. The employer is entitled to such a policy and is entitled to enforce such a policy. I presume that claimant's desire to not have a co-worker disciplined or fired for providing the picture is his motivation for not disclosing his source for the picture. The source of who took the picture is not relevant as to causation and did detract some from his overall credibility; it did not make the rest of claimant's testimony untrustworthy or not credible.

Tyson admits that Mr. Vargas suffered an injury on April 1, 2010 when he hit his chest on the edge of a combo. Tyson denies that Mr. Vargas is entitled to any additional benefits. Mr. Vargas received treatment and was diagnosed with a chest wall injury and received treatment including injections and medication. By August 31, 2010, PA-C Dean noted he was running out of diagnostic or therapeutic options for Mr. Vargas. Dr. Koener found on November 1, 2010 that Mr. Vargas was at MMI and had only mild subjective pain with no permanent impairment. Claimant continued to experience chest pain after November 8, 2010. Dr. Bedell assessed Mr. Vargas with chronic pain due to his chest injury. While there is no objective finding for the cause of the continuing chest pain, the medical reports show that Mr. Vargas continues to complain of chest wall pain since April 2010 through the time of hearing. The records show that claimant's chest wall pain was at least lit-up and permanently aggravated by his April 1, 2010 injury.

Dr. Koerner opined that Mr. Vargas' shoulder was not the result of his April 1, 2010 injury. There is no indication that Dr. Koerner saw the correct picture of a combo for his opinion or whether he determined whether Mr. Vargas' arm position when he hit the combo could have caused his right shoulder problems.

I find the opinion by Dr. Bedell the most convincing in this case. He has extensive contact with Mr. Vargas. He saw him on a very regular basis for a number of medical issues and had the most opportunity of any of the health care providers to evaluate his conditions. Dr. Bedell is bilingual and was able to communicate with Mr. Vargas in Spanish. After he saw a picture of the combo he was able to provide a convincing causation opinion as to both the chest and right shoulder injury.

I find that for File 5041117, the April 1, 2010 claim, Mr. Vargas has proven permanent impairment. He has shown that his chronic chest wall pain and depression are related to his work injury of April 1, 2010. I also find that the injury of April 1, 2010 has caused the claimant's right shoulder injury. I again find Dr. Bedell's opinion most convincing. Dr. Bedell also found Mr. Vargas had depression that was aggravated by his chronic pain in his chest and shoulders, among other factors as well.

Mr. Vargas has not proven a cumulative injury for File No. 5041115, the July 7, 2010 claim, and takes nothing on this file.

Mr. Vargas argued in the Claimant's Summary Statement that the claimant's left wrist is a compensable injury. There is no evidence that the April 1, 2010 injury or cumulative injury alleged of July 7, 2010 either caused or permanently aggravated his condition. Dr. Adams does not support a new injury to the wrist. This injury occurred in 2007. Claimant has not proven in these two files he is entitled to any award for his left wrist.

Mr. Vargas has also requested he be found to have a lower back condition that arose out of and in the course of his employment at Tyson. Mr. Vargas' back condition did not manifest for many months after he stopped working. As this manifested, after he stopped working for Tyson, he has not proven it was work related or permanently aggravated by work at Tyson. I did not consider potential limitations he may have due to a back condition in assessing his industrial disability.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id., at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

I do not find that Mr. Vargas has proven a prima facia case for odd-lot. He has not attempted to look for any work. He has not provided vocation evidence that meets his burden. No physician has recommended he not work and he still has the ability to be a cashier. Mr. Vargas is not an odd-lot employee.

Mr. Vargas has a limited education and work history that is primarily labor work. He does have experience in grocery stores and as a cashier. He has not worked since July 2010. The Social Security Administration found he did not meet their criteria for disability. At the time of the hearing, claimant had work-related impairments of chest wall pain, depression, and right shoulder limitations. Dr. Bedell and Dr. Bollier have recommended that Mr. Vargas engage in physical therapy as a means to recondition his strength, and reduce pain. Dr. Bedell also believed that this will decrease his pain and lessen his depression. Mr. Vargas has been resistant to actively engaging in physical therapy. Considering all of the factors of industrial disability I find Mr. Vargas has a 30 percent industrial disability.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986)

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Mr. Vargas has requested healing period benefits from October 12, 2011 through October 20, 2012. (Tr. p. 10) Tyson paid temporary benefits from July 8, 2010 through October 31, 2010. I find Mr. Vargas is entitled to healing period benefits from the date of his right shoulder surgery, October 12, 2012 through April 8, 2012. April 9, 2012 is the date for commencement of permanent benefits. This date was chosen as Dr. Bollier examined Mr. Vargas for his six-month post-surgery exam and noted improved mechanical symptoms, but persistent pain. (Ex. I, p. 35) Mr. Vargas' pain symptoms have not really changed since that date and no significant treatment has occurred since then.

Under Iowa Code section 85.27, the employer has the right to choose medical care as long as it is offered promptly and is reasonably suited to treat the injury without undue inconvenience to the employee. An employer is not responsible for the cost of medical care not authorized by section 85.27. A claimant can seek payment of unauthorized medical care by a preponderance of the evidence that the care was reasonable and beneficial. Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010). To be beneficial, the medical care must provide a more favorable medical outcome than would likely have been achieved by the care authorized by the employer. Id. at 206. The claimant has a significant burden to prove the care was reasonable and beneficial. Id. at 206.

Tyson was providing medical care to the claimant until they notified him on November 5, 2010 that they would no longer pay for any medical costs related to his bilateral shoulders after that date. Tyson agreed to pay for authorized chest injury expense at this time. In order for Mr. Vargas to receive reimbursement for expenses by Dr. Bedell before November 2010 he would need to show that he had a more favorable outcome than the care being provided by Tyson. He has not done so and is not entitled to reimbursement.

After Tyson sent the letter on November 5, 2010 denying liability for any shoulder condition, Tyson lost any authorization defense for the shoulder condition. Tyson is responsible for the medical expenses for claimant's bilateral shoulder injuries including the surgery performed by Dr. Bollier and the MRI of the right shoulder.

Dr. Milas was the only doctor that attributed Mr. Vargas' left shoulder problems to his April 1, 2010 injury. I do not find his report convincing. It is very short and not very thorough. It relies on Mr. Vargas' opinions about causation without reference to confirmatory medical records or a detailed description of causation by Dr. Milas.

Mr. Vargas is entitled to future medical care for his chest pain, right shoulder, and depression aggravated by his chronic chest and shoulder pain.

Many of Mr. Vargas' visits to Dr. Bedell and other health care practitioners involved multiple complainants. As I have found that the chronic pain from the chest wall injury, depression, and the right shoulder problems are the only work-related injuries Tyson is responsible for, Tyson has no obligation to pay for such care for his blood screening, lower back treatment, and back MRI, ear and hearing treatments, and other health issues found in the records.

Mr. Vargas has also requested medical mileage for a total of $2,075.88. (Ex. 3, p. 143) The trips to Mercy Occupational Health between April 5, 2010 and November 1, 2010 in the amount of $216.45 should be paid by Tyson. The trips to Muscatine Radiology and Muscatine/Columbus Junction PT in the amount of $192.06 should be paid by Tyson. Tyson should pay the medical mileage for the IME that Dr. Milas performed of $58.44.

Mr. Vargas has requested reimbursement for trips to the University of Iowa Hospital. He is entitled to receive medical mileage for his treatment by Dr. Bollier. He is not entitled to medical mileage for treatment from Dr. Bedell. As exhibit 3 does not itemized the expenses I cannot make a specific award.

Mr. Vargas has requested costs in the amount of $902.32. Tyson agreed at the hearing to pay the IME fee of $550.00 of Dr. Milas. (Tr. p. 12)

I find Mr. Vargas is entitled to the filing fee, cost of two depositions and two reports for a total of $352.23 pursuant to 876 IAC 4.33

ORDER

For File No. 5041115 (Date of Injury July 7, 2010):

Mr. Vargas takes nothing.

For File No. 5041117 (Date of Injury April 17, 2010):

Defendant shall pay healing period benefits from October 12, 2012 through April 8, 2012 at the rate of four hundred twenty-seven and 47/100 dollars ($427.47) per week.

Defendant shall pay one hundred fifty (150) weeks of permanent partial benefits at the weekly rate of four hundred twenty-seven and 47/100 dollars ($427.47) per week commencing April 9, 2012.

Defendant is entitled to a credit of sixteen point two eight six (16.286) weeks of benefits at four hundred twenty-seven and 74/100 dollars ($427.74) per week and for a payment of nine hundred and 69/100 dollars ($900.69).

Defendant shall pay cost medical expenses and medical mileage as set forth in this decision.

Defendant shall pay any past due amounts in a lump sum with interest as provided by law.

Defendant shall file subsequent reports of injury as required by this agency.

Signed and filed this 10th day of March, 2015.

James F. Elliott

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876 4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.