BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BALBINO LARA, Claimant, vs. SMITHFIELD FOODS, INC., Employer, and SAFETY NATIONAL CASUALTY CORP., Insurance Carrier, Defendants.	File No. 21001591.01 ARBITRATION DECISION Head Note Nos.: 1803.1, 1806, 2207, 2209

STATEMENT OF THE CASE

Claimant, Lara Balbino, has filed a petition for arbitration seeking worker's compensation benefits against Smithfield Foods, Inc., employer, and Safety National Casualty Corp, and ESIS as the insurer and third-party administrator, respectively.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner in the matter of the Coronavirus/COVID-19 Impact on Hearings, the hearing was held on January 31, 2022, and considered fully submitted upon the simultaneous filing of briefs on February 21, 2022.

The record consists of Joint exhibits 1-16, claimant's exhibits 1-8 , Def A-P, and the testimony of the claimant and Heather Adams.

ISSUES

1. The extent of claimant's disability;
2. Whether claimant's disability is limited to the functional impairment rating pursuant to Iowa Code section 85.34()(2)(v), (x);
3. Whether claimant's disability is industrial in nature;
4. Whether successive disabilities pursuant to Iowa Code section 85.34(7) limits the award of any benefits;

STIPULATIONS

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 stipulate the claimant was an employee at the time of the injury of February 6, 2020. They further agree the injury was a cause of a permanent disability and that the commencement date for permanent partial disability benefits is October 2, 2020.

At the time of the accepted work injury, claimant's gross earnings were $994.00 per week. Claimant was married and entitled to three exemptions. The parties stipulate the weekly benefit rate is $654.68.

Prior to the hearing, defendants paid claimant 10 weeks of compensation at the rate of $654.68 per week. They are entitled to a credit of that amount against any award.

All of defenses are waived. There are no medical benefits in the dispute.

FINDINGS OF FACT

Claimant completed the fifth grade in El Salvador, attended additional four years of schooling in California and obtained his GED in 1996. Claimant's past work history included cleaning Dodger's Stadium, receiving damaging goods and fulfilling orders, assembly of windows at Oropack, and meat processing work at Tyson. (CE 2:19)

At the time of his injury, claimant was an eleven-year employee of defendant employer. He began working for defendant employer on or about September 9, 2009. (CE 4:28) His first position was weighing bacon which required looking down and repetitively moving his neck. His second position was turning over heavy meat pieces weighing up to 100 pounds, pushing and pulling the meat onto lines to be hung. The next position was a machine operator's assistant which required him to place casings into a ham machine and lift heavy boxes of casings.

The position he worked at the time of the injury was the "ham drop" position. It involved maneuvering hams weighing around 100 pounds into a position to be cut by a laser saw. He testified that he would work with his head in a down position and that he would need to move over 1000 carcasses a day for approximately 9 hours a day.

Claimant testified that he can no longer do this work today due to the angle of his neck and the push/pull force required.

On November 17, 2010, claimant was seen by Rosemary Mason, M.D., for a wellness check. (JE 1:1) At the time, he was working on the kill floor rolling hogs and his hands were "burning." Id. He bid on another job which would move him to operating machinery. Id. Claimant developed low back pain in 2011. (JE 2:1; 3:19) He saw Ric E. Jensen, M.D., on November 9, 2011, and described the pain as recurring for the past four years. (JE 4:28) The pain radiated into the antero-medial thigh regions and progressed into the ankle. Id. The pain was most marked on extension and right lateral rotation/flexion. Id. Dr. Jensen observed lack of full participation on the motor examination which suggested some degree of symptom embellishment. (JE 4:29) Dr. Jensen recommended claimant maintain activity restrictions of no lifting greater than 20 to 30 pounds for at least a month and that he must "maintain close control of his overall lifting activities and should avoid lifting/twisting and repetitive axial load to his lumbosacral spine for at least the coming month." (JE 4:30)

An MRI revealed disc degeneration at L4-5. (JE 5:32) The back pain continued to trouble him and he received occasional treatment in 2012 through 2016. (JE 1:2-10, JE 2:1-16) In 2014, possible surgical options were discussed but ultimately, after a consult at the University of Iowa Hospitals and Clinics (UIHC) spine clinic, it was decided claimant's condition was best treated with conservative care such as physical therapy. (JE 6:34; 7:43)

On October 8, 2018, he was seen at his family care center by Erin Schechinger, APRN, for ongoing back pain with bilateral lower extremity parenthesis. (JE 3:20) He stated that he had the same problem intermittently over the last ten years. Id. Ms. Schechinger advised claimant to attend physical therapy which claimant turned down. (JE 3:23)

From February 2-28, 2019, claimant was seen at Lambert Family & Sports Chiropractic for treatment for acute left posterior pelvis/hip pain, left sacroiliac, left lumbar, sacral and left buttock pain. (JE 9:60) Claimant returned to the chiropractic clinic on April 11, 2019, for treatment of the same along with left posterior thigh and left posterior knee tightness/stiffness, numbness, tingling and shooting discomfort. (JE 9:68) He received treatment from the chiropractic clinic approximately once a month following the February visits for the aforementioned regions. (JE 9 et seq)

On February 6, 2020, claimant filled out a pain questionnaire identifying his shoulders, upper back, neck, and arms as suffering from pain. (JE 10:93)

On March 4, 2020, claimant was seen by Craig Simmons, D.O., for bilateral shoulder pain shooting down the arms and into the fingertips. (JE 11:103) His musculoskeletal exam was positive for bilateral shoulder, neck, and scapular pain. Id. Dr. Simmons recommended Flexeril, Naprosyn, over the counter Tylenol as needed and continuance of physical therapy. (JE 11:103) An ortho consult with Todd Harbach, M.D.,

was conducted on March 13, 2020, for the complaints of neck pain. (JE 12:106) Dr. Harbach noted that the claimant was involved in heavy work for the defendant doing "lots of lifting, pushing, pulling, as well as sometimes cutting of meet. [Sic]. About 6 weeks ago, he describes having worsening cervical, bilateral shoulder, and upper extremity pain and paresthesias without any inciting particular incident at work or at home." (JE 12:108) Dr. Harbach placed claimant on light duty and ordered an MRI. (JE 12:108)

On March 19, 2020, Dr. Harbach wrote an opinion letter in response to an inquiry from defendants regarding causation of claimant's cervical and upper back pain. (JE 12:10) He stated that the mechanism of injury that claimant described with repetitive lifting of heavy objects was "certainly" commensurate with the symptoms claimant was showing. (JE 12:110) Given that there were no other records of injuries or problems outside of work or reports of previous medical care for such symptoms, Dr. Harbach concluded claimant's intractable neck pain and upper back pain were work related. Id.

Conservative treatment including physical therapy, medication, and steroid injections were administered. He issued an opinion that claimant was not a candidate for surgery.

On March 30, 2020, claimant underwent the cervical MRI which showed spinal canal stenosis at C3-C4, C4-C5, C5-C6. (JE 2:7) There were posterior disc bulges at these levels with mass effect on the underlying spinal cord. Id.

Despite the treatment, claimant's neck condition worsened. (JE 12:118) When he saw Dr. Harbach on June 12, 2020, he had spasms in his neck and could not turn his head. Id. Dr. Harbach prescribed hydrocodone and methocarbamol and recommended physical therapy which claimant refused. (JE 12:119) Dr. Harbach ordered the PT regardless and continued claimant on light duty. Id.

On June 24, 2020, claimant began physical therapy. (JE 13:143) After 11 visits, claimant's rehab potential was marked as "poor." (JE 13:174) Claimant had a high level of irritability and did not tolerate any advancing activities. (JE 13:174) He had increased neural symptoms with very low-level neural tensioner exercises bilaterally. Id.

On August 6, 2020, claimant underwent an EMG, the results of which were normal. (JE 14:176)

On August 12, 2020, claimant returned to Iowa Ortho and was seen by Kurt A Smith, D.O. (JE 12:124) Claimant's condition was unchanged. He presented "very depressed and immobile." (JE 12:132) Dr. Smith determined that there was nothing further to offer claimant from a Physical Medicine & Rehabilitation standpoint. (JE 12:126) An FCE was ordered and claimant was counseled to give full effort. Id.

On September 25, 2020, claimant underwent the FCE. (JE 15:179) The test was deemed valid due to claimant's consistent efforts. (JE 15:179) As a result of the testing, it was determined claimant could perform work activities within the medium physical demand level. Id.

> Based on test findings, Balbino would benefit from the following restrictions within the Medium Physical Demand Level:
>
> 1. Lifting of objects to shoulder level should be restricted to 30 pounds on an occasional basis and 15 pounds on a frequent basis.
> 2. Overhead lifting should be restricted to an occasional basis with 20 pounds or less.
> 3. No prolonged overhead work to limit aggravation of neck pain complaints. Balbino is capable of forward reaching and overhead reaching on a frequent basis.

(JE 5:179)

On October 2, 2020, claimant returned to Iowa Ortho for a follow up evaluation. (JE 12:130) Dr. Harbach adopted the FCE restrictions as a result of claimant's maximal effort and placed claimant at maximum medical improvement (MMI). (JE 12:132)

Defendants were aware of the work restrictions and they were detailed as followed:

> Occasional: floor to waist lift & 12 inches to waist lift 40 lbs., waist to shoulder lift 30 lbs., overhead lift 20 lbs., bilateral carry 40 lbs./25 feet, pushing 40 lbs./25 feet, pulling 40 lbs./25 feet.
>
> Frequent: floor to waist lift 20 lbs., waist to shoulder lift 15 lbs., bilateral carry 20 lbs./25 feet, pushing 20 lbs./25 feet pulling 20 lbs./25 feet.

(JE 16:187)

On October 8, 2020, claimant presented to a family care facility and was seen by Kelli Borkowski, ARNP, for right-sided abdomen pain. (JE8:46)

On May 17, 2021, the defendants deemed the cure-belly table position as within his work restrictions. (JE 16:187) A physical therapist reviewed video footage of the position, as well as the job description and determined the job would have to be modified to meet claimant's restrictions.

My recommendation would be as follows:

1. Avoid moving or transferring cleaning supply barrels as the weight of the barrel and forces need to move the cart are in excess of the restrictions as noted.
2. Avoid any lifting of the "belly conestands". In order to perform this job duty, the conestand must be grasped at the top and lifted. A person of average height would typically begin this motion at or slightly below shoulder level and lift it to above shoulder level. This tasks [sic] would be in excess of the restriction as noted.
3. Make all efforts to push and pull only 1-2 meat racks at a time versus pushing three meat racks at one time when performing this task at a frequent level. Even though the force needed to sustain motion once started diminishes by 50-60%, the initial force is nearing to frequent maximum for the restrictions as noted.
4. Perform all other job duties as outlined.

(JE 16:190) Marlon Gasner, DPT reviewed five other positions. He opined claimant could perform Bone Loins, Trim Center Cut Loins, Operate Picnic/Butt Saw, Hind Foot saw, and Pull Pancreas without further modifications. (JE 16:194-198)

On January 14, 2021, Dr. Harbach issued an opinion letter regarding claimant's cervical and inter scapular pain. (JE 12:125) According to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Dr. Harbach assigned a 5 percent impairment as claimant fit in to the DRE cervical category #2 due to his clinical history, examination findings that were compatible with an injury that occurred with increased activities at work. (JE 12:135) The increased activity lit up or made worse a pre-existing degenerative condition and claimant was not able to return to the pre-injury baseline. Id. Dr. Harbach assigned 60 percent of the rating to the pre-existing nature of the degeneration and 40 percent related to the aggravation of the condition (JE 12:135)

At the time of January 19, 2021, examination with Sunil Bansal, M.D., claimant reported constant pain in the neck, radiating into both shoulders with numbness in the arms that affect his sleep. (CE 1:7) He also suffered from numbness and tingling in the hands and fingers, burning sensation in the arms, and popping of the shoulder. He was unable to raise his arms above his head, had difficulty reaching behind his back, and frequently dropped items. Id.

He exhibited tenderness with palpation over the cervical paraspinal musculature, greater on the right and tenderness over the trapezius muscles. (CE 1:8) He had full range of motion in both shoulders, negative Neer's, Speed's, impingement, apprehension and O'Brien's tests. Id. His strength and grip were largely normal with some loss of sensory discrimination over the thumb and index finger on the right. Id. He had slightly limited extension and bilateral flexion. (CE 1:8)

Dr. Bansal opined claimant's "constellation of bilateral shoulder, neck, trapezius, and shoulder blade pain" was related to a cervical discogenic problem arising out of his work which required him to push and pull heavy hog carcasses repetitively throughout the day. (CE 1:10-11) Based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Dr. Bansal assessed a 6 percent whole person impairment. (CE 1:11) Dr. Bansal also agreed that the MMI date was October 2, 2020. (CE 1:9)

For restrictions, Dr. Bansal adopted the results of the FCE, modifying them to avoid lifting greater than 25 pounds occasionally or 10 pounds frequently along with no work or activities that require repeated neck motion or that would place his neck in a postural flexed position for more than 15 minutes. (CE 1:12)

On October 22, 2021, claimant was seen by Trevor Schmitz, M.D., for an examination of his neck pain. (DE A:1) Dr. Schmitz documented that claimant's current condition included moderate, constant pain in the bilateral neck. (DE A:1) Claimant rated the pain a 6 on a 10 scale with radiation into the shoulders, arms, and hands. Id. Claimant walked with an antalgic gait. (DE A:2) Examination revealed normal alignment and very minimal functional range of motion with no palpable spasms or subluxation. Id. Claimant exhibited pain with very light axial compression of the spine. Id. He had diffuse tenderness to light touch of the bilateral hands, forearms, upper arms, and shoulders, as well as pain with range of motion of those extremities and body parts. Id. After reviewing the EMG, FCE, as well as his own exemption, Dr. Schmitz concluded that claimant's pain was non-anatomic. (DE A:3) "I do not have an explanation for his symptomatology based on a work injury or a cervical spine source," wrote Dr. Schmitz. "He may have some rheumatologic disorder." (DE A:3)

On September 10, 2021, Dr. Smith wrote that the MRI of the cervical spine showed degenerative disease which was non work related and that due to claimant's report that past epidurals and physical therapy were not helpful, he did not believe that additional interventional pain treatment would be helpful. (JE 12:142)

In a follow-up letter of October 24, 2021, Dr. Bansal addressed the opinions of Dr. Smith and Dr. Schmitz. (CE 1:14) Dr. Bansal noted that "In all cases, including a valid FCE, there was no indication of nonanatomic pain" and that Dr. Schmitz's evaluation stood as an outlier. Id. Dr. Bansal suggested that Dr. Schmitz placed an overemphasis on the EMG findings for compressive radiculopathy and pointed out that the AMA Guides for evaluation cautions evaluators to be mindful of EMGs failing to detect all compressive radiculopathies. (CE 1:15)

On December 2, 2021, Christian Ledet, M.D., wrote about his opinions pertaining to claimant's condition arising out of his work-related activities. (DE N) He stated that the history and physical examination findings for claimant indicate that he is experiencing pain from multiple and co-existing pain generators and that his condition is

best understood as aggravation of normal and progression degenerative spine disease. (DE N:60) Degenerative disc disease can cause axial pain from radiating nerve pain and occasionally weakness in the extremities. (DE N:60) Additional degenerative changes included facet joint arthropathy and uncovertebral joint hypertrophy. Id. All of these things contributed to claimant's pain. Id. All of these degenerative changes were aggravated in claimant. Id. Dr. Ledet recommended no more interventional pain management care and agreed with the restrictions and MMI date set forth by Iowa Ortho. (DE N: 60-61)

On January 11, 2022, Derek Lambert, D.C., of Lambert Family & Sports Chiropractic signed off on a checklist letter agreeing that claimant sought out treatment for low back pain and symptoms radiating into the low back from February 12, 2019, through January 6, 2020, and that during that time claimant did not report pain or symptoms in, or originating from, his neck, shoulders, or upper extremities and that no treatment was provided for those regions of the body. (JE 9:76) During the course of treatment, Dr. Lambert used an interpreter to communicate with claimant. (JE 9:77)

On January 28, 2021, defendant insurer informed claimant via letter that Dr. Harbach assigned a 5 percent body as a whole impairment with 60 percent related to pre-existing conditions and 40 percent related to work-related activities. (CE 7:152)

Claimant is not currently working. This is the subject of significant dispute between the parties. Claimant asserts that the company was unable to accommodate his work restrictions while the defendants argue that there were positions available to claimant but that he self-disqualified.

After the work restrictions were issued by Dr. Harbach, claimant was removed from the ham drop position because it did not fall within those work restrictions. (JE 10:88) He was then placed on light duty until he could find a new position or thirty days expired. Id. Following his removal from ham drop, claimant bid on two different positions but both were excluded on the basis that the positions did not fall within Dr. Harbach's restrictions. (Ex. 5:42-43)

Claimant was then removed from the plant on December 16, 2020. Claimant was instructed to review open jobs with Nurse Heather Adams on a weekly basis; however, claimant admitted to not complying with this request.

Claimant testified that he does go weekly to look at the list of jobs that the employer posts but that the job postings do not provide the physical requirements of the job. He testified that he has bid on approximately 30 jobs since his removal from the plant in December 2020, but that these jobs do not fit his restrictions as defined by Dr. Bansal or he attempted to work the positions but could not complete them due to pain. (See Ex. 6)

On behalf of defendants, Heather Adams, RN, proposed approximately twenty-two jobs that the defendants felt were within claimant's restrictions including mark back joint, remove pizzles final rail, Dr. Helper, expose blade bone, 1st cut picnic, open picnic flap, operate cover machine, pack product to boxes, and operate bagger. (CE 4: 30; J:46) Defendants argue claimant self-disqualified from at least two jobs including the place line and Hind Foot Saw job. (CE 4:29; 4:31) Later, it was acknowledged that the Operate Picnic/Butt Saw and Hind Foot Saw job did not fit with claimant's medical restrictions. (CE 5:42-43)

Claimant bid on and attempted three of the jobs but self-disqualified from each job. (Ex L: 57-58) Claimant testified he has bid on over 30 jobs and been offered a few. Some have been denied due to seniority and some because he self-disqualified from jobs previously offered.

However, there do appear to be at least two jobs such as the Pace Line position and the cooler stacker position that fall within both Dr. Bansal and Dr. Harbach's restrictions. Claimant accepted the cooler stacker position and started training for the position on January 27, 2022. While training, he earns $19.60 per hour and if he passes training, it will pay $21.00 per hour. At the time of his injury, claimant testified he was earning $18.70/hour.

Claimant has adopted the more stringent work restrictions recommended by Dr. Bansal and has maintained that the multitude of positions presented to him are not within those restrictions particularly the restriction that he avoid work where his neck is angled in a downward position for more than fifteen minutes.

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. 6.904(3).

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.

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be

plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

The parties dispute the extent of claimant's disability. In large part, the determination rests on whether the restrictions of Dr. Harbach are adopted verses those of Dr. Bansal.

Dr. Harbach's restrictions are based on the valid FCE along with his own treatment observations. Those restrictions place claimant in the medium work category and according to the testimony of Heather Adams, a nurse employed by the defendant employer, there are approximately 22 jobs that fit within the work restrictions of Dr. Harbach.

There are far fewer jobs if the restrictions of Dr. Bansal are adopted. Based on the record, there appear to be at least two that fit within the more narrow restrictions of Dr. Bansal.

Dr. Harbach's restrictions are adopted herein. While claimant has testified to a more debilitating injury than is reflected in Dr. Harbach's restrictions, Dr. Harbach's restrictions are based on claimant's valid functional capacity evaluation, Dr. Harbach's own treatment observations, the negative EMG tests, as well as claimant's limited experience in physical therapy. It should be noted as well that there were some concerns about symptom magnification in 2011.

Dr. Bansal's restrictions are more consistent with the claimant's testimony and personal opinions regarding his condition; however, more weight is placed on the valid FCE results, EMG tests, lack of objective evidence for the severity of claimant's complaints as well as the opinion of Dr. Harbach.

The next question is whether this injury is compensated on a functional basis or industrial basis.

According to Iowa Code section 85.34(2)(v) (2017), disability for nonscheduled injuries are to be measured by an employee's functional impairment if an employee

"returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury."

At the time of the hearing, claimant was offered work at the same or greater salary than the employee received at the time of the injury. Claimant began training for the cooler stacker position on January 27, 2022. While training, he earns $19.60 per hour and if he passes training, it will pay $21.00 per hour. At the time of his injury, claimant testified he was earning $18.70/hour.

Claimant argues that this position may not fit his current health condition or that he may not pass training. However, the statute requires only that the claimant be offered work at the same or greater salary which is the case here.

Whether his health condition would limit him from working the cooler stacker position is speculative. The parties agree that the position is within the work restrictions of Dr. Harbach and also Dr. Bansal. As the record stands, the cooler stacker position is one that is within his restrictions and pays a higher hourly salary than the ham drop position he worked at the time of the injury. Thus, only a functional impairment can be awarded.

Iowa Code section 85.34(2)(x) (2017) states as follows:

> In all cases of permanent partial disability described in paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity, the extent of loss or 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 pursuant to paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity.

The functional capacity percentage impairment by Dr. Harbach was 5 percent of the whole body impairment. Dr. Bansal assigned a 6 percent whole body impairment. Given that Dr. Harbach's opinion was given more weight as to the restrictions it follows naturally that the impairment opinion is also given more weight. The claimant is found to have sustained a 5 percent whole person impairment.

Defendants argue that based on Dr. Harbach's opinion, the 5 percent should be apportioned. However, Dr. Harbach's opinion is based on a flawed understanding of legal causation. The experts agree that claimant's underlying disc disease was aggravated by his work activities.

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).

Iowa Code section 85.37 (7) regarding successive disabilities allows for apportionment if there is a pre-existing disability that has already been compensated or that arose out of and in the course of employment with another employer. Iowa Code section 85.37(7).

In this case, there is no pre-existing disability that has already been compensated or that arose out of and in the course of employment with another employer. Instead, claimant has a long-standing degenerative disc disease that was asymptomatic prior to early 2020. He had treatment for his low back in the more recent past. In the remote past claimant did have complaints about his hands burning while working on the kill floor rolling hogs but that was not repeated in subsequent medical reports. It is found that apportionment is not appropriate in this case.

Thus, the entirety of the 5 percent is appropriate to award to claimant for the disability that arose out of and in the course of his employment.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant twenty-five (25) weeks of permanent partial disability benefits at the rate of six hundred fifty-four and 68/100 dollars ($654.68) per week from October 2, 2020.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants are entitled to a credit of permanent partial disability benefits previously paid.

That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

Signed and filed this 22nd day of April, 2022.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James Byrne (via WCES)

Michael Miller (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.