BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
JUL 14 2017
WORKERS' COMPENSATION

GERALD D. DONNELL, Claimant, vs. LENNOX INTERNATIONAL, INC., Employer, ACE AMERICAN INSURANCE CO., Insurance Carrier, Defendants.	File No. 5047570 ARBITRATION DECISION Head Note No.: 1402.30, 2502, 2801

STATEMENT OF THE CASE

Gerald Donnell, claimant, filed a petition for arbitration against Lennox International, Inc. (hereinafter referred to as "Lennox"), as the employer and Ace American Insurance Company, as the insurance carrier. The case came on for hearing before the undersigned on January 11, 2017.

Defendants filed a motion prior to commencement of trial seeking to permit an amendment to certain responses to requests for admissions. Argument was heard on the record. Claimant did not object to the request to amend defendants' responses to requests for admissions. Therefore, the undersigned permitted the requested amendments of defendants' admissions.

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 evidentiary record includes claimant's Exhibits 1 through 23. Defendants objected to claimant's Exhibit 4 as untimely. Defendants' objection was overruled and Exhibits 1-23 were received. Defendants' offered exhibits A through H, which were received into the evidentiary record without objection.

Claimant testified on his own behalf. Claimant also called his daughter, Alicia Donnell, and Jeremy Springer to testify. Defendants called Geoff Noel to testify

The evidentiary record closed at the conclusion of trial. However, counsel for the parties requested the opportunity to file post-hearing briefs. Their request was granted and the parties filed their briefs simultaneously on February 6, 2017. The case was considered fully submitted to the undersigned upon filing of the parties' briefs.

Review of the parties' exhibits demonstrates that there is significant overlap or duplication of exhibits. The undersigned will cite to one location where an exhibit is found when referencing the record in this decision. This should not be interpreted or understood to mean that the undersigned did not review the entirety of the evidentiary record. Rather, for purposes of efficiency in drafting this decision, the duplicative exhibits will not be cross-referenced in this decision.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury on July 30, 2012, which arose out of and in the course of his employment with Lennox, including claims for a shoulder injury, mental injury, and claims under a cumulative trauma theory.

2. Whether the alleged injury caused temporary disability and the extent of claimant's entitlement to temporary disability benefits.

3. Whether the alleged injury caused permanent disability and the extent of claimant's entitlement to permanent disability benefits, including a claim for permanent total disability.

4. Whether claimant is entitled to payment, reimbursement, or satisfaction of past medical expenses contained at exhibit 22.

5. Whether claimant is entitled to reimbursement for an independent medical evaluation pursuant to Iowa Code section 85.39.

6. Whether claimant is entitled to penalty benefits for unreasonable delay or denial of weekly benefits.

7. Whether costs should be assessed against either party.

In his post-hearing brief, claimant urged an odd-lot employee theory as a basis for awarding permanent total disability benefits in this case. Review of the hearing report reveals that an odd-lot claim was not asserted on the hearing report. Review of the hearing transcript reveals that the undersigned discussed the hearing report and

disputed issues and allowed discussion pertaining to the disputed issues. Odd-lot was not raised at the commencement of hearing or on the hearing report. As such, odd-lot was not an issue submitted to the undersigned at the time of the arbitration hearing.

Odd-lot includes an evidentiary burden-shifting analysis, which may place an evidentiary burden upon the defendants unlike a traditional industrial disability analysis. It would be prejudicial to implement and analyze this case under an odd-lot theory without giving defendants proper notice of the claim or an opportunity to rebut any evidentiary burdens. Accordingly, I reject any assertion of an odd-lot claim and will not analyze this case as an odd-lot claim.

FINDINGS OF FACTS

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

Gerald Donnell is a 61 year old man, who began working as a heating and cooling service technician for Lennox in April 2012. Mr. Donnell closed his own heating and cooling business to commence employment with Lennox. Although he has significant pre-existing shoulder issues, he certified that he was physically capable of performing all essential functions of the job before he commenced working at Lennox.

Mr. Donnell performed his service technician job with Lennox from April 2012 until July 30, 2012. The spring and summer months Mr. Donnell worked for Lennox are a busy season for the employer. June and July are also hot months in Iowa.

Claimant was required to work long days for Lennox with significant travel and significant work in the elements. Mr. Donnell reported working on hot roofs maintaining and repairing air conditioning units during the heat of the day while employed at Lennox. He estimated the temperatures on some of the roofs to be 130 degrees.

Mr. Donnell explained the extremes he went to in his efforts to try to remain hydrated to continue his employment activities. He described drinking upwards of two gallons of water per day. Nevertheless, he testified that he experienced fatigue, dehydration, and ultimately claims to have sustained cognitive difficulties that he relates to his exposure to heat and long work hours at Lennox.

In support of his claim, Mr. Donnell produces evidence demonstrating the length of his work days, which were sometimes upwards of 16-19 hours. Mr. Donnell describes incidents working for Lennox where he lost consciousness while working on a hot roof. (Transcript, pages 83-84) He describes symptoms of confusion, memory problems, difficulties with finding words, exhaustion, and headaches. (Claimant's testimony)

Mr. Donnell also called his daughter, Alicia Donnell, to corroborate his claims of memory difficulties, difficulties finding words, and resulting depression. Indeed, Ms. Donnell testified that her father reported deplorable working conditions at Lennox. Interestingly, despite his testimony of drinking in excess of two gallons of water per day, Ms. Donnell testified that her father told her he did not a lot of have fluids available while working for Lennox. (Compare Tr., p. 20 with Tr., pp. 80-81) Claimant specifically contradicted his daughter's testimony in this regard by testifying that he thought he did a pretty good job of staying hydrated while on the work site. (Tr., pp. 80-81)

Claimant's daughter did corroborate his claims of exhaustion and long work hours in the heat. She corroborated claimant's statements that his thought processes are slower or that he is cognitively impaired since working at Lennox. For instance, Ms. Donnell testified that her father now has trouble putting sentences together. Interestingly, I did not observe any signs of claimant having difficulties putting sentences together, any memory issues, or any significant and clearly diminished cognitive functioning at least from a layperson's perspective during the trial.

On the contrary, Mr. Donnell seemed to have a good memory and was able to recite many of the facts about his claims, including the work hours, temperatures, his stories about losing consciousness, and various other details of his employment. Again, I recognize that my observations are not of a medical professional, but my observations of claimant during trial were not consistent with Alicia Donnell's testimony about the difficulties her father has expressed and that she testified she has observed.

Alicia Donnell also testified that claimant told her he had injured his shoulder really bad and that he was experiencing pain in his shoulder and back. As will be discussed below, I did not find mention of a shoulder injury to any medical professional for numerous months after claimant last worked for Lennox. Ms. Donnell's testimony in this regard substantiates her father's claims but is not consistent with the contemporaneous medical records.

Mr. Donnell also called Jeremy Springer to testify. Mr. Springer held the claimant's service technician position immediately prior to claimant beginning his employment with Lennox. Mr. Springer confirmed that the work performed by claimant was heavy work and that work on rooftops can be extremely hot and hard work. Mr. Springer corroborated claimant's version of events about the relative temperatures he likely experienced while working for Lennox as well as the physical nature of his job duties at Lennox.

Mr. Springer testified about a telephone conversation he had with Mr. Donnell. He was not able to provide a date for the telephone conversation, but recalled and relayed some fairly detailed information about the call. Specifically, Mr. Springer testified that he received a telephone call from claimant late one evening while he was at home. Mr. Springer explained that he had remained in contact with claimant and

verbally assisted him from time to time because he was familiar with the locations and cooling units claimant serviced having held the same position prior to Mr. Donnell.

On the particular evening when he received a call from Mr. Donnell, Mr. Springer testified that claimant was speaking very slowly and was not making sense. Mr. Springer figured out that claimant was on the roof at Jordan Creek Mall in West Des Moines. He advised claimant to get off the roof and to get a motel room to get some rest or at least sit in his air conditioned van. (Tr., p. 50)

Mr. Springer testified that he also knew claimant before he commenced working at Lennox and that claimant was a "very sharp individual." However, since working at Lennox, he testified that claimant slurs his speech to a certain extent and is not as mentally sharp. (Tr., pp. 51-52)

Mr. Springer certainly is an acquaintance of claimant. He was willing to fly from Colorado to Iowa to testify at this hearing. Yet, I did not identify any specific interest Mr. Springer may have in the outcome of the case. While he may like claimant, Mr. Springer had no perceptible reason to lie or provide inaccurate information in this case. Mr. Springer's testimony appeared reasonable.

Defendants called Geoff Noel to testify. Mr. Noel is a regional manager for Lennox and was an assistant regional manager for Lennox at the time claimant was employed by the company. Mr. Noel presented as a reasonable witness.

Mr. Noel testified as to some events that occurred on July 30, 2012, which were in stark contrast to those testified to by Mr. Donnell. Mr. Noel testified that he went into the field to find claimant to bring him some water or take him to lunch because Mr. Noel had some free time and claimant was the closest service technician to his location. Mr. Noel testified this was a common thing for him to do.

On July 30, 2012, Mr. Noel testified that he drove to Newton to find claimant. When he arrived, he saw claimant departing the location in the company vehicle. He did not know where claimant went after this service call, but eventually found out that claimant's next service call was at the Jordan Creek Mall in West Des Moines. Mr. Noel drove to that location and beat claimant to the location.

He observed Mr. Donnell and ultimately entered the store where claimant was working approximately 10-15 minutes after claimant had arrived. Mr. Noel testified he observed claimant working on an aluminum ladder with his head above the ceiling, without a uniform or identification, and working on the air conditioning unit without it being locked out and tagged out.

Mr. Noel testified that it was a violation of company policy to work on a unit without it being locked out and tagged out and that it was a safety violation to be working on an aluminum ladder. Mr. Noel testified that he confronted claimant in the

store but did not want to cause a scene at a customer's location. After a conversation, Mr. Noel indicated that claimant should go home for the day and that they would be in contact.

Mr. Noel testified that he and the local branch manager went to claimant's residence on July 31, 2012 to obtain possession of the company vehicle because they had decided to terminate claimant's employment. However, he testified that claimant would not answer his phone and left his residence about mid-morning without speaking with Mr. Noel or the branch manager.

Medical records demonstrate that Mr. Donnell went to his personal physician's office on July 31, 2012. JoLynn M. Glanzer, M.D. evaluated claimant on July 31, 2012. She recorded a history from claimant that included 16-19 hour work days, working in extreme heat, and concerns about not being able to think straight, memory issues, and only being able to write one number of a serial number at a time. Interestingly, after her examination of claimant, Dr. Glanzer noted:

> Jerry is alert. He interacts with me well. He does not appear to be confused. I asked him if he wanted me to schedule him an MRI and he stated that he could not make decisions like that right now. However, he could decide that he wanted to proceed with a psychiatric evaluation consisting of a psychiatrist and neuropsychologist.

Per his request, Dr. Glanzer referred claimant to a neuropsychologist for cognitive testing. (Ex. 9, p. 1)

Dr. Glanzer also ordered an MRI. The brain MRI was performed on August 8, 2012 and was interpreted as normal. (Ex. 9, p. 1; Ex. 11) Dr. Glanzer also ordered some blood testing, which also came back normal. (Ex. 9, p. 1) At a later appointment, Dr. Glanzer explained that claimant was not tachycardic or hypotensive on the date of injury. None of his blood work performed on July 31, 2012 demonstrated abnormalities that would have suggested hospitalization was necessary. (Ex. 9, p. 3)

Dr. Glanzer's initial medical record makes no mention of shoulder or back pain, though it is apparent claimant was willing and able to describe his physical ailments during this appointment because he mentioned a cut he sustained on his leg during the appointment. (Ex. 9, p. 1)

A psychiatrist, Gregory Hotsenpillar, M.D., evaluated claimant on August 30, 2012. Dr. Hotsenpillar noted claimant's cognitive complaints, which he related to his employment activities at Lennox. Interestingly, Dr. Hotsenpillar also noted that claimant "continues to work very hard as he has a large acreage as well as active in his garden." No reports of shoulder pain appear in Dr. Hotsenpillar's medical record, despite the ongoing hard and active work claimant reported. (Ex. 7, p. 1) Dr. Hotsenpillar did not

identify any depression or other mental issues that required medication or further psychiatric treatment.

Bruce W. Jasper, Ph.D. is a clinical neuropsychologist. Dr. Jasper evaluated claimant on September 12, 2012, September 26, 2012, and October 16, 2012 for purposes of administering cognitive functioning tests. Dr. Jasper noted:

> Fortunately, his current neuropsychological testing profile is within normal limits including consistently average to high average learning/memory and above average executive function. From the cognitive standpoint, the patient appears to have the capacity to return to work without difficulty.

(Ex. 10, p. 5) (emphasis in original)

Dr. Jasper described claimant's physical and cognitive symptom reporting as "questionably valid." He suggested that there may be a psychosomatic nature to claimant's symptoms. (Ex. 10, p. 5)

As a result of some complaints of headaches, claimant was also evaluated by a neurologist, Winthrop S. Risk II, M.D. Dr. Risk evaluated claimant on October 19, 2012. Dr. Risk recorded a history from claimant that included cognitive difficulties and headaches after his work at Lennox. Dr. Risk appears to have rejected claimant's allegations. Instead, Dr. Risk notes in his October 15, 2012 report:

> While I certainly can understand having cognitive difficulties while working in the summer heat and humidity, I would expect these to clear up relatively quickly once he returned to an inside air-conditioned environment and hydrated himself. I do not know of a mechanism by which he would have persistent neuropsychological problems caused by his work environment.

(Ex. 8, p. 3) Nevertheless, Dr. Risk diagnosed claimant with migraine headaches and provided him medication management for those headaches.

Following the issuance of the reports and records by Dr. Glanzer, Dr. Hotsenpillar, Dr. Jasper, and Dr. Risk, defendants denied liability for claimant's alleged injuries and conditions. Claimant sought an independent medical evaluation performed by psychiatrist, Mark W. Mittauer, M.D., on February 24, 2014.

Dr. Mittauer recorded a similar history from claimant of extensive work days in high heat settings for Lennox. He noted claimant's report of drinking two gallons of Gatorade per day. Dr. Mittauer also noted that claimant was self-employed as of February 2014 installing heating, air conditioning, and plumbing. Claimant reported to

Dr. Mittauer that he was able to complete his work adequately and was able to concentrate earnestly while working. (Ex. 1, p. 3)

Interestingly, Dr. Mittauer recorded a history that included significant memory recall from claimant. Of note, claimant reported a prior history of shoulder injuries and surgeries. Yet, he made no claim of a new injury to his shoulder or shoulders at Lennox. Rather, claimant described his shoulder pain as having "been present for many years." (Ex. 1, p. 4)

Dr. Mittauer diagnosed claimant with a major depressive disorder, single episode, as well as with panic disorder and an anxiety disorder. Dr. Mittauer opined, "I do feel that the client is manifesting symptoms of depression, consistent with Major Depressive Disorder, that likely resulted from his strenuous work conditions and long hours, at Lennox. I don't think that his cognitive symptoms are adequately explained by his depressive symptoms meaning that they are not solely due to depression." (Ex. 1, p. 5) Although he thought it was unlikely, Dr. Mittauer could not rule out a differential diagnosis of malingering, "meaning that he is intentionally complaining of cognitive problems as well as depression and anxiety for secondary gains such as to get Workman's Compensation benefits." (Ex. 1, p. 5) Dr. Mittauer also noted, "his neuropsychological testing did not reveal any significant cognitive deficits despite the client's complaints of cognitive problems." (Ex. 1, p. 5)

Claimant then sought psychological and psychiatric treatment through the Abbe Center for Community Mental Health. (Ex. 6) Initial assessment at the Abbe Center occurred June 26, 2014 by Brenda Miller, LISW. Ms. Miller noted that claimant was oriented and that his speech was normal and the content of his thoughts and speech were appropriate and goal-directed. She noted no observations of confusion, memory difficulties, slurred speech, or inability to put sentences together. (Ex. 6, pp. 1-3) However, claimant complained of chronic pain and depression. At the June 26, 2014 evaluation, Ms. Miller noted that claimant asserted he sustained additional damage to his already damaged shoulders while working at Lennox. (Ex. 6)

Dr. Mittauer again evaluated claimant at Abbe Center on July 16, 2014. He noted that claimant was oriented, had logical thought processes, had normal speech and motor activity, and that he appeared to have grossly intact recent and remote memory. (Ex. 6, p. 5) Dr. Mittauer reiterated his diagnoses of major depressive disorder and anxiety disorder. (Ex. 6, p. 6)

Janette Leal, M.D. assumed claimant's psychiatric care and evaluated him several times at Abbe Center. On May 30, 2015, Dr. Leal noted that she believed "Mr. Donnell is over-medicated which is contributing to his brain fog, confusion, and fatigue throughout the day." (Ex. 6, p. 17) However, by July 31, 2015, Dr. Leal was noting that claimant's cognition was clearly impaired. She noted that claimant had a difficult time reading instructions and that his memory was impaired. (Ex. 6, p. 19) She continued to

have some concerns about the cumulative effects of the various medications claimant took at that time. (Ex. 6, p. 19)

Dr. Mittauer re-evaluated claimant on June 19, 2015 at the request of claimant's attorney. Dr. Mittauer noted at this evaluation that claimant "winced in pain at times." (Ex. 1, p. 8) He noted that claimant's memory appeared grossly intact and that he was oriented. Following this evaluation, Dr. Mittauer again diagnosed claimant with major depressive disorder and anxiety disorder. Although he left the diagnosis off at his second evaluation, Dr. Mittauer again added a panic disorder diagnosis in June 2015.

Following his June 2015 evaluation, Dr. Mittauer opined that claimant's work at Lennox was "a substantial contributing factor" in the diagnosis of major depressive disorder. Dr. Mittauer also opined that claimant's working conditions at Lennox were also a substantial contributing factor in exacerbating, or worsening, his pre-existing anxiety disorder. (Ex. 1, p. 12) Dr. Mittauer predicted a poor prognosis for any significant recovery. He opined that malingering was "highly unlikely," though he could not completely rule out the possibility that claimant was malingering. (Ex. 1, p. 12) Dr. Mittauer opined that claimant is not capable of being employed as a result of his depression, anxiety, and fatigue. (Ex. 1, p. 13)

Defendants also sought an independent medical evaluation, performed by Scott A. Eastin, M.D. on July 10, 2015. Dr. Eastin is a board certified psychiatrist. Dr. Eastin does not appear to have had the prior IME reports from Dr. Mittauer available prior to authoring his report.

Dr. Eastin took a fairly detailed history from claimant, including noting his pre-existing anxiety. Claimant reported depression, anxiety, and cognitive problems when interviewed by Dr. Eastin. (Ex. A13, p. 102) Mr. Donnell reported short term memory difficulties as well, but the ability to perform all chores around his house and acreage. (Ex. A13, p. 102) Dr. Eastin assessed that claimant was oriented, did not demonstrate any slowing of mental thought processes, nor any short-term or long-term memory difficulties. (Ex. A13, p. 104)

Dr. Eastin noted:

> He may have had a brief exacerbation of his pre-existing mental health conditions (anxiety and depression) related to the perceived stress from his job in July 2012, but the mental health conditions clearly preceded July 2012, and do not appear to be more significant now than prior to July 2012. This is supported by various assessments from soon after the alleged injury, through my assessment in July 2015 based on his reports of day-to-day functions at home.

(Ex. A13, p. 107)

Dr. Eastin opined that any exacerbation of claimant's mental health was temporary in nature and that he has achieved maximum medical improvement and returned to pre-existing baseline on or before September 12, 2012. (Ex. A13, p. 108) Dr. Eastin opined that claimant did not sustain permanent impairment related to his mental health as a result of his work at Lennox. (Ex. A13, p. 108)

On February 13, 2016, claimant requested a modification of his medications. Dr. Leal again reiterated that the requested medications can cause dementia. Claimant insisted that his cognitive problems all related to the alleged work incident in July 2012 and requested medication changes anyway. (Ex. 6, p. 26)

On this same date, February 13, 2016, claimant's counsel sent Mr. Donnell for a fourth evaluation by Dr. Mittauer. Dr. Mittauer noted in February 2016 that claimant's chronic pain interferes with his ability to work. Dr. Mittauer notes that claimant's pain affects his ability to walk up and down stairs, drive more than twenty minutes, or lift heavy objects.

Claimant's counsel also sent Mr. Donnell for evaluation by a neuropsychologist, Frank Gersh, Ph.D. Dr. Gersh performed a neuropsychological evaluation of claimant occurring on May 4, 2016, May 13, 2016, May 31, 2016, June 9, 2016, and June 27, 2016. (Ex. 3, p. 1) Dr. Gersh noted that claimant had noticeable word finding difficulty. He noted claimant's memory was vague with respect to the events leading to his disability. He noted that claimant appeared confused during portions of the evaluation. (Ex. 3, p. 3) Again, claimant displayed none of these qualities from a lay-person's perspective at the time of trial.

Dr. Gersh opined that there was no evidence of malingering in his testing. He determined that claimant had significantly reduced mental processing speed as well as significantly impaired memory during testing. Dr. Gersh also noted scores demonstrating significantly reduced concentration, though claimant retained expected executive abilities. Dr. Gersh noted that claimant's scores suggested moderate psychological distress, reflecting severe depression with accompanying anxiety. Dr. Gersh diagnosed claimant with major depressive disorder and neurocognitive disorder that was due to depression and/or possible heat stroke. Dr. Gersh opined "that the depression and cognitive problems are a result of his workplace injury." (Ex. 3, p. 4)

Interestingly, Dr. Gersh provides no comparison, or explanation, of his test results compared to the neurocognitive testing performed by Dr. Jasper closer in time to the July 2012 injury date. No explanation is provided why claimant's cognitive learning and memory testing in 2012 was average to high average but his memory testing in 2016 is considered significantly impaired. No explanation for this deterioration is identified in Dr. Gersh's report or otherwise in this evidentiary record.

Dr. Gersh offers no explanation of the variance between his observations of reduced concentration, impaired memory, and reduced mental processing speed as

compared to either Dr. Eastin's observations or Dr. Mittauer's observations as late as June and July 2015. It would appear strange that claimant's mental and cognitive status would deteriorate between July 2015 and May 2016, more than three years after the alleged injury date. Without some explanation of these changes in claimant's cognitive status, I do not find Dr. Gersh's opinions to be convincing.

With respect to the mental health issues, I ultimately find the recorded observations and opinions of Dr. Eastin, Dr. Glanzer, Dr. Hotsenpillar, Dr. Jasper, and Dr. Risk to be the most convincing opinions in this record. Specifically, I find that claimant failed to prove his depression, anxiety, or subjectively perceived cognitive difficulties are causally related to or materially aggravated, or accelerated, by his work at Lennox between April and July 2012.

I acknowledge the contrary evidence contained in this record, including but not limited to the opinions of Dr. Gersh, Marc Hines, M.D., and Dr. Mittauer, as well as the testimony of claimant, his daughter, and Mr. Springer. Ultimately, however, the contemporaneous medical records do not demonstrate any objective causes for claimant's perceived subjective cognitive complaints. Neuropsychological testing performed close in time to the alleged injury refute any specific memory or cognitive difficulties. Claimant's subsequent decline has not been explained. Claimant failed to produce sufficiently credible evidence to establish by a preponderance of the evidence that he experiences cognitive deficits, or that his alleged cognitive deficits, depression, or anxiety are causally related to or materially aggravated, or accelerated, by is work activities at Lennox.

Mr. Donnell also asserts that he sustained a shoulder injury as a result of the work he performed at Lennox. Claimant clearly established that the work performed for Lennox was physical in nature, including moving items weighing up to 180 pounds without assistance. On the other hand, contemporaneous medical records immediately after the alleged work injury do not reference a shoulder injury or aggravation of symptoms related to Mr. Donnell's work activities at Lennox.

For instance, on July 31, 2012, claimant reported his alleged cognitive difficulties as well as a gash on his leg. Claimant clearly was reporting his concerns to his personal physician on the day after the incident between he and the assistant regional manager, Geoff Noel. Dr. Glanzer's July 31, 2012 office note makes no reference to back pain or shoulder pain. (Ex. 9, p. 1)

Dr. Hotsenpiller evaluated claimant on August 30, 2012. He noted that claimant "has had issues with his shoulders, left hand which have involved exploratory/repair at times in the past." However, claimant reported no "new" injury to his shoulder as a result of work activities at Lennox. (Ex. 7, p. 2)

Claimant reported long-standing shoulder and upper back pain when evaluated by Brian Ray, D. O. on February 11, 2013. (Ex. A8, p. 64) Mr. Donnell reported

bilateral shoulder pain after multiple surgeries on his shoulders when evaluated by Stephanie Vogeler, PA-C on April 23, 2013. (Ex. A9, p. 66) Claimant did not report any "new" injury to his shoulders to either Dr. Ray or Ms. Vogeler.

The first reference that I was able to identify in this evidentiary record regarding a shoulder injury or worsening of symptoms due to work activities at Lennox occurs in a medical record prepared by David Hart, M.D. on December 15, 2014. (Ex. A2, p. 41) I find it unlikely that claimant would have waited nearly two and a half years to report his work injury to his shoulder to a treating physician. Mr. Donnell has prior work injuries and clearly was aware that work injuries could result in workers' compensation claims. He reported other symptoms, including his cognitive allegations, depression, and a cut on his leg. Claimant offers no explanation why he did not report that his shoulder symptoms arose after work activities.

Both parties obtained independent medical evaluations relative to claimant's shoulder conditions. Claimant selected Marc Hines, M.D., who performed his evaluation of claimant on August 7, 2015. Dr. Hines is a board certified neurologist. He is also board certified in headache medicine and was previously board certified in pain management. (Ex. 2, p. 27) Dr. Hines recognized and documented claimant's pre-existing shoulder issues. Dr. Hines also noted that claimant reported only cognitive deficits at the time of his evaluation by Dr. Hotsenpiller in August 2012. Dr. Hines records in his report:

> In December of 2014, when he was continuing to work for a company called Lennox national [sic] Account Services, he was working on a roof when an 180-pound air compressor accidentally tipped off a cart into his lap while he was sitting on the roof, pinning his arms to his legs in a cross-leg position. This required him to push the air compressor with both shoulder to lift the compressor off. He had an injury at that time, with a previous rotator cuff repair by Dr. Fabiano in 2008.

(Ex. 2, p. 12)

Dr. Hines' history and understanding of the shoulder injury alleged was clearly erroneous. Mr. Donnell's employment with Lennox clearly ended in August 2012. He was not working for Lennox, as Dr. Hines thought, in December 2014. This is a fairly significant error in Dr. Hines' report and understanding. It also results in him not understanding that claimant was not reporting a shoulder injury immediately after the alleged July 2012 work injury date.

Dr. Hines' impression noted "long-standing difficulties with his shoulders with multiple previous surgeries." (Ex. 2, p. 17) Dr. Hines ultimately opines that claimant sustained repeated injuries to his shoulders and neck related to work activities. (Ex. 2, p. 18) Unfortunately, the error in Dr. Hines' report and understanding as to the

mechanism and timing of the alleged shoulder and/or neck injuries does not bolster confidence in his opinions.

Defendants also obtained an independent medical evaluation, performed by Joshua D. Kimelman, D.O., an orthopaedic surgeon, on July 30, 2015. (Ex. A12) Dr. Kimelman reviewed claimant's alleged shoulder injuries and accurately noted claimant's report "July 31, 2012, represents the last day that he worked, and that approximately a week or 9 days prior to that date he injured himself while on the job doing installation of an approximately 180-pound compressor on the roof for his employer, Lennox." (Ex. A12, p. 94) Unlike Dr. Hines, Dr. Kimelman appears to have understood the claimant's allegations with respect to his shoulder injuries.

Dr. Kimelman performed a physical examination and concluded that claimant has "symptomatic glenohumeral arthritis, left shoulder more so than right." (Ex. A12, p. 96) With respect to the issue of causation of claimant's shoulder symptoms and injuries, Dr. Kimelman opined:

> I believe that this now 60-year-old gentleman has had a lifetime of wear and tear on his shoulders. He apparently worked at Lennox for 3 months. While I am sure he had some wear and tear to his shoulders, I believe that this was self-limiting and that his residual symptoms are a result of the degenerative arthritis in his shoulders.

(Ex. A12, p. 96) Dr. Kimelman specifically opined, "I do not believe his current shoulder problems are related to his work at Lennox." (Ex. A12, p. 96)

Given Dr. Kimelman's credentials as an orthopaedic surgeon as well as the fact that he recorded and understood an accurate history related to the alleged shoulder injury, I find the opinions of Dr. Kimelman are the best and most accurate medical opinions in this evidentiary record relating to claimant's shoulder injury claims. Having accepted Dr. Kimelman's opinions, I find that claimant failed to prove that his work activities at Lennox caused or materially and permanently aggravated his shoulder conditions.

Review of claimant's claimed medical expenses contained at Exhibit 22 demonstrates that the disputed medical expenses are related to treatment of claimant's depression, anxiety and/or cognitive complaints. Having found that claimant did not prove those conditions are causally related to or materially aggravated by claimant's work activities at Lennox, I similarly find that claimant failed to prove the medical expenses contained in Exhibit 22 are causally related to his work at Lennox.

As noted above, Dr. Kimelman performed his evaluation of claimant's shoulder conditions on July 30, 2015. As a result of that examination, Dr. Kimelman rendered opinions pertaining to claimant's permanent impairment. (Ex. A12) Claimant sought a responsive independent medical evaluation from Dr. Hines, performed on August 7,

2015. Dr. Hines similarly offered opinions pertaining to permanent impairment related to claimant's shoulders.

CONCLUSIONS OF LAW

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

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of

trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

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).

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).

Having found that claimant failed to prove a permanent aggravation or a direct causal connection between his shoulder injuries, cognitive complaints, depression, or anxiety, I conclude that claimant failed to prove that he sustained either a traumatic or cumulative injury that arose out of and in the course of his employment with Lennox on or about July 30, 2012.

Similarly, review of the disputed medical expenses reveals that the medical bills contained in Exhibit 22 relate to treatment of claimant's cognitive issues, depression, and/or anxiety. Having found that claimant did not prove these conditions arose out of and in the course of claimant's employment with Lennox, I conclude that claimant has not established entitlement to reimbursement, payment, or satisfaction of his claimed medical expenses by defendants. Iowa Code section 85.27.

Claimant seeks reimbursement pursuant to Iowa Code section 85.39 for the IME he had with Dr. Hines. Section 85.39 states in pertinent part:

> After an injury, the employee, if requested by the employer, shall submit for examination at some reasonable time and place and as often as reasonably requested, to a physician or physicians authorized to practice under the laws of this state or another state, without cost to the employee; but if the employee requests, the employee, at the employee's own cost, is entitled to have a physician or physicians of the employee's own selection present to participate in the examination.
>
> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination.

Section 85.39 entitles an injured worker to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. Proof of employer's liability for the alleged injury, is not a requisite for entitlement for an 85.39 IME. Dodd v. Fleetguard, 759 N.W.2d 133 (Iowa App. 2008).

Furthermore, the Court of Appeals in Dodd v. Fleetguard, 759 N.W.2d 133 (Iowa App. 2008) held that an employer could be held liable for an examination when the injury did not arise out of or in the course of employment. Dodd at 140. The court cited the following language from IBP, Inc. v. Harker, 633 N.W.2d 322, 327 (Iowa 2001).

> The quid pro quo for these employer rights is the right of the employee to have a physician of his choosing present at any IME conducted at the employer's request and to have an IME conducted by a doctor of his own choice if the physician retained by the employer has given a disability rating unacceptable to the employee. In an apparent attempt to equalize the generally unequal financial positions of the parties, the legislature has

> said that the employer must pay for the employee's IME under the latter circumstances.

Harker at 327 (internal citations omitted).

In City of Davenport v. Newcomb, 820 N.W.2d 882 (Iowa App. 2012), the employer appealed the denial of an examination under Iowa Code section 85.39. This agency had ruled that because the employer denied liability for the claim the employer was not entitled to a section 85.39 IME. The Newcomb court reversed on this issue stating:

> Our supreme court has held that *reimbursement* for a medical examination under Iowa Code section 85.39 cannot be ordered until liability for an injury has been established. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 194 (Iowa 1980). In addition, the court has held an employer's "right to control treatment . . . is lost if the employer disputes liability." Winnebago Indus., Inc. v. Haverly, 727 N.W.2d 567, 575 (Iowa 2006). Although an admission of liability affects the employer's right to control treatment and an employee's ability to receive compensation for an employee-requested IME, we do not find a denial of liability wholly precludes an IME under Iowa Code section 85.39. In fact, if the purpose of the IME is to assist in determining causation, an admission of liability should not be a prerequisite to such an examination. *See* Daugherty v. Scandia Coal Co., 206 Iowa 120, 124, 219 N.W. 65, 67 (1928) (recognizing the purpose of what is now Iowa Code section 85.39 is "doubtless for the purpose of enabling the employer to ascertain the extent and character of the injury").

Newcomb, pp. 18, 19 (emphases in original).

In Newcomb, the court was concerned that the employer would not be able to obtain medical evidence to determine causation. The court recognized that one of the purposes of an IME is to determine causation. "In fact, if the purpose of the IME is to assist in determining causation, an admission of liability should not be a prerequisite to such an examination." Newcomb, p. 19. In Dodd, the court was concerned about the claimant being able to obtain medical evidence. In the present case, defendants obtained an evaluation and impairment rating from Dr. Kimelman before claimant obtained an evaluation and impairment rating from Dr. Hines.

Claimant is entitled to a section 85.39 IME, provided the employer has retained a physician who has made an evaluation of permanent disability that is believed to be too low by the claimant. In this case, I found that the prerequisites of section 85.39 were met. Claimant is entitled to a section 85.39 IME. Thus, defendant is ordered to reimburse claimant the cost of the IME performed by Dr. Hines.

Having reached these findings of fact and conclusions of law, I determine that all other disputed issues are moot.

Finally, claimant seeks an assessment of his costs. Costs are assessed at the discretion of the agency. Iowa Code section 85.40. Exercising the agency's discretion and recognizing that claimant has lost on the majority of the substantive issues in this case, I conclude that the parties should bear their own costs in this action.

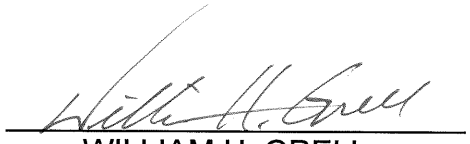
ORDER

THEREFORE, IT IS ORDERED:

Defendants shall reimburse claimant for the cost of Dr. Hines' independent medical evaluation performed on August 7, 2015.

Each party shall bear their own costs.

Signed and filed this 14th day of July, 2017.



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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.