BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GUILLERMO JUAREZ, Claimant, vs. TYSON FOODS, INC., Self-Insured Employer, Defendant.	File No. 5055543 ARBITRATION DECISION Head Note No.: 1402.40, 1803

STATEMENT OF THE CASE

Guillermo Juarez, claimant, filed a petition in arbitration seeking workers' compensation benefits from Tyson Foods, Inc., self-insured employer. Hearing was held on February 8, 2017, at 3:00 p.m. in Sioux City, Iowa.

Guillermo Juarez testified live at trial. The evidentiary record also includes claimant's exhibits 1-4 and defendant's exhibits A-J.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The parties submitted post-hearing briefs on March 21, 2017.

ISSUES

The parties submitted the following issues for resolution:

1. The extent of industrial disability claimant is entitled to as a result of the October 2, 2015, work injury.
2. Assessment of costs.

FINDINGS OF FACT

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

Defendant has admitted that Mr. Juarez sustained a compensable injury to his left shoulder on October 2, 2015. Defendant stipulates that the injury was the cause of permanent disability which should be compensated on an industrial disability basis. The central dispute in this case is the extent of industrial disability claimant is entitled to receive as a result of the injury.

Mr. Juarez was hired by Tyson in the spring of 2007. The first job he performed at Tyson is the same job he held at the time of the arbitration hearing; the Apple Bone job. However, on the date of the stipulated October 2, 2015, injury he was learning the brisket job when he injured his left shoulder. He performed this job for approximately two and one half hours before he was hurt. (Testimony)

Mr. Juarez initially treated with the nurses' station at work. Next, defendant sent him to see Douglas Martin, M.D. Dr. Martin ordered an MRI and then referred Mr. Juarez to Ryan Meis, M.D., an orthopedic surgeon. (Exhibits A & B)

As a result of the work injury, Ryan C. Meis, M.D., performed shoulder surgery on January 18, 2016. The procedures included: left shoulder arthroscopy with arthroscopic rotator cuff repair; arthroscopic subacromial decompression; arthroscopic limited debridement. (Ex. D)

Mr. Juarez continued to treat with Dr. Meis's office following the surgery. Initially following surgery Mr. Juarez was restricted to one-handed duty. Mr. Juarez's activities were increased as his recovery progressed. On June 14, 2016, Mr. Juarez was restricted to 10 pounds lifting, no repetitive work, and occasional push/pull and overhead work. On August 2, 2016, Mr. Juarez was released to full duty work, no permanent restrictions. Dr. Meis placed Mr.Juarez at maximum medical improvement (MMI) on August 2, 2016. The doctor assigned 3 percent whole person impairment as a result of the work injury. (Exs. C, E, F, & J)

At his attorney's request, Mr. Juarez underwent an IME with Sunil Bansal, M.D., on October 28, 2016. Dr. Bansal also placed claimant at MMI on August 2, 2016. Dr. Bansal assigned 5 percent whole person impairment as a result of the work injury. He restricted Mr. Juarez to no lifting greater than 20 pounds with the left arm from floor to table, along with no lifting more than 10 pounds above shoulder level or away from the body with the left arm occasionally; and no frequent overhead lifting with the left arm. (Ex. 1)

On February 3, 2017, after reviewing Dr. Bansal's IME report, Dr. Meis sent a letter to defendant. Dr. Meis disagreed with Dr. Bansal's impairment rating because when Dr. Meis saw the patient in early August of 2016, Mr. Juarez "clearly had a 3% body as a whole rating based upon the standard rating system." (Ex. J, p. 3) Dr. Meis did not assign him any permanent restrictions because he had been able to return to work at a job that was fairly labor intensive and is able to continue to perform the job without difficulty. Thus, Dr. Meis disagreed with the restrictions assigned by Dr. Bansal. (Ex. J)

The ergonomic analysis of the "Pull Apples Bone/Mock Tender" position is in evidence. (Ex. G) Tyler Boutillier, an industrial engineer at Tyson has stated that this job falls within the stated restrictions of Mr. Juarez as assigned by Dr. Bansal. (Ex. H)

Mr. Juarez credibly testified that the restrictions placed on him by Dr. Bansal are similar to his experience of what he is capable of performing in his personal and occupational life. He testified that he can perform his current job just fine and the job is within the restrictions set forth by Dr. Bansal. His shoulder hurts on a day-to-day basis when he gets off work. He rates his pain as a 2 or a 3 at the beginning of his work shift. By the end of his shift the pain is a 7 or 8 and he needs a pain pill. He is willing to work through his pain to keep performing his job so that he has an income for his family. Mr. Juarez is motivated to continue working. (Testimony)

Defendant seemingly argues that Mr. Juarez is more physically capable than he admits because he is able to lift weights and he was able to lift his left arm above his shoulder at the hearing. While Mr. Juarez may be able to do these things, this is not the same as performing the tasks on a full-time basis, eight hours per day, forty hours per week. I do not find defendant's argument to be persuasive.

After considering the record as a whole, including the credible testimony of Mr. Juarez, I find the opinions of Dr. Bansal to be more persuasive than those of Dr. Meis. Mr. Juarez testified that Dr. Bansal's restrictions are consistent with his experience regarding his physical capabilities since the time of the injury. Although Dr. Meis had an opportunity to review Dr. Bansal's opinions and stated that he disagrees with the opinions of Dr. Bansal he does not provide his rationale for why Dr. Bansal's opinions are flawed. I find Dr. Bansal's opinions are more consistent with the record as a whole. Thus, I find claimant has sustained 5 percent whole person functional impairment as a result of the work injury. I further find that Mr. Juarez has restrictions as set forth by Dr. Bansal as follows: no lifting greater than 20 pounds with the left arm from floor to table, no lifting more than 10 pounds above shoulder level or away from the body with the left arm occasionally; and no frequent overhead lifting with the left arm. (Ex. 1)

Mr. Juarez was born in El Salvador where he attended school through the fifth grade; he has no other formal education. He moved to the United States in 1991. He can read a little bit of English but does not comprehend it correctly. He cannot write English and understands very little English. He has not taken any English as a Second Language classes. He does not have any computer skills. (Testimony)

At the time of hearing Mr. Juarez was in his mid-forties. He has a limited education and his work experience is limited to manual labor positions. Prior to working at Tyson, Mr. Juarez worked for a fish company. He believes he is still physically capable of performing this type of work which he categorized as easy work. However, he testified that this type of work is not readily available to him in the Sioux City, Iowa, area. He also worked for Advanced Brands in Orange City where he prepared packaged meals for restaurants. Again, he classified this as easy work and felt he would be physically able to return to this type of work. However, he did note he would

not be physically capable of performing the warehouse work at Advanced Brands because it would be too heavy. Mr. Juarez testified that he could not physically perform cement, construction, or roofing work. (Testimony)

At the time of the injury, Mr. Juarez was paid $15.25 per hour. At the time of hearing he was paid $15.50 per hour. Mr. Juarez has been with Tyson for over 10 years and has quite a bit of seniority in the bidding process. He has not bid for any other jobs since the injury; he enjoys his current job. Mr. Juarez testified that there are numerous other jobs at Tyson that he could bid on but he has not because he is comfortable in his current job. The day he was injured he was training to learn a different position and that resulted in him being hurt; he is concerned that performing a different job could lead to another injury. He is physically capable of performing his current job; although he does have pain at the end of his work days. Also, he knows there are some jobs at Tyson he would be physically capable of performing and some that he would not. Mr. Juarez testified that he continues to try and improve his shoulder's function by working out at home with weights. (Testimony)

Considering Mr. Juarez's age, educational background, employment history, ability to retrain, motivation to continue working at his current job, length of healing period, permanent impairment, and permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that he has sustained a 35 percent loss of future earning capacity as a result of his work injury with Tyson.

Claimant is also seeking an assessment of costs. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. Because claimant was generally successful in his claim I exercise my discretion and find that an assessment of costs is appropriate. Claimant is seeking an assessment of the filing fee. I find that this is an appropriate fee under 876 IAC 4.33(7). Defendant shall be assessed costs in the amount of one hundred and no/100 dollars ($100).

CONCLUSIONS OF LAW

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).

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.

Based on the above findings of fact, I conclude claimant has substantial industrial disability as a result of his work injury at Tyson. Given Mr. Juarez's age, education, qualifications, experience, motivation, severity and situs of the injury, work restrictions, inability to engage in all employment for which the employee is fitted and the employer's offer of work, I concluded that claimant sustained 35% loss of earning capacity or industrial disability. Therefore, Mr. Juarez is entitled to 175 weeks of permanent partial disability benefits.

Claimant is also seeking an assessment of costs. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. Because claimant was generally successful in his claim I exercise my discretion and find that an assessment of costs is appropriate. Claimant is seeking an assessment of the filing fee. I find that this is an appropriate fee under 876 IAC 4.33(7). Defendant shall be assessed costs in the amount of one hundred and no/100 dollars ($100).

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the rate of three hundred forty-eight and 45/100 dollars ($348.45).

Defendant shall pay 175 weeks of permanent partial disability benefits commencing on February 1, 2016.

All past due weekly benefits shall be paid in lump sum with applicable interest pursuant to Iowa Code section 85.30.

Defendant shall be entitled to credit for all weekly benefits paid to date.

Defendant shall reimburse claimant's costs in the amount of one hundred and no/100 dollars ($100.00).

Defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1 (2) and 876 IAC 11.7.

Signed and filed this 2nd day of June, 2017.

ERIN Q. PALS
DEPUTY WORKERS' COMPENSATION
COMMISSIONER

COPIES TO:

Al Sturgeon
Attorney at Law
P.O. Box 5311
Sioux City, IA 51102
alsturgeon@siouxlan.net

James L. Drury II
Attorney at Law
800 Stevens Port Drive, Suite DD713
Dakota Dunes, SD 57049
jamey.drury@tyson.com

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.