BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JULIO CERDA, Claimant, vs. WELLS ENTERPRISES, INC., Employer, Self-Insured, Defendant.	File No. 20003875.01 ARBITRATION DECISION Head Notes: 1403.30, 1802, 1803

STATEMENT OF THE CASE

Claimant, Julio Cerdo, filed a petition in arbitration seeking workers' compensation benefits from Wells Enterprises, Inc., (Wells), self-insured employer. This matter was heard on June 7, 2021, with a final submission date of August 31, 2021.

The record in this case consists of Joint Exhibits 1 through 7, Claimant's Exhibits 1 through 9, Defendant's Exhibits A through G, and the testimony of claimant and David Calhoun. Serving as interpreter was Luz McClellan.

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.

ISSUES

1. Whether the injury is a cause of a temporary disability.
2. Whether the injury is the cause of a permanent disability; and if so,
3. The extent of claimant's entitlement to permanent partial disability benefits.
4. Commencement date of benefits.
5. Medical mileage.
6. Whether defendant is liable for a penalty under Iowa Code section 86.13.

FINDINGS OF FACT

Claimant was 47 years old at the time of the hearing. Claimant was born in Mexico. Claimant went up to the fifth grade in Mexico. Claimant says he speaks a little English. Claimant came to the United States in 2002.

Claimant began working at Tyson in Nebraska in 2002. Claimant worked on the production line at Tyson. Claimant left Tyson in 2006 to work at Wells. Claimant was an order picking technician at Wells. (Exhibit E) Claimant's job at Wells required him to fill orders. Claimant moved product orders from a production line onto a pallet.

Claimant said the orders he lifted from the production line weighed between 20 and 40 pounds. Claimant estimated he lifted between 150-300 orders an hour. Claimant worked 9-12 hours a day. He said he worked between 4 to 7 days a week. (Testimony pages 20-21)

Claimant said that on September 15, 2019, he felt pain in his left elbow and shoulders. He reported an injury to his foreman. Claimant said his foreman suggested he take a voluntary layoff during the slow holiday season to see if his injury would heal.

Claimant said he took time off. He returned to work in December 2019. Claimant said his symptoms continued.

On January 16, 2020, claimant was evaluated by Rodney Cassens, M.D., for left elbow and bilateral shoulder pain. Symptoms began when claimant was repetitively lifting at work. Claimant was assessed as having lateral epicondylitis and bursitis in the left elbow and bilateral rotator cuff tendinitis. Dr. Cassens opined that the bursa was aggravated by a bone spur in the elbow, which was not work related. Claimant was told to take ibuprofen and get a tennis elbow strap. He was prescribed physical therapy. Claimant was returned to work with a 10-pound weight restriction. (Joint Exhibit 2, pp. 16-18)

On January 20, 2020, claimant was given temporary work at Wells consistent with his restrictions, which claimant accepted. (Ex. 2, p. 1)

David Calhoun testified he is the director of risk management at Wells. In that capacity, he is familiar with claimant and his workers' compensation injury. (TR p. 72) Mr. Calhoun said that on January 27, 2020, Wells was made aware of a complaint in claimant's department regarding inappropriate behavior. He said the initial complaint was not specific to claimant. Mr. Calhoun said that in the course of the investigation, Wells discovered claimant was a party to the misbehavior. (TR pp. 72-74)

Specifically, Mr. Calhoun testified that a video from a phone was submitted by a co-worker during the investigation showing claimant "dry-humping" a co-worker in a heating room. (TR p. 74)

Exhibit B consists of three short videos. Video one of Exhibit B lasts approximately 10 seconds. It shows a man in a black coat wrestling or potentially pretending to "dry-hump" a co-worker on a bench. The second video is approximately 2 seconds long and shows what appears to be a man in a black coat laughing. Video number three is approximately 10 seconds long. It shows a man in a black coat wrestling or pretending to "dry-hump" a co-worker on the floor. All individuals in the video are clothed in cold weather gear. (Ex. B)

Mr. Calhoun said the investigation also found that a co-worker complained of being uncomfortable working in the same area as claimant. (TR p. 75) Mr. Calhoun said that claimant and three other co-workers were terminated as a result of the investigation regarding this behavior. (TR p. 76) Mr. Calhoun testified he was not personally involved in the investigation. (TR p. 76) He said claimant was terminated on January 30, 2020, for inappropriate behavior. (TR p. 76) Claimant testified he was not one of the men seen in the videos. He said he was only shown the video approximately seven days after he was terminated. Claimant said that he was told, at the time of the termination, the video was made in March or April of 2019 or "thereabouts." (TR pp. 34, 61)

Both claimant and Mr. Calhoun testified that claimant applied for, but was denied, unemployment insurance benefits. (TR pp. 65, 76)

Exhibit A are termination documents for claimant regarding his employment at Wells. The documents indicate:

> A specific complaint came in about one of Julio's peers, which spun an extensive investigation from HR and management. Through such investigation and video evidence, it was discovered that Julio had been engaging in an unwelcome sexual behavior by dry humping some of his peers (horseplay).
>
> The behavior was confirmed via video evidence. The inappropriate behavior happened mainly while in RM13 warm-up shack.
>
> Through such investigation, it was discovered that the extent of the inappropriate behavior was of unwelcome sexual manner and or encouraged by one of his peers and himself. Specifically, by dry humping some of his peers.
>
> Julio's behavior caused some of his peers to want to bid out of the workgroup or avoid the warm-up shack altogether.

(Ex. A, p. 2)

On February 13, 2020, claimant was seen by Dr. Cassens in follow-up. Claimant indicated his pain was about the same. Claimant had full range of motion in his shoulders. Claimant was again assessed as having lateral epicondylitis in the left elbow

and bilateral rotator cuff tendinitis. Dr. Cassens believed claimant's pain exceeded what would be expected on the physical exam. Claimant was treated with medication and returned to work with restrictions of a 10-pound lifting limitation for each upper extremity. (JE 2, p. 24)

On March 2, 2020, claimant underwent an MRI of the right shoulder. It showed a moderate tendinosis supraspinatus tendon with a mild bursal surface fraying at the insertion and a tear and attenuation of the posterior superior glenoid labrum. (JE 4)

Claimant returned to Dr. Cassens on March 6, 2020. Claimant's left elbow symptoms had improved. The MRI showed a moderate tendinosis and fraying at the insertion. Claimant was referred to an orthopedist for further evaluation of bilateral rotator cuff tendinosis exacerbation. Claimant was found to be at maximum medical improvement (MMI) for the left elbow. (JE 2, p. 29)

Claimant testified he did not tell Dr. Cassens his left elbow had improved. (TR pp. 46-49)

On March 25, 2020, claimant was evaluated by Ryan Meis, M.D., for bilateral shoulder pain. Claimant was given a steroid injection in both shoulders. (JE 1, pp. 6-10)

Claimant returned to Dr. Meis on May 13, 2020. Claimant had no significant improvement from the injection. Claimant's pain became worse with activity. Claimant was assessed as having bilateral shoulder pain, right greater than left. Dr. Meis did not see anything on claimant's MRI. He was given a Medrol Dosepak and told to work aggressively on range of motion exercises. (JE 1, pp. 11-12)

Claimant returned to Dr. Cassens on May 20, 2020. Claimant had normal range of motion and strength in both shoulders. Claimant was referred to physical therapy. (JE 2, p. 31)

Claimant saw Dr. Cassens in follow-up on June 10, 2020. Claimant was found to have normal range of motion and strength in both shoulders. Claimant indicated improvement of symptoms, but he still had difficulty sleeping. Claimant was prescribed medication and continued physical therapy. (JE 2, p. 35)

Claimant returned to Dr. Cassens on July 6, 2020, and July 29, 2020, in follow-up. On both exam dates claimant had normal range of motion and strength in both shoulders. (JE 2, pp. 38-41)

On August 12, 2020, claimant returned to Dr. Cassens in follow-up. Claimant indicated little improvement of symptoms. Physical therapy records noted claimant's range of motion seemed to improve with distraction. Claimant was found to have normal range of motion and strength on exam of both shoulders. Claimant was found to be at MMI. He was recommended to have a functional capacity evaluation (FCE). (JE 2, p. 42)

On August 27, 2020, claimant underwent an FCE. Claimant was found to have given fair effort in testing. He was found to be able to work in the medium heavy physical demand level. (JE 5)

Claimant returned to Dr. Cassens on September 10, 2020. Dr. Cassens found there was not a significant difference between the FCE results and the physical demands of claimant's job. As a result, no permanent restrictions were given. Claimant was found to have no permanent impairment. Claimant was released from care. (JE 2, pp. 43-44)

In a November 10, 2020 report, Sunil Bansal, M.D., gave his opinions of claimant's condition following an IME. Claimant had pain in his left arm and left shoulder. Claimant was assessed as having left and right shoulder rotator cuff tendinitis and lateral epicondylitis in the left elbow. Dr. Bansal opined that claimant's bilateral shoulder and left elbow condition were caused as a result of repetitive physically demanding work at Wells. (Ex. 1)

Dr. Bansal found that claimant had a 5 percent permanent impairment to the left shoulder, an 8 percent permanent impairment to the right shoulder, and a 4 percent permanent impairment to the left upper extremity for the elbow condition. He restricted claimant to no lifting over 10 pounds and no frequent turning or twisting of the left arm. (Ex. 1)

In a May 26, 2021 letter, Dr. Cassens indicated claimant's range of motion and strength were normal in his bilateral shoulders as of August 12, 2020. Based on that August 2020 exam, he found that claimant had no permanent impairment to the left or right shoulder. (JE 6, p. 84)

On June 2, 2021, in response to a letter written by defendant's counsel, Dr. Meis indicated he was unable to identify any objective injury to claimant's right or left shoulder. He opined claimant did not need permanent restrictions regarding his shoulders and claimant had no permanent impairment to either shoulder. (JE 7)

Dr. Cassens testified in deposition that he treated claimant from January 2020 through August 2020. He testified during that period of time he measured claimant's range of motion and strength in both shoulders. Dr. Cassens testified that on visits on January 30, 2020, February 13, 2020, February 27, 2020, March 6, 2020, May 20, 2020, June 10, 2020, July 6, 2020, July 29, 2020, and August 12, 2020, claimant exhibited normal range of motion and strength in both shoulders. (Ex. 8, depo pp. 47-57) He testified that on visits of February 27, 2020, and March 6, 2020, claimant indicated his left elbow symptoms were improving. He said that on claimant's March 6, 2020 exam, claimant indicated his left elbow symptoms had significantly improved. (Ex. 8, depo pp. 48-49) He testified that on subsequent visits claimant did not communicate problems or discomfort in the left elbow. (Ex. 8, depo p. 55) He testified that as of March 6, 2020, claimant had no permanent impairment in the left elbow. (Ex. 8, depo p. 51)

Dr. Meis testified in deposition that he was unable to identify any objective injury of either of claimant's shoulders. He testified claimant's exam, MRI and other diagnostics did not warrant any permanent impairment. (Ex. 9, depo pp. 50-52)

Dr. Meis testified that when he examined claimant on May 13, 2020, claimant had a pain-free full range of motion in the left elbow. (Ex. 9, depo p. 53)

Claimant testified that he has looked for work through ads in the paper and through his brother-in-law. Claimant said he has not worked since leaving Wells. (TR p. 38)

Claimant testified he has ongoing pain in both shoulders and his elbow. He said that given his condition, he could not return to work at Tyson. He said given his condition, he could not return to work at Wells. (TR pp. 39-40)

CONCLUSION OF LAW

The first issue to be determined is whether the injury resulted in a temporary disability.

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. 6.904(3).

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).

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

Claimant contends he is due temporary disability benefits from January 30, 2020, through August 27, 2020. (Claimant's post-hearing brief, p. 21)

Claimant was evaluated by Dr. Cassens on January 16, 2020. At that visit he was put on temporary work restrictions. (JE 2, p. 16) On January 20, 2020, claimant was offered and accepted light duty work at Wells. (Ex. C)

On January 30, 2020, claimant was terminated from Wells for inappropriate behavior. Termination records from Wells indicated claimant was found to be ". . . engaging in an unwelcoming sexual behavior by dry humping some of his peers." Documents also indicate that claimant's behavior ". . . caused some of his peers to want to bid out of the work group or avoid the warm-up shack altogether." (Ex. A, p. 2) Exhibit B shows a video of an individual, who appears to be the claimant, wrestling or "dry-humping" a co-worker.

Mr. Calhoun testified that Wells heard of misconduct on approximately January 27, 2020. After an investigation, claimant and three other co-workers were terminated from Wells on January 30, 2020. (TR p. 76)

For misconduct to disqualify a person from compensation, the misconduct must be tantamount to refusal to perform the offered work. The misconduct must be serious and the type of conduct that would cause any employer to terminate any employee. The misconduct must have a serious adverse impact on the employer. The misconduct must be more than the type of inconsequential misconduct that employers typically overlook or tolerate. Brodigan v. Nutri-Ject Systems, Inc., File No. 5001106 (App. April 13, 2004); Wortley v. Lowe's Home Centers, Inc., File No. 1298582 (App. December 22, 2006) An employee working with restrictions is not entitled to act with impunity toward the employer and the employer's interests. Nevertheless, not every act of misconduct justifies disqualifying an employee from workers' compensation benefits even though the employer may be justified in taking disciplinary action. Reynolds v. Hy-Vee, Inc, File No. 5046203 (App. October 31, 2017)

Claimant was given light duty work from approximately January 20, 2020 through January 30, 2020. Mr. Calhoun testified that the employer learned of misconduct on January 27, 2020, and that claimant and three other employees were terminated for engaging in inappropriate behavior of a sexual nature. Video in evidence shows a person who appears to be claimant wrestling or dry humping a co-worker on two occasions. Claimant's behavior caused co-workers to bid out of his work area and to avoid claimant. Given this record, it is found that claimant's misconduct and engaging in inappropriate behavior of a sexual nature is the same as refusal to perform light duty work. Claimant's misconduct was serious and was of the type and behavior that would cause any reasonable employer to terminate claimant. This misconduct was more than inconsequential misconduct. Based on the record as detailed above, it is found that claimant's misconduct does not entitle claimant to either temporary benefits or healing period benefits under Iowa Code section 85.33 or Iowa Code section 85.34.

Claimant contends, in his post-hearing brief, that his termination at Wells was pretextual and retaliatory. (Claimant's post-hearing brief, p. 21) Claimant contends that the video portraying incidents happened nine months prior to his termination. Other

than claimant's ambiguous testimony (TR p. 34), there is scant evidence to prove these allegations. Mr. Calhoun credibly testified that Wells learned of the misconduct on January 27, 2020, and three days later terminated claimant and three other co-workers. (TR pp. 72-74)

Claimant contends he was not given an opportunity to be heard prior to his termination. An allegation of a wrongful termination is not a factor in finding that claimant engaged in serious misconduct and is thus not entitled to temporary benefits. The record also indicates that claimant's union representative was able to see the video prior to claimant's termination and no action was taken. (TR p. 81) Claimant signed the termination documents regarding his termination. (Ex. A, pp. 1-4) Claimant did not receive unemployment insurance benefits. This suggests that claimant did not qualify for unemployment insurance benefits due to misconduct. Given this record, claimant's argument that his termination was retaliatory is found not convincing.

The next issue to be determined is whether claimant sustained a permanent disability for his injury.

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).

Claimant contends he sustained a permanent disability to his bilateral shoulders and left elbow caused by repetitive heavy lifting at Wells.

Three experts have opined regarding claimant's permanent impairment. Claimant began care with Dr. Cassens in January of 2020 for his bilateral shoulder injury. Dr. Cassens specializes in occupational medicine. Dr. Cassens saw claimant over a period of approximately 8 months. On every visit, Dr. Cassens measured

claimant's range of motion and strength in both shoulders. On every visit, Dr. Cassens found that claimant had normal range of motion and strength in both shoulders. (JE 2, pp, 16, 21, 24, 27, 29, 31, 35, 38, 40, 42; Ex. 8, depo pp. 47-57) Dr. Cassens testified in deposition that claimant's bilateral shoulder range of motion and strength tested normal on every visit. (Ex. 8, depo p. 57)

Dr. Cassens found that claimant had no permanent impairment and no permanent restrictions. (JE 2, pp. 43-44)

In a May 26, 2021 letter, Dr. Cassens indicated claimant's range of motion and strength were normal. He found that claimant had no permanent impairment to either the left or right shoulders. (JE 7)

Claimant also treated with Dr. Meis. Dr. Meis is an orthopedic surgeon. Dr. Meis saw claimant on two occasions between March of 2020 and May of 2020. Dr. Meis indicated he was unable to identify an objective injury to claimant's right or left shoulder, and found claimant had no permanent impairment. (JE 7)

In deposition Dr. Meis testified that based on claimant's exam, the MRI and other diagnostics, he believed claimant had no permanent impairment or permanent restrictions. (Ex. 9, depo pp. 50-53)

Dr. Bansal evaluated claimant once for an IME. He found claimant had a permanent impairment to both his left elbow and bilateral shoulders. (Ex. 1, pp. 11-13)

Dr. Cassens evaluated claimant on ten different occasions. He found that claimant had no permanent impairment or permanent restrictions. The opinions of treating doctors are not to be given greater weight as a matter of law, solely because they are treating doctors. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 409 (Iowa 1994) However, as a factual manner, Dr. Cassens has a far greater familiarity and experience with claimant's medical history and presentation than does any other expert in this case. Dr. Cassens' opinion regarding permanent impairment and permanent restrictions are also corroborated by those of Dr. Meis.

As noted, Dr. Bansal evaluated claimant once for an IME. Dr. Bansal examined claimant on October 30, 2020, approximately nine months after claimant was terminated from Wells. Dr. Bansal's evaluation of claimant shows deficits in range of motion and strength when compared to those of Drs. Cassens and Meis. It is unclear and unexplained why claimant's range of motion and strength decreased when compared with opinions by Drs. Cassens and Meis when claimant had not been working at Wells for approximately nine months.

Dr. Cassens and Dr. Meis have far greater experience in evaluating claimant's condition. It is unexplained how claimant's range of motion and strength decreased after leaving Wells for the nine months. Given this record, it is found that the opinions of Dr. Cassens and Dr. Meis regarding permanent impairment to claimant's shoulders are more convincing than those of Dr. Bansal. Given this record, claimant has failed to

carry his burden of proof he sustained permanent impairment regarding his bilateral shoulders.

Regarding claimant's alleged left elbow, Dr. Cassens notes that claimant had resolved left elbow symptoms on March 6, 2020. (JE 2, p. 29)

In six separate exams by Dr. Cassens and Dr. Meis, there is no mention in the records of any further elbow complaints. (JE 2, pp. 31, 35, 38, 40, 42; JE 1, pp. 6-12) Approximately eight months after leaving Wells, the record indicates claimant was pain free in his left elbow. After not working at Wells for nine months, claimant reported left elbow pain to Dr. Bansal. Given this record, claimant has failed to carry his burden of proof he sustained a permanent disability regarding his left elbow.

As claimant failed to carry his burden of proof he sustained a permanent disability to his bilateral shoulders or his left elbow, the issue of extent of entitlement to permanent partial disability benefits, commencement of permanent partial disability benefits and penalty are all found to be moot.

The final issue to be determined is whether claimant is entitled to medical mileage. Claimant has failed to put any evidence into the record regarding his expenses concerning medical mileage. At hearing he indicated he was due medical mileage as found in evidence in Exhibit 8 (TR p. 41). Exhibit 8 is the deposition of Dr. Cassens. There is no evidence in the record regarding what expenses claimant allegedly expended concerning medical mileage. As claimant has failed to show any evidence of expenses concerning medical mileage, claimant has failed to carry his burden of proof he is entitled to medical mileage.

ORDER

THEREFORE it is ordered:

That claimant shall take nothing from this matter in the way of any additional benefits.

That both parties shall pay their own costs.

That defendant shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

Signed and filed this 15th day of November, 2021.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Judy Freking (via WCES)

Al Sturgeon (via WCES)

Steven Durick (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.